Flink v Escamilla
2015 NY Slip Op 31949(U)
October 20, 2015
Supreme Court, Suffolk County
Docket Number: 11-19740
Judge: Joseph A. Santorelli
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[* 1]

SHORT FORM ORDER

PUBLISH

INDEX No. 11-19740
CAL. No. 14-01728MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 3-16-15
ADJ. DATE 4-16-15
Mot. Seq. # 002 - MD

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MICHAEL FLINK, as Administrator of the Estate of NATALIA NICOLAEVA, Deceased, and MICHAEL FLINK, Individually,

Plaintiffs,

-against-

GLORIA ESCAMILLA, M.D., BRIAN MCKENNA, M.D., and CONTEMPORARY WOMAN'S HEALTH CARE,

Defendants.

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Upon the following papers numbered 1 to 43 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 27 - 41; Replying Affidavits and supporting papers 42 - 43; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Gloria Escamilla, M.D., Brian McKenna, M.D., and Contemporary Woman's Health Care for an order granting summary judgment dismissing the complaint against them is denied.

Plaintiff Michael Flink commenced this wrongful death action to recover damages, personally and derivatively, for defendants' alleged negligence in their prenatal care of his wife, decedent Natalia Nicolaeva. By the bills of particulars, plaintiff alleges that defendants departed from good and accepted medical care by, among other things, failing to maintain accurate records, failing to make adequate and proper consultations at timely and sufficient intervals, failing to take a proper medical history, failing to treat the pregnancy as a high risk pregnancy, failing to admit decedent for close observation, and failing to recognize the symptoms of preeclampsia.

In September 2010, decedent initially visited defendant Contemporary Women's Health Care for her pregnancy and was seen by defendant Dr. Gloria Escamilla. On January 3, 2011, decedent, at 28 weeks gestation, saw Dr. Escamilla, complaining that she was retaining fluids. The records reveal that decedent had gained 14 pounds since her December 9, 2010 visit and her urine dip stick test revealed "4+" protein in the urine. A urinalysis and blood work was sent to the laboratory for evaluation, and decedent was scheduled to return for a follow-up examination on January 10, 2011. The results of the complete blood count (CBC) were reported by the laboratory on January 4, 2011, and the results of the urinalysis were reported on January 5, 2011. On January 6, 2011, Eileen Baumbach, a nurse employed by Contemporary Women's Health Care, received the reports and notified Dr. Brian McKenna, who was the on-call physician at the time. Dr. McKenna ordered that a repeat urinalysis be performed. Decedent was found deceased in her home on January 8, 2011. According to an autopsy of the decedent performed by the medical examiner's office, the cause of death was eclampsia.

Defendants now move for summary judgment dismissing the complaint against them, arguing that decedent did not exhibit any of the typical signs or symptoms of preeclampsia, and that the alleged injuries were not proximately caused by their actions. In support of their motion, defendants submit, among other things, copies of the pleadings, the medical records regarding decedent's prenatal treatment at Contemporary Women's Health Care, the autopsy report prepared by the Suffolk County Medical Examiner's Office, a police field report, transcripts of the parties' deposition testimony, and an expert affirmation of Dr. Henry Prince.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The requisite elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice, and evidence that such departure was a proximate cause of plaintiff's injury or damage (*see* ***Ahmed v Pannone***, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014];***Feinberg v Feit***, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept], *lv denied* 92 NY2d 814 [1998]). On a motion for summary judgment dismissing the complaint, a defendant hospital or physician has the burden of establishing through medical records and competent expert affidavits the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (*see* ***Carioscia v Welischar***, 124 AD3d 816, 2 NYS3d 550 [2d Dept 2015]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; ***Luu v Paskowski***, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]). In opposition, "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" (***Deutsch v Chaglassian***, 71 AD3d 718, 719, 896

NYS2d 431 [2d Dept 2010]). Further, the plaintiff "need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (***Stukas v Streiter***, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011]).

Dr. Henry Prince, a physician licensed to practice medicine in the State of New York and board certified in obstetrics and gynecology, opines that the care and treatment of decedent rendered by defendants conformed to the standard of care and did not proximately cause decedent's injuries. According to Dr. Prince, preeclampsia is a syndrome consisting of hypertension and proteinuria, which may be associated with other symptoms such as edema, visual disturbances, nausea, headache or blood in the urine. As to preeclampsia, hypertension is a "systolic B/P of 140 mm., Hg or higher or a diastolic B/P of 90 mm Hg or higher, proteinuria with the presence of 0.3 grams or more of protein in a 24-hour urine specimen, which generally correlates with a finding of 1+ or greater on a urine dipstick." Dr. Prince states that based on the records, decedent never exhibited any of the typical signs or symptoms of preeclampsia during any of her visits to Contemporary Woman's Health Care. He states that her blood pressure was always normal and that she never had +1 or more protein in her urine except during her last visit on January 3, 2011. While decedent complained that she felt as if she was retaining fluids (edematous), an examination revealed no edema and there is no record that she complained of visual disturbances, nausea or headache. Dr. Prince opines that Dr. Escamilla appropriately obtained a urine sample, and ordered a urinalysis and blood work to be sent to the laboratory for evaluation. Further, he states that decedent's blood pressure of 116/80 was normal and inconsistent with preeclampsia, and that a diagnosis of preeclampsia is unlikely without a blood pressure reading above 140/90.

Dr. Prince further states that urine dipsticks sometimes return false positive results, and that a urinalysis is a more accurate diagnostic tool to confirm urine dipstick test results. He states that Dr. Escamilla comported with good and accepted medial practice by obtaining a urine sample for urinalysis with bilirubiin analysis, and that there was no need to obtain the results "STAT," as decedent was asymptomatic. He states that on January 4, 2011, the results of the CBC was normal "with the exception of a low red blood cell count, and elevated MCH, MPV and neutrophil levels," and that such results were not consistent with a diagnosis of preeclampsia. The January 5, 2011 results of the urinalysis were received by Nurse Baumbach on January 6, 2011, who informed Dr. McKenna of the results. Dr. McKenna ordered a repeat urinalysis to confirm the accuracy of the result. Dr. Prince opines that while the results of +3 protein in the urine is a possible indication of impaired renal function, decedent did not exhibit or make complaints consistent with preeclampsia. Thus, he states that Dr. McKenna's order to have decedent submit to a repeat urinalysis as soon as she was available or at the next scheduled visit was an acceptable option within the standard of care.

Defendants' submissions established prima facie their entitlement to summary judgment dismissing the medical malpractice action against them (*see* ***Bengston v Wang***, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]). Plaintiff opposes the motion and argues that defendants failed to establish their entitlement to summary judgment as a matter of law. In opposition, plaintiff submits, among other things, an expert affirmation of Dr. Bruce Halbridge, medical records regarding decedent's prenatal treatment at Contemporary Women's Health Care, an autopsy report prepared by the Suffolk County Medical Examiner's Office, and transcripts of the parties' deposition testimony.

Dr. Bruce Halbridge, a physician licensed to practice medicine in the State of New York and board certified in obstetrics and gynecology, states that defendants departed from accepted practice in several respects in their treatment of decedent. He states that during decedent's January 3, 2010 visit, with a dipstick urine protein reading of +4, the standard of care should have been hospitalization for a 24-hour urine test for the presence of protein and creatinine, and bed rest with blood pressure and fetal monitoring. He states that at a minimum, a 24-hour urine test for protein and creatinine should have been initiated the same day, and the patient should have been instructed to return daily to have her blood pressure checked. He states that a urine protein level of +4 on the urine dipstick meets the diagnostic criteria for severe preeclampsia and that the urinalysis to confirm the dipstick results should have been performed on a "STAT" basis. Dr. Halbridge states that the disease progresses at various rates and can change from mild to severe over hours, days or weeks, and thus, a work-up must not be delayed. He states that while Dr. Escamilla noted "no edema" in her records, she only based her assessment of patient's extremities, while assessment for edema where there is concern of preeclampsia must include an assessment of a patient's face since facial swelling is more significant than extremity swelling. Also, Dr. Halbridge states that while Dr. Escamilla testified that she included pre-eclampsia in her differential diagnosis, she did not indicate such in her notes, which is a departure from good and accepted standards as pre-eclampsia is a serious condition and failure to indicate it would deprive subsequent providers with critical information. He states that if preeclampsia is included in a differential diagnosis, the standard of care requires an immediate work-up which includes admission to the hospital, bed rest, initiation of a 24-hour urine test for protein and creatinine, as well as blood pressure and fetal monitoring.

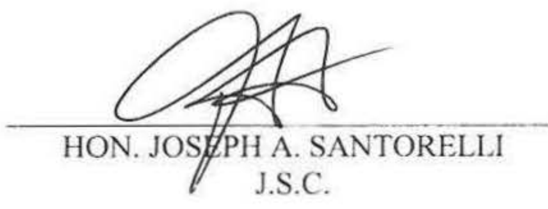
Dr. Halbridge further states that Dr. Escamilla's failure to timely follow-up on the urinalysis results she ordered or to inform the on-call physician that she was waiting such results for a patient with a differential diagnosis of preeclampsia was a departure from the accepted standards of medical care. He states that while Dr. Escamilla testified that she discussed her concerns regarding preeclampsia with decedent, this conversation was not documented in the records, and the accepted medical practice requires that a patient with a differential diagnosis, including preeclampsia, be fully informed with respect to the potential risks, signs and symptoms.

In addition, Dr. Halbridge states that the results of the CBC performed on January 4, 2011, revealed an elevated MPV (mean platelet volume) value and a significant drop in platelets count, which are signs that decedent was developing thrombocytopenia, a condition seen with preeclampsia and/or "HELLP syndrome." He states that the urinalysis confirmed the significant amount of protein in decedent's urine, and that the amount reported was in the range reflecting end organ damage which is "highly suspicious for preeclampsia." He states that based on the findings of the urinalysis, decedent should have been immediately contacted and arrangements should have been made for further evaluation. He states that after Nurse Baumbach reviewed the urinalysis results on January 6, 2011, she did not immediately inform Dr. Escamilla and Dr. McKenna of the abnormal urinalysis, which was a departure from the accepted standards of care. He states that the record indicates that after Dr. McKenna reviewed the report, he determined that a repeat urinalysis should be scheduled for decedent's next scheduled visit on January 10, 2011. Dr. Halbridge avers Dr. McKenna departed from the accepted standard of medical care by not contacting decedent immediately upon learning that the urinalysis revealed a "urine protein of 300 mg/dl with an office dipstick test that revealed proteinuria of 4+" on January 3, 2011. He also states that it was a departure from the standard of care to wait until decedent's

next scheduled appointment, four days away, to repeat the urinalysis. He further states that Dr. Escamilla departed from the standard of care by failing to follow-up on the urinalysis, since there was a differential diagnosis of preeclampsia. Dr. Halbridge concludes that defendants made significant departures in their care and treatment of decedent by failing to recognize that decedent met the diagnostic criteria for preeclampsia, failing to timely perform the necessary work-up for preeclampsia, and failing to hospitalize decedent for management of the condition.

"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" (***Feinberg v Feit***, *supra* at 519; *see* ***Hayden v Gordon***, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; ***Graham v Mitchell***, 37 AD3d 408, 829 NYS2d 628 [2d Dept 2007]; ***Shields v Baktidy***, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]). Here, plaintiff raised a triable issue of fact by submitting the affirmation of Dr. Halbridge, which contradicts defendants' expert by opining that defendants deviated from accepted standards of care in their treatment of decedent (*see* ***Iulo v Staten Is. Univ. Hosp.***, 106 AD3d 696, 697, 964 NYS2d 565 [2d Dept 2013]; ***Magel v John T. Mather Mem. Hosp.***, 95 AD3d 1081, 945 NYS2d 113 [2d Dept 2012]; ***Bengston v Wang***, *supra*). Accordingly, the motion by defendants for summary judgment dismissing the complaint against them is denied.

Dated: OCT 2 0 2015



HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION