

**Peterson v Garber**

2007 NY Slip Op 32866(U)

September 6, 2007

Supreme Court, New York County

Docket Number: 0106977/2005

Judge: Sheila Abdus-Salaam

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHEILA ABDUS-SALAAM  
*Justice*

PART 13

Hanna Jesionowska Peterson

INDEX NO. 106977/05

MOTION DATE 5/3/07

- v -

MOTION SEQ. NO. 002

Andrew Garber, M.D.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by defendant for summary judgment is denied.

This medical malpractice action is based upon a claim that defendant Andrew Garber, M.D. improperly performed an amniocentesis upon plaintiff Hanna Jesionowska Peterson which resulted in a penetration of the infant Cole Peterson's right eye with a needle. It is alleged that Cole has a condition called microphthalmia (small eye) and that he has no vision out of that eye and is required to wear an ocular prosthesis.

In moving for summary judgment, defendant has asserted that the infant's condition is not related to amniocentesis, but is a developmental anomaly. According to defendant's expert, Dr. Steven McCormick, a board certified pathologist with a sub-specialty in ophthalmic pathology, the infant's treating physicians did not find any evidence of ocular rupture or ocular injury. One of the treaters, oculoplastic surgeon Dr. Millman, documented

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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PAPERS NUMBERED

injury. One of the treaters, oculoplastic surgeon Dr. Millman, documented that Cole's mother felt that the eye was punctured during amniocentesis, but Dr. Millman could not find evidence of such an injury. A second opinion rendered by Dr. James Katowitz, also an oculoplastic surgeon, found that Cole has right microphthalmia. A CT scan of the head ordered by Dr. Katowitz showed right microbulbia with right hypoplastic optic nerve, a small right globe with an enlarged deformed lens and plagiocephaly.

Defendant's expert has opined that these findings are developmental abnormalities which would have occurred early in the first trimester of pregnancy, and are not related to the amniocentesis performed in the second trimester. Dr. McCormick also opines that if a needle had impacted the eye during the amniocentesis, one would expect a rupture of the globe, which did not happen in this case, that fluids would have leaked causing the eye to become misshapen, and that growth and development would have halted causing much more malformation of the eye by the time of birth than is found in Cole's eye.

Plaintiff's expert has raised a triable issue of fact as to whether Cole's condition was caused by the amniocentesis. The expert, a board certified ophthalmologist, disagrees with defendant's expert on the issue of whether one would expect a rupture of the globe upon a penetration to the eye, and whether a needle injury would have caused more malformation than is present in Cole's eye. Plaintiff's expert also opines, in contrast with the opinion of defendant's expert that the infant's condition developed during the first trimester, that the gestational development of the infant's right eye was arrested at approximately the same time that the amniocentesis was performed.

Significantly, plaintiff's expert points out that while microphthalmia can be a developmental anomaly occurring in connection with certain syndromes, Cole does not have any of these conditions or any chromosomal abnormalities which are known causes of microphthalmia. The expert also

notes that physical examination of Cole failed to reveal any congenital defects in his ocular and overall facial and physical status, and states that if the microphthalmia were a developmental abnormality, one would expect to find additional congenital abnormalities. Regarding the CT scan that was performed at the request of Dr. Katowitz which showed plagiocephaly (flattening of the head), plaintiff's expert states that this condition is not evidence of a developmental or congenital abnormality, could easily have developed after birth from Cole sleeping on his back, and that it was no longer present during the expert's physical examination.

Plaintiff's expert has concluded with a reasonable degree of medical certainty that the microphthalmia is not a developmental anomaly unrelated to amniocentesis, that the condition is consistent with being caused by a needle injury during amniocentesis, and that the absence of developmental or congenital abnormalities "is consistent with the condition not being a developmental anomaly but rather is more likely secondary to penetration of the needle into the right eye during the performance of the amniocentesis procedure."<sup>1</sup> (Plaintiff's expert's affirmation, ¶ 16).

In reply to plaintiff's opposition, defendant argues that plaintiff's expert has offered an opinion based on supposition, not reasonable medical certainty. However, in this case, unlike in Nieves v. City of New York (91 AD2d 938 [1983]) cited by defendant, the opinion of plaintiff's expert is not based on mere speculation. Plaintiff's expert has opined that the gestational development of the infant's right eye was arrested at

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<sup>1</sup> Plaintiff's expert also states that during the amniocentesis, Dr. Garber was unable to remove fluid during his first two attempts, and on the third attempt, defendant extracted 20cc of "blood tinged" amniotic fluid. The expert states that no evaluation was made to determine whether the source of blood was the fetus or the mother. But the expert does not explain what significance, if any, the presence of blood has in terms of the performance of an amniocentesis or whether the presence of blood is abnormal or evidence that an injury may have been caused to the fetus.

\* 4 ]

approximately the same time that the amniocentesis was performed and that contrary to the position taken by defendant, there is no evidence that the condition is a developmental or congenital abnormality. The expert has stated that it is more likely that the condition was secondary to the amniocentesis than to being a developmental anomaly. As was noted by the court in Nieves, " . . . the use of the words "possible" and "could have been" do not necessarily destroy the probative value of an expert's opinion which is otherwise "fortified by detailed explanation and other facts in the record which add to the reasonableness and probable correctness" (Matter of Miller v. National Cabinet Co., 8 NY2d 277, 282 citing Matter of Zaepfel v. du Pont de Nemours & Co., 284 App Div 693, 696, affd 309 NY 962 . . ." (id. at 939).

In Cassano v. Hagstrom (5 NY2d 643 [1959]), also cited by defendant, plaintiff failed to raise a triable issue of fact regarding her claim that defendant had negligently severed nerves in her mouth. In Cassano, the Court of Appeals stated that there was no direct or circumstantial evidence that the defendant had come near those nerves during the procedure, and that plaintiff's expert had not ruled out the possibility that the injury could have happened nontraumatically. However, in Cassano, defendant offered testimony that he did not cut the nerves and that he did no work in the area of those nerves, and there was no proof by plaintiff that the nerves were cut. In contrast, there is no testimony from this defendant in support of the motion regarding the performance of the amniocentesis, and thus, no requirement that plaintiff raise a triable issue regarding any departure committed during the amniocentesis. Furthermore, regarding whether plaintiff's expert has raised a triable issue of fact as to causation, the expert has explained the basis for his/her opinion that the microphthalmia is not a developmental anomaly unrelated to amniocentesis. And plaintiff's expert has not conceded that there are other possible causes of the injury under the facts known here (compare Lowery v. Lamaute, \_\_\_ AD2d \_\_\_, 2007 WL

Additionally, while plaintiff's expert has not expressly stated that it is his/her opinion with a "reasonable degree of medical certainty" that Cole's condition was caused by penetration during the amniocentesis, the court must look to the substance, rather than to the form, to determine if an expert's opinion raises a triable issue of fact (see Matott v. Ward, 48 NY2d 455, 462 [1979]). The court is not governed by "dictionary dilettantism" when examining the adequacy of an expert's opinion (id. at 461). As was aptly observed by the Matott Court:

. . . allowing for the fact that the cause and effect relationship was one that, perhaps by its very nature, could not be established with scientific certainty, the reservations the doctor articulated by his other comments and responses can be seen as candid indications of the limitations inherent in medical opinion and, as such, a useful revelation to the jury in reaching its own conclusion as to the merits of the parties' opposing contentions on causation . . .

Id. at 462.

The court disagrees with defendant's assertion that the opinion of plaintiff's expert, like that of the expert's opinion in Giberson v. Panter (286 AD2d 217 [2001], lv denied 97 NY2d 606 [2001]) is conclusory and insufficient to defeat this motion. Based upon the foregoing, the motion is denied.

A pre-trial conference is scheduled for October 11, 2007 at 9:30 A.M.

Dated: 9/6/07 **FILED** SEP 17 2007 SA-S

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J.S.C.

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