

S.U. v New York Univ. Langone Med. Ctr.

2020 NY Slip Op 30370(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 805306/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

----- X Index No.: 805306/13

S. U., an infant by his mother and father as
natural guardians, MALKA ALTER and MEYER
Ungar and MALKA ALTER and MEYER
Ungar, individually,

Plaintiffs,

-against-

NEW YORK UNIVERSITY LANGONE
MEDICAL CENTER, AN ENTITY, JOHN
DOES 1-10 (FICTITIOUS NAMES) AND
ABC CORPORATIONS 1-10 (FICTITIOUS
ENTITIES),

Defendants,

----- X

JOAN A. MADDEN, J.:

In this action alleging medical malpractice, defendant New York University Langone
Medical Center (“NYU” or “the hospital”) moves for summary judgment dismissing the
complaint against it, and plaintiffs oppose the motion.

Background

This action involves allegations of negligence and malpractice in connection with the
evaluation, counseling and treatment of feeding problems of the infant plaintiff S.U. (hereafter
“S.U.”) following his birth at NYU on February 27, 2011, at 12:44 pm. At the time of his birth,
S.U. was a full term healthy male baby weighing 6 lbs, 1 ounce. S.U.’s Apgar scores at one, five
and ten minutes were 4, 9 and 9, respectively, and the initial nursing exam was normal.¹ When
S.U. was discharged from the hospital on March 1, 2011, at 10 am, he weighed 5 lbs, 15 ounces.
S.U.’s mother, plaintiff Malka Alter (“Ms. Alter”) declined 24 hour rooming-in, and although she

¹The Apgar score of 4 was the result of pre-birth stress and meconium which resulted in the S.U.
being intubated and suctioned, after he responded to oxygen, his score increase to 9, and he did
not require care in the ICU (Madden Aff. ¶ 10).

wanted to breastfed her son, she requested formula supplementation during his two nights in the newborn nursery (Alter EBT 96-97).

Ms. Alter testified that while she was in the hospital, she needed the nurses help to get her son to latch on while she was breastfeeding, and she was still having trouble getting the baby to latch on at the time of discharge from the hospital (Id at 83). She did not attend a breastfeeding class because she did not feel comfortable breastfeeding in a group setting (Id at 83-84). Ms. Alter testified that on the morning of March 1st, a lactation consultant visited her room while she was nursing and asked if she had any questions (Id at 85). According to Ms. Alter she “didn’t really know enough to ask questions. [The lactation consultant] looked at the baby. The nurse had already latched him on for me so he was sucking. He had a great suck.” (Id at 85). “[The lactation consultant] said he looks like he is doing great, and left.” (Id). Ms. Alter also testified that she was not taught how to express milk or about using a breast pump (Id at 146).

S.U.’s father and Ms. Alter’s husband, plaintiff Meyer Ungar (“Mr. Ungar”) testified that at the time of discharge, he went to the nursing station to get formula samples and was told that “they don’t give formula samples to babies that are breastfed.” (Ungar EBT at 50). With respect to the advice given at discharge, Ms. Alter testified that “[t]hey just said to look out for wet diapers and ...that he should be nursing every three hours.” (Id at 110). She testified that S.U. was “very alert” at NYU and was not irritable and did not have dry skin except for “dry lips” which her husband, S.U. father, plaintiff Meyer Ungar (“Mr. Ungar”) noticed on the morning of March 1st before they were discharged from the hospital (Id at 112). The record also contains photographs of S.U. with dry and peeling lips prior to discharge from NYU on March 1st (Plaintiff’s Opposition Exhibit G; Alter EBT at 100-102).

After discharge from the hospital, Ms. Alter testified that S.U. was crying so she “nursed

him a little” then she and Mr. Ungar found a pacifier in the bassinet that they thought the hospital put there and it calmed him down and he fell asleep (Id at 124). They drove an hour to a friend’s house where S.U. did not eat; they got home at 3:00 pm and Ms. Alter breastfed S.U. “for about fifteen minutes and then we fell asleep” (Id at 127). When S.U. woke from his nap, Ms. Alter saw “red powdery stuff” in his diaper and her husband noticed the baby’s “lips were dry, so he put some water on his lips” (Id at 128).

Ms. Alter testified upon discovery the red power in S.U.’s diaper, they called the hospital and asked for Krista LaMacchia, R.N. (“Nurse LaMacchia”), the nurse who discharged S.U. from NYU earlier that day. According to Ms. Alter, Nurse LaMacchia said to her, “oh, that’s concentrated urine, like making a sound like it is no big deal.” (Id at 115). When Ms. Alter asked if she should be concerned, the nurse “said that if I was concerned I should call my pediatrician . Then she abruptly hung up.”² (Id). After that Ms. Alter did not call the pediatrician but instead called her mother-in-law, who reassured her that it was concentrated urine which was common during the first days of nursing (Id).

Ms. Alter testified that later that afternoon, Ms. Alter kept trying to feed S.U. and “felt like he was not latching on and he was crying.” (Id at 128). That evening, as previously planned, they went to Mr. Ungar’s mother’s house in New Jersey to stay there for three weeks so they would have help with S.U. (Id at 134). Her mother-in-law’s house was two hours away, and Ms. Alter attempted to feed S.U. on the way there, and they arrived after midnight (Id at 134). Ms. Alter testified that she kept trying to feed S.U. between 2:00 am and 8:00 am but he was not latching on well, and he felt cold, although he continued to have wet diapers (Id at 136-137, 140).

²Nurse LaMacchia testified that she did not recall receiving this telephone call although she acknowledged that she was the discharge nurse at NYU on March 1, 2011 until 8:00 pm that night (LaMacchia EBT at 127-128).

The next day, on March 2, 2011, she took S.U. to the pediatrician around noon (Id at 143). Upon examining S.U., the pediatrician found that he was severely dehydrated and called an ambulance to take him to New Jersey Shore Medical Center, a local hospital, where S.U. remained for seven days (Id at 143). Dr. Richard Sultan, the physician who treated S.U. at New Jersey Shore Medical Center, testified that S.U. suffered “diffuse cytotoxic edema³” due to severe acute dehydration. (Sultan EBT at 43-45).

Plaintiffs allege that medical care provided by NYU, its employees and agents, deviated from accepted standards of nursing and lactation consultation care, resulting in brain injuries to S.U. Specifically, it is alleged that NYU was negligent in its failure to appropriately evaluate, treat, counsel and properly refer S.U. and Ms. Alter for appropriate care and treatment for feeding problems, inadequate oral intake, and signs and symptoms of dehydration prior to hospital discharge and following discharge; in its failure to follow the parents' specific instructions, desire, and belief that S.U. be provided adequate formula supplementation in the nursery, and its active discouragement of formula supplementation including upon discharge from the hospital; and through its failure to provide S.U.'s parents with adequate information about the risks of exclusive breastfeeding and the benefits of formula supplementation, including the risks of dehydration. Plaintiffs allege that as a result of these departures, S.U. suffers from brain injuries, blindness and developmental delays.

NYU moves for summary judgment, arguing that it cannot be held directly or vicariously liable for any alleged negligence as the treatment provided by its employees was within the

³Dr. Sultan testified that cytotoxic edema means “edema (which is a type of swelling) [that] is a manifestation of cell death, so that cell damage leads to an edema, a type of edema.” (Sultan EBT at 18-20). He also testified that his note in the New Jersey Shore Medical Center's medical records stating “anatoxic edema is a typographical error.”

standard of care. In support of its motion, NYU submits the expert affidavits of Nurse Loraine O'Neill ("Nurse O'Neill"), a postpartum nurse, and Dr. Lance Parton ("Dr Parton"), a neonatologist. Upon review of the medical records and testimony, both experts opine to a reasonable degree of medical certainty, that NYU did not depart from the standard of care or cause or contribute to S.U.'s injuries. Specifically, they both state that based on the record, S.U. received an adequate amount of oral intake via both breastfeeding and formula supplementation, and that S.U. did not suffer from feeding problems or dehydration during the birth admission (O'Neill Aff. ¶ 36 and Parton Aff. ¶ 36). In support of their opinions, the Nurse O'Neill and Dr. Parton refer to the Newborn Flow Sheets contained in the S.U.'s medical records which document that from 1:00 pm on the February 27th to 1:00 pm on the 28th, S.U. was fed 8 times, and that from 1:00 pm on the 28th through the time of discharge on March 1, S.U. was fed 11 times. As such, they opine that the infant was sufficiently fed, with both breastmilk and formula, during his 46 hours admission.⁴ (Id. ¶ 37 and Id. ¶ 37).

They further opine that S.U. was not exhibiting signs of dehydration during his admission at NYU such as dry diapers, no tears, cool skin, lethargy and sunken fontanelles (Id).

⁴With respect to the Hospital's chart, both experts explain that the infant's Hospital chart reveals that on February 27, 2011, which was Day 1 of life, Ms. Alter breastfed the infant-plaintiff for 10 minutes at 6:15 pm and 20 minutes at 7:15 pm. Thereafter, at 11 pm the infant-plaintiff received ½ an ounce of formula. On February 28, the infant-plaintiff received ¾ an ounce of formula at 3:00 am and "sips" of formula at 5:00 am. Ms. Alter breastfed the infant-plaintiff for 15 minutes at 8:00am; 15 minutes at 9:20am; 10 minutes at 12:30pm; 10 minutes at 1:30pm; and 5 cc's of formula was given at 2:30 pm. At 5:20pm, Ms. Alter breastfed again for 20 minutes and she repeated this at 6:00 pm. That night, Ms. Alter breastfed for 30 minutes at 9:30 pm and again for 30 minutes at 11:00 p m. On March 1, 2011, Ms. Alter breastfed for 10 minutes at midnight and the S.U. received ¼ ounce of formula at 1:00 am and again at 5:00 am. On March 1st, prior to the S.U.'s discharge at 11:00am, the infant was breastfed for 40 minutes at 6:20 am; and for 30 minutes at 9:15 am. (O'Neill Aff ¶ 40 and Dr. Parton Aff, ¶ 40).

In this connection, Dr. Parton states that on February 28, the pediatrician examining S.U. documented that the fontanel was open and flat, which he opines evidences that S.U. was not dehydrated (Parton Aff. ¶ 42). The experts also opine that the hospital records do not document any abnormality with respect to S.U.'s skin throughout the admission ("O'Neill Aff. ¶ 40; Parton Aff. ¶ 40).

As for allegations that S.U. showed signs of dehydration at discharge, Dr. Parton states that the infant had only lost 3% of his body weight from the time of birth, and opines 3% weight loss shows that the infant was able to maintain his blood sugar adequately and was not suffering from dehydration as a weight loss of 10% or more over the span of two days would be concerning for dehydration and hypoglycemia.⁵ (Parton Aff. ¶ 44). In addition, with regard to allegations that NYU ignored reports of symptoms of dehydration after discharge from NYU, and in particular, Ms. Alter's assertion that she called NYU to report "orange powder" in S.U.'s diaper, Nurse O'Neill and Dr. Parton opine that the advice given by the nurse that it was "concentrated urine" and if there was a concern the pediatrician should be called was in accordance with accepted practice (O'Neill Aff. ¶ 44; Parton Aff. ¶ 48). They also opine that it is common for newborn babies to excrete an orange powdery substance for the first 48 hours of life as babies are born with high levels of uric acid in their blood which is quickly excreted in the

⁵NYU also asserts that to the extent the plaintiffs' expert disclosure alleges that the infant's glucose failed to be tested in the hospital, or that the infant was suffering from hypoglycemia, these allegations do not provide a basis for liability as they were not asserted in the complaint or Bill of Particulars and that the Bill of Particulars affirmatively stated that "plaintiffs do not assert a test or procedure should have been performed by the defendant." Plaintiffs' experts do not opine that NYU departed in failing to test S.U.'s glucose and any departure in this regard is deemed abandoned.

urine and stool in the form of orange crystals or powder, which most of the time is not cause for concern and appropriately addressed by a pediatrician. (Id ¶ 45; Id ¶ 49).

NYU also submits the affirmation of Dr. Deena Blanchard, the attending pediatrician who discharged S.U. on March 1, 2011, who states, *inter alia*, that it is her custom and practice to perform a full head to toe assessment of newborns prior to discharge, review the birth weight of newborns and the discharging weight of newborns to assess whether the infant was feeding well; and explained that she advised parents in 2011 that newborns required feedings every 2-3 hours and that if the parents had any concerns about breastfeeding, to supplement feedings with formula. NYU also points to the deposition testimonies of Nurse LaMachhia, Nurse Edna Mendoza-Cabildo and Nurse Jane Weckessar, the way a baby is fed is the choice of the mother, including whether the supplement breastfeeding with formula, and that if the mother requests formula then the baby is given formula.

With respect to causation, NYU argues that S.U.'s injuries were not caused by NYU or its employees but, instead, were the result of the S.U.'s parents' failure to adequately feed S.U. after discharge from the hospital. In support of its argument, NYU cites Dr. Parton's opinion that "[i]n that absence of any documentation that the infant sustained feeding difficulties while at NYU, or exhibited any signs and symptoms of dehydration or hypoglycemia, it is entirely speculative to allege that the care and treatment rendered at Defendant Hospital in any way caused or contributed to the infant-plaintiff's alleged injuries and couch these allegations as conclusions." (Dr. Parton Aff. ¶ 69). In addition, NYU notes that Dr. Parton further opined that "it has been unequivocally established by the deposition testimony that Ms. Alter only fed the infant three times in a 24-hour period following discharge from NYU, which is medically

inadequate to sustain the nutrient needs of a newborn. As such, it is far from speculative, but in fact, clearly proven, that the failure to adequately feed the infant following discharge from NYU was the causative factor leading to the infant's alleged injuries.”⁶ (Parton Aff. ¶ 70).

Plaintiffs oppose the motion, asserting that the contrary to the opinions NYU’s experts, the medical records show that NYU departed from the standard of care and such departures were the proximate cause of S.U.’s injuries. In support of their opposition, plaintiffs submit the affidavits of Dr. Jessica Madden, M.D., who is board certified in Pediatric Medicine and Neonatal-Perinatal Medicine, and licensed to practice medicine in Ohio, and Liesel Sloan, a registered Nurse and International Board Certified Lactation Consultant, who is licensed to practice nursing in Georgia.⁷

Dr. Madden opines, upon reviewing the medical records and discovery in this action, that NYU failed to recognize that S.U. had five risk factors that would indicate that breastfeeding would fail, including 1) his mother was a first time mom; 2) an appreciation of her baby's 1 minute Apgar score which indicated the baby was stressed during the birth process; 3) the baby was small for his gestational age; 4) he was supplemented with formula within the first 24 hours after birth; and 5) he did not achieve an effective latch within the first 24 hours based on his

⁶NYU also argues that to the extent the nursing staff involved in Ms. Alter’s care and treatment followed orders of the attending physician, they would be shielded from liability unless the physician’s orders are “clearly contradicted” by normal practice. However, NYU does not point to any examples in the record where nursing staff acted on the orders of an attending physician.

⁷In reply, NYU argues that as Dr. Madden’s affidavit was notarized in Ohio and Nurse Sloan’s was notarized in Georgia, they should have been accompanied by a Certificate of Conformity. However, such an error is not fatal to the opposition. See Matapos Technology Ltd. v. Compania Andina de Comercio Ltda, 68 AD3d 672, 673 (1st Dept 2009)(the absence of a certificate [of conformity] as required under CPLR 2309(c) “is a mere irregularity, and not a fatal defect”).

consistent latch score (Madden Aff ¶ 10).

Dr. Madden states that the mother's continued latch deficit of 7 out of 10 as baby ended Day 1 of his life and began Day 2, and that these deficits were in areas that should have raised concerns about milk production and transfer, that is S.U.'s repeated attempts to latch, the need to stimulate him to suck, and his lack of consistent rhythmic and audible swallowing. (Madden Aff. ¶ 14). Given repeated latching issues and the lack of sufficient voids by the infant-plaintiff at this point in his hospitalization, Dr. Madden opines that the standard of care required the hospital staff to take some affirmative steps to assess, confirm, and document that the mother had adequate milk/colostrum production and refer the mother/baby to a pediatrician or lactation consultant. (Id ¶'s 14-16). Dr. Madden states that the medical records are devoid of any record or acknowledgement that any nurse made the attending pediatrician or lactation consultants aware of feeding concerns. (Id ¶ 17).

Dr. Madden states that Dr. Parton fails to recognize that S.U. was away from his mother for "long stretches of time during the two nights, namely twelve hours and then over five hours [and that] [t]his resulted in very long intervals between breastfeedings when the baby should have been placed on the breast every two to three hours" (Id ¶ 12). In addition, Dr. Madden states that Ms. Alter "was never educated or instructed at defendant hospital to pump or hand express her milk during the long periods of time her son was away from her."⁸ (Id. ¶'s 12,13, 18,

⁸In this connection, Dr. Madden states that "[although Nurse Russell's computer-templated note references education about pumping, there is no reference that any milk pumping was taught or performed consistent with the plaintiff-mother's testimony that she was not evaluated for milk supply or shown how to pump to promote milk production until after the baby's March 2 admission at Jersey Shore Medical Center for severe dehydration." (citing Alter EBT at 146). Dr. Madden also points to the testimony of Nurse Mahaud that pumping was not taught unless medically indicated and, if taught, it would be specifically recorded and described. (Nurse

19). She opines that these facts were detrimental to S.U.'s intake of fluids and his mother's efforts to produce milk, noting that Ms. Alter was never evaluated for her milk supply during her stay at NYU (Id ¶'s 18, 19, 22). In this connection, Dr. Madden states that “[t]here is no documented confirmation of any check by any nurse or lactation consultant for milk/colostrum supply [noting that]...the mother testified none was performed and she remained unaware of her lack of production until March 2 when she was assessed at [New Jersey Shore Medical Center].” (Id ¶ 62).

Dr. Madden also opines that there were clear violations of accepted feeding practices including, for example, that “Nurse Russell fed S.U. only 5 cc (i.e. ml) of formula at 2:30 pm on Feb. 28th in the newborn nursery and when Nurse Mahaud only fed him two 7.393 ml of formula during each of her two feedings on March 1st” (Id.). Dr. Madden opines that not only did this represent a “gross underfeeding [of S.U.] but it violated accepted standards for supplementary feeding of 15-30 ml per feeding every 3-4 hours as a bare minimum.” (Id. ¶ 18,19).

Dr. Madden further opines that feeding deficiencies were also shown by the recorded reduction of S.U.'s voids and stool from Day 1 to Day 2: two (2) stools and (2) voids on day 1 reduced to only one (1) of each on Day 2. His single wet diaper recorded at 6:20 a.m. on March 1st (Day 2) shortly before his discharge, occurred over 22 hours after the previous void. (Id. ¶ 24). However, Dr. Madden points out that the record shows that Nurse LaMacchia “did not bring this finding to the attention of a pediatrician or lactation consultant ...or the baby’s parents [who] were not told, at the time of discharge, that their son’s output was abnormal.” (Id). Dr. Madden also opines that the baby's marginal output was further negatively impacted by the

Mahaud EBT at 87)

Hospital dissuading his parents to use formula and pushing exclusive breastfeeding. (Id. ¶s 38, 42, and 63).

Dr. Madden further opines that NYU's nursing staff failed to appreciate or react to S.U.'s dry lips which indicated that he had a fluid problem, and notes that the presence of "the baby's obviously peeling and dry lips [was] shown in the parents' discharge photo." (Id. ¶ 26). Dr. Madden states that "the presence of dry lips only is abnormal and an indicator that there is a fluid issue with the patient, as compared to a patient who presents with dry skin everywhere" (Id). Dr. Madden opines that the nursing staff deviated from accepted standards of nursing care when they failed to respond to the signals of inadequate voids and peeling lips. (Id).

As for the call taken by the discharge nurse from Ms. Alter a couple of hours after discharge regarding orange powder in S.U.'s diaper, Dr. Madden opines that "Nurse LaMacchia should have understood the significance of the crystalized urine as a cumulative sign in this particular baby who already presented with inadequate voids and peeling, dry lips. She should have asked how the baby and taken a feeding history." (Id). Dr. Madden opines that "Nurse LaMacchia violated accepted standards of nursing care when she failed to advise the parents to seek immediate emergent care during the telephone conversation." (Id.).

Dr. Madden concludes that the hospital employees were negligent in failing to appropriately evaluate, treat and counsel S.U. and his mother via referral and/or follow-up with appropriate staff such as a lactation consultant, neonatologist or pediatrician for feeding problems and dehydration; that they ignored signs and symptoms of inadequate oral intake, including dehydration prior to discharge and after discharge; that plaintiffs' desire that their baby S.U. be provided adequate supplemental bottle feeding in the nursery was not honored; that they

discouraged plaintiffs from formula supplementation upon discharge; they failed to provide the plaintiff-mother with informed information about breastfeeding and supplementation to satisfy the obligation of informed consent; and they improperly counseled and instructed her regarding breastfeeding procedures and failed to provide proper disclosure about the symptoms and risk of dehydration due to exclusive breastfeeding in the presence of multiple risk factors. Dr. Madden opines that each of these failures represent departures from accepted practices of nursing and lactation consultation care by the hospital employees, nurses, and lactation consultants. (Id. ¶ 33). Dr. Madden opines that these departures were “a proximate and substantial contributing cause of the infant plaintiff’s severe dehydration induced hypoglycemia and cytotoxic (not ‘anoxic’) brain injury, blindness, and developmental delays.” (Id. ¶ 34).

As for Nurse Sloan, she opines that based on her experience as both a nurse and a lactation consultant, and based on her review of the extensive record, that Nurse O’Neill overlooks that on Day 1 of S.U.’s life (Feb. 27th at 8:08 p.m.), Nurse Kakita-Moore recorded a latch score assessment of only 7/10 with recorded deficiencies in the three (3) areas meant to confirm that he was in fact latching and receiving nutrients. His deficiencies were reflected in his repeated attempts to latch, inability to hold the nipple in his mouth, and the need to stimulate him to suck, and in the absence of spontaneous or rhythmic sucking or consistent auditory swallowing according to the medical record. (Sloan Aff., ¶’s 12, 50, and 54). In addition, Nurse Sloan states that the record shows that while the mother expressed a desire to breastfeed, she also requested formula supplementation and newborn nursery care and that records reflect her feeding choices and the standard pediatric orders called for formula every 3-4 hours which did not occur. (Sloan Aff., ¶ 13). Nurse Sloan also opines that the records do not reflect an evaluation or any

confirmation of sufficient breast milk/colostrum production, or adequate teaching or nursing evaluation of milk expression as required by accepted nursing practices and the NYU Breastfeeding Protocol in paragraph 8 (e) ("show mother how to maintain lactation") and page 10 under Patient/Family Education ("Educate mothers how to manually express their breast milk.") (Id. ¶ 12). In addition, contrary to Nurse O'Neill's opinion, Nurse Sloan opines that the nursery records reflect insufficient formula supplementation for S.U. on and particularly after the first day. She states "[t]he amount of formula provided to this baby was grossly inadequate and a violation of accepted standards for formula feeding/supplementation and acknowledged as such by the hospital's nurse employees in their depositions." (Id. ¶'s 13, 14).

In addition, while the record shows that on the first day, S.U. voided once and passed two stools, Nurse Sloan opines that a healthy, well fed infant should have numerous voids per day, especially a baby who receives supplementation. Nurse Sloan opines that the later decrease in the already minimal voids from S.U. after Day 1, which "should have raised red flags about the adequacy of the intake," and the repeating latching issues and the minimal voids/stools from the infant-plaintiff should have raised the question about whether the mother was producing sufficient nutrients for her son ((Id ¶'s 12, 14). In this connection, Nurse Sloan states "[The nurse] failed to appreciate what the latch scores demonstrate: a mother with no mechanical problems to breastfeeding but a baby who is having trouble feeding consistent with a potential difficulty in milk supply" (Id ¶ 14).

Nurse Sloan further states "[w]e know the mother did not have any meaningful breast production of colostrum as later discovered at Jersey Shore Medical Center...that the little nutrition received by S.U. during his admission to NYU consisted primarily in the very low

frequencies and quantities of formula given in the [newborn nursery]." (Id ¶ 40), Nurse Sloan further states: "[t]he attempt by Nurse O'Neill to obfuscate this by grouping, commingling and cumulating the inadequate supplemental feedings with numerous but failed breast feeding efforts does not change the reality" (Id ¶ 40). She further states that Ms. Alter was never educated or instructed at the defendant hospital to pump or hand express her milk during the long periods of time her son was away from her nor was she evaluated by a lactation consultant during her stay at NYU, and the absence of such evaluation as a violation of the standard of care in Nurse Sloan's opinion. (Id. ¶ 19). She also opines that NYU's nursing staff overlooked significant signs S.U.'s dehydration at discharge, including his dry, peeling lips (Id ¶'s 23, 41).

As to the discharge nurse's handling of the telephone call from the concerned plaintiff parents a couple of hours after discharge, Nurse Sloan opines that "It was a clear deviation from accepted standards of nursing practices, given this baby's history of latching problems, lack of sufficient voids and stools and other indicators for Nurse LaMacchia to fail to direct the parents to seek immediate help" (Id ¶'s 29, 44).

Nurse Sloan opines, within a reasonable degree of nursing certainty, that NYU and its employees were negligent and departed from the appropriate standard of care, by ignoring signs of inadequate oral intake, including dehydration, that the infant-plaintiff received inadequate oral intake, and dehydration began to occur during the 47 hours after he was admitted to NYU Hospital from February 27, 2011 through March 1, 2011. (Id. ¶ 39).

In reply, NYU asserts, *inter alia*, that the plaintiffs raise new allegations not included in the complaint or bill of particulars, including that the infant plaintiff had dry lips, which NYU

argues was not necessarily a sign of dehydration.⁹ NYU also argues that the opinions of plaintiffs' experts are speculative and conclusory, mischaracterize the record and are insufficient to raise a triable issue of fact. In addition, NYU asserts that plaintiffs' experts did not opine that any staff member at NYU who was not a nurse departed from the standard of care and/or proximately caused plaintiffs' claimed injuries, noting that Nurse Sloan stated that "it was concededly a nursing function, not a pediatrician's to monitor any feeding issues or signs of imminent dehydration and make referrals for signs of feeding issues or dehydration" (Sloan Aff. ¶ 17).

NYU further argues that plaintiffs' claims of vicarious liability should be stricken as plaintiffs' bill of particulars failed to differentiate as to specific allegations as against NYU staff members, and that, in any event, any surviving claims based on its alleged vicarious liability should be limited to Nurse Edna Mendoza-Cabildo, Nurse Tiffany Mahaud, Nurse Krista Lamacchia, and Nurse Jennifer Russell, the only individuals that plaintiffs' experts opined departed from the standard of care. Additionally, NYU contend that plaintiffs did not refute their arguments that the lack of informed consent and negligent hiring claims are without merit.

Discussion

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "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." Roques v. Nobel, 73 AD3d 204,

⁹NYU also annexes a second affidavit of Nurse O'Neill which is identical to the one previously submitted with the exception of changes in the introductory paragraph relating to certain technical requirements for affidavits.

206 (1st Dept 2010). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the Bill of Particulars. Id. The expert opinion relied on by defendant must be based on the facts in the record or those personally known to the expert. Defense expert opinion should specify “in what way” a patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dept 2010). A defendant’s expert opinion must also “explain what defendant did and why.” Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

In this case, NYU has met its burden based on the opinions in expert affidavits of Nurse O’Neill and Dr. Parton that NYU did not depart from the standard of care or cause or contribute to S.U.’s injuries as S.U. received an adequate amount of oral intake via both breastfeeding and formula supplementation and that S.U. did not suffer from feeding problems or dehydration during the birth admission, and that NYU’s nurse acted within the standard of care when contacted regarding S.U. after S.U. was discharged from NYU. In addition, NYU has met its burden of demonstrating that any alleged departure was not a substantial factor in causing injuries to S.U.

Accordingly, the burden shifts to plaintiffs “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez v. Prospect Hosp., 68 NY2d 320, 324-325 (1986). Specifically, in a medical malpractice action, this requires that a plaintiff opposing a defendant’s summary judgment motion “submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a

triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant[’s]... summary judgment motion.” Id.

In addition, a plaintiffs’ expert’s opinion “must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” Dallas-Stephenson v. Waisman, 39 AD3d 303, 307 (1st Dep’t 2007) (internal citations and quotations omitted). If “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. Downtown Hospital, 99 NY2d 542, 544 (2002). On the other hand, “[t]he law is well settled that when competing experts present adequately supported but differing opinions on the propriety of the medical care, summary judgment is not proper.” (See Rojas v. Palese, 94 AD3d 557 (1st Dep’t 2012))

Here, plaintiffs have met this burden with respect to the medical malpractice claim based on the opinions of Dr. Madden and Nurse Sloan that NYU departed from the applicable standards of nursing and lactation consulting care including in failing to evaluate, care and counsel S.U. for feeding problems, in failing to provide adequate formula supplementation, in failing to recognize and treat S.U. for signs of dehydration prior to discharge from the hospital, including inadequate voids and dry lips, and upon discharge, discouraging formula supplementation and failing to provide S.U.’s parents with adequate information about the risks of exclusively breastfeeding, and the benefits of supplementation by formula and/or by expressing or pumping breastmilk, and after discharge, upon receiving a telephone call from S.U.’s mother, NYU’s employee Nurse LaMacchia failed to understand the significance of

crystalized urine in S.U.'s diaper as a cumulative sign of dehydration and departed from the standards of nursing care in failing to seek emergent help for S.U. In addition, Dr. Madden's opinion that these departures were a proximate and substantial contributing cause of the infant plaintiff's injuries is sufficient to raise an issue of fact as to causation.

Moreover, the opinions of plaintiffs' experts are adequately supported by the record, including evidence that during her hospital stay until discharge, Ms. Alter had difficulty getting S.U. to latch on to breastfeed, that S.U. had a single wet diaper during the 22 hours before discharge; that S.U. had dry and peeling lips on the date of discharge; that S.U. was fed 5 cc's of formula at 2:30 pm on February 28; and two 7.393 ml during two feedings on March 1st; that Ms. Alter was not educated or taught how to express or pump breast milk during her admission at NYU; and that the nurses refused Mr. Ungar's request for formula at the time of discharge.

In addition, NYU's argument that plaintiffs were required to allege that S.U. had dry lips in the Bill of Particulars is unavailing. See Toth v. Bloshtinsky, 39 AD3d 848, 849 (2d Dept 2007)(noting that "[t]he purpose of a bill of particulars is to amplify pleadings, limit proof, and prevent surprise at trial, not to provide evidentiary material"). As for NYU's assertion that the Bills of Particulars are insufficient to support claims of vicarious liability based on the conduct of individual nurses as it does not specify the names of the individual nurses, such assertions are without merit, particularly in light of the identification of such employees during discovery, and in plaintiffs' expert affidavits.

Furthermore, Suits v. Wyckoff Heights Medical Center, 84 AD3d 487 (1st Dept), appeal withdrawn, 17 NY3d 804 (2011), on which NYU relies, is not to the contrary. In Suits, the First Department held that when the bill of particulars failed to specify members of the Hospital staff

who committed malpractice with the exception of one physician (Dr. Abakporo), the defendant Hospital was not required on summary judgment to demonstrate the absence of negligence of the unspecified staff members. Significantly, however, in dismissing the claims against the Hospital for vicarious liability based on the asserted acts and omissions of unspecified staff members, the court noted that plaintiffs failed to “sustain their burden in that there is no evidence that anyone other than Dr. Abakporo managed plaintiff’s care....” *Id* at 490. In contrast, here, as indicated above, plaintiffs have provided evidence as to specific members of NYU’s staff who participated in the care and treatment of S.U. Moreover, NYU’s request that its vicarious liability should be limited to the specifically identified nurses is denied as this is an evidentiary issue for trial.

Next, NYU is entitled to summary judgment dismissing plaintiffs’ claims alleging lack of informed consent and negligent hiring. With respect to the lack of informed consent claim, it is well settled that lack of informed consent is not applicable to noninvasive treatment of the kind at issue in this action. See Deutsch v. Chaglassian, 71 AD3d 718, 719-720 (2d Dept 2010)(trial court should have dismiss claim for lack of informed consent as defendant doctor “did not perform a ‘non-emergency treatment, procedure or surgery’ or ‘a diagnostic procedure which involved invasion or disruption of the integrity of the body,’” [citing Public Health Law 2805–d (2)]; Janeczko v. Russell, 46 AD3d 324, 325 (1st Dept 2007)(holding that “[a] failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that involve[s] invasion or disruption of the integrity of the body”)(internal citations omitted). In addition, the negligent hiring claim, which appears to have been abandoned by plaintiffs, must also be dismissed as the record is devoid of evidence that NYU hired any of the employees at issue “with knowledge of the employee’s propensity for the sort of behavior

which caused the injured party's harm." Sandra M. v. St Luke's Roosevelt Hosp. Center, 33 AD3d 875, 879 (2d Dept 2006).

Conclusion

In view of the above, it is

ORDERED that NYU's motion for summary judgment is granted to the extent of dismissing the lack of informed consent claim, and the negligent hiring claim, and is otherwise denied; and it is further

ORDERED that a pre-trial conference shall be held in Part 11, room 351, 60 Centre Street on January 23, 2020 at 10:00 a.m

Dated: January 6, 2020



J.S.C.

HON. JOAN A. MADDEN
J.S.C.