

**Borino v O' Keefe**

2017 NY Slip Op 32695(U)

November 16, 2017

Supreme Court, Suffolk County

Docket Number: 04-20994

Judge: Jerry Garguilo

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INDEX No. 04-20994

CAL. No. 16-00092MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 47 - SUFFOLK COUNTY

**PRESENT:**

Hon. JERRY GARGUILO  
Justice of the Supreme Court

MOTION DATE 9-15-16  
ADJ. DATE 7-12-17  
Mot. Seq. # 005 - MD

-----X  
MATTHEW BORINO, an infant under the age of  
fourteen years, by his father and natural guardian,  
MICHAEL BORINO and MICHAEL BORINO,  
Individually,

Plaintiffs,

- against -

ROBERT O'KEEFE, M.D., and "JOHN DOE" &  
"JAMES DOE,"

Defendants.  
-----X

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Upon the following papers numbered 1 to 71 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-54; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 55-66; Replying Affidavits and supporting papers 67-71; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion of defendant Dr. Robert O'Keefe for summary judgment dismissing the complaint against him is denied.

Plaintiff Michael Borino, individually and on behalf of his son, infant plaintiff Matthew Borino, seeks to recover damages for injuries allegedly sustained by infant plaintiff during his birth. The complaint, as amplified by the bill of particulars, alleges Dr. O'Keefe failed to properly manage the labor and delivery of infant plaintiff's mother, Renee Lediuzet, failed to recognize and treat respiratory distress syndrome in infant plaintiff, and failed to administer dexamethasone and corticosteroids, causing various injuries to infant plaintiff.

Dr. O'Keefe now moves for summary judgment dismissing the complaint on the grounds that he did not deviate from acceptable standards of medical care and was not a proximate cause of plaintiffs' injuries. In support of the motion, defendant submits copies of the pleadings, the verified bill of particulars, two expert affidavits, transcripts of the parties' deposition testimony and of the deposition testimony of nonparty Renee Lediuzet, medical records and hospital records.

Nonparty Renee Lediuzet testified that when infant plaintiff was born, she was married to infant plaintiff's father, Michael Borino, and her name was Renee Borino. She testified that she discovered she was pregnant with infant plaintiff in September 2001, presented to Stony Brook Gynecology and Obstetrics for pre-natal care, and was seen primarily by Dr. Funt during her pregnancy. She testified that she had two pregnancies prior to becoming pregnant with infant plaintiff, and that she gave birth to twins in 1990 and to a daughter in 1999. Lediuzet testified that her water broke on the morning of March 15, 2002, and that she contacted Stony Brook GYN/OBG and was told to go to the hospital. She testified that she presented to the emergency department at Stony Brook University Hospital and was brought to the labor and delivery room, where a nurse placed a fetal monitor on her. She testified that she remained in the room for approximately one hour before Dr. O'Keefe presented and told her it was "time to deliver the baby." She testified that she was given an epidural, and that she and her husband went to the operating room where she underwent a cesarean section. Lediuzet testified that after the baby was delivered, she did not hear him cry immediately, but that he was brought to her in a basinet. She testified that she was discharged from the hospital on March 18, 2002, and that infant plaintiff was discharged from the hospital on April 10, 2002. She testified that she frequently brought infant plaintiff to Dr. Thomas, a pediatrician, in his first year of life, because he was not crawling or rolling or lifting his head, and that Dr. Thomas told her that infant plaintiff was a "slow learner." Lediuzet testified she later learned that infant plaintiff had cerebral palsy. Lediuzet testified that infant plaintiff received physical therapy and occupational therapy at home. By 2005, Lediuzet and Michael Borino divorced and she moved out of the house. The children remained with Michael Borino, who is their primary caregiver. Lediuzet testified that infant plaintiff has trouble walking, that he wears leg braces and uses crutches when he is in school, and that he is in special education classes.

Dr. O'Keefe testified that he is board certified in gynecology and obstetrics and has been in private practice for thirty years. He testified that he has been a principal in Stony Brook Gynecology/Obstetrics, and that Dr. Mark Funt is also a principal in the practice. He testified that he delivered Lediuzet's third child, Kayla, in 1999 by cesarean section with no complications. Dr. O'Keefe testified that he does not have an independent recollection of Lediuzet Borino or the time period at issue. Relying on medical records he created when she was a patient, Dr. O'Keefe testified that Lediuzet presented to Stony Brook GYN/OB on December 2, 2001 and was seen by Dr. Funt. He testified that he first saw Lediuzet on February 7, 2002, when she was 27 weeks pregnant. He testified that she was 31 years old and was not considered to have a high-risk pregnancy. He testified that he performed a physical examination on Lediuzet, and that her blood pressure and weight were normal, that fetal heart was positive, the head was down and vertex, and that there was active fetal movement. He testified that Lediuzet returned on February 26, 2002 and that she was seen by a nurse practitioner. He testified that the medical chart shows that Lediuzet's blood pressure was normal, her weight was normal, that the fetal heart and growth were normal, and her cervix was long and closed, indicating that there was no change

in the cervix and no evidence of premature labor. He testified that Lediuzet was scheduled to undergo a cesarean section on May 10, 2002.

Dr. O'Keefe testified that he next saw Lediuzet in the labor and delivery room of Stony Brook University Hospital on the afternoon of March 15, 2002 after her water broke, and that she was between 32 and 34 weeks pregnant. He testified that she was attached to a fetal heart monitor from 3:00 p.m. until 5:38 p.m. He testified that he performed an examination, that her cervix was dilated five centimeters, and that the fetus was in a complete breech presentation. Dr. O'Keefe testified that the amniotic fluid found in her vagina was clear, indicating that the fetus was not in distress, and that the fetal monitoring did not indicate fetal distress. He testified that he did not administer tocolytics to delay delivery as Lediuzet was in labor, and that he did not administer dexamethasone, as it is not standard procedure when the patient is under 32 weeks gestation. He explained that the protocol for administering dexamethasone is for patients who are not in labor and are under 32 weeks pregnant, and that tocolytics, used to delay delivery, are not administered to patients who are in active labor. Dr. O'Keefe testified that Lediuzet was in labor when he examined her and that her two prior cesarean sections created a risk of uterine rupture, thus necessitating a cesarean section. He testified that there were no complications and that the baby received an Apgar score between an eight and nine. He testified that he examined Lediuzet on March 16 and on March 17, 2002, and that he discharged her from the hospital on March 18, 2002, as everything was normal.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make 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]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, 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 [2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

To impose liability upon a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (*Senatore v Epstein*, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; *Poter v Adams*, 104 AD3d 925, 961 NYS2d 556 [2d Dept 2013]; *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]). To establish a prima facie showing of entitlement to summary judgment, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in his or her treatment of the patient, or that any departure was not a proximate cause of plaintiff's injuries (*see Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]). Furthermore, to satisfy his or

her burden on a motion for summary judgment, a defendant must address and rebut the specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

Here, Dr. O'Keefe submits affidavits of Dr. Howard Nathanson and Dr. Robert Koppel. Dr. Nathanson states that he is a board certified obstetrician and gynecologist and has been in private practice since 1978. He is a member of the active attending staff at Long Island Jewish Medical Center and is employed by Northwell Health Physician Partners. Dr. Nathanson states that he reviewed the medical and hospital records relating to Dr. O'Keefe's treatment of Lediuzet and infant plaintiff, the bill of particulars, and the transcript of Dr. O'Keefe's deposition testimony. He opines, with a reasonable degree of medical certainty, that Dr. O'Keefe's treatment of Lediuzet during labor and delivery did not depart from accepted obstetrical practice and was not a proximate cause of infant plaintiff's injuries. He states that Lediuzet was admitted to Stony Brook University Hospital on March 15, 2002 at 2:16 p.m. with spontaneous premature ruptured membranes when the fetus was at 33 weeks gestation. He states that Lediuzet was placed on a fetal monitor at 2:56 p.m. until the cesarean section was performed. He states that the monitoring strips indicated that the fetus was active with no distress, and that the baby weighed 4.54 pounds when he was born with an Apgar score between eight and nine. Dr. Nathanson states that the placenta pathology showed mild immaturity and that there were no post partum complications for the mother. He states that the baby was brought to the Neonatal Intensive Care Unit (hereinafter NICU) in good condition, but developed respiratory distress of prematurity which resolved after a three-week hospital stay. He states that the medical records indicate that in 2003, infant plaintiff was diagnosed with developmental delays. Dr. Nathanson states that the standard of care in 2002 for premature rupture of membranes was set by the American College of Obstetricians and Gynecologists and was relied upon by Stony Brook University Hospital. The standard, as it applies to antenatal corticosteroids, recommends that they be administered to patients with premature ruptured membranes before 32 weeks of gestation, and that after 32 weeks gestation such steroids are not recommended. Further, Dr. Nathanson opines that the advanced dilation of the cervix, the patient's two prior cesarean sections, and a breech presentation made delivery necessary upon admission.

Dr. Robert Koppel states that he is a board certified pediatrician with a subcertification in neonatal-perinatal medicine and has been practicing neonatal medicine since 1993. He states that he reviewed the medical records and hospital records of Lediuzet and Matthew Borino, and concludes with a reasonable degree of medical certainty that Dr. O'Keefe's treatment and care of Lediuzet did not depart from acceptable medical practice and was not a proximate cause of infant plaintiff's developmental delays. Dr. Koppel's opinion comports with the opinion of Dr. Nathanson regarding the necessity for the cesarean section and the reasons for not administering antenatal corticosteroids. He states that when the baby was sent to the NICU, he was in good condition but developed respiratory failure with pulmonary hypertension, and he was treated with high frequency ventilation, pulmonary vasodilator therapy, inotropic support, and a blood transfusion. He opines that such clinical course is characteristic of pulmonary vascular disease rather than surfactant deficiency, as "the infant required only a single dose of exogenous surfactant." Further, the low white blood cell count "strongly points to clinical sepsis" as the underlying cause of pulmonary hypertension/respiratory failure. He opines that prompt delivery was indicated to minimize the risks of uterine rupture and fetal asphyxia, and that the treatment rendered by

Dr. O'Keefe did not depart from accepted medical practice and was not a proximate cause of infant plaintiff's developmental delays.

Here, Dr. O'Keefe established, prima facie, his entitlement to summary judgment dismissing the complaint against him by proffering, among other things, the affidavits of two experts who opine that Dr. O'Keefe's treatment of infant plaintiff was in accordance with medically accepted standards of practice, that such treatment did not constitute a departure from same, and was not a proximate cause of infant plaintiff's injuries (*Garcia v Richer*, 132 AD3d 809, 18 NYS3d 401 [2d Dept 2015]). The burden, therefore, shifted to plaintiffs to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]).

In opposition to the motion, plaintiffs submit, among other things, two expert affidavits. Dr. Lawrence Borow, a board certified gynecologist and obstetrician since 1976, avers that Dr. O'Keefe departed from acceptable obstetrical practice by performing the cesarean section without waiting at least 24 hours to assess the fetus's lung maturity and by failing to administer dexamethasone to reduce respiratory distress. Dr. Borow states that there is nothing in the hospital records to indicate that Lediuzet was in active labor, that the hospital records do not indicate she was dilated five centimeters, nor is it written that she was having contractions. Further, he states that Lediuzet did not have an infection, and opines that it was not necessary to perform the cesarean section when it was performed. He states that neonatal morbidity is high among preterm survivors, and that respiratory distress syndrome is common. He explains that antenatal corticosteroid therapy, such as dexamethasone, reduces neonatal complications, especially respiratory distress syndrome. Dr. Borow refers to a committee opinion by the American College of Obstetricians and Gynecologists dated October 1998 which recommends that "all pregnant women between 24 and 34 weeks gestation who are at risk for preterm delivery" should be considered candidates for corticosteroid treatment. He opines that Lediuzet was a candidate for dexamethasone, and that its administration would have substantially reduced the risk of infant plaintiff being born with pulmonary immaturity and its sequelae.

Dr. Marcus Hermansen, board certified in pediatrics with subcertification in neonatal/perinatal medicine, submits an affidavit which details the factual basis for his opinion that substantially contradicts the opinion stated in the affidavit of Dr. Koppel. He opines, with a reasonable degree of medical certainty, that infant plaintiff's developmental delays and diplegic cerebral palsy were caused by severe respiratory distress due to his lung immaturity at birth. Dr. Hermansen states that there are several medical terms used to describe immature lungs at birth, and that immature lungs are also referred to as surfactant deficiency, hyaline membrane disease, respiratory distress syndrome and RDS. He states that the NICU records indicate that infant plaintiff developed complications from RDS, namely pulmonary hypertension, and pneumothorax, and that his respiratory failure worsened and caused brain damage. He opines, with a reasonable degree of medical certainty, that if Lediuzet received antepartum steroid therapy infant plaintiff would have been born with normal or near-normal lung function and would not have suffered brain damage.

Dr. Hermansen further states that he strongly disagrees with Dr. Koppel's opinion that sepsis was a cause of infant plaintiff's pulmonary hypertension and opines that pulmonary hypertension is "entirely consistent with the prematurity and surfactant deficiency." He opines that the single dose of surfactant

administered by the clinicians in the NICU establishes that infant plaintiff suffered from surfactant deficiency, as there is no other reason to administer such drug. Dr. Hermansen explains in detail why he disputes Dr. Koppel's opinion that infant plaintiff was septic, and concludes that infant plaintiff's injuries were caused by his premature birth without the administration of an antenatal corticosteroid.

It is evident that the conflicting expert affidavits raise triable issues of fact. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Feinberg v Feit*, 23 AD3d 517, 519, 806 NYS2d 661 [2d Dept 2005]). The affidavits raise credibility issues properly determined by a trier of fact (*Leavy v Merriam*, 133 AD3d 636, 20 NYS3d 117 [2d Dept 2015]; *Kunic v Jivotovski*, 121 AD3d 1054, 995 NYS2d 587 [2d Dept 2014]; *Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2013]). Accordingly, Dr. O'Keefe's motion for summary judgment in his favor is denied.

Dated: NOVEMBER 16, 2017

  
J.S.C.  
**HON. JERRY GARGUILO**

FINAL DISPOSITION     NON-FINAL DISPOSITION