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SHORT FORM ORDER

INDEX No. 07-5632
CAL NO. 11-00872 MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 9-7-11 (# 001 & # 002)
MOTION DATE 9-21-11 (#003)
ADJ. DATE 1-4-12
Mot. Seq. # 001- MG
#002 - MG
#003 - MG; CASEDISP

PETER RYAN KAGIWADA, an infant under the age of fourteen (14) years, by his parent and natural guardian, CHRISTINE KAGIWADA, Plaintiff, - against - FRANK FOX, RDMS; DAVID J. GARRY, D.O., and ST. CATHERINE OF SIENA MEDICAL CENTER, Defendants	GEORGE C. VLACHOS, P.C. Attorney for Plaintiff Courthouse Corporate Center 320 Carlton Avenue Central Islip, New York 11772 FUREY, KERLEY, WALSH, MATERA & CINQUEMANI, P.C., Attorneys for Defendant David J. Garry, D.O. 2174 Jackson Avenue Seaford, New York 11783 KAUFMAN, BORGEEST & RYAN, LLP Attorney for Defendants Frank Fox, RDMS 1205 Franklin Avenue Garden City, New York 11530 LEWIS, JOHS, AVALLONE, AVILES & KAUFMAN, LLP Attorneys for Defendant St. Catherine of Siena 425 Broadhollow Road Melville, New York 11747

Upon the following papers numbered 1 to 62 read on this motion and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 18 ; Cross motions (002) 19-33; (003) 34-48; Answering Affidavits and supporting papers 49-50; 51-52; 53-54 (each untabbed) ; Replying Affidavits and supporting papers 55-56; 57-58; 59-60; 61-62; Other ; it is,

ORDERED that this motion (001) by the defendant, David J. Garry, D.O., pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted and the complaint is dismissed as asserted against him; and it is further

ORDERED that this motion (002) by the defendant, Frank Fox, RDMS, pursuant to CPLR 3212

for summary judgment dismissing the complaint is granted and the complaint is dismissed as asserted against him; and it is further

ORDERED that this motion (003) by the defendant, St. Catherine of Siena Medical Center, pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint is granted and the complaint is dismissed as asserted against it.

This is an action for medical malpractice on behalf of the infant plaintiff, Peter Ryan Kagiwada. A derivative claim was asserted on behalf of the infant's father, Charles Kagiwada. The action is premised upon the alleged departures from good and accepted standards of care by the defendants in their prenatal interpretation of a sonogram and failure to diagnose posterior urethral valves. It is claimed that the defendants failed to properly interpret the sonogram which was taken while the infant plaintiff was in utero at 20 weeks gestation, and that they subsequently failed to diagnose posterior urethral valves, a condition which consists of a membrane around the ureter that obstructs the path of urine out through the urethra, causing kidney damage and other problems.

Defendant David J. Garry. D.O. seeks dismissal of the complaint in motion (001) on the basis that he properly read and interpreted the sonogram of May 12, 2003, and performed a real time examination, which demonstrated no signs of posterior urethral valves. He asserts that a clinical diagnosis of posterior urethral valves could not be ascertained from a review of the sonogram films or images of May 12, 2003, and thus he did not depart from good and accepted standards of medical care.

Defendant Frank Fox, RDMS seeks dismissal of the complaint in motion (002) on the basis that his involvement is limited to taking the sonogram of May 12, 2003. He contends that he properly performed the subject sonogram, and that he was not responsible for interpreting the sonogram.

St. Catherine of Siena Medical Center (St. Catherine) seeks dismissal of the complaint in motion (003) on the basis that none of its employees departed from good and accepted standards of care in rendering treatment to the infant plaintiff upon his birth. St. Catherine asserts it cannot be held vicariously liable for the claimed injury to the infant plaintiff as neither Dr. Gary nor Frank Fox departed from good and accepted standards of care in performing and interpreting the sonogram.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in

order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

In support of this motion (001), defendant Garry, D.O. has submitted, inter alia, an attorney's affirmation; the affirmation of his expert physician, Adiel Fleischer, M.D.; copies of the summons and complaint, amended complaint, defendant's answer and various discovery demands, and plaintiff's verified bill of particulars; a copy of an unauthenticated CD; unsigned and uncertified copy of the examination before trial of Christine Kagiwada dated September 2, 2009 with letter of service pursuant to CPLR 3116; signed copies of the transcripts of the examination before trial of Charles Kagiwada dated November 13, 2009, Francis Fox, REMS dated May 4, 2010, and David Garry, D.O. dated August 24, 2010; and a copy of the sonogram report dated May 12, 2003.

In support of motion (002), defendant Fox has submitted, inter alia, an attorney's affirmation; the expert physician affirmation of Adiel Fleischer, M.D.; copies of the pleadings and defendant's answer, and plaintiff's verified bill of particulars; copy of the sonogram report of May 12, 2003; an uncertified copy of the infant's medical record; signed and certified copies of the transcripts of the examinations before trial of Francis Fox dated May 4, 2010, David Garry dated August 24, 2010 and Christine Kagiwada dated September 2, 2010.

In support of motion (003), defendant St. Catherine has submitted, inter alia, an attorney's affirmation; the expert physician affirmation of Harold Raucher, M.D. and the expert physician affirmation of Adiel Fleischer, M.D.; the summons and complaint, amended complaint, its answer, and plaintiff's verified bill of particulars; an uncertified copy of the plaintiff's hospital record; the unsigned and uncertified copy of the transcript of Christine Kagiwada dated September 2, 2009 which is not accompanied by proof of service pursuant to CPLR 3116 and is not in admissible form as required by CPLR 3212 (*see* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]).

Christine Kagiwada testified to the effect that she was born on December 2, 1967, has three children born by caesarean section due to failure to progress, and that she terminated one pregnancy in

1986. Her medical history was positive for a cyst on her ovary. She first learned that she was pregnant with the infant plaintiff in about January 2003. She had regular prenatal visits with Dr. Birnbaum, her obstetrician, who ordered a sonogram, which she had performed on May 12, 2003 at St. Catherine of Siena. The technician from St. Catherine told her she was having a boy and gave her a videotape of the sonogram. She also had one sonogram at Dr. Birnbaum's office. She refused the amniocentesis offered by Dr. Birnbaum. Her blood work was normal. She testified that she had no complications during her pregnancy with the infant plaintiff. Her delivery by caesarean section was scheduled at Stony Brook on September 29, 2003, however, she awoke on September 26, 2003 with pains and delivered at St. Catherine of Siena, having been instructed by Dr. Birnbaum to go there. The infant plaintiff, delivered by section at eight pounds five ounces, had good APGAR scores.

Ms. Kagiwada testified that during the infant's first six months of life, he was fine, and had thrush once in February 2004. When the infant was about a year of age, he began crying and seemed unhappy, so her pediatrician, Dr. Manners, performed an examination in her presence and ordered an antibiotic for an ear or sinus infection. Thereafter, he was irritable again, he was not eating well and started losing weight. He was placed back on formula. In December 2004, testing for failure to thrive was to be started as the infant, who had been meeting his milestones, began to regress. He stopped speaking and eating, and would not move around. In January 2005, he began running a fever and was taken to Mercy Hospital where he was diagnosed with an ear infection. A week later, the infant was seen by Dr. Manners, and it was noted that he gained weight, so the testing for failure to thrive was not done. By the end of January 2005, the infant began "zoning out," was very lethargic, stopped eating, and was drinking excessively. His color became yellowish and his eyes were glazed. Dr. Manners ordered blood work, which had to be repeated as it showed that he was dehydrated, and they knew he was not. Following the repeat blood work, she was instructed to take the infant immediately to Stony Brook University Hospital where he was seen by a pediatric nephrologist, Dr. Boydston, who, after various radiological tests, advised that the infant had posterior uretheral valves, which were not supposed to be there, thus requiring treatment.

Charles Kagiwada testified to the extent that he thought he went with his wife for the sonogram at St. Catherines and that they received a video of the exam. When the infant plaintiff was born, he did not remember anything different about him, and thought he was on the small size in his growth percentile. When the infant was about one year of age, he began to notice that he was irritable, but prior to that, he had no illnesses that he could recall. Sometimes his diapers would be dry, and other times, they would be saturated with urine, but he never reported it to any of the infant's doctors, and could not recall if he discussed it with his wife. In about December 2004, the infant looked yellowish-pale. In January 2005, he was eventually diagnosed with a kidney problem. Mr. Kagiwada testified that when the infant was admitted to Stony Brook Hospital in January 2005, he was told that the infant had a blockage in his urethra, and that normally it disappears by shrinking or falling off; but in his case, because it did not, he would need surgery to correct the condition.

Francis Fox, RDMS testified to the extent that he earned an associates degree in applied sciences at Farmingdale University, then attended the Ultrasound Institute and earned a certificate of completion. He is a licensed sonographer, and every three years accrues 30 credits of continuing education to maintain an active status. His certification is called a registry and he is nationally registered in abdominal and ob/gyn sonography since 1982. His registration has never been suspended or revoked. He stated that he

worked with Dr. Garry, a maternal fetal medicine physician who worked at Stony Brook Medical Center and St. Catherine of Siena. He did not have an independent recollection of the sonogram of May 12, 2003, and that Dr. Garry prepared the subject sonogram report of May 12, 2003. His role as a sonographer on May 12, 2003 was to perform the ultrasound exam and to document all the images necessary to complete the exam. He does not interpret any of the images, but takes the pictures and identifies them. Mr. Fox continued that on a twenty-week sonogram, he is required to take a set of measurements with sonogram equipment to indicate that the baby's growth pattern is normal. He starts at the top of the head and documents different structures, including the baby's head, abdomen, and extremities. A tool built into the software permits the determination of particular measurements of anatomical structures in the body during the sonogram. Mr. Fox stated that after the exam is completed and the films are developed, he discusses the exam with the physician during the review.

Mr. Fox testified that posterior urethral valves are anatomical structures on a male fetus that allows the urine to leave the bladder and permits the baby to excrete urine into the amniotic sac. He continued that posterior urethral valves are not actually seen during an ultrasound study. During the course of a sonogram, there are no images obtained depicting the anatomical area where one would typically find posterior urethral valves, if they are present, although images of a fetus' bladder and kidneys are obtained. He continued that normal sized ureters are not visualized on sonogram, but they might be visible if they are dilated. He did not see ureters during the sonogram of the fetus. He testified that hydronephrosis, where urine backs up into the pelvis of the baby's kidneys, can be detectable at nineteen and a half weeks by sonogram, and there was no evidence of hydronephrosis during the examination. He stated that a distended bladder is a bladder that appears to be greater than what would be considered normal, and opined that the fetus' bladder appeared normal in the sonogram films. Mr. Fox testified that a video can be taken as a courtesy to a patient and is not necessarily considered documentation of the exam. He continued that the contents of the video are not necessarily the same that he would be visualizing on the monitor while performing the sonogram. The video can be edited and would not necessarily contain the entire exam. He did not know how long the plaintiff's video was or if it had been edited.

It is noted that the comments on the sonogram report of May 12, 2003 state that the fetus is appropriate size for gestational age, and that the fetal anatomy appears normal on exam today.

David Garry, D.O. testified to the extent that he is a physician licensed in New York, is board certified in obstetrics and gynecology, and has a certificate in maternal fetal medicine. On May 12, 2003, he was employed by Stony Brook University Hospital and was assigned to St. Catherine on a routine basis to perform ultrasound services. The ultrasound films of May 12, 2003 were produced and marked for identification. He stated that the DVD is a recording of the real time ultrasound that was performed by the technologist performing the ultrasound that ultimately resulted in the ultrasound images that he reviewed on that date. He did not, during his evaluation of the sonogram on May 12, 2003, review the contents of that DVD. He prepared the ultrasound report at St. Catherine of Siena by typing it out himself on a laptop at the completion of the exam. His custom and practice is that when the ultrasound technician completes the exam, he has a short discussion in front of the patient about the size of the baby, and the apparent findings. He then images the patient in real-time. He had no way of knowing whether he or Mr. Fox was the sonographer for the DVD images, and it did not appear that the DVD was re-

examining any certain anatomical structures.

Dr. Garry reviewed the May 12, 2003 sonogram, identified the individual images, and testified that there were no abnormalities which required further attention. The bladder appeared normal, and was not distended in the image he had. His testimony was the same for any images in the real time DVD. He testified that in a male fetus, the posterior urethral valves are an anatomic abnormality at the base of the urethra. He continued that all males have some posterior urethral valves, but in terms of problems with a fetus, excessive size of these posterior urethral valves can cause partial, or complete obstruction of the outlet of the bladder. Signs of posterior urethral valves may include a distended bladder, thickened bladder wall, changes in the kidneys with respect to dilation of the kidney pelvis, or hydronephrosis and changes in the amniotic fluid volume which surrounds the fetus. On the images of May 12, 2003, there was no thickening of the bladder wall. He continued that ureters cannot be seen in normal imaging as they are tubular structures that are too small to be imaged. He continued that in a twenty week fetus sonogram, a measurement of about three centimeters on a longitudinal view or sagittal view of the fetal bladder would be considered abnormal, and at no point was the fetal bladder greater than three centimeters. He further testified that it would not be considered an abnormality for a bladder to not empty during a 45 minute exam, if the bladder appeared normal in size and shape.

Dr. Adiel Fleischer, M.D. sets forth that he/she is a physician licensed to practice medicine in New York and is board certified in obstetrics and gynecology and fetal maternal medicine. Dr. Fleischer set forth the materials and records reviewed, including a DVD which recorded real time ultrasound images performed by Frank Fox on March 12, 2003. It is Dr. Fleischer's opinion, with a reasonable degree of medical certainty, that David J. Garry, D.O. provided care and treatment which was at all times in accordance with good and accepted medical practice and did not proximately cause the injuries alleged to have been sustained by the infant plaintiff. Dr. Fleischer stated that it was customary to obtain a sonogram at about twenty weeks, and such routine evaluation, ordered by the obstetrician, was conducted at St. Catherine of Siena Medical Center by Frank Fox, RDMS, who took fetal measurements to ensure the anatomical structure of the fetus fell within the standard range. and took various images of the fetus' body to document the different structures of the head, abdomen and extremities. Dr. Fleischer stated that after the sonogram films were developed, that it was standard for the physician to review the films for quality and to check all images for any abnormalities, and to have a discussion with the ultrasound technician in front of the patient to discuss the findings, prior to performing a real time examination.

Dr. Fleischer affirms that upon reviewing the May 12, 2003 sonogram films and real time examination, all structures appeared normal, no abnormalities were observed, and that there were no signs or indicators of posterior urethral valve, which, he stated, is essentially a membrane around the ureter which obstructs the path of urine through the ureter and causes the bladder to squeeze harder to bypass the obstruction, which generates more muscle in the bladder and results in a thickened bladder. Dr. Fleischer stated that posterior urethral valves cannot be seen on a sonogram at 20 week gestation, although there are signs which might suggest their existence, such as an enlarged bladder, dilation of the ureters, dilation of the kidneys/pelvis (hydronephrosis), and a decrease in amniotic fluid volume, which is the urine output of the fetus. If the urine output is restricted due to obstruction, oligohydramnios (low level of amniotic fluid) is present. Dr. Fleischer stated that none of the signs or indicators were present on the images of the DVD or sonogram of May 12, 2003. The fetal bladder and kidneys appeared

normal. The ureters were not visualized on the sonogram, which demonstrated that they were not dilated. There was a normal level of amniotic fluid volume. Dr. Fleischer continued that it is just not possible to always diagnose posterior urethral valves at 20 weeks gestation, if at any time, in utero. In the instant case, opined Dr. Fleischer, the condition could not be diagnosed until after the infant's birth. He continued that Dr. Garry did not depart from good and accepted standards of care and treatment in that he correctly interpreted the sonogram films and images, and was not involved with Ms. Kagiwada's care and treatment thereafter, or the infant's care and treatment, after his birth.

Dr. Flesicher further affirmed that when Dr. Manners examined the infant plaintiff on January 28, 2005, that he weighted 19 pounds 2.5 ounces with no weight gain for four months. Urine and stool cultures, and multiple laboratory studies were ordered. On January 31, 2005, laboratory results revealed an abnormal BUN and creatinine level of 88/1.2md/dl respectively, and the child was diagnosed with a failure to thrive. On January 31, 2005, a renal ultrasound noted bilateral hydronephrosis which was felt to be caused by an anatomic obstruction. On February 1, 2005, a voided cystourethrogram (VCUG) identified posterior urethral valves with reflux within the left megaureter. On February 4, 2005, Dr. Wasnick, a pediatric urologist, performed a transurethral ablation of the urethral valve. It was noted that the bladder was severely trabeculated (non-compliant, hypotonic, resulting from hypertrophy of the muscular coat). Several corrective procedures followed, including cystoscopy, left megaureter remodeling and nipple re-implantation in the bladder. Dr. Fleischer concludes that the ureter became gradually blocked around December 4, 2004 when the infant became lethargic and experienced some weight loss, consistent with incomplete or intermittent PUV. There was no blockage of the ureter in utero or at the time of the infant's birth. It is not possible for there to have been a blocked ureter in utero as the infant's urinary system would not have been functioning normally for over a year without significant symptoms.

Harold Raucher, M.D. affirms that he is a physician licensed to practice medicine in New York and is board certified in pediatric medicine. He set forth the materials and records reviewed and sets forth his opinions within a reasonable degree of medical certainty. It is Dr. Raucher's opinion that the care and treatment rendered to the infant plaintiff at St. Catherine of Siena Medical Center from September 26, 2003 through his discharge on September 30, 2003 was within accepted medical standards of medical practice and was not the proximate cause of the injuries claimed on behalf of the infant plaintiff. Dr. Raucher stated that posterior urethral valves are an abnormal congenital obstructing membrane located within the posterior male urethra and block or restrict the urine from draining from the bladder to be eliminated, and can range from partially obstructing valves which can present no identifiable symptoms at the time of birth, to fully obstructed valves which may be associated with no urine output or a dribbling of urine. It is Dr. Raucher's opinion that the infant plaintiff was born with partially obstructing posterior urethral valves that did not present any signs or symptoms during his initial hospital admission at the time of his birth.

Dr. Raucher continued that the medical records reveal that the infant plaintiff had two recorded voids or urinations on the day he was born; he had six recorded voids on September 27, 2003; and three recorded voids on the day of discharge, up until twelve noon. This voiding frequency, stated Dr. Raucher, was within the realm of normal, was in no way suspicious for posterior urethral valves, and did not require further testing to evaluate his urinary system. Dr. Raucher stated that it is entirely normal and

expected, that a newborn infant will loose weight immediately after his birth, and the infant plaintiff's recorded weight loss while he was in the hospital following his birth was not an indication of an underlying urinary tract problem, such as posterior urethral valves. Additionally, on the date of discharge, the infant plaintiff was beginning to gain weight. Thus, stated Dr. Raucher, the care and treatment the infant plaintiff received while a patient at St. Catherine of Siena Medical Center from September 26, 2003 to September 30, 2002, was within the applicable standards of care.

Based upon the foregoing, it is determined that the moving defendants have established prima facie entitlement to summary judgment dismissing the complaint. The moving defendants have established prima facie that: there were no departures from good and accepted standards of care and treatment by Frank Fox, RDMS in conducting the sonogram of the fetus; the urinary structures which could be seen were properly imaged; Dr. David Garry properly read and interpreted the sonogram and real time imaging of the infant's urinary system; the images did not depict posterior urethral valves or any signs of their possible existence; St. Catherine of Siena, by its employees, provided proper care and treatment to the infant plaintiff after his birth; and St. Catherine of Siena did not fail to recognize or evaluate the infant for the possibility of posterior urethral valves. It has been further established that there were no acts or omissions by any of the defendants which proximately caused the infant plaintiff's claimed injuries.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (***Bengston v Wang,*** 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]). Here, the plaintiff has opposed the defendants' motions and has submitted, inter alia, a letter dated November 13, 2006, from Frank A. Manning, M.D., which is not in admissible form to be considered as an affidavit of merit attesting to a deviation or departure from accepted practice which was a competent producing cause of the infant's alleged injuries. The letter is not sworn to under the penalties of perjury and is neither an affirmation nor an affidavit. Nor does Dr. Manning proffer an opinion based upon a reasonable degree of medical certainty.

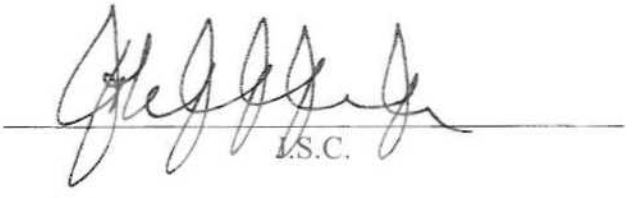
Dr. Manning set forth that he reviewed the videotape of the sonogram made on this infant at about 19 weeks gestation. He stated that during the approximate one hour taped interval the fetal urinary bladder is moderately distended and remains so throughout the entire examination. He continued that amniotic fluid volume is normal, and there is neither hydroureter nor hydronephrosis, and the urethra is not visualized. He continued that the absence of fetal bladder emptying over a more than 40 minute interval is not a normal finding and is an indication for further evaluation.

It is determined that Plaintiff has failed to raise a factual issue to preclude summary judgment dismissing the complaint as to any of the defendants. Even if Dr. Manning's letter were in admissible form, the plaintiff's expert has failed to qualify himself as an expert. He does not state that he is licensed

to practice medicine or that he is board certified in any area of medicine. He failed to set forth the bases for his expertise or his experience upon which he rendered his statements and interpreted the video. "While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field...the witness nonetheless should be possessed of the requisite skill, training, education, knowledge **or** (*emphasis added)* experience from which it can be assumed that the opinion rendered is reliable" (***Ozugowski v City of New York***, 2011 NY Slip Op 9293 [2d Dept]; *see also* ***Postlethwaithe v United Health Services*** Hospitals, 5 AD3d 892, 773 NYS2d 480 [2d Dept 2004]; ***Mustello v Berg***, 44 AD3d 1018, 845 NYS2d 86 [2d Dept 2007]; ***Behar v Coren***, 21 AD3d 1045, 803 NYS2d 629 [2d Dept 2005]). Dr. Manning's statements contained in his letter are conclusory and unsupported. Although Dr. Manning states that the infant's urinary bladder is moderately distended, he does not state what is meant by moderate distention or in what views such distention was visualized. He does not set forth measurements of the urinary bladder at any intervals, and he does not establish the normal emptying pattern of a fetus' urinary bladder at 19 or 20 weeks gestation. Dr. Manning does not state that he reviewed the sonogram images as well as the DVD, and does not opine that there were any departures from good and accepted standards of care which proximately caused any of the injuries claimed on behalf of the infant plaintiff.

Accordingly, defendants' motions (001), (002) and (003) for summary judgment are granted, and the complaint is dismissed as asserted against all the defendants.

Dated: 21 Feb. 2012



J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION