Seq # 9

NC 3/12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

MICHAEL SWANSON, an infant under 14 years of age, by and through his parents and natural guardians, MARY SWANSON and BRUCE SWANSON, and MARY SWANSON and BRUCE SWANSON, individually,

Plaintiffs,

-against-

NORTHERN WESTCHESTER HOSPITAL CENTER, and WOMEN'S MEDICAL ASSOCIATES, PLLC, and CARLA ENG-KOHN, M.D.,

Defendants.

NOTICE OF MOTION

Index No. 16743/07

Oral Argument Requested

FILED
JUN 24 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

PLEASE TAKE NOTICE, that upon the annexed affirmation of Christopher J. Whitton, Memorandum of Law of Roland T. Koke and upon all exhibits thereto, defendant, ***NORTHERN WESTCHESTER HOSPITAL CENTER,*** will move this Court before the Honorable Nicholas Colabella at Supreme Court, County of Westchester, located at 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York 10601 on the 8th day of March, 2010 at 9:30 am for an Order pursuant to CPLR §4404 (1) setting aside the jury verdict against Northern Westchester Hospital Center, and directing judgment in favor of the hospital, or (2) setting aside the jury's verdict in favor of the plaintiff and directing a new trial on the issue of liability and damages, or (3) reducing the apportionment of liability and damages awarded against the hospital or (4) directing a new trial on the issue of damages, unless the plaintiff stipulates to a substantial reduction and (5) if the verdict is not set aside, directing a hearing for the purposes of structuring a judgment pursuant to CPLR Article 50-A and calculating any applicable set-offs in accordance with CPLR § 4545(a) and CPLR § 4546, along with such relief this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR §2214(b), answering Affidavits, if any, are required to be served upon the undersigned at least seven (7) days before the return date herein.

Dated: February 11, 2010
White Plains, New York

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WESTCHESTER SUPREME
AND COUNTY COURTS

Yours, etc.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MICHAEL SWANSON, an infant under 14 years of age, by and through his parents and natural guardians, MARY SWANSON and BRUCE SWANSON, and MARY SWANSON and BRUCE SWANSON, individually,

Plaintiffs,

-against-

NORTHERN WESTCHESTER HOSPITAL CENTER, and WOMEN'S MEDICAL ASSOCIATES, PLLC, and CARLA ENG, M.D.,

Defendants.

---X

AFFIRMATION IN SUPPORT

Index No. 16743/07

CHRISTOPHER J. WHITTON an attorney duly admitted to practice law in the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am a member of RENDE, RYAN & DOWNES, LLP, attorneys for defendant, NORTHERN WESTCHESTER HOSPITAL CENTER, (hereinafter "the hospital") and am familiar with the facts and circumstances of this matter as I was the attorney that represented the hospital at the 14 day jury trial conducted in November and December, 2009.

2. This affirmation is submitted in support of defendant hospital's motion for an Order pursuant to CPLR §4404, (1) setting aside the jury verdict against the hospital and directing judgment in favor of the hospital, or (2) setting aside the jury's verdict in favor of the plaintiff and directing a new trial on the issue of liability and damages, or (3) reducing the apportionment of liability and damages awarded against the hospital or (4) directing a new trial on the issue of damages, unless the plaintiffs stipulate to a substantial reduction and (5) if the verdict is not set aside, directing a hearing for the purposes of structuring a judgment pursuant to CPLR Article 50-A and calculating any applicable set-offs in accordance with CPLR § 4545(a) and CPLR § 4546, along with such relief this Court deems just and proper.

3. In this medical malpractice action, the plaintiffs allege that on October 10, 2003, the defendants negligently delayed in delivering the infant plaintiff after Dr. Eng encountered shoulder dystocia. Shoulder dystocia is a condition at delivery in which the infant's shoulder gets hung up on the mother's pubic bone after delivery of the infant's head. The infant was delivered by co-defendant Dr. Eng-Kohn ("Dr. Eng"), the mother's private physician. Dr. Eng was employed by co-defendant, Women's Medical Associates, PLLC. Dr. Eng was not employed by the hospital.

4. Trial commenced on November 17, 2009, and the jury returned a verdict on December 11, 2009 in favor of the plaintiffs against all defendants, allocating 75% liability against Dr. Eng and her employer, and 25% against the hospital.

5. At the conclusion of the plaintiffs' evidence, and again at the conclusion of all the evidence, your Affirmant moved for a dismissal of the Complaint against the hospital because of plaintiffs' failure to establish a *prima facie* case against the hospital. The Court reserved its ruling on both occasions. Approximately one week following the verdict, the Court denied the reserved applications, and set forth a schedule for submission of defendants' post trial motions.

6. The burden rests upon the plaintiffs at the time of trial to present *prima facie* evidence that the defendant was negligent, and that such negligence was a proximate cause of the alleged injuries.

7. The plaintiffs contend that delivery of the infant began at 18:40 with delivery of his head, that shoulder dystocia was encountered almost immediately thereafter, and that the shoulder dystocia was not properly and timely resolved by Dr. Eng, resulting in a delay of eight to nine minutes before the birth.

8. Specifically, with respect to the hospital, plaintiffs argued two theories of negligence: (1) that the labor and delivery nurse, Nurse Maureen Maresca, instructed the mother to begin pushing without Dr. Eng present in the room, and (2) that the recordkeeping by the hospital staff was insufficient.

9. As will be set forth more fully below and in the accompanying Memorandum of Law, the record demonstrates unequivocally that plaintiffs failed to present any evidence that either claim was a proximate cause of the alleged injuries.

10. The Summons & Complaint and Bill of Particulars are attached hereto as Exhibit "A". A note from the jury is attached as Exhibit "B", the verdict sheet as Exhibit "C", and the trial transcript as Exhibit "D".

The nurse's instruction to the mother to begin pushing was not a proximate cause of any injury to the infant.

11. In response to a hypothetical question from plaintiffs' counsel, the plaintiffs' obstetrical expert, Dr. Michele Batista, testified that it would have been a departure for the Labor and Delivery nurse, Nurse Maresca, to instruct the mother to begin pushing if Dr. Eng was not present in the delivery room (Exhibit "D", p. 625). That hypothetical, however, was not supported by the plaintiffs' own testimony. Both Mr. and Mrs. Swanson unequivocally testified that Dr. Eng was present directing and managing the delivery when the head was delivered.

12. Furthermore, Dr. Batista was never asked whether such an instruction by the nurse to the mother was a proximate cause of any alleged injury. Additionally, none of the other medical professionals who testified offered testimony of a causal connection between the nurse's alleged instruction and the infant's injury.

13. The absence of such testimony that this alleged departure was a proximate cause of any injury is fatal to plaintiffs' claim.

14. Moreover, the facts demonstrate that any such instruction by Nurse Maresca directing the mother to push could not have been a proximate cause of the infant's injury.

15. The plaintiffs' experts claimed that the infant plaintiff's injury occurred during the nine minute delay in delivering his body after shoulder dystocia was encountered and from excessive traction applied by Dr. Eng during that time period. They did not claim that the injury occurred at anytime prior to the time frame.

16. Both Dr. Batista and Dr. Naomi Bloomfield (co-defendant's obstetrical expert) testified that shoulder dystocia does not occur until after the infant's head is delivered and then the infant's shoulder impacts on the mother's pubic bone (See Dr. Batista's testimony, Exhibit "D", p. 577 and Dr. Bloomfield's testimony, Exhibit "D", p. 1850-51, 1885-86, 1908-1909).

17. At least four witnesses were present for the delivery, i.e. the mother, the father, Dr. Eng and Maureen Maresca, R.N.

18. Each of these witnesses, including the parents, testified that Dr. Eng was in the room controlling and managing the delivery when the head delivered and then the shoulder dystocia occurred.

19. The mother and father NEVER claimed that the nurse was the one who instructed the mother to begin pushing.

20. According to the mother, shortly before delivery began, Dr. Eng entered the delivery room. She had not started pushing nor had the infant's head been delivered. Dr. Eng then instructed the mother to push. She pushed two separate times, resulting in delivery of the infant's head.

"A. I remember Doctor Eng had come in, and she checked me and it was time to start pushing.

Q. Okay. Tell the jury about that point in time, please.

A. Doctor Eng had come in. She checked me.

Q. When you say "checked you", what do you mean?

A. Whatever they check down there to see if you are ready to.

Q. They did a vaginal exam?

A. Yes. Yes.

Q. Okay. And then what?

A. I was instructed to begin pushing.

Q. By whom?

A. By Doctor Eng.

Q. Did you?

A. I did. I began to - - my first push, and then I - - after I beared down, I took another deep breath in, and Michael actually - - his head came out the second push, which I was very surprised."

(Exhibit "D", p. 863, line 11 thru p. 864, line 8).

21. The mother further testified that Dr. Eng remained present, giving her further instructions until the infant was fully delivered (Exhibit "D", p. 863-866).

22. The father similarly testified that Dr. Eng was present in the delivery room as early as 18:30, ten minutes before the delivery began, and directed when it was time to push. Dr. Eng was situated between the mother's legs to receive the infant, with a nurse standing to the mother's left side and the father standing on the mother's right side. The infant's head was delivered after two pushes by the mother (Exhibit "D", p. 513-515).

23. Dr. Eng also testified that she was in the delivery room <u>before</u> the infant's head delivered, that she instructed the mother to begin pushing, that the mother pushed two times, and the infant's head then delivered, followed by shoulder dystocia (Exhibit "D", p. 1656-1660).

24. Nurse Maresca further confirmed that Dr. Eng arrived before the infant's head was delivered, that Dr. Eng instructed the mother to push, that the mother pushed two times and then the infant's head delivered (Exhibit "E", p. 1814-1816).

25. In accordance with the testimony of both the mother and father as well as Dr. Eng, Dr. Eng was present and managing the mother's pushing and subsequent delivery when the injury allegedly occurred. Since the infant plaintiff's injury did not occur until *after his head delivered*, any purported instruction given by Nurse Maresca prior to that time could not have been a proximate cause of any injury.

26. While the timing of when Dr. Eng entered the delivery room may vary, it is undisputed that the infant's head was delivered by the doctor, under her care and management, and that only after the delivery of the infant's head did shoulder dystocia occur.

27. Accordingly, the jury's verdict is based on lack of evidence of proximate cause and must be dismissed.

28. Notably, to find the hospital liable under this theory, the jury necessarily would have had to reject the parents' testimony that the infant plaintiff's head was delivered at 18:40. Both the mother and father testified that they vividly remembered looking at the clock and seeing 18:40 when the head delivered. They also testified that Dr. Eng was present when the mother began pushing. To find liability under this theory, therefore, the plaintiffs would have to acknowledge that the jury did not find their testimony credible.

The jury's note reflects its desire to make the hospital pay "restitution" for recordkeeping deficiencies, contrary to the Court's instruction and despite plaintiffs' concession on this issue.

29. Initially, the plaintiffs tried to claim that the hospital was negligent in failing to maintain proper records and tried to falsify documents.

30. In particular, the plaintiffs claimed that Nurse Maresca failed to record the use of the McRoberts' maneuver and suprapubic pressure during the delivery (Exhibit "D", p. 626-627).

31. Plaintiffs also argued that the hospital record contained one entry in the infant's chart regarding the time of delivery that was wrong, and another entry regarding the time of delivery that was changed.

32. Each of these entries, however, were made after the infant was born and clearly did not cause the infant's injuries.

33. In fact, plaintiffs' counsel twice conceded that these alleged recordkeeping errors did not cause the infant plaintiff's injury.

34. First, plaintiffs' counsel stated that he was willing to stipulate that the alleged recordkeeping issues did not cause the injury (Exhibit "D", p. 1577).

35. Then, during summation, he flatly conceded that the recordkeeping issues did not cause any injury to the infant.

> "...We have never argued that record keeping is responsible for Michael's brain injury. We have never argued that."
>
> (Exhibit "D", p. 2246)

36. Plaintiffs' counsel was forced to make this concession because their own expert, Dr. Batista, testified that the alleged deficiencies in the chart did not cause the injury (Exhibit "D", pp. 639-640).

37. Thus, none of the alleged recordkeeping deficiencies could in any way have been a proximate cause of the infant plaintiff's injuries and a verdict on that basis cannot stand.

38. Notably, however, it would appear that the jury imposed liability on the hospital based on its recordkeeping.

39. During its deliberations, the jury sent the following note to the court:

> "If the jury finds the hospital is not liable for physical injuries to Michael, but should pay some restitution for sloppy record keeping

and/or falsification of documents (in other words: "Yes" to #1A and "No" to # 1B), can we still award damages?"

(See Exhibit "B", Court Exhibit "3" dated 12/10/09)

40. Question #1A asked if the hospital was negligent. Question #1B asked if such negligence was a substantial factor in causing injury (See Exhibit "C").

41. In response, Mr. Justice Nicholas Colabella, J.S.C. advised the jury, "No" (Exhibit "D", p. 2347).

42. The jury, however, ignored this instruction as it ignored other instructions in the court's charge. For example, the jury ignored the court's instruction to determine the annual amounts for each item of future economic damages; instead they entered the total. The jury also ignored the court's instruction to determine the growth rate for each item of economic damages; instead they left it blank. In addition, while the jury awarded medical expenses over a 76 year period, they awarded future pain and suffering and custodial care over a 69 year period; failing to provide for a consistent life expectancy.

43. Given the absence of evidence of causation, as outlined above, and the jury's failure to follow the court's instructions on the awards for future economic damages in its charge, it is apparent that the jury also ignored the court's instruction that it could not base a verdict against the hospital on improper recordkeeping. Instead, they found the hospital liable so that they could force the hospital to pay "restitution for sloppy recordkeeping and/or falsification of documents." Such a verdict is wholly improper and must be dismissed.

Alternatively, the apportionment of liability as against the hospital, was against the weight of the evidence, requiring that the apportionment be reduced.

44. The jury's apportionment of 25% against the hospital is not supported by any rational finding of fact.

45. The plaintiffs argued that the infant suffered a brachial plexus injury (stretching of nerves running from the cervical vertebrate to the arm) and mild right hemiparesis as a result of the nine minute delay and excessive traction applied to the infant's head by Dr. Eng in an attempt to resolve the shoulder dystocia (Exhibit "D" p. 579-581, 609-610, 993-994).

46. It is undisputed, however, that Dr. Eng was present at all relevant times and that Dr. Eng was the one who:

- instructed the mother to push before delivery;
- delivered the infant's head;
- gave further instructions to the mother when to push and when to stop pushing;
- instructed the nurse and father to pull the mother's legs back in a McRoberts' maneuver and instructed the nurse to apply supra-pubic pressure;
- held the infant's head and applied traction to resolve the dystocia;
- performed an episiotomy;
- called for neonatology assistance; and,
- resolved the dystocia and delivered the infant.

47. The delivery nurse's role was limited to staying on the mother's side, verbally coaching the mother and father, and applying the McRoberts' maneuver and suprapubic pressure when instructed to do so by Dr. Eng.

48. In light of the minimal and peripheral role played by the nurse, all of whose actions were directed and supervised by Dr. Eng, the jury's apportionment of 25% against the hospital is against the weight of the evidence and should be reduced.

The total damages awarded were grossly excessive and must be reduced.

49. As a further alternative, the jury's award of over $60 million is excessive and unsupported by the evidence, requiring a substantial reduction.

50. Specifically, the award of $22,000,000 for pain and suffering is excessive when compared to awards in other cases involving comparable injuries. Furthermore, the *annual* awards of $2,442,591 for future medical expenses, $1,073,143 for future rehabilitation services, $25,686,413 for future custodial care and $4,633,000 for future lost earnings, are excessive and must be reduced. Indeed, it is evident that the jury failed to follow the court's instructions to enter the annual amounts for such awards and to provide for the growth rate. As such, these awards should be reduced to reflect amounts that the plaintiffs proved to a reasonable degree of certainty would be incurred in the future. In that regard, as will be set forth in the accompanying Memorandum of Law, a number of assumptions underlying the plaintiffs' claims for economic damages have no basis in the record or have not been proven with reasonable certainty and cannot form the basis of a damages award. Moreover, the plaintiffs failed to present any evidence to support the jury's award of $5 million for loss of services and the entire award should be vacated.

51. Finally, in the event the action is not dismissed or a new trial ordered, the hospital seeks a hearing for purposes of structuring a judgment in accordance with CPLR Article 50-A, and taking any applicable set-offs in accordance with CPLR § 4545(a) and CPLR § 4546. In this regard, it is respectfully requested that the Court direct the plaintiffs to update and provide any outstanding discovery as to any form of collateral source reimbursement, such as private medical insurance, that the infant plaintiff is currently receiving or will continue to receive in the future.

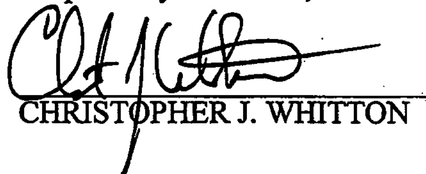
Conclusion

For the reasons stated herein, the jury's finding of liability against the hospital should be vacated and a verdict directed in favor of the hospital dismissing the Complaint. Alternatively, a new trial should be ordered as the jury's verdict is against the weight of the evidence. As a further alternative, the Court should reduce both the amount awarded and the apportionment of liability as against the weight of the evidence. Finally, the Court should direct a hearing for purposes of structuring a judgment in accordance with CPLR Article 50-A and taking any applicable set-offs in accordance with CPLR § 4545(a) and CPLR § 4546 .

WHEREFORE, it is respectfully requested that an Order be issued granting defendant's motion, along with such other relief as this Court deems just and proper.

Dated: February 11, 2010
White Plains, New York

Respectfully submitted,



CHRISTOPHER J. WHITTON