

Lybinova v Tsapok

2023 NY Slip Op 34046(U)

November 14, 2023

Supreme Court, Richmond County

Docket Number: Index No. 150958/2019

Judge: Charles M. Troia

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
SVETLANA LYBINOVA, as parent and natural guardian of D.F.,
an infant, and SVETLANA LYBINOVA individually,

Present:
IAS PART 1

HON. CHARLES M. TROIA

Plaintiff,

DECISION and ORDER

-against-

Index No.150958/2019

ISOLDA TSAPOK M.D., RICHMOND MEDICAL HEALTH CARE P.C.,
STATEN ISLAND UNIVERSITY HOSPITAL, GALINA FEINSTEIN, M.D.,
and JOHN AND JANE DOES 1-50 (said names being fictitious, it
being the intention of Plaintiff to designate any and all
parties, individuals, entities, or corporations, if any, having
or claiming a knowledge of the foregoing complaint),

Motion Sequences 003, 004
and 005

Defendants.
-----X

The following papers numbered 1 to 9 were marked fully submitted on the 15th day of September 2023:

Notice of Motion (003) by Defendant, STATEN ISLAND UNIVERSITY HOSPITAL, with Supporting Papers and Exhibits.....1

Affirmation in Opposition by Plaintiff with Supporting Papers and Exhibits.....2

Defendant’s Affirmation in Reply.....3

Notice of Motion (004) by Defendants, ISOLDA TSAPOK M.D., RICHMOND MEDICAL HEALTH CARE P.C., with Supporting Papers and Exhibits.....4

Affirmation in Opposition by Plaintiff with Supporting Papers and Exhibits.....5

Defendants’ Affirmation in Reply.....6

Notice of Motion (005) by Defendant, GALINA FEINSTEIN, M.D., with Supporting Papers and Exhibits.....7

Affirmation in Opposition by Plaintiff with Supporting Papers and Exhibits.....8

Defendant’s Affirmation in Reply.....9

In this alleged medical malpractice action, the defendants, ISOLDA TSAPOK M.D., RICHMOND MEDICAL HEALTH CARE P.C. (hereinafter "Tsapok" and "RMHC"), STATEN ISLAND UNIVERSITY HOSPITAL (hereinafter "SIUH") and GALINA FEINSTEIN, M.D. (hereinafter "Feinstein") each move for summary judgment and dismissal of the complaint pursuant to CPLR § 3212, and for such other, further and different relief as this court deems just and proper.

The defendants, Tsapok and RMHC, support their motion (004), inter alia, with the expert affirmations of: Wendy Fried, M.D., a physician duly licensed to practice medicine in New York and who is board certified in obstetrics and gynecology; and Ingrid Taff, M.D., a physician duly licensed to practice medicine in New York and who is board certified in psychology and neurology with special competency in child neurology.

The plaintiff opposes Tsapok and RMHC's summary judgment motion and has submitted, inter alia: the expert affidavit of Wendy Humphrey, M.D., a physician duly licensed to practice medicine in Florida and Ohio and who is board certified in obstetrics and gynecology; and the expert affirmation of Tiffani L. McDonough, M.D., a physician duly licensed to practice medicine in New York, Maine and Illinois and who is board certified in psychology and neurology with special qualifications in child neurology.

The defendant, SIUH, supports its motion (003), inter alia, with the expert affirmations of: Iffath Abbasi Hoskins, M.D., a physician duly licensed to practice medicine in New York and who is board certified in obstetrics and gynecology and maternal fetal medicine; Edmund LaGamma, M.D., a physician duly licensed to practice medicine in New York and who is board certified in pediatrics and neonatology; and Phillip Overby, M.D., a physician duly licensed to practice medicine in New York and who is board certified in pediatric neurology and epilepsy.

The plaintiff opposes the hospital's summary judgment motion and has submitted, inter alia: the expert affidavit of Dale Bull, M.D., Ph.D., a physician duly licensed to practice medicine in California and who is board certified in Pediatrics; the expert affidavit of Wendy Humphrey, M.D., a physician duly licensed to practice medicine in Florida and Ohio and who is board certified in obstetrics and gynecology; and the expert affirmation of Tiffani L. McDonough, M.D., a physician duly licensed to practice medicine in New York, Maine and Illinois and who is board certified in psychology and neurology with special qualifications in child neurology.

The defendant, Feinstein, supports her motion (005), inter alia, with the expert affirmations of: Walter J. Molofsky, M.D. (the infant's treating physician), a physician duly licensed to practice medicine in New York and who is board certified in pediatrics and psychology and neurology with special competence in child neurology; Lorry Rubin, M.D., a physician duly licensed to practice medicine in New York and who is board certified in pediatric infectious diseases; and Bidyut Pramanik, M.D., a physician duly licensed to practice medicine in New York and who is board certified in diagnostic radiology and neuroradiology.

The plaintiff opposes Feinstein's summary judgment motion and has submitted, inter alia: the expert affirmation of Tiffani L. McDonough, M.D., a physician duly licensed to practice medicine in New York, Maine and Illinois and who is board certified in psychology and neurology with special qualifications in child neurology; the expert affirmation of Jana Shaw, M.D., a physician duly licensed to practice medicine in New York and who is board certified in pediatric infectious diseases; and the expert affidavit of Giulio Zuccoli, M.D., a physician duly licensed to practice medicine in Pennsylvania and New Jersey and who is board certified in neuroradiology.

The court notes that the plaintiff failed to oppose the defendants' motions for summary judgment regarding the second, third, fourth, sixth, seventh, eighth and ninth causes of action. As such, those causes of action are hereby dismissed. The fifth cause of action claiming lack of informed consent was withdrawn by the plaintiff at oral argument with respect to SIUH and Feinstein. Claims regarding the fifth cause of action for lack of informed consent, only as they relate to the defendants Tsapok and RMHC and claims regarding the first cause of action (claims for medical malpractice against all defendants) are left remaining for the court's consideration.

Upon the foregoing papers: the motion of defendants, ISOLDA TSAPOK M.D. and RICHMOND MEDICAL HEALTH CARE P.C., is granted in its entirety; the motion of defendant, SIUH, is granted in its entirety; and the motion of defendant, GALINA FEINSTEIN, M.D., is granted in its entirety. The court's decision is outlined below.

FACTS

It is alleged that the defendants failed to diagnose and treat a cytomegalovirus (CMV) infection in both the plaintiff-mother and infant-plaintiff, resulting in permanent and severe neurologic injuries and deficits to the infant-plaintiff.

On September 14, 2016, the plaintiff presented to Tsapok for an annual visit and reported having a positive home pregnancy test. A sonogram was performed which did not reveal the presence of an intrauterine pregnancy or an ectopic pregnancy. The plan was to obtain prenatal labs and perform a repeat evaluation in seven days. A follow-up sonogram would be performed as necessary. The plaintiff returned on September 16, 2016, and blood work was done. She returned on September 30, 2016, at which time a repeat sonogram revealed an intrauterine pregnancy at six weeks, one day gestational age. This corresponded to a due date of May 25, 2017. Prenatal labs were obtained, and the plaintiff was instructed to follow up in three weeks. The prenatal lab results were reported to be within normal limits.

The plaintiff returned to Tsapok for routine prenatal visits on October 27, 2016 (ten weeks gestation), November 9, 2016 (12 weeks 3 days gestation), November 28, 2016 (15 weeks gestation), December 19, 2016 (17 weeks 5 days gestation). The pregnancy was proceeding normally and without incident.

On January 17, 2017, the plaintiff underwent obstetric ultrasound testing at Staten Island University Hospital Perinatology, P.C. At that time the gestational age by ultrasound was 21 6/7 weeks with an estimated date of delivery of May 25, 2017. The findings were within normal limits and there were no fetal abnormalities identified. The impression included a single living intrauterine pregnancy. The size was appropriate for the gestational age.

The plaintiff testified that sometime during January or February 2017, she became sick with "flu like" symptoms. She testified that she called Tsapok's office and was told to take Tylenol. She did not want to go to the emergency room because she was afraid that she would catch something else. The plaintiff also testified that she traveled to Mexico in late January, early February 2017. She testified that upon return, she requested to be tested for Zika virus and that a sonogram be performed, only for Tsapok to refuse. Tsapok's records are silent in that regard. The plaintiff returned to see Tsapok on February 13, 2017. A sonogram done at that time confirmed the gestational age of 25 weeks 1 day.

The plaintiff returned to Tsapok for routine prenatal visits on March 9, 2017 (29 plus weeks gestation), March 27, 2017 (31 plus weeks gestation), April 24, 2017 (35 weeks gestation), and May 2, 2017 (36 plus weeks gestation). The pregnancy continued to progress normally and without incident.

The plaintiff returned on May 9, 2017 (37 plus weeks gestation). The record notes that she complained of left inguinal pain with discomfort. An examination revealed an enlarged, moveable lymph node. Blood work, including a viral panel to test for Epstein Barr, herpes, toxoplasmosis, rubella/measles, and cytomegalovirus (CMV), was ordered. Though the plaintiff does not recall, the record states that she was also referred to her primary care physician for a follow-up consult. She was instructed to return in two days for follow up with Tsapok.

The plaintiff returned on May 12, 2017. The results of the blood work ordered on May 9th were still pending. The record notes that Tsapok spoke with the plaintiff about the risks associated with a CMV infection during pregnancy. The plaintiff denies this. (See NYSCEF DOC. NO. 164, page 84).

The plaintiff returned on May 16, 2017. The May 9th blood work results revealed elevated CMV IgM antibodies and CMV IgG antibodies. The record notes that these results were discussed with the plaintiff, that the risks were discussed with her and that she was referred for an infectious disease consult. The plaintiff denies this conversation took place. (See NYSCEF DOC. NO. 164, page 84).

The plaintiff returned on May 23, 2017 (39 plus weeks gestation). Again, the record notes that the risks of congenital CMV were discussed with the plaintiff and she was advised to see an infectious disease specialist. The plaintiff denies this conversation took place.

The last office visit occurred on May 26, 2017. She was 40 plus weeks pregnant. The plan was to schedule an induction of labor at 41 weeks (May 31, 2017). Again, the record notes that there was a discussion with the plaintiff regarding the risk of CMV transmission to the fetus. However, the plaintiff denied this at her deposition.

On May 31, 2017, the plaintiff presented to the SIUH Labor and Delivery unit for induction of labor. She was 40 weeks, 6 days pregnant by last menstrual period. She denied contractions, loss of fluids or vaginal bleeding. She reported good fetal movement and denied any complications with the pregnancy. Cervidil was placed in the plaintiff's vagina at approximately 7:30 p.m. on May 31st. She remained on intravenous infusion and continuous fetal monitoring. She underwent artificial rupture of membranes at approximately 2:31 a.m. on June 2, 2017, and by 2:57 a.m., there was complete cervical dilatation. Delivery occurred at 3:30 a.m. on June 2, 2017. The plaintiff gave birth to a baby boy weighing 2760 grams (six pounds, one ounce) and with Apgar scores of 9 at 1 minute and 9 at 5 minutes. The infant was noted to have symmetrical IUGR. The infant was transferred to the regular nursery. Both mother and infant were discharged from SIUH on June 4, 2017.

On June 5, 2017, the infant presented to Feinstein's office for his first pediatric visit. Feinstein diagnosed him with microcephaly and referred him to a pediatric neurologist (Dr. Brosgol). She also recommended the bilirubin levels be repeated, since the infant was born with slight jaundice. The infant continued to seek treatment from Feinstein through September 20, 2018.

The infant was examined by Dr. Brosgol on June 23, 2017, at approximately three weeks of age. An ultrasound of the infant's head done during the visit revealed abnormal findings including, "enlarged lateral ventricles, prominent sub ependymal nodules on both sides, nodules in the bilateral temporal and

posterior horns (hemorrhage vs. tumors); questionable hypoplasia of corpus callosum, rule out PVL." A follow-up MRI was recommended.

The child was referred to Dr. Walter Molofsky, a pediatric neurologist, for evaluation. Dr. Molofsky ordered an MRI of the head, video EEG and a TORCH panel. The MRI revealed significant abnormalities in the child's brain, the configuration of which suggested the possibility of a congenital viral infection, including CMV, toxoplasmosis or Zika. The Video EEG was noted to be normal. The TORCH panel was reported as follows: Herpes simplex 1 IGG - 5.49 (<+0. 90) (detected); HSV type II - 0.15 (not detected); CMV IgG - 1.60 (detected); Toxoplasma IgM - <3.0 (not detected); Varicella - Zoster - 0.00 (not detected); Rubella AB IGM <10.0 (not detected); Parvovirus B19 IGG IgM -0.33 (not detected).

The infant plaintiff was admitted to Mt. Sinai in October 2017, November 2017, January 2018, February 2018, March 2018, and April 2018. It is undisputed that, over the course of those admissions, the infant was diagnosed with congenital CMV, seizure disorder, spastic quadriplegia, epilepsy, and epileptic encephalopathy.

On October 2, 2018, the infant was seen by Dr. Lilian Liou Cohen, a geneticist. A genetics study identified the infant as having a de novo mutation of the p.G1067E variant on the COL4A1 gene, which was thought to likely be a pathogenic variant, consistent with the infant's reported developmental delay, microcephaly, seizures, and spasticity and likely the genetic etiology underlying the child's health issues. Dr. Cohen's records note that she reviewed these findings with the parents, emphasizing that the genetic disorder was likely the primary etiology of the infant's condition.

DISCUSSION

Summary judgment is a drastic remedy that deprives litigants of their day in court, and it "should only be employed when there is no doubt as to the absence of triable issues." *Andre v Pomeroy*, 35 NY2d 361 (1974); *Bonaventura v Galpin*, 119 AD3d 625 (2d Dept 2014); *Stukas v Streiter*, 83 AD3d 18 (2d Dept 2011). The function of the court on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely determine whether such issues exist. *Guadalupe v New York City Tr. Auth.*, 91 AD3d 716 (2d Dept 2012); *Kolivas v Kirchoff*, 14 AD3d 493 (2d Dept 2005). Importantly, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party. *Pearson v Dix McBride, LLC*, 63 AD3d 895 (2d Dept 2009). The proponent of a summary judgment motion is required to tender sufficient evidence to demonstrate the absence of any material issues of fact, and the failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986).

A physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, *prima facie*, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of plaintiff's injuries. *Mackauer v Parikh*, 148 AD3d 873 (2d Dept 2017); *Stukas v Streiter*, 83 AD3d 18 (2d Dept 2011). To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars. *Mackauer v Parikh*, 148 AD3d 873 (2d Dept 2017); *Schwartzberg v Huntington Hospital*, 163 AD3d 736 (2d Dept 2018). Once the showing has been made, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the defendant's *prima facie* showing, but only as to those elements on which the defendant met the *prima facie* burden (*see Mackauer; Schwartzberg*).

In opposition to a summary judgment motion, the plaintiff's expert must address the contentions of the defense expert to establish an issue of fact. Failure to do so warrants dismissal of the action. *Senatore v Epstein*, 128 AD3d 794 (2d Dept 2015). "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 physician's summary judgment." *Alvarez*; see also *Kramer v Rosenthal*, 224 AD2d 392 (2d Dept 1996). Moreover, "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 (2002).

It is well-settled that expert testimony must be based on facts in the record personally known by the witnesses, and that an expert cannot reach a conclusion by assuming "material facts not supported by evidence." *Cassano v Hagstrom*, 5 NY2d 643 (1959). Expert opinions that are conclusory or unsupported by the record are insufficient to raise triable issues of fact. *Aliosha v Ostad*, 153 AD3d 591 (2d Dept 2017) (affirming the lower court's decision granting defendant's motion for summary judgment because plaintiff's unnamed expert was conclusory and speculative, and failed to address specific assertions made by the defendant's expert, especially those pertaining to proximate causation).

Furthermore, an expert affirmation in opposition to a motion for summary judgment must set forth the medically accepted standards of care or protocol and explain how it was departed from. *Geffner v North Shore University Hosp.*, 57 AD3d 839 (2d Dept 2008). Such an affirmation must address all the key facts relied on by the defendant's expert. *Geffner*; see also *Rebozo v Wilen*, 41 AD3d 457 (2d Dept 2007). In opposition, a plaintiff must "submit material or evidentiary facts to rebut the defendant's *prima facie* showing that he or she was not negligent in treating the plaintiff." *Langan v St. Vincent's Hosp. of N.Y.*, 64 A.D.3d 632 (2d Dept 2015).

Isolda Tsapok M.D., and Richmond Medical Health Care P.C.

According to their bill of particulars, the plaintiffs claim that these defendants negligently performed clinical examinations; failed to perform proper and necessary diagnostic tests; failed to diagnose plaintiff Lybinova with cytomegalovirus (CMV); failed to disclose the diagnosis of CMV to plaintiff Lybinova; failed to treat plaintiffs for CMV; failed to select the proper medications, antivirals, and/or anesthetics necessary to treat plaintiffs' CMV infection; failed to take note of or adequately respond to plaintiffs' manifested signs, symptoms and complaints; failed to detect that the fetus was too small for gestational age; failed to timely take medical measures to alleviate and/or cure plaintiffs' CMV infection; failed to disclose Lybinova's contraction of CMV to defendant, SIUH; failed to disclose the infant-plaintiff's condition to defendant, SIUH; failed to consult an infectious disease specialist; failed to refer plaintiffs to an infectious disease specialist; failed to inform Lybinova of the risks, dangers, prognosis, treatment options for contracting CMV; failed to perform TORCH panel testing earlier during the pregnancy; and as a result, caused the infant-plaintiff to suffer severe, permanent injuries.

These defendants contend that they did not depart from accepted standards of obstetrical care with respect to the treatment rendered to the plaintiff-mother, Lybinova, and that the infant-plaintiff's alleged injuries were not proximately caused by any alleged deviations from the standard of care by Tsapok.

The defendants' contentions are supported by the expert affirmations of Wendy Fried, M.D. and Ingrid Taff, M.D. These experts support their respective opinions with specific references to the record including, deposition testimony and medical records.

Tsapok and RMHC have failed to demonstrate their *prima facie* entitlement to judgment as a matter of law regarding negligence. As evidenced by their submissions, there are clear issues of fact relating to whether the plaintiff complained of symptoms consistent with CMV in January or February 2017 and whether Tsapok referred her to an infectious disease specialist in May 2017. The plaintiff unequivocally testified that she told Tsapok and her staff that she was sick in January/February 2017 (NYSCEF Doc. No. 164, pages 69-76), that Tsapok did not refer her to an infectious disease expert and that Tsapok did not tell her that blood work was positive for CMV (NYSCEF Doc. No. 164, page 84). Additionally, in their initial moving papers, these defendants did not address, let alone refute, the plaintiffs' claims that they failed to disclose the CMV results to the codefendant, SIUH. That claim was addressed only in reply to plaintiffs' opposition. Reply papers in further support of a motion are not a proper vehicle for introducing evidence that seeks to establish, for the first time, a party's *prima facie* proof. Instead, reply papers are intended to voice a rebuttal or response to issues raised in the opposition papers that immediately precede them, and can present new matter only to the extent of addressing the opponent's earlier evidence or arguments (see *Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380 [1st Dept 2006]; *Jones v Castlerick, LLC*, 128 AD3d 1153 [3d Dept 2015]; *Seefeldt v Johnson*, 13 AD3d 1203 [4th Dept 2004]). A party moving for summary judgment cannot meet its *prima facie* burden by submitting evidence for the first time in reply, and generally, evidence submitted for the first time in reply papers should be disregarded by the court (see *Wells Fargo Bank, N.A. v Osias*, 156 A.D.3d 942 [2d Dept 2017]; *OneWest Bank, FSB v Simpson*, 148 A.D.3d 920 [2d Dept 2017]).

However, Tsapok and RMHC have demonstrated their *prima facie* entitlement to judgment as a matter of law regarding causation. As evidenced by their submissions, the defendants have adequately demonstrated that, regardless of any alleged departures, the treatment and/or lack of treatment at issue was not a substantial contributing factor in causing injury to the plaintiffs. Upon this showing, the burden shifted to the plaintiff to submit evidentiary facts or materials to rebut the defendants' *prima facie* showing. The plaintiff has failed to do so.

In opposition, the plaintiffs offer the expert affidavit of Wendy Humphrey, M.D. and the expert affirmation of Tiffani L. McDonough, M.D. The court finds their respective opinions to be conclusory and speculative regarding claims of causation.

The plaintiffs have failed to sufficiently refute defendants' showing that: the child suffered from a congenital CMV infection which occurred before the end of the second trimester; even if CMV testing were the standard of care during the prenatal period, there is no evidence to support or suggest that it would have been positive anytime sooner than May 9, 2017; even if prenatal treatment for CMV were the standard of care, it would not have been effective in preventing or diminishing the significant brain damage that occurred in utero; even if treatment with antiviral medication after birth were the standard of care it would not have been effective in curing or reversing the brain damage which developed in utero or been effective in reducing any further damage. Moreover, the plaintiffs have failed to refute and rebut the defendants' contention that the infant's genetic disorder caused significant and irreversible brain damage and neurologic injuries independent of the CMV infection.

In opposition, the plaintiff does not address the opinion of the defendants' expert, Dr. Taff, that, in 2017, there was no approved treatment for a CMV infection occurring during pregnancy. Plaintiffs' expert, Dr. McDonough, opined that "there is no clear consensus on prenatal treatment to mitigate CNS injury due to CMV." Consequently, the doctor concedes that there was, and still is, no applicable standard of care in that regard.

The affidavits of plaintiffs' expert physicians are speculative, conclusory, contradictory, lack factual support and fail to address statements made in the affirmations of Dr. Fried and Dr. Taff. As such, they do not raise an issue of fact as to causation and fail to rebut the defendant's *prima facie* showing of entitlement to summary judgment. Expert opinions that are conclusory, speculative, or unsupported by the record evidence are insufficient to raise triable issues of material fact (see *Kerrins v South Nassau Communities Hosp.*, 148 AD3d 795, 796 [2d Dept 2017]). "In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record. An expert opinion that is contradicted by the record cannot defeat summary judgment." (*Lowe v Japal*, 170 AD3d 701 [2d Dept 2019] [internal quotation marks and citations omitted]; see *Forrest v Tierney*, 91 AD3d 707 [2d Dept 2012]; *Rebozo v Wilen*, 41 AD3d 457 [2d Dept 2007]).

The plaintiffs' claim for lack of informed consent alleged against these defendants must be dismissed as a matter of law. Simply stated, it is clearly not applicable in this case. Public Health Law § 2805-d (2) states that "the right of action to recover for medical, dental or podiatric malpractice based upon a lack of informed consent...is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure, which involved invasion or disruption of the integrity of the body." Plaintiff's cause of action based on lack of informed consent is devoid of merit. The plaintiffs have not shown that Tsapok failed to obtain her informed consent in connection with the performance of any treatment or testing involving a violation of her, or the infant's, physical integrity, which is an essential element of said cause of action. See Public Health Law § 2805- d; *Flanagan v Catskill Regional Med. Ctr.*, 65 AD3d 563 (2d Dept 2009); *Smith v Fields*, 268 AD2d 579 (2d Dept 2000) (plaintiff's lack of informed consent claim was dismissed because it essentially sought to recover damages for the defendant's failure to inform her of the risks of allowing a disease to go untreated). As a result, the defendants are entitled to summary judgment on the issue of lack of informed consent because there is simply no evidence of a cognizable informed consent claim. See *Zapata v Buitriago*, 107 AD3d 977 (2d Dept 2013) (plaintiff failed to establish that the alleged lack of informed consent was a proximate cause of her injuries); *Johnson v Staten Is. Med. Group*, 82 AD3d 708 (2d Dept 2011); *Spano v. Bertocci*, 299 AD2d 335 (2d Dept 2002).

Staten Island University Hospital

According to their bill of particulars, the plaintiffs claim that SIUH, through its agents, servants, partners, and/or employees; negligently performed clinical examinations of the plaintiffs; failed to perform proper and necessary diagnostic tests; failed to diagnose the plaintiffs with CMV; failed to disclose the diagnosis of having CMV to the plaintiffs; failed to treat the plaintiffs for CMV; failed to select the proper modalities, instruments, and/or equipment necessary for the plaintiffs' treatment; failed to select the proper medications, antivirals, and/or anesthetics necessary to treat the plaintiffs' CMV viral infection; failed to take note of or adequately respond to the plaintiffs' manifested signs, symptoms and complaints; failed to timely take medical measures to alleviate and/or cure plaintiffs' CMV viral infection; failed to implement proper and adequate practices; failed to perform proper and necessary diagnostic

tests; failed to properly and accurately perform and/or read, interpret an ultrasound; failed to diagnose the infant-plaintiff with microcephaly; failed to disclose and inform plaintiff Lybinova of the infant's microcephaly; failed to consult an infectious disease specialist; failed to refer plaintiffs to an infectious disease specialist; failed to appropriately and properly chart completely and accurately all pertinent and significant medical data and information; and as a result, caused the infant-plaintiff to suffer severe, permanent injuries. The court notes that the bill of particulars is silent with respect to any claims related to bruising, physical trauma and jaundice. These claims were raised for the first time in opposition to the motion for summary judgment. Consequently, the defense experts were denied an opportunity to comment on those claims.

The Second Department has consistently held that a plaintiff may not assert a new theory of liability in opposition to a summary judgment motion where the plaintiff had knowledge of the relevant facts and offers no explanation for her delay in presenting the new theory of liability. *Langan v. St. Vincent's Hosp. of New York*, 64 AD3d 632 (2d Dept 2009); *Michel v. Long Island Jewish Medical Center*, 125 AD3d 945 (2d Dept 2015); *Sacino v. Warwick Val. Cent. School Dist.*, 138 AD3d (2d Dept 2013); *Beery v. City of New York*, 111 AD3d 5 (2d Dept 2013). Accordingly, the court rejects the claims related to bruising, physical trauma and jaundice and will not consider them.

SIUH contends that it did not depart from acceptable standards of care with respect to the treatment rendered to the plaintiff-mother, Lybinova, and the infant-plaintiff, and that the infant-plaintiff's alleged injuries were not proximately caused by any alleged deviations from the standard of care by its employees.

SIUH supports its contentions with the expert affirmations of Iffath Abbasi Hoskins, M.D., Edmund LaGamma, M.D. and Phillip Overby, M.D. These experts support their respective opinions with specific references to the record including, deposition testimony and medical records.

These experts opine that: there is no standard of care regarding testing for CMV during pregnancy; even if a patient is CMV positive, there is no accepted medical treatment for CMV in pregnant women; there is no known treatment for congenital CMV; the pediatricians at SIUH did not deviate from accepted standards by not inquiring whether there had been CMV testing performed given that such testing was not the standard of care; based upon the infant's presentation on delivery, there was no reason to ascertain the mother's prenatal CMV testing results; there is no standard of care in place to test for CMV in newborns; there is no indication in the neonatal records that the pediatric staff was advised of any maternal CMV testing; in any event, such information would not have changed the clinical management of the neonate; the presence of microcephaly and IUGR can be indicative of either a genetic disorder or an infection related injury; treatment with antivirals for congenital CMV does not cure or reverse the damage already done by the virus; the infant plaintiff suffered significant, permanent and irreversible brain damage in utero; after birth, earlier treatment with antiviral medications would not have reversed the neurologic damage and deficits that had occurred in utero; as noted by the child's treating geneticist, Dr. Cohen, the infant suffered from a genetic disorder which was likely the cause of his underlying health issues; and that any failure to diagnose the infant with congenital CMV after delivery was not a substantial contributing factor of the infant's alleged injuries because the devastating injuries were attributable to the genetic disorder and a contemporaneous congenital CMV infection that occurred in utero.

Through its submissions, SIUH has satisfied its burden and has established its *prima facie* entitlement to summary judgment regarding the plaintiff's claims of negligence and causation.

In opposition, plaintiffs submit the expert affidavit of Dale Bull, M.D., the expert affidavit of Wendy Humphrey, M.D. and the expert affirmation of Tiffani L. McDonough, M.D. The plaintiffs have failed to satisfy their burden to submit evidentiary facts or materials to rebut the defendant's *prima facie* showing of entitlement to summary judgment.

The opinions expressed by Dr. Bull regarding defendant's liability are completely conclusory. As stated above, "[g]eneral 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 physician's summary judgment." *Alvarez*; see also *Kramer v Rosenthal*, 224 AD2d 392 (2d Dept 1996). Moreover, "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 (2002).

However, Dr. Bull's opinions have some probative value regarding causation. He agrees with the defense experts' opinions that the infant suffered significant and devastating brain damage in utero, early in the pregnancy, before the end of the second trimester. He also agrees that the presence of microcephaly and IUGR can be indicative of either a genetic disorder or an infection related injury.

The opinions expressed by Dr. Humphrey are also conclusory and speculative. For example, she does not refute a genetic cause for the infant's injuries, that the standard of care does not require CMV screening in pregnant women and that there is no acceptable medical treatment for CMV infections in pregnant women. Dr. Humphrey readily admits that she is unqualified to opine as to what degree CMV and COL4A1 had on the eventual outcome for the infant. However, she concedes that both CMV and COL4A1 "can have wide variations on presentation and long-term consequences from asymptomatic to severe effects." Consequently, her opinions are not probative and are insufficient to defeat the defendant's motion for summary judgment.

Likewise, the opinions expressed by Dr. McDonough are also conclusory and speculative. For example, she does not refute that: there is no standard of care regarding testing for CMV during pregnancy; even if a patient is CMV positive, there is no accepted medical treatment for CMV in pregnant women; irreversible brain damage occurred in utero and, in fact, agrees that it did. Additionally, Dr. McDonough fails to reconcile and causally connect the treatment rendered by the pediatricians at SIUH and the brain damage sustained in utero; fails to state what exactly SIUH could have done for the infant after birth to reduce and mitigate the damage caused by the CMV infection; and does not adequately refute or reconcile the defendants' experts' opinions regarding the genetic disorder and its role in causing the infant's injuries. Consequently, her opinions are not probative and are insufficient to defeat the defendant's motion for summary judgment.

Galina Feinstein, M.D.

According to their bill of particulars, the plaintiffs claim that Feinstein: failed to properly supervise medical treatment rendered to the infant-plaintiff; failed to provide adequate and proper medical treatment; negligently performed clinical examinations of the infant-plaintiff; failed to perform proper and necessary diagnostic tests; failed to diagnose the infant-plaintiff with CMV; failed to disclose the diagnosis of CMV to the plaintiffs; failed to treat the infant-plaintiff for CMV; failed to select the proper medications, antivirals, and/or anesthetics necessary to treat the infant-plaintiff's CMV viral infection;

failed to note or adequately respond to the infant-plaintiff's manifested signs, symptoms and complaints; failed to timely take medical measures to alleviate and/or cure the infant-plaintiff's CMV viral infection; failed to diagnose the infant-plaintiff with microcephaly; failed to consult an infectious disease specialist; failed to refer plaintiffs to an infectious disease specialist; failed to appropriately and properly chart completely and accurately all pertinent and significant medical data and information; and as a result, caused the infant-plaintiff to suffer severe, permanent injuries.

Feinstein contends that she did not depart from acceptable standards of care with respect to the treatment rendered to the plaintiff, and that the infant-plaintiff's alleged injuries were not proximately caused by any alleged deviations from the standard of care.

Feinstein supports her contentions with the expert affirmations of Walter J. Molofsky, M.D., Lorry Rubin, M.D., and Bidyut Pramanik, M.D. These experts support their respective opinions with specific references to the record including, deposition testimony and medical records.

These experts opine that: the infant was infected with CMV in utero, early during the pregnancy during the first or second trimester, which resulted in severe brain damage occurring before birth; Feinstein appropriately referred the infant to a pediatric neurologist because infants born with IUGR, SGA status and microcephaly may be at increased risk for a range of medical conditions and developmental delays that require evaluation by said specialist; Feinstein appropriately deferred and relied on the pediatric neurologist's evaluation of the infant's condition and any recommended follow-up testing; the MRI findings of July 10, 2017 were consistent with a brain injury occurring during the first or second trimester; the infant was diagnosed with a debilitating genetic disorder and the combination of that disorder and congenital CMV caused the child's brain damage, developmental delays and microcephaly and other neurologic injuries; there is no treatment that could have reversed or improved the child's neurologic deficits; the administration of antivirals would not have provided a better neurologic outcome due to the severe brain damage that occurred in utero; antiviral medication cannot undo or reverse the damage that had already been done; and there was no reason for Feinstein to have ordered CMV testing for the infant nor refer the infant to a pediatric infectious disease specialist because she was not presented with any evidence of a maternal CMV infection during the pregnancy.

Through her submissions, Feinstein has satisfied her burden and has established her *prima facie* entitlement to summary judgment regarding the plaintiff's claims of negligence and causation.

In opposition, plaintiffs submit the expert affidavit of Giulio Zuccoli, M.D., the expert affidavit of Jana Shaw, M.D. and the expert affirmation of Tiffani L. McDonough, M.D. The plaintiffs have failed to satisfy their burden to submit evidentiary facts or materials to rebut the defendant's *prima facie* showing of entitlement to summary judgment.

Dr. Zuccoli does not express any opinions about the defendant's negligence. His opinions relate entirely to causation and in that regard, he agrees with the defendant's experts that the damage to the infant's brain occurred in utero, before the end of the second trimester, due to congenital CMV. He does not address the genetic disorder whatsoever. Dr. Zuccoli's opinion supports the contention of all defendants that the infant plaintiff suffered significant, permanent, and irreversible brain damage in utero and that earlier treatment with antiviral medications would not have reversed the damage and deficits he sustained. Dr. Zuccoli's opinion clearly fails to raise a material issue of fact regarding causation.

Once again, the opinions expressed by Dr. McDonough are conclusory and speculative. For example, she does not refute that there is no standard of care regarding testing for CMV during pregnancy; even if a patient is CMV positive, that there is no accepted medical treatment for CMV in pregnant women; and that irreversible brain damage occurred in utero and, in fact, agrees that it did. Additionally, Dr. McDonough fails to reconcile and causally connect the treatment rendered by Feinstein and the brain damage sustained in utero; fails to state what exactly Feinstein could have done for the infant after birth to reduce and mitigate the damage caused by the CMV infection; and does not adequately refute or reconcile the defendants' experts' opinions regarding the genetic disorder and its role in causing the infant's injuries. Incredibly, she states that the injury occurred around May 9, 2017, which would be during the late third trimester. That completely contradicts Dr. Zuccoli's opinion, as noted above, that the damage to the infant's brain occurred in utero before the end of the second trimester. Consequently, her opinions are not probative and are insufficient to defeat the defendant's motion for summary judgment.

Likewise, the opinions expressed by Dr. Shaw are also conclusory and speculative. For example, she opines that accepted standards of care require that congenital CMV should be considered in children presenting with microcephaly, small size for gestational age and jaundice and that testing should be conducted "promptly" if the conditions are not explained by an alternative diagnosis. However, Dr. Shaw does not define what constitutes prompt testing and exactly when Feinstein should have undertaken the same. Additionally, she concedes that she is not qualified to comment on the extent to which the genetic disorder contributed to the infant's overall morbidity and states that she "will defer to medical geneticists" in that regard. Based on that statement, she would defer to Dr. Cohen, the child's treating geneticist, who opined that the genetic disorder is responsible for his current condition. Additionally, Dr. Shaw fails to state in what way prompt testing for CMV and a prompt referral to a pediatric infectious disease specialist would have changed the outcome, especially in light of the genetic disorder and its sequelae. Consequently, her opinions are not probative and are insufficient to defeat the defendant's motion for summary judgment.

Causation

As discussed above, each defendant has moved for summary judgment on the issue of causation and has demonstrated that, regardless of any alleged deviations from the standard of care, the outcome would nonetheless have been unchanged. The defendants have demonstrated, through their submissions, that the infant had suffered irreversible brain damage in utero by the end of the second trimester due to a congenital CMV infection and the result of a genetic disorder, which the plaintiff has failed to refute.

To establish a case of medical malpractice, a plaintiff must prove that the departures from accepted standards of medical care and practice were a substantial factor in causing an injury or injuries. See *Stukas v Streiter*, 83 AD3d 18 (2d Dept 2011); see also *Johnson v Staten Is. Med. Group*, 82 AD3d 708. If the departures were not a substantial factor in causing the claimed injuries, the causes of action for medical malpractice must be dismissed. See, e.g., *Senatore v Epstein*, 128 AD3d 794, (2d Dept 2015). The mere presence of an injury or injuries does not establish negligence. See *Landau v Rappaport*, 306 AD2d 366 (2d Dept 2003). A plaintiff need not eliminate entirely all possibility that a defendant's conduct was not a cause but must offer sufficient evidence from which one may conclude that it is more probable than not that the injury was caused by the defendant (See *Goldberg v Horowitz*, 73 AD3d 691 [2d Dept 2010];

Kennedy v Peninsula Hospital Center, 135 A.D.2d 788 [2d Dept 1987]; *Monahan v Weichert*, 82 AD2d 102). However, “where an [injury] is one which might naturally occur from causes other than a defendant’s negligence, the inference of his negligence is not fair and reasonable” *Mortensen v. Memorial Hosp.*, 105 AD2d 151, quoting from *Cole v Swagler*, 308 NY 325. In a medical malpractice action, causation is relevant both to liability and to damages and liability cannot be established unless it is shown that the defendant’s malpractice was a substantial factor in causing the plaintiff’s injury. *Oakes v Patel*, 20 NY3d 633, (2013).

Any remaining contentions of the parties are unpersuasive.

Accordingly, it is hereby,

ORDERED, that the motion of defendant, SIUH (003), for summary judgment is granted in its entirety; and it is further,

ORDERED, that the motion of defendants, ISOLDA TSAPOK M.D. and RICHMOND MEDICAL HEALTH CARE P.C. (004), for summary judgment is granted in its entirety; and it is further,

ORDERED, that the motion of defendant, GALINA FEINSTEIN, M.D. (005), for summary judgment is granted in its entirety; and it is further,

ORDERED, that the Clerk enter Judgment accordingly.

Dated: November 14, 2023

E N T E R


A.J.S.C.

Hon. Charles M. Troia
Justice of the Supreme Court