

Garrison v Quirk

2012 NY Slip Op 31726(U)

June 19, 2012

Supreme Court, Suffolk County

Docket Number: 09-35206

Judge: Joseph Farneti

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Stony Brook Anesthesiology, P.C. a/k/a University Physicians at Stony Brook, for summary judgment dismissing the complaint and all cross-claims asserted against them is denied; and it is further

ORDERED that this motion (seq. #003) by the defendant, Elizabeth Garduno, M.D., for summary judgment dismissing the complaint as asserted against her is denied.

In this action, the plaintiff seeks damages for medical malpractice and the wrongful death of the plaintiff's decedent, Jessica Outen, premised upon the alleged negligence of the defendants in rendering care and treatment to her during her admission to Stony Brook University Hospital. On November 17, 2008, the decedent was admitted to Stony Brook University Hospital for delivery of her infant by cesarean section. It is alleged that the defendants negligently departed from good and accepted standards of care and treatment during the delivery and in the performance of the cesarean section, and following said delivery, caused her to suffer uterine hemorrhage. It is further alleged that the defendants failed to timely and properly provide care and treatment for the hemorrhage, and delayed hours before performing the subsequent hysterectomy to address the hemorrhage, and further departed from the standard of care and treatment following the subsequent surgery. It is alleged that as a result of the alleged departures from the good and accepted standards of care, the plaintiff's decedent, who was twenty years of age, died on December 7, 2008.

It is noted that this action has been discontinued as to defendants Gerald Quirk and Lauri Budnick by stipulations dated March 21, 2011.

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *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 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[2nd Dept 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 [2d 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 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d 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 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d 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 [2d Dept 2007]).

Nikole Ostrov, M.D. seeks summary judgment dismissing the complaint on the bases that she was a fourth-year resident in obstetrics and gynecology at Stony Brook University Hospital at the time the alleged malpractice occurred and was supervised by her co-defendants; she did not have direct responsibility for the care and treatment of the plaintiff's decedent; she did not depart from the applicable standard of care; she used her best judgment in applying her knowledge and skill; that the poor outcome does not permit an inference of negligence; a mistake in judgment does not in and of itself render a physician liable; and she did not exercise independent medical judgment, but instead was under the direct supervision of the attending physicians whose directions did not so greatly deviate from normal practice that she was forced to intervene. The plaintiff has set forth in his opposing papers that he does not oppose this motion by Nikole Ostrov.

Accordingly, motion (seq. #001) is granted and the complaint is dismissed with prejudice as asserted against Nikole Ostrov.

It is determined that the defendants in motions (seq. #002) and (seq. #003) have not established *prima facie* entitlement to summary judgment. Even if their respective motions were supported with evidentiary submissions in admissible form, their experts' respective affidavits raise factual issues, and the plaintiff's decedent's expert affirmation submitted in opposition to their respective motions also raises factual issues with conflicting medical opinions, which preclude summary judgment.

The defendants, Joy Schabel, M.D., Adam Buckley, M.D., University Associates in Obstetrics & Gynecology, P.C. a/k/a University Physicians at Stony Brook, and Stony Brook Anesthesiology, P.C. a/k/a University Physicians at Stony Brook, seek summary judgment dismissing the complaint asserted against them. It is asserted that the claims alleged against University Associates in Obstetrics & Gynecology, P.C. a/k/a University Physicians at Stony Brook, and Stony Brook Anesthesiology, P.C. a/k/a University Physicians at Stony Brook are premised upon their vicarious liability associated with defendants Adam Buckley, M.D. and Joy Schabel, M.D., whom they assert acted within good and accepted standards of medical care and treatment, and such care and treatment was not a substantial factor in any of the decedent's claimed injuries or death.

In support of this motion, the moving defendants have submitted, *inter alia*, an attorney's affirmation; the affirmations of their expert physicians, Jeffrey Spencer, M.D. and James T. Howard Jr., M.D.; a copy of the summons and complaint, the answers served by them and co-defendants, and plaintiff's verified bill of particulars as to Adam Buckley, M.D.; a CD stated to be "Stony Brook Medical Center," which cannot be read by this Court's computer and which is not in admissible form pursuant to 22 NYCRR §§ 202.5 and 202.8 which provide for submissions to be in paper form (*Leavy v Merriam*, 2011 NY Slip Op 31988U

[Supreme Court, Suffolk County 2011]). Expert testimony is limited to facts in evidence. (*see also Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]). The moving defendants have also submitted a partial, uncertified copy of the decedent's medical record from Stony Brook University Hospital, and uncertified prenatal records, which are not in admissible form pursuant to CPLR 3212. The transcripts of the examinations before trial of Adam Buckley, Joy Schabel, Alvin Garrison, and non-party Ceclia Avila, are not in admissible form and fail to comport with CPLR 2101 (a). Expert testimony is limited to facts in evidence, as set forth above. The CD, the uncertified medical records, and the deposition transcripts are deemed not to be facts in evidence as they are not in admissible form.

While the moving defendants' expert, Jeffrey Spencer, M.D., opines that defendant Dr. Schabel comported with the good and accepted standards of care and treatment during the administration of anesthesia, it is noted that Dr. Chervenak, Dr. Ostrov's expert, stated that the decedent suffered a myocardial infarction due to hypoxia and massive blood loss during the hysterectomy procedure. However, Dr. Spencer states that there is no indication that the decedent sustained any type of medical compromise to the cardiovascular system during the care provided by Dr. Schabel while the obstetrical team attempted to control the bleeding. Dr. Spencer does not address these conditions or the care and management relative thereto and thereafter, although he stated that the role of the anesthesiologist at this point is to provide medical support for the cardiovascular system and to continue to anesthetize the patient. Although Dr. Spencer asserts that Dr. Schabel responded by appropriately providing additional fluid and three units of blood, he does not indicate the timeliness of such treatment or when such therapy was administered. These factual issues preclude the granting of summary judgment even if the moving defendants' submissions were in proper evidentiary form.

Dr. James T. Howard, defendants' expert obstetrical physician, states that defendant Dr. Buckley, with the assistance of the resident, Dr. Garduno, performed the cesarean section on the decedent. However, Dr. Buckley left the decedent's care and treatment for closing the surgical wound to Dr. Garduno at the end of the cesarean section delivery to attend to another patient. Thereafter, Dr. Garduno pressed upon the decedent's lower abdomen and expressed additional blood, giving the suspicion of possible uterine bleeding at that time. She continued to close the surgical wound. It was not until four hours later that the decedent was taken to the operating room for a hysterectomy. Although Dr. Howard indicates that the decedent had good vital signs and good output during those four hours, he does not indicate if any blood tests were taken to monitor internal bleeding. He opines in a conclusory manner that Dr. Buckley took the decedent to the operating room in a timely manner, but he does not indicate how the decedent's medical presentation supports that such hysterectomy was timely, in light of the decedent suffering a myocardial infarction, hypoxia and massive blood loss in the operating room during the subsequent surgery. Such factual issues preclude the granting of summary judgment. Additionally, as will be discussed below, the plaintiff's expert has raised factual issues which preclude the granting of summary judgment to Dr. Buckley, Dr. Schabel, University Associates in Obstetrics & Gynecology, P.C., and Stony Brook Anesthesiology, P.C.

Elizabeth Garduno, M.D. seeks summary judgment dismissing the complaint as asserted against her on the basis that she was a second-year resident in obstetrics and gynecology at the time of the alleged malpractice and was supervised by co-defendants and other attending physicians; she is insulated from tort liability in that she conformed to the accepted standards of care; a poor outcome does not in and of itself

permit an inference of malpractice; a mistake in judgment does not in and of itself render a physician liable; a resident is not liable for medical malpractice where during their treatment of the patient, they did not exercise any independent medical judgment but were under the direct supervision of their attending physicians whose directions did not so greatly deviate from normal practice that the resident should not be held liable for failing to intervene.

This motion is supported by the affirmation of Elizabeth Garduno which is not in appropriate form pursuant to CPLR 2109, however, the Court has considered the affirmation to be an affidavit as it is notarized (see *Scudera v Mahbubur*, 299 AD2d 535, 750 NYS2d 644 [2d Dept 2002]). The moving defendant has also submitted a copy of the summons and complaint, her answer, and the plaintiff's verified bill of particulars for Dr. Buckley; an unauthenticated, uncertified copy of a CD which is not in admissible form pursuant to 22 NYCRR §§ 202.5 and 202.8; the unsigned transcript of the examination before trial of Elizabeth Garduno which is deemed adopted as accurate by the moving defendant (*Ashif v Won Ok Lee*, supra); the unsigned and uncertified copy of the transcript of the examination before trial of Adam Buckley and the unsigned transcript of the non-party witness Cecilia Avila, M.D. which are not in admissible form as required by CPLR 3212 (see *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), and are not accompanied by an affidavit pursuant to CPLR 3116, and are not considered on this motion. The CD, and the deposition transcripts, which are not in admissible form as set forth, are deemed not to be facts in evidence. It is also noted that the defendant's affidavit of service was notarized on November 1, 2011, indicating that this motion was served on December 1, 2011.

Dr. Garduno sets forth in her affirmation that she has been a physician licensed to practice medicine in New York since 2011. She is not yet board certified in any specialty. During the time period that she rendered care and treatment to the decedent, she was a second-year resident in obstetrics and gynecology at Stony Brook University Hospital, and participated in, among other things, the performance of cesarean deliveries and hysterectomies under the supervision of an attending physician. She was assigned to perform the cesarean section on the plaintiff's decedent under the supervision of Adam Buckley, M.D. Once the procedure was commenced, a uterine window was seen which displayed the head of the fetus, which, she stated, is a relatively rare finding. She discussed with Dr. Buckley how to proceed with the surgery in light of the uterine window, and made a lower uterine segment incision in a transverse fashion. The uterus was then entered, an artificial rupture of the amniotic sac/membrane was made, the fetus was delivered, and the cord was cut and clamped. She continues that after the uterus was cleaned, she and Dr. Buckley began the repair of the uterus, however, during the repair, there was a "slight amount of uterine atony," or incomplete contraction of the myometrium, noted. Methergine was administered to assist the uterus to contract. When the uterus was replaced into the abdominal/pelvic cavity, the uterine incision was checked and there was no bleeding noted. The surgical wound was closed and Dr. Buckley left the operating room to attend to another patient. She applied a pressure dressing to the abdominal wound, then placed the decedent's legs into a frog position and pressed on her abdomen, expressing an excess clot. The uterus was noted to be three fingerbreadths above the umbilicus, which was an unusual finding in the immediate post-cesarean period.

Dr. Garduno continues that she then applied pressure to the uterine fundus with one hand, and then applied bimanual compression from within the vagina and noted that there was a significant amount of atony from the lower uterine segment. She therefore ordered Cytotech 800 mg. and a third dose of Methergine, to be administered. She discussed a possible transfusion with Dr. Schabel, the anesthesiologist, but does not

indicate whether or not a transfusion was given. Dr. Garduno states that there was a period of time that there was no member of the department of Obstetrics and Gynecology present in the operating room with her during the immediate post-operative period, but she does not quantify that period, and continues that Dr. Schabel, the anesthesiologist, was always present. It was estimated that the decedent lost two liters of blood during the cesarean section and immediately thereafter. Dr. Cecilia Avila, a maternal-fetal specialist came into the operating room at some time, supervised and directed the care of the decedent, and ordered the placement of the Bakri Balloon in the uterine cavity to act as a tamponade in an effort to stem the bleeding. At some point, the decedent was transferred to recovery. Dr. Buckley resumed her supervision with regard to the treatment of the decedent. Dr. Buckley determined that a hysterectomy was required to stop the bleeding. During the hysterectomy performed by Dr. Buckley, Dr. Ostrov and Dr. Budnick assisted him, and she was the second assistant. Dr. Budnick responded to assist with the Code Noelle when the decedent arrested during the hysterectomy. After the hysterectomy, the decedent was transferred to SICU. Dr. Garduno states that she was then no longer involved in the decedent's care and treatment.

Dr. Garduno testified at her deposition that the cause of the uterine atony is unknown, and that it caused the decedent's bleeding. She stated that the allegations that she neglected to properly deliver the plaintiff's decedent, permitted her to have a post-partum hemorrhage, neglected to timely diagnose and treat the postpartum hemorrhage, neglected to timely and properly perform a hysterectomy, failed and neglected to timely transfuse the decedent, and permitted her to go into shock, are incorrect in their entirety. However, she did not set forth the standard of care with regard to uterine atony and hemorrhage, and how she comported with such standards. She stated that she was a resident physician acting under the orders and directions of her attending physicians, made no independent decisions as to definitive obstetrical, gynecological, or medical treatments, and cannot be responsible for the decedent's damages.

Based upon the foregoing, it is determined that Dr. Garduno has not established *prima facie* entitlement to summary judgment dismissing the complaint as asserted against her. 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 [2d Dept 2008]). Here, Dr. Garduno has not submitted the affirmation of an expert physician to establish that the care and treatment rendered by those supervising physicians did not so greatly deviate from normal practice that she should not be held liable for failing to intervene. The affirmations submitted with her co-defendants' motion did not establish that the attending physicians, Buckley and Schabel, comported with the accepted standards of care due to the existence of factual issues. Thus, the affirmations do not demonstrate that movant should not be held liable for failing to intervene.

It is determined that even if Dr. Garduno's application were legally sufficient and supported by evidentiary submissions in admissible form, that she has not established that the attending physicians who were directing her care and treatment did not so greatly deviate from normal practice that she had no obligation to intervene. Thus, movant has not established *prima facie* entitlement to summary judgment. It is further noted that the plaintiff's expert has raised factual issues which preclude the granting of summary judgment.

The plaintiff's expert, a physician licensed to practice medicine in New York, and who is board certified in obstetrics and gynecology, opines with a reasonable degree of medical certainty that had Dr.

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Buckley performed the classical cesarean section higher in the uterus after he observed a “thin lower segment and a uterine window,” a contraindication to a low incision, he would have been able to achieve hemostasis, avoiding the decedent’s injuries and sequella. He continues that Dr. Buckley left the operating room after the cesarean section before the uterine bleeding was noted. Neither Dr. Buckley nor Dr. Schabel were present when the bleeding was first noted in the operating room at the end of the cesarean section, thus they did not properly assess the amount of blood loss. The pelvis could not be observed for the amount of bleeding as Dr. Buckley closed the fascial incision before he left the operating room. The plaintiff’s expert opines that a hysterectomy should have been performed immediately as opposed to inserting a Bakri Balloon, and that Dr. Garduno and Dr. Avila departed from the accepted standards of care in not performing a hysterectomy during the first surgery. During the four hours between the end of the cesarean section, and the decision to perform the hysterectomy, the decedent’s condition continued to deteriorate, as indicated by her blood tests and hematocrit levels. And based upon those hematocrit levels, states the plaintiff’s expert, it is demonstrated that the amount of the decedent’s blood loss was not accurately estimated and not adequately replaced following the cesarean section. Thus, opines the decedent’s expert, Drs. Buckley, Schabel, and Garduno departed from accepted standards of care that resulted in the decedent suffering severe blood loss, myocardial infarction, hypoxia, and acute respiratory arrest, and caused all her subsequent injuries and death. The plaintiff’s expert states that the autopsy report showed the decedent’s cause of death as “Diffuse Alveolar Damage (clinically acute respiratory distress syndrome)” and the death certificate stated the “Death was caused by, Immediate Cause: Acute Respiratory Distress Syndrome due to or as a consequence of Marked Post Partum Hemorrhage.”

Based upon the foregoing, it is determined that even if the moving papers were legally sufficient, the plaintiff’s expert has raised factual issues which preclude summary judgment from being granted to any of the moving defendants in motions seq. #002 and #003.

Accordingly, this motion by the defendants, Joy Schabel, M.D., Adam Buckley, M.D., University Associates in Obstetrics & Gynecology, P.C. a/k/a University Physicians at Stony Brook, and Stony Brook Anesthesiology, P.C. a/k/a University Physicians at Stony Brook, for summary judgment dismissing the complaint and all cross-claims asserted against them is denied; and this motion by the defendant, Elizabeth Garduno, M.D., for summary judgment dismissing the complaint as asserted against her is denied.

Dated: June 19, 2012



 Hon. Joseph Farneti
 Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION