[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS Justice PART 6

YOKO MIYAZAKI-ENGLISH
-v-
MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK

INDEX NO. 113965/06
MOTION DATE 11/01/11
MOTION SEQ. NO. 3
MOTION CAL. NO.

The following papers, numbered 1 to 10* were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1→9
Answering Affidavits — Exhibits	See 26→40(mS004)
Replying Affidavits	10

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

..310,

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 27 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Jan. 26, 2012

JOAN B. LOBIS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

YOKO MIYAZAKI-ENGLISH, as the mother and natural guardian of SUIKA MIYAZAKI ENGLISH, an infant, and YOKO MIYAZAKI-ENGLISH, individually,

Plaintiff,

Index No. 113965/06

-against-

Decision and Order

MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., d/b/a MIC-WOMEN'S HEALTH SERVICES, ANDREA SONENBERG, COLUMBIA UNIVERSITY MEDICAL CENTER, COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS & SURGEONS, COLUMBIA UNIVERSITY, JACK E. MAIDMAN, M.D., LESLIE M. JACOBSON, M.D., JOHN F.J. CLARK, III, M.D., KIM K. CARAWAY, C.N.M. AND LESLIE F. LACEY, R.N.,

Defendants

----------X

JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 003 and 004 are hereby consolidated for disposition. In Motion Sequence Number 003, defendant John F. J. Clark, III, M.D., moves, by order to show cause, for an order granting him summary judgment and dismissing the complaint against him pursuant to C.P.L.R. Rule 3212. In Motion Sequence Number 004, defendants Andrea Sonenberg, C.N.M. s/h/a Andrea Sonenberg; The Trustees of Columbia University in the City of New York s/h/a Columbia University College of Physicians and Surgeons and Columbia University ("Columbia"); Jack E. Maidman, M.D.; Leslie M. Jacobson, M.D.; and Kim K. Caraway, C.N.M., seek a hearing in accordance with Frye v. United States, 293 F. 1013 (1923), on the issue of whether plaintiffs' experts' testimony and/or theories should be precluded at trial or, in the alternative, seek an order precluding plaintiffs from offering expert proof at the time of trial that Ms. Miyazaki-English developed preeclampsia during her pregnancy; that preeclampsia was a substantial factor in causing

injury to the infant-plaintiff Suika Miyazaki-English; that the infant-plaintiff developed intrauterine growth restriction ("IUGR") during the pregnancy; and that IUGR was a substantial factor in causing injury to the infant-plaintiff.

Plaintiffs allege that defendants mismanaged Ms. Miyazaki-English's obstetrical care, thereby causing the infant-plaintiff to be disabled. Ms. Miyazaki-English received care during her pregnancy at a women's health clinic, co-defendant Medical and Health Research Association of New York City, Inc. d/b/a MIC – Women's Health Services ("MIC"). During the pregnancy, Ms. Miyazaki-English was primarily seen by certified nurse-midwife ("CNM") Andrea Sonenberg, an employee of Columbia performing nurse-midwifery services at MIC. CNM Sonenberg testified that CNMs handle "normal" patients, or uncomplicated pregnancies. The pregnancy was Ms. Miyazaki-English's first. On February 20, 2004, Ms. Miyazaki-English saw CNM Sonenberg for her first prenatal visit, at which it was determined that she was at five weeks gestation and it was estimated that her due date was October 22, 2004. At that first visit, it was also determined that Ms. Miyazaki-English had a urinary tract infection from E. coli, and she was treated with antibiotics, which cleared the infection. Ms. Miyazaki-English had an ultrasound on March 3, 2004, which was consistent with seven weeks gestation. For all intents and purposes, Ms. Miyazaki-English was having a normal pregnancy, and she saw CNM Sonenberg approximately every four weeks from March 5, 2004 through June 25, 2004. She also had an ultrasound on June 7, 2004, which indicated that the pregnancy was at approximately 20 weeks 4 days gestation, and that the estimated fetal weight was in the seventy-first (71st) percentile. Based on an ultrasound measurement, the average estimated gestational age was 21 weeks, 1 day, plus or minus 10 days.

CNM Sonenberg and Dr. Clark testified at their examinations before trial ("EBT") that pursuant to Columbia's protocols, which require that patients see a physician at least once during their pregnancies, Ms. Miyazaki-English was scheduled for one appointment with Dr. Clark during her pregnancy. Dr. Clark was an attending physician at Columbia and saw patients at MIC on a part-time basis; he did not supervise the CNMs. The prenatal care rendered at MIC was such that physicians provided care to high-risk clinic patients or referred them to Columbia's high risk clinic, and CNMs provided care to patients with uncomplicated pregnancies. Dr. Clark saw Ms. Miyazaki-English on July 21, 2004, at approximately 27 weeks gestation. Dr. Clark determined that the pregnancy was proceeding normally and cleared Ms. Miyazaki-English for continued management of her pregnancy by a CNM. He referred her for a glucose tolerance test, the results of which were normal. This was the only date that Dr. Clark saw Ms. Miyazaki-English.

Thereafter, Ms. Miyazaki-English saw CNM Sonenberg on August 6 and August 20, 2004. The size of the fetus was slightly "less than date" on August 6, but at the following visit on August 20, there was two centimeters of growth and weight gain. CNM Sonenberg felt the growth was adequate for two weeks, although she testified that the fetal size was still smaller than she would expect for that period of gestation. Ms. Miyazaki-English saw another CNM, Mary Sufrin, for her appointment on September 3, 2004, presumably because CNM Sonenberg was unavailable. CNM Sufrin found the fetal size equal to date, at 32 weeks gestatation. However, when Ms. Miyazaki-English returned to CNM Sonenberg two weeks later on September 17, CNM Sonenberg again measured the size as "less than date," and referred Ms. Miyazaki-English for a second ultrasound, which took place on September 23, 2004. The results from the second ultrasound indicated that the

fetus size was in the twenty-sixth (26) percentile. CNM Sonenberg testified that the second ultrasound showed that the size of the fetus was slightly less than gestational age but with adequate growth, and that the results did not cause her to treat Ms. Miyazaki-English differently.

At Ms. Miyazaki-English's next appointment on October 1, 2004, CNM Sonenberg noted positive fetal movement, and no regular contractions, ruptured membranes, or bleeding. She noted the fundal height, heart rate, and amniotic fluid volume were within normal limits. Her impression was a term intrauterine pregnancy, with positive fetal growth. At this visit, CNM Sonenberg reviewed labor and rupture management with Ms. Miyazaki-English, such as when to go to the hospital, what to do if her water broke, and daily fetal movement counts. Ms. Miyazaki-English had a similar appointment on October 8, 2004.

On October 15, 2004, CNM Sonenberg again noted positive fetal movement, and no contractions, ruptured membranes, or bleeding. She thought the fetus was possibly in the breech position. CNM Sonenberg noted that the fetal heart rate was high, from 120 to the 130's, but she testified that it was "good." She noted that the weight gain was three pounds in one week, and that Ms. Miyazaki-English had a 2+ glucose reading, but that she had recently eaten cereal and half of a bagel, which could have accounted for the high glucose level. Ms. Miyazaki-English was also voiding trace protein in her urine. Her blood pressure was 110/70, and CNM Sonenberg testified that the diastolic pressure was slightly above baseline, but not significantly, and that she still felt it was within the normal range. Ms. Miyazaki-English reported occasional mild headaches that were relieved quickly. CNM Sonenberg also noted trace pedal edema. CNM Sonenberg referred Ms.

Miyazaki-English for an ultrasound with regard to the possible breech and ordered a random glucose screening. She further advised Ms. Miyazaki-English to decrease her carbohydrates and calories; go to the hospital for headaches, visual changes, labor, or rupture of the membranes; and return in one week for her next appointment. Although the medical notes indicate that an ultrasound was scheduled for October 21, 2004, it is unclear if this was indeed scheduled and/or communicated to Ms. Miyazaki-English. Regardless, she did not have an ultrasound on October 21.

Ms. Miyazaki-English began experiencing contractions on the evening of October 21, 2004. She and her husband confirmed, by telephone, that they should continue to time the contraction intervals. She experienced brown staining in her underwear in the early morning of October 22, 2004, so she and her husband went to the labor and delivery unit at the Allen Pavilion (a facility under the Columbia umbrella). Ms. Miyazaki-English presented to the Allen Pavilion between 6:30 and 7:00 a.m., and at approximately 7:43 a.m., an external fetal monitor was applied. The fetal monitor results indicated a troubling fetal heart rate, and the attending obstetrician Farris Fahmy, M.D., was called immediately. Dr. Fahmy performed an emergency cesarean section under general anesthesia and delivered the infant-plaintiff at approximately 8:04 a.m.. The infant-plaintiff weighed 6 pounds, 5 ounces, which is in the tenth (10th) percentile, and was 50 centimeters long, at the fiftieth (50th) percentile. She had an initial Apgar score of 1 with no effective heartbeat. Resuscitation was commenced and successfully restored oxygen to the infant-plaintiff, but the early lack of oxygen caused injury to the infant-plaintiff. Her Apgar scores were eventually 5, 6, and 8. The infant-plaintiff was born in critical condition with a hypoxic brain injury and seizures. Today, her continuing disabilities include cerebral palsy, brain damage, and developmental delays.

Motion Sequence 003

Plaintiffs contend that defendants failed to appreciate the signs and signals that the fetus was in distress—including decreased fetal growth rate and intrauterine growth restriction ("IUGR"), preeclampsia, gestational diabetes, placental insufficiency, and decreased amniotic fluids—thereby allowing Ms. Miyazaki-English's pregnancy to progress without the proper medical interventions. They allege that had defendants intervened appropriately, the infant-plaintiff would not have been born with brain damage. Plaintiffs' essential allegation against Dr. Clark is that he departed from accepted standards of medical care and treatment in his overall failure to appropriately follow and be aware of the condition of Ms. Miyazaki-English and her fetus. Plaintiffs allege, inter alia, that Dr. Clark failed to take Ms. Miyazaki-English's complete history and record her complaints; failed to recommend appropriate follow-up care and monitoring; and failed to detect, monitor, and/or appreciate the fetus' decreasing interval growth velocity and other signs that the fetus was in distress.

Dr. Clark now seeks summary judgment. It is "a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that [he or she] is entitled to judgment as a matter of law." Ostrov v. Rozbruch, ___ A.D.3d ___, 2012 N.Y. Slip Op. 22, **9-10 (1st Dep't January 3, 2012), citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). To be entitled to summary judgment, a defendant in a medical malpractice action must demonstrate "the absence of any deviation or departure from accepted medical practice, or that any such departure was not a proximate cause of the injury or damage alleged." King v. St. Barnabas Hosp., 87 A.D.3d 238, 246

(1st Dep't 2011). Once a defendant meets this burden, it is incumbent upon the plaintiff to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostroy, at **10, citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). In medical malpractice actions, expert medical testimony is the sine qua non for demonstrating either the absence or presence of material issues of fact pertaining to departure from accepted medical practice or proximate cause.

Dr. Clark contends that on the sole occasion that he saw Ms. Miyazaki-English, she exhibited all signs of a normal pregnancy and there were no signs of IUGR or a decrease in the interval growth rate; a decrease in utero-placental perfusion or amniotic fluid levels; or placental insufficiency. Her blood pressure was normal, and there were no signs of preeclampsia or any other significant maternal morbidity. Dr. Clark thus argues that he acted appropriately in recommending continued care of Ms. Miyazaki-English's pregnancy by a CNM and he appropriately ordered a glucose challenge test for diabetes. In support of his motion, Dr. Clark offers an expert affirmation from Lawrence G. Mendelowitz, M.D., who affirms that he is licensed to practice medicine in New York State and board certified in obstetrics and gynecology. Dr. Mendelowitz states that he has reviewed the bill of particulars, medical records, and EBT transcripts, and upon his review of the materials, he states that Dr. Clark acted within good and accepted standards of medical practice and that nothing Dr. Clark did, or did not do, proximately caused any of the infant-plaintiff's alleged damages. Dr. Mendelowitz states that when Dr. Clark evaluated Ms. Miyazaki-English on July 21, 2004, she had a low-risk pregnancy proceeding without complications. He states that the June 7, 2004 sonogram showed no placental insufficiency, no decreased placental perfusion, and no structural abnormalities. The fetal measurements were consistent with gestational age. There were

no indications of IUGR, a decrease in rate of growth, or anything that would have qualified the pregnancy as high risk. Dr. Mendelowitz states that Dr. Clark's conclusion that the pregnancy could be monitored by a CNM was well founded, entirely acceptable, and within the bounds of good obstetrical practice. Dr. Mendelowitz opines, within a reasonable degree of medical certainty, that Dr. Clark did not deviate from good and accepted practice, that he used sound medical judgment in his assessment and clinical impression of plaintiff, and that there is nothing in the medical records that indicates that Dr. Clark was in any way negligent in his care and treatment of plaintiff.

In opposition, plaintiffs argue that Dr. Clark's motion does not address the issue that applies to him. They maintain that "Dr. Clark was one of . . . two physicians . . . supervising a flawed system of care. [CNS Sonenberg] should not have been managing any of the IUGR, [preeclampsia], breech or [gestational diabetes] issues." Plaintiffs' expert (name redacted)[1] sets forth that he/she is a physician licensed to practice in California and board certified in obstetrics and gynecology, and maternal-fetal medicine. The expert maintains that each of the defendants departed from accepted standards of care in failing to properly manage Ms. Miyazaki-English's pregnancy, which was complicated by unidentified and mismanaged preeclampsia-related IUGR. The expert agrees that the June 7, 2004 sonogram supported normal growth related to gestational age at that time. The expert does not take issue with the care that Dr. Clark provided on July 21, 2004. S/he does believe that once the second sonogram was performed on September 23, 2004, there were signs

[1] Plaintiffs' expert's statement is not notarized, though as a physician not licensed to practice in New York, s/he is not entitled to submit an affirmation but must provide a notarized affidavit; however, as this issue was not raised by defendants, the court will consider the merits of the statement.

that the pregnancy was no longer normal and that the fetus was in distress. Thus, the expert believes that there should have been a system in place to create a rational and coordinated treatment plan going forward, which the expert believes did not occur. The expert contends that Dr. Clark and co-defendant Leslie M. Jacobson, M.D. (the other attending physician providing part-time care at MIC), "who were assigned to supervise and be responsible for this obstetrical mother and the fetal patient, allowed a flawed system to exist thereby departing from good and accepted practice." Plaintiffs' expert maintains that Drs. Clark and Jacobson "participated in a system destined to fail to identify clinical circumstances that required an attending obstetrician to be aware of and to become involved in the continued management of the pregnancy." Participating in and allowing a "flawed system" are the only departures that plaintiffs' expert attributes to Dr. Clark.

Dr. Clark has made a prima facie showing that he is entitled to summary judgment on the grounds that there was no departure in the care he undertook to provide to Ms. Miyazaki-English. Plaintiffs have not raised an issue of fact in this regard. There is no dispute that he saw Ms. Miyazaki-English only once, at which point everything appeared normal. Dr. Clark's duty to Ms. Miyazaki-English was to confirm that her care, at that point, could be appropriately followed by a CNM. He did so, and she was then followed by CNM Sonenberg. Even assuming, for the purposes of the motion, that the other defendants departed from the standard of care, plaintiffs have neither shown nor alleged that Dr. Clark had any supervision or control over the other defendants or the policies in place at Columbia or MIC. The allegation that Dr. Clark participated in a "flawed system" is far too vague and speculative to raise an issue of fact sufficient to rebut Dr. Clark's prima facie showing that his care and treatment did not depart from the standard of care. Accordingly, summary judgment in Dr. Clark's favor is warranted.

Motion Sequence 004

Pursuant to C.P.L.R. § 3101(d), on or about August 5, 2009, and April 5, 2010, plaintiffs served an expert witness disclosure and supplemental expert witness response, respectively. In the supplemental disclosure, plaintiffs identified two expert witnesses and set forth the substance and basis of their opinions. The experts are expected to testify that physicians must identify problems and potential problems, and must create plans to address problems and potential problems; that issues of uncertainty should be resolved "in favor of protecting the patient"; and that failing to do so is a departure from the standard of care; that criteria for diagnosing preeclampsia are purposefully vague and not without limitations, and that the clinical spectrum of preeclampsia can manifest in varying ways; that the discrepancy in fetal size to gestational age, when the June 2004 sonogram is compared to the September 2004 sonogram, was significant but ignored by defendants; that once the September 2004 sonogram was taken, a physician should have been directly involved in Ms. Miyazaki-English's care and a plan should have been implemented to coordinate her care; that all of the available information indicated that the fetus was not growing normally, and that had defendants resolved this issue in favor of protecting the fetal patient by assuming IUGR was present, the brain damage that occurred could have been prevented; that a biophysical profile ("BPP") (an ultrasound plus a nonstress test) should have been performed to get a more accurate picture of the condition of the fetus; that once Ms. Miyazaki-English's diastolic blood pressure rose more than 15 mm Hg, defendants should have exercised caution and performed a BPP; that on October 15, 2004, defendants failed to attribute significance to Ms. Miyazaki-English's elevated glucose reading, increased diastolic pressure, three pound weight gain in one week, trace protein in her urine, edema, and reports of headaches; and that these symptoms "reflected that the ongoing pregnancy was

unmasking what could be [preeclampsia] . . . [so] the working diagnosis should have been IUGR." Essentially, the opinion testimony of plaintiffs' experts is that defendants' failure to identify and treat preeclampsia and IUGR caused the infant-plaintiff's hypoxic-ischemic brain injury at birth.

Now, CNM Sonenberg, Columbia, Dr. Maidman, Dr. Jacobson, and CNM Caraway (hereinafter the "Moving Defendants") seek to subject plaintiffs' experts to a hearing to test the admissibility of their theories, or to preclude plaintiffs from offering proof that preeclampsia or IUGR was ever present or was a substantial factor in injuring the infant-plaintiff. The Moving Defendants set forth that Ms. Miyazaki-English never had blood pressures over 140 systolic or 90 diastolic, and never had proteinuria, two criteria for identifying preeclampsia. Thus, the Moving Defendants maintain that any opinion by plaintiffs' experts that Ms. Miyazaki-English's blood pressure was indicative of developing preeclampsia is not generally accepted in the scientific community and should be precluded. Further, the Moving Defendants maintain that the infant-plaintiff never met the diagnostic criteria for identifying IUGR since the estimated fetal weight was never less than or equal to the 10th percentile, and the abdominal circumference was never less than the 5th percentile, the criteria for IUGR. They maintain that the fact that the infant-plaintiff was small for her gestational age and that her weight was in the 10th percentile at birth was consistent with the mother's small stature and Japanese heritage. Accordingly, the Moving Defendants set forth that any opinion by plaintiffs' experts that the infant-plaintiff developed IUGR, or that IUGR was a substantial factor in causing the injuries alleged, is not generally accepted in the scientific community and should be precluded. The Moving Defendants submit expert affirmations supporting these contentions, and a practice bulletin from January 2002 from the American College of

Obstetricians and Gynecologists ("ACOG") which defines gestational hypertension as a systolic blood pressure level of 140 mm Hg or a diastolic blood pressure level of 90 mm Hg. Plaintiffs oppose a Frye hearing and preclusion on the grounds that their experts' expected testimony includes no novel theories.

A hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), is used to determine whether an expert's methodologies in arriving at a conclusion are generally accepted by the relevant scientific community. Ellis v. Eng, 70 A.D.3d 887, 891-92 (2d Dep't 2010). "[W]here . . . the challenge is to the reliability of the expert's conclusions, not whether the expert's methodologies or deductions are based upon principles that are sufficiently established to have gained general acceptance as reliable, there is no basis for a *Frye* hearing." Id. at 892. Here, the Moving Defendants take issue with plaintiffs' experts' proposed articulation of the standard of care, not their methodology or causation theories. The Moving Defendants' experts argue that plaintiffs did not have preeclampsia or IUGR and that they exhibited no signs or symptoms of these conditions. Plaintiffs have disclosed that their experts shall opine otherwise, that is, that plaintiffs indeed had preeclampsia and IUGR and exhibited signs and symptoms thereof. Plaintiffs' experts shall further opine that the guidelines for criteria for preeclampsia and IUGR are not set in stone and are not the only criteria used for identifying the need for further examination or intervention. Plaintiffs' proposed expert testimony is supported by reading the ACOG guidelines submitted by the Moving Defendants, which are not so unequivocal as the Moving Defendants suggest, even including a statement that the guidelines should not be construed as dictating an exclusive course of treatment and that variations may be warranted based on the needs of an individual patient.

Under the circumstances of this case, a Frye hearing or preclusion is unwarranted on the grounds argued by the Moving Defendants.

Accordingly, it is hereby

ORDERED that John F. J. Clark, III, M.D.'s motion for summary judgment (Motion Sequence Number 003) is granted, and the complaint is dismissed against him in its entirety, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Motion Sequence Number 004 is denied in its entirety; and it is further

ORDERED that the parties shall appear for their previously scheduled pre-trial conference on February 21, 2012, at 9:30 a.m.

Dated: January 26, 2012

ENTER:

JOAN B. LOBIS, J.S.C.