

J.B. v Heltzer

2021 NY Slip Op 30920(U)

February 25, 2021

Supreme Court, New York County

Docket Number: 805409/2016

Judge: Judith Reeves McMahon

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

PRESENT: <u>HON. JUDITH REEVES MCMAHON</u> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>J. B., JENNIFER BRUNO, AND JASON BRUNO, AND JENNIFER BRUNO, AND JASON BRUNO,</p> <p style="text-align: center;">Plaintiff,</p>	PART	IAS MOTION 30 INDEX NO. <u>805409/2016</u> MOTION DATE <u>N/A</u> MOTION SEQ. NO. <u>001</u>
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- v -

PAUL HELTZER, PAUL HELTZER, M.D., P.C., STATEN ISLAND UNIVERSITY HOSPITAL, NORTHWELL HEALTH, INC., BDAIR BULAIMOUN, RUBY COOMA, JONATHAN BLAU, MITCHELL PRICE, PHILIP ROTH, PHYSICIANS OF UNIVERSITY HOSPITAL, P.C., AND, BENJAMIN MATTA,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 116

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 Paul Heltzer, M.D., Paul Heltzer, M.D., P.C., Staten Island University Hospital ("SIUH"), Northwell Health, Inc., Bdair Abulaimoun, M.D. s/h/a Bdair Bulaimoun, M.D., Sivaroopi Coomaringam, M.D. s/h/a "Ruby Cooma, M.D.", Jonathan Balu, M.D., Mitchel Price, M.D., Phillip Roth, M.D., Physicians of University Hospital, P.C., and Benjamin Matta, M.D. and dismissal of Plaintiffs' complaint against said Defendants is granted in part and denied in part as detailed herein.

This is an action for medical malpractice wherein Infant Plaintiff J.B. was born on December 26, 2015, floppy, not moving, without respirations and unable to cry. Plaintiffs allege that as a result of Defendants' negligence, J.B. suffered brain damage, necrotizing enterocolitis and other injuries.

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

“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 Affirmations of Pediatric Surgeon Dr. Howard Ginsburg, Neonatologist Dr. Deborah E. Campbell, and Maternal-Fetal Medicine Expert Dr. Nancy Kirshenbaum. *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. Kirshenbaum opined that “in summary, it is my opinion as an expert in the field of Obstetrics and Gynecology that the treatment rendered to Ms. Bruno was consistent with the standard of care. The prenatal care was appropriate. The management of labor and the delivery of the infant-plaintiff was appropriate as was the use of Pitocin. Ms. Bruno's blood pressure was appropriately managed throughout labor and there was no evidence of fetal hypoperfusion. There was no evidence of fetal distress, no evidence of fetal asphyxia, and no reason to order a cesarean section prior to the actual vaginal delivery.”

In support of Defendants' summary judgment motion, Dr. Campbell opined that, “Plaintiffs' claims regarding the infant-plaintiff's NPO status are unfounded. The infant-plaintiff was initially made NPO because his clinical presentation at birth. It was appropriate for Dr. Abulaimoun to make to the plaintiff NPO, and it was equally appropriate for Dr. Blau to start feeds when the infant-plaintiff's clinical presentation, including his respiratory condition improved shortly after this birth. Infants born at 36 weeks are not kept NPO for 24-28 hours as a matter of course.”

Dr. Campbell further opined that, “Plaintiffs' claim that any provider ‘caused’ NEC is not supported by the literature. The cause of NEC is not understood at this time. Because there is no medically accepted single factor that causes NEC, no one can state to within in a reasonable

degree of medical certainty what causes NEC. In particular, it is impossible to know what caused the infant-plaintiff to develop NEC. Even among exclusively human milk feeding preterm infants NEC can occur. The fact is NEC can neither be predicted nor prevented. The main defense against developing NEC is avoiding preterm delivery; however, in this case the pregnancy could not be extended because Ms. Bruno experienced a premature preterm rupture of membranes prior to her arrival at SIUH. Further, the claim that the specific cause of NEC can be identified is rank speculation. Although NEC occurs most frequently in preterm infants, it occurs in term infants.”

Finally, Dr. Campbell concluded, “In summary, it is my opinion as an expert in the field of Pediatrics and Neonatology that the treatment rendered to the infant-plaintiff during his birth admission and his readmission was consistent with the standard of care. The infant-plaintiff was appropriately resuscitated. His respiratory issues improved to the point where oral feedings were indicated. He was fed appropriately, and there is no support for the claims regarding breast feeding or causing NEC. NEC was appreciated in a timely manner and properly treated. There is no evidence that the infant-plaintiff developed CP, HIE, brain damage, brain hematoma, seizures, short bowel syndrome, respiratory acidosis, mixed acidosis, septicemia, hypoperfusion, neonatal asphyxia, perinatal asphyxia, or encephalopathy.”

In support of Defendants’ summary judgment motion, Dr. Ginsburg opined that, “it is my opinion as an expert in the field of Pediatric Surgery that the treatment rendered to the infant-plaintiff was consistent with the standard of care. Dr Price was not involved in the neonatal care beyond assessing the infant plaintiff’s potential need for surgery. The infant-plaintiff did not require surgery. The infant plaintiff developed a post-NBC stricture which was timely diagnosed and the appropriate plan of care was recommended. The infant-plaintiff underwent surgery at another facility in a timely manner. None of the injuries alleged in this case are causally related to Dr. Price's involvement in the infant-plaintiff’s care or the Pediatric Surgery care rendered at SIUH.”

“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 Affirmations from a doctor board certified in obstetrics and gynecology, as well as an Affirmation from a doctor specialized in neonatology and perinatology in Opposition to Defendants’ motion.

In Plaintiffs’ Opposition, and confirmed at oral argument on the motion, Plaintiffs did not oppose the dismissal of allegations made against Defendants Northwell Health, Inc., Phillip Roth, M.D., Physicians of University Hospital, P.C., and Benjamin Matta, M.D., so all of Plaintiffs’ allegations as against those Defendants are severed and dismissed unopposed. Likewise, Plaintiffs did not oppose the dismissal of any allegations related to Dr. Sivaroopi Coomaringam concerning breaches of the standard of care that occurred before December 29, 2015 so those allegations are severed and dismissed unopposed.

In Opposition to Defendants’ motion, Plaintiffs’ OB/GYN Expert opined that “Dr. Heltzer departed from good and accepted obstetric and medical care and that these deviations caused the multiple severe injuries suffered by the infant plaintiff, J.B. As an initial matter, Dr. Heltzer failed to properly rule out nuchal cord. It is my opinion to a reasonable degree of medical certainty that the standard of care requires ultrasonographers to perform a high-resolution ultrasound to look for a ‘divot’ sign, which is the circular indentation of fetal nuchal skin. Moreover, prior to delivery, the presence of a nuchal cord could, and should, have been assessed clinically through a noninvasive test involving transabdominal manual compression of the fetal neck.”

Plaintiffs’ OB/GYN Expert also opined that, “Dr. Heltzer and SIUH’s nurses failed to timely diagnose and treat maternal hypotension which caused J.B. to suffer severe injuries. It is well established that hypotension can cause hypoperfusion to an unborn baby and end organs...The anesthesia BP graph shows that Jennifer was experiencing extremely low BP of 80-90/40-50 from approximately 12:00 to 15:00.”

Plaintiffs’ OB/GYN Expert further opined that, “In addition, it is my opinion to a reasonable degree of medical certainty that Dr. Heltzer deviated from accepted medical practice

in failing to timely diagnose and treat repetitive decelerations. Temporary drops in fetal heart rate are known as decelerations. Variable decelerations occur when the umbilical cord is compressed cutting off blood flow and oxygen to the baby. Here, both repetitive variable decelerations are documented in the SIUH medical record. When repetitive variable decelerations are noted, the standard of care requires intrauterine resuscitative measures to be taken as soon as possible to limit the risk of harm caused to the baby from prolonged lack of oxygen... Dr. Heltzer's failure to diagnose and treat repetitive decelerations with implementing intrauterine resuscitative measures was a deviation in the standard of care which caused J.B.'s injuries resulting from prolonged lack of oxygen.”

Plaintiffs' OB/GYN Expert concluded that, “Dr. Heltzer deviated from the standard of care by failing to timely diagnose Jenifer's intrauterine infection and timely deliver J.B. and these deviations from the standard of care caused J.B. to suffer further brain damage. Additionally, Dr. Heltzer's claim that all symptoms common with infection must be present at the same time, this is not in accord with accepted medical practice. To the contrary, some women have intrauterine infections without exhibiting any clear signs and/or symptoms of the infection. Here, the intrauterine infection was not timely diagnosed and treated and J.B. was not timely delivered. As a result of Dr. Heltzer's failure to timely deliver J.B., J.B. was caused to be born with sepsis.”

Plaintiffs' Neonatology and Perinatology Expert opined that, “the standard of care is to test for to diagnose or rule out NEC as soon as it is suspected and to treat it as soon as diagnosed. However, here, Dr. Abuilamon testified (at p. 83) that he told the family on the first day of life, December 26, 2015, that infection may cause NEC...As such, the failure to timely diagnose NEC and keep J.B. NPO until NEC could be ruled out was a substantial contributing factor to J.B. developing NEC, which had progressed from stage I by the time it was diagnosed...It is my opinion to a reasonable degree of medical certainty that defendants deviated from the standard of care by disregarding J.B.'s feeding status was NPO and instead fed him almost immediately...Indeed, Dr. Abulaimoun wanted J.B. to be NPO for one to two days and it is my opinion to a reasonable degree that this would have met the applicable standard of care and would have avoided the NEC which ultimately developed between December 26, 2015 and December 29, 2015. It is further my opinion to a reasonable degree of medical certainty that

defendants deviated from the standard of care by over feeding J.B., a premature infant, on the first day of life.”

Finally, Plaintiffs’ Neonatology and Perinatology Expert concluded that, “the defendants improperly stopped CPAP despite the fact that J.B. was tachypneic. It is my opinion to a reasonable degree of medical certainty that for as long as there is a concern for infection CPAP should be utilized. And therefore, as long as CPAP is used, there is a concern for infection and subsequently, the infant should remain NPO for as long as there is a concern for infection. J.B. was diagnosed with an infection almost immediately after birth as per Dr. Matta’s documented impression that J.B. had ‘clinical sepsis’ immediately after birth. Here, J.B. was tachypneic through at least mid-January, J.B. should have been given CPAP for as long as he was tachypneic. However, according to the records, CPAP was discontinued on December 29, 2015. It is my opinion to a reasonable degree of medical certainty that discontinuing the CPAP on December 29, 2015 deviated from the applicable standard of care...The defendants departed from the applicable standard of care when they prematurely discharged J.B. on February 3, 2016, as he had not been fed for very long, was spitting up a lot and had not been monitored long enough... Injuries J.B. has suffered, and will continue to suffer, as a result of the defendants’ negligence include, but are not limited to weakened balance and core strength, strabismus and the need for strabismus surgery, motor deficits, numerous developmental and motor delays.”

“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).

However, this Court finds that Plaintiffs’ Experts’ opinions in regard to Defendant Dr. Price are conclusory and assume facts not in the record as to Dr. Price’s involvement in the care and treatment of the Infant Plaintiff.

An expert opinion offered in opposition to a motion for summary judgment that is not responsive to the movant's expert's opinions and is conclusory is insufficient to create a triable issue of fact. *See Roques v. Noble*, 73 A.D.3d 204, 899 N.Y.S.2d 193 (N.Y.A.D. 1st Dept. 2010); *See Dolan v. Halpern*, 73 A.D.3d 1117, 902 N.Y.S.2d 585 (N.Y.A.D. 2nd Dept. 2010); *See also Cregan v. Sachs*, 65 A.D.3d 101, 879 N.Y.S.2d 440 (N.Y.A.D. 1st Dept. 2009); *See also Kaplan v. Hamilton Med. Assocs., P.C.*, 262 A.D.2d 609, 692 N.Y.S.2d 674 (N.Y.A.D. 2nd Dept. 1999).

“An expert opinion that is contradicted by the record cannot defeat summary judgment.” *Bartolacci-Meir v. Sassoon*, 149 A.D.3d 567, 50 N.Y.S.3d 395 (N.Y.A.D. 1st Dept. 2017).

As to the remainder of Defendants, there are questions of fact created by Plaintiffs' Experts, including, but not limited to, the failure to diagnose and treat maternal hypotension, the failure to diagnose and treat repetitive decelerations, and the failure to timely decrease or discontinue the use of Pitocin. 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).

ORDERED that Plaintiffs' allegations against Defendants Northwell Health, Inc., Phillip Roth, M.D., Physicians of University Hospital, P.C., and Benjamin Matta, M.D. are severed and dismissed unopposed; and it is further

ORDERED that Plaintiffs' allegations against Defendant Mitchel Price, M.D. as to departures that occurred prior to December 29, 2015 are severed and dismissed unopposed; and it is further

ORDERED that the remainder of Defendants' motion for summary judgment is denied; 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.

2/25/2021

DATE

JUDITH REEVES MCMAHON, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: