

Pozo v Somersel

2016 NY Slip Op 30702(U)

March 17, 2016

Supreme Court, Bronx County

Docket Number: 350245/10

Judge: Douglas E. McKeon

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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JORDANNY POZO, an infant, by his Mother and
Natural Guardian, DENNY JOAQUIN, and DENNY
JOAQUIN, individually,

Plaintiff(s)

- against -

INDEX NO: 350245/10

GAVIN SOMERSEL, M.D., and MONTEFIORE
MEDICAL CENTER,

DECISION/ORDER

Defendant(s)

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HON. DOUGLAS E. MCKEON

Defendants Gavin Somersel, M.D., and Montefiore Medical Center have moved this Court for summary judgment and an order dismissing plaintiff's complaint. The motion is decided as follows.

Denny Joaquin first presented to Montefiore Medical Center for prenatal care for this pregnancy on March 25, 2008. It was her third pregnancy. She had a C-section in July of 1999 and a miscarriage in June 2007. She underwent a triple screen option to assess risks of certain birth defects which was within normal limits. Subsequently based on the normal results of the triple screen she decided not to undergo an amniocentesis. She expressed an interest in delivering the baby vaginally. As such, on May 9, 2008 the Montefiore physicians obtained a copy of her operative report from the 1999 delivery and it was determined that a vaginal birth after the prior C-section, known as a VBAC would not necessarily be

contraindicated. On June 6, 2008 she underwent a sonogram as a follow up for an ovarian cyst that was discovered on a May 6th sonogram. With the exception of the cyst the scan was normal. On June 13th she was given an antibiotic based upon her urine culture. Additionally on this date she indicated she wanted to deliver vaginally. The risks, benefits and alternatives were discussed with her. Normal visits followed and on September 5th she was diagnosed as an anemic and told to take iron. At 36 weeks on September 19th she was 1 cm dilated. On September 26th she was 2 to 3 cm dilated. On her due date of October 3rd she was still 2 to 3 cm dilated. Her attending physician Dr. Rasmussen informed her that she should return on October 7th and if she had not delivered the plan would be to perform a repeat C-section on that date.

On October 5th Ms. Joaquin presented to labor and delivery at Montefiore. Her water broke at 11:30 a.m. and she was evaluated at 1:30 p.m. The plan was to admit her for an induction of labor. The on call attending OB/GYN, Dr. Somersel, gave her Pitocin at 5:00 p.m. and at 7:00 p.m. she was noted to be 6 cm dilated. She delivered vaginally at 11:00 p.m. The baby was born in reassuring condition. Normal Apgars of 9/9 were given and she weighed 7 pounds and 14.2 ounces. His cord blood gas readings were normal and, as such, the infant was sent to the well baby nursery. For the first 24 hours the infant had a typical neonatal course. He was feeding well and appropriately active.

On October 7th his mother expressed concerns that he was not breathing right. A pulse oximetry reading was normal. He had a good appetite and showed

appropriate activity. Later that evening Mrs. Joaquin again expressed concern over his color. His oxygen saturation rate was normal and he was noted to be jaundiced. Plaintiff's mother then informed staff that her son had an episode of shaking and color changing and his eyes being fixed at about 7:50 p.m. that evening. He was sent to the NICU for evaluation and a CAT scan. The infant remained at Montefiore until he was transferred to Westchester Medical Center on October 21, 2008. The admission was prolonged because of numerous seizures on an almost daily basis. Full work ups were performed. Although the seizures were most consistent with a metabolic disorder they were considered to be of an unknown etiology.

While at Montefiore the infant underwent two CAT scans and an MRI. A subdural hematoma which is a bleed in the head outside of the brain was demonstrated which had resolved. The scans were otherwise inconsistent with any type of brain damage. The MRI studies showed no indication of a brain bleed or any type of hypoxic injury. After transfer the infant stayed at Westchester Medical Center through November 27, 2008. He continued to have multiple seizures almost daily. Further MRI's showed no evidence of a brain bleed nor any brain damage consistent with hypoxic injury. One EEG did show signs consistent with his seizures being secondary to a metabolic disorder. He underwent a full metabolic and genetic work up which were negative. Despite the negative finding his parents were advised to follow up with genetics after discharge as there seemed to be no other cause for his seizures. On December 3rd he was readmitted to Westchester Medical and stayed through December 7th. His anti-seizure medications were adjusted and he

was discharged after not having seizures for two days. The discharge summary indicated he suffered from neonatal onset epilepsy of uncertain etiology with a metabolic disorder suspected. Nothing in the Westchester Medical records indicates or alludes to any seizures being caused by hypoxia or hypoxic injury.

The infant came under the care of Dr. Talbott, a pediatric neurologist specializing in pediatric epilepsy. This doctor saw the infant from January 2009 through July 2011. The records indicate that since being under her care the infant has not had any seizures. Furthermore, he has taken no medication as seizure prophylaxis since July 2011. Dr. Lavega-Talbott found only speech delays in the child. Furthermore, records provided from the Briggs Family Pediatrics as of November 2011 note the only delay in the infant is speech.

Plaintiff argues that there was medical malpractice herein and asserts three causes of action. The first is for personal injury and medical malpractice on behalf of the infant, the second for lack of informed consent, and the third for spoliation of records. In support of the motion, movant has provided the Court with the expert affirmations of Drs. Alvarez, Bainbridge, Molofsky and Lefton. Dr. Alvarez is a Board Certified Obstetrician and Gynecologist and a Maternal Fetal Medical Specialist, Dr. Molofsky is a Board Certified Pediatrician and Pediatric Neurologist. Dr. Lefton is a Board Certified Radiologist and Neuroradiologist and Dr. Bainbridge is a Board Certified Pediatrician and Neonatologist. All doctors have reviewed the relevant medical records and deposition transcripts. Based upon their reviews of the materials as well as their experience, each doctor opines to a reasonable degree of

medical certainty that the defendants did not depart from accepted standards of practice in their care and treatment of either the mother or infant plaintiff. Furthermore, these experts opine that none of the plaintiff's injuries were caused by any alleged improper acts or omissions by defendants. Finally, Dr. Alvarez sets forth that adequate consent for treatment was obtained and that even if there was no adequate consent the acts in question did not proximately cause any injuries.

Dr. Alvarez opines that this was a fairly uneventful induction of labor and that the fetal heart monitoring strips were reassuring throughout. There was no prolonged labor and no medical indication to perform a cesarean section. The infant was delivered in a healthy condition which would be inconsistent with any type of injury. Dr. Bainbridge agrees that all the pediatric care was proper and he sets forth that it was appropriate to transfer the infant to the well baby nursery after delivery based on his condition. Once the infant began to show changes in his condition, the symptoms and complaints were adequately addressed including the performing of radiographic studies, administering medication and attempting to determine the etiology of the infant's seizures. As for proximate cause, all four experts opine that the infant's injuries are inconsistent with any type of hypoxic ischemic event or the suffering of any hypoxic injury. Specifically, they opine that the Apgar scores, range blood results, head imaging study results, EEG results, and lab studies are inconsistent with any hypoxic ischemic event. Furthermore, the physicians at both Montefiore and Westchester set forth that the seizures are of an unknown etiology but are most consistent with an underlying metabolic disorder. As such, the Court

finds that plaintiff has made a prima facie showing of entitlement to summary judgment on any negligence or medical malpractice issue.

As for the informed consent claims, the issue seems to be the patient undergoing a vaginal birth after having a cesarean section in 1999. According to Dr. Alvarez, based on plaintiff's deposition and the medical records, plaintiff was repeatedly advised of the risks, benefits and alternatives of having a vaginal birth after a C section. She repeatedly expressed her desire to deliver vaginally if possible and at no point did she request a cesarean section. Dr. Alvarez opines that a reasonable person having been advised of the risks and alternatives of having a VBAC and repeatedly indicating her desire to have a VBAC could have consented to a vaginal delivery. Additionally, the experts opine that the infant suffered no injury as a result of the vaginal delivery. The Court finds that movants have also established a prima facie case for summary judgment on the informed consent claim.

The third cause of action for spoliation of records is dismissed as the Court of Appeals has rejected the recognition of this as an independent tort. See Ortega v. City of New York 9 N.Y.3d 69, (2007). Furthermore, this appears to the Court to be a boilerplate cause of action. There is no factual basis for this claim as there are no missing records.

In opposition, plaintiff argues that there are triable issues of fact regarding causation and whether the defendant has complied with the applicable standard of care warranting a jury trial. In support of the opposition, plaintiff argues that their

experts, Dr. Bruce Hallbridge, Dr. Daniel Adler, Dr. Stuart Danoff, and Dr. Gregory Lawler have reviewed the relevant files and medical records and have determined, to a reasonable degree of medical certainty that defendant committed departures from good and accepted standards of care and that these departures were a proximate cause of the injuries. Plaintiff argues that there are questions of fact raised as to whether there was a bleed within the brain that could be consistent with a hypoxic ischemic event, whether a VBAC was contra indicated given the mother's medical history, whether brain damage is demonstrated by radiology reports and the EEG and whether such damage was the result of a traumatic vaginal birth and not any metabolic disorder.

Defendants argue that plaintiff's opposition to the motion must be disregarded as untimely. The motion was returnable on May 24th, 2013 and, at plaintiff's request, was adjourned to August 13, 2013 with opposition to be served on or before July 19, 2013. Instead, plaintiff again requested a further adjournment which was stipulated to. The stipulation specifically stated plaintiff would serve opposition papers on or before September 13th. September 13th came with no opposition being received. On September 26th, plaintiff's counsel's office requested a further adjournment. Although movants would not agree to another adjournment plaintiff's counsel submitted opposition on October 4th. The motion was adjourned to January 10th to allow movant to submit reply papers.

Initially, plaintiff's second cause of action for lack of informed consent is dismissed. Montefiore demonstrated its entitlement to summary judgment on this

issue via Dr. Alvarez's expert affirmation and plaintiff's opposition offered no opposition to said claim. As such, summary judgment is appropriate. Furthermore, plaintiff did not oppose that portion of the motion seeking a dismissal of the third cause of action for spoliation of evidence. As such summary judgment is appropriate for that claim.

The physical examination report of the infant by Dr. Adler and the affirmation of Dr. Lawler which includes an interpretation of an MRI taken of the infant's head on July 10th will not be considered by this Court. The physical examination was performed while this motion was pending and did not exist at the time the Note of Issue was filed. Similarly, the interpretation of the MRI taken on July 10th was conducted while the motion was pending and seven months after the Note of Issue was filed. Despite being demanded on multiple occasions, Dr. Adler's examination report was never exchanged other than being attached to an exhibit in the plaintiff's opposition herein. Montefiore has informed the Court that despite multiple requests it has never received a copy of the MRI, never been given a copy of the official interpretations of the study or medical records from the facility where it was performed, have never been given authorizations for the records of the facility where the MRI was performed nor for the records of the physician who requested the study.

The Court precludes this expert evidence because the Court finds that there was a willful failure to disclose the testimony and resultant prejudice to the defendants. See Rojas v. Palese 74 A.D.3d 557 (1st Dept. 2012). Here, the infant was examined by an expert who created a report for this motion. Despite the fact

that the report should have been exchanged under the CPLR and had been demanded by defendant the reports concerning the MRI has never been exchanged and no authorization for the production of it has been provided. Therefore, preclusion is appropriate. Because the motion was timely made after the plaintiff filed a Note of Issue and neither of these examinations were yet conducted any reference to them are discounted. The Court finds that defendant was entitled to rely on plaintiff's statement in the Note of Issue that discovery including physical examinations was complete. Furthermore, the defendants are entitled to rely upon the plaintiff fulfilling his obligations to provide updated medical records and authorizations especially when plaintiff is using them for opposition to a motion.

Both Dr. Danoff and Dr. Adler opine that the infant's injuries were caused by head compression during the labor and delivery. Movants argue that plaintiff has offered two conflicting theories that either trauma from head compression (supported by Dr. Hallbridge) or hypoxic injury caused plaintiff's injuries herein.

Movants argue that Dr. Hallbridge's opinion that a VBAC was contraindicated should be rejected as he is silent as to the fact that Ms. Joaquin did not have a traumatic delivery, that no instrumentation was necessary to effect a vaginal delivery, that the infant was born in otherwise normal condition with perfect Apgar scores normal cord blood gas, and no signs of compromise either at birth or for 24 hours of life following. There is no explanation for how there could be a hypoxic brain injury in the face of no signs of depression, normal Apgar scores and cord gas values. Additionally, there is no indication as to when any of the purported injuries to the

infant occurred.

While Dr. Hallbridge claims that a C section should have been performed as of 8:00 p.m. there is no indication that any hypoxic injury occurred nor that any trauma occurred between 8:00 p.m. and the delivery. Concerning Dr. Danoff, who opines that the infant's seizure disorder was a result of brain damage occurring during labor and delivery the Court notes that there is a failure to explain how the small amount of subdural blood which quickly resolved caused the alleged disorder or brain damage. While he opines that a finding of a subdural hematoma is an indication that the infant could have suffered brain damage he does not state that it is his opinion, to a reasonable degree of medical certainty, that the infant suffered brain damage from a hematoma herein only that he "could have". This is speculative by definition and insufficient to create a question of fact to defeat the instant motion.

Furthermore, this doctor also discounts the fact that the infant had normal Apgars, was not depressed at birth and had normal cord blood gas. No expert for plaintiff has addressed movant's experts opinions that for there to have been any type of hypoxic brain damage or brain injury from the labor and delivery the infant must show signs of depression which he did not. Dr. Lawler opines that there was evidence of hypoxic injury yet he too fails to explain or address how the infant's condition at the time of birth does not meet nationally accepted criteria for a perinatal hypoxic injury. Plaintiff's opposition is confusing. Plaintiff argues both that trauma caused the injury and that there was a hypoxic injury. As these are two different things, plaintiff's affirmations are contradictory. Drs. Hallbridge, Danoff and Adler

opine that head compression caused the injury herein but plaintiff's fourth expert, Dr. Lawler, states that the cause of the injuries is hypoxia. The opinions contradict each other and are insufficient to link departure and proximate cause.

In sum, Montefiore is entitled to summary judgment. The evidence shows that the infant was born with Apgars of 9/9 and normal cord gas which are incompatible and inconsistent with any type of hypoxic ischemic injury. Furthermore, plaintiff's opposition contradicts itself with a neuroradiology expert stating that the infant suffered a hypoxic injury while three clinical experts do not state that there was hypoxic injury but in fact state that there was a compression injury. For these reasons, the Court finds that plaintiff has failed to create any real questions of fact herein and that summary judgment is warranted. The case is dismissed.

So ordered.

Dated: 3/17/16



Douglas E. McKeon, J.S.C.