

Altman v Horwitz

2018 NY Slip Op 32954(U)

November 9, 2018

Supreme Court, Kings County

Docket Number: 507624/13

Judge: Bernard J. Graham

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At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of November, 2018.

P R E S E N T:

HON. BERNARD J. GRAHAM,
Justice.

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STACI H. ALTMAN, Individually and as Mother and natural guardian of BA, an Infant under the age of five years,

Plaintiffs,

- against -

Index No. 507624/13

DAVID A. HORWITZ, M.D., SOL S. ZIMMERMAN, M.D., PEDIATRIC ASSOCIATES OF NEW YORK CITY, P.C., RABBI ELIYAHU SHAIN AND NEW YORK UNIVERSITY MEDICAL CENTER,

Defendants.

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The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Cross Motion and Affidavits (Affirmations) and Exhibits Annexed_____

70-87

Opposing Affidavits (Affirmations)_____

120-127

Reply Affidavits (Affirmations)_____

131-137

Upon the foregoing papers, defendants David A. Horwitz, M.D., Sol S. Zimmerman, M.D., and Pediatric Associates of New York City, P.C. (collectively referred to as Pediatric Associate Defendants), move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint as against them (Motion Sequence Number 7).

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The Pediatric Associate Defendants' motion is denied. As this court, in an order entered on May 2, 2018, granted the motion of NYU Hospitals Center s/h/a New York University Medical Center (NYU) to discontinue and dismiss the action as against it with prejudice (NYSCEF Doc. No. 138), the action is severed accordingly and the caption is amended to read:

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STACI H. ALTMAN, Individually and as Mother
and Natural Guardian of BA, an Infant under the
age of five years,

Plaintiffs,

- against -

Index No. 507624/13

DAVID A. HORWITZ, M.D., SOL S. ZIMMERMAN,
M.D., PEDIATRIC ASSOCIATES OF NEW YORK
CITY, P.C., AND RABBI ELIYAHU SHAIN,

Defendants.
-----X

Plaintiffs allege that the infant plaintiff BA suffered injuries as the result of the failure of Dr. Horwitz and Dr. Zimmerman to diagnose that BA suffered from mild hypospadias¹ before BA was circumcised at a bris performed by defendant Rabbi Eliyahu Shain, a mohel. BA was born at NYU in 2009. Drs. Horwitz and Zimmerman had been the family pediatricians for plaintiff Staci Altman's other children, and it was Dr. Horwitz who

¹ At his non-party deposition, Howard Ginsburg, M.D., described hypospadias as a condition of the penis in which the meatus, or opening of the urethra, is not located at the tip of the penis, but rather, is located at the ventral or bottom side of the penis.

conducted the first pediatrician examination of BA at NYU following BA's birth. In connection with his physical examination of BA's genitalia, Dr. Horwitz's notes indicate that BA had normal external male genitalia with bilateral descended testes. Based on his examination of BA before BA's discharge from NYU the next day, Dr. Zimmerman also noted that BA had normal genitalia.

Following BA's discharge, Rabbi Shain circumcised BA at a bris performed seven days after BA was born. The day after the bris, Dr. Zimmerman examined BA, but did not examine BA's penis because the bandage applied following the circumcision was still in place. Almost three weeks later, Dr. Horwitz examined BA, diagnosed a mild hypospadias along with a possible chordee,² and referred BA to Howard Ginsburg, M.D., a urologist, to evaluate the hypospadias.

Shortly after the referral, Dr. Ginsburg performed his initial evaluation of BA, and diagnosed plaintiff with a glandular hypospadias. Dr. Ginsburg's notes from this examination indicate that he would consider surgery, if necessary, when BA was at least six-months old. BA's parents ultimately elected to proceed with surgery to repair the hypospadias. In his examination notes from the surgery performed on October 6, 2010, Dr. Ginsburg indicated that there was "no significant chordee," which, at his deposition, he testified meant that there might have been a minimal amount of chordee. Dr. Ginsburg's

² As described by Martin Winick, M.D. in his November 2017 affirmation and Anatoly Belilovsky, M.D., in his March 15, 2018 affirmation, chordee is a condition where the head of the penis curves downward or upward and is often associated with hypospadias.

surgical notes indicate that the procedure went well, and the examinations, at the initial follow-up appointments, suggested that the surgery had been successful. However, the examination conducted on November 2, 2010 revealed that the meatus had reverted back to its original position, and that additional surgery would be required to repair the hypospadias. Plaintiffs assert that subsequent surgeries have also failed, that the hypospadias is unchanged, and that the meatus remains at the level of the corona and not at the tip of the penis.

Plaintiffs commenced the instant action in December 2013 with the filing of the summons and complaint. Plaintiffs allege that the Pediatric Associate Defendants committed medical malpractice when Dr. Horwitz and Dr. Zimmerman failed to diagnose BA's hypospadias during their initial examinations at NYU. According to plaintiffs' allegations, if Dr. Horwitz and Dr. Zimmerman had properly diagnosed the hypospadias, they would have recommended deferring circumcision until after evaluations by a urologist, and that the absence of the foreskin was a factor in the failure of the initial hypospadias' repair surgery performed by Dr. Ginsburg. In moving for summary judgment, the Pediatric Associate Defendants assert that there was no malpractice in failing to diagnose the hypospadias prior to the bris, and that, in any event, they assert that such a failure was not a proximate cause of BA's injuries.

"In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider 'departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's

injuries” (*Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1088 [2d Dept 2014], quoting *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012] [internal quotation marks omitted]; see *Dixon v Chang*, 163 AD3d 525, 526 [2d Dept 2018]). A defendant moving for summary judgment dismissing a medical malpractice action must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient’s injuries (see *Schwartzberg v Huntington Hosp.*, 163 AD3d 736, 737 [2d Dept 2018]; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 918 [2d Dept 2013]). “Once the health care provider has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden” (*Schmitt*, 121 AD3d at 1088; see *Schwartzberg*, 163 AD3d at 737; *Stukas v Streiter*, 83 AD3d 18, 30 [2d Dept 2011]).

In moving for summary judgment, the Pediatric Associate Defendants have submitted an affirmation from Karen Warman, M.D., a board certified pediatrician, and Martin Winick, M.D., a board certified surgeon who specializes in pediatric surgery. The court notes that the copies of the affirmations from Dr. Warman and Dr. Winick that were attached to the Pediatric Associate Defendants’ initial moving papers were not signed. The court, however, will consider said affirmations because the Pediatric Associate Defendants attached signed copies of the affirmations from Dr. Warman and Dr. Winick to their reply papers that are identical to the unsigned affirmations appended to the initial motion papers in all respects other than the addition of their respective signatures (see *Batts v Medical Express Ambulance*

Corp., 49 AD3d 294, 295 [1st Dept 2008]; *see also Solano v Ronak Med. Care*, 114 AD3d 592, 593 [1st Dept 2014]; *Matos v Schwartz*, 104 AD3d 650, 653 [2d Dept 2013]; CPLR 2001).

In her affirmation, Dr. Warman asserts that hypospadias can generally be immediately diagnosed if it is present because there is usually an incomplete foreskin when the condition exists. However, particularly in cases of mild hypospadias, Dr. Warman states that the presence of an intact foreskin can make it impossible to detect the hypospadias. This, according to Dr. Warman, is because the foreskin of a newborn is usually very tight and cannot be fully retracted to see if the meatus is displaced. Indeed, Dr. Warman asserts that it would be a departure from accepted medical practice to attempt to fully retract the foreskin because it would be difficult and painful for the infant. Dr. Warman opines that, under the circumstances here, where the hypospadias was not observed by Dr. Horwitz, Dr. Zimmerman and the nursing staff at NYU, who each noted normal genitalia, the hypospadias was not grossly observable, and the failure to detect the hypospadias before BA's circumcision was not a departure from accepted standards of medical practice.

In his affirmation, Dr. Winick makes similar observations, and also asserts that the failure to detect the hypospadias prior to BA's circumcision was not a proximate cause of any injury to BA in that, in view of Dr. Ginsburg's deposition testimony that there was sufficient foreskin remaining after the circumcision to perform his repair surgery, the failure of the repair surgery was caused by known and accepted complications of such surgery. The

Pediatric Associates Defendants have demonstrated, prima facie, both that there was no departure from accepted standards of medical practice and that any departure was not a proximate cause of BA's injuries through these expert affirmations, as well as the appended medical records and deposition testimony (*see Swartzberg*, 163 AD3d at 738; *Aliosha v Ostad*, 153 AD3d 591, 593 [2d Dept 2017]; *Senatore v Epstein*, 128 AD3d 794, 796 [2d Dept 2015]).

In opposition, however, plaintiffs have demonstrated factual issues warranting denial of the motion. In this regard, they have submitted an affirmation from Anatoly Belilovsky, M.D., a board certified pediatrician, who opines that, even where there is a complete foreskin, a pediatrician must still locate the meatus in order to rule out hypospadias. Dr. Belilovsky asserts that a complete or full retraction of the foreskin is generally not necessary to identify the location of the meatus, and that even if the meatus is not seen with a partial retraction of the foreskin, such a partial retraction will generally cause the foreskin to deviate ventrally, which is an indication of hypospadias. Moreover, if the meatus cannot be located through a partial retraction, Dr. Belilovsky opines that the proper standard of care requires that the pediatrician advise against circumcision and request a consultation with a pediatric urologist. Dr. Belilovsky asserts that the presence of mild or insignificant chordee also indicated the likelihood of hypospadias and should have led Drs. Horwitz and Zimmerman to recommend against circumcision prior to a consultation with a urologist. These assertions are sufficient to demonstrate the existence of a factual issue as to whether Dr. Horwitz and

Dr. Zimmerman's failure to identify the hypospadias during their initial examinations constituted a departure from accepted medical practice.

Dr. Belilovsky also opines that such a departure was a proximate cause of injury to BA. Pediatric Associate Defendants, however, object to consideration of Dr. Belilovsky's affirmation in this respect because he, unlike Dr. Winick, is not a pediatric surgeon, and he is thus not competent to render an opinion relating to whether the absence of a foreskin played a role in the failure of the repair surgery performed by Dr. Ginsburg. While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field (*see Fuller v Preis*, 35 NY2d 425, 431-433 [1974]; *Payant v Imobersteg*, 256 AD2d 702, 704-705 [3d Dept 1998]), "the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" (*Galluccio v Grossman*, 161 AD3d 1049, 1052 [2d Dept 2018], quoting *Postlethwaite v United Health Servs. Hosps.*, 5 AD3d 892, 895 [3d Dept 2005]; *see Tsimbler v Fell*, 123 AD3d 1009, 1009 [2d Dept 2014]). "Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered" (*Galluccio*, 161 AD3d at 1052 [internal quotation marks and citations omitted]; *see Tsimbler*, 123 AD3d at 1009).

Here, Dr. Belilovsky asserts that has treated 20 to 50 newborn males with hypospadias and that he has "familiarized [himself] with relevant literature from the American Academy of Pediatrics, the Cleveland Clinic and the National Center for Biotechnical Information, the

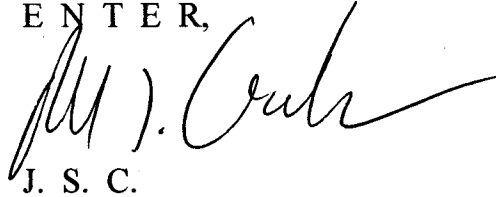
subject matter of which concerned hypospadias management, including diagnosis [and] surgical management” (Belilovsky Aff. at ¶ 3). Dr. Belilovsky further asserts that, based on his training and review of relevant literature, he was “familiar with the pediatric urological standards of care for the diagnosis, treatment and repair of hypospadias” (Belovsky Aff. at ¶ 4). These assertions are sufficient to establish Dr. Belilovsky’s familiarity with the applicable standards of care (*see Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017]; *DeGiorgio v Racanelli*, 136 AD3d 734, 737 [2d Dept 2016]; *Leavy v Merriam*, 133 AD3d 636, 637 [2d Dept 2015]; *Frank v Smith*, 127 AD3d 1301, 1303 [3d Dept 2015]; *Texter v Middletown Dialysis Ctr., Inc.*, 22 AD3d 831, 831 [2d Dept 2005]). Contrary to Pediatric Associate Defendants’ contentions, Dr. Belilovsky could lay the foundation relating to repair issues based on his representations regarding his review of relevant literature (*see Spensieri v Lasky*, 94 NY2d 231, 239 [1999] [although not directly admissible for its truth, Physician’s Desk Reference properly considered by expert in evaluating standard of care]; *Cummings*, 147 AD3d at 904; *see also Hinlicky v Dreyfuss*, 6 NY3d 636, 647 [2006]; *Tsimbler*, 123 AD3d at 1009 [suggests that physician may become familiar with standard of care through review of literature]). Having laid the foundation for his familiarity with the standard of care, any skill or expertise that Dr. Belilovsky may lack goes to the weight of his opinion as evidence, not its admissibility (*see Cummings*, 147 AD3d at 904; *Leavy*, 133 AD3d at 638; *Texter*, 22 AD3d at 831).

On the merits, Dr. Belilovsky states that the foreskin is commonly used during hypospadias repair surgery because it is “uniquely vascularized tissue.” According to Dr. Belilovsky, however, Dr. Ginsburg’s report indicated that the foreskin tissue that remained after the circumcision was “edematous” tissue. Dr. Belilovsky asserts that such edematous tissue contains excessive watery fluid, which compromises the vascular nature of such tissue, and makes it, unlike an intact foreskin, ineffective for purposes of a hypospadias repair. Accordingly, in Dr. Belilovsky’s opinion, Dr. Ginsburg’s attempted repair using such compromised tissue failed due to the lack of vascularized tissue, and that, once the initial repair effort failed, the chance of a successful subsequent repair substantially decreased. This court finds these non-conclusory assertions sufficient to demonstrate an issue of fact with respect to causation (*see Neyman v Doshi Diagnostic Imaging Servs., P.C.*, 153 AD3d 538, 544-546 [2d Dept 2017]; *Leto v Feld*, 131 AD3d 590, 592 [2d Dept 2015]; *Frank*, 127 AD3d at 1303; *Polanco v Reed*, 105 AD3d 438, 441-442 [1st Dept 2013]; *Poter v Adams*, 104 AD3d 925, 926-927 [2d Dept 2013]; *Olgun v Cipolla*, 82 AD3d 1186, 1187 [2d Dept 2011]; *Bell v Ellis Hosp.*, 50 AD3d 1240, 1242 [3d Dept 2008]), and thus, that the conflicting opinions of the experts present an issue of credibility that must be determined by a jury (*see Cummings*, 147 AD3d at 904; *Leto*, 131 AD3d at 592; *Poter*, 104 AD3d at 926).

In sum, the factual issues presented by Dr. Belilovsky's affirmation warrant denial of the Pediatric Associate Defendants' motion.

This constitutes the decision and order of the court.

ENTER,



J. S. C.

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