

Fox v Joseph Xerri, M.D. PLLC
2012 NY Slip Op 32343(U)
September 4, 2012
Supreme Court, Suffolk County
Docket Number: 08-9867
Judge: Thomas F. Whelan
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COPYSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY**PRESENT:**Hon. THOMAS F. WHELAN
Justice of the Supreme CourtMOTION DATE 4-9-12
ADJ. DATE 6-1-12
Mot. Seq. # 002 - MGVICTORIA FOX, an infant by her mother and
natural guardian, LINDA FOX,

Plaintiff,

- against -

JOSEPH XERRI, M.D. PLLC and DAVID S.
FRENCH, M.D.,

Defendants.

DAVIS & FERBER, LLP
Attorney for Plaintiff
1345 Motor Parkway, Suite 201
Islandia, New York 11749MARTIN CLEARWATER & BELL LLP
Attorney for Defendant Joseph Xerri, PLLC
220 East 42nd Street
New York, New York 10017ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF THE STATE OF
NEW YORK
by: Marcie K. Glasser, Assistant District Attorney
Attorney for Defendant David S. French, M.D.
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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12 - 14; Replying Affidavits and supporting papers 15 - 16; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant David S. French, M.D. for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint as against him is granted.

This is an action to recover damages for injuries allegedly sustained by the infant plaintiff as a result of the alleged negligent medical care rendered by plaintiff's treating obstetrician, defendant Joseph Xerri, M.D., and a first year resident at Stony Brook University Hospital (Stony Brook Hospital), defendant David S. French, M.D., prior to and during delivery. The infant plaintiff was born premature at 25 weeks on October 22, 1998 and plaintiff was ultimately diagnosed with chorioamnionitis. Plaintiff

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mother had been referred to Stony Brook Hospital on October 19, 1998 following complaints of cramping and was seen by Dr. French, who examined plaintiff and discharged her that same day.

Defendant Dr. French now moves for summary judgment dismissing the complaint as against him on the ground that he was a first year medical resident during the one time that he examined plaintiff and that he did not exercise any independent medical judgment. In support of his motion, Dr. French submits, among other things, the complaint and his answer, plaintiff's bill of particulars, his deposition transcript and the deposition transcript of Dr. Xerri, the Stony Brook Hospital records for plaintiff's October 19, 1998 prenatal visit, and the affirmation of his expert, Marc Engelbert, M.D.

In opposition to the motion, plaintiff contends that the motion must be denied on the ground that there is a dispute between the parties as to what occurred during Dr. French's examination of plaintiff, including whether plaintiff was experiencing vaginal bleeding. In addition, plaintiff contends that there is an inference that Dr. French did not accurately document his examination. Plaintiff further contends that inasmuch as the affidavit of Dr. French's expert is based on the premise that there was no vaginal bleeding, it is flawed and should not be considered. She argues that issues of fact exist as to the propriety of Dr. French's treatment of plaintiff which must be determined by a jury. Plaintiff submits a copy of her deposition transcript.

In reply, Dr. French argues that plaintiff's opposition is insufficient inasmuch as she has failed to submit an expert affirmation or affidavit of a physician with a specialty in obstetrics or with knowledge of the standard of care of an obstetrician demonstrating that there was a departure from the standard of care of Dr. French.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of medical practice, and evidence that such deviation or departure was a proximate cause of injury or damage (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]; *see also Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]). On a motion for summary judgment dismissing the complaint in a medical malpractice action, a defendant must make a prima facie showing that there was no departure from good and accepted medical practice, or that any departure was not the proximate cause of the alleged injuries (*see Salvia v St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053,

923 NYS2d 856 [2d Dept 2011]; *Ahmed v New York City Health & Hosps. Corp.*, 84 AD3d 709, 922 NYS2d 202 [2d Dept 2011]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). Where a defendant physician makes a prima facie showing that there was no departure from good and accepted medical practice, as well as an independent showing that any departure that may have occurred was not a proximate cause of plaintiff's injuries, the burden then shifts to plaintiff to rebut the physician's showing by raising a triable issue of fact as to both the departure element and the causation element (*see Stukas v Streiter*, *supra*; *Swezey v Montague Rehab & Pain Mgt.*, 59 AD3d 431, 872 NYS2d 199 [2d Dept 2009]; *Myers v Ferrara*, 56 AD3d 78, 864 NYS2d 517 [2d Dept 2008]). General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment (*see Salvia v St. Catherine of Sienna Med. Ctr.*, *supra*; *Ahmed v New York City Health & Hosps. Corp.*, *supra*).

A resident who assists a doctor during a medical procedure, and who does not exercise any 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 (*Soto v Andaz*, 8 AD3d 470, 779 NYS2d 104 [2d Dept 2004]).

The deposition testimony of Dr. French from November 22, 2010 reveals that at the time of this incident he was participating in the first year of a three-year family medicine program at Stony Brook Hospital performing a rotation in obstetrics. Dr. French testified that he had supervisors, who would have been OB-GYN upper level residents or OB-GYN "attendings," and that one supervisor was Dr. Xerri. In addition, Dr. French testified that he only interacted with plaintiff on October 19, 1998 and on one occasion after delivery when she yelled at him to the effect that the delivery was his fault. The records for said date indicate that plaintiff was approximately 24 weeks pregnant and that the infant plaintiff's estimated delivery date was February 1998, that the chief complaint and reason for admission was contractions and cramping. Dr. French read his assessment which included plaintiff's complaints of cramping lasting about 15 seconds, and her belief that she lost her mucus plug, which keeps the cervix sterile and prevents infection, and notes that earlier in the morning plaintiff had a sterile vaginal exam indicating no rupture of membranes and positive yeast. He read his recorded history of plaintiff's temperature 99.3, positive fetal movement, negative vaginal bleeding, negative rupture of membranes, plaintiff's being very thirsty one day earlier, and that she was taking prenatal vitamins. Dr. French stated that the note did not indicate who supervised him but that clearly Dr. Xerri was in a supervising role and that it would have been customary for him to have discussed the case with a supervisory OB-GYN resident. He had no independent recollection of calling Dr. Xerri but stated that he would have spoken to Dr. Xerri. Dr. French also stated that he did review the fetal monitoring strips, that it would have been customary to have reviewed them with a supervisor, and indicated that they showed nothing unusual. Dr. French further stated that he did perform a sterile vaginal exam but he could not recall whether there was a supervisor present and read his exam results as the cervix being closed, long, firm and posterior which was reassuring in terms of labor. No sonogram was ordered but a urinalysis was ordered. Dr. French explained that he would have needed approval from someone with more authority to have ordered blood work or a sonogram and that the performance of a sterile vaginal exam may or may not have been in the presence of a supervisory physician and that at the time, he had performed more than a hundred such exams. According to Dr. French, the ultimate decision not to admit the patient but to send her home was the responsibility of the attending, Dr. Xerri.

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By his deposition testimony dated October 20, 2010, Dr. Xerri testified that he is board certified in obstetrics and gynecology, that plaintiff first became his patient in March 1995, and that in 1995 he delivered plaintiff's prior baby that was born premature at 34 weeks. In addition, Dr. Xerri testified that he continued treating plaintiff after 1995, that plaintiff had a miscarriage with no bleeding in 1997, that no physiological condition was diagnosed that may have led to the miscarriage, and that subsequently plaintiff became pregnant again with an expected delivery date of January 13, 1999. Dr. Xerri explained that the prior pre-term delivery was significant as it could happen again but that the miscarriage was not significant. The last time Dr. Xerri actually saw plaintiff was on July 22, 1998 and plaintiff was thereafter seen by his nurse practitioner. He noted from his records that on October 19, 1998 plaintiff visited his office with complaints of cramping and some white, "curdy" discharge and that his nurse practitioner examined plaintiff and found that her water had not broken and that plaintiff's cervix was thick and posterior, meaning normal for gestational age. Dr. Xerri also testified that his nurse practitioner called him during said visit and that he instructed her to send plaintiff to Stony Brook Hospital for monitoring in case there were any contractions because plaintiff had a history of preterm labor. He wanted plaintiff to be placed on a fetal heart monitor. Dr. Xerri recalled that later that same day he spoke with a resident at Stony Brook Hospital, Dr. French, who told him that plaintiff's cervix was closed, long, firm and posterior, that there were no contractions on the non-stress test machine, that there was good fetal movement, negative for rupture of the membrane, that her urine revealed a possible urinary tract infection, that he was considering prescribing antibiotics for a urinary tract infection to which Dr. Xerri responded that it was probably a good idea, and that Dr. French gave a prescription for Macrobid for the infection. During the deposition, Dr. Xerri reviewed the fetal monitoring strip and concluded that it was normal. According to Dr. Xerri, after returning from the hospital, plaintiff told the nurse practitioner that there was some spotting, which Dr. Xerri told plaintiff was normal. Then, on October 20, 1998, Dr. Xerri spoke with plaintiff's husband who said that plaintiff was doing better but still had some spotting and Dr. Xerri told him that she should stop work and be on bed rest. Dr. Xerri stated that on October 21, 1998 he received a call early in the morning that plaintiff had copious fluid coming out of her vagina and he told plaintiff to go to Stony Brook Hospital immediately and she was admitted. Dr. Xerri also stated that he had admitting privileges to Stony Brook Hospital since approximately 1990. After plaintiff's admission, it was determined at the hospital that she had a spontaneous rupture of her membrane, that there was a pool of dark brown fluid, positive ferning and positive "Nitrazine," severe oligohydramnios, and chorioamnionitis, an infection of the amniotic fluid.

By affirmation dated March 2, 2012, defendant's expert Marc Engelbert, M.D. states that he is board certified in obstetrics and gynecology and that based on his review of the Stony Brook Hospital labor and delivery record for October 19, 1998 it is his opinion with a reasonable degree of medical certainty that the care and treatment provided plaintiff by Dr. French did not depart from good and accepted medical practice and did not cause or contribute to her alleged injuries. Dr. Engelbert states that Dr. French rendered care to plaintiff only on October 19, 1998, and as a first year resident, Dr. French did not use any independent judgment or make any independent decisions regarding her obstetrical management. Rather, her care and treatment was under the supervision and direction of the attending physician, Dr. Xerri. Here, Dr. French met his prima facie burden of demonstrating that, during his one day treatment of plaintiff, he did not exercise any independent medical judgment, but was under the direct supervision of the attending physician, Dr. Xerri, whose directions did not so greatly deviate from normal practice that Dr. French should be held liable for failing to intervene (*see Bellafore*

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v Ricotta, 83 AD3d 632, 920 NYS2d 373 [2d Dept 2011]; *Muniz v Katlowitz*, 49 AD3d 511, 856 NYS2d 120 [2d Dept 2008]; *Velez v Goldenberg*, 29 AD3d 780, 815 NYS2d 205 [2d Dept 2006]).

Plaintiff failed to raise a triable issue of fact in opposition to the motion (see *Costello v Kirmani*, 54 AD3d 656, 863 NYS2d 262 [2d Dept 2008]; *Muniz v Katlowitz*, *supra*). Plaintiff failed to submit an affidavit or affirmation of a medical expert to support her claims of malpractice and to refute defendant's submissions and thus failed to raise a triable issue of fact (see *Savage v Quinn*, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]; *Thomas v Richie*, 8 AD3d 363, 777 NYS2d 758 [2d Dept 2004]). Plaintiff's deposition testimony alone is insufficient to raise a triable issue of fact (see *Luu v Paskowski*, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]).

Accordingly, the instant motion is granted and the complaint is dismissed as against defendant Dr. French. The action is severed and continued as against Dr. Xerri.

Dated: _____

9/4/12



THOMAS P. WHELAN, J.S.C.