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SHORT FORM ORDER

COPY

INDEX No. 08-44775
CAL No. 11-01435MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 12-13-11
ADJ. DATE 1-24-12
Mot. Seq. # 004 - MD

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CHASE NASCA, an infant by his Father and Natural Guardian, DEAN NASCA,

Plaintiffs,

- against -

MARIBETH B. CHITKARA, M.D., ROBYN LaBARCA, M.D. and SHANE McALLISTER, M.D.,

Defendants.

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DUFFY & DUFFY
Attorney for Plaintiff
1370 RXR Plaza, West Tower, 13th Floor
Uniondale, New York 11556

HARRIS BEACH PLLC
Attorney for Defendant Maribeth B. Chitkara, M.D.
100 Wall Street, 23rd Floor
New York, New York 10005

ERIC T. SCHNEIDERMAN, ESQ.
ATTORNEY GENERAL OF THE STATE OF NY
Attorney for Defendants Robyn LaBarca, M.D. and Shane McAllister, M.D.
120 Broadway, 12th Floor
New York, New York 10271

Upon the following papers numbered 1 to 30 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 25 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 29-30 ; Replying Affidavits and supporting papers 26-28 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by the defendant, Maribeth B. Chitkara, M.D., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint as asserted against her is denied.

In the complaint, plaintiff sets forth causes of action sounding in medical malpractice on behalf of the infant plaintiff, Chase Nasca. It is claimed that beginning on or about February 19, 2008, during a continuous course of care and treatment, the two year old infant plaintiff was a patient of Maribeth B. Chitkara, M.D, Robyn LaBarca, M.D., and Shane McAllister, M.D., and that the defendants failed to timely and properly diagnose and treat him for a left testicular torsion. It is further alleged that the defendants failed to properly inform the infant's parents of the risks, hazards, and alternatives of the procedures utilized in treating the infant plaintiff.

The defendant, Maribeth Chitkara, M.D., seeks summary judgment dismissing the complaint as asserted against her on the bases that she owed no duty of care to the infant plaintiff prior to his admission to the

pediatric floor at Stony Brook University Hospital on February 19, 2008; did not depart from accepted standards of care in her care and treatment of the infant plaintiff; appropriately relied upon the information conveyed to her about the infant plaintiff; is not vicariously liable for the Stony Brook University Hospital residents, Dr. LaBarca, Dr. McAllister, and Dr. Cohen, who were employed by the State of New York/Stony Brook University Hospital; and there is nothing that she did or did not do which proximately caused the injuries alleged to have been sustained by the infant plaintiff.

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]).

In support of motion (004), Dr. Chitkara has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, her answer, notice of claim, and the verified and supplemental verified bills of particulars; the unsigned but certified transcripts of the 50-H examinations of Dean Nasca and Michelle Nasca, each dated December 2, 2009, each with proof of service pursuant to CPLR 3116; a copy of the signed transcript of the examination before trial of Shane McAllister dated October 21, 2010; the unsigned and uncertified copy of the transcript of the examination of the moving defendant Maribeth Chitkara, M.D. with proof of mailing pursuant to CPLR 3116 and which is adopted as accurate by movant (*see*, ***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); the unsigned but certified transcripts of the examination before trial of Dean Nasca and Michelle Nasca, each dated August 11, 2010 (*see*, ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); certified copies of the infant plaintiff's record from Stony Brook Hospital; the unsigned but certified transcript of the examination before trial of Robyn LaBarca, M.D. dated December 29, 2010; the affirmation of Maribeth Chitkara, M.D. which fails to comport with CPLR 2106 in that it is not a sworn and notarized party affidavit; and the expert affirmations of Joseph J. Abularrage, M.D. and Lane Palmer, M.D.

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 [1999]). 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***, 224 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], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Bloom v City of New York***, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

Dean Nasca testified that his son Chase was born on October 2, 2005 and he had no health problems. On February 18, 2008, his wife was bathing Chase when she noticed that the left side of his scrotum was a little red, with the appearance of a solid rash about an inch long, with no swelling. Prior to that incident, he never noticed his son having any urinary problems, or redness in his scrotum or testicles, except for an occasional diaper rash. On the morning of February 19, 2008, the child's scrotum was still red, looked slightly swollen, and gave the appearance of being one sac instead of two. When Michelle Nasca took Chase to the pediatrician, she was instructed to take him to the emergency department to be evaluated for possible testicular torsion. Between 2:00 p.m. and 3:00 p.m. on February 19, 2008, Dean Nasca was advised by his wife that Chase was being admitted to the hospital. That evening, about 10:30, his son was still in the emergency room waiting to be admitted. They had been advised that he might have cancer based on his blood test results. During that evening, the child appeared to be in a little distress, and was whining and uncomfortable. The swelling in his scrotum had increased by about an inch and a half. He thought the infant was seen by Dr. Chitkara in the emergency room that evening. On February 20, 2008, a second sonogram of the scrotum was taken. Chase had still not been seen by the urologist. He was advised by a male physician over the telephone that there was no torsion and that his son would be discharged. Fifteen minutes later, his wife called him and advised that Chase was being rushed to have surgery on his testicle. When he arrived at the hospital, he saw the surgeon, Dr. Wasnick, whom he stated advised him that there was most likely a torsion and that he would try to save the testicle. He testified that Dr. Wasnick advised him that he did not know when the torsion occurred, and added that there is a limited window within which to save the testicle.

Michelle Nasca's testified that her son Chase used the wooden rocking horse in his room on the evening of February 18, 2008 either just before or just after his bath, and got off it very quickly. When he was being bathed, he told her his pee-pee hurt. She saw that his scrotum was red. When he awoke the following morning, his scrotum was red, slightly swollen and looked irritated, so she took him to the pediatrician, who instructed her to take the child to the emergency room. Chase was admitted to Stony Brook University Hospital emergency department. She testified that she was advised that there were spots on his testicle that were indicative of childhood lymphoma. She was further advised that the sonogram revealed that his testicle was getting blood flow.

Shane McAllister testified to the extent that he is not licensed to practice medicine in any state and is employed by Stony Brook University Medical Center. He worked in the department of pediatric infectious disease as a second-year fellow. He admitted Chase to11 North. He stated that he did not see the child in the emergency department. Robyn LaBarca was his senior resident who would have told him about the admission pending from the emergency room. Maribeth Chitkara, M.D. was the attending pediatrician. He added that Dr. LaBarca had written a note which he did not believe was generated prior to his seeing Chase, and that she wrote the admission orders on February 19, 2008 at 23:20.

McAllister further testified that at 12:20 a.m. on February 20, 2008, he wrote his note indicating that the child had a swollen, tender left testicle. He used a light to transilluminate the left testicle to ascertain if there was fluid collection, and determined that the left testicle did not transilluminate as well as the right testicle. He stated that the exam was not consistent with a hydrocele. When he reviewed the testicular ultrasound, as indicated in his note, he determined that the test showed heterogeneous texture bilaterally with positive blood flow bilaterally to the testicle, and further demonstrated an enlarged left inguinal lymph node. His differential diagnosis was infection versus malignancy, leukemia less likely, possible lymphoma or primary testicular neoplasm, but did not include testicular torsion. At the time, ultrasound with Doppler, and absence of cremasteric reflex, were the means to determine testicular torsion. He testified that when he examined the infant, there was an absence the cremasteric reflex, which supported a possible diagnosis of testicular torsion.

He continued that he could not order an ultrasound without permission from his senior resident and the attending. He stated that Dr. LaBarca ordered an ultrasound of the kidneys and bladder to be done on February 20th. He did not order a urology consult, but discussed obtaining the same with Dr. LaBarca, but Dr. LaBarca did not indicate in her note that a urology consult was to be obtained. He testified that it was his understanding after a conversation with Dr. LaBarca that urology had been contacted by phone, and the case and result of the Doppler ultrasound were discussed. The urology consult was ordered by Dr. Chitkara on February 20, 2008 at 10:15 a.m. McAllister testified that in February, 2008, he was not aware of any standard of care related to the diagnosis, treatment and management of testicular torsion as it is outside the scope of his practice.

Robyn LaBarca, M.D. testified to the extent that she first became employed by the State of New York at Stony Brook Medical Center in June 2006 as a pediatric resident, and that she is now an attending physician at Stony Brook Hospital. She became involved in the care and treatment of the infant plaintiff, Chase Nasca, during his admission to the service of Dr. Maribeth Chitkara, an attending physician at Stony Brook, while she was working on the pediatric floor, 11 North, as a floor senior for the evening of February 19, 2008, during her second year of residency. Her involvement in the care and treatment of the infant terminated at the end of her shift at 8:00 a.m. on February 20, 2008. She received a telephone call from Dr. Liji Daniels, an attending in the emergency department, advising her that the infant, a patient in the emergency department, was being admitted. She was briefed as to the infant's history, examination and the results of the labs. Her fellow resident, Dr. Youssef, spoke with Dr. Chitkara. LaBarca said Dr. Chitkara was her attending. The infant's admitting diagnosis was testicular lesions premised upon lesions in the testicles found on ultrasound. Dr. LaBarca was not trained to interpret the ultrasound images and relied upon the radiologist's interpretation.

Dr. LaBarca testified that she saw and examined the infant at 12:10 a.m. on February 20, 2008, upon his admission to 11 North. She noted that the infant's right testicle was one centimeter, smooth, with good transillumination, and was not tender; the left scrotum was swollen, edematous, tender to light palpation, had a negative cremasteri reflex,[1] and was two centimeters with poor transillumination. Differential diagnosis included orchitis, epididymitis, varicoclele, leukemia, and testicular carcinoma. She stated that her note indicated that it was difficult to distinguish the differential diagnoses and that an oncologic process was likely due to the extremely elevated blood alkaline phosphatase and LDH. She testified that Dr. Daniels ruled out testicular torsion based upon the ultrasound results obtained while the child was in the emergency room. Dr. LaBarca, pursuant to her testimony, did not include testicular torsion in her differential diagnoses as it had been ruled out by Dr. Daniels, and after her discussion with Dr. Chitkara, the child's attending physician, prior to 12:10 a.m.. Dr. LaBarca stated that as a resident, it was her obligation to continue the evaluation, and that torsion of the testicle was no longer part of that differential diagnoses after she spoke with Dr. Daniels and Dr. Chitkara.

When Dr. LaBarca returned to work on February 20, 2008 at 6:00 p.m., she learned that the infant had been taken to the operating room after a repeat ultrasound at 11:30 a.m. revealed a torsion of the child's left testicle. Dr. Wasnick performed the surgery and found that the left testicle was necrotic. Dr. LaBarca had no opinion concerning when the torsion of the testicle occurred. She further stated that she did not know what caused the testicle to become necrotic, other than the torsion. She stated that torsion is a twisting of the cords, blocking blood supply to the testicle, resulting in death of the tissue from the lack of blood supply. She testified

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[1]Dr. LaBarca testified that cremasteric reflex refers to the reflexive retraction of the testes upon stroking of the inner thigh. When the reflex is negative, there is no retraction of the testes, which can be indicative of an infectious, inflammatory process, or torsion of the testicle.

that there is a short time period within which to salvage the testicle when a torsion develops, but she did not know the number of hours or days. She continued that Dr. Wasnick, the urologist, had been contacted by the emergency room on February 19th requesting that he conduct an urology consult. She did not know if the hospital had a policy that an urology consult be obtained prior to ruling out torsion of the testicle. Dr. LaBarca further testified that as a resident, she did not have the authority to order diagnostic tests, such as ultrasounds, without the approval of the attending physician.

Dr. Chitkara testified to the effect that she is licensed to practice medicine in New York State and is board certified in pediatrics. In 2008, she was employed by Clinical Practice Management Plan and the State of New York. She had admitting privileges at Stony Brook University Hospital where she was a pediatric hospitalist and an assistant professor of pediatrics, with responsibility for supervising pediatric residents. Dr. Chitkara stated that she remembered the entire hospitalization of Chase Nasca. She was first notified about Chase by phone at home by Dr. Liji Daniel between 10:00 and 11:00 p.m. on February 19, 2008. She stated she did not go to the hospital to see the child after being contacted by Dr. Daniel. She testified that Dr. Daniel gave her the history, the results of the physical exam, the tests performed, and her impression, and that Dr. Daniel recommended a course of treatment. She continued that Dr. Daniel advised her that the ultrasound showed there was Doppler flow in both testicles, and thus, it was negative for testicular torsion, but that there were hypoechoic regions presenting concern for a malignancy. She added that the infant's blood count, ESR, and alkaline phosphatase were elevated, raising further concern for malignancy. She continued that Dr. Daniel recommended consultation with hematology/oncology, and a repeat of the lab work and ultrasound of the kidney and bladder, to take place on the morning February 20th. She was not advised that a urology consult had been ordered. She did not recall speaking to any interns or residents about the infant, but did speak with Dr. McAllister and Dr. LaBarca from the night team about two hours after she spoke with Dr. Daniel.

Dr. Chitkara testified that she went to the hospital to see the child on February 20, 2008, and first reviewed his chart at about 9:30 a.m. or 10:00 a.m., prior to seeing him. Seth Cohen was the senior resident. Dr. Chitkara stated that she reviewed the laboratory tests and the ultrasound report from February 19, 2008, and that the child's father was there when she arrived. When she examined the child, there was no cremasteric reflex, however, she did not modify the differential diagnoses set forth by Dr. LaBarca and Dr. McAllister, and agreed with their differential diagnoses. Although she obtained no cremasteric reflex when examining the child and suspected testicular torsion, she did not add it to the differential and did not order another ultrasound of the testicles as the ultrasound examination from the day before was negative. She was aware that testing for the list of possibilities must be carried out until each potential diagnosis was ruled in or out. Dr. Chitkara testified that before she arrived at the hospital, testicular torsion had been ruled out. She believed Seth Cohen ordered a urology consult sometime on February 20th.

Dr. Chitkara testified that she left the hospital at about 12:00 noon, and was thereafter advised by Seth Cohen that the urology consult had been obtained and that the child was being taken to the operating room for surgery by the urologist, Robert Wasnick, M.D. She was also advised by Seth Cohen that the radiologist, Harris Cohen, M.D., on February 20th, reviewed the ultrasound from February 19th, and advised that it was suspicious for testicular torsion, and that Harris Cohen wanted a repeat ultrasound as he was confident that the child had testicular torsion. Dr. Chitkara testified that she did not believe the testicular torsion occurred after the negative ultrasound on February 19th. She continued that with testicular torsion, there is a window of time in which to treat it, and the sooner it is diagnosed, the better. She continued that she has seen anywhere from six to eighteen hours to make the diagnosis from the time it torses to correction to salvage the testicle. She added that she did not order a radionuclide scrotal image of the scrotum. In supervising the interns and residents, she did not make any changes or alterations to their plan of treatment or the differentials, as she was

in agreement.

The defendant's expert physician, Joseph J. Abularrage, M.D. affirms that he is a physician licensed to practice medicine in New York State and is board certified in pediatrics and practices in that specialty. He set forth the records and materials reviewed in rendering his opinion[2], and set forth his opinion within a reasonable degree of medical certainty that Dr. Maribeth Chitkara comported with the standard in basing her treatment decisions upon information relayed to her by other physicians at the hospital, including Dr. Daniel; in relying upon the interpretation of the February 19, 2008 ultrasound by the radiologist, Dr. Moore; and in formulating a treatment plan with a medical team based upon the evidence available to her, including an ultrasound possibly positive for cancer but negative for torsion, laboratory values indicating a cancerous or infectious process, and the infant's physical symptoms which were consistent with leukemia or testicular carcinoma.

Dr. Abularrage set forth that after the infant was triaged at Stony Brook Hospital emergency room where he was seen by an attending pediatrician covering the emergency room Dr. Daniel, who ordered a testicular ultrasound. The radiologist, Dr. William Moore, reviewed the ultrasound, and Dr. Daniel's working diagnosis of testicular torsion was ruled out. The findings of scattered hypoechoic areas were consistent with a cancerous or inflammatory process, and the broad differential diagnoses included leukemia and inflammatory/infectious processes. Dr. Abularrage opines that it was within the accepted standard of practice for Dr. Daniel, a pediatrician, to rely upon Dr. Moore's interpretation of the testicular ultrasound, as Dr. Moore was trained to diagnose disease and conditions with the use of internal imaging devices. Between 10:00 and 11:00 p.m., on February 19, 2008, Dr. Chitkara was notified by Dr. Daniel of the child's admission to her service. Prior to that time, Dr. Chitkara had no involvement in the infant's care and treatment. When Dr. Daniel relayed to Dr. Chitkara the radiologist's finding that there was no evidence of testicular torsion on the Doppler ultrasound, it was within the pediatric standard of care for her to rely on the negative imaging study and to formulate a plan to add testing and evaluation for cancerous and/or inflammatory conditions of the scrotum.

Dr. Abularrage continues that the cremasteric reflex is a superficial reflex observed in males, which, when elicited by lightly stroking the inner portion of the thigh, causes the cremaster muscle to contract, which in turn pulls up the scrotum and testes on the side being stroked. He continued that this non-specific diagnostic tool assists a practitioner in recognizing several testicular conditions, including testicular torsion, however, the reflex is often absent in otherwise healthy infant males less than thirty months old. Dr. Abularrage continued that the pediatric standard of care for an infant younger than this age requires performance of an internal imaging study, such as an ultrasound, to rule testicular torsion in or out. Thus, stated Dr. Abularrage, Dr. Chitkara was within the pediatric standard of care in formulating a treatment plan with her medical team based upon the evidence available, including an ultrasound negative for testicular torsion. He added that there was no need to request any other consultations, tests or diagnostic studies.

Dr. Abularrage further stated that when Dr. Chitkara examined the infant on February 20th, she documented that the infant displayed symptoms "suspicious for torsion" but the internal imaging ultrasound with Doppler found no torsion, so Dr. Chitkara suspected a malignant or inflammatory process. When Dr. Harris Cohen re-reviewed the February 19, 2008 ultrasound film interpreted by Dr. Moore, he determined the film was suspicious for testicular torsion and ordered a repeat testicular ultrasound to rule out testicular torsion. This repeat ultrasound found no appreciable blood flow to the left testicle for which Dr. Harris Cohen's

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[2]Although Dr. Abularrage stated that he reviewed the transcript of Dr. Alex Mishail, the same has not been provided to this court.

impression was testicular torsion. Thereafter, at 1:15 p.m., Dr. Alex Mishail, under the service of pediatric urologist Dr. Robert Wasnick, conducted a urological exam of the infant. By 3:00 p.m., the infant was taken to the operating room for exploratory surgery wherein it was found that there was left testicular torsion with no viability of the left testicle, necessitating its removal. Dr. Abularrage opined that there was no sign or symptom that Dr. Chitkara failed to appreciate, or test or consultation she failed to obtain, because the infant plaintiff was already in the process of undergoing the diagnostic study which would lead to a diagnosis of torsion. Dr. Abularrage stated that by the time Dr. Chitkara became personally involved in the infant's care, no other tests beyond the ultrasound already ordered would have diagnosed the testicular torsion, and consequently, there was no action or inaction on the part of Dr. Chitkara would could have changed the result.

Dr. Lane Palmer, defendant's expert, affirms that he/she is a physician licensed to practice medicine in New York State and is certified in urology, with a subspecialty certification in pediatric urology. It is Dr. Palmer's opinion within a reasonable degree of medical certainty that Dr. Chitkara comported with each and every standard of medical practice in her evaluation and treatment of the infant plaintiff, and that there is nothing that Dr. Chitkara did or did not do which caused, or exacerbated the infant plaintiff's testicular torsion and eventual loss of the testicle. Dr. Parker set forth that testicular torsion occurs in 1 out of every 4,000 males from birth through puberty. The inciting event is not known, but presents with symptoms of pain and swelling of the scrotum, and acute onset. Dr. Palmer continued that testicular torsion requires emergency surgery within 24 hours of onset. After 24 hours, the testicle is normally not salvageable and must be removed. Dr. Palmer further stated that there are no long-term medical complications associated with removal of a testicle as hormonal function is the same regardless of having one or two testicles, and the secondary sexual characteristics seen in adolescence are exactly the same. Moreover, there is no medical evidence associating removal of a testicle with decreased fertility. Dr. Palmer stated that given the short time to reverse the condition, testicular torsion is normally an emergency department diagnosis rather than an inpatient diagnosis.

While the expert recitation of when the redness of the scrotum was first noted, and the parent's testimony differ, it is clear that by 8:00 p.m. on February 18, 2008, the infant had redness of his scrotum and said his "pee pee" hurt. Dr. Palmer stated that on the morning of February 19, 2008, Dr. Eisenberg saw the infant and immediately referred him to the emergency department due to a "swollen, red, mildly tender left testicle with firm mass in the left hemiscrotoum." Dr. Palmer opined that the infant had torsion of the testicle for at least eighteen hours prior to his presentation to the emergency room and more than twenty four hours prior to Dr. Chitkara's involvment with the patient. Dr. Palmer continued that Dr. Moore's interpretation of the ultrasound on February 19, 2008 revealed no testicular torsion due to the demonstrable flow in the bilateral testicles with color Doppler. Dr. Palmer continued that Dr. Harris Cohen reviewed that same ultrasound imaging and opined that the ultrasound revealed that the infant plaintiff had left testicular torsion at the time the test was conducted at 3 p.m. on February 19th, which was in disagreement with Dr. Moore's determination. Dr. Palmer continued that there are inconsistencies found within Dr. Moore's interpretation and that it is highly unlikely that there was demonstrable blood flow to the dead tissue. Dr. Palmer further added that instead, it appears that the radiologist observed blood flow around the testes rather than within the subject testicle. Due to this observation, the radiologist specifically, but incorrectly, found no evidence of torsion.

Dr. Palmer concluded that by the time Dr. Chitkara was informed of the testicular torsion, that the testicle could not have been saved; it was within the standard of care for Dr. Chitkara to rely on the radiological interpretation by Dr. Moore in his interpretation of the ultrasound; that a proper treatment plan was formulated by the medical team consisting of Dr. Chitkara, Dr. LaBarca and Dr. McAllister; there is no sign or symptom that Dr. Chitkara failed to appreciate or test or consultation she failed to obtain; there was no act or inaction on the part of Dr. Chitkara which could have changed the outcome; that Dr. Chitkara properly relied upon the

information provided by Dr. Daniel, including the results of the ultrasound; and that the infant plaintiff has no long-term medical complications associated with the removal of his testicle.

Based upon the foregoing, it is determined that Dr. Chitkara has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against her.

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]).

The plaintiff's expert is a physician licensed to practice medicine in New York, is board certified in pediatrics, has set forth the records and materials reviewed and opines within a reasonable degree of medical certainty that Dr. Chitkara departed from good and accepted standards of medical care and treatment in treating the infant plaintiff. The plaintiff's expert stated that on February 18, 2008, Chase Nasca was examined at the office of the pediatrician, David J. Eisenberg, at which time there were no abnormal findings of the genitourinary system. On February 19, 2008, when the infant presented to the emergency department at Stony Brook University Hospital at 2:14 p.m., it was suspected that he was suffering from testicular torsion, an emergency in which blood supply is cut off from the testicle and surrounding structures. The plaintiff's expert continued that because the diagnosis and treatment of testicular torsion needs to be made promptly, and the passage of the window of opportunity decreases the chance of testicle viability, that early urological consultation is necessary to determine if the testicle can be manually detorsed and whether there is need for surgery to detorse the testicle. Diagnosis of a testicular torsion requires physical examination and ultrasound examination.

The plaintiff's expert stated that an untimed physical examination by a third year resident was performed in the emergency room, revealing scrotal swelling and redness, however, there was no indication in the record that the infant's cremasteric reflex was checked as absence of the reflex is associated with testicular torsion. At 2:25 p.m., Dr. Annamma Daniel ordered an ultrasound of the testicles to determine blood flow through the testicle. Plaintiff's expert continued that there was no request for a urology consult while the infant was in the emergency department on February 19, 2008, and that the urology consult was not ordered until 10:15 a.m. on February 20, 2008, twelve hours after the infant initially presented to the emergency department. It was further stated that at 4:05 when Dr. Daniel completed the emergency department encounter and treatment form, that there was no reference to the findings of the testicular ultrasound, which was not signed by the attending radiologist, William Moore, until 4:18 p.m., and which incidentally showed no evidence of testicular torsion. Additionally, there was no indication that Dr. Daniel checked the infant for cremasteric reflex. The infant was admitted to Dr. Chitkara's pediatric service on 11 north at 11:20 p.m., and at 12:15 a.m. on February 20, 2008, Dr. Shane McAllister conducted a comprehensive initial inpatient evaluation which indicated that there was no cremasteric reflex present, representing a new finding which was not noted earlier in the record. Dr. McAllister further noted that the infant was "jumpy" with testicular exam, left more than right, and that he had endorsed pain with palpation which was also a new finding not previously noted prior to his examination.

The plaintiff's expert opined that while testicular torsion had been previously ruled out by ultrasound on February 19, 2008, it should have been reconsidered as part of the differential diagnosis based on the newly noted absent cremasteric reflex and newly noted pain, and the failure to include testicular torsion as a part of the differential diagnosis by Dr. Daniel, Dr. LaBarca, Dr. McAllister, Dr. Chitkara, and Dr. Seth Cohen was a

departure from the standard of care. When Dr. McAllister noted that there was no cremasteric reflex and newly noted pain, a urological consultation and further diagnostic studies were necessary, however, no further diagnostic studies were ordered until 11:30 a.m. on February 20, 2008 by the resident Seth Cohen, nearly twelve hours later. The ultrasound was not performed until 12:15 p.m. and was not read until 2:55 p.m. Thus, opined the plaintiff's expert, the failure to timely order a repeat ultrasound was a departure from the standard of care by Dr. Daniel, Dr. LaBarca, Dr. McAllister, Dr. Seth Cohen, and Dr. Chitkara.

The plaintiff's expert further opined that it was a departure from the standard of care for Dr. Daniel, Dr. LaBarca, Dr. McAllister, Dr. Seth Cohen, and Dr. Chitkara to timely order a urological consult. The plaintiff's expert continued that Dr. Chitkara did not order a urology consult until 10:15 a.m. on February 20, 2008 nearly ten hours after Dr. McAllister first noted the absence of the cremateric reflex. The plaintiff's expert further opined that the infant plaintiff was not adequately monitored as there were gaps in physician entries from 4:05 p.m. until 11:20 p.m. on February 19, 2008, and that there was a departure from the standard of care in failing to chart such examinations. The plaintiff's expert concluded that these failures were the substantial contributing factors related to the Chase Nasca's loss of his left testicle.

Based upon the foregoing, it is determined that the plaintiff has raised factual issues to preclude summary judgment on both departures from the accepted standards of care and treatment, and causation relating the infant's loss of his left testicle.

Accordingly, motion (004) by defendant Maribeth Chitkara, M.D. for summary judgment in her favor is denied.

Dated: MARCH 28, 2012.

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION