

**Gavzy v Simonson**

2014 NY Slip Op 31840(U)

July 14, 2014

Supreme Court, New York County

Docket Number: 800096/11

Judge: Alice Schlesinger

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

IA PART 16  
PART 16

PRESENT: ALICE SCHLESINGER

Justice

*Ella Gaurzy*

- v -

*Peter T. Simonsen*

INDEX NO.

800096/11

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

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

PAPERS NUMBERED

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 and cross-motion are determined in accordance with the accompanying memorandum decision.

**FILED**

JUL 16 2014

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: JUL 14 2014

*Alice Schlesinger*

ALICE SCHLESINGER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
ELLA GAVZY, An Infant by her Parents and Natural  
Guardians, ELIZABETH GAVZY and JARED  
GAVZY, ELIZABETH GAVZY, Individually, and  
JARED GAVZY, Individually,

Plaintiffs,

Index No. 800096/11  
Motion Seq. No. 002

-against-

PETER T. SIMONSON, M.D., PETER T.  
SIMONSON, M.D., P.L.L.C., GOOD SAMARITAN  
HOSPITAL, SONYA S. STRASSBERG, M.D.,  
CHILDREN'S AND WOMEN'S PHYSICIANS OF  
WESTCHESTER, LLP, RAMAPO  
ANESTHESIOLOGISTS, P.C., BOLES LAV  
KOSHARSKYY, M.D, MAXINE DRIVENS, R.N.,  
and CAROLYN PAGANO, R.N.,

Defendants.

**FILED**

JUL 16 2014

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
SCHLESINGER, J.:

Ella Gavzy is now four years old, having been born on February 3, 2010, at 8:35 p.m. She is unable to walk, to talk, to crawl or feed herself. She is fully dependent on others for all activities of daily living.

How and why this tragedy occurred is the subject of this medical malpractice action, as well as the subject of several dispositive motions before the Court. Some background of the events of February 3, 2010, are necessary before discussing the details of the motions before me.

Ella's mother, her guardian and plaintiff Elizabeth Gavzy, seemed to be having a normal second pregnancy. She was under the care of defendant Dr. Peter T. Simonson, an obstetrician/gynecologist. Her due date was February 4, 2010. However, on the day before when Ms. Gavzy was 9 months and 6/7 weeks into her

pregnancy, at 6:00 a.m., she began having contractions and went to Dr. Simonson's office. It was determined several hours later that she was in labor and should go to the hospital, Good Samaritan Hospital, a defendant in this case.

No one here disputes that Ms. Gavzy's labor was long and complicated. Dr. Simonson was present at various parts of the labor, and Mrs. Gavzy was hooked up to a fetal monitor. During the two stages of labor that Mrs. Gavzy experienced the fetal monitoring strips, at various times the strips gave non-reassuring data as to the baby's heart rate. Finally, when Ella was actually being delivered at 8:35p.m., there were additional issues in delivering her entire body. In other words, after the head was delivered, various maneuvers were engaged in by Dr. Simonson and others to get Ella's shoulders and the rest of her body out. That is why, in addition to the grievous injuries noted above, the infant also suffered from Erb's Palsy.

When Ella was delivered, she weighed 8lbs and 9.9oz. It was believed that at her birth she was acidotic and severely depressed. This condition was reflected in her Apgar scores, which were 3 at 1 minute, 4 at 5 minutes, and 5 at 10 minutes. Defendant Dr. Boleslav Kosharsky, an anesthesiologist, was present at the latter stage of Ms. Gavzy's labor and seems to have participated in administering an epidural.<sup>1</sup> Dr. Kosharsky denies administering the additional sedative. He acknowledged that when this was allegedly done, Ms. Gavzy was having difficulty pushing due to numbness. Therefore, arguably the better practice was to lessen the sedative so she would have more feeling and could push more effectively.

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<sup>1</sup>One of the disputes in this action involves the "topping off" of the epidural which was first given to the mother earlier on during labor.

[\* 4]

In any event, it is clear that Dr. Kosharskyy observed the infant in her depressed state and was the first doctor to actually attend to her. He intubated her at either 3 minutes or 5 minutes after the birth. That is another disputed issue in this case. The endotracheal tube which this doctor placed in Ella at some point became dislodged. It was later removed in the Neo-Natal Intensive Care Unit (NICU). When that occurred, the tube had green secretions from the stomach on it. The removal occurred at 9:17 p.m. by defendant Dr. Sonya Strassberg.

Dr. Strassberg first became involved in these events 9 minutes after Ella was delivered. She was the on-call Neonatologist. She testified that pursuant to the Hospital's policy she was not expected to remain at the hospital for that assignment. At 8:44 p.m. she was asked to come to treat Ella. It appears she left her home immediately and arrived at the NICU some time between 9:00 p.m. and 9:09 p.m. Upon arrival, she had her first contact with Ella, who became her patient. The infant up to then had been cared for by a nurse, as well as by Dr. Kosharskyy. As stated earlier, Dr. Strassberg observed the tube but did not remove it until 9:17 p.m. When that occurred, Ella began to breathe spontaneously. Dr. Strassberg then placed her on 2 liters of supplemental oxygen with a nasal cannula.

Dr. Strassberg also did blood gas tests and determined that Ella had persistent acidosis. Therefore, at some point she ordered Sodium Bicarbonate to be given to Ella over a slow infusion. At or around this time, Dr. Strassberg and Dr. Simonson advised the parents that Ella had to be transferred to Westchester Medical Center where she would be given more sophisticated treatment, including a "cool cap" protocol. The actual transfer took place at 11:25 p.m.

[\* 5]

At Westchester Medical Center, in the days ahead, various tests including an EEG on February 9 and a MRI on the same day were done on Ella and showed severely diffused cerebral dysfunction. The attending Neurologist believed that the infant suffered from severe hypoxic ischemic encephalopathy ("HIE"). Finally, on March 11, 2010, Ella was transferred to Blythedale Children's Hospital for rehabilitation.

It is on these extremely distressing facts that, as stated above, this action sounding in malpractice was brought against the various participants in this tragedy. It is also on these facts that several of the defendants are moving for summary judgment.<sup>2</sup> In the first instance, there is a motion by Neonatologist Dr. Strassberg and her group, Children's and Women's Physicians of Westchester, LLP ("CWPW"). Then a cross-motion is made, concededly an untimely one by 10 days, by Dr. Boleslav Kosharsky and his group, defendant Ramapo Anesthesiologists, P.C.

Dr. Strassberg supports her motion with an affirmation by Dr. Warren Rosenfeld. He is a New York licensed physician, Board Certified in Pediatrics and Neo-Natal Perinatal Medicine. He is also Chair of the Department of Pediatrics at Winthrop University Hospital and Professor of Pediatrics at SUNY Stony Brook School of Medicine. Before reviewing the events of this delivery and birth, Dr. Rosenfeld states that "on numerous occasions" he has personally attended to infants undergoing similar events, including infants who have required resuscitation after birth.

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<sup>2</sup>Good Samaritan Hospital ("GSH") had moved for summary judgment but withdrew that motion. At the same time, the two named registered nurses Maxine Davieds and Carolyn Pagano, who had also moved, were discontinued from the case.

It should be noted by the Court at this juncture that a major area of dispute here is when Ella's brain suffered injury or injuries. It is the moving defendants' position that all of the injury occurred intra-partum or during the birth process. Therefore, while Dr. Rosenfeld opines that Dr. Strassberg did not commit any malpractice, the more significant thrust of his affirmation is that whatever Dr. Strassberg did or did not do had no effect on the grievous assault(s) to this infant's brain. Not surprisingly, the opposition by counsel for the family argues that, while Ella's brain was injured during the labor and delivery, the injury was exacerbated by the various failures of these defendants, namely Dr. Kosharsky, Dr. Strassberg and the GSH.

In reviewing Dr. Rosenfeld's statement, Dr. Rosenfeld notes that Dr. Strassberg got to the hospital as soon as she could, which was approximately 20 minutes after she was called. She took over Ella's care and treatment approximately 4 minutes later. This expert then reviews what Dr. Strassberg did with regard to removal of the tube inserted by Dr. Kosharsky, as well as giving Sodium Bicarbonate to the infant.

Therefore, in addition to Dr. Strassberg's prompt arrival at the hospital when contacted, Dr. Rosenfeld also opines that Dr. Strassberg properly evaluated the infant in NICU, timely rendered appropriate treatment, and timely organized Ella's transfer to Westchester Medical Center for monitoring and cool cap therapy.

He also emphasizes that as a Neonatologist, Dr. Strassberg was not responsible for anything to do with the delivery of the baby. He opines that there was no evidence in the record to show that Dr. Strassberg should have been at the hospital for a high risk birth. There was no such designation here. He adds that neither New York State Regulations nor the policy and procedures of GSH required her presence during the

delivery. Dr. Rosenfeld says that the reason for this is that this hospital is a Level II perinatal center and pursuant to this, it was not necessary for Dr. Strassberg to remain at the hospital overnight, as long as she, as the on call physician, could be on site within 20 minutes. In this regard, again Dr. Rosenfeld points out that there is no record that anyone involved in the delivery believed that this was high risk, sufficient to alert the Neonatologist. He points out, and the record supports, that no call was made to Dr. Strassberg until 9 minutes after the birth.

Dr. Rosenfeld additionally states that Dr. Kosharskyy, the anesthesiologist, was fully capable of performing the initial resuscitation and in fact did that here. He points out that the infant was intubated within a few minutes of her life and when this happened, she responded with improvement in her color and heart rate. He opines that there was no delay in intubation.

Dr. Rosenfeld also states that this tube was removed by Dr. Strassberg without delay and that there is no evidence that anything injurious happened to Ella before 9:17 p.m. when the removal occurred. As to Dr. Strassberg ordering a repeat test of the blood gases and her dispensing of Sodium Bicarbonate, he opines that these actions were not a departure from accepted care. He further explains why the dispensing of Sodium Bicarbonate was somewhat delayed. He believes that Dr. Strassberg did this, appropriately, so as to give the infant a chance to self correct. Finally, he says that the transfer to Westchester was not unduly delayed. He tells us that cool cap therapy is to be administered within 6 hours of birth, which occurred here. Ella arrived at Westchester Hospital at 12:15 a.m. on February 4, and the cool cap therapy began at 1:30 a.m., about 5 hours after her delivery.

Dr. Rosenfeld concludes his affirmation by discussing the various criteria for a finding of cerebral palsy, one affliction this baby suffers from. As stated earlier, Dr. Rosenfeld believes that the asphyxia insult occurred solely intra-partum. In this regard he points out that the blood gasses taken from Ella immediately after delivery showed severe acidosis, as well as other serious deficits. Therefore, once again, the argument is made that all of Ella's injuries occurred before Dr. Strassberg had any involvement in the infant's care. Therefore, he urges her dismissal from this action.

As stated above, there is also an untimely cross-motion by Dr. Boleslav Kosharsky. There are two basic allegations of malpractice against him. The first involves the alleged "topping off" of the epidural during the second stage of labor, when the mother Elizabeth was asked to push. Secondly, the plaintiff notes various failures associated with Dr. Kosharsky's efforts to resuscitate the infant. As examples, the allegations include a delay in performing the intubation, as well as the manner in which it was done, resulting in dislodgement and failure.

Counsel argues that the Court should accept the cross-motion even though it is 10 days after the time period they were given to make such a motion. She urges this was only "marginally" untimely and that since the cross-motion was relying on precisely the same evidence as Dr. Strassberg's motion and raises nearly identical issues to those raised by that doctor, the motion should be heard on its merits. It should be noted further in this regard that counsel does not even submit a statement from an Anesthesiologist, the same specialty as Dr. Kosharsky, as support for the cross-motion. In other words, counsel relies exclusively on Dr. Rosenfeld's affirmation, despite the fact that he is a Neonatologist and despite the fact that he never specifically

and directly discusses whether or not Dr. Kosharsky committed malpractice. Instead, counsel relies on Dr. Rosenfeld's opinions regarding the timely and proper intubation after birth and the proximate cause arguments made on behalf of Dr. Strassberg pursuant to Dr. Rosenfeld's opinions. I will hear the cross-motion on the merits over the objection of plaintiffs' counsel, as I do concur with defense counsel that nothing material has been added and thus there is no real prejudice to the plaintiffs.

In this regard, Dr. Kosharsky's counsel points to various parts of Dr. Rosenfeld's affirmation which suggest that the injury here was purely due to an acute intra-partum hypoxic event and therefore nothing that Dr. Kosharsky did or did not do caused or contributed to any of the infant's injuries.

There is strenuous and ultimately successful opposition by counsel for the plaintiffs, although by this decision, I am considering the merits of the arguments. First counsel points out what he believes are the deficiencies in defendants' papers. For example, counsel argues that Dr. Rosenfeld and Dr. Strassberg differ on certain issues such as when the Sodium Bicarbonate should have been started. Counsel also points out that Dr. Rosenfeld proffers no opinion with regard to the time period between approximately 9:05 p.m. and 9:17p.m. when the time when the tube was removed. This tube was allegedly preventing Ella from breathing properly. Therefore, an explanation of what Dr. Strassberg was doing during that time period and why she did not remove the tube earlier is relevant.

The plaintiff's opposition is supported by expert affirmations. Not surprisingly, the experts are unnamed. One is a Pediatrician/Neonatologist. The other is an Obstetrician/Gynecologist. Not only are their names not given, neither is any

information provided for either physician as to their education and training and what they presently do. The only information provided is that the Obstetrician/Gynecologist is licensed in Massachusetts and has been Board Certified in that field for a long time and has managed to participate in hundreds of labors and deliveries. This person's opinions deal only with the care and treatment given by GSH, whose motion was then withdrawn and the anesthesiologist Dr. Boleslav Kosharskyy.<sup>3</sup> Therefore, I will confine my discussion to departures given against Dr. Kosharskyy.

The first departure, as noted earlier, was between 8:15 p.m. and 8:30 p.m. when the record suggests that it was by the anesthesiologist present at the delivery, arguably Dr. Kosharskyy, alleged "topping off" the epidural that had been administered. This expert opines that this was precisely the opposite of what should have been done and thus a departure from accepted standards because it led to ineffective pushing by the mother and a birth further delayed. Therefore, the epidural should have been reduced not increased. It should be added here that Dr. Kosharskyy, in his deposition, does acknowledge that one would not want to top off a patient who was having difficulty pushing, but he denies having topped it off. The expert concludes his/her statement with an opinion, with a reasonable degree of medical certainty, that Ella continued to suffer from hypoxia after she was delivered and that this continued hypoxia caused further damage to her brain.

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<sup>3</sup>This Court at oral argument meant to bring up this less than major issue. Since this unnamed Obstetrician/Gynecologist is licensed outside New York, the CPLR §2106 directs that the statement provided must be in an affidavit form. It is unclear here whether it is. Therefore, I am directing counsel for the plaintiff to provide such an affidavit to the Court.

This second expert, Board Certified in Pediatrics with a subspecialty in Neonatology, is a licensed physician in New York State. He/she is familiar with standards of care with regard to caring for infants and holds all opinions to a reasonable degree of medical certainty.

This expert offers additional information as a predicate to a departure opinion offered against Dr. Kosharsky. The doctor says that the records show that a 2.5 millimeter ETT (endotracheal tube) was improperly used to intubate Ella. This size is properly used for premature or small-sized infants. However, as was pointed out earlier, Ella was a full term baby and weighed over 3900 grams or well over 8lbs. The expert says that the standard of care under these circumstances would require a 3.5 millimeter ETT. This undersized tube would result in the baby not getting the needed oxygen and therefore was a departure from accepted standards of care.

This doctor also takes issue with the amount of time that elapsed between Ella's delivery and the time of her intubation. The latter event occurred somewhere at either 3 minutes of life, according to Dr. Kosharsky, or 5 minutes of life, as opined by Dr. Strassberg. However, it is this expert's opinion that when dealing with a non-breathing, cyanotic infant as Ella was, intubation should occur within 60 to 90 seconds of life. Therefore, the delay in intubating, while attempting other lesser protocols, was a departure from accepted standards. This expert points out that Ella not only had very poor Apgar scores but was pale, floppy, without any cry, without any movement, and without any respiration.

Another departure, this time addressed to both doctors Kosharsky and Strassberg, was their failure to timely recognize, diagnosis and treat the situation that

arose from the dislodgement of the tube. This expert believes that the event happened in the delivery room and explains why. Assuming that the expert is correct, Dr. Kosharsky acknowledges that it was his responsibility to check this tube during the entire time that Ella was in his care or here until about 9:05 p.m. However, counsel for Dr. Kosharsky argues that the record supports the dislodgement occurring while Ella was in the NICU. The Court is not here to resolve these factual disputes.

As to Dr. Strassberg, the departure against her was that she failed during a period of approximately 17 or 12 minutes (either from 9:00 p.m. to 9:17 p.m. or 9:05 p.m. to 9:17 p.m.) to recognize that the tube was not functioning and had to be removed. It is elaborated upon here that, to the extent that the tube was not functioning, the infant was not receiving oxygen and her brain was becoming more impaired. At 9:17 p.m., the tube was removed and Ella for the first time spontaneously breathed. Therefore, plaintiffs' counsel urges that arguably 42 minutes elapsed from the time of Ella's entry into life and the time when she began to breathe on her own and receive sufficient oxygen.

Another departure opined against Dr. Strassberg is her alleged failure to administer Sodium Bicarbonate in a timely manner. According to this expert, there was almost a two hour gap before this was done. Therefore, during this time, Ella continued to suffer from metabolic acidosis, which in turn would lead to more damage to the brain.

Additionally, this expert notes that arterial blood gases were not obtained in the NICU until 10:15 p.m. This delay is charged against Dr. Strassberg, who was caring for Ella from the time they both arrived at NICU at approx 9:05 p.m., until she was transferred to Westchester Medical Center. The expert explains why the information

provided by these blood gases is so significant and why a delay in obtaining that information would be malpractice.

Finally this expert, similar to the expert Obstetrician, opines that Ella suffered not only from perinatal hypoxia but continued to suffer from hypoxia throughout the first 42 minutes of her life.

I received replies from the moving and cross-moving defendants. First it should be noted, and it is, by counsel for Dr. Strassberg and CWPW that no departures were made out against these defendants or criticism of any kind with regard to the time of the doctor's arrival at the hospital or with regard to her arrangements in transferring the infant to Westchester Medical Center. Therefore, counsel argues such claims should be dismissed against Dr. Strassberg. This is correct and at oral argument counsel for the plaintiff did not argue otherwise. Therefore, these claims are dismissed.

Counsel also argues that there is no evidence to show that Ella's condition worsened as a result of care by Dr. Strassberg. However, if one were to accept the opinions given by the plaintiffs' expert, that Ella continued to suffer oxygen deprivation up until 9:17 p.m. and additional injury before she was given Sodium Bicarbonate, then the injury is apparent. I am not going to burden this decision by alluding to the various blood gas numbers and other information. Suffice it to say, at least as regards the period of time of 15 minutes after birth or at approximately 8:50 p.m. while Ella was still under the care of Dr. Kosharsky, her Apgar score went down from 5 to 4. This suggests that her condition was certainly not getting any better. Quite the contrary.

Finally, with regard to Dr. Strassberg, counsel suggests in reply that the tally sheet used in NICU was unreliable. Specifically, she points out that even though the

sheet showed that the tube was clotted at 9:08 p.m., this should not necessarily be relied upon. This point is important because it is apparent that the tube was not removed by Dr. Strassberg until 9:17 p.m.. Therefore, the time when the tube began to non-function is very relevant.

In the reply by counsel for Dr. Kosharskyy, it is pointed out that there is no proof that it was this defendant who "topped off" the epidural. Dr. Kosharskyy testified that he did not know which doctor did this and further that it was topped off at Dr. Simonson's request. However, as noted earlier, we know that this occurred between 8:15 p.m. and 8:30 p.m. and the Court is at a loss to know whether there were any other anesthesiologists on the scene in the delivery room beside, Dr. Kosharskyy.

Further, counsel argues that the insertion of the ETT was successfully accomplished at 8:38 p.m., 3 minutes after the birth. Further, it is urged that there is no support for Dr. Strassberg's opinion that the tube was inserted at 5 minutes of life. Additionally, counsel takes issue with the opinion expressed by experts for the plaintiffs that after the tube was inserted by Dr. Kosharskyy, he did nothing else for the child. Counsel argues that the anesthesiologist kept monitoring her condition and quotes the statement that Dr. Kosharskyy made as to his role; "my job was to keep the baby stable, which I did".

Finally, counsel criticizes the fact that plaintiffs' expert Neonatologist gives departure opinions and standards for Anesthesiologists, despite the fact that that person is in a different field of medicine from Dr. Kosharskyy. Apparently, counsel fails to see the irony in that argument, since no expert was provided in the field of Anesthesiology to support Dr. Kosharskyy in his papers. His motion depended exclusively on the opinions of Dr. Rosenfeld, a Neonatologist.

The motions by Dr. Strassberg, CWPW, Dr. Kosharskyy and Ramapo are all denied. As stated at some length in this opinion, there are multiple issues surrounding the main one of whether Ella continued to experience brain damage after her birth. If she did, and that will have to be proved by the plaintiff, then there are very real issues as to the timeliness and effectiveness of the care provided to Ella by each of these doctors. As pointed out several times earlier, plaintiffs' experts, using the Good Samaritan records, opine that Ella did not receive sufficient oxygen or perhaps any oxygen, during her first 42 minutes of life. During those 42 minutes, first Dr. Kosharskyy and then Dr. Strassberg cared for her. Enough said.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Sonya S. Strassberg, M.D., and Children's and Women's Physicians of Westchester, is granted to the extent of dismissing any claims related to the time of Dr. Strassberg's arrival at the hospital and/or the arrangements she made to transfer the infant to Westchester Medical Center, and the motion is in all other respects denied; and it is further

ORDERED that the cross-motion by defendants Boleslav Kosharskyy, M.D., and Ramapo Anesthesiologists, P.C., on the merits is denied in its entirety.

A pre-trial conference is set for September 10, 2014 at 10:00 a.m.

Dated: July 14, 2014

JUL 14 2014

**FILED**

JUL 16 2014

NEW YORK  
COUNTY CLERK'S OFFICE

*Alice Schlesinger*  
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J.S.C.  
**ALICE SCHLESINGER**