

Bearden v Hong

2008 NY Slip Op 30352(U)

February 4, 2008

Supreme Court, Nassau County

Docket Number: 2695-02/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
PATRICK BEARDEN, an infant by his mother
and natural guardian ELVIA BEARDEN
Plaintiff,

**MICHELE M. WOODARD
J.S.C.
TRAIL/IAS Part 16
Index No.: 12695/02
Motion Seq. No.: 04**

-against-

PETER HONG, M.D., POLINA KAGEN, M.D.,
THE COUNTY OF NASSAU, NASSAU UNIVERSITY
MEDICAL CENTER, a/k/a/ NASSAU COUNTY MEDICAL
CENTER and "J. DOE, M.D."

DECISION AND ORDER

Defendants.

-----X
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Defendants' Notice of Motion and Affirmation	04
Plaintiff's Opposition	xx
Defendants' Reply Affirmation	xx

The Defendants move by Notice of Motion for an Order compelling the Plaintiff to provide authorizations, pursuant to CPLR §3124. The Plaintiff opposes the motion.

Plaintiff commenced this action for medical malpractice related to the prenatal care and birth of the infant Patrick Bearden. Plaintiffs are alleging the care rendered by Defendants resulted in brain damage to the infant. Defendants argue that they need medical and school records of the infant's two siblings to help in their defense. Defendants note the Plaintiffs' expert, Dr. Alan Shenske, has opined, based on tests he performed, that the infant's problems are not founded in a genetic basis (see Exhibit K annexed to Defendants' motion, Plaintiffs' Further Expert Witness Response). Defendants' expert, Dr. David B. Hyman, alleges the infant's problems are genetic in nature and do not in any way relate to negligence by Defendants. Defendants argue that they need

the requested authorizations relating to the infant's siblings to aid in their defense that the infant's condition is not based on negligence but on a prenatal brain malformation.

Of course, medical records are discoverable in an action in which the party's mental or physical condition is in controversy (*Zimmer v Cathedral School of St. Mary and St. Paul*, 204 AD2d 538 [2d Dept 1994]). Thus, the infant Plaintiff's records are fair game.

The Defendants have sufficiently demonstrated that the school records of the infant Plaintiff's nonparty siblings are relevant and material to their defense of this action (*Rojas-Onofre v Lutheran Medical Center*, 35 AD3d 832 [2d Dept 2006]).

Contrary to the Plaintiff's contentions, academic records of an infant's siblings are not protected by a physician-patient privilege or any other privilege, and thus are subject to disclosure in a medical malpractice suit brought by the infant's mother on behalf of the infant even though the siblings are not parties (*Dalley v LaGuardia Hospital*, 130 AD2d 543 [2d Dept 1987]). Here, the Court has already granted authorizations for the academic records of the infant's siblings with the added protection of an *in camera* inspection (see *Anderson v Seigel*, 255 AD2d 409 [2d Dept 1998]).

A mother's medical records pertaining to the period when the infant was *in utero* are discoverable on the ground that there can be no severance of the infant's prenatal history from the mother's medical history (*In re New York County DES Litigation*, 168 AD2d 44 [1st Dept 1991]).

With respect to the mother's other medical records, such material was protected by the physician-patient privilege under CPLR §4504 unless a waiver of the privilege is found based upon the Plaintiff's reference to the mother's medical history and a demonstration has been made that such medical information, beyond the period when the Plaintiff was in utero, is relevant to the

issue in controversy and is material and necessary to the defense (*In re New York County DES Litigation, supra*). Here, as noted, the Plaintiffs have offered an expert and have alleged the infant Plaintiff's issues are not genetic in nature.

By suing in her representative capacity as the mother of the infant Plaintiff, the mother did not waive her physician-patient privilege (*Roman v Turner Colours, Inc.*, 255 AD2d 571 [2d Dept 1998]). However, where the mother reveals "privileged" information at a deposition, she can be said to have waived the physician-patient privilege as to her medical records by voluntarily revealing it (*Wepy v Shen*, 175 AD2d 124 [2d Dept 1991]).

Waiver of the physician-patient privilege occurs when the patient personally, or through a lay or medical witness, introduces testimony or documents concerning "privileged" information (*Gilroy v McCarthy*, 254 AD2d 325 [2d Dept 1998]; *Scharlack v Richmond Memorial Hospital*, 102 AD2d 886 [2d Dept 1984]).

Waiver also can occur by the disclosure of the family's privileged medical history to various physicians in the treatment of the patient after his or her birth (*Gilroy v McCarthy, supra*; *Wepy v Shen, supra*). However, the "information" cannot be mere facts and incidents of medical history of the mother and siblings (*Cardillo v Hillcrest General Hospital*, 149 AD2d 454 [2d Dept 1989]).

Records of a sibling are discoverable where the Plaintiff alleges that the acts of negligence committed by Defendants included the failure by Defendants to ascertain relevant aspects of the family's medical history (*Baldwin v Franklin General Hospital*, 151 AD2d 532 [2d Dept 1989]). Here, Plaintiffs do not make such allegations.

The physician-patient privilege serves to protect the patient from being compelled to

disclose the substance of a communication made to a medical professional in an attempt to obtain treatment; that which the privilege seeks to protect are the confidential communications not the mere facts and incidents of a person's medical history (*Williams v Roosevelt Hospital*, 66 NY2d 391 [1985]). The examination of Mrs. Bearden's deposition reveals mere facts and incidents of the infant Plaintiff's siblings' medical history, not privileged medical information.

Defendants seek Social Security records of infant Plaintiff's siblings and they point to the "extra help" given to sibling Natasha. Whether a child gets Social Security benefits at an early age (Social Supplement Insurance or SSI) due to some issue the child has can be resolved by asking the parent, here Elvia Bearden, if such benefits were obtained or not. To obtain a complete file from the relevant Social Security office if the child did not get such benefits could involve the exposure of privileged medical information that the child has not waived by his or her actions or those of a parent.

The fact that the infant Plaintiff's siblings might require "extra help" (if their mother, Elvia Bearden, thought it would be best) in reading or math does not, in the court's opinion, require the non-party siblings' medical history be invaded. Dr. Hyman, Defendants' expert, could fully utilize school records of the infant Plaintiff's siblings to determine "developmental delays and/or other deficits" especially as to sibling Natasha (now more than 10 years old).

Thus, although the Defendants have demonstrated that information sought in discovery, regarding family medical records, could be helpful to their defense of the action, that information could be obtained from other sources, i.e., Defendants' experts, the non-party siblings' academic history, etc. From the court's examination of the record herein, the invasion of the siblings' medical history is not warranted to the extent of breaching their physician-patient relationship.

Finally, Plaintiffs have indicated they have responded to Defendants' request for authorization as to the infant Plaintiff, Patrick Bearden. The court has already permitted the discovery of the infant Plaintiff's siblings' school records. Thus, a conference shall be held to determine if Plaintiffs have complied with the proper Defendants' discovery requests as to the infant Plaintiff and Elvia Bearden. Based on the foregoing, the Defendant's application is **granted** to the extent that it is hereby

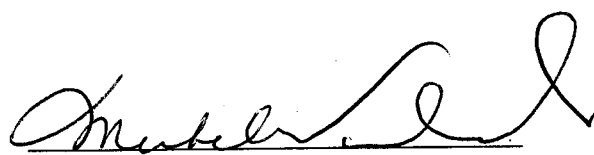
ORDERED, the Plaintiff is directed to provide the Defendants with the discovery requests as to the infant Plaintiff and Elvia Bearden (prenatal care, birth records of Patrick Bearden, and medical records of Elvia Bearden pertaining to the birth of Patrick Bearden) and the school records of the infant Plaintiff's siblings by February 22, 2008. (And see numbers 45-49 of the authorization requests, pg. 14 of Barry Dennis' affirmation). It is further

ORDERED, that the parties are directed to appear on March 10, 2008 at 9:30 a.m. to allow the Court to make the aforementioned determination and to monitor compliance with the above referenced Order.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: February 4, 2008
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD

J.S.C.

ENTERED

FEB 07 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**