

Serrano v Winthrop Univ. Hosp.

2010 NY Slip Op 32992(U)

October 7, 2010

Supreme Court, Nassau County

Docket Number: 18692/08

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

YULISSA SERRANO, an infant by her mother and
natural guardian, ALETICIA FERNANDEZ and
ALETICIA FERNANDEZ, Individually,

Plaintiffs,

- against -

WINTHROP UNIVERSITY HOSPITAL, UNIVERSITY
PLAZA OBSTETRICS AND GYNECOLOGY, L.L.P.,
JOHN A. CAFARO, M.D., GARY SHELDON
ROSENBERG, M.D. and JEFFREY NEIL MILLER, M.D.

Defendants.

TRIAL/IAS, PART 15
NASSAU COUNTY

INDEX NO. 18692/08

MOTION SUBMISSION
DATE: 8/30/10

MOTION SEQUENCE
NO.4

The following papers read on this motion:

- Notice of Motion and Affidavits..... X
- Memorandum of Law in Support of Motion..... X
- Affirmation in Opposition..... X
- Memorandum of Law in Support of Opposition..... X
- Reply Affirmation..... X

The defendants, University Plaza Obstetrics and Gynecology, L.L.P., John A. Cafaro, M.D., Gary Sheldon Rosenberg, M.D., and Jeffrey Neil Miller, M.D., (hereinafter referred to as "University", "Dr. Cafaro", "Dr. Rosenberg" and "Dr. Miller"), move for an order (a) pursuant to CPLR §3212, granting summary judgment to the defendants and dismissing the Complaint against said defendants, (b) directing the entry of judgment in favor of defendants and (c) deleting the names of the defendants from the caption. The defendants submit a Memorandum of Law in support of their motion for summary judgment. The plaintiffs, Yulissa Serrano, and infant, by her mother and natural guardian, Aleticia Fernandez, (hereinafter referred to as the "infant plaintiff"), and Aleticia Fernandez, individually, (hereinafter referred to as "Ms. Fernandez" and "plaintiff mother"), submit opposition and a Memorandum of Law in support of their opposition. The defendants submit a reply affirmation.

The plaintiffs have discontinued their action as and against the defendant, Dr. Rosenberg, M.D.

BACKGROUND

The plaintiffs initiated this action sounding in malpractice as and against the defendants, Winthrop University Hospital, (hereinafter referred to as "Winthrop"), University, Dr. Cafaro and Dr. Miller. The plaintiffs allege that the defendants essentially failed to timely schedule a cesarean section, deliver the infant plaintiff who was in double footling breech presentation, (a condition whereby the fetus' both feet are presenting), without injury to the infant plaintiff's spine, thereby causing the infant plaintiff to suffer a spinal injury during delivery, produce bleeding and swelling, and ultimately segmental spinal cord atrophy and resulting paralysis and severe hypotonia, (low muscle tone), to the lower extremities, hydronephrosis, neurogenic bladder transverse myelopathy, (a condition indicating there is something wrong with the spine), and a marked spinal kyphosis, (a curving of the spine that leads to a hunchback or slouching posture). The plaintiffs claim that the infant plaintiff, now four years old, is unable to walk, is confined to a wheelchair, suffers from frequent urinary tract infections, requires continuous antibiotic therapy, and requires urinary catheterization. Plaintiffs allege all of the infant plaintiff's injuries are permanent.

The plaintiffs allege that the defendants failed to perform a cesarean section when an external version was unsuccessful. (An external version is known as a procedure used to manually turn a fetus from a breech position, (transverse) into a head-down (vertex) position before labor begins to make it possible to have delivery vaginally.) Plaintiffs claim that the defendants were negligent in performing the external version, the defendants failed to perform pelvimetry studies, (pelvimetry refers to the measurement of the diameters of the pelvis), recognize footling breech, (a condition when the fetus in which one or both feet are positioned at the inlet of the maternal pelvis), caused a frank breech to become a footling breech, (a frank breech has been described as the position of the fetus whereby the fetus' buttocks are present at the maternal pelvic inlet, legs are straight up in front of the body, and feet are at the shoulders), and failed to perform vaginal exams at 36 weeks.

The plaintiff, Ms. Fernandez, was presented to University on October 11, 2005 for a prenatal visit. Thereafter, an ultrasound revealed pregnancy and the estimated due date was calculated to be about June 2, 2006. The plaintiff, Ms. Fernandez, appeared for a scheduled prenatal visits at University, up and until the time of birth of the infant plaintiff which occurred on May 23, 2006 at Winthrop. On or about May 11, 2006, Ms. Fernandez appeared at University for a prenatal visit at 37 weeks gestation. Plaintiff was seen by Dr. Cafaro. At this time it was noted that the baby was in breech presentation, a condition whereby the fetus is a longitudinal line with the buttocks or feet closest to the cervix. Dr. Cafaro advised Ms. Fernandez of her options of external version, a cesarean section, or vaginal delivery. Ms. Fernandez elected to attempt an external version.

Ms. Fernandez was presented to Winthrop on May 17, 2006 for an attempted external version. Dr. Cafaro performed the external version under ultrasound guidance. The external version was not successful, and Ms. Fernandez was scheduled for a cesarean section at Winthrop for May 26, 2006, at which time the pregnancy would be at 39 weeks gestation.

Ms. Fernandez was presented to Winthrop on May 23, 2006 at 3:05 a.m. with a reported spontaneous rupture of membranes at 2:30 a.m. The infant plaintiff was in the double footling presentation, (both feet are positioned at the inlet of the maternal pelvis). The plaintiff testified that she spoke with Dr. Miller on the phone when her water broke and he directed her to go to the hospital. The triage record indicates that Dr. Miller was notified at 3:25 a.m. and the patient was being scheduled for a cesarean section. The defendants provide that the Admitting Note documented that Ms. Fernandez was admitted at 38 4/7 weeks gestation due to spontaneous rupture of membranes with particulate meconium and footling breech presentation, and noted that Dr. Miller was in route to the hospitals. A fetal heart monitor was applied, Ms. Fernandez was brought up to the delivery room at 3:50 a.m., and anesthesia was started. The surgery commenced at approximately 4:04 a.m. with Dr. Miller, and the infant was delivered at 4:15 a.m.

Expert Opinions Offered

The defendants' obstetrical physician, board certified in obstetrics and gynecology, opines that at all relevant times, the defendants' care and treatment of Ms. Fernandez and the infant plaintiff was within good and acceptable standards of medical practice, and the defendants' care of Ms. Fernandez and the infant plaintiff did not proximately cause the infant plaintiff's claimed injuries. The defendants' obstetrical physician provides that pelvimetry is not presently routinely used and is not a useful diagnostic tool for cephalopelvic disproportion, (a condition when the pelvis is inadequate to allow the fetus to negotiate the birth canal). In any event, defendants' obstetrician states that Ms. Fernandez's pelvis was assessed and her pelvic measurements were adequate and any claimed failure to perform pelvimetry studies is irrelevant.

The defendants' obstetrician opines that the defendants timely appreciated a footling breech and appropriately offered Ms. Fernandez the option of performing an external version after 35 weeks gestation in an attempt to turn the fetus into the vertex position so that the fetus could be delivered vaginally. The defendants' obstetrician opines that Dr. Cafaro conformed to good and accepted standards during the May 17, 2006 external version, and opines that Dr. Cafaro did not cause plaintiff's claimed injuries during the external version, and that Dr. Cafaro appropriately performed a sonogram prior to the version to confirm the position of the fetus and to ensure that the version was not contraindicated. The defendants set forth that Dr. Cafaro explained to Ms. Fernandez that he was not optimistic that the version would be successful due to both the size of the baby and the size of the mother. As per the defendants' obstetrician's review of the records, Ms. Fernandez was given the appropriate information to allow her to make an informed decision as to whether to proceed with the external version.

The defendants' obstetrician submits that although the plaintiffs allege that Dr. Cafaro should have immediately proceeded to a cesarean section delivery when the external version failed on May 17, 2006, Winthrop's protocols do not permit elective cesarean section prior to 39 weeks gestation for breech presentation unless the mother has a rupture of membranes.

While the plaintiffs allege that Dr. Miller failed to arrive at Winthrop in a timely fashion, defendants' obstetrician provides that Dr. Miller arrived at Winthrop in a timely fashion as the triage record indicates Dr. Miller was notified at 3:25 a.m., obstetricians were on standby at Ms. Fernandez's bedside, she was brought to the delivery room at 3:50 a.m., surgery was commenced at 4:04 a.m. with Dr. Miller, and the infant plaintiff was delivered at 4:15 a.m.

The defendants' obstetrician opines, within a reasonable degree of medical certainty, that Dr. Miller conformed to good and accepted standards during the cesarean delivery of the infant, and appropriately performed a low transverse incision, (known as an incision made horizontally across the lower end of the uterus), appropriate for the fetus in the double footling breech presentation. While plaintiffs allege that a classical incision, (known as an incision made vertically along the uterus), should have been made, defendants' obstetrician maintains that a classical incision would have created more potential complications for this young patient during future pregnancies.

The plaintiffs' obstetrical physician, board certified in obstetrics and gynecology, opines that Dr. Cafaro departed from accepted standards of obstetrical care by not formulating and implementing a proper and timely delivery plan that could have, and would have, produced a non traumatic and noninjurious delivery prior to May 23, 2006, as there was not reason to wait until 39 weeks, that waiting until 39 weeks to deliver the fetus was contraindicated and was a departure from the accepted standards of care. Plaintiffs' obstetrician provides that there essentially was no regulation by Winthrop that labor and delivery could not accommodate a scheduled breech delivery at 38 weeks gestation, but rather that the regulation allows the scheduling of a cesarian section anytime after 38 weeks, and the defendants' obstetrician, and/or the defendants, misread the pertinent regulation.

The plaintiffs' obstetrician submits that Dr. Cafaro failed to perform a vaginal examination of Ms. Fernandez on May 18, 2006 and failed to consider the real possibility that she would go into labor prior to 39 weeks and with ruptured membranes, creating an emergency situation, the footling breech, a more complicated delivery.

The plaintiffs submit that contrary to the defendants' submissions, Dr. Miller did not immediately leave for the hospital. Ms. Fernandez testified that she called Dr. Miller's service shortly after membranes ruptured, then spoke to Dr. Miller at approximately 2:30 a.m., told him her water broke, and he advised her to go to the hospital. Dr. Miller testified that when he spoke to Ms. Fernandez at or about such time, he assumed the baby was in vertex because Ms. Fernandez did not tell him that there was a breech presentation or that she had a scheduled cesarean section. Once Ms. Fernandez arrived at Winthrop, at about 3:05 a.m., a vaginal exam confirmed that both feet were in the vagina and it was now a double footling breech presentation. The plaintiffs submit that Dr. Miller was notified at 3:25 a.m. of Ms. Fernandez's presentation to the hospital.

Plaintiffs obstetrician opines that Dr. Miller departed from accepted standards of obstetrical care in failing to deliver the infant plaintiff through an adequate uterine incision, that Dr. Miller's failure to perform the cesarean section via a classical incision, or at least with a vertical extension of the incision or the uterine incision, constituted a departure from good and accepted standards of obstetrical care, and further opines that the use of an excessive longitudinal traction caused trauma to the spine of the baby during the delivery process.

Plaintiffs' obstetrician opines that Dr. Miller's failure to perform gentle and proper maneuvers led to the development of nuchal arms, (described as an arm entrapment that occurs when the arms become raised over the fetal head, whereby not only the head must pass through the cervix, but also the added bulk of one or two arms must come with it). The plaintiffs' obstetrician provides that the maneuvers that were needed required more than the typical horizontal uterine incision would allow, and once nuchal arms were discovered, it was certainly required that a vertical extension of the incision be performed so that the nuchal arms and head could safely be delivered. Plaintiffs' obstetrician also opines that Dr. Miller created the condition of the nuchal arms by delivering the baby too quickly and/or too forcefully and had Dr. Miller performed proper and gentle maneuvers to deliver the baby, the nuchal arms would not have developed.

Plaintiffs' obstetrician opines that the infant plaintiff's spinal cord injury was avoidable and was in fact caused by excessive longitudinal traction to the spine, particularly to the vulnerable C7-T4 level during delivery, and provides that where there is excessive pulling on the fetus in an effort to deliver the fetal head through too small an opening can lead to spinal insult, bleeding, swelling, compression and ultimately to transverse myelopathy and segmental spinal cord atrophy at the exact levels of the spinal cord where the infant injury is evident, and further, that there is no other valid explanation for this injury. Plaintiff's obstetrician opines that there is no evidence to support a claim that the infant plaintiff suffered an in utero spinal cord injury leading to severe hypotonia of her lower extremities.

Plaintiffs' pediatric neurologist opines that infant plaintiff suffered a traumatic spinal cord insult as a result of the delivery process involving excessive traction, hypertension of the cervical spine, and distraction of the spine, producing bleeding and swelling and ultimately resulting in transverse myelopathy and spinal cord atrophy with resulting paralysis and/or severe hypotonia in the lower extremities, bilateral hydronephrosis and a neurogenic bladder. Plaintiffs' pediatric neurologist states that the injury suffered by the infant plaintiff is a known complication of the use of undue traction during a breech delivery, whether performed vaginally or through an insufficient uterine opening, and that the facts herein are most consistent with such an injury.

DISCUSSION

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627). The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665).

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opines as such credibility issues can only be resolved by a jury. (*Roca v. Perel*, 51 AD3d 757). The submission by the parties of conflicting medical opinions necessarily presents an issue of fact requiring the denial of the motion. (*Viti v. Franklin General Hospital*, 190 AD2d 790; *Zimmer v. Phelps Memorial Hospital*, 140 AD2d 436).

In determining whether a plaintiff had made out a *prima facie* case thereby precluding judgment to the defendant as a matter of law, plaintiff's evidence must be accepted as true and plaintiff is entitled to the benefit of every favorable inference which can be reasonably drawn from the evidence. (*Corvino v. Mt. Pleasant Central School District*, 305 AD2d 364; *Mosheyev v. Pilevsky*, 283 AD2d 469; *Akseizer v. Kramer*, 265 AD2d 356; and *Hughes v. New York Hospital - Cornell Medical Center*, 195 AD2d 442).

Here, the moving defendants have made a *prima facie* showing of entitlement to summary judgment. The defendants' obstetrician opined with a reasonable degree of certainty that the treatment rendered by Dr. Cafaro conformed to good and accepted standards of medical practice, that the external version performed on May 17, 2006 conformed to good and acceptable standards, that there were no complications and Dr. Cafaro properly utilized ultra sonography and fetal monitoring. Additionally, defendants' obstetrician provides that there is no evidence that the infant plaintiff's neck was hyper extended and the infant plaintiff could not have been injured due to the external version. Further, defendants' obstetrician opines that Dr. Cafaro's scheduling of a cesarean section at a later date was consistent with Winthrop's protocol to not conduct an immediate cesarean section. The defendants' obstetrician also opines that Dr. Miller arrived in a timely fashion, and performed the appropriate incision, a lower uterine transverse incision, which is appropriate when the fetus is in the footling or double footling breech presentation, and used the appropriate maneuver applying gentle pressure to deliver the fetus.

The plaintiffs, in opposition to the motion, have raised triable issues of fact warranting the denial of this summary judgment motion. The opinions set forth by the plaintiffs' obstetrician and pediatric neurologist directly conflict with the opinion set forth directly by the defendant's obstetrician. Plaintiffs' obstetrician disagrees with the defendants' obstetrician and states that a cesarean section scheduled for breech presentation is not an elective cesarean subject to the Winthrop regulation requiring a 39 week gestational age for elective cesarean section deliveries. The plaintiffs' obstetrician sets forth the departures from acceptable standards of obstetrical care by each of the defendants. The plaintiffs' pediatric neurologist and obstetrician opine that the spinal injury sustained by the infant plaintiff is a result of the defendants' departures from good and accepted standards of medical practice, and that there is sufficient evidence that the injury did not occur in utero and rather occurred at the time of delivery. Plaintiffs' pediatric neurologist disagrees with defendants' obstetrician and opines there are no genetic or congenital developmental abnormalities of the spinal cord that can produce a focal spinal cord atrophy such as the one suffered by the infant plaintiff.

CONCLUSION

The defendants' motion for summary judgment is denied.

As the plaintiffs have discontinued the instant action against defendant, Dr. Rosenberg, the caption is hereby amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

YULISSA SERRANO, an infant by her mother and
natural guardian, ALETICIA FERNANDEZ and
ALETICIA FERNANDEZ, Individually,

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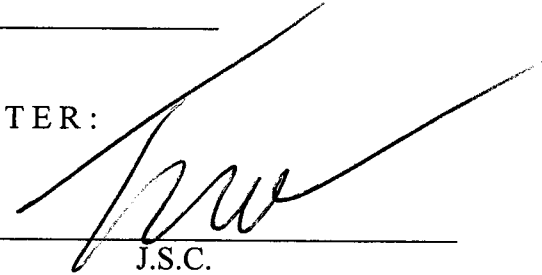
Plaintiffs,

- against -

WINTHROP UNIVERSITY HOSPITAL, UNIVERSITY
PLAZA OBSTETRICS AND GYNECOLOGY, L.L.P.,
JOHN A. CAFARO, M.D., and JEFFREY NEIL
MILLER, M.D.

Defendants.

ENTER:



J.S.C.

Dated: October 7, 2010

cc: Pegalis & Erickson, LLC
Heidell, Pittoni, Murphy & Bach, LLP
Martin, Clearwater & Bell, LLP

ENTERED
OCT 15 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE