

H.L. v Poppas

2021 NY Slip Op 30919(U)

February 25, 2021

Supreme Court, New York County

Docket Number: 805365/2015

Judge: Judith Reeves McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDITH REEVES MCMAHON PART IAS MOTION 30

Justice

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<p>H. L., ALEXANDRA LANDEGGER,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>DIX POPPAS MD, WEILL CORNELL UROLOGY, WEILL CORNELL MEDICAL CENTER, THE NEW YORK AND PRESBYTERIAN HOSPITAL</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>INDEX NO. <u>805365/2015</u></p> <p>MOTION DATE <u>N/A</u></p> <p>MOTION SEQ. NO. <u>002</u></p>
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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 70, 71, 72, 73, 74

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents,

Defendants' motion seeking summary judgment pursuant to CPLR § 3212 on behalf of Defendants Dix Poppas, M.D., Cornell University ("Cornell"), and The New York and Presbyterian Hospital ("NYPH") and dismissal of Plaintiffs' complaint against said Defendants is denied.

This is an action for medical malpractice wherein Plaintiffs allege that Defendants negligently perforated Infant Plaintiff H.L.'s bladder and/or caused a leak in H.L.'s bladder during an open bladder biopsy and excision surgery performed by Dr. Poppas at NYPH on April 9, 2015. Plaintiffs further allege that the aforementioned procedure was unnecessary, and that Defendants failed to timely diagnose and properly repair the bladder leak.

Defendants now move for summary judgment to dismiss Plaintiffs' allegations against all Defendants.

"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 A.D.3d 15, 888 N.Y.S.2d 479 (N.Y.A.D. 1st Dept. 2009).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Rosario v. Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2nd Dept. 2020).

Defendants established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Saul Greenfield. *See Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008).

In support of Defendants’ summary judgment motion, Dr. Greenfield opined that “It is my opinion to a reasonable degree of medical certainty that the care rendered to H.L, by Dr. Poppas, Cornell, and NYPH was at all times appropriate and consistent with good and accepted medical practice. Dr. Poppas' treatment plan for H.L. was reasonable and appropriate based on his exam and evaluation of H.L. on March 17, 2015. Given H.L.'s reported hematuria, and the finding of blood mixed with urine and a small clot in his diaper, it was proper for Dr. Poppas to recommend a cystoscopy to try to determine the etiology of the hematuria as a urinalysis ruled out a UTI as the source of bleeding and hematuria is unusual in children of H.L.'s age.”

Dr. Greenfield stated that, “Dr. Poppas properly performed a cystoscopy and rectal disimpaction and rectal irrigation under general anesthesia on the infant with assistance from Dr. Lee on March 20, 2015 at NYPH.”

Dr. Greenfield further opined that, “H.L.'s options given the indeterminate pathology were observation versus obtaining a definitive diagnosis by either performing a repeat cystoscopy in an effort to obtain a better biopsy sample, or performing an open bladder excision..., it was reasonable and appropriate for Dr. Poppas to not recommend observation to plaintiffs and to instead recommend seeking a definitive diagnosis.”

On the issue of informed consent, Dr. Greenfield opined, “[P]laintiffs' informed consent was properly obtained by Dr. Poppas on April 1, 2015 in anticipation of the open bladder procedure. Dr. Poppas properly advised Ms. Landegger of the alternatives to an open bladder excision, namely observation and repeat cystoscopy; and properly advised Ms. Landegger that the risks associated with an open bladder excision include bleeding, infection, and bladder leak.”

On the issue of the treatment of H.L.'s vascular lesions, Dr. Greenfield concluded, "that it was not foreseeable that the highly vascular lesions in H.L.'s bladder would spontaneously resolve in less than three weeks between March 20, 2015 and April 9, 2015. Notably, given that the open bladder excision was indicated and appropriate, there was no reason for Dr. Poppas to perform an additional cystoscopy immediately before commencing the open bladder procedure as doing so would have been superfluous particularly given the small size of H.L.'s urethra and the reasonable belief that an open excision would be required anyway."

Lastly, Dr. Greenfield opined that, "that all care and treatment rendered to the infant in the ED and upon admission to NYPH on April 13, 2015 and April 14, 2015 was reasonable, appropriate, and in accordance with the standard of care."

"Once this showing has been made, a plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the defendant met the prima facie burden." *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Plaintiffs submitted an Affirmation from Dr. Michael C. Ost in Opposition to Defendants' motion.

In Opposition to Defendants' motion, Dr. Ost opined "the most concerning departure was performing an unnecessary and contraindicated open bladder biopsy if there was a concern for a urothelial cancer. It is my opinion to a reasonable degree of medical certainty that the appropriate standard of care when a urologist is concerned about a urothelial cancer is to perform a repeat cystoscopic biopsy; an open biopsy is contraindicated in that circumstance because the risk of tumor seeding outweighs the possible benefit of confirming a diagnosis... Accordingly, performing such an invasive procedure on a thickened bladder without prolonged post-operative decompression (i.e. Foley Catheter) unnecessarily exposed the infant plaintiff to complications including perforations and bladder leaks."

Dr. Ost also opined, "that Dr. Poppas failed to properly appreciate the findings of the March 20, 2015 cystoscopy (pertaining to the lesions) and the test results reported in the cytology and pathology reports, and that this constitutes another departure from good and accepted medical care... small vascular lesions often have no symptoms and do not pose a risk for mass spontaneous hemorrhage. In fact, small hemangiomas are known in the medical community to spontaneously resolve, which is exactly what Dr. Poppas observed with

the infant plaintiff's lesions when inspecting during the open biopsy. This further supports that there was no need to perform an open biopsy in this circumstance."

As to the bladder biopsies, Dr. Ost stated that, "I agree with Dr. Greenfield that Dr. Poppas properly performed the bladder biopsies in accordance with the standard of care. However, to a reasonable degree of medical certainty, I disagree with Dr. Greenfield's contention that the pathology results were 'indeterminate' because the biopsy samples did not include the underlying muscle of the infant plaintiff's bladder, and instead only included urothelial tissue... Dr. Poppas failed properly appreciate the test results as reflected in the cytology report and the pathology report contained in the infant plaintiff's medical records, that this failure represents a departure from good and accepted standards of medical practice, and that the departure was the proximate cause of injuries and damages to the infant plaintiff...the medical records regarding the tests the infant plaintiff underwent on March 20, 2015 clearly demonstrate that Dr. Poppas also did not properly appreciate the test results set forth in the cytology report and the pathology report. The pathology report clearly reflects that two specimens were 100% submitted, the 'midline posterior bladder biopsy' and the 'left lateral wall bladder'. The diagnosis for both specimens is 'Benign urothelial mucosa'.... Dr. Greenfield inaccurately opines that the pathology results were 'indeterminate' because the biopsy samples did not include underlying muscle, and instead only included urothelial tissue. This opinion is based on the pathology notes under each specimen clarifying that 'muscularis propria is not present for evaluation.' The underlying muscle is not integral in biopsies for diagnosing cancer, but rather for determining the staging of cancer, most often in adult cases and extrapolating to children as such cases in the pediatric population are rare."

As to the open bladder surgery, Dr. Ost opined that, "given that by the time Dr. Poppas recommended the open bladder surgery, he had no reason to suspect that the infant plaintiff's lesions were malignant, the standard of care entailed further observation, imaging (i.e. Ultrasound), and a repeat cystoscopy, since small hemangiomas are known to resolve spontaneously... The open hemangioma removal procedure was not only unnecessary, but contraindicated in light, not only of the invasive nature of the surgery, but also of the fact that if there had been a malignancy, performing an open bladder biopsy posed a risk of tumor seeding."

Dr. Ost concluded that, "when he presented in the emergency department with new or persistent pain, it would have been appropriate and within good and accepted standards of medical care for Dr. Poppas to have considered and tested for the possibility of complications related to the infant plaintiff's recent surgery. Dr. Poppas also failed to timely order necessary diagnostic testing and imaging studies to determine the

cause of the infant plaintiff's post-operative complaints and to timely and properly recognize, diagnose, and treat the infant plaintiff's perforated bladder, therefore causing infant plaintiff to need to undergo corrective surgery on April 14, 2015 with Dr. Poppas at defendant NYPH to repair the infant plaintiff's bladder leak... it was a deviation from good and accepted standard of medical care for Dr. Poppas not to prescribe the Ditropan to the infant plaintiff before he did; the infant plaintiff had been experiencing bladder spasms since the very first surgical procedure on April 9, 2015."

A plaintiff's expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

"In opposition, Plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that Defendant departed from the accepted standard of care." *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017).

There are questions of fact created by Plaintiffs' Expert, Dr. Ost, including, but not limited to the performance of an unnecessary open bladder biopsy and hemangioma removal surgery on April 9, 2015, the failure to obtain Plaintiffs' proper informed consent for the April 9th open biopsy procedure, negligently perforating and causing a leak in H.L.'s bladder, and the failure to timely diagnose and repair H.L.'s bladder leak. However, Plaintiffs' allegations on which Defendants met their prima facie burden and Plaintiffs' Expert did not opine are dismissed as unopposed. "[T]he plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation." *Severino v. Weller*, 148 A.D.3d 272, 48 N.Y.S.3d 60 (N.Y.A.D. 1st Dept. 2017).

On Reply, Defendants also correctly argue that allegations by Plaintiff made for the first time in opposition to this summary judgment motion must also be dismissed. Those allegations are: that informed consent was not properly obtained by the Defendants on March 20, 2015 for their retrieval of specimens for biopsy from the lesions observed for the first time in H.L.'s bladder; failing to consult with a pathologist in interpreting the pathological findings of the bladder biopsies obtained on March 20, 2015; and that the Defendants failed to leave a catheter in H.L.'s bladder at the close of the April 9th procedure.

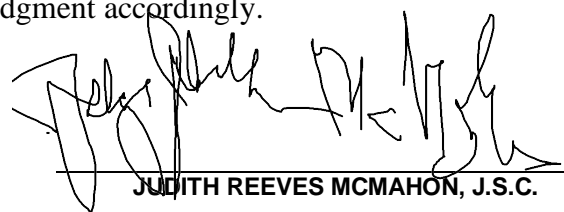
ORDERED that Plaintiffs’ allegations first introduced in opposition to this motion, namely a lack of informed consent on March 20, 2015, failing to consult with a pathologist, and the failure to leave a catheter in are dismissed; and it is further

ORDERED that the remainder of Defendants’ motion seeking summary judgment pursuant to CPLR § 3212 on behalf of Defendants Dix Poppas, M.D., Cornell University, and The New York and Presbyterian Hospital and dismissal of Plaintiffs’ complaint against said Defendants is denied; and it is further

ORDERED that all parties shall appear for a conference, to be held remotely via Microsoft Teams on April 22, 2021 at 11:30 a.m.; and it is further

ORDERED that any and all other requested relief is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.



JUDITH REEVES MCMAHON, J.S.C.

2/25/2021
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	