

Debes v Saint Vincent's Med. Center-Staten Is.

2011 NY Slip Op 33322(U)

October 24, 2011

Supreme Court, Richmond County

Docket Number: 12033/04

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 12033/04
Motions No.: 4 & 5**

**STEPHANIE TAYLOR DEBES, an infant under the Age of
14 years, by her father and natural guardian,
ROBERT K. DEBES; and
ROBERT K. DEBES, individually**

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**SAINT VINCENT'S MEDICAL CENTER-STATEN
ISLAND, a hospital of SAINT VINCENT'S MEDICAL
CENTERS OF NEW YORK, INC.;;
MICHAEL ANTHONY GRECCO, M.D.;;
LOUIS ANDREW GRECCO, M.D.;;
OB-GYN ASSOCIATES OF STATEN ISLAND, P.C.; and
ANTHONY SAMPINO, M.D.;;
ANATHAM HARIN, M.D.; and
JEFFREY FRANCIS SIRACUSE, M.D.**

Defendants

The following items were considered in the review of the following motions for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1 & 2
Answering Affidavits	3
Replying Affidavits	4 & 5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

The defendants Michael Anthony Grecco, M.D. (“Dr. M. Grecco”), Louis Andrew Grecco (“Dr. L. Grecco”) and OB-Gyn Associates of Staten Island, P.C. (“OB-Gyn Associates”) move to preclude failure to perform cerclage, failure to perform an episiotomy, and failure to perform a caesarean section theories of the case in the action brought by Stephanie Taylor Debes, an infant, by her father and natural guardian Robert D. Debes (“Stephanie”); and Robert K. Debes, individually. The motion is denied. The motion for summary judgment made by Dr. L. Grecco, Dr. M. Grecco, and OB-Gyn Associates is denied. The motion for summary judgment made by

the defendant Saint Vincent's Medical Center-Staten Island, a hospital of Saint Vincent's Medical Centers of New York, Inc. ("St. Vincent's") is denied.

Facts

Catherine Debes ("Mrs. Debes") became pregnant with twins, and was seen prenatally by Dr. L. Grecco and Dr. M. Grecco, who were associated with Ob-Gyn Associates. Mrs. Debes suffered premature rupture of membranes after only twenty-four weeks of pregnancy. On January 13, 1995, she entered Staten Island Hospital ("SIUH") under the service of Dr. L. Grecco. Mrs. Debes was transferred to St. Vincent's on January 14, 1995, in order to have access to intensive care units that SIUH did not have available at the time. At St. Vincent's, Mrs. Debes was placed on Dr. M. Grecco's service, but was also seen by Dr. L. Grecco. Upon admission to St. Vincent's labor and delivery unit, Mrs. Debes was not in active labor, and showed no evidence of active infection. Ampicillin was given for prophylaxis against infection because of the ruptured membranes. She received Dexamethasone around 4:10 PM. At about 10:50 PM, Mrs. Debes had the onset of mild contractions, and she was given intravenous Magnesium sulfate ($MgSO_4$) to halt the contractions.

Michael Moretti, M.D. ("Dr. Moretti"), a fetal-maternal medicine specialist, consulted with Dr. M. Grecco on January 15, 1995. A fetal ultrasound showed twins. The fetus designated as Twin A (Stephanie), was diagnosed as having a partial premature rupture of the amniotic membrane. Twin A (Stephanie) was in a vertex presentation with an estimated weight of 649 grams, good fetal movement, and normal anatomy. The placental membrane was seen posteriorly. Dr. Moretti recommended reserving caesarean section for obstetrical indications, and wrote that he concurred with Dr. M. Grecco's plan of care. Mrs. Debes was stable through the morning of January 16, and was transferred to the antepartum maternity floor with bed rest ordered. On January 17, Mrs. Debes remained stable, cultures were negative and Ampicillin was discontinued. At 12:10 AM on January 18, early contractions began, $MgSO_4$ was again started and Mrs. Debes was transferred to the labor and delivery area. As time passed through the day, her contractions ceased. On January 19, Mrs. Debes' level of ordered activity was bed rest with

bathroom privileges. Her condition remained stable through 11:00 PM on January 21, at which time she complained of mild abdominal pressure.

Almost 4 hours later at 2:50 AM, on January 22, Mrs. Debes experienced worsening pain. She had a dilated cervix and was transferred to the labor and delivery unit. Cervical dilation rapidly progressed and increased from 6 to 10 centimeters. Dr. M. Grecco was called. A hospital obstetrical- gynecological resident, Anthony F. Sampino, M.D. (“Dr. Sampino”) delivered Stephanie vaginally without an episiotomy. Stephanie’s twin sister was delivered by Dr. M. Grecco shortly after Stephanie’s birth. Stephanie is stated to suffer from cerebral palsy, spastic quadriplegia, grade I intraventricular hemorrhage, periventricular leukomalacia, hyperbilirubinemia, hyaline membrane disease, anemia, and cytomegalovirus disease. These injuries are allegedly due to the medical malpractice of the defendants.

Discussion

“On a defense motion for summary judgment, the defendant medical provider has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby.”¹ “In opposition [to a defendant’s motion for summary judgment], a plaintiff must submit evidentiary facts or materials to rebut the defendant’s prima facie showing, so as to demonstrate the existence of a triable issue of fact.”² In actions founded upon medical malpractice, where there are conflicting medical opinions, any issue of credibility must be resolved by a trier of fact.³ To succeed, the defendant must prove every critical element of the defense.⁴

¹*Rebozo v. Wilen*, 41 AD 3d 457, 458 [2d Dept 2007]; *quoted in Deutsch vs. Chaglassian*, 71 AD 3d at 719.

²*Deutsch v. Chaglassian*, 71 AD 3d at 719.

³*Id.* at 719.

⁴*Cerny v. Williams*, 32 AD 3d 881, 883 [2d Dept 2006].

St. Vincent's motion for summary judgement is denied.

Here, St. Vincent's meets its initial burden in its request for summary judgment by offering the expert opinion of Dr. Adiel Fleischer ("Dr. Fleischer"), whose opinion is based upon his review of the medical record. Dr. Fleischer states that St. Vincent's did not depart from the accepted standard of good medical care because the level of activity enforced by St. Vincent's staff, and the actions of the staff towards the plaintiff were appropriate.

In opposition to St. Vincent's motion for summary judgment, the plaintiff challenges Dr. Fleischer by stating that he failed to confirm knowledge of care in the community in 1995 and that his opinions are conclusory. Dr. Fleischer's statement shows he has practiced in the New York region for over twenty-five years, and he was already board certified in obstetrics and gynecology in 1995. Dr. Fleischer enumerates the documents he reviewed and provides specifics leading to his conclusions. Consequently, Dr. Fleischer does not express merely conclusory opinions.

The plaintiff's expert attributes Stephanie's cerebral palsy, spastic quadriplegia, grade I intraventricular hemorrhage and periventricular leukomalacia to compression-decompression syndrome occurred during her delivery. The plaintiff's expert attributes hyperbilirubinemia, hyaline membrane disease, anemia and cytomegalovirus disease to Stephanie's prematurity. The plaintiffs' expert states that St. Vincent's departed from an accepted standard of medical care by allowing Mrs. Debes out of bed and by allowing her transport while sitting in a wheelchair instead of being recumbent. Therefore, there are issues of fact that must be decided. Summary judgment is denied to St. Vincent's for Stephanie's injuries that may be due to prematurity.

St. Vincent's resident physician, Dr. Sampino, provided care to Mrs. Debes during her labor and delivery. In further opposition to St. Vincent's motion for summary judgment, the plaintiff's expert opines that St. Vincent's is liable for grade I intraventricular hemorrhage, cerebral palsy, spastic quadriplegia, and periventricular leukomalacia. It is alleged that these conditions were caused by compression-decompression syndrome during labor and delivery brought on by a failure to perform an episiotomy or caesarean section. It is not clear if Dr. Sampino was

instructed not to perform either an episiotomy or caesarean section by Dr. M. Grecco. Generally, a hospital is not liable when its employees follow a clear and explicit order given by the patient's attending physician unless it would be unreasonable for an individual of ordinary prudence to follow the order.⁵ Therefore, St. Vincent's would not be liable if Dr. M. Grecco gave a reasonable order to Dr. Sampino not to perform an episiotomy or caesarean section.

Dr. Sampino was a hospital obstetrical resident, an employee of St. Vincent's, and was working within the scope of an obstetrical resident. A hospital is liable for the actions of employed physicians acting within the scope of their employment.⁶ Therefore, if Dr. Sampino was not given an order not to do an episiotomy or caesarean section, then the hospital is vicariously liable for Stephanie's injuries if Dr. Sampino failed to perform either an episiotomy or a caesarean section, and that failure was the proximate cause of, or a significant factor in causing those injuries. Here, it is not clear that Dr. Sampino was instructed not to perform either an episiotomy or a caesarean section. All evidence presented in a motion for summary judgment must be examined in the light most favorable to the non-moving party;⁷ and the non-movant must be given the benefit of every favorable inference.⁸ Giving every inference to the opponent of St. Vincent's motion for summary judgment, St. Vincent's remains potentially liable for acts or omissions that are the proximate cause of, or a significant factor in an injury resulting from Dr. Sampino's omissions during Stephanie's delivery. The expert opinion rendered on behalf of St. Vincent's is of the opinion that St. Vincent's employees did not depart from good and accepted medical care. Therefore, whether Dr. Sampino, the employee of St. Vincent's, omitted performing a medically indicated episiotomy or a caesarean section, and this omission was a proximate cause or significant factor in Stephanie's injuries related to a compression-decompression syndrome at birth, are issues of fact to be determined by a finder of fact.

⁵*Toth v Community Hospital at Glen Cove*, 22 NY 2d 255, 265 [1968]; and *Salandy v Bryk*, 55 AD 3d 147, 165 [2d Dept 2008].

⁶*Bing v Thunig*, 2 NY 2d 656, 667 [1957].

⁷*Nicklas v. Tedlen Realty Corp.*, 305 AD 2d 385, 386 [2d Dept 2003].

⁸*Gray v. N. Y. City Transit Auth.*, 12 AD 3d 638, 639 [2d Dept 2004]; and *Perez v. Exel Logistics, Inc.*, 278 AD 2d 213, 214 [2d Dept 2000].

In further opposition to the St. Vincent's expert's assertion that there was no departure from a proper standard of care, the plaintiff's expert cites St. Vincent's staff allowing Mrs. Debes out of bed for bathroom privileges. The plaintiff's expert states this to have been a departure from good care and a significant contributing factor to Stephanie's premature birth. However, the orders specifying the level of activity were in writing and authored by Dr. M. Grecco, Mrs. Debes attending physician. Therefore, St. Vincent's had a clear and unequivocal order, and the hospital followed that order. Consequently, St. Vincent's may not be considered liable for injuries proximately caused or significantly contributed to by Stephanie's premature birth resulting from Mrs. Debes being out of bed, if the level of activity enforced by St. Vincent's staff was the same as that ordered by her physicians. The plaintiff's expert opines that having the patient transported in a wheelchair for procedures and allowing the patient out of bed when bed rest was ordered were not in accord with an order for bed rest. The expert opinion offered by St. Vincent's states that St. Vincent's did not depart from good and accepted medical practice. Accordingly, on that basis, St. Vincent's may be held liable for hyperbilirubinemia, hyaline membrane disease, anemia, and cytomegalovirus disease only if they departed from the level of activity ordered by Dr. M. Grecco and Dr. L. Grecco and that departure was the proximate cause of, or significant factor in injuries arising from prematurity. Whether St. Vincent's deviated from Dr. M. Grecco's orders is a question of fact to be decided by a finder of fact. For these reasons St. Vincent's motion for summary judgment is denied.

The motion to preclude certain of the plaintiff's theories of the case is denied.

Dr. M. Grecco, Dr. L. Grecco and OB-Gyn Associates move to preclude consideration of failure to do cerclage, failure to perform a caesarean section, and failure to do an episiotomy from the plaintiff's action. Cervical cerclage is the placement of non-absorbable stitches intended to counteract incompetence of the cervical opening that might lead to premature birth.⁹ The plaintiff's expert opines that failure to do cerclage for Mrs. Debes caused, or was a significant contributing factor to Stephanie's premature birth. The plaintiff's expert further stated that hyperbilirubinemia, hyaline membrane disease, anemia, and cytomegalovirus disease are each a consequence of Stephanie's premature birth and therefore these injuries are

⁹Stedman's Medical Dictionary 612 [26th ed 1995].

attributable to a failure to perform cerclage. The plaintiff's expert also states that compression-decompression syndrome during Stephanie's delivery was the proximate cause of grade I intraventricular hemorrhage, cerebral palsy, spastic quadriplegia, and periventricular leukomalacia. The plaintiff's expert opines that failure to perform an episiotomy or a caesarean section caused the compression-decompression syndrome. Therefore, the plaintiff's expert attributes grade I intraventricular hemorrhage, cerebral palsy, spastic quadriplegia, and periventricular leukomalacia to a failure to perform episiotomy or caesarean section. The procedures of cerclage, caesarean section, and episiotomy were not specified in the plaintiff's complaint and bill of particulars. Consequently, Dr. M. Grecco, Dr. L. Grecco and OB-Gyn Associates move to preclude consideration of these procedures.

The plaintiff's verified complaint includes allegations that the defendants were negligent and careless in diagnosing and treating the plaintiff's condition, departing from accepted practices, performing contraindicated procedures, failing to perform indicated procedures, failing to follow good practices, and in other ways being negligent. Thus, the plaintiff cites pre-partum and intra-partum acts and omissions relative to Mrs. Debes' obstetrical care that resulted in Stephanie's injuries. Therefore, the complaint is "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."¹⁰ "If a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response he may move for a more definite statement."¹¹ No defendant has moved for a more definite statement, and the court does not find the complaint to be vague and ambiguous on its face.

The bill of particulars is required to contain a "[g]eneral statement of the acts or omissions constituting the negligence claimed..."¹² The plaintiff's verified bill of particulars includes allegations that the defendants disregarded special obstetrical complications of pre-term rupture

¹⁰CPLR § 3013.

¹¹CPLR § 3024 (a).

¹²CPLR § 3043 (a) (3).

of membranes, failure to perform a vaginal examination, failure to properly diagnose and treat during various stages before labor, departing from accepted practices and services, failure to follow good practice, and for providing negligent and careless prenatal care. Because these allegations provide a general statement of the acts or omissions constituting the alleged negligence, the allegations fulfill the requirements of a bill of particulars.

Here, the plaintiff seeks to clarify a theory of the case, not to add new facts or claims. In the Second Department, Appellate Division, “A plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability for negligence for the first time in opposition to the motion.”¹³ However, cerclage and caesarean section are alleged by the plaintiff to be accepted practices that are indicated and are considered to be associated with good medical care in obstetrical care of patients with Mrs. Debes’ obstetrical conditions. If they are not accepted obstetrical practice that should be a finding determined by a finder of fact, following expert testimony. Therefore, preclusion of these issues is denied..

Dr. M. Grecco’s and Dr. L. Grecco’s motion for summary judgment is denied.

Francis Chervenak, M.D. (“Dr. Chervenak”) rendered an expert opinion on behalf of the defendants, Dr. M. Grecco and Dr. L. Grecco. Dr. Chervenak’s expert opinion is that these defendants did not depart from good and accepted care, because failure to impose severe motion restrictions was not a departure from the standard of care owed to Mrs Debes and to Stephanie. Dr. Chervenak further states that Mrs. Debes’ premature rupture of membranes was properly treated and there was no deviation from accepted standards of medical practice. Therefore, the defendants Dr. L. Grecco, Dr. M. Grecco and OB-Gyn Associates have met the initial burden for their motion for summary judgment by offering expert testimony that they did not deviate from the accepted standard of medical care.

¹³*Winters v St. Vincent’s Med. Ctr.*, 273 AD 2d 465 [2d Dept 2000].

The plaintiff alleges malpractice both prior to Mrs. Debes labor and delivery, as well as during labor and delivery *per se*. As to alleged errors during labor and delivery, the plaintiff's expert states that failure to perform an episiotomy or a caesarean section was a proximate cause or a significant factor in causing compression-decompression syndrome resulting in grade I intraventricular hemorrhage, cerebral palsy, spastic quadriplegia, and periventricular leukomalacia. Shortly before Stephanie's birth, Dr. M. Grecco was notified that Mrs. Debes was in labor. Dr. M. Grecco was not physically present when Stephanie was delivered, and the available evidence does not indicate that he ordered the resident obstetrician to perform an episiotomy or caesarean section. Dr. Chervenak states that these omissions would not have caused Stephanie's injuries related to delivery. Therefore, whether Dr. M. Grecco's absence at the time of delivery or the omission of a caesarean section or episiotomy was a proximate cause of, or significant factor in a compression-decompression syndrome causing Stephanie's injuries during labor and delivery is an issue of fact to be determined by a finder of fact.

The plaintiff's expert alleges medical malpractice prior to Mrs. Debes labor and delivery. In part, the plaintiff's expert attributes Stephanie's premature birth to Mrs. Debes level of activity during her hospitalization. The plaintiff's expert also attributes prematurity to the failure of Dr. L. Grecco and Dr. M. Grecco to perform cerclage. Dr. M. Grecco was responsible for prescribing Mrs. Debes' level of activity in his orders. Dr. L. Grecco attended upon Mrs. Debes and according to plaintiff's expert, could have and should have modified orders for Mrs. Debes' level of activity. Therefore, the plaintiff's expert alleges these acts and omissions proximately caused, or significantly contributed to Stephanie's premature birth. Consequently, according to the plaintiff, Stephanie developed hyperbilirubinemia, hyaline membrane disease, anemia, and cytomegalovirus disease as a result of her premature birth. However, Dr. Chervenak asserts that there was no deviation from the accepted standard of medical care because neither failure to perform cerclage, nor Mrs. Debes' level of activity, were outside the accepted standard of care. Therefore, whether failure to perform cerclage or allowing Mrs. Debes level of activity were

departures from accepted standards of obstetric care for Mrs. Debes and whether these caused or significantly contributed to premature birth and injuries consequent to Stephanie's premature birth are questions of fact to be determined by a finder of fact.

Accordingly, it is hereby

ORDERED, that the motion for summary judgment made by Saint Vincent's Medical Center-Staten Island, a hospital of Saint Vincent's Medical Centers of New York, Inc. is denied; and it is further

ORDERED, that the motion for summary judgment made by Michael Anthony Grecco, M.D., Louis Andrew Grecco, M.D., and OB-GYN Associates of Staten Island, P.C. is denied; and it is further

ORDERED, that the parties return for a **conference at DCM Part 3, 130 Stuyvesant Place, Third Floor, on Monday, December 5, 2011 at 9:30 A.M.**

ENTER,

DATED: October 24, 2011

Joseph J. Maltese
Justice of the Supreme Court