

Gibson v Devine

2021 NY Slip Op 33191(U)

May 13, 2021

Supreme Court, Westchester County

Docket Number: Index No. 81151/2018

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeal of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X
EBONY GIBSON, As Administratrix of the
Estate of N-- J-- , and EBONY GIBSON,
Individually,

Index No. 81151/2018

Plaintiffs,

DECISION AND ORDER

-against-

PATRICIA DEVINE, M.D. and WESTMED
MEDICAL GROUP,

Defendants.

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The following papers numbered 1 to 3 were read on this
motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmations and Exhibits	1
Affirmations and Exhibits in Opposition	2
Reply Affirmation	3

Defendants bring their motion for summary judgment seeking to dismiss this medical malpractice action in which plaintiff's baby died at only three days old.

Many of the facts are not in dispute. Without reciting the extensive medical history present here, suffice it to say that at the time of the pregnancy in question, plaintiff had already had, 16 years earlier, an episode of eclampsia that resulted in her first child being born prematurely. When she first came to defendant Westmed Medical Group in July 2016, she was then (at 34

years old) of "advanced maternal age" and obese. She was considered a high-risk pregnancy. Although she continued to see non-party Dr. Randee Wysoki, who provided some of her care, Dr. Wysoki also referred plaintiff to Dr. Devine, a high-risk ob-gyn. At her first visit with Dr. Devine, two days after a visit with Dr. Wysoki, Dr. Devine did an ultrasound to check for genetic abnormalities, but did not take her blood pressure. Dr. Devine told plaintiff to take a baby aspirin daily. She also testified at her deposition, and her records reflect, that she ordered a 24-hour urine test. Plaintiff testified at her deposition that she did not recall being told about the 24-hour urine test. For whatever reason, plaintiff never did this test. All of the doctors opine that this test is critical for determining whether there is protein in the urine, a significant indicator of complications.

On September 29, 2016, plaintiff's second visit with Dr. Devine, Dr. Devine did a second trimester fetal anatomy scan. Although Dr. Devine was able to determine some measurements and that development was normal, there were many measurements that she was unable to take and views that she was unable to see because of plaintiff's particular anatomy. Dr. Devine directed plaintiff to return in two weeks for another scan. When Dr. Devine did this second scan, on October 19, 2016, she was able to see certain views that she had not been able to see previously.

She was, however, unable to see other views. There is also no dispute that she did not take fetal measurements again. She testified at her deposition that since the time period was only two weeks between the scans, it would have been futile to take measurements again. Dr. Devine did take plaintiff's blood pressure, which was normal. There is no dispute that Dr. Devine did not refer plaintiff to a specialized ultrasound center (a "tertiary" facility); Dr. Devine testified at her deposition that this was because she herself was a tertiary provider. Dr. Devine directed plaintiff to return in three to four weeks.

However, that never happened. Instead, only two weeks later, plaintiff developed severe pain. When she went to the hospital on November 4, 2016, her blood pressure was extremely elevated. There was protein in her blood. The fetal measurements indicated that not only was there restricted growth, but there was also inadequate amniotic fluid.¹ Plaintiff gave birth to her child on November 5, 2016. The child died three days later.

"In a medical malpractice action, a defendant moving for summary judgment has the burden of establishing, prima facie, either the absence of any departure from good and accepted medical practice, or that any departure was not a proximate cause

¹The Court notes that defendants admit that during Dr. Devine's treatment of plaintiff, the amniotic fluid was never measured objectively, only subjectively. They assert that that was all that was required.

of the plaintiff's injuries. Here, the defendant, on its motion, failed to establish, prima facie, that it did not depart from good and accepted standards of medical care." *Barlev v. Bethpage Physical Therapy Assocs., P.C.*, 122 A.D.3d 784, 995 N.Y.S.2d 514 (2d Dept. 2014). Although the Court finds that defendants did establish that they met the standard of care in certain respects, the Court is surprised by Dr. Devine's failure to take plaintiff's blood pressure at every visit; her failure to have a high-risk patient evaluated every two weeks; and her failure to insist on obtaining better views, whether by her own hand or someone else's. For these reasons, the Court finds that defendants did not establish their prima facie case.

Even if they had, though, the Court would deny summary judgment to defendants. Plaintiffs' expert - who states that they² focus their clinical practice on high-risk patients, even if they are not certified as a maternal-fetal medical specialist - establishes that Dr. Devine failed to follow some of Westmed Medical Group's own protocols. The doctor also opines, among other things, that Dr. Devine should have directed plaintiff to take her blood pressure at home, given her history and high risk factors. "Summary judgment is not appropriate in a malpractice action where, as here, the parties adduce conflicting expert

²The Court uses "they" to avoid using any gender-identifying pronouns.

opinions." *Amendola v. Brookhaven Health Care Facility, LLC*, 150 A.D.3d 1061, 1062, 55 N.Y.S.3d 348, 350 (2d Dept. 2017).

Accordingly, the Court denies the motion in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
May 13, 2021



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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