STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS **SUPERIOR COURT**
SOUTHERN DISTRICT

NO. 06-C-159

NATHAN LANDRY, PPA BECKY HEWES

V.

KAREN MURPHY, CNM; APRIL J. HEWEY, RN; DARTMOUTH-HITCHCOCK CLINIC; AND SOUTHERN NEW HAMPSHIRE MEDICAL CENTER

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

LYNN, C.J.

Acting on behalf of her minor son Nathan Landry, plaintiff Becky Hewes instituted this medical malpractice lawsuit against the defendants, alleging negligence in the handling of Nathan's labor and delivery. Defendants April J. Hewey, RN (Nurse Hewey) and Southern New Hampshire Medical Center (SNHMC) now move for summary judgment. The court concludes that the motion must be DENIED.

I.

Based on the record properly before the court for purposes of the instant motion, the court finds the pertinent facts to be as follows. Ms. Hewes was admitted to SNHMC at approximately 11:00 p.m. on March 28, 2004 for labor and delivery and was assigned to Nurse Hewey. Hewey placed Hewes on an external fetal monitor in order to track her contractions and the fetal heart rate. The information coming from the monitor indicated that the baby could be in distress and, at 11:45 p.m., Hewey decided to put Hewes on oxygen and have her lay on her left side, two measures which can help improve fetal heart rate. At 12:15 a.m., when the monitor still indicated that the baby could be in

distress, Hewey contacted Cynthia Coughlin, a certified nurse midwife, and obtained an order from Coughlin to start an IV. The IV was started sometime between 12:15 a.m. and 12:30 a.m. Coughlin arrived at Hewes's bedside at approximately 12:30 a.m., assessed the information coming from the monitor, and determined that an obstetrician needed to be called. The obstetrician, Dr. Peggy Gregory, arrived at 12:45 a.m. and decided to perform an emergency Caesarean section. Nathan was delivered at 1:07 a.m., but by that time he had already suffered permanent neurological injuries.

Plaintiff alleges that Nurse Hewey was negligent in failing to immediately summon an obstetrician when the fetal monitor showed signs that the baby was in distress. Plaintiff contends that had Dr. Gregory been called in earlier, the C-section would have occurred sooner and Nathan would have avoided injury. However, at her deposition, Gregory testified that she would not have performed the C-section any earlier even if she had been paged prior to 12:45 a.m. Based on this testimony, Hewey and SNHMC contend that summary judgment should be entered in their favor because plaintiffs cannot establish a causal link between any negligence on the part of Hewey and the injuries suffered by Nathan.

II.

The standards for consideration of a party's request for summary judgment are well established. In order to prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (1997). A fact is "material" "if it affects the outcome of the litigation under the applicable substantive law." Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002). "The party objecting to

a motion for summary judgment may not rest upon mere allegations or denials of his or her pleadings, but his or her response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue of material fact for trial." Panciocco v. Lawyers Title Ins. Corps., 147 N.H. 610, 613 (2002) (brackets and quotation omitted). The court will examine "the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." Sintros v. Hamon, 148 N.H. 478, 480 (2002). "The trial court cannot weigh the contents of the parties' affidavits and resolve factual issues." Iannelli v. Burger King Corp., 145 N.H. 190, 193 (2000).

III.

Nurse Hewey and SNHMC argue that summary judgment is appropriate because the plaintiff cannot establish proximate cause as required by RSA 507-E:2, I(c) (Supp. 2008). Their argument is based on Dr. Gregory's deposition testimony that she would not have performed the C-section any sooner than she actually did even if she had been paged at some earlier time. Thus, the defendants argue that there is no causal link between Hewey's alleged failure to summon Gregory at an earlier point in Hewes' treatment and the injuries suffered by Nathan.

Plaintiff asserts that a genuine issue of material fact remains for trial. Specifically, plaintiff points to the disclosures made by her expert, Dr. Melvyn J. Ravitz, concerning the applicable standard of care. Pursuant to these disclosures, plaintiff's expert is prepared to testify at trial that Gregory would have violated the prevailing standard of care if, as she testified at her deposition, she would have delayed the C-

section even if called in by Hewey at an earlier time.[1] Given this opinion, plaintiff contends that there is a genuine factual issue concerning whether or not Gregory would have performed an emergency C-section earlier if she had been paged sooner.[2] Accordingly, plaintiff argues that Dr. Gregory's testimony is not dispositive of the case.

Under RSA 507-E:2, I, the plaintiff is required to prove, by providing affirmative evidence, including expert testimony of a competent witness: "(1) the standard of reasonable professional practice in the medical care provider's profession or specialty; (2) the medical care provider failed to act in accordance with such standard; and (3) as a proximate result thereof, the injured person suffered injuries, which would not otherwise have occurred." In re Haines, 148 N.H. 380, 382 (2002). "Negligent conduct is a proximate or legal cause of harm if the actor's conduct is a substantial factor in bringing about the harm." Pillsbury-Flood v. Portsmouth Hosp., 128 N.H. 299, 304 (1986) (brackets and quotations omitted). Moreover, "[t]he plaintiff must produce evidence sufficient to warrant a reasonable juror's conclusion that the causal link between the negligence and the injury probably existed." Bronson v. Hitchcock Clinic, 140 N.H. 798, 801 (1996).

[1] It appears from the parties' submissions that Dr. Cohn has replaced Dr. Ravitz as the plaintiff's expert. However, Cohn has adopted Ravitz's conclusions and the court therefore may properly consider them for purposes of ruling on summary judgment.

[2] Dr. Ravitz also opines that if, having been summoned earlier, Dr. Gregory had refused to perform a C-section immediately upon her arrival, the standard of care would have required Nurse Hewey to take action through her chain of command to obtain another obstetrician to perform the operation. Thus, plaintiff maintains that even if Gregory would have acted in accordance with her deposition testimony, a jury could find that the C-section would have been performed in a timely fashion by another physician who would have followed the proper standard of care and Nathan therefore would have been born prior to the time he suffered injury. The defendants contend that Ravitz's opinion about Hewey's obligation to pursue action through her chain of command does not provide a proper basis for avoiding summary judgment because there is no evidence in the record of whether another physician was available to perform the operation, how long it would have taken that physician to respond, etc. Because the court finds that the record contains sufficient evidence for a jury to find that Dr. Gregory herself would have performed the C-section earlier than she did if she had been summoned sooner, the court need not decide at this time if Ravitz's "chain of command" evidence provides an alternative basis for declining to enter judgment in defendants' favor.

To support their argument, defendants cite three out-of-state cases: Albain v. Flower Hosp., 553 N.E.2d 1038 (Ohio 1990); Sunderman v. Agarwal, 750 N.E.2d 1280 (Ill. App. 2001); and Seef v. Ingalls Memorial Hosp., 724 N.E.2d 115 (Ill. App. 1999). The court will focus on Seef because all the cases are cited for the same general proposition and Seef is the most similar factually to the case at hand.[3] In Seef, a pregnant woman, Mrs. Seef, was admitted to the hospital at approximately 10:00 p.m. Seef, 724 N.E.2d at 117. Her physician, Dr. Sutkus, arrived at the hospital shortly thereafter and examined her by 10:30 p.m. Id. at 117-18. Due to Seef's temperature fluctuations and a fetal heart rate at the upper limits of the normal range, at 11:45 p.m. she was put on an external fetal monitor. Id. at 118. The doctor watched the monitor for approximately 15 to 20 minutes, saw nothing of concern, and then went to the doctors' lounge to rest. Id. At 3:05 a.m., Sutkus was roused by a nurse to attend to Seef. Id. He became concerned after observing the latest information coming from the monitor and soon ordered an emergency C-section. Id. Seef's baby was stillborn. Id. A lawsuit followed in which plaintiffs alleged, in part, that hospital employees waited too long to notify Sutkus of the baby's distress. Id. at 119. Dr. Sutkus, like Dr. Gregory, testified at his deposition that he would not have done anything differently even if he had been called to Seef's bedside earlier. Id. at 118.

The Seef plaintiffs were prepared to offer expert testimony very similar to what plaintiff will present in this case, i.e., that if Dr. Sutkus had been notified of the situation

[3] The court also notes that both Albain and Sunderman are distinguishable from this case. In Albain, there is no indication in the court's opinion that the plaintiffs had expert evidence showing the standard of care would have required the attending physician to come to the hospital and take action prior to the time the baby suffered injury. See Albain, 553 N.E.2d at 1051-52. Similarly, in Sunderman, there was no evidence from an expert that a pathology report worded in the way the report at issue was worded would likely have caused a physician such as Dr. Agarwal to conclude the patient did not have cancer, thus contradicting Agarwal's testimony that, after reading the report, he believed the patient did have cancer. See Sunderman, 750 N.E.2d at 1283-84.

earlier, any reasonably qualified obstetrician in his position would have performed the C-section sooner than he actually performed it. Id. at 119, 122. However, the trial court ruled that this evidence could not overcome Sutkus' deposition testimony and did not raise an issue for the trier of fact as to whether the hospital employees' delay in notifying Sutkus was the proximate cause of the baby's death. The court therefore dismissed the suit against the hospital. Id. at 119. On appeal, the majority of the Illinois Appellate Court affirmed the trial court's decision, adopting the trial judge's rationale. Id. at 122-23.

This court does not agree with the reasoning of the majority opinion in Seef, but, on the contrary, finds the dissenting opinion of Justice O'Mara Frossard far more persuasive. In the court's view, the fundamental flaw in the reasoning of the Seef majority is the notion that the testimony of the treating physician as to what he would or would not have done had he received earlier notification had to be accepted as conclusive, and that the testimony of plaintiffs' expert -- to the effect that any reasonably qualified obstetrician would have delivered the baby sooner if he had received earlier notification of signs of fetal distress -- was relevant only to the doctor's liability and not to the liability of the hospital's nursing staff. See id. at 122. But as Justice O'Mara Frossard correctly recognized, the testimony of plaintiffs' expert was also relevant to the hospital's liability because it "discredited Dr. Sutkus' assertion" and tended to suggest that he actually would have acted more quickly than he claimed he would have, thus creating an issue of fact for the jury as to whether the nursing staff's delay in notifying Sutkus was the proximate cause of the harm to the baby. Id. at 130 (O'Mara Frossard, J., dissenting) ("The weight to be given to Dr. Sutkus' and Dr. Lilling's conflicting

testimony was a matter for the jury to determine."). Indeed, it is questionable whether Seef retains precedential force even within its own jurisdiction inasmuch as, in a later case, the Illinois Supreme Court cited the dissent with approval:

> [A] plaintiff would always be free to present expert testimony as to what a reasonably qualified physician would do with the undisclosed information and whether the failure to disclose the information was a proximate cause of the plaintiff's injury in order to discredit a doctor's assertion that the nurse's omission did not affect his decisionmaking. See Seef v. Ingalls Memorial Hospital, 311 Ill. App.3d 7, 26-27, 243 Ill. Dec. 806, 724 N.E.2d 115 (1999) (O'Mara Frossard, P.J., dissenting). In such a case, a factual dispute as to proximate cause would be created sufficient for the jury to resolve.

Snelson v. Kamm, 787 N.E.2d 796, 821 (Ill. 2003) (emphasis added). See also Suttle ex rel Central Trust Bank v. Lake Forrest Hosp., 733 N.E.2d 726, 733-34 (Ill.App. 2000).

Here, Dr. Ravitz is prepared to testify that Dr. Gregory, if paged by Nurse Hewey at an earlier point in Ms. Hewes' treatment, would have violated the standard of care if she had declined to deliver Nathan immediately. From this evidence a jury could find, notwithstanding Gregory's testimony to the contrary,[4] that Gregory would have conformed to the standard of care and would have performed the C-section sooner than she did and in time to avoid injury to Nathan.

IV.

For the reasons stated above the defendants' motion for summary judgment is hereby denied.

So ordered.

March 23, 2009

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ROBERT J. LYNN, Chief Justice

[4] A jury might determine, for example, that Dr. Gregory's affiliation or alignment with Nurse Hewey and/or SNHMC affords a source of bias that could affect her testimony.