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

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 109244/2009

FONDA, YVETTE

INDEX NO. _____

vs

WAPNER, RONALD J.

MOTION DATE _____

Sequence Number : 003

MOTION SEQ. NO. _____

DISMISS

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss is denied in accordance with the accompanying memorandum decision.

FILED

FEB 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: February 10, 2012 FEB 10 2012

ALICE SCHLESINGER 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
COUNTY OF NEW YORK

----------X

YVETTE FONDA, as mother and natural guardian of LEVI FONDA, and JEFF FONDA and YVETTE FONDA, Individually,

Plaintiffs,

-against-

RONALD J. WAPNER, MD and COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS,

Defendants.

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Index No. 109244/09
Motion Seq. No. 003

SCHLESINGER, J.:

Plaintiffs Yvette and Jeff Fonda seek damages in this action based on the alleged "wrongful birth" of their son Levi, who was born with cystic fibrosis on November 23, 2006. It is undisputed that the Fondas consulted the defendant Dr. Wapner before Levi's birth with the specific purpose of confirming whether the infant would be born with cystic fibrosis and with the specific intent of terminating the pregnancy if cystic fibrosis was confirmed. Plaintiffs assert that, due to the defendants' malpractice in connection with the pre-natal genetic testing and reduction of two of the three fetuses, they were not notified of the disabling condition of one fetus and therefore continued that pregnancy through birth when they otherwise would not have done so. Underlying this tragic tale are complex legal issues relating to *forum non conveniens* and choice of law.

Background Facts

Yvette and Jeff Fonda are now, and have been at all relevant times, residents of the State of Colorado. They are both carriers of genetic mutations that cause cystic fibrosis. When Mrs. Fonda became pregnant with triplets in 2006 via in vitro fertilization, the couple decided to have genetic testing performed in utero to determine the health of

the fetuses. To accomplish that goal, the Fondas in May 2006 sought the services of defendant Ronald Wapner, M.D., Chief of the Columbia Center for Genetics, Fetal & Maternal Medicine. Dr. Wapner apparently gave the Fondas the option of coming to New York for the procedure or of going to Dr. Wapner's satellite office at the Drexel University College of Medicine in Philadelphia, Pennsylvania, where Dr. Wapner typically practiced one day per week. The Fondas chose to go to Philadelphia.

Although the Fondas did not know it at the time[1], Dr. Wapner's use of the Drexel space was governed by a somewhat complicated agreement between Columbia and Drexel. Dr. Wapner had previously had a relationship with Drexel. At some point in 2005, well before meeting the Fondas, Dr. Wapner became a full-time employee of Columbia.[2] At that time, however, perhaps at the request of Dr. Wapner to accommodate his Pennsylvania residence, Columbia and Drexel entered into an agreement whereby Drexel allowed Dr. Wapner to use certain space and services at Drexel one day per week, with any fee to be paid by Columbia and any income generated to be paid over to the Department's Faculty Practice Plan at Columbia.

Specifically, Dr. Wapner was permitted to use consult rooms, procedure rooms and the lab at Drexel, as well as the services of the medical assistant, sonographer and

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[1] Plaintiffs discovered these facts via various depositions and the exchange of documents during the discovery phase of litigation.

[2] The extent, if any, of Dr. Wapner's continuing relationship with Drexel is unclear. In his March 2011 affidavit (at ¶10) he describes himself as "presently the Principal Investigator in obstetrical genetic related studies at Drexel." Further, counsel suggests a claim may exist against Drexel, contending in his moving papers (n 1) that maintaining this action in New York would deprive defendants of their right to demonstrate the culpability of Drexel and its equitable share of damages, as Drexel is not subject to this Court's jurisdiction. Any preference by defendants notwithstanding, defendants in a trial here would not waive their right to assert a claim for contribution against Drexel in Pennsylvania, assuming one exists, if plaintiff were to prevail here.

laboratory technician employed by Drexel on the date Dr. Wapner was practicing there. During those times, the employees worked under the supervision and control of Dr. Wapner and were covered by Columbia's liability insurance, rather than Drexel's. The patients were billed by Columbia, all payments went to Columbia, and all medical records were the property of Columbia. In providing services to patients while at Drexel, Dr. Wapner agreed to be bound by Columbia's policies and procedures relating to the Faculty Practice.

In addition to the staff he worked with while performing procedures at Drexel, Dr. Wapner brought certain Drexel staff members to Columbia. The most significant of those persons was a genetic counselor, Susan Walther, who became a full-time Columbia employee in May 2005 and served, among other things, as Dr. Wapner's head administrator. After the events in question, she left Columbia for a position at the University of Pennsylvania School of Medicine, and she now lives in Pennsylvania.

When Yvette Fonda first contacted Dr. Wapner's office, she spoke with Ms. Walther, who made the arrangements. On May 10, 2006, Dr. Wapner performed the chorionic villus sampling (CVS) procedure on the Fondas' triplet fetuses. The procedure involved taking a small sample of the placental tissue of each fetus to perform chromosomal and DNA analysis. Dr. Wapner was assisted in the procedure by Ms. Walther, who acted as the medical assistant even though she usually served as a genetic counselor and had only done the procedure once before. Dr. Wapner was apparently also assisted by a sonographer Patricia Morgan and a lab technician Margaret Sherwood, both of whom reside in Pennsylvania. Ms. Morgan testified at her EBT, however, that she is employed by Columbia, as well as Drexel.

The samples were split and labeled, with some sent to Genzyme Genetics in Santa Fe, New Mexico for chromosomal analysis and some sent to Kimball Genetics in Denver, Colorado for genetic testing for cystic fibrosis. In addition to labeling each sample as belonging to fetus A, B or C, the placental location of each fetus was to be noted on the laboratory requisition form. However, plaintiffs allege that the samples were not properly labeled and/or that the placental location was not properly noted on all the forms.

Dr. Wapner apparently delegated to Ellen Schenkler of Genzyme Genetics the duty to obtain the test results and convey them to the Fondas on his behalf. Ms. Schenkler served as Genzyme's regional manager of genetic counseling, based in their Philadelphia office. At some point, Ms. Schenkler called Yvette Fonda and informed her that they had one healthy fetus and two with cystic fibrosis. According to the DNA analysis performed by Kimball in Colorado, Fetus C was a carrier of CF but did not have the disease and fetuses A and B had cystic fibrosis. Based on their belief that two fetuses had cystic fibrosis, the Fondas had Dr. Wapner reduce those two fetuses on May 23, 2006, while allowing the pregnancy to continue as to the third fetus which plaintiffs believed was only a carrier. Dr. Wapner then sent to Kimball amniotic fluid from the two reduced fetuses to confirm that the correct fetuses had been reduced. Plaintiffs allege that they were told they would be contacted in the event of a problem.

Apparently, Kimball was unable to complete the confirmatory studies due to insufficient DNA in the samples. Plaintiffs allege that because no one advised them of this problem, they carried the pregnancy to term with respect to the third fetus, believing that it did not have cystic fibrosis. Levi Fonda was born on November 24, 2006 and was diagnosed with cystic fibrosis in January 2007.

In May 2009 the plaintiffs commenced an action in Colorado only against the Colorado-based company Kimball Genetics, Inc. based upon the above facts and circumstances. That action was settled in October of 2009 for the sum of $900,000. In the interim, in June of 2009, plaintiffs commenced an action in Pennsylvania against Dr. Wapner, Drexel, Columbia and its affiliates. Plaintiffs voluntarily withdrew that action without prejudice in August 2009, having learned at some point that Drexel's role was extremely limited based on its agreement with Columbia.

In June 2009, the plaintiffs commenced this action against Dr. Wapner and Columbia here in New York. The parties have engaged in extensive discovery over a period of years, which included numerous depositions of the various persons involved in the testing and related procedures in the various states. The residences of those deponents and the parties include Colorado, New York, Pennsylvania and New Jersey.

When discovery was nearly complete, but before the Note of Issue was filed, defendants moved for an order pursuant to CPLR §327 dismissing the complaint on *forum non conveniens* grounds. Plaintiffs opposed, defendants replied, and oral argument was held. Based on the papers and argument, this Court determined that a complete resolution of the issues required the briefing of the choice of law issue, which this Court directed over defendants' objection (see n 3, below). Further argument was then held, and this decision followed.

Forum Non Conveniens

The determination of a motion to dismiss based on *forum non conveniens* is not an easy task. The appellate cases in the field are countless, and because the inquiry is fact-laden, no single case is controlling. The statute that governs a *forum non conveniens* determination is CPLR §327(a), which states in relevant part that:

> **When the court finds that in the interest of substantial justice the action should be heard in another forum,** the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action. (Emphasis added).

The most hotly debated issue is whether the seemingly required finding under the statute that "the action should be heard in another forum" requires that another forum actually be available and precisely what that means. For while defendants urge this Court to dismiss this action in favor of a lawsuit in Pennsylvania, plaintiffs argue that Pennsylvania is not an available alternative forum because that state does not recognize a cause of action for wrongful birth. The debate thus ties directly in to the choice of law issue; that is, regardless of the forum of the trial, which state's law should be applied.[3]

In arguing for dismissal, defendants assert that the availability of an alternative forum, while important, is not dispositive. For that proposition, they point the Court to the oft-cited case decided by the Court of Appeals in 1984, *Islamic Republic of Iran v Pahlavi,* 62 NY2d 474. There the Islamic Republic of Iran brought suit against Iran's former ruler and his wife, alleging that the defendants had accepted bribes and misappropriated, embezzled or converted 35 billion dollars in Iranian funds in breach of their fiduciary duty to the Iranian people. Plaintiff asked the court to impress a constructive trust on defendants' assets located throughout the world and for an accounting of all moneys and property received by the defendants from the government of Iran.

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[3] It is for this reason as well that this Court directed the briefing of the choice of law issue at this time, as a finding that Pennsylvania law applies would compel the dismissal of the action.

The defendants were served while temporarily present in New York and promptly moved to dismiss on various grounds. The trial court granted the motion based on *forum non conveniens*, finding that the defendants' only connection to New York was the deposit of some monies in New York banks, which was insufficient to justify maintaining the action here. The Appellate Division affirmed, with a strong dissent by Justice Fein urging the court to maintain jurisdiction because no alternative forum was available to the plaintiff. On appeal, plaintiff urged the Court of Appeals to adopt the reasoning of Justice Fein. The Court of Appeals declined to do so and affirmed the decisions below, deferring (at p 478) to the exercise of discretion by the lower courts:

> We do not find that those courts abused their discretion as a matter of law under the circumstances presented, even though it appears that there may be no other forum in which plaintiff can obtain the relief it seeks.

In so stating, the Court of Appeals emphasized not only that the courts have broad discretion to determine a *forum non conveniens* issue, but also that its affirmance was particular to the facts of the case before it. Nevertheless, the court did offer some guidelines for a court's exercise of discretion in other cases by noting the "relevant factors" considered by the lower courts:

- the fact that there may be no alternative forum to try the claim due to the political situation in Iran
- the substantial financial and administrative burden on the New York courts
- the genesis of the claims in Iran
- the likely applicability of Iranian law
- the nonresidence of both parties
- the fact that the issues spanned a 38-year period of time, requiring extended trial and pretrial proceedings and the appearance of many foreign witnesses

62 NY2d at 479-480. The court then turned to the balancing test applied by the lower courts, with which it agreed (at p 480):

> The courts below, after reviewing these factors, concluded that the public interest factors affecting defendant outweighed plaintiff's claim to litigate this action in the New York courts notwithstanding the unavailability of an alternative forum.

The focus of plaintiff's argument, and therefore the focus of the decision, was on the factor relating to the unavailability of an alternative forum. Specifically, plaintiff had contended that the lower courts had erred in granting dismissal in the absence of an alternative forum "because the availability of an alternative forum is not merely an additional factor for the court to consider but constitutes an absolute precondition to dismissal on *conveniens* grounds." 62 NY2d at 480. The Court of Appeals disagreed, differing with the analysis by the dissent and stating (at p 481) that:

> Without doubt, the availability of another suitable forum is a most important factor to be considered in ruling on a motion to dismiss but we have never held that it was a prerequisite for applying the *conveniens* doctrine ...

Significantly, the court went on to note (at p 483) that the plaintiff had "failed to establish that no alternative forum exists ..." Continuing on to balance the various factors, the court emphasized that the burden on the New York courts and the cost to the taxpayers simply did not justify keeping the suit here, when New York had little nexus to the controversy and the court's ability to impose a constructive trust on assets beyond its borders was, in any event, questionable. *Id.*

Defendants in the case at bar urge this Court to dismiss the action on *forum non conveniens* grounds, emphasizing that Dr. Wapner performed all his procedures at the Drexel site in Pennsylvania and that most of the relevant witnesses reside in that state.

Implicitly acknowledging that defendant Columbia, which employs Dr. Wapner, is considered a New York resident, counsel adds that the defendants consent to the jurisdiction of the Pennsylvania courts. (Mandell Aff. at p 36).

In addition to *Islamic Republic,* defendants cite various other cases in the First and Second Departments in which the action was dismissed on *forum non conveniens* grounds. No real purpose would be served by discussing those cases in detail, as the holding in each case is fact specific. The courts uniformly consider the various factors enumerated in the *Islamic Republic* case and apply a balancing test to determine whether the burden on the defendants and the New York courts outweighs the plaintiff's interest in proceeding in the forum of its choice, recognizing that the ultimate decision is a matter of the court's discretion.

In their opposition papers, plaintiffs emphasize the various factors that support maintaining jurisdiction in New York. First, they assert that no available forum exists as the State of Pennsylvania does not recognize claims for wrongful birth. 42 Pa.C.S. §8305. Second, while the two medical procedures took place in Philadelphia, the site was leased by Columbia and the procedures were governed by Columbia's rules, regulations and policies, with all fees being paid to Columbia and with Columbia maintaining possession of the patient's records.

Third, party residency is split, with plaintiffs residing in Colorado, defendant Columbia residing in New York, and defendant Dr. Wapner personally residing in Pennsylvania but acting as an employee of the New York defendant Columbia. Fourth, records relating to the medical procedures are in New York, the infant's medical records are in Colorado, and the various testing records are maintained by laboratories in

Colorado (Kimball Genetics), New Mexico (Genzyme Genetics), Oklahoma (identity testing), and Texas (forensic testing by Orchid Cellmark). Fifth, the majority of the witnesses knowledgeable about Levi's condition and plaintiffs' damages reside in Colorado.

In support of their position, plaintiffs cite a series of cases, including *Waterways Ltd. v Barclays Bank PLC,* 174 AD2d 324 (1st Dep't 1991), a case where the Appellate Division reversed the trial court and denied the defendant's motion to dismiss on *forum non conveniens* grounds. While the *Waterways* court conducted the same type of factor analysis as did the *Islamic Republic* court, it is nevertheless significant for its emphasis on justice and fairness and its stated deference to the plaintiff's choice of forum. In discussing the doctrine of *forum non conveniens,* the Appellate Division stated as follows:

> We held, in *Corines v Dobson* (135 AD2d 390, 391 [1st Dept1987]), "[t]he rule of forum non conveniens, now codified in CPLR 327, allows a court to stay or dismiss an action when in the interests of substantial justice it should be heard in another forum. The rule rests upon justice, fairness and convenience, and while various objective factors are to be considered, no one factor is controlling. ... The burden is on the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation. ... It is well established law that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Gulf Oil Corp. V Gilbert,* 330 US 501, 508 [1947] ...).

174 AD2d at 327 (citations omitted). The Court of Appeals in *Islamic Republic* used the same language to emphasize that the "rule rests upon justice, fairness and convenience," rather than a rigid formula, and offers great "flexibility based upon the facts and circumstances of each case." 62 NY2d at 479.

In reply, after characterizing plaintiff's arguments as "unsound" and "disingenuous", defendants claim that plaintiff's opposition is a transparent attempt to evade dismissal of their action if litigated in Pennsylvania, where no cause of action for wrongful birth is recognized. While acknowledging that this assertion implicated choice of law principles, defendants asked to reserve that issue for future motion practice. However, as both sides referred to choice of law in their discussion of the *forum non conveniens* issue raised in this case and acknowledged the potentially dispositive nature of the issue, the Court decided to address both issues in this motion and directed a full briefing by both parties of the choice of law issue in the interest of judicial economy and to avoid the delays inherent in repeated motion practice.

Before turning to the choice of law issue, however, defendants do raise some additional points in their Reply relevant to the *forum non conveniens* issue that merit discussion. First, counsel states (at p 2) that the burden of proof is on the plaintiffs to justify this Court's retention of jurisdiction. This statement is plainly wrong. This Court undeniably has jurisdiction to determine this action based on the New York residence of defendant Columbia and Dr. Wapner's position as an employee of Columbia. As the Appellate Division has repeatedly held, oftentimes with a citation to *Islamic Republic:* "**The burden is on the defendant challenging the forum** to demonstrate private or public interest factors which militate against accepting the litigation." *Waterways,* 174 AD2d at 327, quoting *Corines v Dobson,* 135 AD2d 390, 391 (1st Dep't 1987)(emphasis added); *see also, Holness v Maritime Overseas Corp.,* 251 AD2d 220, 225 (1st Dep't 1998); *Turay v Beam Bros. Trucking, Inc., et al.,* 61 AD3d 964, 966 (2d Dep't 2009).

Then, citing to *Islamic Republic*, defense counsel insists (at p 3) that: "The phrase *available forum* refers — only — to the state whose courts have the right to

exercise jurisdiction over the persons of all necessary parties," and not whether the state recognizes the particular cause of action. However, in the opinion of this Court, that point is far from clear, as the Court of Appeals in *Islamic Republic* included in its discussion "the fact that there may be no alternative forum in which this claim can be tried because of the political situation in Iran under the Khomeini regime." 62 NY2d at 479-80. That situation is analogous to the situation here, where plaintiffs' claim cannot be tried in Pennsylvania due to the legislative prohibition against wrongful birth claims.

Defendants' extended efforts to distinguish the various cases cited by plaintiffs on *forum non conveniens* miss the point. As discussed above, each case is fact specific, and the court's decision based on the factor analysis is a matter of discretion. The appellate courts routinely defer to the trial court's exercise of discretion, absent a clear abuse. *See, e.g., Islamic Republic,* 62 NY2d at 479.

The final point raised by defendants in their Reply addresses plaintiffs' claim that the instant motion is barred by laches because the motion was not made until after the parties had engaged in extensive discovery. As defendants correctly assert, prejudice caused by the delay is essential to a claim of laches. *See, e.g., Murray v City of New York,* 43 NY2d 400 (1977). Plaintiffs have not demonstrated that their discovery strategy would have been significantly different, or that they otherwise would have proceeded differently, had defendants made this motion earlier. Having failed to establish actual prejudice, plaintiffs' claim of laches must fail, and this Court will determine the motion on the merits.

Choice of Law

Turning now to the choice of law issue, the parties in this action vigorously debate the issue due to its significant impact on the plaintiffs' potential right to recover

damages. The moving defendants urge the Court to apply the law of Pennsylvania, where Dr. Wapner lives and where he performed the procedures at issue in this case. The benefit to the defendants of that position is clear and absolute, as Pennsylvania law completely bars any recovery for wrongful birth or wrongful life. Specifically, 42 Pa.C.S. § 8305 states in relevant part that:

> **(a) Wrongful birth.–** There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born.
>
> **(b) Wrongful life. –** There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person ... once conceived, would or should have been aborted.

Plaintiffs, on the other hand, when arguing against defendants' *forum non conveniens* motion, initially urged the Court to apply either New York or Colorado law. (See Affirmation in Opposition of Howard Richman at ¶2). Both of those states recognize claims for wrongful birth, albeit to different degrees. In their supplemental papers directly addressing the choice of law analysis, plaintiffs began (at p 2) by arguing that "Colorado or New York law should be applied" but then refined their argument to more forcefully urge the application of Colorado law (Supplemental Affirmation of Lorraine Parker at p 11). The Court rejects the defendants' argument that the doctrine of judicial estoppel bars plaintiffs from urging the adoption of Colorado law. As plaintiffs had always included Colorado law as an option, they cannot be said to have changed their position. What is more, defendants have not been prejudiced by the plaintiffs' initial reservation of its options. Needless to say, New York law continues to govern this Court's determination of both the *forum non conveniens* and the choice of law issues.

Pursuant to New York law, the first question is whether the substantive law governing wrongful birth constitutes a "conduct-regulating" or a "loss-allocating" rule. Pointing to the intent of the Pennsylvania legislature, as expressed by the court in *Jenkins v Hospital of the Medical* College *of Pennsylvania,* 401 Pa. Super 604, 625, 585 A.2d 1091, *aff'd* 535 Pa 252, 634 A. 2d 1099 (1993), defendants insist that the statute is conduct-regulating because it was designed in part "to prevent the practice of medicine, especially obstetrics and gynecology, from becoming coerced into accepting eugenic abortion as a condition for avoiding what are particularly wrongful birth lawsuits." Plaintiffs, in contrast, argue that the rule is loss-allocating as it does not prohibit or regulate the performance of CVS and fetal reduction procedures such as those performed by Dr. Wapner, but simply bars the parents from recovering monetary damages after any malpractice has occurred.

The landmark case on this issue is *Padula v Lilarn Props. Corp.,* 84 NY2d 519 (1994). The Court of Appeals there explained the distinction as follows (at p 522):

> Conduct-regulating rules have the prophylactic effect of governing conduct to prevent injuries from occurring. ... "If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders" (*Cooney v Osgood Mach.,* 81 NY2d 66, 72).
>
> Loss allocating rules, on the other hand, are those which prohibit, assign, or limit liability after the tort occurs, such as charitable immunity statutes ..., guest statutes ..., wrongful death statutes ..., vicarious liability statutes ...., and contribution rules ...[citations omitted]. Where the conflicting rules at issue are loss allocating [the outcome depends on the application of the rules in *Neumeier v Kuehner,* 31 NY2d 121].

In *Padula*, the Court of Appeals held that the rules at issue, Labor Law sections 240 and 241, were conduct-regulating, as their primary purpose was to require the employer to institute adequate safety measures at the worksite. In contrast, in *Schultz v Boy Scouts of America, Inc.,* 65 NY2d 189, 198 (1985), the charitable immunity statute exempting a charitable organization such as the Boy Scouts from liability for tortious conduct was found to be loss-allocating. Similarly, in *Cooney v Osgood Mach.,* 81 NY2d 66, 74 (1993), the workers' compensation statute that barred contribution claims against an employer was found to be loss-allocating. In addition, guest statutes that limit the liability of a driver who negligently injures a guest passenger are considered loss-allocating. *See, Neumeier v Kuchner,* 31 NY 2d 131 (1972); *Edwards v Erie Coach Lines Company,* 17 NY3d 306 (2011). Wrongful death statutes, which limit the monetary recovery available to the plaintiff, are also considered loss-allocating. *Padula, 84 NY2d at 522, citing Miller v Miller*, 22 NY2d 12 (1968).

The Court in this case finds that the wrongful birth statutes at issue here are loss-allocating. As plaintiffs properly note, the statutes are not designed to set a standard of care for the physician or regulate his conduct in advance of a procedure. Instead, they are designed to limit a party's economic recovery after the fact in the event of negligence by the physician. While defendants may be correct that the Pennsylvania statute exempting a physician from liability may well dissuade informed patients from coming to that State for fetal reduction services based on genetic testing, the primary purpose of the statute is to allocate potential losses by shielding the physician from liability. In that regard, the statute is similar to the charitable immunity and guest statutes and other examples noted above which protect a party from liability or otherwise limit damages after the wrong has occurred.

Pursuant to *Padula, supra,* the next step in resolving the choice of law conflict is for this Court to apply the three-rule framework set forth in *Neumeier v Kuchner,* 31 NY 2d 131 (1972). Although that case involved guests statutes applicable to motor vehicle accidents, the Court of Appeals has routinely applied the *Neumeier* framework to loss-allocating rules not involving guest statutes. *Edwards,* 17 NY3d at 322. The three *Neumeier* rules follow:

> 1. When the guest-passenger [plaintiff] and the host-driver [defendant] are domiciled in the same state, and the car is there registered, the law of that state should control ...
>
> 2. When the driver's [defendant's] conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, ***when the guest [plaintiff] was injured in the state of his own domicile and its law permits recovery***, the [defendant] driver who has come into the state should not – in the absence of special circumstances – be permitted to interpose the law of his state as a defense.
>
> 3. In other situations, when the passenger [plaintiff] and the driver [defendant] are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

31 NY2d at 128, quoting *Tooker v Lopez,* 24 NY2d 569, 585 (emphasis added).

In this case, all agree that Rule 1 is not applicable because the parties do not share a common domicile. And while the papers address the application of the second and third rules, both counsel asserted at oral argument that the second rule is the one that applies. This Court agrees. As the Court of Appeals confirmed last year in

Edwards, 17 NY3d at320, the second *Neumeier* rule effectively adopts a "place of injury" test. To apply the rule here, then, one must look to the place of injury.

Determining the place of injury is more complicated here than in a motor vehicle accident case such as *Edwards,* where the plaintiff suffered injuries immediately upon the defendant's negligence – crashing into the vehicle stopped at the side of the road. A far more instructive case, cited by both parties, is *Schultz v Boy Scouts of America, Inc., et al.*, 65 NY2d 189 (1985).

The plaintiff parents in *Schultz* instituted an action to recover damages for personal injuries they and their sons suffered because the boys had been sexually abused by defendant Edmund Coakeley, a brother in the Franciscan order who was the boys' school teacher and Boy Scout troop leader. Plaintiffs resided in New Jersey, where the school was located; the school was owned and operated by the Roman Catholic Archdiocese of Newark and the Franciscan order supplied the teachers. Coakeley took the boys to a Boy Scout camp in upstate New York where he allegedly sexually abused them, and the abuse allegedly continued after their return to school in New Jersey. Plaintiffs claim that, due to Coakeley's acts, both boys suffered severe psychological injury, leading one of the boys to commit suicide by overdosing on drugs. In addition to asserting claims on behalf of the boys, the parent plaintiffs also sought damages for their own injuries, including mental anguish and psychological injuries.

Plaintiffs sued the Boy Scouts (a New Jersey domiciliary), the Franciscan Brothers (an Ohio domiciliary), and Coakeley. Coakeley did not appear, but the institutional defendants appeared and moved to dismiss based on New Jersey's charitable immunity statute. Plaintiffs responded that under applicable choice-of-law

principles, New York law should apply based on the abuse that began at the Boy Scout camp in New York.

To the extent relevant here, the Court of Appeals included in its analysis a discussion of the place of injury, stating that:

> Under traditional rules, the law of the place of the wrong governs all substantive issues in the action ..., but when the defendant's negligent conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another, **the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred** .... Thus, the locus in this case is determined by where the plaintiffs' injuries occurred.

65 NY2d at 196 (emphasis added, citations omitted). Applying that rule to the facts, the court noted that Christopher's wrongful death occurred in New Jersey, as did most of the injuries suffered by his brother and parents. Although some of the tortious conduct had occurred at the Boy Scout camp in New York, the court concluded that that fact was insufficient to warrant the application of New York law when the relevant issue is a loss-distribution rule such as charitable immunity. In support of its determination, the court cited, among other cases, *Poplar v Bourjois*, 298 NY 62 (1948), a products liability case where a New York company sold its perfume boxes in Maryland. The plaintiff was allegedly cut due to a defect in the design and manufacturing that created a sharp edge on the box. The court concluded that the wrong had occurred in Maryland where the consumer purchased the box and was injured, not in New York where the box was negligently manufactured.

Applying that analysis here, this Court agrees with plaintiffs that the place of the wrong is Colorado, as Levi's birth and the damages incurred by his parents for Levi's care and treatment all occurred in Colorado. Although Dr. Wapner performed his

procedures in Pennsylvania, the confirmatory testing was done in Colorado and the failure to communicate the problem with that testing occurred either in Colorado, or in Pennsylvania where the procedure occurred or in New York where Dr. Wapner and his Columbia practice are based. However, pursuant to *Schultz*, the last event — Levi's birth in Colorado — is the dispositive event. *See also, LaBello v Albany Medical Ctr. Hosp.,* 85 NY2d 701 (1995)(a cause of action for medical malpractice during the prenatal care period accrues at live birth when the injuries are manifested); *Alquijay v St. Luke's-Roosevelt Hosp. Ctr.*, 63 NY2d 978 (1984)(parents' cause of action for pecuniary expenses incurred based on wrongful birth of infant accrued upon the infant's birth). Therefore, under *Neumeier's* second rule, this Court finds that Colorado law applies to plaintiffs' wrongful birth claim.

Defendants' argument on this point is misguided in its claim that "here the alleged malpractice and the injury suffered all occurred in the State of Pennsylvania." (Mandell Supp. Aff. at p 9). That argument completely ignores the statement in *Schultz,* quoted above, that "the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred." Similarly misguided is defendants' claim that the "tenuous connection which plaintiffs have attempted to construct [is] all predicated upon Colombia's 'administrative connection' to defendant Wapner ...." *Id.* As Chief of the Columbia Center for Genetics, Fetal & Maternal Medicine, Dr. Wapner is an employee of Columbia with much more than an administrative connection. Presumably, Columbia is vicariously liable for any malpractice by Dr. Wapner and the staff. Further, as noted above, all billing and payments went to Columbia and the patient's medical records were all maintained by Columbia because the Fondas were considered to be patients of Columbia, and not of Drexel nor Dr. Wapner individually.

The Application of the Rules Compels the Denial of Defendants' Motion

Applying the above-stated rules to the case at bar, this Court in its discretion declines to grant defendants' motion to dismiss based on *forum non conveniens,* finding that defendants' have failed to sustain their statutory burden of proving that "in the interest of substantial justice the action should be heard in another forum." CPLR §327(a).

We begin by noting that defendant Columbia University College of Physicians and Surgeons is a New York domiciliary and that defendant Dr. Wapner is Columbia's employee. As discussed above, plaintiff Yvette Fonda was treated as a patient of Columbia; Drexel merely provided a site in Philadelphia for Dr. Wapner and his staff to perform the procedures. Although some of the staff were employed by Drexel, Columbia does not dispute that even those people were working under the supervision and control of Dr. Wapner and Columbia at all relevant times. Thus, one may say that the genesis of the claim is in New York, at least as much as Pennsylvania, and that the interest of New York in resolving disputes involving New York medical institutions is significant.

Further, the relevant medical records regarding the procedures performed by Dr. Wapner are maintained by Columbia in this State and thus are readily available. To the extent that a party may wish to call as witnesses any of the staff who reside in Pennsylvania or New Jersey, the travel to New York would not impose a substantial hardship. To the extent that the relevant records or witnesses are based in Colorado, Pennsylvania is no different than New York with respect to those matters. Unlike the *Islamic Republic* case, this Court can readily apply Colorado law and grant any requested relief that may be appropriate.

Applying the other *Islamic Republic* factors, while the availability of another forum is not dispositive, it is a most important factor. As discussed above, Pennsylvania is not an available forum as it does not recognize a cause of action for wrongful birth. Moreover, New York clearly has an interest in this lawsuit because of the location here of defendant Columbia University College of Physicians and Surgeons and the continuing practice of Dr. Wapner as Chief of the Columbia Center for Genetics, Fetal & Maternal medicine, whose services along the lines of those at issue here financially benefit Columbia.

Maintaining the action here would not impose a financial or administrative burden on the New York courts. Extensive discovery has already been conducted here in this action, and the New York courts are well-equipped to conduct a medical malpractice trial, even if witnesses must travel from a neighboring states. Indeed, such a trial is a daily occurrence.

Considering all these factors, this Court does not find that "the public interest factors affecting defendant outweighed plaintiff's claim to litigate this action in the New York court" in, as required for a dismissal on *forum non conveniens* grounds. *Islamic Republic*, 62 NY2d at 480. As the factors do not balance strongly in favor of the defendants, this Court will defer to plaintiffs' choice of forum. *See Gulf Oil, supra.* Defendants have failed to meet their burden on this motion, and the Court in its discretion declines the request for dismissal.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss based on *forum non conveniens* is denied; and it is further

ORDERED that, to the extent a difference exists between New York and Colorado law, both of which recognize claims for wrongful birth, at trial Colorado law shall be applied; and it is further

ORDERED that counsel shall appear before this Court for a status conference on Wednesday, March 21, 2012 at 3:00 p.m. to determine whether any outstanding discovery must be completed and to set dates for the filing of a Note of Issue and the commencement of a trial.

Dated: February 10, 2012

FEB 10 2012

J.S.C.

ALICE SCHLESINGER

FILED

FEB 15 2012

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COUNTY CLERK'S OFFICE