D.H. v Medows
2017 NY Slip Op 32896(U)
November 17, 2017
Supreme Court, Kings County
Docket Number: 4080/11
Judge: Michelle Weston

At an IAS Term, Medical Malpractice Early Settlement Part 5 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 320 Jay Street, Brooklyn, New York, on the 17th day of November, 2017.

PRESENT:

HON. MICHELLE WESTON,
Justice.

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D.H., an Infant, by KENISHA HOPKINS, his Parent and Natural Guardian, and KENISHA HOPKINS, Individually,

Plaintiffs,

- against -

MARSHA MEDOWS, M.D., OSKAR SALAMAN, M.D., CECIL GRIMES, M.D., and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

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DECISION AND ORDER

Index No. 4080/11

Mot. Seq. No. 2-3

The following papers numbered 1-8 read herein:	Papers Numbered
Notice of Motion/Cross Motion and Affirmations (Affidavits) Annexed	1-3, 4-7
Reply Affirmation	8

This is an action to recover damages for medical malpractice. The plaintiffs allege that the defendants negligently cared for and treated the infant plaintiff from December 26, 2009, through December 30, 2009, at Woodhull Hospital in Brooklyn (Woodhull Hospital). Specifically, the plaintiffs allege that the defendants were negligent in, among other things, failing to diagnose and properly treat the infant plaintiff's otitis media and mastoiditis, and that such failure rendered the infant plaintiff blind in both eyes. The defendants move for partial summary judgment dismissing any and all claims related to the infant plaintiff's bilateral blindness. The plaintiffs cross-move for an order, pursuant to General Obligations

Law (GOL) § 3-111, striking the defendants' affirmative defense which seeks to impute to the infant plaintiff the alleged negligence of his parents.

The Defendants' Motion

The defendants contend that the infant plaintiff's subsequent inpatient treatment at nonparty Children's Hospital of the King's Daughter Health System in Norfolk, Virginia (Children's Hospital), from December 31, 2009, to January 21, 2010 (the subsequent hospitalization), for the same conditions for which he was initially treated at Woodhull Hospital (*i.e.*, otitis media and mastoiditis), was the sole proximate cause of his blindness. According to the defendants' expert neuro-ophthalmologist, Children's Hospital was grossly negligent in failing to immediately perform a lumbar puncture (LP) on the infant plaintiff. As the defense expert maintains in ¶¶ 49-50 of his affidavit:

> "The inaction and improper medical treatment by the doctors at Children's Hospital is quite shocking. Pseudotumor cerebri caused [the infant plaintiff's] blindness. The doctors at Children's Hospital failed to recognize obvious signs that an infant with otitis media, a venous sinus thrombosis (the cerebrospinal fluid drains into the venous sinus) coupled with papilledema is strongly suggestive of pseudotumor cerebri requiring a lumbar puncture to obtain the confirmatory diagnosis. . . . [D]uring the infant-plaintiff's [subsequent hospitalization] in January 2010, not only did he have a venous sinus thrombosis and papilledema, but persistent 6th CN [cranial nerve] palsy, headaches, blurry vision and diplopia. This entire picture should have immediately alerted the doctors at Children's Hospital enough to at the very least perform a lumbar puncture early on.
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> . . . The lumbar puncture is important because the puncture itself can relieve some of the pressure, and measurement of the

> ICP will determine whether the increased ICP is being caused by a pseudotumor cerebri (otitic hydrocephalus), especially when an MRI and other imaging have ruled out a brain lesion and general hydrocephalus. Even pediatricians should be able to diagnose and treat pseudotumor cerebri . . . since otitic hydrocephalus/pseudotumor cerebri occurs with otitis media."

The plaintiffs' expert neuro-ophthalmologist disputes the opinion of the defendants' expert. According to the plaintiffs' expert neuro-ophthalmologist (in ¶ 33 of the expert's affidavit), "an LP [lumbar puncture] was not indicated for suspicion of pseudo-tumor as throughout the course of [the infant plaintiff's subsequent hospitalization], he never demonstrated more than trace to very mild papilledema, indicating there was no threat to his vision due to pseudo-tumor." As the plaintiffs' expert neuro-ophthalmologist explains (in ¶¶ 41-45 of the expert's affidavit):

> "Although [the infant plaintiff's] medical course was complex, the sequence of medical events and the ultimate cause of his blindness is not. The process began with a middle ear infection [otitis media], which led to mastoiditis, an infection of the bony space behind the ear, that was incompletely treated at Woodhull Hospital. His infection then extended to involve the mastoid bone itself and ultimately caused a pocket of infection between that bone and the brain (an epidural abscess), which was seen on the CT scan of December 31, 2009, at Children's Hospital [at the inception of the subsequent hospitalization]. Inflammation of the adjacent vein (the transverse sinus) caused it to become clotted as seen in the MRI of January 3, 2010. This venous sinus thrombosis was clearly caused by [the infant plaintiff's] incompletely treated mastoid infection at Woodhull Hospital[,] which [infection] propagated and spread[,] and that led to otitic hydrocephalus, pseudotumor, which caused his blindness. Had [the infant plaintiff's] mastoid infection been adequately treated at Woodhull Hospital, he would not have ultimately suffered blindness.

> "There are two possible reasons to perform an LP. One is for diagnosis and the other is as therapy. [The infant plaintiff's] signs and symptoms (headache, papilledema and 6th NP [nerve palsy]) were all explainable based on the MRI finding of a clot in the venous sinus [during the subsequent hospitalization]. Therefore an LP was not indicated for diagnosis. As for the possible therapeutic benefits of an LP, the indication would depend on the possibility of impending visual loss. If the treating physicians thought that [the infant plaintiff's] vision were threatened, then an LP would have been advisable to lower that risk. Since the risk of visual loss is related to the severity of the papilledema, and his was mild, an LP was not indicated. . . . [B]ecause [the infant plaintiff] did not demonstrate anything more than trace to 1+ papilledema, a lumbar puncture was not indicated during his [subsequent hospitalization].
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> "For these reasons, I disagree with the opinion of defendants' expert . . . that a lumbar puncture was indicated."

At issue in this case is whether the failure of the physicians at Children's Hospital to perform a lumbar puncture on infant plaintiff during his subsequent hospitalization was so contraindicated and harmful as to break the causal chain between Woodhull Hospital's negligence (which is expressly assumed for purposes of the defendants' motion) and the infant plaintiff's ultimate injuries (bilateral blindness). The general rule of successive and independent liability is that "the initial tort-feasor may well be liable to the plaintiff for the entire damage proximately resulting from his [or her] own wrongful acts, including aggravation of injuries by a successive tort-feasor" (*Ravo v Rogatnick*, 70 NY2d 305, 310 [1987] [internal citation omitted]). A narrow exception to the general rule is the concept of an intervening or superseding cause. "If the intervening act is extraordinary under the circumstances, unforeseeable in the normal course of events, or independent of the

defendants' conduct, it may be a superseding act which breaks the causal nexus" (*Megally v LaPorta*, 253 AD2d 35, 43 [2d Dept 1998]).

Defendants fail to demonstrate the applicability of this exception here. Specifically, defendants fail to show that (1) it was extraordinary and unforeseeable in the normal course of events that Children's Hospital would fail to perform a lumbar puncture during the infant plaintiff's subsequent hospitalization for otitis media and mastoiditis, or (2) Children's Hospital's failure to perform a lumbar puncture produced injuries that were different in kind than those which would normally have been expected from the defendants' own failure to properly treat the infant plaintiff for the same conditions.

In this vein, there have been cases in which the subsequent treatment was so contraindicated and harmful as to raise an intervening or superseding cause defense. For example, in *DePesa v Westchester Square Med. Ctr.*, 239 AD2d 287, 288-289 (1st Dept 1997), the proof was that a subsequent healthcare provider "had administered almost double the amount of fluids that decedent could output, resulting in congestive heart failure and her ultimate demise," and "that such intervening negligence would not have been foreseeable by a reasonably prudent person." Here, however, Children's Hospital's failure to diagnose the infant plaintiff's increased intracranial pressure by performing a lumbar puncture on him during his subsequent hospitalization was not extraordinary because his papilledema was repeatedly rated at trace to very mild. Moreover, Children's Hospital's failure to perform the lumbar puncture was not an event that produced harm different in kind than that which would have been expected from Woodhull Hospital's failure to complete the treatment of the infant

plaintiff's otitis media and mastoiditis. The fact that Children's Hospital may share some responsibility for the infant plaintiff's blindness does not absolve Woodhull Hospital from liability because "there may be more than one proximate cause of an injury" (*Mazella v Beals*, 27 NY3d 694, 706 [2016] [internal quotation marks omitted]).

It is well established that "issues of proximate cause are generally fact matters to be resolved by a jury" (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 659 [1989]), unless the acts or omissions of the intervening party are independent or so far removed that they do not flow from the original negligence. Although this case presents facts that may persuade a jury to make such a finding, the defendants have failed to establish that there are no genuine issues of disputed facts regarding proximate cause and that they are entitled to summary judgment on that issue as a matter of law. If a jury finds malpractice by the defendants, it is in the jury's province to consider proximate cause. The defendants' motion for partial summary judgment dismissing any and all claims related to the infant plaintiff's blindness is denied.

Plaintiffs' Cross Motion

Plaintiffs cross-move for an order, pursuant to GOL 3-111, striking the defendants' affirmative defense which seeks to impute to the infant plaintiff the alleged negligence of his parents. GOL 3-111 provides that "[i]n an action brought by an infant to recover damages for personal injury the contributory negligence of the infant's parent or other custodian shall not be imputed to the infant." As defendants conceded at oral argument, the infant plaintiff's parents' alleged negligence, including the father's decision to take his child back to Virginia

upon discharge from Woodhull Hospital on December 30, 2009, may not be imputed to the infant plaintiff to diminish his recovery against the defendants (*see Ferguson v Iqbal*, 33 AD3d 657 [2d Dept 2006]). However, contrary to defendants' contention, the fact that the father, who was visiting New York City for Christmas Day, would choose to take his child back to his hometown and have the child's primary care physician and/or nearby hospital continue the child's treatment, rather than continue treatment at Woodhull Hospital, was "not of such an extraordinary nature or so attenuate[d] the defendant[s'] [alleged] negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant[s]" (*see Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]). Although the alleged negligence of the infant plaintiff's parents may not be imputed to the infant plaintiff to diminish his recovery against the defendants, the reach of GOL 3-111 is not so broad as to preclude the defendants, in the liability phase of the trial, from arguing to the jury any alleged acts or omissions of the infant plaintiff's parents (*see Vaughan v Saint Francis Hosp.*, 29 AD3d 1133, 1137 [3d Dept 2006]).

Conclusion

Accordingly, the defendants' motion for partial summary judgment dismissing any and all claims related to the infant plaintiff's blindness is denied.

The plaintiffs' cross motion for an order, pursuant to GOL 3-111, striking the defendants' affirmative defense which seeks to impute to the infant plaintiff the alleged negligence of his parents is granted to the extent that such defense is stricken insofar as it seeks *to diminish the infant plaintiff's recovery against the defendants*.

This constitutes the decision and order of the Court.

The plaintiffs' counsel is directed to serve a copy of this decision and order with notice of entry on the defendants' counsel.

ENTER,

Michelle Weston

J. S. C.

Hon. Michelle Weston