SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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G[redacted] L[redacted], an infant, by her Parents and Natural Guardians, FRANK LEVA and FRANCES LEVA, and FRANK LEVA and FRANCIS LEVA, individually

Plaintiffs,

-against-

ALAN HARAWITZ, M.D., EVAN HARAWITZ, M.D., MONROE PEDIATRIC ASSOCIATES, P.C., MIRNA CHEHADE, M.D., KEITH BREGLIO, M.D. and MOUNT SINAI MEDICAL CENTER,

Defendants.

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Index No. 156318-2012

DECISION/ORDER

Motion Sequence 002

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Attorney's Affirmation & Collective Exhibits Annexed.....	1, 2, 3
Affirmation in Opposition, Physician's Affirmation & Collective Exhibits Annexed.....	4, 5, 6
Reply Affirmation & Collective Exhibits Annexed.....	7, 8

In this medical malpractice action defendant Evan Harawitz, M.D. (Harawitz) moves pursuant to CPLR § 3212 for an order granting him summary judgment dismissing the complaint of plaintiffs G[redacted] L[redacted] (the infant), an infant, by her Parents and Natural Guardians Frank Leva and Francis Leva, and Frank Leva and Francis Leva, individually (collectively plaintiffs). Plaintiffs oppose the motion. The gravamen of plaintiffs' complaint is that Harawitz negligently failed to diagnose and treat the infant's medulloblastoma. The bill of particulars alleges that from on or about August 27, 2007 until on or about March 23, 2010 Harawitz departed from good an accepted standards of medical care by (1) failing to do a complete physical examination, including a complete neurological examination, (2) failing to formulate a differential diagnosis based upon the infant's history and physical examination, (3) failing to rule out the elements of a differential diagnosis, (4) failing to appreciate the significance of vomiting in the absence of a gastroenterological diagnosis, (5) failing to refer the infant to a child neurologist, (6) in failing to refer the infant to a pediatric gastroenterologist, (7) failing to perform or order diagnostic testing

including but not limited to CT, MRI, PET, electrolytes, comprehensive, (8) failing to hospitalize the infant, (9) failing to order the infant's parents to bring the infant for a follow-up examination, (10) failing to order consultations with a gastroenterologist and a pediatric neurologist, (11) assuaging plaintiffs' concerns about the infant's health, and (12) failing to diagnose medullablastoma.

In support of the motion Harawitz submits an affirmation by Dr. Stephen Shear, M.D. (Shear), a board certified pediatrician. According to Shear, the infant treated with co-defendant Monroe Pediatric Associates, P.C. (Monroe Pediatric) from approximately December 30, 2003, on an intermittent basis for a variety of childhood ailments and well check-ups until August 4, 2012. The infant was seen at Monroe Pediatric on August 27, 22007 by Harawitz and co-defendant Dr. Alan Harawitz for a sick visit. The infant presented with a fever, congestion and a slight cough. The infant was eating and drinking well. The impression was that the infant had a viral syndrome and her parents were advised to increase her fluid intake and to follow-up as needed. The infant's called later that same day and told Dr. Evan Harawwitz that the infant had begun vomiting. Harawitz assured the mother and specified increased hydration.

According to Shear, the infant next presented to Monroe Pediatric on November 5, 2007 for a flu shot. On December 5, 2007 the infant was seen for a sick visit with complaints of a dry red ring behind the right knee. A 2 inch dry ring-like lesion was noted on physical examination and the diagnosis was eczema. The doctor, Dr. Clubwawa, also elected blood work to rule out lymes disease. On December 21, 2007 the infant was seen for a 4 year old well-child exam and immunization update at Monroe with Harawitz and Dr. Clubwawa. The impression regarding the rash behind the infant's knee was lymes disease. The plan was to do an MMR, administer Varicella vaccines and prescribe Amoxicillin three times per day for 30 days. On January 9, 2008 the infant was seen for the administration of Hepatitis A vaccine # 2.

On March 10, 2008 the infant was seen by Harawitz for a sick visit. On examination the infant had positive strep testing with an impression of pharyngitis. An overnight throat culture was ordered. If the overnight throat culture was positive the plan was to treat the infant with Omnicef 25 0 60cc and, if negative, to do a CBC. On May 27, 2008 the infant was seen for a sick visit by Harawitz. The impression was that the infant had a viral syndrome, with vomiting and diarrhea. The treatment was a BRAT diet and increased fluids. If the symptoms persisted an anti-reflux medication regimen or a referral to a gastroenterologist would be considered. On June 8, 2008 the infant was seen by Dr. Alan Harawitz for a sick visit with complaints of vomiting on and off and diarrhea every few days. The infant was afebrile and did not have an upper respiratory infection. A CBC and UA were done and the impression was gastroenteritis and to rule out urinary tract infection. The plan included a work-up and/or gastroenterological referral. On June 17, 2008 Dr. Alan Harawitz was called and advised that the infant was better.

On June 24, 2009 the infant was seen by Dr. Alan Harawitz for a sick visit with complaints of a temperature, sore throat and abdominal pain. There were no complaints of vomiting or diarrhea and no upper respiratory infection symptoms. On examination, the infant's temperature was normal at 98.2 F. The impression was pharyngitis and the plan was to do another overnight throat culture. On October 4, 2008 the infant was seen for a sick visit by non-party Dr. Dziedzic in conjunction with Dr. Alan Harawitz for a cough which the infant reportedly had for 3 weeks. The infant also complained of body aches and a sore throat. The infant was

reported to be eating well and did not have a fever. The impression was an upper respiratory infection or allergic rhinitis and the plan was to try either Claritin or Triaminic with supportive care. On October 6, 2008 the infant was seen for a sick vist by non-party Dr. Rosmarin for complaints of cough and congestion on and off. The infant had no fever, no vomiting or diarrhea but felt dizzy on that day. The infant denied having an ear ache, sore throat and/or stomach ache and her appetite was fine. The impression again was an upper respiratory infection or allergies and the plan was to continue Claritin and to try Triaminic yellow. On October 15, 2008 the infant received a flu vaccine administered by Dr. Rosmarin. On December 26, 2008 the infant was seen by Dr. Dziedzic and Dr. Alan Harawitz for a sick visit for a sore throat and abdominal pain with mild tactile temperature. The impression was pharyngitis and the plan was to do a CBC in the office if the rapid throat culture was negative and to do an overnight throat culture. The plan included treating with Amoxicillin even if the throat culture was negative. On December 30, 2008 the infant was seen for a 5 year old well-child visit and immunization update by Harawitz.

On January 10, 2009 the infant was seen for a sick visit by Harawitz. The infant had recently been on Amixicillin for leukocytosis and now had a fever, sore throat, ear pain and stomach ache. A rapid throat culture was negative for strep and the impression was pharyngitis or a viral syndrome. The plan was to do an overnight throat culture and to increase fluids. On April 20, 2009 the infant was seen for a sick visit by Dr. Dziedzic and non-party Dr. Goldstein for a sore throat, abdominal pain and vomiting. The infant had a fever on the day of the visit. A rapid throat culture was negative and the impression was pharyngitis with fever. The plan was to provide supportive care with Motrin or Tylenol and to prescribe Amoxicillin if the overnight throat culture was positive. On April 22, 2009 the infant was seen for yet another sick visit by Harawitz and Dr. Alan Harawitz. It was reported the infant was having very high fevers, coughs and congestion. The infant complained of chest heaviness and difficulty breathing. The infant had been taking Motrin. The impression was cough, possibly early bronchitis and the plan was to prescribe Zithromax, to increase fluids and to follow up as needed.

On August 25, 2009 the infant was seen by Dr. Alan Harawitz for vomiting of food, on and off, with no diarrhea and no upper respiratory infection symptoms. The impression was vomiting. On September 10, 2009 the infant was administered a flu vaccine. On October 26, 2009 the infant was seen by Dr. Alan Harawitz. The infant was taking Motrin and had been vomiting on and off. The infant was congested and there was a discharge from her right eye. The infant was afebrile and was going to see a gastroenterologist in 1 week. The impression was gastroenteritis and conjunctivitis and the infant was prescribed Vigamox for her eye and was to see a gastroenterologist. Beginning on November 3, 2009 the infant was treated by co-defendants Dr. Robert Breglio (Breglio) and Dr. Mirna Chehade (Chehade), both gastroenterologists[1].

The infant was next seen at Monroe Pediatrics on March 14, 2010 by Harawitz. The infant was on a special diet for Eosinophilic Esophagitis, was losing weight and had headaches which were much worse at night. The impression was headache and the plan was to increase

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[1] A recitation of the treatment provided by Breglio and Chehade is set forth in the court's decision and order under motion sequence number 003.

fluid intake and to consider repeat blood work. On March 23, 2010 the infant was again seen by Harawitz. While in school on March 23 the infant appeared to be spacing out and very lethargic. The infant complained of a headache and slept in the school nurse's office. The school nurse noted the infant appeared to have muscle rigidity with shallow breathing. The infant was awakened by the school nurse, vomited and then fell back asleep. Harawitz noted the infant was tired appearing and very lethargic. There was some dryness of the mucous membranes and positive vertical and horizontal nystagmus. The infant was afebrile, a CBC was done in office, as was a flu test which was negative. Harawitz spoke with co-defendant Chehade and it was agreed the infant should go the emergency room for a neurological evaluation. Harawitz's impression was a question of a seizure versus dehydration versus tumor. The next day Harawitz spoke with the infant's mother who reported that a CT scan showed a 3 centimeter cerebellar tumor. For the remainder of the infant's visits to Monroe Pediatrics she was seen for general check-ups and sick visits but received no treatment or examinations specifically addressed to or for the infant's diagnosis of medulloblastoma.

Shear contends that Harawitz did not fail to do a complete physical examination including a neurological examination of the infant. Shear contends the infant was appropriately examined when she presented for well visits and that when a child presents for a sick visit, the standard of care is to do a focused examination directed towards the complaints and illness which led to the sick visit. Shear claims Harawitz did precisely this. Shear also contends that complete neurological examinations are not generally done in the office of a community-based pediatrician. According to Shear, prior to May 23, 2010 the infant never presented to Monroe Pediatrics with evidence of neurological impairment, complaint or deficit necessitating a complete neurological examination or referral to a pediatric neurologist.

Shear further opines that Harawitz did not fail to formulate a differential diagnosis based upon the infant's history and physical examination. Shear contends that each time the infant was seen her complaints were noted, responded to and evaluated by the doctors at Monroe Pediatrics and a diagnostic impression was reached. Shear claims that these impressions were appropriate given the complaints, history of illness and examination findings.

Shear also opines that Harawitz did not fail to appreciate the significance of vomiting in the absence of a gastroenterological cause of diagnosis. Shear claims in a community-based pediatric practice like Monroe Pediatric a child presenting with complaints of vomiting is a frequent occurrence and most often due to a viral illness or gastroenteritis. When vomiting persists, the standard of care, according to Shear, is to refer the child to a gastroenterologist, as was done here. Shear further contends that a gastroenterological cause or diagnosis was arrived at when the infant was diagnosed with Eosinophilic Esophagitis.

Shear also contends that the medical records establish that Harawitz recommended returns to the office for follow-up visits, which the infant's parents followed. Shear further claims that the allegation that Harawitz committed malpractice by failing to refer the infant to a pediatric gastroenterologist is factually untrue because the infant was in fact referred to a gastroenterologist.

Shear further claims that Harawitz did not commit malpractice by failing to refer the infant to a neurologist, surgeon, neuro-surgeon, pediatric neurosurgeon or pediatric neurologist because none the infant's complaints, history and/or physical examination findings warranted

such a referral, especially in light of a gastroenterological diagnosis which accounted for the infant's symptoms. Nor did Harawitz commit malpractice by failing to hospitalize the infant since prior to May 2010 none the infant's symptoms warranted hospitalization. Shear also argues that the infant never presented with symptoms, history, complaints or findings which warranted the performance of CT scans, MRIs, PET Scans or ultrasounds.

Finally, Shear opines that Harawitz did not commit malpractice by failing to diagnose and treat the infant's medulloblastoma. According to Shear, the infant presented with no unexplained symptoms that would lead a reasonable community-based pediatrician to consider a diagnosis of medulloblastoma, particularly where, as here, the infant was referred to and seen by specialists who arrived at a diagnosis, Eosinophilic Esophagitis, which accounted for the infant's symptoms. Shear also opines that nothing that Harawtiz did or failed to do was a proximate cause of the infant's injury.

In opposition, plaintiffs offer a redacted affidavit from a board certified pediatrician. Plaintiffs' expert contends that the inordinate delay in diagnosing the tumor resulted in, among other things, the inability of the infant's pediatric surgeon to remove the large tumor in its entirety. The expert also contends that the delay in diagnosis caused the infant to endure multiple, more complicated surgeries, chemotherapy and radiation and a much longer stay in the hospital. The expert further claims that Harawitz's malpractice caused the infant to suffer permanent bilateral hearing loss, left facial weakness, ocular motor dysfunction, left sided coordination difficulties, left hemi neglect, ataxia, difficulties with mobility and gait and major academic delays. The expert also claims that there is a high likelihood that the infant will suffer a reoccurrence of the cancer due to the length of time it remained undiagnosed and untreated in her body.

With respect to the alleged malpractice, plaintiff's expert contends that Harawitz, as the infant's pediatrician, had a continuing obligation to recognize the signs and symptoms that were being displayed by the infant, that a neurological problem was forming and present, to perform standard examinations and to include the possibility of a neurological problem within his differential diagnosis. According to plaintiff's expert, Harawitz departed from good and accepted standards of medical practice by failing to recognize the signs and symptoms of the infant's neurological disorder, including her prolonged and recurring episodes of vomiting for unknown cause, headache, dizziness, muscle stiffening and other signs of intracrancial abnormality such as arching of the back, nystagmus and weight loss. Specifically, plaintiff's expert claims that Harawitz deviated from accepted standards of medical practice by improperly performing a neurological examination of the infant on March 14, 2014[2] and by failing to recognize the signs and symptoms of a neurological disorder. The expert further contends that Harawitz was not relieved of his duty of care to the infant once the infant began treating with the Breglio and Chehade and since he regularly received letters and reports from the gastroenterologists, Harawitz was on notice of the infant's continuing vomiting and worsening of her symptoms despite aggressive gastroenterological therapy. The failure of the infant to improve, and, moreover, her worsening, was a clear sign to Harawitz that a neurological exam should have been performed and that a neurological problem should have been part of his

[2] The court assumes plaintiffs' expert is referring to March 14, 2010.

differential diagnosis.

In an action premised upon medical malpractice, a defendant doctor establishes *prima facie* entitlement to summary judgment when he/she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). With respect to opinion evidence, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646, 159 NE2d 348, 187 NYS2d 1 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish *prima facie* entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars fail to establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108; *Wasserman* 307 AD2d at 226).

Once the defendant meets her burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept 2008]; (*Koeppel v Park*, 228 AD2d 288, 289 [1st Dept 1996]). In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston* 66 AD3d at 1001; *Myers* 56 AD3d at 84; *Rebozo* 41 AD3d at 458).

Movants' submission of deposition transcripts, medical records and an expert affirmation based upon the same established a prima facie defense entitling them the summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). The foregoing submission established, inter alia that movants' treatment of the infant did not depart from accepted medical practices or proximately cause the infant's injuries.

In opposition, plaintiffs fail to raise a triable issue of fact. Ordinarily, the opinion of a qualified expert that plaintiff's injuries were caused by a deviation from relevant standards of care would preclude a grant of summary judgment. However, "where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . the opinion should be given no

probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544, 784 NE2d 68, 754 NYS2d 195 [2002]). Plaintiffs' expert contends that a simple and proper neurological exam would likely have disclosed signs caused by the infant's tumor and led to an earlier diagnosis of the medulloblastoma growing in the infant's brain. Plaintiff's expert's opinion that a neurological exam should have been performed and that Harawitz deviated from the standard of care by not performing one is based upon the expert's claim that infant's neurological abnormality revealed itself in the form of months of persistent vomiting unrelieved by aggressive gastroenterological therapy, her headache, arching of her back, muscle rigidity, nystagmus and weight loss. However, other than the episodes of vomiting, none of the symptoms relied upon by plaintiffs' expert in support of his opinion manifested themselves until March 2010, the month the infant's medulloblastoma was diagnosed. The infant did not exhibit symptoms of headache and weight loss until March 14, 2010 and plaintiffs' expert offers no medical rationale supporting the claim that Harawitz improperly performed a neurological exam on that date. Similarly, positive vertical and horizontal nystagmus and lethargy were exhibited for the first time on March 23, 2010 and there is no evidence in the record that Harawitz was ever told, either by the infant's parents or her gastroenterologists, that the infant was experiencing muscle stiffness and arching of her back. The record also discloses that the infant's gastroenterological symptoms were actually improving over the course of her treatment with Drs. Breglio and Chehade, not worsening as plaintiffs' expert contends. Since plaintiffs' expert's opinion is not supported by facts in record it is of no probative value. Moreover, the expert's speculative opinion that a simple neurological exam would more likely than not have led to an earlier diagnosis of the infant's brain tumor reflects a reasoning back from the fact of injury to find negligence (*Brown v Bauman*, 42 AD3d 390 [1st Dept 2007]). Such hindsight reasoning is insufficient to defeat summary judgment (*id.*). Moreover, plaintiff's expert has not proffered an explanation as to how Harawitz negligently performed a neurological examination of the infant on March 14, 2010 or how that alleged malpractice was a proximate cause of the infant's injuries. Accordingly, it is hereby

ORDERED that Dr. Evan Harawitz's motion for summary judgment is granted and the complaint against him is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that movants are to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.

George J. Silver, J.S.C.

GEORGE J. SILVER
J.S.C.

Dated: January 15, 2016
New York County