

**A.V. v Jacovetty**

2020 NY Slip Op 34591(U)

January 16, 2020

Supreme Court, Westchester County

Docket Number: Index No. 60352/2017

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

-----X  
A.V.,an infant, by her mother and natural guardian  
SAMANTHA GUZMAN,

Plaintiffs,

-against-

ERICA JACOVETTY, MARVELLE MALONEY,  
WESTCHESTER MEDICAL CENTER and WESTCHESTER  
HEALTH CARE CORPORATION, MONICA KAPOOR and  
ADVANCED PHYSICIANS SERVICES, P.C.,

Defendants.  
-----X

**ECKER, J.**

**INDEX NO. 60352/2017**

**DECISION/ORDER**

**Motion Seq. 2 <sup>1</sup>**

**Submission Date: 12/11/2019**

The following papers were read on the motion of defendants MONICA KAPOOR and ADVANCED PHYSICIANS SERVICES, P.C. [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint, as against A.V.,an infant, by her mother and natural guardian SAMANTHA GUZMAN (plaintiff);

**PAPERS**

Notice of Motion, Affirmation, Exhibits A-P  
Affirmation in Opposition, Expert Affirmation, Exhibits A-C  
Affirmation in reply

Upon the foregoing papers, the court determines as follows:

Plaintiff's mother, Samantha Guzman, was admitted to WMC on August 3, 2016 after having been transferred from Orange Regional Medical Center. She was first admitted to WMC due to potential medical complications that were identified at week 30 of gestation. Plaintiff, infant A.V., was born by Cesarean section on August 24, 2016, at 12:49 a.m. She remained at WMC until the date of discharge on August 30, 2016.

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<sup>1</sup> By letter dated November 22, 2019, counsel for defendants Jacovetty, Maloney, WMC and WHCC advised the court that the action had been settled by plaintiff and these named parties [NYSCEF No. 154]. Hence, the action continues only as against Monica Kapoor and Advanced Physicians Services, P.C.

Monica Kapoor, an employee of Advanced Physician Services, P.C., was the attending physician supervising A.V.'s delivery from on or about August 23<sup>rd</sup> at 7:00 p.m. until the infant's delivery just after midnight on August 24, 2016. It is plaintiff's contention that Kapoor was negligent in not ordering an earlier delivery at 11:33 p.m. on August 23<sup>rd</sup>, based on the irregular readings generated by the fetal monitor, and that the delay in delivery caused the infant to sustain debilitating injury occasioned by the lack of oxygen.

In support of Kapoor's motion to dismiss, defendant submits the expert's affirmation of Joseph Cioffi, M.D., board certified and credentialed in high-risk obstetrical care. [NYSCEF No. 77]. Cioffi opines that from the time Kapoor assumed Guzman's care on August 23, 2016, by transferring Guzman to labor and delivery and ordering one-on-one nursing upon the complaint of right flank pain, there was no status change or indication of change in fetal well-being. Cioffi opines that the fetal heart tracings remained Category 1; the decision to deliver the fetus was correctly determined as the tracings became equivocal; and Kapoor's actions were timely and appropriate. Cioffi maintains that Guzman was extremely obese, making the monitoring of the fetal heart rate more difficult. Under the circumstances, loss of signal can occur, but did not hinder the ability to access and assess the fetal heart rate as the external monitor was giving sufficient readings and an internal monitor was contraindicated and appropriately not used. Cioffi states that the decisions to deliver the infant and the STAT C-section were timely and appropriate, and there was no evidence that a reasonably prudent person would not have consented to the procedure.<sup>2</sup> In addition, the NICU staff suitably cared for the infant and Kapoor's continued attention was appropriately on Guzman. Cioffi states that the duty to the infant ended upon delivery, Kapoor met the standard of care, and Kapoor's actions were unrelated to the alleged injuries.

In opposition, plaintiffs submit the affirmation of an expert (not identified although revealed to the court), appropriately board certified and credentialed in the diagnosis, evaluation and treatment of fetal distress. Plaintiff's expert opines that, based upon the lack of entries in the medical record, it is not clear when Kapoor was present at the mother's bedside. Based upon fetal heart rate patterns and signal loss, Guzman's discomfort level, the fetus' breech position, and the only 2 centimeters cervical dilation, on the evening of August 23<sup>rd</sup>, the expert opines that Kapoor departed from good and accepted practice by failing to recognize a non-reassuring fetal heart rate pattern and failing to order an emergency Cesarean section as early as 10:00 p.m. and no later than 11:33 p.m. Plaintiff's expert also opines that the departure was a substantial factor in causing A.V.'s significant neurological disabilities, due to prolonged fetal distress and with Hypoxic Ischemic brain injury, the diagnosis of which is confirmed in the report submitted by plaintiff, prepared by pediatric neurologist Daniel Adler.

When considering a motion for summary judgment in a medical malpractice action, in order to establish the liability of a medical provider for medical malpractice, a plaintiff must prove that the provider deviated or departed from accepted community standards of practice, and that

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<sup>2</sup> There is no cause of action pled for lack of informed consent; there is a passing reference to this in the Bill of Particulars at paragraphs 14-15.

such departure was a proximate cause of the plaintiff's injuries (*Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067 [2d Dept 2017]; *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]). Thus, a defendant physician seeking summary judgment in a malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from good and accepted medical practice or that any alleged departure did not proximately cause the plaintiff's injuries (*Gullo v Bellhaven Center for Geriatric and Rehabilitative Care, Inc.*, 157 AD3d 773 [2d Dept 2018]). Where such a showing is made, the burden shifts to the plaintiff to produce evidentiary proof in admissible form demonstrating the existence of a triable issue of fact (*Duvidovich v George*, 122 AD3d 666 [2d Dept 2014]; see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Bowe v Brooklyn United Methodist Church Home*, *supra*). 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 a defendant's summary judgment motion (*Duvidovich v George*, *supra*; see *Keun Young Kim v Lenox Hill Hosp.*, 156 AD3d 774 [2d Dept 2017]; *Gullo v Bellhaven Center for Geriatric and Rehabilitative Care, Inc.*, *supra*).

Furthermore, summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*Nisanov v Khulpateea*, 137 AD3d 1091 [2d Dept 2016]; *Henry v Sunrise Manor Center for Nursing and Rehabilitation*, 147 AD3d 739 [2d Dept 2017]). Conflicting expert opinions raise credibility issues that are to be resolved by the fact finder (*Omane v Sambaziotis*, 150 AD3d 1126 [2d Dept 2017]; *Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]).

Here, there are conflicting expert opinions as to the appropriateness of defendant Kapoor's actions, and whether those actions were the proximate cause of the infant plaintiff's alleged injuries. As such, whether Kapoor departed from the standard of care and whether that deviation caused the alleged injuries are factual questions that are for the jury to resolve (*Amendola v Brookhaven Health Care Facility, LLC*, *supra*; *Henry v Sunrise Manor Ctr. For Nursing & Rehabilitation*, *supra*). Consequently, the motion for summary judgment is denied.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

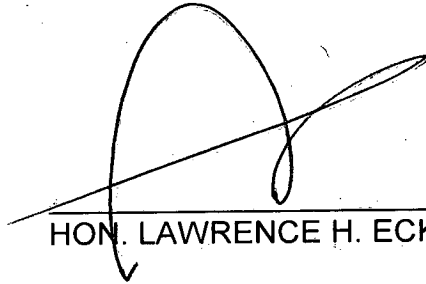
ORDERED that the motion of defendants MONICA KAPOOR and ADVANCED PHYSICIANS SERVICES, P.C. [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint, as against plaintiff A.V., an infant, by her mother and natural guardian SAMANTHA GUZMAN is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on March 24, 2020, at 9:15 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York  
January 16, 2020

ENTER,

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal stroke and a small flourish.

HON. LAWRENCE H. ECKER, J.S.C.

**Appearances**

All parties appearing via NYSCEF