

M.C. v David

2019 NY Slip Op 33023(U)

October 15, 2019

Supreme Court, Suffolk County

Docket Number: 12-1719

Judge: David T. Reilly

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INDEX No. 12-1719

CAL. No. 18-01683MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 3-20-19

ADJ. DATE 7-10-19

Mot. Seq. # 003 - MD

004 - MD

-----X
M.C., by His Mother and Natural Guardian
AMY CAVALLO,

Plaintiff,

- against -

DR. AARON DAVID & DR. HERMAN
WEISS OB/GYN PLLC, DR. AARON DAVID
OB/GYN PLLC, DR AARON DAVID MD,
DR. HERMAN WEISS MD, DR. DALE
SAGLIMBENE, DO, and DALE E.
SAGLIMBENE, DO, P.C.,

Defendants.
-----X

ZAREMBA BROWN, PLLC
Attorney for Plaintiff
40 Wall Street, 52nd Floor
New York, New York 10005

MARTIN, CLEARWATER & BELL, LLP
Attorney for Defendant Saglimbene
90 Merrick Avenue, Suite 401
East Meadow, New York 11554

FUMUSO, KELLY, SWART, FARRELL,
POLIN & CHRISTESEN, LLP
Attorney for Defendant David
110 Marcus Blvd., Suite 500
Hauppauge, New York 11788

Dr. Herman Weiss, PRO SE
Hweissmd@gmail.com

Upon the following papers numbered 1 to 107 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-30; 31-79; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 80-100; Replying Affidavits and supporting papers 101-103; 104-107; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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ORDERED that the motion (#003) by defendants Dale E. Saglimbene, D.O., and Dale E. Saglimbene, D.O., P.C., and the motion (#004) by defendants Dr. Aaron David & Dr. Herman Weiss OB/GYN, PLLC, Dr. Aaron David OB/GYN, PLLC, and Dr. Aaron David, M.D., are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendants Dale E. Saglimbene, D.O., and Dale E. Saglimbene, D.O., P.C., for summary judgment dismissing all claims against them is denied; and it is further

ORDERED that the motion by defendants Dr. Aaron David & Dr. Herman Weiss OB/GYN, PLLC, Dr. Aaron David OB/GYN, PLLC, Dr. Aaron David, M.D., for summary judgment dismissing all claims against them is similarly denied.

Amy Cavallo (Cavallo) commenced this action on behalf of her son, infant plaintiff M.C., against the defendants to recover damages for medical malpractice. The gravamen of the complaint is that the prenatal treatment and care rendered to Cavallo by Drs. David, Weiss, and Saglimbene was negligent and departed from the applicable standard of care. Specifically, plaintiffs allege, *inter alia*, that the defendants were negligent in failing to properly prevent and treat Cavallo's urinary tract infection during her 27th-28th week of pregnancy, which resulted in the development of a systemic maternal infection, namely a kidney infection. It is alleged on behalf of the infant plaintiff that this systemic maternal infection caused the child to develop cerebral palsy, cognitive deficits, and other developmental delays.

The facts of the case, as they relate to the instant motions, subject to some dispute, can be summarized as follows: Cavallo first became a patient of the practice of Dr. Aaron David and Dr. Herman Weiss on May 1, 2007. At this initial appointment, Cavallo was already in her 12th-13th week of pregnancy. At this initial appointment, Dr. David documented Cavallo's medical, social and gynecological history. Cavallo's history was pertinent for frequent urinary tract infections, for which she was receiving care from a urologist, Dr. Deepak Kapoor. Cavallo continued to receive prenatal care from Dr. David and Dr. Weiss, and her pregnancy was progressing without complaint.

On June 30, 2007, Cavallo was seen by Dr. Weiss for an outpatient ultrasound. At this appointment, she reported pain in her upper quadrant, but had no complaints of back pain. On June 31, Cavallo testified, she began to feel symptoms consistent with a urinary tract infection, such as increase in urination frequency, and painful reflux while urinating. She testified that she did not experience fever or chills on this date.

The record is unclear with respect to the communications between Cavallo and Dr. David subsequent to her development of symptoms of a urinary tract infection, but the record reflects that on August 2, 2007 Dr. David prescribed Macrobid, an antibiotic, over the telephone, without seeing Cavallo in person. Dr. David testified that this would be his custom and practice, depending on the complaint of the patient and whether it was an appropriate indication. Cavallo testified she filled the prescription and began taking the medication, adding that she began to feel better, but that her symptoms returned days later while still taking the medication.

Cavallo testified she had an appointment with Dr. David in his office on August 8, 2007. She testified that she took notes of the visit, which indicate that she reported feeling that either her urinary tract infection had not yet resolved, or that she had developed a yeast infection from the antibiotic. Dr. David testified that his medical record reflects that at this visit, Cavallo had no complaints of symptoms consistent with a urinary tract infection. Dr. David testified that if she had reported such complaints despite taking the antibiotic, he would have performed more testing and he would have sent a sample of her urine for a culture and sensitivity.

Cavallo had an appointment with Dr. Saglimbene, her primary care physician, on August 11, where she presented with complaints of symptoms of a urinary tract infection. Dr. Saglimbene's records reflect that Cavallo had a urinalysis performed in the office and that Dr. Saglimbene prescribed ampicillin, as Cavallo was not responding to Macrobid. Cavallo testified that she left a urine sample for it to be sent out for a culture and sensitivity testing, but Dr. Saglimbene's records do not reflect that this urine sample was ever sent to a lab for a culture to be performed.

Cavallo testified she called Dr. Saglimbene's office on August 13 to inquire about the results of her urine culture. She testified she was unable to obtain the results. Cavallo made an appointment with Dr. Kapoor, due to worsening symptoms, which now included fever, chills and back pain. Dr. Kapoor performed a sonogram in the office, and found Cavallo's right kidney to be inflamed. Dr. Kapoor instructed Cavallo to proceed to the emergency room at Good Samaritan Hospital for evaluation. On the same day, Cavallo was admitted as an inpatient to Good Samaritan Hospital. She was diagnosed with pyelonephritis, or a kidney infection, was started on IV antibiotics and a urine culture and sensitivity was performed. On August 15, the urine culture and sensitivity testing revealed the bacteria that caused her infection was *klebsiella pneumoniae*, which is drug resistant to ampicillin, intermediately sensitive to Macrobid. The culture and sensitivity testing revealed that the bacteria was sensitive and would respond to the antibiotic Rocephin, which was started and administered intravenously on the same day. Cavallo continued to improve, and the fetus was monitored throughout her admission, with no distress noted. Cavallo was discharged home on August 16 with a prescription for augmentin, an oral antibiotic.

Cavallo continued to be followed by Dr. David, Dr. Weiss, Dr. Saglimbene and Dr. Kapoor for the remainder of her pregnancy. She also sought treatment from a maternal-fetal medicine practitioner and a dietitian. Dr. Kapoor prescribed a prophylactic course of Macrobid to prevent future urinary tract infections, and she was directed to take the medication until close to the time of delivery. The remainder of her pregnancy was largely uneventful.

On October 25, Cavallo was induced for labor, and she gave birth to infant plaintiff the following day. Infant plaintiff was born with nuchal cord around his neck, and he was not breathing on his own or crying. He was admitted to the neonatal intensive care unit and treated for potential sepsis. He was discharged home five days later.

At 15 months of age, infant plaintiff underwent an MRI study and was diagnosed with periventricular leukomalacia (PVL), a form of white matter brain injury and cerebral palsy. Cavallo alleges that the kidney infection she suffered resulted in infant plaintiff's brain injury.

Dr. Saglimbene and Dale E. Saglimbene, D.O., P.C. (collectively Dr. Saglimbene), now move for summary judgment dismissing the complaint against them, arguing that Dr. Saglimbene did not depart from the acceptable standard of medical care in the treatment that was rendered to Cavallo during her pregnancy, and that the care she did provide did not proximately cause the alleged injuries sustained by infant plaintiff. In support of the motion, Dr. Saglimbene submits, *inter alia*, transcripts of the depositions of the parties, medical records of infant plaintiff and Cavallo, and the affirmations of experts Dr. David Hauer, a physician board certified in family medicine, and Dr. Kwame Anyane-Yebo, a board certified pediatrician and clinical geneticist.

Defendants Dr. Aaron David & Dr. Herman Weiss OB/GYN, PLLC, Dr. Aaron David OB/GYN, PLLC, and Dr. David (collectively Dr. David), also move for summary judgment dismissing the complaint against them, arguing that Dr. David departed from the acceptable standard of medical care with respect to their treatment rendered to Cavallo during her pregnancy, and that if there was such a departure, the care they did provide did not proximately cause the alleged injuries sustained by infant plaintiff. In support of the motion, Dr. David submits, *inter alia*, transcripts of the parties' depositions, medical records of infant plaintiff and Cavallo, and the affirmations of experts Dr. Gary Mucciolo, a board certified obstetrician/gynecologist, and Dr. Kwame Anyane-Yebo, a board certified pediatrician and clinical geneticist.

Plaintiff opposes the motion, arguing that there are triable issues of fact as to whether the defendants deviated from the applicable standard of care in rendering treatment to Cavallo during her pregnancy, and whether that deviation was the proximate cause of his injuries. In opposition to the motion, plaintiff submits, *inter alia*, transcripts of the parties' depositions, Cavallo's medical and pharmacy records, infant plaintiff's medical records, and the affidavits of experts Dr. William Roberts, a board certified obstetrician/gynecologist, who is licensed to practice medicine in Tennessee, and of Dr. Daniel Adler, a board certified pediatrician and psychiatrist.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once the moving party has made the requisite showing, the burden then shifts to the opposing party, who is then required to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). On such motion, the court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the non-moving party; the court is not responsible for resolving issues of fact or determining issues of credibility (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]). However, general allegations

of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (*see Arkin v Resnick, supra; Dolan v Halpern*, 73 AD3d 1117, 902 NYS2d 585 [2d Dept 2010]; *Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

A medical malpractice action, which is a type of negligence action, involves three basic duties of care owed to a patient by a professional health care provider: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Pike v Honsinger*, 155 NY 201, 49 NE 760 [1898]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof (1) that the defendant deviated or departed from accepted standards of medical practice, and (2) that such deviation or departure was a proximate cause of his or her injury or damage (*see Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, 157 AD3d 773, 69 NYS3d 108 [2d Dept 2018]; *Duvidovich v George*, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Ahmed v Pannone*, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014], *lv dismissed* 25 NY3d 964, 8 NYS3d 261 [2015]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *DiMitri v Monsouri*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]).

A defendant seeking summary judgment on a medical malpractice claim has the initial burden of establishing, through medical records and competent expert affidavits, the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby (*see Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc., supra; Stucchio v Bikvan*, 155 AD3d 666, 63 NYS3d 498 [2d Dept 2017]; *Mackauer v Parikh*, 148 AD3d 873, 49 NYS3d 488 [2d Dept 2017]; *Feuer v Ng*, 136 AD3d 704, 24 NYS3d 198 [2d Dept 2016]). Furthermore, to satisfy the burden, a defendant must address and rebut the specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Mackauer v Parikh, supra; Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]). Once this burden is satisfied, in opposition, a plaintiff must submit evidentiary proof "to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (*Stukas v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011], quoting *Deutsch v Claglassian*, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]; *see Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 912 NYS2d 104 [2d Dept 2010]). The burden on the plaintiff is not to prove his or her entire case, but "merely to raise a triable issue of fact with respect to the elements or theories established by the moving party (*Stukas v Streiter, supra* at 25). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see Stucchio v Bikvan, supra; Contreras v Adeyemi*, 102 AD3d 720, 958 NYS2d 430 [2d Dept 2013]).

Upon review of the affirmations of her experts, Dr. Hauer and Dr. Anyane-Yebova, and the additional exhibits submitted in support of the motion, Dr. Saglimbene has established, prima facie, that she did not deviate or depart from acceptable standards of medical care during her prenatal treatment of Cavallo, and that if there was such a departure, it was not the proximate cause of infant plaintiff's

alleged injuries (*see Senatore v Epstein*, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Adjetey v New York City Health & Hosps. Corp.*, 63 AD3d 865, 881 NYS2d 472 [2d Dept 2009]; *Costello v Kirmani*, 54 AD3d 656, 863 NYS2d 262 [2d Dept 2008]; *Dandrea v Hertz*, 23 AD3d 332, 804 NYS2d 106 [2d Dept 2005]). Dr. Saglimbene offers, in support, the affirmation of Dr. Hauer, a physician licensed to practice medicine in New York with a specialty in family medicine. Dr. Hauer opined to a reasonable degree of medical certainty that Dr. Saglimbene's care and treatment, specifically with respect to her treatment of Cavallo's urinary tract infection, was proper and within the standard of care. Dr. Hauer avers that Dr. Saglimbene properly recognized the symptoms of a urinary tract infection and prescribed ampicillin, an antibiotic that is safe to use to treat a urinary tract infection during pregnancy, when it was clear that Cavallo was not responding to Macrobid. Dr. Hauer opined that Dr. Saglimbene properly prescribed this medication while awaiting the results of a urine culture and sensitivity testing. Dr. Hauer further opined that the failure of Cavallo's urine to be tested for culture and antibiotic sensitivity was not due to an act or omission by Dr. Saglimbene and, therefore, not a departure from the accepted standard of care. Dr. Hauer further avers that the lack of results with respect to the August 11, 2007 urine culture had no effect on the outcome, as Cavallo had developed a kidney infection and was hospitalized before the urine results would have been reported to Dr. Saglimbene. Further, Dr. Hauer avers that Cavallo was placed on intravenous antibiotics at Good Samaritan Hospital on the same date that the urine culture results would have been expected, resulting in no delay in her treatment.

In addition, Dr. Saglimbene offers the affirmation of Dr. Anyane-Yeboa, a physician licensed to practice medicine in New York, with a specialty in pediatrics and clinical genetics. Dr. Anyane Yeboa opined to a reasonable degree of medical certainty that no action or inaction on the part of Dr. Saglimbene was the proximate cause of infant plaintiff's injuries. Dr. Anyane-Yeboa reviewed, *inter alia*, the results of MRI images of infant plaintiff from June 2, 2008 and June 15, 2015, and the results of infant plaintiff's and Cavallo's genetic microarray testing. Dr. Anyane-Yeboa opines that the results of these tests provide a clear explanation as to the cause of infant plaintiff's injuries, specifically that infant plaintiff's genetics reveal a genetic mutation which resulted in a 15q13.3 micro-duplication and the duplication of gene CHRNA7. Dr. Anyane-Yeboa avers that this genetic mutation results in developmental delay, autism, muscular hypotonia (including cerebral palsy) and other neuropsychiatric disorders. Further, Dr. Anyane-Yeboa avers that the comparison of infant plaintiff's 2008 and 2015 MRI reports further indicates that the improvement noted with respect to infant plaintiff's brain, specifically the disappearance of the previously diagnosed PVL, is consistent with the genetic mutation found. Dr. Anyane-Yeboa opines that if infant plaintiff's brain injury were still present in 2015, it would be caused by scarring, as the result of a maternal infection while he was in utero, and no improvement would be seen on subsequent MRI studies. However, since there was notable improvement, he opines that the PVL was caused by slow development of the white matter of infant plaintiff's brain, a symptom of his genetic mutation, not an injury, which is why improvement is seen over time.

With respect to Dr. David's motion, upon review of the affirmations of his experts, Dr. Mucciolo and Dr. Anyane-Yeboa, and the additional exhibits submitted in support of the motion, Dr. David has established, *prima facie*, that he did not deviate or depart from acceptable standards of medical care during his treatment of Cavallo, and that if there was such a departure, it was not the proximate cause of infant plaintiff's alleged injuries (*see Senatore v Epstein, supra; Stukas v Streiter, supra; Adjetey v New*

York City Health & Hosps. Corp., *supra*; *Costello v Kirmani*, *supra*; *Dandrea v Hertz*, *supra*). In support of his motion, Dr. David offers the affirmation of Dr. Gary Mucciolo, a board certified obstetrician/gynecologist, who is licensed to practice medicine in New York. Dr. Mucciolo opined to a reasonable degree of medical certainty that Dr. David did not depart from accepted standards of gynecological/obstetrical practice in the prenatal and delivery of Cavallo. Dr. Mucciolo opines that Dr. David did not depart from the standard of care by not prescribing prophylactic antibiotics to Cavallo while she was pregnant, as her history revealed she had not had a urinary tract infection for at least six months prior to her first treatment with Dr. David. Dr. Mucciolo opines that it is within a treating obstetrician's medical judgment to prescribe a prophylactic course of antibiotics under these circumstances. Further, Dr. Mucciolo opines that Dr. David's act of prescribing antibiotics over the phone, in response to Cavallo's sudden onset of urinary tract infection symptoms, was within the standard of care when treating a patient who is familiar with the symptoms of a urinary tract infection. Dr. Mucciolo further avers that Dr. David's care of Cavallo during the August 8 appointment comported with the standard of care and that he properly documented the prenatal visit, despite not documenting a negative finding of symptoms. Further, he opines that it would not be the standard of care to collect a sample from Cavallo to perform a urine culture and sensitivity testing during the August 8 visit, as Cavallo was taking antibiotics on that date.

Dr. David also submits the affirmation of Dr. Anyane-Yeboa, in support of his motion. Dr. Anyane-Yeboa's affirmation is the same as submitted by Dr. Saglimbene, and he opines, to a reasonable degree of medical certainty, that no action or inaction on the part of Dr. David was the proximate cause of infant plaintiff's injuries, for the same reasons detailed above.

Dr. Saglimbene and Dr. David having met their prima facie burden on the motion, the burden now shifts to plaintiff to raise triable issues of fact (*see Alvarez v Prospect Hosp.*, *supra*; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; *Makinen v Torelli*, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; *Stukas v Streiter*, *supra*). Infant plaintiff has submitted the affidavits of two expert physicians, Dr. William Roberts and Dr. Daniel Adler. The Court notes that while the affirmation of Dr. Roberts that was initially submitted by infant plaintiff did not comply with CPLR 2106, and was subscribed to and sworn to out of state, unaccompanied by a certificate of conformity as required by CPLR 2309(c), this defect is not fatal and no substantial right of defendants would be prejudiced by considering it (*see* CPLR 2001; *Gallucio v Grossman*, 161 AD3d 1049, 78 NYS3d 196 [2d Dept 2018]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *Worthy v Good Samaritan Hosp. Med. Ctr.*, 50 AD3d 1023, 857 NYS2d 178 [2d Dept 2008]).

Dr. Roberts states that he is licensed to practice medicine in Tennessee and that he is board certified in obstetrics and gynecology, with a sub-certification in maternal fetal medicine. Dr. Roberts opines, within a reasonable degree of medical certainty, that Dr. David and Dr. Saglimbene "were negligent and committed malpractice" by failing to timely and properly diagnose and treat Cavallo's urinary tract infection and that, as a result, Cavallo's urinary tract infection progressed to an upper tract infection, which involved the kidneys, leading to "pyelonephritis, an inflammatory response in the fetus, and damage to the white matter of the infant-plaintiff's brain." Dr. Roberts opines that this failure to properly diagnose led to a progression of an infection that ultimately caused infant plaintiff's brain

damage. Dr. Roberts avers that Dr. Saglimbene and Dr. David should have been aware that due to Cavallo's history of recurrent urinary tract infections, she had a 25 to 40% chance of developing pyelonephritis during pregnancy. Dr. Roberts avers that the effect of pyelonephritis during this stage of pregnancy led to the development of a systemic infection in Cavallo and a fetal inflammatory response in infant plaintiff, which caused infant plaintiff's development of cerebral palsy and PVL.

With respect to Dr. David specifically, Dr. Roberts opines that Dr. David departed from accepted standards of care with respect to his treatment of Cavallo on August 2. Dr. Roberts specifically avers that Dr. David was required to evaluate Cavallo's signs, symptoms and complaints and document her reported symptoms, to schedule an appointment and physically examine Cavallo that day to rule out pyelonephritis, to order a urinalysis and culture to identify the infectious organism and prescribe the proper antibiotics, to advise Cavallo on the purpose of the urine culture, and to advise Cavallo of the signs and symptoms of pyelonephritis and to advise her to seek emergency care if those symptoms developed. Dr. Roberts also opines that if Dr. David had ordered a urine culture on August 2, the results would have been reported by August 4, revealing the type of bacteria causing the infection and allowing for the proper antibiotic to be prescribed. Dr. Roberts also opines that Dr. David departed from accepted standards of care on August 8 when, during an office visit, he did not order a urine culture and neglected to document Cavallo's complaints, or the improvement, of her symptoms of a urinary tract infection.

With respect to Dr. Saglimbene, Dr. Roberts opined that she departed from accepted standards of care. Dr. Roberts states that based upon the records provided, Cavallo was still experiencing urinary tract infection symptoms, despite being on antibiotics, and that Dr. Saglimbene departed from accepted standards of medical practice by not ordering, and sending to the lab, a urine culture for Cavallo. Dr. Roberts opines that Dr. Saglimbene's failure to perform this testing resulted in a two-day delay in the administration of the appropriate antibiotics for Cavallo's infection. He opines that this delay in treatment caused the pyelonephritis to continue to be un- or undertreated, resulting in damage to infant plaintiff's brain. Additionally, Dr. Roberts opines that Dr. Saglimbene departed from accepted standards of care by prescribing ampicillin to Cavallo, after the failure of Macrobid to treat her infection. Dr. Roberts avers that "[i]t is common knowledge amongst physicians [such as Dr. Saglimbene] . . . that approximately 70% of urinary tract infections in pregnancy are caused by E. coli. Dr. Saglimbene also should have known that over 90% of E. coli strains are sensitive to Macrobid" and that if Cavallo was still symptomatic on August 11, she should have prescribed "Rocephin or Augmentin, which would have been effective against Macrobid-resistant E. coli as well as most other strains of bacteria associated with urinary tract infections in pregnancy, including Klebsiella."

Infant plaintiff also submits the affirmation of Dr. Daniel Adler. Dr. Adler states that he is licensed to practice medicine in New York and New Jersey, and that he is board certified in pediatrics, as well as psychiatry and neurology. Dr. Adler opines, to a reasonable degree of medical certainty, that "the pyelonephritis that Ms. Cavallo suffered in her 27-28th week of pregnancy was a substantial contributing factor, if not the cause, of the periventricular leukomalacia and white matter injury" suffered by infant plaintiff, which caused his cerebral palsy and neurological and developmental delays. Dr. Adler avers that urinary tract and kidney infections during pregnancy are associated with the development of brain injuries, cerebral palsy and PVL. Dr. Adler states that these injuries are caused

when an infection in the mother exposes the fetus to infection through the placenta, creating an inflammatory response in the fetal tissue. Dr. Adler states that neurological inflammation in the fetus can result in injury to the white matter of the brain, resulting in PVL and cerebral palsy. Dr. Adler opines that all of infant plaintiff's injuries are the result of PVL and cerebral palsy, caused by Cavallo's pyelonephritis during the 27-28th week of her pregnancy. Additionally, Dr. Adler reviewed and compared the two MRI studies of infant plaintiff and opined that the 2015 study is still consistent with a diagnosis of PVL, as its presentation changes over time in a consistent manner. Dr. Adler avers that infant plaintiff's MRI presentation shows this expected progression of the course of PVL.

Infant plaintiff has submitted evidence sufficient to raise triable issues of fact, as the opinions of his experts described the applicable standards of care under the circumstances, explained how Dr. Saglimbene and Dr. David departed or deviated from such standards, and concluded that these departures were competent causes of infant plaintiff's injuries (*see Memoli v Winthrop-University Hosp.*, 147 AD3d 931, 47 NYS3d 128 [2d Dept 2017]; *Kitt v Okonta*, 143 AD3d 601, 39 NYS3d 456 [1st Dept 2016]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Williams v Bayley Seton Hosp.*, *supra*; *Stukas v Streiter*, *supra*). As the parties have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred and as to the proximate cause of infant plaintiff's injuries, an order granting summary judgment is not appropriate (*see Jagenburg v Chen-Stiebel*, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; *Leto v Feld*, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]; *Gressman v Stephen-Johnson*, 122 AD3d 904, 998 NYS2d 104 [2d Dept 2014]; *Moray v City of Yonkers*, 95 AD3d 968, 944 NYS2d 210 [2d Dept 2012]).

Accordingly, defendants motions for summary judgment dismissing the complaint are denied.

Dated: October 15, 2019
Riverhead, NY



J.S.C.

HON. DAVID T. REILLY

FINAL DISPOSITION NON-FINAL DISPOSITION