

Hally v Steres
2009 NY Slip Op 33343(U)
June 22, 2009
Supreme Court, Ulser County
Docket Number: 07-4421
Judge: Christopher E. Cahill
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**STATE OF NEW YORK
SUPREME COURT**

ULSTER COUNTY

**MISTY HALLY, Individually and as Parent
and Natural Guardian of DAKODA HALLY,
an infant,**

Plaintiffs,

-against-

**Decision & Order ✓
Index No.: 07-4421**

**DAVID A. STERES, M.D., KRISTINA J.
HEITZMAN, R.P.A., THE KINGSTON
HOSPITAL, PINE STREET PEDIATRIC
ASSOCIATES, P.C., JANE H. FERGUSON,
M.D. and NALINI NAUTH-OTELLO, M.D.,**

Defendants.

**Supreme Court, Ulster County
Motion Return Date: April 22, 2009
RJI No. 55-08-00424**

**FILED
1 H54 M**

JUN 29 2009

Present: Christopher E. Cahill, JSC

**NINA POSTUPACK
ULSTER COUNTY CLERK**

Appearances:

**Powers & Santola, LLP
Attorneys for Plaintiffs
39 North Pearl Street
Albany, New York 12207-2785
By: John H. Fisher, Esq.**

**The Law Offices of Sholes & Miller, LLP ✓
Attorneys for Defendants Steres and The Kingston Hospital
327 Mill Street, PO Box 4609
Poughkeepsie, New York 12602
By: Denise M. FitzPatrick, Esq.**

**Phelan, Phelan & Danek, LLP
Attorneys for Defendant Heitzman
302 Washington Avenue Ext.
Albany, New York 12203
By: Syma S. Azam, Esq.**

The Law Offices of Steinberg, Symer & Platt, LLP
Attorneys for Defendants Pine Street, Ferguson and
Nauth-Otello
27 Garden Street
Poughkeepsie, New York 12601
By: Ellen Fischer Bopp, Esq.

Cahill, J.:

Plaintiff commenced this action alleging medical malpractice. As here relevant, it is contended that between December 2004 and April 2005, the infant plaintiff, Dakota Hally, presented to defendants, on repeated occasions, with various symptoms which should have triggered diagnostic testing such as a CT or MRI of the brain. After the infant plaintiff was diagnosed with a brain tumor in January 2006, requiring emergency surgery and extensive follow-up treatment, the infant plaintiff's mother, Misty Hally, commenced the instant action alleging that due to the acts, or the failure to act, the infant plaintiff's injuries resulted in extensive cognitive and physical difficulties.

A judicial subpoena *duces tecum* was issued to the Ulster County Department of Social Services (hereinafter "DSS") for all files and records regarding the infant plaintiff, limited only to information found in indicated reports. Quite appropriately, DSS produced such records directly to the Court. Contending that there has been no formal proceeding commenced against plaintiff in Family Court or any other court where the issues raised by a DSS investigation were determined to be substantiated, plaintiffs sought an order prohibiting defendants from, *inter alia*, examining or cross-examining

any witness with respect to any issue raised in these records as they relate to either the infant plaintiff or plaintiff. Relying upon Social Services Law § 422, regarding reports and any other information obtained as a result of a report of child abuse or maltreatment, as well as Social Services Law § 372, relating to all records and reports maintained by the Department of Social Services regarding families either investigated or under their care, plaintiffs contend that the records sought are required, by statute, to be confidential. Plaintiffs argue that if the Court were to permit defendants access to these records, it would highly prejudice the prosecution of this action and would distract the jury from the only real issue which is defendants' alleged negligence in failing to test or diagnose the infant plaintiff's brain tumor.

Counsel for all defendants, other than The Kingston Hospital and David Steres, M.D., opposed plaintiffs' motion on numerous grounds which included the claim that under Social Services Law § 372 (3), the records can be released if they are subject to the provisions of Article 31 of the Civil Practice Law and Rules and under Social Services Law § 422, "upon a finding that the information in the record is necessary for the determination of an issue before the court." Noting the decision in Catherine C. v Albany County Dept. of Social Services (38 AD3d 959 [2007]), defendants state that the Court disallowed the disclosure of DSS records in that case because the trial court failed to make a clear determination of their necessity and because the necessary parties were not

given notice of the application for disclosure.¹ Further citing plaintiffs' responses to the bill of particulars, as well as concerns expressed by the lack of follow-up treatment with regard to the infant plaintiff by the infant's medical providers, defendants contend that the DSS records may, in fact, have information which is material, relevant and necessary to the defense in this matter. Finally contending that plaintiffs' have clearly waived the physician-patient privilege regarding all aspects of the infant plaintiff's medical condition by the filing of this action, defendants propose, as an alternative to denial, that the DSS records either already produced or sought to be produced by an additional judicial subpoena *duces tecum* submitted in connection with this motion be directly produced to the Court for an in camera inspection.

In light of the claims by plaintiffs in connection with this action, this Court will order, under Social Services Law § 422 (4) (A) (e), to have the records sought produced for an in camera inspection so that a determination can be made as to whether the information contained therein is necessary for the determination of an issue before the Court. It is only in this manner can a clear determination of necessity be made (see Catherine C. v Albany County Dept. of Social Services, 38 AD3d at 960). This

¹The cross-motion seeks a court-ordered subpoena *duces tecum* directed to DSS for the production of the records of Child Protective Services as it pertains to the infant plaintiff, his mother, as well as the infant plaintiff's father, Matthew J. Hally, due to his criminal history which includes a conviction of Endangering the Welfare of a Child, Aggravated Harassment, and numerous other offenses since such history raises the issue of whether the infant plaintiff, for whom serious and permanent brain injuries, as well as other permanent injuries, are claimed in this action, has been the subject of physical abuse or neglect.

determination is based upon the showing made by defendants as to not only the injuries claimed by plaintiffs which resulted from this alleged malpractice but also because of the infant plaintiff's father's criminal history and the problems with follow-up care noted by the infant plaintiff's treating physicians (see generally Fernandez v Riverstone Assoc., 6 Misc3d 1019 [A] [Civil Ct, Kings County 2005]). Should a determination of relevance be made after an in camera review, notice will be provided to "all interested persons" (Social Services Law § 372 [4] [a]), including parents or guardians of any alleged non-party infant witnesses identified in the records so that an opportunity can be provided to have these persons participate in a hearing for the purpose of determining the extent of the disclosure. It is only after such steps have been completed will the Court determine which of those records, if any, shall have the confidentiality mandated by § 372 (4) and § 136 (2) of the Social Services Law yield to the right of these defendants (see People v McFadden, 178 Misc2d 343, 346 [Sup Ct, Monroe County 1998], affd 283 AD2d 1030 [4th Dept 2001]). The subpoena *duces tecum* to DSS seeking all records in their possession concerning Child Protective Services' investigation of the plaintiffs or information reported to Child Protective Services pertaining to plaintiffs Misty Hally and Dakota Hally shall be signed and returned herewith for service.

This shall constitute the decision and order of the Court, the original of which is being returned to Sholes & Miller, LLP for filing. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the

provisions of that rule regarding filing, entry and notice of entry.

SO ORDERED.

Dated: Kingston, New York

June 22, 2009

ENTER,



CHRISTOPHER E. CAHILL, JSC

Papers considered: Order to Show Caused dated March 16, 2009 with Affirmation of John H. Fisher, Esq., dated March 16, 2009 with exhibits; Affirmation in Opposition of Ellen Fischer Bopp, Esq., dated April 13, 2009; Affidavit in Opposition of Syma S. Azam, Esq., dated April 10, 2009 with exhibits; Notice of Cross-Motion dated April 10, 2009 with Affirmation of Denise M. FitzPatrick, Esq., dated April 10, 2009 with exhibits; Affirmation in Opposition of John H. Fisher, Esq., dated April 22, 2009.

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JUN 29 2009

NINA POSTUPACK
ULSTER COUNTY CLERK