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SHORT FORM ORDER

INDEX No. 10-6323
CAL No. 11-02187MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 4-11-12
ADJ. DATE 7-11-12
Mot. Seq. # 001 - MD

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ELAYNE HERRERA, as Mother and Natural Guardian of Infant, SANAA MORGAN,

Plaintiff,

- against -

RANDI TURKEWITZ, M.D., DYMPNA WEIL, M.D., and PAUL OGBURN, M.D.,

Defendants.

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 19-23; Replying Affidavits and supporting papers 24-25; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendants, Randi Turkewitz, M.D. and Dympna Weil, M.D, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is denied.

In this medical malpractice action, the plaintiff, Elayne Herrera, as the mother and natural guardian of her infant, Sanaa Isla Morgan, alleges that the defendants negligently departed from good and accepted standards of care and treatment in the delivery of the infant plaintiff, causing the infant to sustain a 3.5 cm. laceration to her forehead during her delivery by cesarean section on February 28, 2008 at Stony Brook University Hospital. Defendant Paul Ogburn, M.D. was the attending obstetrician. Defendants Randi Turkewitz, M.D. and Dympna Weil, M.D were residents at Stony Brook University Hospital, participating in the delivery. Causes of action premised upon the defendants' alleged negligence and lack of informed consent have been asserted.

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Defendants Turkewitz and Weil now seek summary judgment dismissing the complaint on the bases that as residents, they did not exercise independent medical judgment and that Dr. Ogburn did not deviate so greatly from normal practice to warrant liability on their part for failing to intervene.

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 this application, the moving defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answers served by defendants Turkewitz, Weil, and Ogburn, and plaintiff's verified bills of particulars as to each defendant; signed and certified copies of the examinations before trial of each defendant, and an unsigned and uncertified copy of the transcript of Elayne Herrera with proof of service pursuant to CPLR 3116, which transcript fails to comport with 22 NYCRR 202.5 and CPLR 2101; an unauthenticated CD of the plaintiff's certified Stony Brook hospital record; and the affirmation of Victor R. Klein, 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, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Bloom v City of New York***, 202 AD2d 465, 609 NYS2d 45 [2d Dept 1994]).

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]).

A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly

deviate from normal practice that the resident should be held liable for failing to intervene (***Bellafiore v Roccotta***, 83 AD3d 632, 920 NYS2d 373 [2d Dept 2011]; ***Muniz et al v Katiowitz, et al***, 49 AD3d 511, 856 NYS2d 120 [2d Dept 2008]); ***Brinkley v Nassau Health Care Corporation***, 2012 NY Slip Op 30961U [Sup. Ct., Nassau County]. A private physician may be held vicariously liable for conduct of a resident physician where the resident is under the direct supervision and control of the private physician at the time of the conduct; the key is whether the resident exercises independent medical judgment (*see* ***Hill v St. Clare's Hospital***, 67 NY2d 72, 499 NYS2d 904 [1986]; ***Freeman et al v Mercy Medical Center et al***, 2008 NY Slip Op 31337U [Sup. Ct., Nassau County]).

Randi Turkewitz, M.D. testified to the extent that she is licensed to practice medicine in Pennsylvania, is not currently board certified, and is working at the West Morlin Women's Health Center in Pennsylvania as an obstetrician/gynecologist. In February 2008, she was in the seventh month of a second year residency in obstetrics and gynecology at Stony Brook University Medical Center. She was involved in repeat cesarean sections, some primary cesarean sections, and minor gynecological procedures. She would perform a routine repeat cesarean section under the supervision of the attending physician, as long as no major complications were anticipated. She performed primary cesarean sections under the supervision of her attending physician. In February 2009, she had performed about 100 primary sections and 50 secondary sections under the supervision of the attending physician. She did not observe or encounter lacerations to an infant's scalp during those prior cesarean sections, but was aware of the risk of a baby's scalp being lacerated during the procedure. Such risk was part of the routine consent she was taught to review with patients at the time of admission for a cesarean section. She did not take the consent for the vaginal delivery from Ms. Herrera upon admission, and did not know who did.

Dr. Turkewitz continued that she did not have an independent recollection of Elayne Herrera and the delivery of her baby on February 28, 2008, but later testified that she went to get Dr. Ogburn to have him evaluate Ms. Herrera after she was called to see her. Upon examination, she noted that the fetal heart rate decreased to the 50's, so she tried scalp stimulation to stimulate the fetus, discontinued the Pitocin to stop contractions, and ordered Terbutaline to be administered to relax the uterus from a prolonged or tetanic contraction. Dr. Ogburn was an attending physician who supervised her work. She stated that Dr. Ogburn made the determination that a cesarean section was to be done somewhere between 17:21 and 17:24 hours. Dr. Weil, a senior resident, was present during the delivery, but Dr. Turkewitz testified that she did not remember anything that Dr. Weil did. She did not know who made the incisions during the procedure, but testified that it would have been Dr. Weil or Dr. Ogburn. She did not believe that she, as a second year resident, made any of the incisions during Ms. Herrera's delivery. It was the first stat section she had ever seen. She thought her participation in the procedure was to hold the bladder blade to keep the bladder out of the way, but was not sure. After the delivery, she wrote a note at 7:10 p.m. which indicated, inter alia, that a Pfannenstiel skin incision (described as a horizontal cut near the bikini line) was made, and that the infant went to the newborn nursery with superficial scalp lacerations covered with steri-strips. Dr. Turkewitz testified that she was told of the scalp lacerations by the Neonatal Intensive Care staff present at the time of the delivery. The lacerations were not something that she observed as she did not look at the infant after the delivery. Although Dr. Ogburn usually signed off on the notes she wrote, he did not sign off on this particular note. She did not discuss the scalp laceration with Dr. Ogburn, and did not follow up with anyone to learn about such an event.

Dympna Weil testified that she is licensed to practice medicine in New York, is an attending physician at Stony Brook University Hospital, and became board certified in obstetrics and gynecology in December 2010. In February 2008, she was working at Stony Brook University Hospital as a fourth year resident in obstetrics and gynecology, wherein she could perform emergent and non-emergent cesarean sections, always under the

supervision of an attending physician present in the room. By February 2008, she would have performed a couple hundred cesarean sections, and several stat sections where she would have made one or more incisions. Once, about three years prior to Ms. Herrera's delivery, she had seen a scalp laceration occur with a cesarean section at Stony Brook Hospital. While in her residency, she did receive training about such a complication. She did not consider a scalp laceration to be due to physician error, and instead considered it a complication of surgery. She stated that to avoid a scalp laceration from occurring, the incision is to be made in layers. She did not think there was anything in particular about Ms. Herrera's case that made her more at risk than any other patient for her baby to have a scalp laceration during the incision into the uterus.

When Dr. Weil reviewed the operative note for Ms. Herrera's surgery, which indicated that the uterine incision was extended bluntly, she did not know who made the incision. She testified that it was possible that she did, but she did not remember the details, as she scrubbed in after Dr. Ogburn and Dr. Turkewitz were already in the operating room. She thought it was more likely that Dr. Ogburn made the incision into Ms. Herrera's uterus. She then testified that she did not know whether Dr. Ogburn or Dr. Turkewitz made the incisions. The operative note does not indicate anything that she did during the procedure. She was not involved in the decision that a cesarean section had to be done as she was not there at the time such decision was made with Dr. Ogburn and Dr. Turkewitz.

Paul Ogburn, Jr., M.D. testified that Elayne Herrera's baby was delivered by cesarean section. The cesarean section was performed due to fetal bradycardia (slow heart rate) which had lasted at least five or six minutes. He stated that the window of time was within which the baby needed to be delivered to avoid damage to the fetus. He believed he acquiesced in the decision to perform a cesarean section, consistent with his practice and responsibility. He did not recall if he made any of the incisions and did not recall all of the incisions during the cesarean section. He did not recall Dr. Turkewitz being present, or doing anything, during the delivery, or whether or not she made an incision during the case. He testified that he had no memory of the entire beginning or end of the operation, and could not answer for sure who made all of the incisions. He stated he had only a partial memory of the last few incisions-a visual memory of the last two or three incisions, but not of the initial incisions. He then had an independent recollection that Dr. Weil made the uterine incision in his presence, as he was in the room at the time. He stated that at the conclusion of the incision to the uterus, the baby's forehead was lacerated as a result of that incision. Although he did not give Dr. Weil any instructions at the time the incisions were being made, he did gesture that he recognized that there was a cut to the baby's forehead as the incision was being made.

Dr. Ogburn further testified that he has "a very short sharp memory of the actual end of the uterine incision and the laceration occurring." He stated that that specific memory was fifteen seconds of the actual incision, and everything else is a bit of a blur. When asked it that incision took fifteen seconds or longer, he stated that "having said that, and realizing how time has compressed it, it probably was the entire uterine incision that was probably less than fifteen seconds." He continued that he has bits and pieces, but not enough direct memory to be able to answer questions from direct memory. He continued that he was supervising Dr. Weil's work and stated that the laceration to the baby's head could have been caused at the point of the last incision to separate the uterine muscles, and also included the baby's forehead. He felt that it would have been preferable to avoid that. Dr. Ogburn also testified that what was most memorable was that the last incision separated the lower uterine segment, the muscle of the uterus, and caused the incision in the forehead. He continued that he observed the separation of muscle tissue, as the knife separated it, and then saw edges of skin (of the baby's forehead), suggesting that the incision had completed the opening of the uterus and had, at the same time, initiated a skin incision in the fetal forehead.

Dr. Ogburn further testified that he had no memory of speaking to Dr. Weil about the laceration to the baby's head while the section was in progress. He further stated that when the incision is being made through the uterus, there can be amniotic fluid or membranes bulging through the incision, indicating the incision has been completed. There could also be gastric fluid or meconium or the bulging of the membranes to signify completion of the uterine incision. However, he continued, those landmarks and warnings were not present in this case. He testified that he presumed membranes had ruptured and labor had advanced so that fluid that would have been there was no longer separating the skin of the baby from the underside of the uterine wall. Dr. Ogburn further testified that a laceration to a baby's head during a cesarean section can occur in spite of good and accepted standards of care, and that its occurrence is also a mistake. Dr. Ogburn defined a mistake as any unintentional harm caused to a patient by an action or lack of action by a physician or provider, that is an error; it is an unintentional adverse outcome. Once or twice, prior to this, he encountered a scalp laceration in his supervisory capacity during a cesarean section, once while supervising, and once as the surgeon. He did not remember if those incidences involved emergency cesarean sections. He had no direct memory of teaching residents in obstetrics about scalp or skin lacerations occurring during a cesarean section.

Dr. Ogburn testified that a scalp laceration is a known complication in making uterine incisions, and is not a preferable outcome. He continued that a physician can perform a uterine incision in the course of a cesarean section delivery, lacerate the baby's forehead, and still have acted within good and accepted standards of care. To avoid a laceration to the infant, he stated, more time should be taken as the time required to make the incision is somewhat dependent on the urgency with which the baby needs to be delivered. When there is more time to take thinner slices, then one is sometimes more able to see where the uterus stops and the baby starts. He continued that when time is of the essence to remove the baby, there is a tendency to take thicker slices and cut through more muscle which leads to the possibility that the last cut will include a layer of skin or subcutaneous tissue of the baby. He testified that the skin incision was made at 17:24 hours, then stated it was 17:26. The birth time was 17:30 hours.

Dr. Turkewitz and Dr. Weils' expert, Dr. Klein, affirmed that he is a physician duly licensed to practice medicine in New York, and that he is board certified in obstetrics and gynecology, maternal fetal medicine, and clinical genetics. He set forth his education and training, and the materials and records which he reviewed in forming his opinions. Dr. Klein opined with a reasonable degree of medical certainty that Randi Turkewitz, M.D. and Dympna Weil, M.D. did not depart from good and accepted standards of medical practice during the delivery of the infant.

Dr. Klein set forth the pre-natal history of Elayne Herrera, who was hospitalized at Stony Brook University Hospital on February 21, 2008, due to elevated blood pressure and protein in her urine during this pregnancy. He continued that the status of the fetus remained stable until February 28, 2008 at 5:17 p.m. On February 26, 2008, a decision to induce labor was made by Dr. Kiefer, a maternal fetal medicine fellow, due to Ms. Herrera's preeclampsia, superimposed on chronic hypertension, and on the basis that she was near term. Dr. Klein set forth that Dr. Paul Ogburn, the attending physician who began following Ms. Herrera's care and treatment on February 25, 2008, agreed with this decision to induce labor. He continued that Dr. Ogburn supervised the residents and fellows in Ms. Herrera's care and treatment, as evidenced by his countersigning the residents' notes. It is noted that Dr. Ogburn's signature does not appear on the delivery note written by Dr. Turkewitz, a second year resident.

Dr. Klein set forth that Dr. Turkewitz became involved in Ms. Herrera's care and treatment at 5:17 p.m. on February 28, 2008, when the fetus' heart rate decreased to 50 beats per minute. He continued that Dr. Turkewitz took appropriate measures to improve the fetal heart rate by changing Ms. Herrera's position, placing

oxygen, discontinuing Pitocin, performing scalp stimulation, and administering Terbutaline 0.25 mg., without any improvement of the fetal heart rate. Thereafter, Dr. Turkewitz went to Dr. Ogburn and notified him of the situation. Dr. Ogburn then saw Ms. Herrera at 5:21 p.m. By 5:24 p.m., the fetus' heart rate was at 50 for seven minutes, and a decision was made to proceed with a stat (immediate) cesarean section. Dr. Weil, a fourth year resident, then joined Dr. Ogburn and Dr. Turkewitz in performing the cesarean section. Dr. Klein set forth that the medical records reflect that during this emergency procedure, the fetus' forehead sustained a 3.5 cm. laceration which was treated by the NICU team with steri strips. Dr. Klein opined that a laceration to the fetus is a known risk of the procedure, especially where there is an emergency cesarean section and danger of death or brain damage to the fetus. Thus, states Dr. Klein, this laceration was not a departure from good and accepted medical or surgical practice.

Dr. Klein stated that Dr. Weil did not recall who made the incisions resulting in the laceration to the baby's forehead. Dr. Ogburn testified that he does not recall if he made any incisions, but recalled Dr. Weil made the last 2 or 3 incisions into the uterus, and that he observed the baby's forehead was lacerated with the last incision. Dr. Klein opined that it was highly unlikely that Dr. Turkewitz, the second year resident, would perform the emergency cesarean section when a fourth year and attending physicians were present. Dr. Turkewitz, he stated, testified that she did not make any incisions. Dr. Klein continued that Dr. Ogburn did not recall if he gave either Dr. Weil or Dr. Turkewitz instructions during the surgery, but then he opined that Dr. Weil and Dr. Turkewitz were at all times acting under the supervision of Dr. Ogburn, and that neither Dr. Weil nor Dr. Turkewitz exercised independent medical judgment during the cesarean section surgical procedure. He opined that there is nothing in the records which indicate that Dr. Ogburn's directions deviated from accepted standards of medical practice such that Dr. Weil or Dr. Turkewitz should have intervened.

Based upon the foregoing, it is determined that Dr. Turkewitz and Dr. Weil have not established prima facie entitlement to summary judgment dismissing the complaint as asserted against them on the basis that they did not depart from the accepted standard of care and treatment during the delivery of Ms. Herrera. Dr. Klein has not set forth the standard of care for making incisions into the uterus for the delivery of the fetus. He has not established what method was employed by the defendants to avoid lacerating the infant's forehead, and how the standard of care was complied with. Although Dr. Klein stated that Dr. Ogburn did not recall if he gave either Dr. Weil or Dr. Turkewitz instructions during the surgery, he then indicated that there is nothing which indicated that Dr. Ogburn's directions deviated from accepted standards of care, thus raising factual issues as to whether or not Dr. Ogburn gave directions or instruction. Except for a conclusory opinion, Dr. Klein has not established that Dr. Ogburn did not deviate from accepted standards of medical practice. There are factual issues concerning who actually made the incisions into the uterus to deliver the infant. Dr. Turkewitz testified that she did not make the incision and did not know who did. Dr. Weil testified that she did not know who made the incisions into the uterus, and that she scrubbed in after Dr. Turkewitz and Dr. Ogburn had already commenced the procedure. She further testified that it was more than likely that Dr. Ogburn made the incision. Dr. Ogburn testified that he had only some recall of the delivery and that Dr. Weil made the last two or three incisions into the uterus, lacerating the infant's forehead. These testimonies raise factual issues concerning who actually made the incisions. The operative note and hospital record are silent in this regard. Dr. Ogburn's testimony is conclusory and unsupported by the record and admissible evidence, raising further factual issues concerning whether he was supervising the incisions or actually making the uterine incisions.

Dr. Ogburn did not testify relative to the issue of informed consent. Dr. Weil did not see Ms. Herrera until the procedure had already begun, and Dr. Turkewitz testified that there was no time to provide to Ms. Herrera a separate consent for a cesarean section, and that Ms. Herrera had initially signed the consent form for a vaginal delivery. Dr. Turkewitz testified that the consent form for a vaginal delivery provided that if

necessary, a cesarean section will be performed, but it does not specifically mention that the baby could suffer a scalp laceration. Dr. Turkewitz continued that only if there is time is another consent obtained for a cesarean delivery. Dr. Klein did not support his conclusion with any evidentiary submissions that informed consent was provided sufficiently to explain specific complications associated with a cesarean delivery, such as a scalp or forehead laceration, or that either Dr. Turkewitz or Dr. Weil were not responsible for obtaining the same on behalf of Dr. Ogburn in an emergency.

It is additionally noted that the plaintiff's expert who is licensed to practice medicine in New Jersey and is board certified in obstetrics and gynecology, set forth his education and training, and indicated the materials and records which he reviewed. He opined with a reasonable degree of medical certainty that Dympna Weil, M.D. and Randi Turkewitz, M.D. departed from good and accepted standards of care during the cesarean delivery of the infant, and that such deviation was a substantial factor in causing the forehead laceration to the infant. Although there are factual issues concerning who actually made the incisions, plaintiff's expert opined that it was a departure from the standard of care for the infant's forehead to have been lacerated during the incision to the uterus. The plaintiff's expert disagrees with Dr. Klein and raises factual issue in that the plaintiff's expert opined that the standard of care requires that such incision should be done carefully so as to cut completely through the uterine wall, but not deeply enough to injure the underlying fetus. He also stated that a scalp laceration is not a known risk of the procedure, again disagreeing with Dr. Klein.

Plaintiff's expert further opines that, in this case, there was sufficient time to make the uterine incision with the skill and due care required to ensure that the fetus would not be injured by the incision. He continued that lacerating the baby's forehead was a medical error and could, and should, have been avoided, regardless of whether the cesarean section in question was considered an emergency or not. Thus, opined the plaintiff's expert, it was a departure from the standard of care for Dr. Weil to have lacerated the baby's forehead. However, he continued, Dr. Weil testified that she did not know who made the incisions. He added that Dr. Ogburn testified that he did not recall if Dr. Weil was the only physician who made incisions. He further opined that if Dr. Turkewitz did not make the incision which caused the laceration, that she should not be liable for the baby's injury. However, such factual issues concerning who made the actual incision which caused the laceration to the baby's forehead also preclude the granting of summary judgment.

Accordingly motion (001) is denied.

Dated: AUG 13 2012

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION