

T.B. v Boggio
2018 NY Slip Op 31558(U)
February 9, 2018
Supreme Court, New York County
Docket Number: 805422/14
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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T.B., JR., an infant by his mother and natural guardian,
ANGEL WELLS, and ANGEL WELLS, individually,

Index No. 805422/14

Plaintiffs,
- against -

DECISION

NELLY T. BOGGIO, M.D., MOUNT SINAI ROOSEVELT
HOSPITAL, MOUNT SINAI HOSPITALS GROUP, INC.
and MOUNT SINAI HEALTH SYSTEM, INC.,

Defendants.
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In this medical malpractice action, defendants Nelly T. Boggio, M.D. (Dr. Boggio), Mount Sinai Roosevelt Hospital s/h/a Mount Sinai, Roosevelt Hospital; Mount Sinai Hospitals Group, Inc.; and Mount Sinai Health System, Inc. (MSRH) (collectively defendants), move pursuant to CPLR 3212 for summary judgment dismissing the complaint. Plaintiffs T.B., Jr., an infant by his mother and natural guardian, Angel Wells, (infant plaintiff) and Angel Wells, individually (collectively plaintiffs) oppose the motion.

BACKGROUND

This action arises from the infant plaintiff's alleged improperly performed circumcision. Non-party Dr. Adia Kelly, then a resident (O'Sullivan Reply Aff., ¶14), performed the circumcision at MSRH on June 4, 2014 during the course of the infant plaintiff's newborn admission. Although not stated in the moving affirmation and expert affidavit, defendants' answer indicates that Dr. Boggio was an attending pediatrician and MSRH staff member (Motion at Exh. B, ¶3). The medical records indicate that she was the attending physician for the circumcision (*id.* at Exh. E).¹

¹ The transcript of Dr. Boggio's deposition was not available to defense counsel at the time they served this motion and therefore it is not part of the record.

The medical records, including nursing notes, indicate that the infant plaintiff was stable after the procedure and had minimal bleeding. Subsequent notes indicate that he had no bleeding and was voiding appropriately. Unfortunately, after being discharged the infant plaintiff was re-admitted on June 14, 2014 for pneumonia and again on July 12, 2014 for apnea. Genitourinary physical exam findings noted during both of these admissions were normal. At routine check ups on July 18, 2014 and August 15, 2015 there were no complaints and all findings were normal.

On September 22, 2014 the infant plaintiff presented to the Surgical Clinic of Harlem Hospital for evaluation of an abnormal meatal opening/second opening with dimpling on the left side of the glans. The assessment at that time was a mild glandular hypospadias with a possible fistulous tract/opening on the left side of the glans. The infant plaintiff was referred to Dr. Jeffrey Stock (Dr. Stock), a pediatric urologist at Mount Sinai Hospital, who ultimately diagnosed him with having an "ectopic abortive urethral duplication". Dr. Stock performed a corrective surgery on March 1, 2016 involving "excision of accessory duplicating urethra (urethrectomy)" (*id.*, second supplemental bill of particulars at Exh. D, ¶3).

The complaint alleges causes of action for medical malpractice, lack of informed consent and a derivative claim on behalf of the infant plaintiff's mother, Angel Wells (Wells). Plaintiffs' bill of particulars states that the infant plaintiff sustained the following injuries as a result of the circumcision: "Penis: permanent disfigurement. Two holes in penis. Permanent disfiguring scarring. Loss of skin. Skin tags. Skin bridges. Infection with pus discharge. Humiliation. Emotional distress. Nervousness. Tension. Embarrassment (sic). Anxiety. Psychological harm/trauma. Depression.

Traumatization. Frustration. Mental anguish." (*id.*, verified bill of particulars at Exh. D, ¶(3). Plaintiffs allege that the March 1, 2016 surgery Dr. Stock performed caused permanent scarring and state that further treatment and/or surgery will be necessary for the rest of the infant plaintiff's life (*id.*, second supplemental bill of particulars at Exh. D, ¶(3).

EXPERTS' CONTENTIONS

In support of their motion for summary judgment dismissing the complaint, defendants submit an expert affirmation from Ellen Shapiro, M.D. (Dr. Shapiro), a physician who is board certified in urology and pediatric urology (*id.* at Exh. M). Dr. Shapiro sets forth within a reasonable degree of medical certainty that the care and treatment defendants rendered was in accordance with good and accepted medical practice and did not proximately cause the infant plaintiff's alleged injuries. Dr. Shapiro further opines that defendants obtained Wells' informed consent for the procedure. She states in relevant part that:

- the "duplicated" or "accessory" urethra Dr. Stock found is a congenital condition having nothing to do with the circumcision;
- Dr. Stock's operative report reflects that the duplicated/accessory urethra was small in circumference but had more significant depth as it extended down to the penoscrotal junction, which is inconsistent with an injury caused by an improperly performed circumcision. Rather, had the infant plaintiff sustained an injury to his penis secondary to an improperly performed circumcision, the hole would have a significant depth instead of a small hole or opening at the surface;
- the medical records indicate the procedure was performed without complications and there was no post-operative bleeding from the site, which is also inconsistent with an injury to the penis, which is very vascular;

- even if it were possible that the circumcision caused the infant plaintiff's duplicated/accessory urethra, the care and treatment defendants' provided was in accordance with good and accepted medical practice since injury to the penis is an inherent risk of any circumcision; and
- the consent form Wells signed prior to the procedure disclosed the risks of "bleeding, infection, damage to penis, undesirable cosmetic results."

In opposition, plaintiffs submit an affidavit from David Shusterman, M.D. (Dr.

Shusterman), a board certified urologic surgeon, who avers within a reasonable degree of medical certainty that defendants deviated from the applicable standards of good and accepted medical and surgical care. Having himself examined the infant plaintiff on September 12, 2017, he concludes the following:

- Dr. Shusterman concurs with Dr. Shapiro's conclusion that the infant plaintiff was born with a congenital defect resulting in a duplicated urethra, however, the circumcision "resulted in independent scarring and deformity of the penis, resulting in a curvature of the penis";
- the hole of the secondary urethra is larger than would normally be expected, as evidenced by attached photos, indicating that defendants caused and created additional damage to the second hole during the circumcision; and
- if performed properly, a circumcision should not result in scarring or deformity.

In reply, defendants claim that Dr. Shusterman's affidavit is insufficient to raise any issue of fact warranting a trial. They note that allegations regarding curvature of the infant plaintiff's penis have never been alleged until now, nor is there any indication in the medical records that his penis was curved from the date of the circumcision to the date of the corrective surgery. That the infant plaintiff may now have a curved penis is irrelevant to the claims herein.

With regard to Dr. Shusterman's allegations that the circumcision caused independent scarring, deformity and curvature of the penis, defendants respond that plaintiffs' expert fails to describe the purported scarring and deformity, or indicate where it is located, its size or how the circumcision proximately caused it. Moreover, the records indicate that the only problem with the infant plaintiff's penis prior to the March 2016 corrective surgery was the duplicated urethra; there is no indication of any scarring or deformity between the date of the circumcision and the date of the corrective surgery. As to the claim that the secondary urethra's opening was larger than would normally be expected, defendants find this conclusory since Dr. Shusterman does not state what size is "normal".

DISCUSSION

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept), *aff'd* 62 NY2d 938 (1984); *Andrea v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

In deciding the motion, the court views the evidence in the light most favorable to the nonmoving party and gives him the benefit of all reasonable inferences that can be

drawn from the evidence. See *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 (1985). Moreover, the court should not pass on issues of credibility. *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad, supra*), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 (1977); see also, *Friends of Animals, Inc., supra*.

Medical Malpractice

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]). "The elements of a cause of action to recover damages for wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the patient's death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of patient and (4) the appointment of a personal representative of the patient" (*Chong v New York City Tr. Auth.*, 83 AD2d 546, 547 [2d Dept 1981]).

When a defendant has met its burden of showing entitlement to judgment "[i]n a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact" (*id.* at 419-420 [internal quotation

marks and citation omitted)). Specifically, a plaintiff must offer expert support that is neither conclusory nor based upon mere speculation (see *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357, 357 [1st Dept 2006] [defendant's motion for summary judgment was granted where "plaintiff's expert offered only conclusory assertions and mere speculation that her cancer would have been discovered earlier and would not have spread if appellants had more aggressively pursued her, and expedited and tracked her follow-up visits more actively"])).

Here, plaintiffs deny that defendants met their burden of proof. While plaintiffs claim defendants' showing is insufficient to shift the burden of proof to them and warrants denial of their summary judgment motion, nonetheless, in the event this court determines otherwise, plaintiffs argue that Dr. Shusterman's affidavit raises issues of fact as to whether defendants departed from the applicable standard of care, thus warranting a trial.

Defendants have more than adequately met their initial burden by submitting Dr. Shapiro's affidavit, which explains in detail how she reached her conclusion that the circumcision in question was not improperly performed. Accordingly, the burden now shifts to plaintiffs to demonstrate an issue of fact.

This court finds that no issues of fact exist with respect to plaintiffs' medical malpractice cause of action. Dr. Shapiro's affidavit establishes that defendants' care and treatment of the infant plaintiff did not depart from the standard of care. Dr. Shusterman does not address her opinion that the size of the secondary urethra's hole was not consistent with having resulted from an improperly performed circumcision. Nor does he address the lack of any post-surgical complications which might indicate an

injury to the penis. Finally, he does not refute that, even if Dr. Kelly performed the circumcision negligently that injury to the penis is an inherent risk of any circumcision.

Dr. Shusterman's affidavit is in fact conclusory and speculative. As noted in defendants' reply, plaintiffs' allegations regarding curvature are raised for the first time in opposition to summary judgment. In any event, the claim that the circumcision "resulted in independent scarring and deformity of the penis, resulting in a curvature of the penis" is unsupported by the medical records, which lack any indication of scarring or deformity between the time of the circumcision and the time of the corrective surgery. Finally, Dr. Shusterman appears to merely guess that defendants caused and created additional damage to the secondary urethra opening during the circumcision.

Plaintiffs' expert thus fails to rebut Dr. Shapiro's opinion that there was no departure from the accepted standard of care with respect to the circumcision. Summary judgment is thus granted in defendants' favor dismissing the medical malpractice cause of action.

Informed Consent

As stated in *Colarusso v Lo*, 42 Misc3d 1210(A), 2013 WL 6985388, [*5] (Sup Ct, NY County, Schlesinger, J.S.C.):

Claims of lack of informed consent are statutorily defined. Pub. Health § 2805-d. The law requires persons providing professional treatment or diagnosis to disclose alternatives and reasonably foreseeable risks and benefits involved to the patient to permit the patient to make a knowing evaluation. *Id.* § 2805-d(1).

To prevail on a lack of informed consent cause of action a plaintiff must establish the following:

(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury. The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury (citations omitted).

Figueroa-Burgos v Bieniewicz, 135 AD3d 810, 811-812 (2016).

Here, defendants cite the consent form Wells signed, which states that the risks attendant to a circumcision include: "bleeding, infection, damage to penis, undesirable cosmetic results" (Motion at Exh. F). However, Wells testified at her deposition that the form she signed was blank and the foregoing language, including her name, was hand written on it after she signed it. She also averred that if she had seen the hand written language prior to signing the form, she would have corrected her name from "Angela" to "Angel". Finally, Wells stated that she was told she was merely signing a consent for a blood transfusion, rather than the circumcision.

Defendants' reply does not address plaintiffs' arguments regarding this cause of action. Wells' testimony creates an issue of fact which must be resolved by a jury. Accordingly, the branch of defendants' motion seeking summary judgment dismissing the claim for lack of informed consent is denied.

For the foregoing reasons, it is

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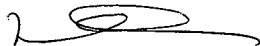
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ORDERED that defendants' motion is granted to the extent that the first and third causes of action are dismissed, and is denied with respect to the second cause of action alleging lack of informed consent.

Counsel for the parties are directed to appear for a pre-trial conference at Part 1 MMSP, 60 Centre St., Room 325, New York, New York on March 6, 2018 at 9:30 a.m. In the event that no settlement can be reached, counsel shall be prepared on that date to stipulate to a firm trial date in Part 40 TR.

The foregoing is this court's decision and order.

Dated: New York, New York
February 9, 2018



Hon. Martin Shulman, J.S.C.