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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

Present: Hon. JOHN A. MILANO, PART IAS 3
Justice

-----x Index # 16695/94

GERGIS ARIAS, An Infant by her Mother
and Natural Guardian GRISELDA ARIAS, Motion date: 9/25/01
Individually,

Plaintiff, Cal. # 41

-against-

FLUSHING HOSPITAL MEDICAL CENTER,
DR. GEDDIS ABEL-BEY, DR. WEISS
THENOR LOUIS, DR. W. ROBERT LOCKRIDGE
AND DR. INNAMORATI,

Defendants.

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The following papers numbered 1 to 14 read on this motion for summary judgment.

N/M, AFF., AFF., AFF., MEMO OF LAW, EXHIBITS A-G AND SERVICE	1-7
STIP	8
AFF. IN OPP., AFF., EXHIBITS AND SERVICE	9-12
REPLY AND SERVICE	13-14

Upon the foregoing papers it is ordered that this motion is decided as follows:

The underlying action herein is one for medical malpractice arising out of the alleged malpractice of the defendants leading up to and including the birth and delivery of the infant plaintiff.

Defendant, Dr. Innamorati has moved for summary judgment of dismissal alleging a failure of plaintiffs to establish even a question of any malpractice on his part.

This court was presented with a mountain of motion papers, some four inches thick. At the outset it must be noted that both counsel have presented an excellent work product which made it extremely difficult for this court to come to a final decision. It was only after long deliberation and detailed analysis of the conflicting arguments that this court came to a decision by attempting to cut through the rhetoric and laying bare the actual evidence.

Dr. Innamorati was the director of Maternal-Fetal Medicine at Flushing Hospital Medical

Center, the facility where the infant was born. The plaintiff mother was admitted to the hospital at or about 12:39 PM on March 25, 1993 complaining of decreased movement of the as yet unborn child. The resident of Flushing Hospital, who was not the mother's personal attending doctor called in movant for a consultation. The resident and movant conducted a non-stress test and Biophysical Profile. The non stress test was non-reactive. Plaintiff's counsel in his affirmation reports that this result "is an indication that there may be a problem with the well being of the fetus". The Biophysical profile resulted in a score of 2 out of a possible 10. Plaintiff's counsel again reports that the range of normal is 8 to 10. Also, plaintiff's counsel reports a Bishop's score of 3 out of a possible 8. What might be considered a normal Bishop's score is not reported to the court.

These tests were completed and at 2 P.M. movant wrote a three page note on the mother's chart and recommended that labor be induced. The mother was about thirty-eight weeks pregnant at the time. At 2:09 P.M. the fetal heart rate was 148-152 beats per minute.

Movant contends that was his only connection to the care of the plaintiff child and mother. He claims no further consultation, care or direction other than the preceding consultation and formulation of a plan of care which called for the inducing of labor with prostaglandin gel and oxytocin.

Thereafter, the mother continued to be cared for by the resident, as well as Dr. Lockridge and Dr. Abel-Bey, her attending physicians. Care was also provided by Dr. Latchaw, under the supervision of Dr. Lockridge and a separate physician's assistant.

The medical chart records reflect that the fetal heart beat continued at 148-153 beats per minute through 4:30 P.M. Without setting forth in great detail the notations on the medical chart, the first indication of any decrease in heart beat was at 5:25 P.M. when it fell to as low as 140. Dr. Lockridge was notified. The heart beat remained mostly strong and regular but did decelerate, on occasion, between 6:50 P.M. until 9 P.M. The resident and Doctors Lockridge and Abel-Bey were kept advised of the heart beat.

At 9 P.M. the chart records the heart beat decreasing to 80 beats per minute with quick recovery. At 9:30 P.M. the heart beat is strong and regular. At 9:44 P.M. the heart beat decreased to 60 beats per minute with the resident, Dr. Abel-Bey and the physician's assistant at bedside. At 9:47 P.M. the resident and Dr. Abel-Bey declared the fetus in fetal distress and Dr.

Abel-Bey ordered delivery by cesarian-section.

Plaintiff contends movant's malpractice was occasioned by movant's decision, at or about 2 P.M., to use drugs to immediately induce labor and a natural delivery. Plaintiff contends the proper procedure would be to order an immediate cesarian.

Plaintiff's expert, in broad and conclusory strokes contends that the failure to order an immediate cesarian is a departure from good and accepted medical practice. This opinion is based upon plaintiff's expert's review of the results of the tests conducted by movant. The expert does not however explain the significance of those tests. That explanation of such significance is provided by plaintiff's counsel, who is presumably not a medical doctor. As such, counsel's explanation is inadmissible.

Plaintiff's expert also contends that movant, by being called into consultation thus became, in a sense, a primary care giver to the mother. Plaintiff's expert asserts that the judgment of the resident and the mother's own attending physicians then became subordinate to the movant because the movant was the director of Maternal-Fetal Medicine.

Plaintiff's expert does not provide any basis whatsoever, in general or under these specific circumstances, for these assertions. There is no authority, either legal or medical, to establish that once movant is called in for a consult, he becomes ultimately responsible for the patient. This court was not advised of how frequently movant was called in for consultations. If movant is called in, on a daily basis, for consultations on 5, 10, 15 or more pregnancies does that mean that movant becomes ultimately responsible for 40 or more overlapping pregnancies in the hospital at any given time?

Neither is any authority given, either legal or medical, to support plaintiff's expert's assertion that once movant is called in, the pregnant mother's own attending physicians lose all prerogatives of independent judgment and become beholden to movant's directives.

Movant's expert in his moving affirmation contends that based upon the information available to movant at and before 2 P.M., movant acted within medically acceptable guidelines. Upon reviewing the test results movant's expert contends that movant recognized the evidence of potential danger and immediately took action. That action was to induce labor which was a more medically conservative course of action. Movant was not inclined to do an immediate cesarian

as the mother had not yet even gone into natural labor.

Movant's expert contends that based upon the information available at the time this was a medically appropriate and acceptable choice. Any evidence of a decreased fetal heart beat did not appear until after the consultation. Movant was never advised of the decreased heart beat and movant's expert contends that movant had no duty to inquire after the consultation had occurred.

It is the choice of the mother as to her attending physician. It was the hospital resident who brought in movant for a consultation and there is no basis whatsoever for the position that the attending physician was bound by the consulting physician brought in by the resident.

Movant's expert was careful to distinguish movant's plan of care as a "suggestion" rather than an order. In fact, when the attending physician determined the fetus to be in fetal distress the attending did disregard movant's plan of care and conducted an immediate cesarian.

Even after finding evidence of decreased fetal heart beat. The resident and attending physicians continued to concur with movant's plan of conservative care, for several hours, until changed circumstances indicated a more aggressive approach was warranted. Movant was never aware of those changed circumstances as he had concluded his medical services hours before.

Movant has established prima facie entitlement to summary judgment and despite colorful allegories of plaintiff's counsel to football fields and icebergs, plaintiff has been unable to raise any issues of fact based on legally sufficient evidence as opposed to conclusory speculation.

Accordingly, summary judgment is granted as a matter of law and plaintiff's claims against movant, Dr. Innamorati are dismissed. The remaining defendants continue as parties to this action.

Dated _____

John A. Milano J.S.C.