

Schwartz v New York Univ. Med. Ctr.

2010 NY Slip Op 33054(U)

October 28, 2010

Sup Ct, Nassau County

Docket Number: Sup Ct, Nassau County

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

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

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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**ELIZABETH SCHWARTZ and MARC SCHWARTZ,
individually and as Parents and Natural Guardians
of HARRISON SCHWARTZ, an infant,**

TRIAL TERM PART: 45

Plaintiff,

INDEX NO.: 011797/08

-against-

**MOTION DATE: 8-3-10
SUBMIT DATE: 9-21-10
SEQ. NUMBER - 004**

**NEW YORK UNIVERSITY MEDICAL CENTER,
JON ROBERT SNYDER, M.D., JON ROBERT
SNYDER, M.D., P.C., NEW YORK UNIVERSITY
SCHOOL OF MEDICINE DEPARTMENT OF
OBSTETRICS AND GYNECOLOGY, MATERNAL
FETAL MEDICINE ASSOCIATES, DANIEL
ROSHAN, M.D., ANNA MOTEAGUDO, M.D.,
and ILAN TIMOR, M.D.,**

Defendant.

-----x

The following papers have been read on this motion:

Notice of Motion, dated 7-13-10	1
Affirmation in Opposition, dated 8-23-10.....	2
Affirmation in Opposition, 9-10-10.....	3
Affidavit in Reply, dated 9-17-10.....	4

This motion by the plaintiffs Elizabeth Schwartz and Marc Schwartz, individually and as parents and natural guardians of Harrison Schwartz, an infant, for an order pursuant to CPLR 2221(d) granting them reargument of this court's order dated May 28, 2010 and upon reargument, an order denying the defendants' motions for summary judgment is granted as provided herein.

The plaintiffs in this medical malpractice action seek to recover, *inter alia*, damages that the infant plaintiff Harrison Schwartz suffered at birth as a result of the defendants' alleged negligence. By order dated May 28, 2010, this Court granted the defendants' summary judgment motion dismissing the complaint against them, finding that although the plaintiffs established that there were in fact issues of fact as to whether the defendants had committed medical malpractice, the plaintiffs failed to demonstrate the existence of a material issue of fact with respect to whether the defendants' alleged negligence caused the infant plaintiff Harrison's injuries. The plaintiffs seek reargument of this Court's decision insofar as the complaint was dismissed as against Jon Robert Snyder, M.D., Jon Robert Snyder, M.D., P.C., New York University School of Medicine, Department of Obstetrics and Gynecology, Maternal Fetal Medicine Associates, Daniel Roshan, M.D., Anna Monteagudo, M.D. and Ilan Timor, M.D.

A motion for reargument pursuant to CPLR 2221(d)(2) must be "based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but [may] not include matters of fact not offered on the prior motion." *Cruz v Masada Auto Sales, Ltd.*, 41 AD3d 417 (2nd Dept. 2007), citing CPLR 2221(d)(2); *Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434, 435 (2nd Dept. 2005); *see also, V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 (2nd Dept. 2010); *Giovaniello v Carolina Wholesale Office Mach. Co., Inc.*, 29 AD3d 737 (2nd Dept. 2006). Reargument may not be obtained based upon "a new theory of liability not previously advanced" *Frisenda v X Large Enterprises, Inc.*, 280 AD2d 514, 515 (2nd Dept. 2001); *V. Veeraswamy Realty v*

Yenom Corp., supra. To obtain reargument, the movant must establish that the court misapprehended or overlooked a matter of fact or law. *Hoffman v Debello-Teheney*, 27 AD3d 743 (2nd Dept. 2006); *V. Veeraswamy Realty v Yenom Corp., supra*. Absent such a showing, reargument does not lie. *Goldman v Rio*, 20 Misc 3d 1131(A) (Supreme Court Nassau Co. 2008), *aff'd in part, dism. in part*, 62 AD3d 834 (2nd Dept. 2009), citing *Barrett v Jeannot*, 18 AD3d 679 (2nd Dept. 2005).

This Court found in its decision that through their expert Dr. Sibai, who is Board Certified in Obstetrics and Gynecology with a subspecialty in Maternal and Fetal Medicine, the defendants established that Mrs. Schwartz's care during her pregnancy and her eclamptic seizure did not cause any of the infant plaintiff Harrison's neurological deficits. More specifically, the Court found that the defendants established that:

- It is not generally accepted in the medical community that an intrapartum hypoxic event can cause left hemiparesis which the infant plaintiff Harrison allegedly suffered from because only spastic quadriplegic and dyskinetic cerebral palsy has been linked to hypoxic events.
- Furthermore, it is generally not accepted in the medical community that cerebral palsy can result from an intrapartum hypoxic event absent hypoxic ischemic encephalopathy which pursuant to the criteria set forth by the American College of Obstetrics and Gynecology ("ACOG") guidelines, the infant plaintiff Harrison did not experience.
- That if the infant plaintiff Harrison had suffered from hypoxic-ischemic encephalopathy, he would have displayed global deficits and that intrapartum hypoxic events do not cause a stroke in the right internal capsule

(the infarction) manifesting as deficits to one side of the body as the infant plaintiff Harrison experienced.

- Again, that an intrapartum hypoxic event does not cause left hemiparesis and that the infarction found on the infant plaintiff Harrison's MRI February 28, 2005, seven months after birth could have been the sole cause of his deficits.

Thus, the Court found that Dr. Sibai demonstrated to a reasonable degree of medical certainty that the infant plaintiff Harrison's neurological deficits were due to a spontaneous focal infarction or stroke of the posterior limb of the right internal capsule of the brain, which was unrelated to the eclamptic seizure experienced by Mrs. Schwartz.

This Court also found that through Dr. Atluru, who is certified by the American Board of Pediatrics and the American Board of Psychiatry and Neurology with a specialty in Child Neurology, the defendants had established that:

“[t]he lesion described on the infant plaintiff's brain MRI of February 28, 2005 accounts for the infant plaintiffs' left hemiparesis found on examination” and that “[t]he infant's diagnosis of isolated left hemiparesis and the MRI finding of an old infarction of the posterior limb of the right internal capsule are not consistent with a diffuse cerebral insult.” Like Dr. Sibai, [Dr. Atluru] explain[ed] that “[i]t is not generally accepted in the medical community that an intrapartum hypoxic event can cause left hemiparesis, as seen in this infant [and that] the only types of cerebral palsy which have been linked to intrapartum hypoxic events are spastic quadriplegia and dyskinetic cerebral palsy, which [the] infant [plaintiff] clearly does not have.” And, that “[t]here is no evidence that the infant plaintiff has global neurological deficits that are associated with an intrapartum hypoxic event. To the contrary, his clinical symptoms reflect left-sided hemiparesis, as plaintiff's expert in pediatric neurology acknowledges, and his brain MRI shows a focal, unilateral small vessel abnormality.”

The Court noted that the plaintiffs' experts:

- Rejected Dr. Sibai's reference to the infarction as a cause wholly unrelated to the eclamptic seizure as speculative and inconsistent with standard deductive reasoning.
- Found that the infant plaintiff Harrison's condition at eight months of age was consistent only with brain injury to a pre-term infant who was chronically stressed and vulnerable who then experienced a serious superimposed hypoxic brain insult.
- Found that there was no identifiable alternate explanation consistent with standard medical deductive reasoning and that the infant plaintiff Harrison's injuries were "a result of the chronic and then superimposed stresses associated with pre-eclampsia experienced by Mrs. Schwartz."
- Opined that cerebral palsy can in fact result from an intrapartum hypoxic event in the absence of hypoxic ischemic encephalopathy and the ACOG criteria.
- That Harrison's injury was not the result of a spontaneous focal infarction or stroke but rather of hypoxic stress.

However, this Court rejected the plaintiffs' experts' opinions regarding causation because of the absence of an acknowledged, accepted and proven cause and effect relationship between the events surrounding Harrison's birth and his left hemiparesis and developmental deficits. The Court found that while an association between the stresses and injury had been identified, that did not constitute causation. It concluded that the absence of general acceptance of their causation theory in the medical community, published medical literature or studies and/or specific factually similar incidents rendered the plaintiff's experts' opinions conclusory regarding proximate cause, and thus insufficient to establish causation.

Also rejected was the plaintiffs' experts' opinion "that 'the only explanation' for the injuries alleged 'is the severe asphyxial event he suffered related to eclampsia [because it did] not come with a sound factual recitation as to why the defendants' contention—that the infarction found on the MRI could alone be the cause of the infant plaintiff's condition—was wrong." The Court reasoned that "[t]he statement of the [plaintiffs'] California expert that this explanation was speculative, and 'appears fanciful and inconsistent with medical deductive reasoning' is not equivalent to demonstrating by reference to the record how such an infarction could not be to blame." Thus, the Court therefore found the defendants' explanation concerning the cause of the infant plaintiff's condition to be effectively un rebutted. *Kaplan v Hamilton Medical Associates, P.C.*, 262 AD2d 609 (2nd Dept. 1999); *Geffner v North Shore University Hosp.*, 57 AD3d 839 (2nd Dept. 2008); *Rebozo v Wilen*, 41 AD3d 457 (2nd Dept. 2007).

The Court also rejected plaintiffs' counsel's attempt to supply support for their experts' opinions with respect to causation. It found that although plaintiffs' attorney "recit[ed] authority which call[ed] into question both the medical community's acceptance of the defendants' theory that there was no causation here and support[ed] the plaintiffs' experts' theory," that this did not suffice to establish grounds for accepting the plaintiffs' experts' opinions as reliable and generally accepted in the medical community to discount the defendants' experts' opinions since plaintiffs' counsel is not qualified to render medical opinions. *See, Hudson v Krukencamp*, 5 Misc3d 957 (3rd Dept. 1987).

In sum, the reason for granting defendants summary judgment was the plaintiffs' failure to submit admissible evidence regarding causation.

In seeking reargument, the plaintiffs maintain that this Court misconstrued their position. They allege that contrary to the defendants' and this Court's interpretation, their position did not limit the cause of the infant plaintiff Harrison's deficits to the infarction but rather they also alleged oxygen deprivation which caused hypoperfusion, and the infant plaintiff Harrison's ischemic brain injury, which manifested itself in global deficits as well. The plaintiffs maintain that the defendants failed to establish their entitlement to summary judgment because they failed to address the plaintiffs' case in its entirety, more specifically, the cause of the infant plaintiff Harrison's global deficits. They further maintain that in any event, their expert established the existence of an issue of fact with respect to that issue.

Many of the plaintiffs' arguments are now being made for the first time; for instance, that by failing to address the cause of the infant plaintiff Harrison's global deficits and failing to establish the lack of proximate cause, the defendants failed to establish their *prima facie* entitlement to summary judgment. Such arguments raised for the first time are not permitted in support of reargument and are rejected.

Moreover, this Court did not err in rejecting the plaintiffs' attorney's citation to medical literature in an attempt to establish a foundation for their expert's opinions and theories as generally accepted in the medical community. It is the experts themselves who must establish the reliability of their theories, not counsel.

Nevertheless, in reviewing the submissions, the Court finds that reargument lies. While the plaintiffs failed to establish the existence of an issue of fact as to whether the defendants' care of Mrs. Schwartz caused the infant plaintiff Harrison's left hemiparesis, the plaintiffs have established the existence of an issue of fact as to whether the defendants' care

of Mrs. Schwartz caused the infant plaintiff's global deficits due to a blood flow problem and concomitant oxygen deprivation, resulting in his brain injury.

The plaintiffs' "California expert," an OBGYN, opined that the defendants' departures consisted of a failure to properly manage a progressive hypertensive/vasospastic disorder in Mrs. Schwartz which led to a severe preclampsia/eclamptic crises with associated "superimposed fetal hypoxia, and cerebral ischemia on a child already chronically compromised and vulnerable." The plaintiff's California expert opines that these departures led to "fetal acidosis and a brain insult and brain injury including the right cerebral hemisphere . . . resulting in a left hemiplegia and developmental delays" which he opines "were avoidable with good care." The California expert explains that all objective data including an eclamptic crisis, fetal bradycardia (low heart rate and severe metabolic acidosis at birth) confirms a hypoperfusion (ischemia/decreased blood flow) which impacted the infant plaintiff Harrison's brain. He explained:

"eclamptic seizures are associated with excessive uterine activity. Thus, [the infant plaintiff] was at serious risk of ischemic brain insult and damage [which] event evol[ed] over some two plus hours [and] include[d] some compensation in a child already vulnerable and compromised. The compensation would be an "effort" by the child's intrinsic adaptive mechanisms to maintain adequate brain blood perfusion. Inevitably, there will be decompensation as revealed by the bradycardia. The decompensation would be associated with ischemic brain hypoperfusion which in this case is the most likely cause of Harrison's ischemic brain injury and disability."

Furthermore, the plaintiffs' "New York expert," a pediatric neurologist, offered a consistent causation theory. He stated that the infant's ". . . brain injuries . . . were the result of the chronic and then superimposed stresses associated with eclampsia experienced by Mrs.

Schwartz on April 29, 2004" and that "a generalized disturbance of systemic circulation resulted in impaired perfusion of the brain in the infant plaintiff Harrison while his mother was eclamptic, producing the ischemic brain injury."

Even the defendants' expert Dr. Sibai recognized that global deficits can result from hypoxic ischemic encephalopathy. While defendants' counsel now asserts that the child did not have global deficits, there is evidence to the contrary. Further, it has not been established that there is always easily ascertainable, objective evidence of the producing cause of that type of injury. Indeed, absent from the defendants' moving papers is an assertion that the cause of the brain insult leading to these deficits must be traceable by objective evidence such as an MRI. Thus, the explanations by plaintiffs' experts for the cause of global deficits cannot be ruled out as a matter of law.

That defendants' experts deem the infarct identified on the infant plaintiff Harrison's MRI as "inconsistent with" diffuse or global hypoxia does not conclusively establish the absence thereof. *Green v New York City Health and Hospital Corp.*, Sup Ct NY County, Index No. 118826/02, March 3, 2005. Moreover, the plaintiffs have established that it is not entirely clear from the record that the infarct was "spontaneous" and unrelated to Mrs. Schwartz's care and eclamptic seizure, even if it had been a producing cause of the deficits later diagnosed..

Reliability and admissibility are adequately established where, like here, an expert lays a foundation for their theory of causation within generally accepted principles of obstetrical medicine that is not novel or challenged. The lack of textual authority directly on point or cases or studies under exactly parallel circumstances is relevant to the weight to be given the

opinion, but not its admissibility. *Diejoia v Gacioch*, 42 AD3d 977 (4th Dept. 2007), citing *Marsh v Smyth*, 12 AD3d 307, 312-313 (1st Dept. 2004); *Zito v Zabarsky*, 28 AD3d 42, 45 (2nd Dept. 2006).

Accordingly, reargument is granted, and upon reargument, so much of this Court's order dated May 28, 2010 as found that the plaintiffs failed to establish the existence of a material issue of fact regarding proximate cause is vacated. A finding that the plaintiffs established the existence of a material issue of fact as to whether the acts or omissions of defendants Jon Robert Snyder, M.D., Jon Robert Snyder, M.D., P.C., New York University School of Medicine, Department of Obstetrics and Gynecology, Maternal Fetal Medicine Associates, Daniel Roshan, M.D., Anna Monteagudo, M.D. and Ilan Timor, M.D.'s caused the infant plaintiff Harrison's injuries, is substituted therefor. With the exception of New York University Medical Center, the defendants' motions for summary judgment dismissing the complaint against them are therefore denied.

None of the defendants properly requested reargument regarding this Court's finding of a material issue of fact with respect to their medical malpractice. CPLR 2214. The Court finds no basis for disturbing its findings in any event. Those requests therefore are denied.


This shall constitute the Decision and Order of this Court.

ENTER

DATED: October 28, 2010

ENTERED

OCT 29 2010


HON. DANIEL PALMIERI
Acting Supreme Court Justice

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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