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Conference May 16, 2011

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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DANIELLE DiMILIA, an infant by her parent and natural guardian, RANDI DiMILIA, and RANDI DiMILIA, individually,

Plaintiffs,

-against -

STEPHANIE ULLMAN,

Defendant.

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DECISION & ORDER

Index No. 2508-2008

Sequence Nos. 5, 6 & 7

LUBELL, J.

The following papers were considered in connection with **(I - Sequence 5)** this motion by defendant, Stephanie Ullman, for an ORDER (a) granting summary judgment in her favor and dismissing the complaint (CPLR §3212); **(II - Sequence 6)** the motion by plaintiff, Randi DiMilia, for an ORDER pursuant to CPLR §3212 granting her summary judgment dismissing defendant's counterclaims on the ground that defendant cannot establish a prima facie case of defamation or injurious falsehood against DiMilia; and **(III - Sequence 7)**, the cross-motion of defendant for an ORDER (a) denying plaintiff's motion for summary judgment, (b) granting defendant's cross-motion to conform to defendant's pleadings to the proof and be permitted to serve an Answer and Amended Counterclaims:

PAPERS	**NUMBERED**
Motion I (Plaintiff)/Affirmation/Exhibits A-P	1
Motion II (Defendant)/Affirmation/Exhibits A-F	2
Affirmations in Opposition to Motion I/Exhibits A-F	3
Cross-Motion III (Defendant)/Affirmation/Exhibits A-J	4
Reply Affirmation and Opposition to Cross Motion/ Exhibits G-H	5

Plaintiffs, Danielle DiMilia ("Danielle"), an infant, and her mother, Randi DiMilia ("Plaintiff"), bring this action for assault and battery, intentional and malicious treatment, negligent infliction of emotional distress, gross negligence and loss of services in connection with personal injuries sustained by Danielle who, when sixteen months old, was injured allegedly while in the care and custody of defendant Stephanie Ullman ("Defendant"), her caretaker.

Defendant counterclaims for libel, libel per se, slander and slander per se. She also seeks sanctions and attorneys fees (22 NYCRR Part 130.1), punitive damages and related relief.

The following undisputed facts set the stage for this action.

At approximately 7:00 AM on January 2, 2008, Plaintiff and non-party Jon DiMilia, Plaintiff's husband and the father of Danielle, dropped off Danielle at the home of Defendant and her husband, non-party Gerald Ullman. For the most part, Danielle was home alone with Defenant, her caretaker, during most of the day. Upon Defenant's eldest child's return from school at approximately 2:15 PM, Defenant left the premises for a period of from ten to twenty-five minutes to pick up her youngest daughter from the bus stop and another child whom she also watches. Danielle would ultimately be picked up from Defendant's home at 7 PM that evening.[1]

From the time of her 7 PM pickup, Danielle was in the exclusive care and custody of her parents until they took her to Northern Westchester Hospital at 7 AM the next morning whereupon they reported, among other things, that they had observed Danielle's limbs shaking. At about noon, Danielle was transferred to the Neonatal Intensive Care Unit of Westchester Medical Center where she came under the care of Dr. Gary Tatz, among other health care professionals. Upon examination, Danielle was determined to have suffered traumatic brain injury consistent with Shaken Baby Syndrome.[2] Danielle was hospitalized for two weeks and still receives associated medical care.

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[1] No allegations are advanced by Plaintiff against anyone other than Defendant.

[2] Generally, "Shaken Baby Syndrome" or "Shaken Infant Syndrome" generally results from the violent or pronounced shaking of an infant or toddler to the point where traumatic brain injury or cerebral hemorrhage results.

Given the nature and circumstances of the injury, the matter was investigated by the police, the Office of the Putnam County District Attorney and by Child Protective Services, all with inconclusive results. Consequently, the investigations were discontinued.

In addition to the above uncontested facts, both sides have provided the Court with contradictory sworn statements detailing Danielle's condition and/or activities or lack thereof during the brief drop-off and pick-up periods during which all parties were together with Danielle. In addition, each side gives their own account of the period during which Danielle was in their respective exclusive care and custody. Neither side is in a position to directly contradict the other's statements about what may have transpired during their periods of exclusive possession. In that regard, however, each submits expert opinion regarding same.

DEFENDANT'S MOTION for SUMMARY JUDGMENT

Upon review and consideration of Defendant's moving papers, the Court is satisfied that Defendant has come forward with sufficient proof in admissible form establishing entitlement to judgment in her favor as a matter of law on all causes of action contained in the complaint. Among other things, the Court has been presented with Defendant's own statements denying any wrongdoing and the opinion of her expert who affirms,

> . . . to a reasonable degree of medical certainty, that it would be pure speculation, if not impossible, for myself or any neurologist or other medical doctor to testify or opine to a reasonable degree of medical certainty that the infant-plaintiff's injuries were caused by [D]efendant . . . or during the time period that the infant-plaintiff was in the care of [Defendant] on January 2, 2008 from 7:00 a.m. until approximately 6:45 p.m.

(Affirmation of Joseph Maytal, M.D. dated December 18, 2010 [Exhibit "P" to Defendant's Motion for Summary Judgment]).

In response, however, the Court is satisfied that Plaintiff has come forward with sufficient proof in admissible form sufficient to raise material questions of fact.

The principal issue raised in this action is not whether Danielle was injured, but rather at whose hands. Like Defendant, Plaintiff and her husband emphatically deny any wrongdoing and, as

with Defendant, have come forward with the opinion of an expert addressing this material issue.

More particularly, upon the February 20, 2011, Affirmation of Gary Tatz, M.D., all causes of the traumatic brain injury suffered by Danielle are discounted except for Shaken Baby Syndrome and, as to that, Dr. Tatz opines that it occurred on January 2, 2008 and "upon a reasonable degree of medical certainty, and in light of the severity level of the injuries [with] which Danielle presented . . . on January 3, 2008, it is medically probable that the injuries were sustained between the hours of 7 AM and 6:45 PM on January 2, 2008", i.e., the hours that Danielle was in the care of Defendant.

Upon consideration of Plaintiff's opposition papers, the Court has considered but rejects Defendant's argument that the above quoted opinion of Dr. Tatz should be rejected on the ground that it is beyond Plaintiff's Expert Witness Exchange dated May 12, 2010 and, thus, has been stated for the first time solely to oppose Defendant's summary judgment motion. To the contrary, the Court concludes that the opinion falls squarely within the ambit of "the cause or causes of the injuries sustained by [Danielle]" which is clearly set forth in the 3101(d) notice as "subject matter on which Dr. Tatz is expected to testify."

The Court also rejects Defendant's position that Dr. Tatz's affirmation should be rejected as conclusory or not in proper evidentiary form. As to the latter issue, the Court finds no legal significance to Dr. Tatz's use of the phrase "medically probable" upon rendering his opinion on the issue of the timing of Danielle's injuries (as is more fully set forth above)(see, People v. Lane, 195 A.D.2d 876 [3d Dept., 1993][expert testimony adequate to refute explanation of victim's death by indicating that it was not *medically possible* for the victim to have died as defendant contends]). In any event, the objected to term, "medically possible", is preceded by the phrase "upon a reasonable degree of medical certainty, and in light of the severity level of injuries [with] which Danielle presented . . . on January 3, 2008 . . ."

In addition, the Court does not find that the expert affirmation of Dr. Tatz is the "sole evidence" advanced by Plaintiff to defeat Defendant's motion for summary judgment. As such, Defendant's reliance on cases such as Romano v. Stanley (90 N.Y.2d 444 [1997][expert's affidavit proffered as sole evidence to defeat summary judgment motion must contain sufficient allegations to demonstrate that conclusions reached are more than mere speculation]) is misplaced.

In any event, Dr. Tatz's opinion is expressly based upon, among

other things, his review of Danielle's medical history and of her "medical records from . . . Westchester Medical Center . . . where Danielle was admitted to the Pediatric Intensive Care Unit under [his] service." Dr. Tatz's opinion is expressly based the noted records, the "severity level of the injuries [with] which Danielle presented", and, among other things, an admission note in Danielle's Westchester Medical Center records that, "around 1 PM, Danielle's caretaker informed Mrs. DiMilia that Danielle's eyes had become 'infected'". Continuing, Dr. Tatz states, "Eye redness is a common sign which can occur immediately following abdominal or thoracic trauma resulting from a significant increase in intra-abdominal and intra-thoracic pressure, i.e., from shaking, and would have manifested relatively close in time to the infliction of the injury, which would have occurred on the morning of January 2, 2008."

The Court finds no merit to any other objection raised with respect to Plaintiff's expert submission in response to Defendant's motion for summary judgment.

In sum, upon consideration of Plaintiff's expert submission and the various other evidence advanced in response to Defendant's prima facie showing of entitlement to summary judgment in her favor, the Court finds that summary judgment must be denied in that Plaintiff has raised material questions of fact by proof in admissible form, most particularly, whether the injuries sustained by Danielle occurred during the period during which she was in the care and custody of Defendant.

DEFENDANT'S MOTION to AMENDED COUNTERCLAIMS

> [M]otions for leave to amend pleadings should be freely granted (see G.K. Alan Assoc., Inc. v. Lazzari, 44 AD3d 95, 99 [2007] ["(i)n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit"]; Trataros Constr., Inc. v. New York City Hous. Auth., 34 AD3d 451, 452-453 [2006]). Additionally, "[t]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (Sample v. Levada, 8 AD3d 465, 467-468 [2004]; see Sleepy's, Inc. v. Orzechowski, 7 AD3d 511 [2004]; Zacma Cleaners Corp. v. Gimbel, 149 AD2d 585, 586 [1989]). [Therefore, one] . . . seeking leave to amend [his or her pleadings] is not required to establish the merit of the

proposed amendment in the first instance.

(Lucido v. Mancuso, 49 A.D.3d 220, 226-227 [2d Dept., 2008]).

Here, the Court does not find that Plaintiff will suffer prejudice or surprise and the Court is not persuaded that the proposed amendment is palpably insufficient or patently devoid of merit such that the merits of the proposed pleadings need be examined (beyond that otherwise necessarily performed in connection with the summary judgment motions decided herein).

Therefore, Defendant's cross-motion for leave to serve an Answer with Amended Counterclaims is granted *except to the extent* that any statements therein violate this Court's (Nicolai, J.) Decision & Order of January 6, 2011, and only upon the condition that a conforming Answer with Amended Counterclaims be served and filed within ten days of the date of service of a copy of this Decision & Order with notice of entry.

PLAINTIFF'S MOTION for SUMMARY JUDGMENT DISMISSING DEFENDANT'S COUNTERCLAIMS

Plaintiff moves to dismiss Defendant's counterclaims on the grounds that Defendant cannot establish a prima facie case of defamation or injurious falsehood against them.

Defamation

As set forth in Roche v. Claverack Co-op. Ins. Co. (59 A.D.3d 914, 916 [3d Dept., 2009]):

> To constitute defamation, plaintiff must prove that defendant[] made a false statement, published that statement to a third party without privilege, with fault measured by at least a negligence standard, and the statement caused special damages or constituted defamation per se (see Dillon v. City of New York, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1 [1999]).

Libel and Slander

As a rule, libel and slander are not actionable unless one suffers special damage, i.e., "the loss of something having economic or pecuniary value" (Liberman v. Gelstein, 80 N.Y.2d 429, 434 quoting Restatement §575, comment b, and citing Prosser and Keeton, Torts [Prosser] §112, at 794 [5th ed.]).

Plaintiff's motion for summary judgment as to libel and slander is granted upon Defendant's failure to have come forward with proof in admissible form as to any special damages sustained. In fact, her very own deposition testimony attests to the lack of same (see, "Injurious Falsehood", supra).

Libel and Slander Per Se

Since, in any event, all of the asserted statements charge Defendant with a serious crime or tend to injure Defendant in her trade, business or profession, they are more properly characterized as slander per se or libel per se; thus, the law presumes that damages will result, and there is no need to allege or prove spacial damages (Liberman v. Gelstein, supra at 435).

The statements at issue here, both oral and written, are those made by Plaintiff about Defendant to the police, the District Attorney's Office, Child Protective Services and to Danielle's healthcare providers with respect to injuries sustained by Danielle allegedly at the hands of the Defendant, i.e. child abuse and mistreatment.[3]

> Social Services Law §419 provides, in pertinent part, that a person who complies with the reporting requirements of Social Services Law §413 in good faith is entitled to immunity from any civil or criminal liability that may otherwise result from such actions. That section additionally provides that the good faith of any person required to report cases of suspected child abuse shall be presumed (see Social Services Law §419; Kempster v. Child Protective Servs. of Dept. of Social Servs. of County of Suffolk, 130 AD2d 623, 624).

(Escalera v. Favaro, 298 A.D.2d 552, 553 [2d Dept., 2002]).

> In addition to those individuals and institutions required by law to report cases of suspected child abuse or maltreatment (see Social Services Law §413), "any person may make such a report if such person has reasonable

[3] Defendant expressly does not oppose Plaintiff's motion for summary judgment to the extent that it relates to any statements contained in Plaintiff's complaint in that, admittedly, such statements enjoy absolute privilege (see, Wiener v. Weintraub, 22 N.Y.2d 330, 331 [1968]; Regan v. Coldwell Banker Residential Real Estate Services, 176 A.D.2d 864 [2d Dept., 1991]).

> cause to suspect that a child is an abused or maltreated child" (Social Services Law § 414).

(Vaz v. Sipsas, 1 A.D.3d 503, 504 [2d Dept., 2003]).

While under section 419 of the Social Services Law, "good faith" is presumed for mandatory reporters of suspected child abuse or maltreatment, "good faith" is not presumed where, as here, the reporter falls outside of the persons and positions enumerated in Social Services Law §413 (id.). Thus, Plaintiff's statements are not presumptively privileged (id.). Therefore, in order for Plaintiff to invoke this statutory privilege in the context of her motion for summary judgment, she must, in the first instance, come forward with sufficient proof in admissible form establishing "reasonable cause" and "good faith". Upon succeeding in that regard, Defendant would then need to demonstrate, among other things, that Plaintiff was motivated by actual malice (Escalera v. Favaro, supra, at 553, citing Miller v. Beck, 82 AD2d 912, 913 [2d Dept., 1981]).

It would appear that there is no genuine issue that there exists "reasonable cause to suspect that [Danielle] is an abused or maltreated child" within the meaning of Social Services Law §414. The material issue in this case is one of blame.

Upon review and consideration of Plaintiff's moving papers, the Court finds that Plaintiff has come forward in the first instance with prima facie showing that the challenged statements fall within the ambit of section 419 of the Social Services Law and that said statements were made in "good faith." As such, Plaintiff has established her entitlement to immunity from liability in this civil action, i.e., that her statements were privileged.

In response, however, the Court finds that Defendant has come forward with an adequate showing in proper from raising material questions of fact such that the Court cannot determine, as a matter of law, that judgment should be granted in favor of Plaintiff dismissing the counterclaims. Keeping in mind that issue finding, and not issue determination, "is the key to the procedure" (Chase v. Skoy, 146 A.D.2d 563 [2d Dept., 1989]), the issues to be explored at trial include, but are not limited to, whether Plaintiff acted in "good faith" in connection with her accusations against Defendant upon reporting and recounting same to the various authorities.

Injurious Falsehood

That aspect of Plaintiff's motion seeks to dismiss the counterclaims of injurious falsehood is granted.

> The tort of trade libel or injurious falsehood requires the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment . . In addition, the facts so published must cause special damages, in the

form of actual lost dealings . . .

(Banco Popular North America v. Lieberman, 75 A.D.3d 460, 462 [1st Dept., 2010]).

Here, upon Defendant's own submissions, Defendant did not discontinue providing childcare services because of concerns articulated by the parents of any child regarding the allegations. Rather, Defendant stopped providing childcare services because of the mental and emotional strain of having been "falsely accused" of something she did not do (Deposition Transcript of Defendant dated September 24, 2009, Exhibit "E" to Plaintiff's Motion for Summary Judgment).

There being no merit to any of the other arguments advanced in connection with the motions currently before the Court, it is hereby

ORDERED, that motions and cross-motion are decided as hereinabove indicated; and, it is further

ORDERED, that, the Court will conduct a Status/Settlement Conference at 9:30 A.M. on May 16, 2010.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
April 26, 2011

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

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