STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

CONNOR MONTERUIL, a minor, by ANDREA MONTERUIL, his natural mother and NEXT FRIEND,

Plaintiff,

v

File No. 08-26617-NH
HON. PHILIP E. RODGERS, JR.

DR. MARCY D. VERPLANCK-KANTZ, DO and GRAND TRAVERSE WOMEN'S CLINIC, P.L.L.C., a Michigan corporation,

Defendants.
/

Milton H. Greenman (P34621)
Rebecca Sposita (P69424)
Attorneys for Plaintiff

David R. Johnson (P33822)
Attorney for Defendants

DECISION AND ORDER DENYING
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

This is a medical malpractice action. The Plaintiff claims that Defendant Dr. Verplank-Kantz was negligent because she did not properly respond to the fetal heart monitor tracing and deliver Connor Monteruil by Cesarean Section. During the labor and delivery, Connor allegedly suffered oxygen deprivation. In addition, during the delivery, he developed shoulder dystocia. He was born with severe neurological injuries.

The Defendants filed a motion for summary disposition, pursuant to MCR 2.116(C)(10), claiming that there is no genuine issue of material fact and they are entitled to judgment as a matter of law. The Court heard oral arguments on June 8, 2009 and took the matter under advisement. The Defendants claim that the alleged abnormalities on the fetal heart monitor tracing did not give any indication of shoulder dystocia which was the singular cause of Connor Monteruil's injury. In other words, the shoulder dystocia could not have been reasonably foreseen or predicted and therefore, Dr. Verplank-Kantz' alleged failure to respond

to the fetal heart monitor tracing and deliver Connor by Cesarean Section was not a proximate cause of Connor Monteruil's injury. The Defendants rely upon excerpts from the deposition testimony of the Plaintiff's experts.

Standard of Review

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

A motion filed under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rely on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence filed in the action. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Applicable Law

To establish a prima facie case of medical malpractice, plaintiff must prove the following elements:

> (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence,
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> (2) that the defendant breached that standard of care,
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> (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care.
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> *Craig v Oakwood Hosp,* 471 Mich 67, 86; 684 NW2d 296 (2004). Further, plaintiff has the burden of proving the proximate causation element by a preponderance of the evidence. *Id.*

"'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Id.* Our Supreme Court recently explained:

> "Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or 'but for') that act or omission." *Craig v Oakwood Hosp,* 471 Mich 67, 87; 684 NW2d 296 (2004). Cause in fact may be established by circumstantial evidence, but the circumstantial evidence must not be speculative and must support a reasonable inference of causation. *Wiley v Henry Ford Cottage Hosp,* 257 Mich App 488, 496; 668 NW2d 402 (2003).
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> "'All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty.'" *Skinner v Square D Co,* 445 Mich 153, 166; 516 NW2d 475 (1994), quoting 57A Am Jur 2d, Negligence, § 461, p 442. Summary disposition is not appropriate when the plaintiff offers evidence that shows "that it is more likely than not that, but for defendant's conduct, a different result would have obtained." *Dykes v William Beaumont Hosp,* 246 Mich App 471, 479 n 7; 633 NW2d 440 (2001). [*Robins v Garg,* 276 Mich App 351, 362; 741 NW2d 49 (2007).]
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> Proximate (or legal) cause, on the other hand, involves the examination of the foreseeability of consequences, and whether a defendant should be found legally responsible for those consequences. *Skinner, supra* at 163; 516 NW2d 475. It is defined as that which, in natural and continuous sequence, unbroken by any independent, unforeseen cause, produces the injury. *McMillian v Vliet,* 422 Mich 570, 576; 374 NW2d 679 (1985). More than one proximate cause may exist, and if several factors contribute to produce an injury, "one actor's

negligence will not be considered the proximate cause of the harm unless it was a substantial factor in producing the injury." *Brisboy v Fibreboard Corp,* 429 Mich 540, 547; 418 NW2d 650 (1998).

Therefore, to establish proximate cause, two elements must be proven: cause in fact and legal cause. *Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994). To prove cause in fact, a plaintiff must show that "but for" the defendant's actions, the plaintiff's injury would not have occurred. *Id.* at 163; 516 NW2d 475. If cause in fact is established, the issue becomes whether the defendant's actions were the legal cause of the injury. *Id.* To be the legal cause of the injury, the plaintiff must show that it was foreseeable that the defendant's conduct would create a risk of harm, and that the result of that conduct and intervening causes were foreseeable. *Weymers v Khera,* 454 Mich 639, 648; 563 NW2d 647 (1997); *McMillian v Vliet,* 422 Mich 570, 576; 374 NW2d 679 (1985).

The issue of proximate cause generally presents a question of fact for the jury. *Nichols v Dobler,* 253 Mich App 530, 532; 655 NW2d 787 (2002); *Helmus v Dep't of Transportation,* 238 Mich App 250, 256; 604 NW2d 793 (1999); *Reeves v Kmart Corp,* 229 Mich App 466, 480; 582 NW2d 841 (1998). But, when the facts bearing on proximate cause are not disputed and reasonable minds could not differ, the issue presents a question of law for the court. *Id.*

Proximate cause is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury, without which such injury would not have occurred. *McMillian v Vliet, supra.* A new, independent or intervening cause, which actively operates to produce the harm after the negligence of the defendant, can relieve a defendant from liability. *Meek v Dep't of Transportation,* 240 Mich App 105, 120; 610 NW2d 250 (2000). "An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was 'reasonably foreseeable.'" *McMillian, supra* at 576; 374 NW2d 679. In other words, an intervening cause is not a superseding cause if it was reasonably foreseeable. *Meek, supra.* When a defendant's negligence consisted of enhancing the likelihood that the intervening cause would occur or consist[s] of a failure to protect the plaintiff against the risk that occurred, the intervening cause was reasonably foreseeable." *Hickey v Zezulka (On Resubmission),* 439 Mich 408, 438, 447; 487 NW2d 106 (1992), amended 440 Mich 1203 (1992), superceded on other grounds *Lamp v Reynolds,* 249 Mich App 591, 604; 645 NW2d 311 (2002); *Meek, supra*

at 120-121; 610 NW2d 250 (2000), overruled on other grounds *Grimes v Dep't of Transportation,* 475 Mich 72; 715 NW2d 275 (2006). An act of negligence does not cease to be a proximate cause of the injury because of an intervening act of negligence, if the prior negligence is still operating and the injury is not different in kind from that which would have resulted from the prior act." *Taylor v Wyeth Laboratories, Inc,* 139 Mich App 389, 401-402; 362 NW2d 293 (1984). Finally, whether an intervening act constitutes a superseding cause is also typically a question for the factfinder. *Meek, supra* at 118; 610 NW2d 250; *Taylor v Wyeth Laboratories, Inc,* 139 Mich App 389, 402; 362 NW2d 293 (1984).

Analysis

In response to the Defendants' motion, the Plaintiff points out that "the shoulder dystocia was not the 'single event' responsible for Connor Monteruil's outcome" as claimed by the Defendants. The Plaintiff identifies two factual issues in dispute: whether the fetus was suffering from ongoing oxygen deprivation or hypoxia during labor and how long was the head to body interval for the delivery?

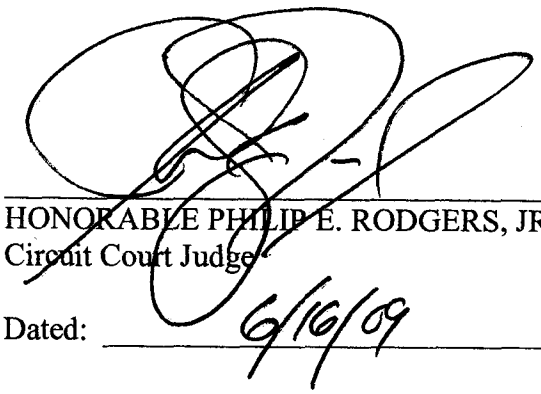
Whether the fetus suffered from ongoing oxygen deprivation or hypoxia during labor is important because, if he did, Plaintiff argues that the asphyxia and resulting brain damage were foreseeable and the Defendant doctor may be found negligent in not delivering him by Cesarean Section. The Plaintiff's position is that, based on the dysfunctional labor and the non-reassuring fetal heart rate monitor tracings, the Defendant doctor was required to deliver Connor Monteruil by Cesarean Section. The Plaintiff contends that oxygen deprivation is a process that had been occurring during the labor and "was progressively worsening until delivery." Asphyxia was foreseeable based on the dysfunctional labor and unsatisfactory fetal monitor tracing. The severity of the damage was determined by the total time that the baby was deprived of oxygen. According to the Plaintiff, the fact that oxygen deprivation began during the labor is evidenced by the fetal heart monitor tracings and signs of tachycardia.

The length of the delivery is important because it prolonged the oxygen deprivation. If the delivery took only 4 or 6 minutes as claimed by the Defendants, the baby would not have suffered the severity of injuries that he did at birth. Both parties agree that his condition worsened as resuscitation continued. But, Plaintiff argues that the oxygen deprivation must have started during labor and, again would have required the Defendant doctor to deliver the

baby by Cesarean Section. The fact that oxygen deprivation occurred during labor, continued during delivery and caused the severity of damages that it did is evidenced by the 0 apgar score and the length of time it took to resuscitate the infant. The Plaintiff's theory is supported by the medical records, the testimony of Plaintiff's experts, and the testimony of Defendants' expert, Dr. Fain. All indicate that the fetus was deprived of oxygen well in excess of the six and one half minutes reported in the medical records that it took to deliver the baby because of the shoulder dystocia.

Viewing the evidence presented thus far in a light most favorable to the Plaintiff, the jury could find that the oxygen deprivation began during labor, that it was reasonably foreseeable that the baby would suffer oxygen deprivation and increasingly severe injury the longer the oxygen deprivation continued, and that the standard of care required the Defendant doctor to deliver the baby by Cesarean Section. To make such findings, the jury would have to reject the Defendants' theory that the only cause of the baby's injuries was the shoulder dystocia. Based on the evidence presented thus far, the jury could decide to reject this theory. Therefore, the Defendants' motion for summary disposition is denied without prejudice. The Court will review this issue again at the close of Plaintiff's proofs.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/16/09