Cuji-Zuniga v Ogburn
2014 NY Slip Op 33002(U)
November 12, 2014
Supreme Court, Suffolk County
Docket Number: 10-31869
Judge: Jeffrey Arlen Spinner
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SHORT FORM ORDER

INDEX No. 10-31869
CAL No. 13-01757MM

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 3-4-14
ADJ. DATE 8-6-14
Mot. Seq. # 003 - MG

JONATHAN GABRIEL CUJI-ZUNIGA, an infant, by his father and natural guardian, AQUILES MARIO CUJI MARCA, and AQUILES MARIO CUJI MARCA, individually,

Plaintiffs,

- against -

PAUL L. OGBURN, JR., M.D., J. GERALD QUIRK, M.D., TODD R. GRIFFIN, M.D., K. KATKURI, M.D., (first name unknown to Plaintiff), DYMPNA WEIL, M.D., R. TURKEWITZ, M.D. (first name unknown to plaintiff), JOHN/JANE DOE, M.D. (first and last name unknown to plaintiff ad fictitious), JOHN/JANE ROE, M.D., (first name and last name unknown to plaintiff and fictitious) and UNIVERSITY ASSOCIATES IN OBSTETRICS AND GYNECOLOGY, UFPC,

Defendants.

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Upon the following papers numbered 1 to 10 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers _; Replying Affidavits and supporting papers _; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by defendants K. Katkuri, M.D., Dympna Weil, M.D., and R. Turkewitz, M.D, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted.

In this medical malpractice action, Aquiles Mario Cuji Marca, individually and on behalf of the infant plaintiff, Jonathan Gabriel Cuji-Zuniga, seeks damages for personal injuries sustained by the infant. It

is alleged that the defendants departed from good and accepted obstetrical care, resulting in the infant sustaining hypoxia, subdural hematoma, arachnoid cyst, respiratory depression, erb's palsy, and neurological impairment. On February 26, 2008, after delivery of the infant's head, a tight nuchal cord (umbilical cord around the neck) was noted and cut; shoulder dystocia was then noted so suprapubic pressure and woodscrew maneuver were utilized to deliver the infant. The infant weighed 9.38 pounds. Apgar scores of 0 at one minute, 3 at five minutes, and 5 at ten minutes were noted. Respiratory support was provided for the infant, who was intubated and transferred to LIJ Medical Center for head cooling and treatment.

The moving defendants K. Katkuri, M.D., Dympna Weil, M.D., and R. Turkewitz, M.D, assert they were residents at the time they rendered care and treatment to the infant plaintiff and his mother, and seek summary dismissal of the complaint on the bases they exercised no independent judgment; and they worked under the instructions of the private attending physicians whose actions did not depart so significantly from the standard of care that their intervention was required.

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 (***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 opposing party 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 [2nd Dept 1981]).

In motion (004), the defendants submitted, inter alia, copies of the summons and complaint, the answers served by the moving defendants; plaintiffs' verified bill of particulars; copies of the signed deposition transcript of defendant Katkuri; certified copy of the Stony Brook University Hospital record; and the affirmation of Marc Engelbert, M.D.

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 [1999]). 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***, 224 AD2d 674, 638 NYS2d 700 [2nd 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 [2nd Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Bloom v City of New York***, 202 AD2d 465, 465, 609 NYS2d 45 [2nd 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, 6630 NYS2d 739 [2d Dept 1997]).

Defendants' expert, Marc Engelbert, M.D., averred that he is a physician licensed to practice medicine in New York State and is board certified in obstetrics and gynecology. While Dr. Engelbert set forth that he provides obstetrical care to patients, including prenatal care, labor and delivery, he has failed to provide either a copy of his curriculum vitae, or any information concerning his education and experience in obstetrics to qualify as an expert. However, plaintiff has not objected to his affirmation.

In reviewing Dr. Engelbert's affirmation, it is noted that he reviewed the pertinent medical records, including Stony Brook University Hospital, and the transcripts of the testimonies given by Dr. Paul Ogburn, Dr. Gerald Quirk, Dr. Todd Griffin, and resident Katkuri. However, the transcripts for the testimony provided by Dr. Paul Ogburn, Dr. Gerald Quirk, and Dr. Todd Griffin have not been provided as required pursuant to ***Friends of Animals v Associated Fur Mfrs***., *supra*. 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]), and the specified materials reviewed by Dr. Engelbert, and upon which he bases his opinions, in part, are not in evidence.

Dr. Engelbert opined within a reasonable degree of medical certainty that Dr. Katkuri, Dr. Weil, and Dr. Turkewitz were residents at the time they provided care and treatment to the infant's mother, that they were under the supervision and direction of the attending obstetrical physicians, and they did not make any independent medical decisions or judgment with regard to the obstetrical management of the mother. Dr. Engelbert opined that they did not depart from the standards of obstetrical care and treatment, and that none of the care rendered by Dr. Katkuri, Dr. Weil, and Dr. Turkewitz caused or contributed to the alleged injuries sustained by the infant. He stated that at all times, the moving defendants complied with the instructions and directions given by the attending physicians, and that the care and treatment they provided was in accordance with their level of training and experience as residents.

Dr. Engelbert stated that there were no directions given to the residents by the supervising attending physicians that deviated from the normal medical obstetrical practice such that it called for intervention by the residents, and none of the treatment plans designated by the supervising attending physicians were contraindicated by normal medical practice, such that the residents should have inquired as to whether the attending physicians were correct in their obstetrical medical management.

Dr. Engelbert indicated that the infant plaintiff's mother was a thirty seven year old woman who received prenatal care from Suffolk County Department of Health from August 2007 to November 13, 2007, but was referred to Stony Brook University Hospital for prenatal care on October 30, 2007, when it was noted that she had an elevated thyroid hormone level. The defendant residents did not see the mother prior to this time. Dr. Engelbert set forth the mother's care and treatment on November 29, 2007, and December 11, 2007, wherein Dr. Quirk signed off as the attending physician. A December 18, 2007 sonogram was reported as normal. Dr. Engelbert continued to set forth the mother's care and treatment in January 2008 through February 5, 2008, and indicated there were no complaints, no contractions, and a normal amniotic

fluid index was obtained. On February 12, 2008, stated Dr. Engelbert, Dr. Quirk and resident Patrowsky evaluated the infant's mother and noted fetal movement and contractions, but no leakage of fluid. On February 19, 2008, when the plaintiff was seen "by an attending" and resident James, the plan of care was for the induction of labor at 41 weeks gestation if the mother did not deliver by the next visit. The sonogram, at 39 weeks 2 days gestation, revealed that the estimated fetal weight was 3812 grams, which is greater than the 90th percentile. Polyhydramnios (increased amniotic fluid) was also noted. Biophysical profile was 8/8, and the estimated due date of February 24, 2008 was confirmed.

Dr. Engelbert stated that on February 26, 2008, at 40 weeks 2 days gestation, the infant's mother was seen by Dr. Quirk and resident James for possible rupture of membranes and decreased fetal movement since the night before. Her cervix was 1 cm dilated and 90% effaced, with a vertex presentation at -3 station, so she was admitted at 11 a.m. to Stony Brook University Hospital and sent to labor and delivery. At 12:50 p.m., Dr. Turkewitz performed a history and physical and discussed her findings and plan with attending Dr. Griffin. There were no contractions demonstrated by tocometer, and the fetal heart rate was in the 130s. Dr. Engelbert stated that Dr. Griffin reviewed the fetal monitor strips and found them reassuring. The assessment and plan was for induction with Pitocin. Dr. Turkewitz performed a vaginal exam at 2:55 p.m. and inserted a Foley Bulb to aid in labor induction. Pitocin was at 2 milliunits. At 4 p.m., Dr. Weil added another admission summary and plan of care which was discussed with Dr. Griffin. Pitocin was at 4 milliunits. At 4:13 p.m., minimal variability was noted with no decelerations on the fetal monitor strips. Dr. Engelbert stated that at 5:27 p.m., Dr. Weisman documented the cervix was 4 cm dilated, and 80% effaced with the vertex at -2 station, so the Foley Bulb was removed and the membranes were artificially ruptured, revealing clear amniotic fluid.

Dr. Engelbert stated that Dr. Ogburn entered a note at 6:50 p.m., noting the mother was stable, fetal heart rate in the 140s, Pitocin continued, and cervix advancing. He countersigned Dr. Turkewitz's note of 5:45 p.m. which indicted the cervix was 5 cm dilated, 80 % effaced with the vertex at -1 station. He discussed the progression of labor and continued that on February 27, 2008, at 12:32 a.m. the mother's cervix was 9 cm dilated, 100 % effaced, with the vertex at 0 station. Full dilation was at 12:58 a.m., with 100 % effacement, and the vertex was at +1 station, at which time the mother began to push. Dr. Katkuri, a third year resident, entered a note at 1:30 a.m. noting the mother had discomfort and had been pushing ineffectively for 30 minutes with no good effort, despite coaching and teaching. The mother was then placed in a high Fowlers position to labor down, fully dilated at +1 station, with fetal tracing in the 130s to 140s with accelerations. Dr. Katkuri documented that she discussed with Dr. Ogburn that the mother was to labor down and be monitored. At 4:20 a.m., Dr. Katkuri documented that the mother had rested for one and a half hours, and resumed pushing.

Dr. Engelbert stated that at 4:20 a.m., Dr. Katkuri wrote a delivery note documenting Dr. Ogburn assisted with the delivery. The fetal head delivered at 3:31 a.m. There was a tight nuchal cord which was clamped and cut. Dr. Katkuri testified that when the nuchal cord was cut, the baby had no oxygen supply. When she noticed there was shoulder dystocia, that there was a delay in shoulder delivery after delivery of the head, she would have had guidance from the attending to make a decision concerning whether or not to cut the cord. When the shoulder dystocia was encountered, the mother was placed in McRoberts position while resident Reese applied suprapubic pressure. Woods' screw maneuver was then performed, but Dr. Engelbert does not indicate by whom, and the posterior shoulder was displaced downward to fully deliver the infant at 3:33 a.m. Dr. Katkuri testified that the McRoberts maneuver was not successful in this case. She continued that the attending would have determined when to switch from the McRoberts to the Woods'

screw maneuver. She did not know how much time lapsed from the time the Woods' screw maneuver was employed until delivery of the anterior shoulder, following delivery of the posterior arm. She stated that an episiotomy was performed to facilitate delivery of the posterior arm. She believed there was a lapse of two minutes between delivery of the infant's head at 3:31 a.m. and the delivery of the shoulder at 3:33 a.m. She did not recall if traction was placed on the baby's head. Dr. Engelbert stated that the infant was given to NICU immediately due to Apgar scores of 0 at one minute, 3 at five minutes, and 5 at ten minutes. The infant weighed 9.38 pounds. The cord PH was 7.24, which was normal, stated Dr. Engelbert, however, Dr. Katkuri testified that the baby was acidotic at delivery, and that the Apgar score of 0 at one minute meant that the baby had no heart rate at one minute after its delivery.

Dr. Engelbert opined that while there is a claim for failure to treat polyhydramnios, an increase in the amount of amniotic fluid, it was of no significance in this case, although he does not state why. Dr. Engelbert stated that Dr. Ogburn evaluated the prenatal sonograms which were normal, and fetal monitor strips during the course of labor. However, Dr. Engelbert did not indicate whether or not those fetal monitor strips were normal or if they revealed any problems with the fetal heart rate. It is noted that Dr. Katkuri testified that there was a two minute long deceleration after the epidural was administered. She stated that she discussed it with the junior resident and the attending Dr. Ogburn, and it was thought the deceleration may have been secondary to the epidural. She later testified that the deceleration may have been due to the mother having hypotension of 96/46, at which time fetal resuscitation was done by giving the mother oxygen and placing her on her left side in lateral tilt, and giving the mother a bolus of intravenous fluid. A fetal scalp electrode was then placed on the fetus' head to monitor the fetal heart rate and status of the baby. She continued that the fetal heart rate had dropped from 150 to 100, but there was still moderate variability with recovery noted, as the baseline fetal heart tracing returned to normal. She described the delivery and stated the infant was intubated and resuscitated after delivery. Dr. Katkuri testified that neonatal head cooling is done when there is concern for hypoxic ischemic encephalopathy. Dr. Katkuri stated that they did not consider pushing the baby back into the uterus, a Zavanelli maneuver, and then doing a cesarean section when the shoulder dystocia was encountered.

Dr. Engelbert continued that the residents were overseen at all times by the attending obstetricians, including Dr. Ogburn who was present for the delivery. He stated that while it is unknown which residents or whether Dr. Ogburn performed the maneuvers for shoulder dystocia, Dr. Ogburn was present and supervised the delivery and the maneuvers used, which maneuvers were done within the standard of care. Dr. Engelbert does not provide the standard of care for a baby which is 9 pound 8 ounces, with shoulder dystocia, and a tight nuchal cord, but he stated that none of the treatment plans or directions by the attending physicians deviated from normal medical obstetrical practice. There were no decisions made by Dr. Katkuri, Dr. Weil and Dr. Turkewitz with regard to performance of a cesarean section, stated Dr. Engelbert, however, he does not opine whether or not a cesarean section was indicated or necessary in this situation, and whether the injuries to the infant could have been avoided by performing a cesarean section.

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 do not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (***McLaughlin et al v Royek et al,*** 2007 NY Slip Op 31281U; 2007 NY Misc Lexis 9013 [Sup Ct, Suffolk County 2007]. Here it has been demonstrated that the moving defendants did not exercise any independent judgment. Dr. Engelbert opined that the attending doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (***Shehebar v Boro Park Obstetrics and Gynecology, P.C.***, 106 AD3d 715, 964 NYS2d 239 [2d Dept 2013]; ***Feinberg v Feit***, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; ***Shields v Baktidy***, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]. Plaintiff does not oppose this application, and Dr. Engelbert has placed responsibility for the treatment plan and care of the mother, and decisions and directions upon the treating attending physicians, which he stated were adhered to by the moving defendants. It is determined that these moving defendants have established prima facie entitlement to summary dismissal of the complaint as asserted against them. Based upon the failure of the plaintiff to raise any factual issue and to submit an expert affirmation which raises conflicting medical opinion with regard to the care and treatment provided by these moving defendants, summary dismissal of the complaint is not precluded.

Accordingly, motion (003) is granted and the complaint, as asserted against the moving defendants, is dismissed.

Dated: NOV 12 2014

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**