Short Form Order and Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA PART 13
Justice

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HUNTER SHECTMAN, etc., et al.

Index Number 1664 2005

- against -

Motion Dates November 21, 2007

STEPHEN WILSON, M.D., et al.

Motion Cal. Numbers 27-31

Motion Seq. Nos. 1-5

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The following papers numbered 1 to 69 read on these separate motions by plaintiffs for the following relief: for an order directing defendants Stephen Wilson, M.D. and Christine Duncan, M.D. to appear for continued examinations before trial and to answer those questions which were objected to; for an order directing a judicial hearing officer be appointed to issue rulings at the continued depositions of Dr. Wilson and Dr. Duncan; for an order directing that Dr. Wilson and Dr. Duncan pay the costs of the judicial hearing officer, counsel fees and costs to complete the depositions and the costs of the instant motion; and on this motion by defendant Dr. Wilson, for an order disqualifying plaintiffs' counsel, Anthony C. Casamassima, Esq., M.D. (Anthony Casamassima), pursuant to Code of Professional Responsibility DR 5-102(d) (22 NYCRR 1200.21[d]) and for a protective order staying a hearing of plaintiffs' motion until the status of plaintiffs' counsel is determined; and this motion by defendant Dr. Wilson for the following relief: summary judgment in his favor dismissing the complaint and all cross claims; for summary judgment in his favor dismissing plaintiffs' second cause of action for lack of informed consent; and for an order precluding plaintiffs' attorney, Anthony Casamassima, from authoring an expert affirmation or compelling plaintiffs to submit any unredacted affirmation for an in camera inspection; and on this motion by Dr. Duncan for summary judgment in her favor; and by defendant Long Island Jewish Medical Center (LIJ) for summary judgment in its favor; and on this cross motion by plaintiffs for an order imposing costs, counsel fees and sanctions against defendant Dr. Wilson; and on this cross motion by Dr. Duncan for an order disqualifying plaintiffs'

counsel, Anthony Casamassima, pursuant to Code of Professional Responsibility DR 5-102(d) (22 NYCRR 1200.21[d]), for an order precluding plaintiffs' attorney, Anthony Casamassima, from authoring an expert affirmation, and for a protective order staying a hearing of plaintiffs' motion until the status of plaintiffs' counsel is determined.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1-19
Notices of Cross Motion - Affidavits - Exhibits ..	20-26
Answering Affidavits - Exhibits	27-53
Reply Affidavits	54-69

Upon the foregoing papers it is ordered that these motions and cross motions are consolidated and determined as follows:

In this medical malpractice action, it is alleged that the infant plaintiff suffers from, inter alia, global developmental, motor and pervasive developmental disorder (PDD) as a result of defendants' failure to properly diagnose intrauterine growth retardation and their failure to properly monitor and intervene during the labor and delivery process.

In support of his motion for summary judgment, defendant Dr. Wilson submits the affirmation of Yitzchak Frank, M.D., who is board certified in psychiatry and neurology with a sub-specialty in neurodevelopmental disabilities. Dr. Frank concludes that Dr. Wilson did not depart from good and accepted standards of medical practice with respect to his treatment of plaintiffs and that he did not contribute to or proximately cause the infant plaintiff's injuries. Dr. Frank further affirms that "intrauterine growth restriction and/or uterine growth retardation is not the cause of Pervasive Developmental Disorder which is an autism spectrum disorder associated with symptoms of behavioral abnormalities, speech and language abnormalities, global developmental delays, social abnormalities and fine motor problems. The cause of this disorder is not intrauterine, related to mechanisms of delivery, or prenatal care, but is rather a genetic disorder." This evidentiary submission, which indicates that defendant Dr. Wilson did not deviate from accepted standards of medical care, is sufficient to meet defendant's burden as a proponent of a summary judgment motion (see Alvarez v Prospect Hosp., 68 NY2d 320 [1987] ;Berger v Becker, 272 AD2d 565 [2001]; Juba v Bachman, 255 AD2d 492 [1998]; Whalen v Victory Memorial Hosp., 187 AD2d 503 [1983]).

In support of her motion for summary judgment, defendant Dr. Duncan submits the affirmation of Steven J. Milim, M.D., who is

board certified in obstetrics and gynecology. Dr. Milim concludes that defendant Dr. Duncan did not depart from good and accepted standards of medical practice with respect to her treatment of the infant plaintiff and that she did not contribute to or proximately cause the infant plaintiff's injuries and that "any injuries that the infant may have are not a result of an intrauterine, delivery or prenatal problem." Dr. Duncan further submits the affirmation of Kwame Anyane-Yeboa, M.D., who is board certified in Genetics and Pediatrics, and who concludes that Dr. Duncan did not depart from good and accepted standards of medical practice with respect to her treatment of the infant plaintiff, and that "[t]here were no perinatal factors which contributed to the development of PDD because autism is genetic in nature."

These evidentiary submissions, which indicate that defendant Dr. Duncan did not deviate from accepted standards of medical care, are sufficient to meet Dr. Duncan's burden as a proponent of a summary judgment motion (see Alvarez v Prospect Hosp., supra; Berger v Becker, supra; Juba v Bachman, supra; Whalen v Victory Memorial Hosp., supra).

The burden now shifts to plaintiffs to respond with rebutting medical evidence demonstrating that defendants' actions were a departure from the accepted standard of care in the medical community (see Alvarez v Prospect Hosp., supra; Whalen v Victory Memorial Hosp., supra) and a proximate cause in bringing about the injury (see Mortensen v Memorial Hosp., 105 AD2d 151 [1985]). In opposition to defendants Dr. Wilson and Dr. Duncan's motion, plaintiffs submit the affidavit of Lawrence Borow, M.D., who is board certified in obstetrics and gynecology, and who opines that defendants Dr. Wilson and Dr. Duncan departed from good and accepted standards of medical practice, inter alia, by failing to: induce labor on August 15, 2002; perform an amniotomy and institute intrauterine fetal monitoring on August 23, 2002; administer oxygen to plaintiff mother during an episode of bradycardia on August 24, 2002; and to perform a timely caesarean section.

Thus, plaintiffs' expert's affidavit raises questions of fact involving the issues of malpractice and proximate cause as to whether the infant plaintiff suffered injury due to the treatment he received from Dr. Wilson and Dr. Duncan (see Sisko v New York Hosp., 231 AD2d 420 [1998]; Evans v Holleran, 198 AD2d 472 [1994]).

Accordingly, those branches of the motions of Dr. Wilson and Dr. Duncan which seek summary judgment are hereby denied.

In light of the abovementioned expert affirmations, that branch of defendant Dr. Wilson's motion seeking to preclude Anthony Casamassima from submitting his own affirmation or compelling the in camera inspection of an unredacted affirmation is

denied as moot.

With respect to the branch of Dr. Wilson's motion seeking to dismiss the cause of action asserted against him for lack of informed consent, in order to state a cause of action for lack of informed consent, plaintiff must allege that the wrong complained of arose out of some affirmative violation of plaintiff's physical integrity (Jaycox v Reid, 5 AD3d 994 [2004]; Pedone v Thippeswamy, 309 AD2d 792 [2003]; Smith v Fields, 268 AD2d 579 [2000]; Campea v Mitra, 267 AD2d 190 [1999]; Schel v Roth, 242 AD2d 697 [1997]; Hecht v Kaplan, 221 AD2d 100 [1996]), "such as surgical procedures, injections or invasive diagnostic tests" (Karlsons v Guerinot, 57 AD2d 73, 82 [1977]). Here, it is undisputed that Dr. Wilson only treated plaintiff Heidi Shectman prenatally. Plaintiffs' cause of action for lack of informed consent against Dr. Wilson is based on allegations that Dr. Wilson failed to diagnose intrauterine growth restriction and timely deliver the infant plaintiff and is, therefore, not predicated on an affirmative violation of the patient's physical integrity (see Saguid v Kingston Hosp., 213 AD2d 770 [1995]). Accordingly, that branch of Dr. Wilson's motion seeking summary judgment in his favor on the cause of action for lack of informed consent is granted.

With regard to the summary judgment motion of LIJ, as a general rule, a hospital is sheltered from liability where its employees follow the directions of a private attending physician (see Cook v Reisner, 295 AD2d 466 [2002]; Filippone v St. Vincent's Hosp. & Med. Ctr. of NY, 253 AD2d 616 [1998]). However, where the hospital's staff knew or should have known that the attending physician's orders were "so clearly contraindicated by normal practice that ordinary prudence required inquiry into the correctness of the orders," liability may be imposed on the hospital (Toth v Community Hosp. at Glen Cove, 22 NY2d 255, 265 [1968]; Filippone v St. Vincent's Hosp. & Med. Ctr. of NY, supra; Somoza v St. Vincent's Hosp. & Med. Ctr. of NY, 192 AD2d 429 [1993]; Pollicina v Misericordia Hosp. & Med. Ctr., 158 AD2d 194 [1990]; Christopher v St. Vincent's Hosp. & Med. Ctr. of NY, 121 AD2d 303 [1986]).

Since no depositions of any employees of LIJ have been conducted, summary judgment should be denied as premature where, as here, the party opposing the motion has not had an adequate opportunity to conduct discovery into issues within the knowledge of the moving party (see CPLR 3212[f]; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Colombini v Westchester County Healthcare Corp., 24 AD3d 712 [2005]; OK Petroleum Distrib. Corp. v Nassau/Suffolk Fuel Oil Corp., 17 AD3d 551 [2005]; Mazzola v Kelly, 291 AD2d 535[2002]).

With respect to the branch of Dr. Wilson's motion which seeks

to disqualify plaintiffs' counsel under the advocate-witness disqualification rule, in order to obtain disqualification of counsel pursuant to Code of Professional Responsibility DR 5-102(d) (22 NYCRR 1200.21[d]), the party moving for disqualification must demonstrate that (1) the testimony of the opposing party's counsel is necessary to their case, and (2) that such testimony is or may be prejudicial to the client (see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437 [1987]; Daniel Gale Assoc., Inc. v George, 8 AD3d 608 [2004]).

Herein, Dr. Wilson argues that disqualification is warranted because of the May 7, 2004 letter written by plaintiffs' counsel, Anthony Casamassima, to geneticist Masood A. Khatamee, M.D.:

The letter states, in pertinent part, as follows:

> "I am a physician duly licensed to practice medicine in the State of New York, and I am board certified in both pediatrics and medical genetics.
>
> "I have consulted with Mr. and Mrs. Rory Shectman concerning the possibility of utilizing gender selection techniques to conceive a female child. I believe that gender selection is both appropriate and medically necessary in this case, since the Shectmans have a son with Pervasive Developmental Disorder for which X-linked recessive inheritance cannot be ruled out. This means that the Shectmans have as high as a 50% chance with each male child of having another son with Pervasive Developmental Disorder. This is the genesis of their desire to conceive a female child."

The theory that there might be a genetic cause of PDD is not information for which it is necessary that plaintiffs' counsel be called upon to testify. This is aptly demonstrated by the affirmations of defendants' experts, Dr. Anyane-Yeboa and Dr. Frank, who affirm that PDD is genetic in origin. Where, as here, there is no necessity for the plaintiffs' counsel to be called as a witness at trial, no violation of the advocate-witness rule exists (see Code of Professional Responsibility DR 5-102[d] [22 NYCRR 1200.21(d)]; S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., supra at 443; Ahrens v Chisena, 40 AD3d 787 [2007]; Milbank Hous. Dev. Fund v Royal Indem. Co., 17 AD3d 280 [2005]; Goldberger v Eisner, 21 AD3d 401 [2005]; Daniel Gale Assocs. v George, supra; Arons v Charpentier, 8 AD3d 595 [2004]).

In light of the foregoing, that branch of Dr. Wilson's motion seeking a protective order staying the plaintiffs' motion has been rendered academic.

The court will next address that branch of plaintiffs' motion which seeks an order directing Dr. Wilson and Dr. Duncan to appear for continued examinations before trial and to answer those questions which were objected to by their counsel. The first contested question was whether Dr. Wilson agreed with his co-defendant Dr. Duncan's statement that the infant plaintiff suffered from intrauterine growth retardation. Herein, this question runs afoul of the prohibition that, in a medical malpractice action, one defendant physician may not be examined before trial about the professional quality of the services rendered by a co-defendant physician if the question bears solely on the alleged negligence of the co-defendant and not on the practice of the witness (see Claudino v Mastellone, 286 AD2d 697 [2001]; Forgays v Merola, 222 AD2d 1088 (1995); Carvalho v New Rochelle Hosp., 53 AD2d 635 [1976]).

The second contested question involved an inquiry into Dr. Wilson's medical condition which caused his medical leave of absence four months after the alleged acts of negligence took place. Discovery with respect to a party's physical condition may be obtained where that party's physical condition has been placed in controversy (CPLR 3121[a]). Such a situation may arise where a defendant affirmatively asserts the condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff (Koump v Smith, 25 NY2d 287 [1969]; Cannistra v County of Putnam, 139 AD2d 479 [1988]). Even where there has been a showing that a party's physical condition is in controversy, discovery may still be precluded where the information requested is privileged and there is no evidence of a waiver of privilege (see Dillenbeck v Hess, 73 NY2d 278 [1989]).

Where, as here, neither the pleadings nor the deposition reveal that Dr. Wilson suffered from a physical disability at the time of the alleged negligence, his condition has not been placed in controversy (see Grafi v Solomon, 274 AD2d 451 [2000]; D'Alessio v Nabisco, Inc., 123 AD2d 816 [1986]). Moreover, the record contains no indication that Dr. Wilson has waived the physician-patient privilege which attaches to medical records by asserting his medical condition, either by way of counterclaim or an attempt to excuse the conduct complained of by the plaintiffs (see Dillenbeck v Hess, supra; Gandy v Larkins, 165 AD2d 862 [1990]).

The third contested question, posed to Dr. Duncan, was whether Dr. Wilson had made it known that he was going through a divorce. A party's right to discovery is not unlimited (Butterman v

R. H. Macy & Co., 33 AD2d 746 [1969], affd 28 NY2d 722 [1971]; Kenford Co. v County of Erie, 55 AD2d 466 [1977]), and may be curtailed where it may become an unreasonable annoyance and tend to harass and overburden the other party (Richards v Pathmark Food Store, 112 AD2d 360 [1985]). The test is one of usefulness and reason (Andon v 302-304 Mott St. Assocs., 94 NY2d 740 [2000]; Allen v Crowell-Collier Publ. Co., 21 NY2d 403 [1968]; Conrad v Park, 204 AD2d 1011 [1994]). Thus, plaintiffs' inquiry into whether Dr. Wilson had mentioned that he was going through a divorce is not sufficiently related to the issues being litigated to warrant discovery of such information and inquiry into his marital status is improper and not relevant to the litigation herein.

Accordingly, plaintiffs' motion for an order directing Dr. Wilson and Dr. Duncan to appear for continued examinations before trial, to answer those questions which were objected to, for a judicial hearing officer to be appointed to issue rulings, and for costs and counsel fees is denied in its entirety.

Plaintiffs' cross motion for an order imposing costs, counsel fees and sanctions against defendant Dr. Wilson is hereby denied. Dr. Duncan's cross motion for an order disqualifying plaintiffs' counsel, for an order precluding plaintiffs' attorney from authoring an expert affirmation, and for a protective order staying a hearing of plaintiffs' motion until the status of plaintiffs' counsel has been determined is denied as academic.

Dated: April 18, 2008

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J.S.C.