

**McMahon v Arato & Blaszczyk Obstetrics &  
Gynecology, P.C.**

2007 NY Slip Op 31217(U)

April 23, 2007

Supreme Court, Suffolk County

Docket Number: 0013680/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 10-10-06  
ADJ. DATE 12-11-06  
Mot. Seq. # 002 - MG

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DOROTHY McMAHON and JOSEPH :  
McMAHON, :  
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 Plaintiffs, :  
 :  
 - against - :  
 :  
 ARATO AND BLASZCZYK OBSTETRICS AND :  
 GYNECOLOGY, P.C., MICHAEL ARATO, M.D. :  
 and THEODORE BLASZCZYK, M.D., :  
 :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 12-19; Replying Affidavits and supporting papers 20-22; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (#002) by the defendants for summary judgment dismissing the second and third cause of action in the verified complaint, pursuant to CPLR 3212, is granted; and it is further

**ORDERED** that the plaintiffs are directed to forward an unredacted copy of the medical expert's affirmation, annexed to their opposition papers, directly to the undersigned's chambers and to serve affidavits of such filing upon counsel for all parties within ten (10) days after service upon the defendants of a copy of this order together with notice of entry.

The summons and verified complaint in this action were filed on or about December 2, 2003, and issue was joined by the filing of defendant's answer on or about February 17, 2004. Discovery has been completed, and the note of issue was filed on or about May 25, 2006.

This is an action to recover damages for the alleged medical malpractice of the defendants in the medical care and treatment rendered to the plaintiff Dorothy McMahon (McMahon) during a full term pregnancy. Plaintiffs allege in the first cause of action that due to defendants' negligent care and treatment, from on or about March 12, 2001 through and including the date of delivery of the infant on October 12, 2001, plaintiff gave birth to an infant suffering from congenital defects. Plaintiffs allege that defendants failure to diagnose the fetus' congenital defects during the term of the pregnancy resulted in the infant being born with multiple life threatening congenital defects and caused the plaintiffs to suffer substantial economic loss for medical care for the infant. Plaintiffs allege in the second cause of action that, due to the negligence of the defendants, plaintiff McMahon was caused to endure pain, suffering, anxiety and the emotional distress of giving birth to a disabled child, learning that the child suffered from multiple congenital defects and emotional injury flowing from those disabilities. Plaintiff McMahon also alleges in her second cause of action an independent personal injury stemming from the surgery necessary to remove a portion of her liver for transplant into her infant son<sup>1</sup> and the emotional injury stemming from her transplant surgery. Plaintiff alleges that but for the negligence of the defendants her liver transplant surgery would not have been necessary. The third cause of action in the complaint is a derivative claim of Joseph McMahon for medical expenses stemming from his wife's liver transplant surgery and the attendant loss of services.

Defendants Arato and Blaszczyk Obstetrics and Gynecology, P.C., Michael Arato, M.D. and Theodore Blaszczyk, M.D. now move for summary judgment dismissing the second and third cause of action in the complaint, pursuant to CPLR 3212, on the grounds that emotional distress is not recoverable as a result of the birth of a child born with congenital defects and that plaintiff's claim for personal injury is unrelated to the care and treatment rendered by the defendants during her pregnancy. Defendants state that the plaintiff did not suffer an independent physical injury apart from those recognized in normal labor and delivery of a child as the surgery complained of was a result of plaintiffs voluntary donation of a portion of her liver to her child. Defendants state that the derivative claim of the husband also must fail as it is predicated upon the emotional injuries claimed by plaintiff mother and also stems from plaintiff mother's voluntary donation of a portion of her liver. In support of their motion defendants submit, *inter alia*, an affirmation of counsel, copies of the pleadings and verified bill of particulars, a copy of the deposition transcript of Dorothy McMahon, a copy of the "Living Donation for Liver Transplant" consent form and an affidavit from Warren Rosenfeld, M.D.<sup>2</sup>

Plaintiffs oppose the motion on the grounds that the defendants' misconstrue the second cause of action as a claim exclusively for emotional injury flowing from the fact that the plaintiffs' son was born with congenital deformities. Plaintiffs argue that the second cause of action seeks to recover for the physical and emotional injury to plaintiff mother related to the surgery necessary to donate a portion of her liver to her infant son as well as the emotional injury of a parent of a disabled child and the

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<sup>1</sup>Plaintiff claims, and it is undisputed, that she was the only viable donor for the liver transplant to her son.

<sup>2</sup>Dr. Warren Rosenfeld, M.D., states that he is a Board Certified Neonatologist and is duly licensed to practice medicine in the State of New York. Dr. Rosenfeld states that, at the request of counsel, he reviewed the pleadings, bills of particulars, deposition transcripts, medical and hospital records including those of defendants, Stony Brook University and New York Presbyterian Hospital as well as the records of the plaintiffs subsequent treating OE/GYN Dr. San Roman.

emotional injury flowing from the disabilities of her infant son. Plaintiffs argue that the derivative claim in the third cause of action flows from the physical and emotional injury of the wife as a result of the transplant surgery. Plaintiffs submit in opposition, *inter alia*, an affirmation of counsel, uncertified medical records, a copy of the deposition testimony of Theodore Blaszczyk, M.D. and Dorothy McMahon, an affidavit from plaintiff Dorothy McMahon and an unsigned redacted<sup>3</sup> expert's affirmation<sup>4</sup>.

It is undisputed that the plaintiff was under the care and treatment of the physician defendants during her pregnancy and it is undisputed that the plaintiff gave birth to an infant son with multiple congenital abnormalities. It is also undisputed that the defendants did not cause the congenital defects but, rather, plaintiffs claim that the defendants failed to properly interpret sonograms during the pregnancy and failed to order additional testing which would have revealed the abnormalities which, in hindsight, would have afforded the plaintiffs the opportunity to terminate the pregnancy.

The issue therefore, with regard to the second cause of action<sup>5</sup>, as alleged, is two-fold and concerns first, whether the plaintiffs may recover for the mother's emotional pain and distress of carrying a child to term, giving birth, and learning, upon delivery, that the child suffered from multiple congenital defects. The second issue concerns whether the mother of a child, as the only viable liver donor, can recover for alleged physical and emotional injury related to a voluntary elective surgical procedure, performed on the plaintiff mother approximately one year after the birth of her child, involving donation of a portion of her liver to her infant son. The husband's derivative claim as alleged in the third cause of action flows directly from the wife's claims concerning her transplant surgery and is determined accordingly. Solely for the purposes of this motion the court will assume defendants liability in failing to interpret the sonograms and for failing to order additional tests such as a level 2 sonogram.

With regard to the first issue, plaintiffs' claim for emotional distress associated with the delivery of a child with multiple congenital defects has previously been dealt with by the New York Court of Appeals (*see, Howard v Lecher*, 42 NY2d 109, 397 NYS2d 363 [1977]; *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895 [1978]; *Vaccaro v Squibb Corp.*, 52 NY2d 809, 436 NYS2d 871 [1980]) and, it is not a legally cognizable claim. It is well settled that plaintiff parents may not recover for the emotional

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<sup>3</sup>Submission of an affidavit or affirmation from an unidentified expert is permissible with the proviso that the court may require submission of an unredacted copy of the affidavit or affirmation for an *in camera* inspection (*see, Marano v Mercy Hosp.*, 241 AD2d 43, 670 NYS2d 570 [1998]; *McCarty v Community Hosp.*, 203 AD2d 432, 610 NYS2d 588 [1994]).

<sup>4</sup>The redacted affirmation of plaintiff's expert states that he is duly licensed to practice medicine and that he has been practicing for 30 years during which time he has had extensive experience in the care and treatment of pregnant women involving the review of sonograms and issues of multiple congenital anomalies.

<sup>5</sup>Plaintiff's second cause of action as alleged in the complaint and verified bill of particulars asserts a compound cause of action: first for the emotional pain and distress of carrying a child to term and giving birth and learning that the child which she carried and delivered suffered from multiple congenital defects; and second, that due to the negligence of the defendants plaintiff mother suffered physical injury and pain and suffering associated with the surgical removal of a portion of her liver for transplant to her infant son as well as the emotional pain and suffering connected to her transplant surgery.

harm alleged to have occurred as a consequence of the birth of their infant with multiple congenital defects (*Becker v Schwartz, supra*).

Plaintiffs also argue in their second cause of action that the plaintiff mother's voluntary liver transplant surgery was necessitated by defendants' negligence and they are therefore liable. Plaintiffs allege that due to the condition known as biliary atresia, discovered soon after the child's birth, the drainage of bile from the liver was prevented and the infant suffered irreversible liver damage requiring a liver transplant. Plaintiff mother averred that she was the only viable donor for her child<sup>6</sup>. Notably, the plaintiff mother stated in her affidavit that, "the liver donation which [she] agreed to and underwent in November, 2002 was a very necessary action undertaken by a parent, upon the advice of a highly qualified medical specialist, to support [her] son whom [she] had been advised would not survive without the benefit of a liver transplant." Plaintiff mother stated that she did not hesitate to undertake this parental responsibility to enable her son to survive when she agreed to donate a portion of her liver to her infant son. Plaintiff mother's donation of a portion of her liver was a very laudable action and was one which, this court presumes, every loving parent would undertake for the benefit of their child plaintiff, however, seeks to have this Court expand liability to the defendants for a voluntary donation which it is not inclined to do (*see generally, Howard v Lecher, supra; Vogel v West Mountain Corp., 97 AD2d 46, 470 NYS2d 475 [1983]; Moore v Shah, 90 AD2d 389, 458 NYS2d 33 [1982]*).

"The predicate for holding a defendant liable must be that a duty is owed the plaintiff, the breach of which duty is the proximate cause of plaintiff's injury" (*Moore v Shah, 90 AD2d 389, 390, 458 NYS2d 33, 34 [1982] citing Palsgraf v Long Is. R. R. Co., 248 NY 339*). Thus, in order for the plaintiffs to establish defendants negligence, the defendants must have foreseen that their negligence could cause this injury to the plaintiff mother (*Moore v Shah, supra*). While questions concerning what is foreseeable are generally issues for resolution by the finder of fact, there are certain instances where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law (*Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315, 434 NYS2d 166 [1980]*). Generally, evidence that involves independent intervening acts, which operate upon but do not flow from the original negligence, will break the causal connection (*id.*). Thus, where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection may be severed (*id.*).

In the present case, at the time that the plaintiff mother underwent the transplant surgery she was no longer a patient of the defendants, she did not consult with the defendant doctors concerning her transplant surgery and had not been their patient for approximately one year. Any duty that the defendants owed to the plaintiff involving her pregnancy and the birth of her child had ended. In addition, the decision by the plaintiff parents, and ultimately the plaintiff mother as the only viable donor, to voluntarily undergo organ transplant surgery for the benefit of the child constituted an independent intervening act which was not a normal or foreseeable consequence of the defendant's alleged negligence (*Derdiarian v Felix, supra; see also, Cohen v Cabrini Medical Center, 94 NY2d 639, 643, 709 NYS2d 151,154 [2000]*). Furthermore, any pain and suffering or emotional distress

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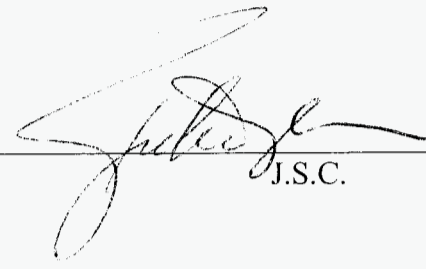
<sup>6</sup>Plaintiff states that various donors were tested, including family members, but their tissue types did not match.

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stemming from the transplant surgery would also not be recoverable. Plaintiff husband's derivative claim in the third cause of action, predicated upon the claims in the second cause of action, also fail for the reasons cited above (*James v Middletown Community Health Ctr., Inc.*, 278 AD2d 280, 718 NYS2d 358 [2000]).

Therefore, as a matter of law, defendants' motion for summary judgment dismissing the second and third cause of action in the verified complaint is granted and the first cause of action for pecuniary damages shall continue.

Dated: APR 23 2007

  
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J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION