

Upshur v Staten Is. Med. Group

2010 NY Slip Op 31547(U)

June 14, 2010

Supreme Court, Richmond County

Docket Number: 11640/04

Judge: Joseph J. Maltese

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 11640/04
Motion No.:004, 005,
006**

**MARIJOHNNE UPSHUR, an infant by her
Mother and Natural Guardian, ARVA UPSHUR, and
ARVA UPSHUR, Individually,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**STATEN ISLAND MEDICAL GROUP, and
JING ZHANG, M.D.,**

Defendants

JING ZHANG, M.D.

Third Party Plaintiff

against

**EDUARDO BERNALES, M.D., and
MICHAEL MORETTI, M.D.,**

Third Party Defendants

The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1,2
Notice of Cross-Motion and Affidavits Annexed	3
Answering Affidavits	4, 5
Replying Affidavits	6,7, 8
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Staten Island Medical Group (“SIMG”) and Jing Zhang, M.D. (“Dr. Zhang”), argue that the plaintiff has not made a prima facie demonstration that they committed acts of medical malpractice. They move for an order granting them summary judgment

dismissing the plaintiff's complaint. The third party defendant, Eduardo Bernales, M.D. ("Dr. Bernales") argues that no act or omission during his care of the plaintiff caused or contributed to the injuries alleged to have been suffered by the plaintiffs. SIMG, Dr. Zhang, and Dr. Bernales' motions are granted in their entirety.

Facts

Arva Upshur claims that she was a patient of the defendants and third party defendants SIMG, Dr. Zhang, Dr. Bernales and Dr. Michael Moretti. Before submitting the motions on summary judgment the action against Dr. Moretti was discontinued.

The undisputed facts reveal that Arva Upshur ("Upshur") is an insulin dependent diabetic. Facts further demonstrate that Upshur suffered from a seizure disorder from 1998 through the birth date of the infant plaintiff Marijohnne Upshur. In addition, Upshur is a self confessed illicit drug user. Medical records indicate that she told medical professionals that she used illicit drugs on at least one occasion in 1999. But the records also indicate that Upshur attempted drug and alcohol treatment.

Medical records show that Upshur repeatedly failed to follow doctors orders. And that her diabetes was completely out of control. Throughout Upshur's medical files the doctors repeatedly informed her of the need to control her diabetes. She was repeatedly referred to specialists all with the hope that the plaintiff could, (1) control the complications caused by uncontrolled diabetes; and (2) begin to maintain proper glucose levels, thereby controlling her disease.

Before Upshur became pregnant with Marijohnne, Dr. Zhang referred her to multiple specialists. Appointments were made for Upshur to see specialists in the fields of neurology, ophthalmology, and diabetic education. But, Upshur's medical records are replete with missed appointments, and evidence of a total disregard for her own health. Time and again, Upshur

would miss scheduled appointments only to reappear as a walk in patient.

Upshur first saw third party defendant Dr. Bernales for this pregnancy on August 25, 1999. At this time, Arva Upshur was approximately 10-12 weeks pregnant. At this initial visit Dr. Bernales directed Upshur to monitor her glucose levels by glucometer and referred for blood testing and a sonogram. On September 8, 1999 Dr. Bernales ordered additional blood sugar testing and referred the plaintiff for nutritional counseling. On September 22, 1999 Dr. Bernales noted that Upshur failed to go for nutritional counseling and the repeat blood test.

Marijohnne Upshur is Arva Upshur's child. She was born with numerous birth defects. Marijohnne was born with a deformed left femur, six digits on each foot, absence of a left kidney, dislocated hips and knees, hypoplasia of the left hermi pelvis and head of the left femur; a-genesis of the left fibula; congenital deformity anterior aspects 7th and 8th ribs on right and 7th rib on left; absence of 12th rib on right side; and congenital abnormalities of the lumbar spine, among other injuries.

The plaintiffs allege that these injuries were the direct result of the defendants and third-party defendant's failure to properly warn the plaintiff about the risks of conception while her diabetes was out of control. The thrust of the plaintiffs' claims is that had she known about the risks involved to her unborn child she would have taken steps to properly control her diabetes, despite her failure to take steps to control the disease for her own safety.

The defendants and third party defendants move to dismiss this action arguing that the plaintiffs failed to state a prima facie case.

Discussion

“On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was

not injured thereby. . . In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury . . . General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment . . ."¹

Dr. Zhang and SIMG's motion and cross motion for summary judgment to dismiss the plaintiffs' complaint

In support of her motion for summary judgment dismissing the plaintiffs' complaint, Dr. Zhang submits the expert affidavit of Howard Kolodny, M.D. who is board certified in internal medicine and endocrinology. Dr. Kolodny avers that Dr. Zhang did not deviate from the standard of care. According to the medical records reviewed by Dr. Kolodny, the likely date of conception of Marijohne was approximately the end of June or beginning of July, 1999. The medical records indicate that plaintiff first scheduled and missed an appointment with Dr. Zhang on December 21, 1998. Dr. Zhang first treated Upshur as a walk in patient on January 21, 1999.

According to Dr. Kolodny, Dr. Zhang's referrals to medical specialists and a diabetic educator were the appropriate care for Upshur. The fact that Upshur failed to keep a scheduled visit on February 23, 1999 and a March 4, 1999 appointment with the diabetic educator, does not demonstrate a breach of the standard of care. Upshur did not see Dr. Zhang until August 2, 1999 several weeks after conceiving Marijohne.

SIMG cross-moves for summary judgment dismissing the plaintiffs' complaint relying on the expert opinions submitted by Dr. Zhang and Dr. Bernales in support of their motions to dismiss. SIMG directs the court's attention to the fact that plaintiffs' claim is limited by their Bill of Particulars wherein they state that SIMG is vicariously liable for the care rendered by Dr. Zhang.

¹*Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

The defendants have come forward with expert medical opinions that establish the absence of any departure from good and accepted medical practice. The burden now shifts to the plaintiff to come forward with a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury.

The plaintiffs' submit the affirmation of an unidentified physician licensed to practice in the States of New York and New Jersey who is board certified in obstetrics and gynecology. Plaintiffs' expert states that the standard of care for all women with diabetes that have child bearing potential should include, "1) counseling about the risk of malformations associated with unplanned pregnancies and poor metabolic control, and 2) use of effective contraception at all times unless the patient is in good metabolic control and actively trying to conceive."

The plaintiffs' expert affirmation is replete with conclusory statements. Plaintiffs' expert states that "[i]t is my opinion to a reasonable degree of medical certainty that had Arva Upshur been counseled so that she understood the causal link between catastrophic birth deformities and poorly controlled diabetes mellitus it is likely that she would have followed medical advise (sic) to control her diabetes." And further statements include that Dr. Zhang and "numerous physicians at the Staten Island Medical Group" failed to provide her proper preconception counseling.

Such a conclusory statement must be discarded by the court as a matter of law.² The expert opinion is discounted by the record. It is clear that Arva Upshur missed multiple scheduled appointments with Dr. Zhang and other SIMG physicians. In fact, Arva Upshur attended only one session with Leslie Taub, R.N. the diabetic educator she was referred to by Dr. Zhang. Arva Upshur also skipped the second scheduled appointment. The record does not indicate that she attempted to reschedule any additional sessions after missing her follow up

² *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986].

appointment. Moreover, the fact that the plaintiffs' expert failed to differentiate between the doctors that treated the plaintiff provides a further basis for this court not to consider the expert opinion or to give it very little weight.³

But, assuming this court was to consider the expert opinion submitted by the plaintiffs, the cases cited by the plaintiff are distinguishable from the matter before the court. The plaintiffs cite to the Court of Appeals decision in *Tenuto v. Lederle Laboratories, Div. Of American Cyanamid Co.*⁴ In *Tenuto*, the Court of Appeals found that a special relationship existed between a pediatrician administering a vaccine, and the parents rendering care to an infant. As a consequence of this special relationship the Court of Appeals held that a pediatrician was under a duty to warn the parents of the possible risk of harm to themselves from the live polio virus vaccine that their child was being administered.

The plaintiffs contend that Dr. Zhang and SIMG had a duty to warn Arva Upshur that her uncontrolled diabetes would have serious consequences to her unborn child. This is a misapplication of the Court of Appeals' holding in *Tenuto*. In this case the record is replete with medical orders to Arva Upshur to take steps to regulate her uncontrolled diabetes. And the record is clear that Arva Upshur began demonstrating the onset of diabetic complications that included neuropathy on her first presentation to Dr. Zhang. But it is clear that Arva Upshur did not take the necessary steps to remedy her own health. Instead, she missed repeated appointments scheduled for the purpose of controlling her diabetes. Defendant and third party defendant's experts demonstrated that it was Arva Upshur's uncontrolled diabetes that caused the injuries to Marijohnne Upshur, not the medical treatment rendered by Dr. Zhang, Dr. Bernales and SIMG.

This court acknowledges that there is a special relationship between a mother and the

³ *Jonassen v. Staten Island Univ. Hosp.*, 22 AD3d 805, [2d Dept 2005].

⁴ 90 NY2d 606, [1997].

fetus she is carrying. But this is not the special relationship described in *Tenuto*. The third party beneficiary of a duty to warn in *Tenuto*, allows the third party to take necessary precautions to stave off any complications that may effect them because of the intimate contact with the person receiving medical treatment. In this case, it is impossible for any individual to warn an unborn child to take precaution against the actions of a mother, healthy or otherwise.

In addition to *Tenuto*, the plaintiffs cite the Court of Appeals decision in *Ferrara v. Bernstein*.⁵ In that case, the plaintiff sued the physician that performed an abortion on her and did not properly inform her that the procedure was not completed. One week after the abortion the facility received a pathological report that indicated the plaintiff could still be pregnant. The plaintiff skipped a follow up appointment and she was never notified of this possibility. Twenty days after the procedure the plaintiff in *Ferrara* presented to an emergency room in New Jersey where she gave birth to a 4 ½ inch baby. While the baby dangled from her, she was taken by wheelchair with the child on her lap to an examining room. The treating physician at the emergency room held the 4 ½ inch baby up to the mother and said, “I want you to see that this is a fetus, that it is a baby, that it is not some tissue passed.”⁶ The plaintiff then sued the physician that performed the abortion for negligence in failing to advise her of the results of the pathological report.

After trial in *Ferrara*, the plaintiff was awarded \$125,000 in damages for pain and suffering, and \$20,000 for emotional distress. In affirming the award of damages for emotional distress the Court found that the malpractice was based on the physician’s failure to advise the plaintiff of her condition that caused her physical and emotional injuries.⁷

This case is also easily distinguished from the matter before the court. In this case it is

⁵ 81 NY2d 895, [1993].

⁶ Id at 897.

⁷ Id. at 898.

clear that Arva Upshur was informed of her grave health condition. On multiple occasions she was referred to diabetic specialists. And she failed to follow their medical directions or appear for her appointments.

The same logic can be used to distinguish the Appellate Division, Second Department's decision in *Braun v. Ahmed*.⁸ In *Braun* the treating physician failed to advise the plaintiff patient that the irritation on his penis could have been cancerous. And that a circumcision could have prevented the need for a subsequent partial penectomy.

In this case there is no question that Dr. Zhang informed Arva Upshur that her diabetes was out of control. The record clearly demonstrates the steps Dr. Zhang took to get Arva Upshur's condition under control.

Given the record before this court, it is impossible to conclude as Arva Upshur contends in her affidavit that had she known that her uncontrolled diabetes would result in the birth defects present in Marijohnne she would have acted differently. As such, summary judgment is granted in favor of Dr. Zhang and SIMG dismissing the plaintiffs' complaint.

Dr. Bernales' motion for summary judgment dismissing Dr. Zhang's third party complaint

Given that this court has dismissed the primary action finding that there was no negligence in the treatment rendered by Dr. Zhang and SIMG, Dr. Zhang's third party complaint for indemnification and contribution against Dr. Bernales is denied.

However, had this court considered the merits of his motion, summary judgment would have been granted on the basis of the expert opinion submitted in support of his motion. The expert affirmation of Kwame Anyane Yeboa, M.D., a physician licensed to practice in New York who is board certified in Pediatrics and Genetics avers that the birth defects suffered by

⁸ 127 AD2d 418, [2d Dept 1987].

Marijohnne are consistent with diabetic embryopathy. According to Dr. Yeboa, the time to stave off birth defects of this nature is to have a patient's diabetes under control prior to the time of conception. In this case, Dr. Yeboa concludes that Dr. Bernales treatment could not have caused Marijohnne's sever birth defects. According to Dr. Yeboa, ". . . what is . . . well known is the fact that diabetic embryopathy (and the birth defects in which it manifests itself), is a potential consequence of uncontrolled diabetes occurring during the period of organogenesis, which occurs at the time of conception and in the ensuing 4-8 weeks." According to Dr. Yeboa's review of Arva Upshur's medical records, she was 9 weeks and 4 days pregnant the first time Dr. Bernales saw her for this pregnancy.

While Dr. Bernales saw Arva Upshur on March 18, and 31 1998 as well as on November 17, 1998 these visits were to treat her for a vaginal itch. On all three occasions Dr. Bernales prescribed medication to treat the condition of Upshur's vaginal itch. There is no indication that Upshur was referred to Dr. Bernales to treat her diabetes.

It was therefore impossible for Dr. Bernales' treatment of Arva Upshur to have caused the birth defects in Marijohnne Upshur.

Conclusion

This court is not unsympathetic to the tragic birth defects suffered by Marijohnne Upshur; and the untold difficulties that she will face throughout her life. But it would be wholly inappropriate to lay liability for her most unfortunate condition on the medical doctors in this case. The record is clear, Arva Upshur had been repeatedly warned of her dire health condition as a result of her uncontrolled diabetes. She was referred to physician specialists, but skipped appointments. She was referred to a diabetic counselor, but only appeared for one scheduled appointment and failed to return for her scheduled follow up. The record is clear that Arva Upshur completely disregarded the advice of medical professionals and did not take responsibility for her own health, which had dire consequences for her child.

Accordingly, it is hereby:

ORDERED, that Eduardo Bernales, M.D.'s motion for summary judgment dismissing the third party plaintiff's complaint is granted in its entirety; and it is further

ORDERED, that Jing Zhang, M.D.'s motion for summary judgment dismissing the plaintiffs' complaint is granted in its entirety; and it is further

ORDERED, that Staten Island Medical Group's cross-motion for summary judgment dismissing the plaintiffs' complaint is granted in its entirety; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER,

DATED: June 14, 2010

Joseph J. Maltese
Justice of the Supreme Court