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SHORT FORM ORDER

INDEX No. 08-26277
CAL. No. 10-00341-MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 7-9-10
ADJ. DATE 8-27-10
Mot. Seq. # 003 - MD

DANIEL PACCIONE, an infant under the age of 18 years by his Natural Mother and Legal Guardian, JULIA PACCIONE and JULIA PACCIONE, Individually,

Plaintiffs,

- against -

GAY EZER, D.O., LORRAINE CATALANO, M.D. and COMMACK PEDIATRICS ASSOCIATES,

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 (003) by the defendants pursuant to CPLR §3212 for an order granting summary judgment dismissing the complaint as asserted against them is denied.

This is a medical malpractice action wherein the plaintiffs allege that the defendants negligently departed from good and accepted standards of medical/pediatric practice in the care and treatment of Daniel Paccione, (hereinafter infant plaintiff), and failed to properly and adequately give informed consent to Julia Paccione, the mother of the infant plaintiff (hereinafter Paccione) who also asserts a derivative claim. The plaintiffs claim that the negligent acts and omissions occurred from on or about February 2, 2006 through February 28, 2006 during the care and treatment of the infant plaintiff for a strep infection, resulting in the infant plaintiff developing and suffering rheumatic carditis, congestive heart failure, rheumatic fever, rheumatic heart disease, tricuspid and mitral valve insufficiency, shortness of breath, tachycardia and permanent heart damage.

In motion (003), the defendants seek dismissal of the complaint as asserted against them because they bear no liability in this action, they were not negligent in their care and treatment of the infant plaintiff, and that they did not proximately cause the injuries claimed by the infant plaintiff.

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 and triable issues of fact from the case. (***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 produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979] , ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) 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 [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 [1979]).

In support of motion (003), the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint; the moving defendants' answers, plaintiffs' verified bill of particulars; copies of the transcripts of the examinations before trial (hereinafter EBT) of Paccione and the infant plaintiff, dated June 4, 2009, Gay Ezer, D.O., dated August 5, 2009, Lorraine Catalano, M.D., dated August 20, 2009; copy of the infant plaintiff's medical records; and the affirmation of William Borkowsky, M.D.

The infant plaintiff's medical records submitted by the defendants note that on February 20, 2006, the infant plaintiff was seen at the Commack Pediatric Association (hereinafter Commack Pediatric), and that he had a fever for three days, vomited twice that day, and had a cough, sore throat and diarrhea. He was diagnosed with pharyngitis/upper respiratory. His strep culture was positive and he was started on Amoxicillin 875 mg twice a day for 10 days. On February 28, 2006, he was again seen and it was noted that he was on his seventh day of Amoxicillin and now also had a rash. Blood work was ordered and the antibiotic was discontinued. On March 3, 2006, the office note indicated infant plaintiff was feeling better and went to school. On April 7, 2006, the office note indicated the infant plaintiff had tachycardia. The infant plaintiff was then seen by Barry E. Goldberg, M.D., (hereinafter Goldberg), Director of Pediatric Cardiology at Good Samaritan Hospital, West Islip, New York (hereinafter hospital). The Commack Pediatric note indicated that the infant plaintiff had mild to moderate congestive heart failure with valve involvement and was being admitted to the hospital's pediatric intensive care unit.

A echocardiogram report, dated May 15, 2006, in the Commack Pediatric file signed by Goldberg, indicated that the infant plaintiff had an improved dilated left atrium and left ventricle; moderate aortic insufficiency, and mild to moderate mitral regurgitation. The Doppler interrogation revealed mitral valve-mild to moderate insufficiency; aortic valve-moderate insufficiency.

William Borkowsky, M.D., (hereinafter Borkowksy), stated in his affirmation that he was a physician licensed to practice medicine in New York and was Board Certified in pediatrics and pediatric infectious diseases. He stated his opinion within a reasonable degree of medical certainty that Lorraine Catalano, M.D. (hereinafter Catalano) and Gay Ezer, D.O. (hereinafter Ezer) did not deviate or depart from acceptable medical standards in their care and treatment of the infant plaintiff and that none of their actions caused him to contract rheumatic carditis. He stated that the medical history from February 20, 2006 showed the infant plaintiff was treated at Commack Pediatric by Catalano who tested him for strep which test was positive and for which he was prescribed Amoxicillin 875 mg twice a day for 10 days and that on February 28, 2006 the infant plaintiff was seen by Ezer who diagnosed an Amoxicillin rash and discontinued the medication. Borkowsky further stated that the infant plaintiff had taken 17 of the 20 prescribed doses. The infant plaintiff was also tested for the Epstein Bar virus to rule out that the rash was due to mononucleosis and the test was negative. When Ezer spoke to the infant plaintiff's father on March 2, 2006, she was advised that the infant plaintiff returned to school and the rash was resolving. When Ezer saw the infant plaintiff on April 7, 2006, she diagnosed him with tachycardia and arranged for him to be seen by Goldberg, the pediatric cardiologist. Thereafter, the infant plaintiff was admitted to the hospital by Goldberg who diagnosed the infant plaintiff with congestive heart failure, rheumatic carditis.

Paccione testified at her EBT that the infant plaintiff did not have a history of a reaction to any antibiotics. When Catalano prescribed the Amoxicillin, he took it for 7 or 8 days. He had returned to school for one day when he was sent home due to the rash from head to toe, for which she took him that day to Commack Pediatric. Ezer told her he must be allergic to the Amoxicillin and he should stop taking it. Sometime thereafter, the infant plaintiff was removed from baseball practice because he was tired and short of breath and his coach told him to go see his doctor. He was thereafter seen by Ezer as he was complaining that his heart was racing and he was referred to Goldberg who admitted him to the hospital. She stated Goldberg told her that rheumatic heart disease came from untreated strep.

Catalano testified at her EBT that the infant plaintiff had been a patient at her office since 1998 and had no history of heart problems or strep prior to 2006. She saw the infant plaintiff on February 20, 2006 and diagnosed him with, and treated him for, a strep infection confirmed by a rapid strep test. Amoxicillin 875 mg twice a day for 10 days was the standard of care. The risk of not treating the strep for the full 10 days can be a recurrence of the strep and rheumatic fever. She stated that rheumatic fever is caused by the body having an immune response to the strep in the body. She described the rash with rheumatic fever as being everywhere on the body, a pink discoloration of the skin, a little raised, blotchy, and it did not look like an allergic reaction rash. Other antibiotics for the treatment of strep were available in case of an Amoxicillin allergy. She believed everything was done to prevent rheumatic fever and that it could occur whether it was treated or not, and that the infant plaintiff's rheumatic fever was not preventable.

Ezer testified at her EBT that Catalano saw the infant plaintiff on February 20, 2006 and diagnosed strep throat based upon a rapid strep test and the infant plaintiff was placed on Amoxicillin 875 mg twice a day for 10 days. Some of the risks of not completing the entire course of the antibiotic were that there could be a recurrence of strep; rheumatic fever could

develop; it could be passed onto others and there were risks to the kidney such as glomerular nephritis. The rash from rheumatic fever was a full body rash and it could linger. It did not manifest as hives. She saw the infant plaintiff on February 28, 2006 and noted he was on the eighth day of Amoxicillin for strep, and now had a rash, and he took a long time to get better. He was still tired and not feeling great. She noted that the rash was head to toe, raised, maculopapular rash. Her assessment was that the rash was an Amoxicillin rash versus mono, and she was not aware of what the rash from rheumatic fever would look like. The Amoxicillin was discontinued. She did not order any further strep testing. She stated his heart was fine with no murmur. Later testing revealed the infant plaintiff was not allergic to Amoxicillin. When she saw the infant plaintiff on April 7, 2006, she noted his resting pulse was 125 and that he complained of feeling his heart racing and that he was out of breath. She heard a murmur when listening to his heart. She did not make any diagnosis on that day. She had no opinion with a reasonable degree of medical certainty as to what caused the infant plaintiff's rheumatic fever. It was not her custom and practice after treatment for strep to re-culture. On February 28, 2006, she did not believe he needed further antibiotic therapy and did not consider switching the infant plaintiff to another antibiotic. He was referred to Goldberg. She concurred with Goldberg that his problem was secondary to strep, even treated strep.

Borkowsky opined that the infant plaintiff developed rheumatic fever at some point after the last visit at Commack Pediatric on February 28, 2006 and that his rheumatic carditis was not evident to the doctors at Commack Pediatric until April 7, 2006 when he returned for a visit. Borkowsky stated that the typical course for rheumatic carditis is 18-28 days after the onset of strep, which he stated in this case would be several days before the first office visit on February 20, 2006. The typical course would be expected to exhibit symptoms at the latest in mid-March 2006. There was no contact with any doctor at that point regarding symptoms. He stated the rash that was described as what the infant plaintiff had was caused by Amoxicillin and not by rheumatic carditis. He further stated that discontinuing Amoxicillin after 8 ½ days and not prescribing another 3 doses of another antibiotic did not cause the infant plaintiff to develop rheumatic carditis, which could have developed due to the original infection or re-infection from his siblings who tested positive for strep throat. He stated that it is more than likely that the infant plaintiff was reinfected from his surroundings after successful treatment with an antibiotic in February 2006.

In a medical malpractice action the requisite elements of proof 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 did during the treatment of the patient and indicate that the treatment was 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 breach of the duty of care to the patient (***Kleinert et al v Begum,*** 144 AD2d 645, 535 NYS2d 43 [2nd Dept 1988]).

To rebut a defendant's prima facie showing of entitlement to an order granting summary judgment the 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 defendant's acts or omissions were a competent-producing cause of the plaintiff's injuries (*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]).

This Court finds that the defendants have not established prima facie entitlement to summary judgment dismissing the case as there are factual issues raised in the defendants' moving papers. Ezer testified that the risk of not completing the entire course of the antibiotic was that there could be a recurrence of strep throat, rheumatic fever could develop, it could be passed onto others, and that there are risks to the kidney such as glomerular nephritis. Borkowsky opined that the infant plaintiff was not under-treated and further opined that the rash he developed was caused by Amoxicillin. Borkowsky did not state the standard of care for the treatment of strep infection. However, Ezer stated that she learned that further testing determined that the infant plaintiff was not allergic to Amoxicillin. Borkowsky did not opine concerning whether or not a differential diagnosis to rule out rheumatic fever should have been made when the infant plaintiff presented with the rash. Even if it could be argued that the defendants established prima facie entitlement to summary judgment, the plaintiffs have raised factual issues which preclude summary judgment.

In opposing the motion for summary judgment, the plaintiffs have submitted, inter alia, an attorney's affirmation; the affirmation of their expert physician; the affidavit of the infant plaintiff, the affidavit of Paccione; a copy of a letter, dated September 6, 2006; and copies of medical records.

The plaintiffs' expert is a physician licensed to practice medicine in New York and Board Certified in Family Medicine. The plaintiffs' expert's opinion, with, a reasonable degree of medical certainty, is that the defendants departed from good and accepted medical practice in their care and treatment of the infant plaintiff which departures led to the infant plaintiff contracting rheumatic fever and the resulting heart damage. The plaintiffs' expert opined that contracting rheumatic fever and suffering heart damage was avoidable and would have been prevented if the defendants had followed the standard of care *i.e.* Amoxicillin 875 mg twice a day for 10 days. The primary risk of under-treating strep infection was rheumatic fever leading to congestive heart failure and permanent heart damage, as admitted by Ezer. The plaintiffs' expert stated that it was imperative that patients complete the full 10 day course of antibiotics to assure that the strep was completely eradicated. Following this course would not cause rheumatic fever and damage to the heart. The standard of care also required a re-test for strep to assure the infection was eradicated after the 10 day course of Amoxicillin. The infant plaintiff had a positive test for strep and was appropriately prescribed the correct course of antibiotic.

When the infant plaintiff presented to Ezer on February 28, 2006 with the rash, he complained that he was tired and not feeling great, which indicated he was not completely free of the strep infection. Without repeating the rapid strep test to assure the strep infection was cured, Ezer diagnosed an allergic reaction to the Amoxicillin and discontinued it on the eighth day, and then did not prescribe an alternate antibiotic to treat the strep infection or check with Catalano, the prescribing physician, prior to discontinuing the antibiotic. Ezer admitted that she was not aware how a rash resulting from rheumatic fever would appear and did not consider the rash as being a symptom of rheumatic fever. The plaintiffs' expert's opined that the red, bumpy rash causing an itch was the result of the on-going strep infection. Other symptoms of rheumatic fever, including extreme fatigue and shortness of breath, presented within 2 to 3 days of the discontinuance of the antibiotic, which placed the infant plaintiff squarely within the 1 to 5 week incubation period between strep infection and the symptoms of rheumatic fever and the rash was a hallmark clinical sign consistent with the underlying infection, causing it to also be known as Scarlet Fever. The strep bacteria toxins sometimes cause an allergic skin reaction-a clear indication that strep infection was still present, which was missed by Ezer who, in discontinuing the antibiotic, exposed the infant plaintiff to an increased risk of contracting rheumatic fever as occurred.

The plaintiffs contend that the infant plaintiff's brothers were diagnosed with strep after the infant plaintiff's diagnosis of rheumatic fever leading to the conclusion that the infant plaintiff infected them with his strep infection. However, it is pure conjecture to speculate that the infant plaintiff was re-infected with strep from his brothers. The plaintiffs' expert also stated that rheumatic fever was virtually unheard of in cases where strep was properly treated with a 10 day course of Amoxicillin. Thus, the plaintiffs contend that Catalano departed from accepted medical care for failing to instruct the patient to return at the completion of the 10 day course of antibiotics for follow up strep tests and to assure that the strep infection was eradicated at the conclusion of the therapy. They also contend that Ezer departed from accepted practice by prematurely discontinuing Amoxicillin prior to the completion of the 10 day course of treatment; failing to repeat the strep test; failing to prescribe additional antibiotic therapy; failing to consult with Catalano, the prescribing physician before discontinuing the antibiotic; failing to determine whether the rash was a reaction to the medication or a symptom of rheumatic fever. These all lead to questions of fact which preclude summary disposition as a matter of law.

Accordingly, summary judgment is denied.

Dated: September 28, 2010

J.S.C.