

Schwahl v Grant

2010 NY Slip Op 32521(U)

September 10, 2010

Supreme Court, Suffolk County

Docket Number: 04-6811

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**

COPY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 6-10-10
ADJ. DATE 8-17-10
Mot. Seq. # 013 - MG
014 - MG; CASEDISP

-----X		DUFFY & DUFFY
MARGARET A. SCHWAHL, As Mother and	:	Attorney for Plaintiff
Natural Guardian of GADGE SCHWAHL, an	:	1370 Reckson Plaza, West Tower, 13 th Floor
Infant,	:	Uniondale, New York 11556
	:	
	:	FUREY, FUREY, LEVERAGE, MANZIONE,
	:	WILLIAMS & DARLINGTON, P.C.
	:	Attorney for Defendants Grant, Vorha & Vitkun
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	:	Hempstead, New York 11550
	:	
	:	ANDREW W. CUOMO, ESQ., Attorney General
	:	By: Bridget E. Farrell, Esq.
	:	Attorney for Defendants Kleyman, Macco & Duck
	:	120 Broadway
	:	New York, New York 10271
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MARGARET A. SCHWAHL, As Mother and
Natural Guardian of GADGE SCHWAHL, an
Infant,

Plaintiff,

- against -

PAMELA GRANT, M.D., DAVID MICHAEL
SHOBIN, M.D., SHOBIN & HALPERT, M.D.,
P.C., NIDHI VORHA, M.D., STEPHEN A.
VITKUN, M.D., BORIS KLEYMAN, M.D.,
LYNNE E. MACCO, M.D., and ROBERT W.
DUCK, M.D.,

Defendants.

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Upon the following papers numbered 1 to 13 read on this motion and cross motions for summary judgment by Notice of Motion/Order to Show Cause and supporting papers (013) 1 - 19 ; Notice of Cross Motion and supporting papers (014) 20-38 ; Answering Affidavits and supporting papers 39-40 ; Replying Affidavits and supporting papers Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is

ORDERED that this motion (013) by the defendants, Boris Kleyman, M.D., Lynne E. Macco, M.D., and Robert W. Duck, M.D., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint against them is granted; and it is further

ORDERED that this motion (014) by the defendants, Pamela Grant, M.D., Nidhi Vorha, M.D., and Stephen A. Vitkun. M.D., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint against them is granted.

This is an action for medical malpractice wherein it is alleged that the defendants negligently departed from good and accepted standards of medical/obstetrical care and treatment and failed to give informed consent to Margaret A. Schwahl during her admission to Stony Brook University Hospital on October 12, 1997 relating to her pregnancy, labor and delivery of the infant plaintiff, Gadge Schwahl. It is further claimed that the defendants failed to provide the infant plaintiff with proper medical care and treatment and otherwise departed from good and accepted standards of care, causing the infant to suffer serious and severe injury. It is claimed in the verified bill of particulars that the infant plaintiff suffered, inter alia, iatrogenic prematurity, brain damage,

static encephalopathy, cerebral palsy, ataxia, global developmental delays, respiratory distress syndrome; persistent pulmonary hypertension, bronchopulmonary dysplasia, hyaline membrane, disease, hyperbilirubinemia, gastroesophageal reflux, pronated lower extremities with difficulty walking and need of orthosis, reactive airway disease, cognitive impairment and delays, communicative impairment and delays, difficulty seeing with his left eye, pervasive development disorder, autistic spectrum disorder, loss of enjoyment of life, social-emotional developmental delay, and impaired earning capacity. It is claimed that the infant plaintiff has been caused to require early intervention services, physical therapy, occupational therapy, speech therapy, and may require custodial care, medical care including therapies and equipment and special residential accommodations and modifications.

It is noted that a Stipulation of Discontinuance was filed with this Court on November 3, 2006 as to Michael Shobin, M.D., and Shobin & Halpert, M.D. P.C.

In motions (013) and (014), the defendants are moving for summary judgment dismissing the complaint as asserted against them on the basis they bear no liability in this action.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [2nd Dept 1979]).

In support of motion (013), the defendants, Boris Kleymann, M.D., Lynne E. Macco, M.D., and Robert W. Duck, M.D., have submitted, inter alia, an attorney’s affirmation; the affidavits of Boris Kleymann, M.D., Lynn E. Macco, M.D., and Wendy Solvstein, M.D.; the affirmation of Steven R. Goldstein, M.D. copies of the summons and complaint, the moving defendants’ answers, plaintiff’s verified bill of particulars; uncertified copy of the Mather T. Memorial Hospital record for Tatiana Doka; transcripts of the examinations before trial of Stephen A. Vitkun, M.D. dated July 28, 2009, Pamela Jo Grant, M.D. dated July 17, 2009, Modjo Vorha, M.D. dated July 23, 2009, Margaret Schwahl dated June 26, 2009 and Robert Duck, M.D. dated August 5, 2009; a certified and illegible copy of the Central Suffolk Hospital record of Margaret Schwahl; and an uncertified copy of the Stony Brook University Hospital record

In support of cross-motion (014), the defendants, Pamela Grant, M.D., Nidhi Vorha, M.D., and Stephen A. Vitkun, M.D., have submitted, inter alia, an attorney’s affirmation; affirmations of Jeffrey Bernstein, M.D.,

Ingrid P. Taft, M.D. Mary E. D'Alton, M.D.; copies of the summons and complaint, answers of the moving defendants, plaintiff's bill of particulars; a copy of the Stony Brook Hospital medical record for Margaret Schwahl; and the transcripts of the examination before trial of Margaret Schwahl dated June 26, 2009, Gadge Schwahl dated October 1, 2009, Stephen A. Vitkun, M.D. dated July 28, 2009, Pamela Jo Grant, M.D. dated July 17, 2009, Modjo Vorha, M.D. dated July 23, 2009, and Margaret Schwahl dated June 26, 2009 and Robert Duck, M.D. dated August 5, 2009.

It is noted in the Stony Brook University Hospital record that Margaret Schwahl, then a twenty-eight year old female, was admitted on October 11, 1997 at 22:31 with a diagnosis of premature labor, to the service of Dr. Pamela Grant. This was her second pregnancy with a prior confidential termination of pregnancy. She was noted to be 33 1/7 weeks estimated gestational age by her last menstrual period of February 21, 1997, with an estimated delivery date of November 28, 1997. The infant was estimated to be about five pounds. She complained of feeling pulling in her upper abdomen followed by rupture of the membranes at 5:30 p.m. with clear yellow-tinged fluid. Fetal movement was then reported good and there was no vaginal bleeding. She had been seen at Central Suffolk Hospital where she was ruled/in for rupture of the membranes, given Decadron and transported to Stony Brook. At Stony Brook, the plan was to monitor her for contractions and if persistent, proceed with tocolysis for at least 48 hours to obtain maximum benefit of steroids for the infant's lung maturity. Upon admission, the fetal heart rate was noted to be 130's to 140's. On October 12, 1997, the nurse's note written at 17:25 indicates a family member alerted the nursing staff that Mr. Schwahl was in the bathroom with the umbilical cord hanging out. One nurse placed her hand up the vaginal track to relieve pressure on the cord and another nurse called Dr. Duck stat. She was transferred to the labor and delivery room in a knee/chest position and an emergent caesarean section was performed by Dr. Vorha (noted to be scrubbed and present for the majority of the case), assisted by Dr. Duck and Dr. Pinney, due to prolapsed cord and fetal bradycardia noted at 60 per minute per cord pulsations. General anesthesia was administered by Dr. Vitkun and Dr. Kleyman. The birth report indicates that a male was delivered on October 12, 1997 at 17:21. Resuscitation noted PPV x 1 minute, and he was intubated at 1-2 min of life. Asymmetric chest excursion was noted. His diagnosis was RDS, r/o sepsis, r/o air leak. However, the operative note indicates that a vigorous male infant was delivered from a vertex LOT position, with Apgars of 5 and 9. Maternal complication was noted as a right posterior lower uterine segment venous sinus rupture which vessel was repaired with suturing.

MARGARET SCHWAHL

Margaret Schwahl testified to the effect that she saw Dr. Andrew Nataloni for prenatal care for the subject pregnancy. On October 11, 2007, she was at home with her sister-in-law when her water broke. She called her doctor and went to Central Suffolk Hospital right away. Dr. Nataloni examined her there and had her transferred to Stony Brook Hospital as there was no NICU at Central Suffolk. He advised her that she would be delivering within the week. Upon arrival at Stony Brook, she was seen by a female doctor, and then transferred to labor and delivery, where she was seen by a male doctor. A sonogram was performed. Her foley catheter, which had been inserted at Central Suffolk Hospital, was removed. She was attached to the monitor. She was advised she could use the bathroom and was assisted by the nurse when she first used it, and thereafter was permitted to use it without assistance. Otherwise, she stayed in bed. On October 12th, another sonogram was performed because she was cramping. On October 12th, just before 5:00 p.m., she felt something when she was wiping herself when she went to the bathroom and saw blood. She thought it was the baby coming out. Her sister-in-law who was visiting with her, went for help which took about five minutes. A nurse came and told her just to sit there and went to get other assistance. A couple minutes later, the nurse returned with a stretcher and several people. She was still on the toilet so they told her to get on the stretcher and to get onto all fours. A nurse then inserted her hand into her vagina to hold the baby's head up from the cord. She was taken to the O.R. Three days later she was told about her baby son's condition, that he had a lot of lung

problems, that he was intubated, and that he was critical.

PAMELA JO GRANT, M.D.

Pamela Jo Grant, M.D. testified to the extent that she is board certified in maternal fetal medicine with a subboard in obstetrics and gynecology. From 1996 through 1999, she was employed by the State University of New York in the department of Obstetrics and Gynecology and limited her practice to obstetrics only. She held an assistant professorship as well and trained residents during that time period, including labor and delivery. She reviewed Mrs. Schwahl's hospital record concerning her admission, but had no recollection of the patient. Mrs. Schwahl became her patient as she was the attending on call for labor and delivery from 7 a.m. on October 11, 1997 to 7 a.m. October 12, 1997. During that time period, she would have been supervising at least two residents. She stated Dr. Robert Duck, Dr. Mari Inagami, and Dr. Lynn Macco were residents whom she was supervising.

ROBERT WILLIAM DUCK, M.D.

Robert William Duck, M.D. testified at his examination before trial to the extent that in October 1997 he was a third year resident at the State University of New York at Stony Brook. He was not sure if he ever became licensed to practice medicine in the State of New York, but did become licensed in the States of Virginia and West Virginia and is now licensed in Virginia. He did not become board certified in obstetrics and gynecology, although he did pass the written exam. After a career path change, he did become board certified in family medicine in 2003. He had no independent recollection of Mrs. Schwahl but remembered the care and delivery and conversations with her, and instructing junior, first year resident Antonia Ferrara Pinney about her. Dr. Pamela Grant was a physician who instructed him clinically in obstetrics and gynecology. On October 12, 1997, he came on duty between 6:45 and 8:00 a.m. The ob/gyn attending was Dr. Vorha on that date who clinically supervised him and taught him in the care and treatment of obstetrical patients. He was responsible for pre and post-partum patients admitted to the service of his attending physician, Dr. Vorha. When he began his shift on October 12th, Dr. Grant and the resident, Dr. Macco, were outgoing. Dr. Duck testified that after he was notified that Mrs. Schwahl had a prolapsed umbilical cord, he saw her immediately and accompanied her to the operating room where she was prepped for an emergency caesarean section. Dr. Vorha arrived at some point prior to the incision and supervised him throughout the delivery.

NIDHI VORHA, M.D.

Nidhi Vorha, M.D. testified at her examination before trial to the effect that she was an employee of Stony Brook University Hospital from 1997 to 1999 as an attending in the division of maternal-fetal medicine and is licensed to practice medicine in the State of New York and is board certified in ob/gyn and the subspecialty of maternal-fetal medicine. She was present for the delivery of Mrs. Schwahl on October 12, 1997 as she was the attending covering labor and delivery from 7 a.m. on October 12th through 7 am October 13th. She had no recollection of Mrs. Schwahl. She was also supervising residents for inpatients under the service wherein they discussed patients as necessary and made a plan of management. Robert Duck and Antonia Pinney were residents in 1997. She had a sign-out meeting with Dr. Grant when she came on duty and Dr. Grant was leaving. Her plan was to continue expectant management for possible transfer to 12 South. She stated expectant management was not to intervene and deliver the baby at this point. Dr. Vorha testified that did not remember if she made the incision or if the resident did, but it was custom and practice at Stony Brook to have the resident make the incision and that she supervised him during the delivery. Dr. Duck was the senior resident and Dr. Pinney was the junior resident. Typically, the senior resident does the majority of the delivery. Dr. Duck wrote the delivery note and she signed it after reviewing it.

STEPHEN A. VITKUN, M.D.

Stephen A. Vitkun, M.D. testified at his examination before trial to the effect that he is board certified in anesthesiology, and is a diplomate of the American Academy of pain management and the American Board of Quality Assurance and Utilization Review Physicians, and is licensed to practice medicine in the State of New York. He was an attending generalist anesthesiologist on staff at Stony Brook University Hospital in October 1997. Boris Kleyman was an anesthesia resident in October 1997. He was supervising Dr. Kleyman for anything having to do with the anesthesia for Margaret Schwahl. He had no independent memory of Margaret Schwahl. On October 12, 1997, he was assigned to OB as the attending anesthesiologist for patients needing anesthesia service in the obstetric suite. The anesthesia note, prepared by him and Dr. Kleyman, indicates that Ms. Schwahl understood and agreed to proceed with general anesthesia for a stat C/S for prolapsed cord/fetal bradycardia. He stated the section was urgent and had to be performed as soon as was possible. Under the circumstances, his conversation with the patient would have been very brief, asking if she had any medical problems, took any medications, had any allergies. He would have explained to her that he was going to be giving her general anesthesia to deliver her baby. In this case, due to the urgency of the situation, general anesthesia would have been the only option. It would have taken about one to two minutes to position her on the table in a supine position with a left lateral tilt for fetal consideration and to optimize the perfusion of blood flow to the fetus. The anesthesia start time was 5:16 for a rapid sequence induction. The infant was delivered at 5:21 p.m.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503[1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [1994]). In a medical malpractice action, the moving defendant's papers must set forth everything that the defendant does during the treatment of the patient and indicate that the treatment is not the proximate cause of the patient's complaints. A defendant meets this burden by establishing, as a matter of law, that there was no duty of care breached to the patient (*Kleinert et al v Begum*, 144 AD2d 645, 535 NYS2d 43 [2nd Dept 1988]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [1997]).

Turning to motion (013), the defendants, Boris Kleyman, M.D., Lynne E. Macco, M.D., and Robert W. Duck, M.D., seeks summary judgment dismissing the complaint against them. The affirmation of defendants' expert, Steven R. Goldstein, M.D., has been submitted on behalf of Dr. Macco and Dr. Duck.

Steven R. Goldstein, M.D. affirms that he is licensed to practice medicine in the States of New York and New Jersey and is board certified in obstetrics and gynecology and is a diplomate with the National Board of

Medical Examiners. He opines with a reasonable degree of medical certainty that there is no liability as to Dr. Macco and Dr. Duck in their care and treatment of Mrs. Schwahl. He states that placing her on bed rest with bathroom privileges was appropriate, as was the plan of treatment to complete the steroidal therapy and thereafter evaluate further. At 4:50 p.m. Mrs. Schwahl was taken off the fetal heart monitor to use the bathroom, and in so doing, noted that the umbilical cord had prolapsed into her vagina, an obstetrical emergency. A nurse responded and two to three minutes later, Dr. Duck responded and immediately placed his hand into the vagina to elevate the cord and avoid further stress on the fetus, and this was the proper therapy to be rendered along with arranging for the most expeditious delivery of the fetus. Anesthesia was started at 5:16 p.m., surgical incision was made at 5:20 p.m. and the baby delivered at 5:21 p.m. He indicated that the times were outstandingly fast and there was no delay in effectuating the delivery. Dr. Goldstein further affirms that in a teaching hospital such as Stony Brook, residents in the field of obstetrics and gynecology are supervised by their attendings. Dr. Macco and Dr. Duck, being third year residents, worked under the supervision of their attendings, Dr. Grant and Dr. Vorha.

Boris Kleyman, M.D. sets forth in his affidavit to the effect that he is a physician licensed to practice medicine in the State of New York and upon entering into private practice of medicine, specialized in the fields of anesthesiology and pain management. Dr. Kleyman sets forth that he first met Mrs. Schwahl on October 12, 1997 when she was emergently brought to the labor and delivery suite operating room for an emergency cesarean section and he was a second year resident in anesthesiology having done his first year in internal medicine. As an anesthesiology resident, he states, he was always directly supervised by his various attending physicians. At no time did he make any independent decisions concerning the care and treatment of any patient and in this case, he was supervised by Stephen A. Vitkun, M.D.

Lynne E. Macco, M.D. has set forth in her affirmation to the effect that she is a physician licensed to practice medicine in the State of New York. From 1995 to 1999 she was a resident in obstetrics and gynecology at SUNY Stony Brook and became board certified in obstetrics and gynecology in 2004 and recertified in 2007. She has no independent recollection of Margaret Schwahl. According to the hospital records, she first met Mrs. Schwahl on October 11, 1997 at approximate 9:50 p.m. when she was a third year resident and Mrs. Schwahl was admitted to the labor and delivery suite with premature rupture of the membranes. At 10:00 p.m., Pamela Grant, M.D., the attending physician, saw Mrs. Schwahl. Dr. Macco went off duty at 8:00 a.m. on October 12, 1997, with Mrs. Schwahl's care and plan of treatment discussed with the on-going team of physicians. Dr. Macco avers that at no time did she make any independent decisions concerning the plan of treatment for Mrs. Schwahl, and was not involved with her transfer to the ante-partum unit, and all orders written by her were done after and with the direction of her attending physician, Dr. Grant.

Based upon the foregoing, Dr. Duck, Dr. Macco, and Dr. Kleyman have demonstrated prima facie entitlement to summary dismissing the complaint as asserted against each of them. It has been established that, as a resident, each was working under the supervision and direction of a supervising attending physician and did not exercise independent medical judgment in their care and treatment of Mrs. Schwahl.

A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (*Muniz et al v Katiowitz, et al*, 49 AD3d 511, 856 NYS2d 120 [2nd Dept 2008]). A private physician may be held vicariously liable for conduct of a resident physician where the resident is under the direct supervision and control of the private physician at the time of the conduct; the key is whether the resident exercises independent medical judgment (*Freeman et al v Mercy Medical Center et al*, 2008 NY Slip Op 31337U; 2008 Misc Lexis 10141 [Supreme Court of New York, Nassau County]). Here the record supports that the moving defendants were each

working under the supervision and control of their respective attendings and only acted within the scope relating to what care and treatment was approved by the attendings. The plaintiffs, who have not opposed this motion, have not raised a factual issue to preclude summary judgment dismissing the complaint.

Accordingly, motion (013) is hereby granted and the complaint asserted against the moving defendants, Kleyman, Macco and Duck, is dismissed with prejudice.

Turning to motion (014), the defendants, Pamela Grant, M.D., Nidhi Vorha, M.D., and Stephen A. Vitkun, M.D. seek summary judgment dismissing the complaint against them. In support, the affirmations of Jeffrey Bernstein, M.D., Ingrid P. Taft, M.D., and Mary E. D'Alton, M.D., have been submitted.

Mary E. D'Alton, M.D. affirms that she is a physician licensed to practice medicine in the State of New York and her practice is limited to the specialty of obstetrics and gynecology. She is board certified in obstetrics and gynecology, and maternal-fetal medicine. She bases her opinions set forth in her affirmation with a reasonable degree of medical certainty and opines that nothing Drs. Grant, Vorha or Vitkun did or failed to do was a substantial factor in causing the alleged injuries to the infant plaintiff, and there is no evidence of departures from accepted standards of good medical or obstetrical practice on their part. She states that Mrs. Schwahl was adequately monitored, that proper sonograms were performed, that she was properly positioned and did not require absolute bed rest. Two sonograms were conducted within 21 hours, and neither sonogram nor the biophysical profile indicated any evidence of a potential cord prolapse. Funic or velamentous cord presentation with its origin on the fetal membranes rather than on the placenta, could not be diagnosed by sonogram in 1998 once the membranes had ruptured. The care plan instituted by Dr. Grant for a newly admitted patient with PPRM while being evaluated and while stability is being determined was appropriate. Mrs. Schwahl used the bathroom as permitted by the nursing staff, which was contrary to the orders Dr. Grant wrote. Prophylactic tocolysis is ineffective at prolonging pregnancy in a patient with PPRM and does not prevent cord prolapse. The standard of care does not call for the Trendelenburg position and could allow more room for a cord prolapse rather than preventing it, and is used once the cord prolapses. Vaginal cultures, blood testing and monitoring of vital signs were appropriately obtained. The physicians were immediately available for performing the caesarean section, and according to ACOG guidelines, was timely performed. There was no delay in performing the delivery when the cord prolapsed and it was determined that surgery needed to be emergently performed to deliver the infant. Dr. Grant was no longer on duty when the cord prolapsed. Dr. D'Alton sets forth her opinions and the basis for the opinions that the infant did not suffer intrapartum asphyxia and brain damage as there was no evidence of periventricular leukomalacia, no metabolic acidosis in the fetal umbilical cord arterial blood obtained at delivery, there was no seizure activity, severe irritability, abnormal tone or comas associated with moderate or severe encephalopathy, the infant's records do not indicate that he has spastic quadriplegia or dyskinetic type cerebral palsy, and the child has not had a sufficient workup for neurological injuries and their causes.

Jeffrey Bernstein, M.D. affirms that he is licensed to practice medicine in the State of New York and is board certified in anesthesiology. His opinions are set forth with a reasonable degree of medical certainty and he opines that there is no evidence of any departure from accepted standards of good medical or anesthesia practice on the part of Stephen A. Vitkun, M.D., and that there is nothing that Dr. Vitkun did or failed to do which was a substantial factor in causing the injuries sustained by the plaintiffs. It is Dr. Bernstein's opinion that the alleged departures cannot be attributed to treatment that is within Dr. Vitkun's purview or responsibility as an anesthesiologist. Dr. Vitkun became involved in Mrs. Schwahl's care and treatment only after she had ruptured her membranes, had a prolapse of the umbilical cord and as she was being brought to the operating room. When he learned of the occurrences, the only reasonable treatment was to arrange and accomplish

caesarean delivery as comported with good practice and safety at 5:15 p.m. He states that a funic cord presentation, with its origin on the fetal membranes rather than on the placenta, could not possibly be diagnosed prenatally in 1998 once the membranes had ruptured as routine sonographic resolution was not sufficiently advanced to allow diagnosis of a funic cord after rupture of membranes. Such diagnosis was made on pathological examination of the placenta, well after the birth of the infant plaintiff. Anesthesia was commenced at 5:16 p.m., one minute after Mrs. Schwahl's presentation, and during that time, Dr. Vitkun ascertained the prior history, present condition and the fact that there was a prolapsed cord and fetal bradycardia, and obtained consent. Dr. Bernstein sets forth the methodology employed for anesthesia, and the medications used, and each step before progression in anesthesia induction. At 5:20 p.m., Dr. Vitkun gave the surgeon the signal to start surgery. The time for induction, approximately four minutes, is consistent with good, safe and accepted anesthesia practice, and an induction time of substantially less than four minutes would like compromise safety and put both the patient and her fetus at increased risk. Dr. Vitkun started oxygen therapy for Mrs. Schwahl as soon as she was positioned on the delivery/operating table and such therapy is one of the best treatments of possible fetal hypoxia short of delivering the fetus.

Dr. Ingrid P. Taff, M.D. affirms that she is a physician licensed to practice medicine in the State of New York and is board certified in neurology and psychiatry with special competence in child neurology, and is board eligible in pediatrics. Her opinions are based with a reasonable degree of medical certainty and are submitted on behalf of Dr. Vitkun, Dr. Grant and Dr. Vorha. It is Dr. Taff's opinion that any of the claimed departures did not contribute to or cause the injuries claimed to the infant plaintiff nor is there anything that the defendants did or failed to do that were a substantial factor in causing the alleged injuries to Gadge Schwahl. She sets forth that after birth the infant suffered from hyaline membrane disease, a condition caused by immature lungs present in a preterm infant. After birth, the infant had no seizures or tremors, had a symmetrical and normal Moro reflex, Grasp reflex and such. His activity level and tone were evaluated as normal, he was alert and responsive, and during his 30 day stay in NICU, he had two normal brain ultrasound examinations. Head circumference measurements reflected appropriate head growth. Gastro-esophageal reflux disease was diagnosed and treated. At some point, Gadge's records reflect a diagnosis of high functioning Autism. Upon a series of evaluations by Pediatric Developmental Specialist, Dr. Andrew Adesman, at Scheider's Children's Hospital, starting in July 2001, a definitive diagnosis of Pervasive Development Disorder (PDD, NOS) was made. Dr. Taff indicates that although Mrs. Schwahl testified that Gadge was diagnosed with cerebral palsy because of his toe walking and flat feet, these records were not provided for her review. Dr. Adesman disagreed with the diagnosis of cerebral palsy and felt that the toe walking and flat feet were characteristic symptoms of PDD, NOS. She states that Dr. Carrion documented Pes Planus, flat feet, but did not reach a diagnosis of cerebral palsy. At about three years of age, a psychological evaluation concluded Gadge had an IQ of about 80, but he was uncooperative and therefore a true evaluation of his abilities was not obtained. Subsequent developmental and psychological evaluations by Dr. Soares and Dr. Menella respectively indicated that Gadge's primary developmental problem was PDD and that his behavioral difficulties were caused by his PDD and its associated symptoms. According to recent testing (fifth grade), Gadge has a near genius IQ, with reasoning and math IQ of 142 and his processing and decoding abilities are at the 99.9th percentile, and he was functioning at college age level in these areas. He was in the 95th percentile for reading. In May 2009, the child's school physical therapist reported that the child no longer had gross motor deficits that impacted his school performance and suggested that physical therapy for Gadge be given no more often than once a month. He is on the school's football team and plays basket ball competently.

Dr. Taff further opines that cerebral palsy associated with prematurity is associated with periventricular leukomalacia, a finding indicative of destruction of brain tissue seen on imaging studies, or birth asphyxia, or intrapartum infection, or brain hemorrhage during or after birth. The records demonstrate that the child suffered

from none of these conditions. His brain ultrasound tests were normal and there was no periventricular leukomalacia. Gadge's toe walking improved and such physical improvement is not compatible with the diagnosis of diplegia or cerebral palsy. Other symptoms related to PDD include socialization and communication deficits. At this point, his education support services consists of organizational skills. A child with low normal intelligence does not usually later improve to near genius IQ levels particularly if the child had allegedly suffered obstetrical asphyxial brain damage. Dr. Taff opines that the medical records do not reflect any significant delay in reaching early developmental milestones. Dr. Taff opines that there is overwhelming evidence that indicates that hypoxia-asphyxia was not present at his birth as he had an arterial cord blood pH of 7.31 and a base deficit of 4, which findings are not compatible with pH levels which would be seen in asphyxiated infants, which would be a pH of less than 7.0 and a base excess of greater than 12. The Apgar scores of 5 and 7 are also higher than the Apgar scores of an asphyxiated infant. Any oxygen desaturation suffered by Gadge in the nursery was related to his hyaline membrane disease and bronchopulmonary dysplasia due to the preterm birth rather than trauma or hypoxia.

Based upon the foregoing, this court finds that Dr. Vitkun, Dr. Grant and Dr. Vorha have demonstrated prima facie entitlement to summary judgment dismissing the complaint on the issue that they did not depart from good and accepted standards of medical care and that they did not proximately cause any of the injuries which it is claimed the infant plaintiff suffers from. The plaintiffs have not opposed this motion and therefore have failed to raise a factual issue to preclude summary judgment.

Accordingly, motion (014) for summary judgment dismissing the complaint asserted against Dr. Stephen Vitkun, Dr. Pamela Grant and Dr. Nidhi Vorha is granted and the complaint asserted against them is dismissed with prejudice.

Dated: 9/10/10
Riverhead, NY

Emily Pines
J.S.C.
HON. EMILY PINES