

**Encarnacion v Southside Hosp.**

2011 NY Slip Op 32077(U)

July 14, 2011

Supreme Court, Suffolk County

Docket Number: 03-27897

Judge: W. Gerard Asher

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INDEX No. 03-27897

CAL. No. 09-01268MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 32 - SUFFOLK COUNTY

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 11-17-09  
ADJ. DATE 12-2-10  
Mot. Seq. # 004 - MD

-----X  
DORIS ENCARNACION, :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 SOUTHSIDE HOSPITAL, JOHN ZIMMERLY, :  
 M.D. and NANCY BRASIL, M.D., GARY S. :  
 KASTEN, D.O. and AJIT SINGH, M.D., :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1-14; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 15-19; Replying Affidavits and supporting papers 35-40; Other 20-34; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion (004) by the defendants John Zimmerly, M.D. and Gary S. Kasten, D.O. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is denied.

This medical malpractice action is premised upon the alleged negligence of the defendants and lack of informed consent relating to the care and treatment rendered to the then thirty-three year old pregnant plaintiff, Doris Encarnacion. It is claimed that during the plaintiff's hospitalization for delivery of her baby, and during the care and treatment rendered to her between July 18, 2002 and October 18, 2002, the defendants failed to diagnose and treat the plaintiff's elevated blood pressure and discharged her without treatment, causing her inter alia to suffer an intracranial hemorrhage and bilateral pulmonary embolism, to develop right sided hemiparesis with resulting contractures and loss of function, and to undergo an emergency left frontal craniotomy and evacuation of the intracerebral hematoma.

The defendants John Zimmerly, M.D. and Gary S. Kasten, D.O. seek summary judgment dismissing the complaint as asserted against them on the basis they did not deviate from good and accepted standards of medical practice and did not cause the plaintiff's claimed injuries.

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 [2<sup>nd</sup> 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 [2<sup>nd</sup> 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 [1979]).

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 [2<sup>nd</sup> Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420[1998]). 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 [2<sup>nd</sup> Dept 1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2<sup>nd</sup> Dept 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 [3<sup>rd</sup> Dept 1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 (2<sup>nd</sup> Dept 1998), *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2<sup>nd</sup> Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, 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 injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2<sup>nd</sup> Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2<sup>nd</sup> Dept 1997]). “Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury” (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2<sup>nd</sup> Dept 2007]). In the instant action, summary judgment is precluded in that the plaintiff and the moving defendants have submitted affirmations which contain conflicting medical opinions.

Counsel for the defendants Southside Hospital, Nancy Brasil, M.D. and Ajit Singh, M.D., did not file a cross motion, however, by affirmation of Michael Baranowicz, served on January 5, 2010, the court is asked to search the record and grant summary judgment on their behalf. It is noted that even if a cross motion had been interposed, it would be precluded pursuant to CPLR 3212 as untimely for not having been filed within 120 days of the filing of the note of issue (filed on January 30, 2009). Moreover, there are factual issues which preclude

summary judgment to the defendants Southside Hospital, Brasil and Singh.

Although the plaintiff has stipulated to discontinue the action against Gary Kasten, D.O., the stipulation proffered is not signed by all the parties. CPLR 3217 (a)(2) provides that “[a]ny party asserting a claim may discontinue it without an order...by filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorneys of record for all parties...” CPLR 3217(b) provides “[e]xcept as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.”

Subsection (d) of CPLR 3217 provides that [a]ll notices, stipulations, or certificates pursuant to this rule shall be filed with the county clerk by the defendant. Here, a stipulation of discontinuance has not been filed with the county clerk (*see generally, Matter of Michael T.*, 188AD2d 1090, 593 NYS2d 471 [4<sup>th</sup> Dept 1992]; *Noble v O’Leary*, 165 Misc2d 231, 628 NYS2d 930 [Sup. Ct. New York County 1995]). Moreover, the stipulation is not signed by all parties as required by CPLR 3217(b) (*see, C.W. Brown et al v HCE, Inc. et al*, 8 AD3d 520, 779 NYS2d 514 [2<sup>nd</sup> Dept 2004]). Since the instant motion for summary judgment seeking a final disposition of the action is pending, the court is prohibited from discontinuing the action as against defendant Kasten (*see, Farkas v Farkas*, 47 Misc2d 827, 263 NYS2d 214 [Sup. Ct. New York, New York County 1965]). Accordingly, the instant motion for summary judgment will be considered with respect to both defendants Zimmerly and Kasten.

In support of this motion (004), the defendants Zimmerly and Kasten have submitted, inter alia, an attorney’s affidavit, copies of the summons and complaint, the answer served on behalf of defendants Zimmerly and Brasil, the answer served on behalf of Kasten, and the plaintiff’s verified bill of particulars; plaintiff’s medical records; the affirmation of the defendant’s expert Victor Klein, M.D.; and the transcripts of the examinations before trial of John Zimmerly, M.D. dated August 16, 2005, and Gary Kasten, D.O. dated October 13, 2006.

Gary Kasten, D.O. testified at his deposition that he is licensed to practice medicine in the State of New York, is board certified in obstetrics and gynecology, and has been affiliated with Southside Hospital since 2001 and Good Samaritan Hospital since 1996. With respect to Southside Hospital, he was a private practitioner on staff in 2002 as well as part of a group that worked for the County (of Suffolk) covering County patients. He had on-call days for the County, mostly on Fridays. Although he had no independent recollection, there came a time that he saw Doris Encarnacion for routine prenatal care as a County patient. She had an estimated date of confinement of July 13, 2002 with an estimated fetal gestational age of 34 weeks. She was thirty-three years of age. He stated that she did not have hypertension (described as a blood pressure of 140/90 or above taken on at least two separate occasions six hours apart) because her blood pressure on those two prenatal visits was 110/80 and 122/70. He described pregnancy induced hypertension as hypertension occurring after 20 weeks of gestation, but he did not know of any known causes. He was not familiar with “postpartum hypertension in that term” but stated that there could be hypertension in the postpartum period and treatment would depend on the postpartum blood pressure, which would determine whether he would prescribe anti-hypertensive medication or just follow the patient. He stated that treatment depended upon whether the blood pressure was persistently elevated at 140/90 or above. He described preeclampsia as hypertension along with protein in the urine and usually generalized edema: mild preeclampsia is at a level of 300 milligrams in 24 hours, and severe preeclampsia is greater than 5 gram in 24 hours. He then testified that he also saw the plaintiff on July 19, 2002 when she was a patient at Southside Hospital. When a patient is in the hospital, blood pressures are taken each

shift, and if he observed a continually elevated blood pressure over a number of shifts, he would then treat the patient. He continued that treatment for pregnancy induced hypertension is delivery. After delivery, he stated, he would follow the blood pressures while the patient remained in the hospital and follow them sooner than normal after discharge just to check the blood pressure.

On July 19, 2002, while the plaintiff was in Southside Hospital and her labor was being induced, her blood pressure readings were 142/86 at 8:00 a.m., 147/83 at 8:30 a.m., 136/87 at 9:00 a.m., and 151/91 at 9:30 a.m., but, he testified, he did not place any significance thereon. On that day, he had the responsibility of supervising the residents. He performed an internal examination on the plaintiff at approximately 9:30 a.m., and again at 5:50 p.m. When he saw her at 9:30 p.m., she was still in labor. The nurse noted that at 9:30 p.m., "Dr. Kasten made aware of the patient's increased blood pressures and pulse. Will continue to monitor closely." He reviewed the blood pressure readings from 8:15 p.m. until 9:30 p.m. and, he stated, he did not attach any significance to them in connection with his care and treatment of Doris Encarnacion. He did not prescribe anti-hypertensive medications for her blood pressure which he considered elevated at the time as she was in labor. He testified that when a patient is in labor, he typically will not prescribe anti-hypertensive medication unless the diastolic blood pressures are 110 and above because lowering the blood pressure may compromise placental blood flow to the fetus. At 4:00 a.m. on July 20, 2002, Ms. Encarnacion was still in labor. Dr. Brasil, a resident, attended the vaginal examination and consulted with him. At 5:50 a.m., she was still in labor, and Dr. Kasten stated he performed a vaginal examination and that one centimeter dilation was noted. He did not prescribe anti-hypertensive medications for her nor did he see her again after that.

John Zimmerly, M.D. testified at his deposition that he is licensed to practice medicine in the State of New York and is board certified in obstetrics and gynecology. In 2002, he had a private practice and also was an independent contractor with the County of Suffolk. Concerning his work with the County, he saw both gynecological and obstetrical patients for prenatal care at the Suffolk County Clinics. He stated he saw clinic patients at Southside Hospital where he was on call every Thursday from 7 a.m. to 7 a.m. Friday morning. He also was on staff at Southside Hospital and saw private patients there as well.

He testified that most commonly, blood pressure readings that are over 140/90 sustained on two or more occasions over more than a six hour period between them are indicative of hypertension. The top number is the systolic pressure, and the bottom number is the diastolic pressure. He testified that the risks of hypertension in pregnancy are abruption of the placenta, stroke, and over a long term, kidney damage and cardiac failure. With severe hypertension, intracranial hemorrhage would be a risk whether a patient is pregnant or not. He continued that he would prescribe anti-hypertensive or blood pressure medication to a pregnant patient if the systolic pressure is more than 160 and the diastolic is 110 with sustained readings of six hours or more apart. He further stated that with reference to a pregnant patient, the physiological state of pregnancy is considered to continue until six weeks after the birth, commonly known as the postpartum period. Pregnancy induced hypertension is generally diagnosed when a patient has met the stated criteria for hypertension and yet does not have any significant proteinuria (protein in the urine) and/or generalized edema (swelling of the entire body sufficient enough to diagnose preeclampsia). Preeclampsia, he testified, does not occur prior to 20 weeks of pregnancy and the risks are very similar to the risks for severe hypertension: stroke or intracranial hemorrhage, abruption of the placenta, seizures, and if the pregnancy is not delivered, over a period of time, the baby may suffer from intrauterine growth restrictions. Postpartum preeclampsia occurs in the postpartum period. One form of treatment for hypertension and preeclampsia is delivery of the baby, as once the baby is delivered, hypertension and preeclampsia issues disappear.

Dr. Zimmerly further testified that he had no independent recollection of his care and treatment of Doris

Encarnacion and that the records indicate that he did not see her at any time during the course of her prenatal care. He first saw her as a patient on July 18, 2002 at 7:00 a.m. as the attending physician on call until the following morning. At 8:00 p.m., her blood pressure was noted to be 155/93 and she was noted to have 2+ pitting edema, which he indicated would be mild to moderate. She was placed on her right side for the purpose of getting a lower blood pressure reading. He placed Cervidil at 9:40 p.m. to soften the cervix in preparation for labor, as she was being induced. Her blood pressure was 142/83. On July 20, 2002, he was filling in for a physician on call and saw the plaintiff at about 9:50 a.m. and considered her blood pressure, which was 142/82, normal. He reviewed her blood pressures from the time of her admission on July 18, 2002 until the time he saw her on July 20, 2002 and testified that "certainly the highest ones were somewhat concerning." He further testified that there were elevated blood pressures recorded over six-hour intervals which is consistent with preeclampsia, but the other criteria must be met for the diagnosis of preeclampsia to be made. The elevated blood pressures recorded were consistent with hypertension, and he stated that when he saw her on July 20, 2002, he diagnosed Ms. Encarnacion with hypertension and treated her by performing a cesarean section. However, he asserted that he performed the cesarean section primarily due to a failed Cervidil induction in that three Cervidils were placed with minimal to no dilation of the cervix, and she was not put into good labor with progress to delivery. He stated again that oftentimes once a pregnant patient delivers, the blood pressure will decrease following delivery.

Dr. Zimmerly testified that he did not make a differential diagnosis which included preeclampsia as Ms. Encarnacion did not have generalized edema and did not have significant proteinuria. However, he continued, he had no independent recollection of Ms. Encarnacion and the record did not indicate that she did or did not have generalized edema. He stated that the record did indicate she had 2+ pitting edema, but that does not address whether there was generalized edema. He continued that the urinalysis showed trace protein which, he stated, was not significant. He stated the hospital record indicates he was aware of the patient's status, the Pitocin was discontinued and the patient was advised that a cesarean section would need to be performed. The infant was delivered at 10:41 a.m. on July 20, 2002 by Dr. Zimmerly.

As Dr. Zimmerly recalled, the residents at Southside Hospital would discharge the patient and consult with the doctor on call if necessary, but he was not the physician on call on the date of the plaintiff's discharge and, thus, had no input into the decision to discharge her. He co-signed the resident's discharge note on July 24, 2002 and stated that the records do not indicate that he saw Ms. Encarnacion following the delivery while she was still in the hospital.<sup>1</sup> He continued that the discharge note indicated that her blood pressure was 162/96. He also noted that her blood pressure was 156/93 at 4:00 p.m. on July 23, 2002. At 9:40 p.m. on July 23, 2002, her blood pressure was 162/96, she had pedal edema-pitting, she was placed on a low salt diet, and she was encouraged to rest. Dr. Zimmerly testified that these blood pressure readings were slightly elevated, and there was no indication in the record that the hypertension was treated at any point during Ms. Encarnacion's admission or that medication was ordered for her blood pressure. He further testified that he would have discharged her on July 24, 2002 if he had been treating her at that time, and that he would not have addressed her elevated blood pressure in terms of prescribing medication as it did not exceed the level of 160/110 or equal the level of 160/110, which is the point that he would have treated her with medication. He added he would not have made a referral for her concerning her elevated blood pressure. She was discharged with instructions to follow up at the clinic in two weeks.

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Dr. Zimmerly testified that the discharge note of July 24, 2002 was transcribed on November 4, 2002 and that he reviewed and signed that note after it was transcribed.

It was Dr. Zimmerly's opinion within a reasonable degree of medical certainty that Ms. Encarnacion was not suffering from preeclampsia at the time she was discharged from Southside Hospital as she did not meet all the criteria and she only had edema of her feet. He considered her hypertension to be pregnancy-induced hypertension as it was 140/90 or greater of a sustained nature, as defined, and that her records do not reflect a prior history of hypertension. With pregnancy-induced hypertension, there is an expectation that it will resolve within four to six weeks following delivery.

Victor R. Klein, M.D., the defendants' expert, sets forth that he is duly licensed to practice medicine in the State of New York and is board certified in clinical genetics, obstetrics and gynecology, and maternal-fetal medicine. It is Dr. Klein's opinion within a reasonable degree of medical certainty that neither Dr. Zimmerly nor Dr. Kasten deviated from accepted standards of medical practice in the care and treatment they provided to Doris Encarnacion, and that their care and treatment did not cause or substantially contribute to the various injuries and/or damages claimed by the plaintiff. Dr. Klein continues that during the prenatal visits from January 11, 2002 through July 16, 2002, Ms. Encarnacion's blood pressure readings were all within normal limits. During the course of her admission at Southside, her blood pressure fluctuated and there were a number of recorded blood pressures that were elevated, and that during her admission, she had gestational hypertension or pregnancy induced hypertension. He continues that because Cervidil induction failed to bring on labor, a cesarean section was performed on July 20, 2002 and the plaintiff was discharged on July 24, 2002. On July 28, 2002, she returned to Southside Hospital after suffering an intracranial hemorrhage which required surgery and rehabilitation.

Dr. Klein continued that Dr. Zimmerly noted that some of the plaintiff's highest blood pressure readings were somewhat concerning and were consistent with a diagnosis of gestational hypertension and that delivering the baby was appropriate in all respects. He opined that delivering the baby earlier would not have had an effect on the ultimate outcome. He states that where a patient has elevated blood pressure and it is found to be elevated one hour later, then the patient will be treated as if she has gestational hypertension. This does not mean that the patient must be treated with medication, but instead, the patient's blood pressure is to be closely observed. Delivery was the appropriate plan. Ms. Encarnacion was not suffering from preeclampsia as she did not have generalized edema and there was only one test indicating an insignificant level of protein (in her urine). Therefore, opines Dr. Klein, prescribing an antihypertensive medication was not indicated.

In view of the foregoing, it is determined that the defendant's expert, Dr. Klein failed to set forth the appropriate standard of care for the treatment of gestational hypertension, thus creating a factual issue as to the medical care provided by both Dr. Kasten and Dr. Zimmerly. Assuming, arguendo, that the defendants did establish prima facie entitlement to summary judgment dismissing the complaint, it is determined that summary judgment is precluded as to the moving defendants in that the plaintiff has submitted an expert affirmation which conflicts with the opinions of Dr. Klein.

The plaintiff's expert, Robert Hock, M.D., is a physician licensed to practice medicine in the State of New York and is board certified in obstetrics and gynecology. He opines within a reasonable degree of medical certainty concerning Dr. Zimmerly's care and treatment of the plaintiff. He does not render an opinion with regard to Dr. Kasten as he states that counsel for the plaintiff has elected to discontinue the plaintiff's action against Dr. Kasten. The plaintiff's expert opines that the defendants, John Zimmerly, M.D., Southside Hospital, Nancy Brasil, M.D. and Ajit Singh, M.D. each departed from good and accepted medical practice in connection with their care and treatment of the plaintiff, and that the departures were a substantial factor in causing the plaintiff to suffer the extensive injuries she is claiming.

The plaintiff's expert states that Dr. Klein does not offer an opinion on the appropriateness of the postpartum care received by the plaintiff during the remainder of her Southside hospitalization because it is his opinion that Dr. Zimmerly's responsibilities for the plaintiff's treatment ended at the time he performed the cesarean section and delivered the baby. The plaintiff's expert disagrees, opining within a reasonable degree of medical certainty that Dr. Zimmerly departed from good and accepted medical practice with respect to his care and treatment of the plaintiff. He states that Dr. Zimmerly, as the admitting physician, had a continuing responsibility for the plaintiff's postpartum care while she remained hospitalized at Southside and remained under his care and treatment. The plaintiff's expert continued that gestational hypertension developed after the plaintiff was admitted to the hospital for induction, prior to the time Dr. Zimmerly performed the cesarean section. However, continues the plaintiff's expert, nowhere in the plaintiff's record was a diagnosis of gestational hypertension set forth. He continues that Dr. Zimmerly testified that the reason he decided to perform the cesarean section was based on a failed attempt to induce labor rather than upon a diagnosis of gestational hypertension. This failure by Dr. Zimmerly to diagnose gestational hypertension, states the plaintiff's expert, is a departure from the appropriate standard of care. The plaintiff's expert further stated that Dr. Zimmerly, never recorded the diagnosis of gestational hypertension, never issued orders for the close observation/monitoring of the blood pressure following the delivery, thus causing or contributing to the remaining co-defendants' failure to diagnose gestational hypertension, and to properly treat the plaintiff in the postpartum period. Had Dr. Zimmerly properly diagnosed and appreciated the plaintiff's gestational hypertension, opines the plaintiff's expert, the appropriate standard of care following the delivery would have required that he either personally continue to closely monitor the plaintiff's blood pressure or that he provide orders to ensure that her blood pressure was properly monitored. The plaintiff's expert further opines that the plaintiff's blood pressure was not closely monitored during the days she remained hospitalized after the delivery, and although the plaintiff's blood pressure elevated to dangerous levels during the postpartum period, these levels were virtually ignored, no treatment was administered, and the plaintiff was discharged without the elevations being addressed, ultimately causing the plaintiff to suffer an intracranial hemorrhage/stroke and the additional injuries claimed.

The plaintiff's expert continues that Dr. Ajit Singh, a resident, was not qualified to diagnose a patient with pregnancy induced hypertension and simply asked the nurse whether the elevated blood pressures were a new or ongoing problem, that the nurse informed him that the elevated blood pressures were an ongoing problem and that the family practice residency team was aware of the blood pressures. Continuing, the plaintiff's expert states that Dr. Singh chose not to examine the plaintiff, did not order the administration of antihypertensive medication, did not order more frequent monitoring of the plaintiff's blood pressure, and did not consult with or speak with any of the family practice residents or attending physicians on call concerning the plaintiff's elevated blood pressure. Thus, the plaintiff's expert concludes that Dr. Singh departed from the appropriate standard of care, causing and/or contributing to the plaintiff ultimately suffering an intracranial hemorrhage/stroke.

With regard to resident, Dr. Nancy Brasil, the plaintiff's expert states that although she was aware on July 24, 2002 at 6:15 a.m. that Ms. Encarnacion's blood pressure was 162/96, she discharged her without rechecking the blood pressure. In addition, she did not discuss the elevated blood pressure with any other doctor before issuing the discharge order, and thus, issued the discharge order independent of any other physician. The plaintiff's expert states that the Southside Hospital policy #18 requires that all residents and fellows (trainees) shall be supervised at all times and that Southside Hospital, Dr. Singh, Dr. Brasil and Dr. Zimmerly breached this policy. He continues that Dr. Brasil was a first year resident with less than three weeks experience and reached the decision to discharge the plaintiff without any supervision and without addressing the plaintiff's elevated blood pressure. There were no discharge instructions given to the plaintiff which

addressed her elevated blood pressure or the need to closely monitor the same. The discharge instruction called for the plaintiff to follow up in two weeks, however, she was not given instructions concerning her blood pressure. She suffered the intracranial hemorrhage only four days later.

In conclusion, the plaintiff's expert opines that each of the defendants, Zimmerly, Brasil, and Singh, departed from good and accepted medical practice in their care and treatment of the plaintiff by failing to diagnose, appreciate and properly address the plaintiff's gestational hypertension, resulting in the plaintiff being improperly discharged from Southside Hospital despite her significantly elevated blood pressures. It was a departure from accepted standards of care in that the plaintiff should have remained hospitalized and treated with antihypertensive medications; discharge instructions should have required a next-day follow up with close blood pressure monitoring rather than a follow-up in two weeks. The plaintiff's expert states that these departures were a substantial factor in causing the plaintiff to suffer an intracranial hemorrhage. The plaintiff's expert further opines that testing conducted after the plaintiff sustained the intracranial hemorrhage ruled out an arterial venous malformation or aneurysm as the source of the plaintiff's intracranial hemorrhage, and that all tests were negative for any vascular abnormality.

Based upon the foregoing, the factual issues raised by the plaintiff and the conflicting expert opinions preclude summary judgment.

Accordingly, motion (004) is denied.

With regard to the application of Southside, Brasil and Singh asking the court to search the record and to grant summary judgment in their favor, it is noted as follows. The affirmations of Dr. Richard Bonanno and Dr. Joel Cooper have been submitted, inter alia, along with the affirmation of counsel for the defendants Southside Hospital, Brasil and Singh. The plaintiff's expert has noted these affirmations and raises factual issues not only with the opinions set forth by Dr. Zimmerly's expert, Dr. Klein, but also notes that Dr. Bonanno and Dr. Cooper opine that Dr. Zimmerly was Ms. Encarnacion's attending physician of record and that, pursuant to the policy of Southside Hospital as set forth in the affirmations, Dr. Zimmerly has the continuing responsibility for the patient and is ultimately responsible for the plaintiff's care and treatment. Dr. Cooper set forth with a reasonable degree of medical certainty that Ms. Encarnacion had a labile blood pressure with elevations which were not medically significant from the time of her admission until delivery, but continues that her blood pressure reached a diastolic of 110 on a couple of occasions and that the attending physicians were notified of the same. Postpartum, he states, Ms. Encarnacion's blood pressure was monitored and remained under 160/110 for 24 hours prior to her discharge, and that Dr. Brasil's imperfect recollection and omission to fully document her discharge note does not mean that she alone made the decision to discharge her as either the attending Ob/Gyn or the Family Practice attending would have rounded with the residents prior to Ms. Encarnacion being discharged. Dr. Cooper continues that the decision to discharge, and the decision not to prophylactically prescribe an antihypertensive, or refer the patient to a physician for her blood pressure, all fall within the standard of care testified to by Dr. Zimmerly.

Significantly, at no time do any of the defendants' experts opine as to the appropriate standard of care in treating a patient with gestational hypertension and only refer to the standard testified to by Dr. Zimmerly without commenting on the appropriateness of his standards. Dr. Zimmerly, at his deposition, stated that he did not recall if the American Academy of Obstetrics and Gynecology addressed treating pregnancy induced hypertension with medication at certain levels. In addition to that omission, the plaintiff's expert has raised factual issue with regard to all the defendants, except Dr. Kasten, precluding summary on motion (004) or in searching the record.

Encarnacion v Southside Hospital

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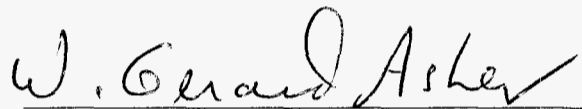
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Additionally, a resident who assists a doctor during a medical procedure, and who does not exercise independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (*Muniz v Katiowitz* 49 AD3d 511, 856 NYS2d 120 [2<sup>nd</sup> 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 v Mercy Medical Center*, 2008 NY Slip Op 31337U; 2008 Misc Lexis 10141 [Sup. Ct. of New York, Nassau County]). In the instant action, there are factual issues with regard to the standard of care and the appropriateness of the care and treatment rendered by Dr. Zimmerly. Thus, factual issues exist concerning whether Southside Hospital, Dr. Singh and Dr. Brasil failed to intervene concerning the monitoring and treatment of the plaintiff's blood pressure and whether either Dr. Singh or Dr. Brasil exercised independent judgment in their care and treatment of the plaintiff.

Dr. Cooper and the plaintiff's expert have differing opinions concerning the cause of the plaintiff's intracranial hemorrhage, further precluding summary judgment. The plaintiff's expert has not opined with regard to the care and treatment rendered by Dr. Kasten to Ms. Encarnacion and as to whether he departed from the appropriate standard of care. In that the appropriate standard of care has not been set forth by the defendants' experts who refer only to the standard testified to by Dr. Zimmerly, this court is left to speculate as to whether or not Dr. Kasten departed from the appropriate standard of care and whether or not he is vicariously liable for the actions or failure to action by Southside Hospital, Dr. Singh and Dr. Brasil. Therefore, even if this Court were to search the record on behalf of Southside Hospital, Dr. Singh and Dr. Brasil, as counsel has requested, such factual issues preclude summary judgment in their favor.

Dated: \_\_\_\_\_

July 14, 2011



J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION