

Jenkins v Moehlen

2014 NY Slip Op 31999(U)

June 2, 2014

Sup Ct, Bronx County

Docket Number: 6233/06

Judge: Stanley B. Green

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

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JAMILLAH JENKINS, as Administratrix of the Estate of
SAMIHAH GANT and JAMILLAH JENKINS,

INDEX No. 6233/06

Plaintiff(s),

- against-

KARL HEINZ MOEHLEN, M.D., BARBARA
SHORTLE, M.D., HAYAMA BRILL, M.D. s/h/a
KHAYANA TACHOYEVA, M.D., MOEHLEN
MEDICAL, P.C., LENOX HILL HOSPITAL and
CHRISTOPHER P. O'REILLY-GREEN, M.D.,

Defendant(s)

DECISION

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HON. STANLEY GREEN:

The motion by Hayama Brill, M.D. s/h/a Khayana Tachoyeva, M.D. (Dr. Brill) and Lenox Hill Hospital (LHH) for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is granted.

Plaintiff claims that during her admission to LHH in June 2004, defendants failed to timely and properly manage her labor and delivery and as a result, the infant plaintiff suffered severe brain damage and died on March 30, 2007.

In November 2003, plaintiff began seeing Dr. Shortle at Moehlen Medical, P.C. for pre-natal check-ups and sonograms. On June 18, 2004, plaintiff telephoned Dr. Shortle complaining of decreased fetal movement since that morning. Dr. Shortle referred her to the Center for Maternal Fetal Medicine (not affiliated with LHH) for a biophysical profile (BPP). Following the study, plaintiff presented to LHH for evaluation. She was triaged by Dr. Brill, a first year

resident, under the supervision of Dr. Shortle. Based on her BPP score of 4/8, Dr. Shortle decided to admit plaintiff to the hospital, repeat the BPP in the morning and continue monitoring her. A maternal fetal medicine consult (MFM) was requested and, at 9:02 p.m. Dr. O'Reilly-Green (an MFM specialist) examined plaintiff. He noted that a repeat BPP had been performed and the result was 6/10. He also noted that the non-stress test (NST) was persistently flat and non-reactive, with no variability, no accelerations, and no decelerations. Dr. O'Reilly-Green wrote a note on the MFM Obstetrics Report indicating that "Fetal testing [was] not reassuring."

At 6:00 a.m. on June 19, 2004 a BPP was ordered with results of 8/10. At 7:30 a.m. that day, occasional late decelerations were documented along with decreased fetal movement. Plaintiff underwent serial BPP assessments on June 19, 20, 21 and 22 with scores of 8/10, with two points lost due to the non-reactive fetal heart tracing. On the evening of June 22, 2004, Dr. O'Reilly-Green performed another BPP examination and observed the presence of polyhydramnios (an abnormal amount of amniotic fluid in the amniotic sac). Due to a persistent non-reactive fetal heart tracing now combined with an increase in amniotic fluid, as well as the fact that plaintiff was now at 35 6/7 weeks gestation, Dr. O'Reilly-Green recommended delivery. An oxytocin challenge test was performed to ascertain if labor could be tolerated and it was determined that induction was appropriate. At 11 p.m., plaintiff was placed on Cervidil in an attempt to induce labor.

On June 23, 2004, Dr. Moehlen took over plaintiff's care and plaintiff received Pitocin to induce labor. At about 2:50 p.m., she was given an epidural for pain relief. At 3:05 p.m., a lack of long term variability was noted along with a vaginal blood clot, which was described by Nurse Lutwin as "a handful." Nurse Lutwin called for a physician to evaluate the blood clot and Dr.

Brill responded. Nurse Lutwin noted on the Labor Flow Sheet that Dr. Tankhoyeva [Dr. Brill] was "aware of decreased long term variability. Positive blood clot handful." Dr. Brill testified that she examined the plaintiff, noted the clot and reported her findings to her "seniors" (EBT, p. 65). However, Dr. Moehlen does not recall Dr. Brill calling him about a blood clot (EBT, p. 122). At 3:35 p.m., Dr. Bornstein, another first year resident, also examined plaintiff. At 4:30 p.m., Dr. Moehlen performed a vaginal examination of plaintiff. He noted that the fetal heart rate showed minimal variability (which was unchanged from the previous recordings throughout her stay in the hospital) and that there were no late decelerations (p. 128-129). At 4:35 p.m. plaintiff was instructed to push. At 4:50 p.m., late decelerations were noted. At 5:00 p.m., Dr. Moehlen called an emergency c-section due to face presentation and fetal distress (EBT, p. 141-142). He delivered the infant at 5:18 p.m. and at that time, he diagnosed a placental abruption (a separation of the placenta from the uterine wall prior to delivery). Although it was not noted in the operative report, Dr. Moehlen testified that he recalled that it was a partial placental abruption (EBT, p. 125). The infant was born limp with no spontaneous respirations and Apgars of 4/6. Cord blood gases were normal. She was admitted to the NICU where she was treated for respiratory issues and septicemia. She was discharged from LHH on August 23, 2004 and was subsequently in and out of hospitals for respiratory infections, viruses and pneumonia. On March 30, 2007, Samihah died. The Medical Examiner's Neuropathology report indicates that her brain revealed that she had suffered "chronic diffuse perinatal anoxic/ischemic injury."

Dr. Brill and LHH seek dismissal of the complaint on the grounds that: (1) Dr. Brill was a resident and she and hospital staff acted under the direction and control of plaintiff's private attending OB/GYN's at all times; (2) neither she nor any of the hospital staff deviated from the

direction of plaintiff's physicians or from the standards of care in their treatment of plaintiff; (3) plaintiff's attending physicians were responsible for managing her labor and delivery and for obtaining informed consent; and (4) no act or omission by Dr. Brill or LHH staff caused or contributed to the claimed injuries. LHH also contends that it cannot be held vicariously liable for any negligence of Dr. Shortle, Dr. Moehlen or Dr. O'Reilly-Green, who were plaintiff's private attending physicians, that there is no record of any treatment at LHH in April 2004, and that any claims related to treatment in April or March 2004 are barred by the statute of limitations.

In support of the motion, Dr. Brill and LHH submit the affirmation of Dr. Adiel Fleischer, who opines that Dr. Brill, in her role as a resident, acted at all times within the standard of care and was in no way negligent, that the records and testimony show that LHH staff did not depart from the standard of care at any time and were in no way negligent, and that no alleged act or omission by Dr. Brill of LHH staff was a proximate cause of the claimed injuries.

Dr. Fleischer explains that as a first year resident, Dr. Brill's role, was solely to evaluate the patient and provide information to the attending physicians. She was not responsible for managing plaintiff's labor and delivery, making decisions regarding the performance of a cesarean section, induction of labor, recognizing and acting on the alleged medical significance of placental abruption, position of the fetus and fetal distress. Dr. Fleischer opines that the vaginal blood clot that plaintiff passed on June 23, 2004 was appropriately evaluated and notes there was no evidence of any ongoing bleed through the labor. He explains that while the presence of a blood clot may indicate a minor placental abruption, it is not uncommon and simply calls for continued monitoring of fetal well being, which is precisely what was done in

this case.

With regard to the alleged injuries, Dr. Fleischer opines that the generally favorable BPP results and the fact that the fetal heart tracings continued to be non-reactive (which was unchanged from the time that plaintiff complained of decreased fetal movement) are indicative of an acute event that occurred prior to plaintiff's presentation on June 18 and were not indicative of a hypoxic event at any point during her admission or labor and delivery. He opines that the fact that there were no persistent late decelerations while the fetus was under stress of labor shows that there was no ongoing or acute hypoxia present during plaintiff's admission and notes that this was confirmed by the normal cord blood gases. Thus, he opines that there was no indication to perform a cesarean section any earlier than it was performed and that earlier intervention would not have changed the outcome, because any injury to the fetus did not occur during this hospital admission.

With regard to plaintiff's remaining claims, Dr. Fleischer opines that plaintiff's private attending physicians were responsible for managing her labor and delivery and obtaining her informed consent to the treatment and that plaintiff was properly evaluated and managed during her admission to LHH in March 2004 for complaints of lower left quadrant pain.

In opposition to the motion, plaintiff submits an affirmation by Dr. Bruce Hallbridge, a Board Certified obstetrician who opines, inter alia, that: (1) Samihah had stopped growing weeks before delivery due to placental insufficiency (the placenta is not working properly and the fetus is not fed sufficient nutrients to grow); (2) Samihah was suffering from a "decreased or total" lack of placental reserves as early as June 19, 2004, when her fetal heart monitoring strips were identifying a total lack of any beat to beat variability; (3) she continued to suffer from a lack of

placental reserves continuously from June 19 up to and including June 23, 2004, when the vaginal blood clot was passed; (4) the blood clot was caused by a placental abruption, which can cause a severe decrease or even complete deprivation of oxygen to a child in-utero; and (5) that the risk of brain damage to a child that has undergone the ischemic stress of a placental abruption is amplified where the child's placental reserves are already diminished.

Dr. Hallbridge opines that the accepted standards of medical care require first year residents to notify either a senior resident or an attending obstetrician of significant, vaginal blood clots to ensure that those physicians making determinations concerning the patient have "necessary and important medical information in a timely fashion, so as to react speedily with the appropriate medical course." He opines that the accepted standards of medical care require an attending obstetrician to examine the patient and, unless a placental abruption can be ruled out, to immediately deliver the patient because otherwise the child is at risk of suffering ischemic injuries in-utero. Thus, he opines that the failure of Dr. Brill and Dr. Bornstein to report the vaginal blood clot to a senior resident or attending obstetrician was a substantial factor in directly and proximately causing the infant's injuries and death and deprived her of a substantial chance at achieving a better outcome.

Plaintiff also submits the affirmation of a neuroradiologist who opines that the two hour delay in delivery caused Samihah to be subjected to a hostile womb as a result of what Dr. Hallbridge has identified as a partial placental abruption. He states that "having read plaintiff's expert obstetrician and pediatric neurologist's affirmations," the timing of this injury is consistent with their conclusions that Samihah was injured while in-utero and that "their expert conclusions that Samihah's injuries were as a result of an unaddressed abruption occurring in an

already dysfunctional placenta are consistent with an injury to the brain, that became more demonstrable with the passage of time.” He also opines that the findings on radiological studies as noted in his report are “totally consistent with this diagnosis of cerebral palsy and that Samihah’s cerebral palsy was directly and proximately caused by in-utero perinatal hypoxic ischemic encephalopathy.”

Plaintiff’s third expert, who is Board Certified in Psychiatry and Neurology, opines that the autopsy report’s diagnosis of “chronic anoxic/ischemic injuries” indicates that there were repeated periods of time where Samihah’s brain was not obtaining sufficient oxygenated blood, that the placental abruption occurring when Samihah was already vulnerable to decreases in blood transport is consistent with recurrent decreases in oxygenated blood to Samihah’s brain and that the autopsy report’s diagnosis of chronic diffuse perinatal anoxic/ischemic injury is consistent with Samihah being injured as a result of her not being delivered for two hours after a placental abruption had occurred. This expert opines, relying on plaintiff’s obstetrics expert’s opinion that plaintiff’s placenta was suffering from a lack of placental reserves as early as June 19, 2004, that Samihah’s injuries could have been substantially avoided had Samihah not been subjected to two hours of ischemic stress, whereby her vulnerability to drops in oxygenated blood made her extremely susceptible to the type of ischemic stress that a placental abruption can caused.”

In an affirmation submitted in reply to plaintiff’s opposition, Dr. Fleischer elaborates on his original opinion, disputing plaintiff’s contention that the blood clot was significant and pointing out that it was only one clot, not a “bleed,” as referred to by plaintiff’s expert. He also points out that, when questioned as to whether residents generally had a duty to inform an

attending if a patient is reported to have a blood clot, Dr. Moehlen responded "It's very difficult to answer since every patient in labor will eventually have bleeding or pass a blood clot." Dr. Fleischer reiterates his opinion that blood clots are common during labor and delivery, that the presence of a single clot, in and of itself, is not an indication to modify the labor and delivery plan and that delivery just two hours earlier on June 23rd would not have altered the outcome in light of the evidence that an acute event occurred prior to plaintiff's presentation on June 18, 2004.

In a medical malpractice action, a defendant physician establishes prima facie entitlement to summary judgment when he establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (Roques v. Noble, 73 AD3d 204). Once the defendant has met his prima facie burden, the burden shifts to the plaintiff to present competent evidence sufficient to show that the defendant departed from accepted standards of practice and that such departure was a proximate cause of the plaintiff's injuries (Kafka v. New York Hospital, 228 AD2d 332). To avert summary judgment, the plaintiff must present an expert affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the claimed injuries (Roques v. Noble, 73 AD3d 204, citing Coronel v NYCHHC, 47 AD3d 456). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat the defendant physician's summary judgment motion (Alvarez v. Prospect Hospital, 68 NY2d 320).

Initially, it is noted that although plaintiff has made the same allegations against Dr. Brill

and LHH as the co-defendants, she has opposed this motion only on the basis of one specific claim against Dr. Brill and LHH, which is that Dr. Brill and Dr. Bornstein departed from the standard of care by failing to notify a senior resident or an attending obstetrician of plaintiff's vaginal passage of a blood clot, that this caused the infant to remain in-utero for two hours after a placental abruption and amplified the ischemic stress already caused by placental insufficiencies and "directly and proximately" caused the claimed injuries. Accordingly, plaintiff's remaining claims against Dr. Brill and LHH, including the cause of action for lack of informed consent are dismissed as abandoned (Gaffney v. City of New York, 101 AD3d 410).

As to the sole remaining claim against Dr. Brill and LHH, while the testimony of Dr. Mochlen that he does not recall being informed of the clot, Nurse Lutwin's testimony that the clot was a "handful" and the opinion of plaintiff's OB/GYN expert are sufficient to raise triable issues of fact as to whether Dr. Brill departed from the standard of care by failing to report the clot to a senior resident or to Dr. Mochlen and as to whether the clot was "significant," plaintiff's expert's opinions are insufficient to raise a triable issue as to causal relationship between the alleged departure and the claimed injuries because they: (1) disregard the Dr. Hallbridge's opinion that Samihah was growth restricted and had stopped growing weeks before she was delivered; (2) disregard Dr. Hallbridge's opinion that Samihah was suffering from fetal hypoxia for days prior to her delivery; (3) assume that if Dr. Moehlen had been notified of the blood clot at 3:05 p.m., he would have made the decision to immediately deliver the infant, which is contradicted by Dr. Moehlen's testimony that plaintiff had suffered a partial placental abruption and that: "It's not necessary to do a c-section if one would note that there is a partial abruption of the placenta;" and (4) ignore the fact that when Dr. Moehlen examined plaintiff at 4:30 p.m., the

clot had been noted in the record by Nurse Lutwin, plaintiff was told to push and he first called for a c-section at 5:00 p.m. when face presentation and fetal distress were noted.

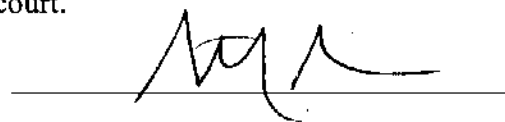
In light of Dr. Moehlen's undisputed testimony that the fetal tracings were "unchanged" from the prior tracings during the afternoon of the delivery and in the absence of any explanation of how the alleged injuries could have been avoided by delivery two hours earlier, the experts' opinions that the two hour delay in delivery was a substantial factor in causing the claimed injuries is speculative, conclusory and insufficient to raise a material issue of fact as to proximate cause. Accordingly, the motion for summary judgment by Dr. Brill and LHH is granted.

It is noted that a plaintiff's expert need not "quantify" the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury. However, there must be evidence presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury (Alicea v. Liguori, 54 AD3d 784); Jump v. Facelle, 275 AD2d 345). Based on the evidence presented, a jury would have to engage in speculation to find that Dr. Brill's and LHH's alleged departure was a substantial factor in causing the claimed injuries.

Movants shall serve a copy of this order with notice of entry on the Clerk of the Court who shall enter judgment dismissing the complaint against Hayama Brill, M.D. s/h/a Khayana Tachoyeva, M.D. and Lenox Hill Hospital.

This constitutes the decision and order of the court.

Dated: June 2, 2014



STANLEY GREEN, J.S.C.