

**Jennerich v Staten Is. Univ. Hosp.**

2019 NY Slip Op 32536(U)

July 23, 2019

Supreme Court, Richmond County

Docket Number: 150520/2014

Judge: Judith N. McMahon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

\_\_\_\_\_ x

IAS PART 6

BARBARA JENNERICH and WILLIAM JENNERICH,  
Individually and as parents and natural guardians of  
WILLIAM JOSEPH JENNERICH, an infant,

ORDER

Plaintiffs,

- against -

Index Number: 150520/2014

STATEN ISLAND UNIVERSITY HOSPITAL,  
LYDIA TRIPOLSKY, M.D., SIU-PUN CHAN, M.D.,  
and VAHID GHIASIAN, M.D.,

Hon. Justice  
Judith N. McMahon

Defendants.

*MOTION SEQUENCES*  
*#003, #004*

\_\_\_\_\_ x

Defendants', Staten Island University Hospital ("SIUH") and Dr. Lydia Tripolsky's motion (sequence 003) and Dr. Siu-Pun Chan ("CHAN") and Dr. Vahid Ghiasian's motion (sequence 004) for Summary Judgment seeking to dismiss the case are granted in part and denied in part as detailed herein.

Plaintiff was born premature in 2009. Within weeks of his birth, Plaintiff was observed to have tremor like activity. Plaintiff was diagnosed with Tuberous Sclerosis, a rare genetic disease that causes benign tumors to grow in the brain and on other organs. Subsequent to this diagnosis, the infant Plaintiff was repeatedly treated for seizure management, including brain surgeries and drug treatments.

On December 14, 2011, Plaintiff's mother observed him in a seizure like state at approximately 5:00 a.m. Plaintiff's parents had last observed him at approximately 1:00 a.m., and he was not seizing at that time.

Plaintiff was brought to the emergency room of SIUH and admitted to the Pediatric Intensive Care Unit ("PICU"). Neurological exam was positive for tonic/clonic seizure. The assessment was status epilepticus secondary to Tuberous Sclerosis and right lobe pneumonia.

From December 17<sup>th</sup> overnight into December 18<sup>th</sup>, Plaintiff seized four times. Propofol was administered and the seizures stopped. On December 19<sup>th</sup>, Plaintiff experienced five seizures.

A head CT scan performed on December 24, 2011, revealed diffuse effacement compatible with acute ischemia.

On December 28, 2011, Plaintiff was transferred to the Children's Hospital of Philadelphia ("CHOP") and remained there for five weeks.

At present, Plaintiff is ten years old and he is wheelchair bound.

Plaintiff alleges, among others, Defendants failed to properly treat seizures, caused seizures to continue unabated, failed to timely and properly prescribe medication, prescribed an excessive dose of medication, negligently administered Propofol, failed to administer Ativan or Versed to treat a seizure, and failed to treat a fever and caused a Cerebral Vascular Accident ("CVA").

All Defendants have moved for Summary Judgment to dismiss Plaintiff's claims.

At Oral Argument on the motions, it was noted that all claims against Defendants Dr. Lydia Tripolsky and Dr. Vahid Ghiasian have been discontinued, and so the portions of the motions concerning those Defendants are moot.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89

N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage.” *Castro v. New York City Health & Hosps. Corp.*, 74 A.D.3d 1005, 903 N.Y.S.2d 152 (N.Y.A.D. 2<sup>nd</sup> Dept. 2010). “To prevail on a motion for summary judgment in a medical malpractice action, the defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that any departure was not a proximate cause of the patient’s injuries.” *Kelly v. Rosca*, 164 A.D.3d 888, 83 N.Y.S.3d 317 (N.Y.A.D. 2<sup>nd</sup> Dept. 2018).

Defendant SIUH submitted an Affirmation from Dr. Lewis Singer. Dr. Singer opined that the care and treatment rendered to the infant Plaintiff was appropriate and timely and did not depart from the standard of accepted and reasonable medical care. Dr. Singer also stated that the seizures the infant Plaintiff experienced between December 17<sup>th</sup> and December 18<sup>th</sup> were timely recognized and addressed appropriately, and that the seizures were not the proximate cause of the changes noted on a CT scan administered on December 24, 2011.

Defendant CHAN submitted an Affirmation from Dr. Steven Pavlakis. Dr. Pavlakis opined that CHAN provided the appropriate pediatric and neurological care to the infant Plaintiff. Dr. Pavlakis further opined that the infant Plaintiff, “did not suffer a CVA under the care of Defendants. Although the 12/24/11 head CT at SIUH revealed evidence of ischemic changes, the subsequent MRIs on 12/28/11 and 1/25/12 at CHOP conclusively demonstrated that the infant Plaintiff did not have a stroke.”

Both moving Defendants submitted affirmations from experts which demonstrated their prima facie entitlement to judgment as a matter of law. See *Lefkowitz v. Kelly*, 170 A.D.3d 1148, 96 N.Y.S.3d 642 (N.Y.A.D. 2<sup>nd</sup> Dept. 2019).

“Once this showing has been made, a plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the defendant met the prima facie burden.” *Reid v. Soultis*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2<sup>nd</sup> Dept. 2016); See also *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Plaintiff did not oppose the portion of Defendants’ motion seeking the dismissal of the lack of informed consent claim, and so that portion of the respective motions is granted.

In opposition to the remainder of Defendant’s motions for Summary Judgment to dismiss, Plaintiff submitted an Affirmation from an expert physician who is board certified in Pediatrics and Pediatric Critical Care Medicine.

Plaintiff’s Expert stated that:

The deviations from good and accepted practice in the failure to properly monitor this child, whose complex presentation seemed beyond the scope of the capabilities of [SIUH], were a substantial factor in causing, contributing, and/or exacerbating the neurological damage to this child. The deviations included the failure to check Dilantin levels on a continual basis and the failure to timely note and detect that Dilantin levels were below therapeutic levels. These deviations are attributable to both [CHAN], who was in charge of the PICU, saw this child almost daily and failed to [ensure] that appropriate

monitoring of anti-convulsant medication was done, as well as [SIUH employee] Dr. Isakov on 12/17 – 12/18/2011, for failing to check to see if levels had been taken and were in therapeutic ranges.

Plaintiff's Expert further opined that:

The deviations attributable to both [SIUH employees] Dr. Isakov and Nurse Miller include the failure to closely monitor this patient's blood pressure and other vital signs during the night of 12/17-12/18. This resulted in a delay in timely addressing [infant Plaintiff]'s hypotension. Dr. Isakov's failure to attend to this child, perform physical examinations, observe the seizure activity first-hand and attempt to arrive at a differential diagnosis as to why there was a sudden escalation of seizure activity after 48 hours of being seizure free, coupled with his failure to contact the neurology attending or even the PICU Chief as the seizure activity continued, is also a deviation. Lastly, Dr. Isakov's use of Propofol in this child was an inappropriate choice under the circumstances and his failure to monitor the child closely for the potential side effects of hypotension caused and created a situation in which this child's blood pressure dropped to a level which required fluid resuscitation. These deviations in a child who had prior issues with seizures resulting from his TS caused

and/or contributed to significant ischemic neurological damage to  
[infant Plaintiff].

“In opposition, the Plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that the Defendants departed from the accepted standard of care.” *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2<sup>nd</sup> Dept. 2017).

As such, the portion of Defendants’ motions for Summary Judgment which Plaintiff opposed must be denied.

Accordingly, it is

ORDERED that the branches of Defendants’ motions seeking to dismiss Plaintiff’s cause of action related to a lack of informed consent is granted and that cause of action of the complaint is severed and dismissed for each Defendant, SIUH and CHAN; and it is further

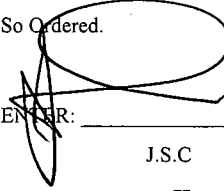
ORDERED that the remainder of Defendants’ motions for Summary Judgment seeking dismissal is denied, and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further,

ORDERED that the Clerk enter Judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: 7/23/19

So Ordered.  
  
\_\_\_\_\_  
J.S.C

Hon. Judith N. McMahon  
J.S.C.