| **Fernandez v Moskowitz** |
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| 2010 NY Slip Op 31524(U) |
| June 11, 2010 |
| Supreme Court, New York County |
| Docket Number: 111669/07 |
| Judge: Joan B. Lobis |
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SCANNED ON 6/15/2010
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS, Justice — PART 6

Index Number : 111669/2007
FERNANDEZ, MARQUES
VS.
MOSKOWITZ, JOEL
SEQUENCE NUMBER : 003
SUMMARY JUDGEMENT

INDEX NO. ______
MOTION DATE 3/31/10
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

a motion to/for ______

| | PAPERS NUMBERED |
|---|---|
| N... ...its ... | 1-21 |
| | * see motion seq. 002 |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | 22-25 |

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/11/10

[signature], J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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MARQUES FERNANDEZ, an infant, by his mother and natural guardian, RUTH DE LOS SANTOS

Plaintiff,

Index No.: 111669/07

- against -

**Decision and Order**

JOEL MOSKOWITZ, M.D., and NEW YORK UNIVERSITY MEDICAL CENTER

Defendant.

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FILED
JUN 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

**JOAN B. LOBIS, J.S.C.:**

Motion Sequence Numbers 002 and 003 are consolidated for disposition. In Motion Sequence Number 002, defendant Joel Moskowitz, M.D., moves, pursuant to C.P.L.R. Rule 3212, for an order granting him summary judgment dismissing this matter in its entirety. In Motion Sequence Number 003, defendant New York University Medical Center ("NYU") moves for similar relief. For the reasons discussed below, the motions are denied.

This action, sounding in medical malpractice, centers on the prenatal care administered to and the delivery of the infant-plaintiff in June and July 2004. Plaintiffs allege that the infant-plaintiff suffered from hypoxic-ischemic brain injury during the prenatal and delivery period, which caused cognitive and behavioral deficits. The infant-plaintiff's mother, Ruth De Los Santos, first presented to Dr. Moskowitz on January 2, 2004 for prenatal care. Dr. Moskowitz determined that Ms. De Los Santos' estimated delivery date was July 10, 2004. On February 25, 2004, an ultrasound was performed, which revealed that the fetus' arithmetic ultrasound age was identical to its gestational age, as well as average measurements for weight, head size, abdominal

circumference, and femur length. On April 24, 2004, a second sonogram was again normal in all respects. A third and final sonogram, performed on June 30, 2004, revealed an arithmetic ultrasound age of thirty-five weeks and four days; the gestitational age was thirty-eight weeks and five days. The sonogram also revealed that the ratio of head circumference to abdominal circumference was 1.09, outside the normal range of 0.92 to 1.05. The estimated fetal weight was 2482 grams.

On July 4, 2004, Ms. De Los Santos reported to NYU after her membranes ruptured and was placed on a fetal heart monitor. At approximately 3:00 p.m., she was examined by Tarah Pua, M.D., a resident physician. Dr. Pua reported that the infant-plaintiff's head was at the ischial spines or at the "0 station." According to Dr. Pua's examination before trial ("EBT") testimony, she was not involved in Ms. De Los Santos' care beyond the 3:00 p.m. examination. However Dr. Moskowitz's testified that, at approximately 10:40 p.m., Dr. Pua called him and "asked what a cord prolapse felt like."[1] After receiving the call, Dr. Moskowitz rushed to Ms. De Los Santos' room and examined her. Dr. Moskowitz confirmed that the umbilical cord had passed through Ms. De Los Santos' cervix and into her vagina before the baby, which presents a risk of compressing the umbilical cord and cutting off the baby's oxygen and blood supply. Dr. Moskowitz ordered an emergency Cesarian section ("C-section") and Ms. De Los Santos arrived in the operating room at 10:54 p.m. In the operating room, the infant's head was noted to be above the ischial spines at the "-2 station," but in his EBT testimony, Dr. Moskowitz claimed that the he probably erroraneously made that notation. According to Ms. De Los Santos' EBT testimony, once in the operating room,

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[1]In Ms. De Los Santos' EBT testimony, she claimed that she was not examined by any physicians or nurses at NYU, between 11:40 a.m. and 10:15 p.m.

a nurse placed her finger into Ms. De Los Santos' vagina. This was done in order to push the infants head up and relieve any pressure on the umbilical cord. At approximately 11:09 p.m., the infant-plaintiff was delivered via C-section with normal Apgar scores. The infant-plaintiff's cord blood gases were also normal.

In April 2006, the infant-plaintiff was diagnosed with congenital motor nystagmus, an impairment of vision. In August 2006, the infant-plaintiff, who was 21 months old at the time, exhibited developmental delays. In February 2007, his pediatrician believed that he had a developmental disorder and possibly autism. In March 2007, when the infant-plaintiff was 2 years and 8 months old, his pediatrician noted that the infant-plaintiff had pervasive developmental disorder ("PDD"). On May 17, 2007, the infant-plaintiff underwent an MRI of the brain, which was unremarkable.

On or about August 27, 2007, plaintiffs commenced this action by the filing of a summons and complaint. Dr. Moskowitz answered on or about September 17, 2007 and NYU answered on or about September 24, 2007. On October 30, 2008, after the depositions were complete, the infant-plaintiff underwent an independent medical examination ("IME") conducted by Joseph Maytal, M.D. Dr. Maytal concluded that the infant-plaintiff demonstrated "delays mostly in fine motor and in his personal-social skills, and mild or no delays in his gross motor and language skills."

Both defendants now, separately, seek an order granting them summary judgment and

dismissing the action. The party moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 2010 N.Y. Slip Op. 3177, ___ A.D.3d ___ (1st Dep't 2010) (citations omitted). To satisfy their burden, defendants must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

> must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Roques, 2010 N.Y. Slip Op. 3177 (internal citations omitted). The plaintiff's expert opinion testimony must also be founded in facts in the record, not merely consisting of general or conclusory statements of negligence, in order to rebut defendant's prima facie showing. Id.

A defendant hospital that is seeking summary judgment in a medical malpractice action may also argue that the alleged malpractice was committed by a private attending physician or by hospital staff under the "directions of the attending physician." Walter v. Betancourt, 283

A.D.2d 223, 224 (1st Dep't 2001). In such circumstances, the "hospital is sheltered from liability." Id. However, a hospital "may be held concurrently liable with a private physician for the independent negligence of its medical staff." Pearce v. Klein, 293 A.D.2d 593, 594 (2d Dep't 2002); see also Gerner v. Long Island Jewish Hillside Med. Ctr., 203 A.D.2d 60, 61-62 (1st Dep't 1994); cf. Walter, 283 A.D.2d at 224.

Defendant Dr. Moskowitz relies on the affirmations of two physicians. In the first affirmation, James Howard, M.D., who is board certified in obstetrics and gynecology, asserts that all of Ms. De Los Santos' sonograms were normal and that it was not a deviation from the standard of care to perform no more than three sonograms. Dr. Howard asserts that all pre-delivery care and examinations rendered on July 4, 2004 were appropriate. Dr. Howard notes that the prolapsed umbilical cord was confirmed at approximately 10:40 p.m. on July 4, 2004, and asserts that there is no evidence that the cord was prolapsed before that time. Dr. Howard maintains that the prolapsed cord had no effect on the infant-plaintiff's blood and oxygen supplies, because the infant-plaintiff's Apgar scores were normal and the cord blood gases were within normal limits. Dr. Howard opines that the fetal monitoring strips were normal and that there were no signs of distress. Dr. Howard sets forth that, under the standard of care, after a prolapsed cord is diagnosed, a C-section should take place within thirty (30) minutes, and notes that the infant-plaintiff's C-section delivery occurred within twenty-nine (29) minutes of the diagnosis of a prolapsed cord.

In the second affirmation, John Pomeroy, M.D., a physician board certified in child and adolescent psychiatry and adult psychiatry, asserts that the infant-plaintiff's normal Apgar scores

as well as his normal MRI indicate that the infant-plaintiff did not suffer from brain damage during delivery. Dr. Pomeroy further asserts that the infant-plaintiff suffers from PDD, which is within the "broad spectrum of autism." He asserts that there is no evidence that PDD results from birth related trauma and that it is more likely a genetic condition. Dr. Pomeroy further asserts that the infant-plaintiff's impairment of vision is also a genetic condition.

Defendant NYU argues that it is not liable for malpractice, if any, because its staff acted under the direction of Dr. Moskowitz, a private attending physician. It also relies on the affirmations of three physicians. Daniel W. Skupski, M.D., a board certified physician in obstetrics and gynecology and maternal fetal medicine, maintains that Ms. De Los Santos was appropriately monitored when she presented at NYU on July 4, 2004. Dr. Skupski further asserts that the C-section was performed within thirty (30) minutes of the diagnosis of the prolapsed umbilical cord, which is within the standard of care. He sets forth that the normal Apgar scores and normal measurement of blood gases indicate that "the absence of any hypoxia or anoxia in utero." Dennis Davidson, M.D., a board certified pediatrician with a subspecialty in neonatal-prenatal medicine, echos Dr. Skupski's opinions. Dr. Davidson adds that any development delays exhibited by the infant-plaintiff are attributable to his vision impairment. Dr. Maytal, who performed the infant-plaintiff's IME, provides the third affirmation and similar opinions. He also maintains that the infant-plantiff's developmental delays are the result of his vision impairment.

In opposition, plaintiffs rely on the affirmations of three physicians. In the first affirmation, Bruce Halbridge, M.D., an expert in the field of obstetrics, maintains that the infant-

plaintiff first exhibited signs of distress on June 30, 2004, when the third sonogram was taken. Dr. Halbridge notes that the sonogram manifested that the estimated fetal weight was below normal and sets forth that it was below the fifth percentile. He notes that the ratio of head circumference to abdominal circumference was also below normal. To Dr. Halbridge, these characteristics clearly indicate the presence of intrauterine growth restriction ("IUGR"). Dr. Halbridge asserts that "hypoxia caused by placental insufficiency is one of the most significant problems found in infants with IUGR"; therefore, the infant-plaintiff should have been delivered immediately. Dr. Halbridge maintains that it was a deviation from the standard of care to postpone delivery until spontaneous birth. As to the care rendered at NYU on July 4, 2004 prior to the delivery, Dr. Halbridge notes that the infant-plaintiff was at "0 station" after Dr. Pua's examination at approximately 3 p.m. and then at the "-2 station" in the operating room at approximately 10:54 p.m. Dr. Halbridge asserts that the fact that the infant-plaintiff's head went from a low position to a high position is evidence that "outside force acted upon it." Dr. Halbridge maintains that this force was from a pelvic examination administered by Dr. Pua sometime before the umbilical cord prolapse. He asserts that this newly created space allowed the cord to prolapse and was the result of a deviation from the standard of care. Dr. Halbridge further asserts that hospital staff should have immediately elevated the infant-plaintiff's head once an umbilical cord prolapse was diagnosed in order to take pressure off the umbilical cord. He notes that Ms. De Los Santos testified that a nurse did not do so until fourteen (14) minutes after the cord prolapse, which was a deviation from the standard of care. Dr. Halbridge also maintains that between 10:40 p.m. and 10:55 p.m., a series of deep variable decelerations were apparent on the fetal monitoring strips, which indicated that the umbilical cord was being compressed. With respect to the normal Apgar scores and normal gases measurements, Dr.

Halbridge asserts that hypoxic brain injury can occur without any "grossly obvious clinical signs in the neonatal period." He maintains that Apgar scores only measure catasphrophic losses of oxygenation.

In plaintiffs' second expert affirmation, Rosario Trifiletti, M.D., a board certified pediatrician and neurologist, recounts his examination of the infant-plaintiff on February 24, 2010. Dr. Trifiletti maintains that the infant-plaintiff has sensory motor integration deficits and fine motor delay that are the result of brain injury and are not related to his vision impairment. Vicki Sudhalter, Ph.D., an expert in psychology and neuropsychology, provides the third affirmation. Dr. Sudhalter examined the infant-plaintiff on February 20, 2010. Dr. Sudhalter notes that the infant-plaintiff has significant cognitive and development delays, but she asserts that he is not suffering from PDD. Dr. Sudhalter maintains that the infant-plaintiff's delays and deficits are consistent with hypoxic-ischemic brain injury.

As to plaintiffs' allegations of medical malpractice, defendants have met their prima facie burden. Their experts' affirmations eliminate material allegations of malpractice and causation by sufficiently detailing the infant-plaintiff's prenatal and postnatal course as normal and by describing how the infant-plaintiff's current condition is unrelated to brain injury. Nonetheless, plaintiffs' experts have adequately offered an alternative theory as to the cause of infant-plaintiff's undisputed developmental delays. In light of the experts' conflicting opinions, summary judgment must be denied. See Cruz v. St. Barnabas Hosp., 50 A.D.3d 382 (1st Dep't 2008).

As to NYU's argument that it cannot be liable for any malpractice under New York vicarious liability law, plaintiffs' expert, Dr. Halbridge, has pointed to several facts that support plaintiffs' contention that an NYU staff member performed a negligent pelvic examination that proximately caused the infant-plaintiff's injury. Taking this allegation to be true, there is no indication that the manner in which the pelvic examination was conducted was directed by Dr. Moskowitz. It is an independent act of alleged negligence and summary judgment is not warranted.

Defendants' complaints in their replies about the factual inferences drawn by plaintiffs' experts concern the credibility of evidence and "[i]t is not the court's function on a motion for summary judgment to assess credibility." Ferrante v. American Lung Ass'n., 90 N.Y.2d 623, 631 (1997)(citations omitted); see also Frye v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep't 2009).

The parties are to appear for a pre-trial conference on July 20, 2010 at 9:30 a.m. This constitutes the decision and order of the court.

Dated: June 11, 2010

**JOAN B. LOBIS, J.S.C.**

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JUN 15 2010
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