

Harwood v Halfon

2023 NY Slip Op 30187(U)

January 13, 2023

Supreme Court, New York County

Docket Number: Index No. 805221/2020

Judge: Judith N. McMahon

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

PRESENT: HON. JUDITH MCMAHON PART 30M

Justice

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INDEX NO. 805221/2020

ANNETTE HARWOOD, MICHAEL HARWOOD,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

JOHANNA HALFON, HEMASHI PERERA, NEW YORK
PRESBYTERIAN HOSPITAL

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

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

Upon the foregoing documents, defendants’ motion for summary judgment pursuant to CPLR §3212 is granted to the extent that (1) the complaint is severed and dismissed as against the defendant Hemashi Perera, M.D.; (2) plaintiffs’ Third Cause of Action for lack of informed consent is dismissed, and (3) plaintiffs’ Fifth Cause of Action against The New York and Presbyterian Hospital s/h/a New York Presbyterian Hospital (“NYPH”) for negligent training and supervision is dismissed as duplicative. The balance of the motion is denied. The only defendants remaining in this case are Dr. Johanna Halfon for plaintiffs’ allegations of negligence (First Cause of Action), negligent infliction of emotional distress (Second Cause of Action), loss of services of plaintiff-husband, Michael Harwood (Fourth Cause of Action), and defendant NYPH for vicarious responsibility for the conduct of Dr. Halfon.

This matter arises out of alleged medical malpractice involving delivery of a 38-week stillborn on August 16, 2019, one day after a diagnosis of fetal demise. Plaintiffs allege, *inter alia*, that the baby would have been born alive if not for Dr. Perera’s improper attempt at an

external cephalic version on August 5, 2019, and Dr. Halfon's failure to refer plaintiff to the hospital for a stat biophysical profile on August 14, 2019. Plaintiffs claim that defendants' departures between January 15, 2019 and August 17, 2019 resulted in fetal demise and emotional damages.

FACTUAL BACKGROUND

The 31-year-old Annette Harwood, who had already suffered one miscarriage, began her prenatal treatment with the Dr. Perera in January of 2019. She underwent standard normal prenatal sonograms during her pregnancy, the first being given on February 15, 2019 at twelve weeks, the second on March 29, 2019, and a third on April 19, 2019, all of which showed a complete, normally developing fetus. On June 4, 2019, Dr. Perera documented "PTL [preterm] precautions reviewed," meaning that she had instructed plaintiff regarding early signs of labor, bleeding and reduced fetal movement. The pregnancy was uneventful.

A sonogram on July 30, 2019, at 35 weeks and 5 days, revealed that the plaintiff had a breech presentation for a male fetus. On August 5, 2019, Dr. Perera recommended and performed an external cephalic version ("version"), a procedure in which the obstetrician attempts to turn the fetus from a breech presentation to a vertex presentation by the application of firm manual pressure to the mother's abdomen. In a procedure note dated August 5, 2019, Dr. Perera documented that she discussed the risks of a version procedure (*i.e.*, premature rupture of membranes, placental abruption, and possible non-reassuring fetal heart tracings) including the possibility of having to perform a cesarean section. The version was unsuccessful, and a c-section was scheduled for August 22, 2019, at 39 weeks gestation.

Fetal monitoring was continued for at least one hour following the attempted version, and plaintiff presented to Dr. Perera's office the following day, August 6, 2019, for follow-up care

and continued monitoring. Plaintiff felt the baby move regularly (as she had throughout the pregnancy), from August 6th through August 13th. She testified at her deposition that on the evening of August 13, 2019, however, she noticed that the fetal movements were less frequent but “bigger” and “more intense.”

On August 14, 2019, plaintiff saw Dr. Halfon, (who was covering for Dr. Perera while the latter was on vacation) for a regularly scheduled prenatal visit. Dr. Halfon’s records indicate that plaintiff reported “normal fetal movement today,” but slightly decreased movement the day before¹. At her deposition, however, plaintiff testified that she informed Dr. Halfon that the baby was moving less frequently on August 14th also. Dr. Halfon performed a bedside sonogram which reflected a normal heart rate and positive fetal movement, but no kicking (*see* NYSCEF Doc. No. 47, p. 85). The doctor reviewed precautions with Mrs. Harwood, including “strict kick counts” and ordered a biophysical profile to be conducted the following day at the hospital as a precautionary measure.

On August 15, 2019, plaintiff presented to NYPH for a biophysical profile ultrasound, for “reduced fetal movement.”² The report reflects that plaintiff had an intrauterine pregnancy with a

¹ At her June 4, 2021 deposition (*see* NYSCEF Doc. No. 47) plaintiff testified: “I came to the appointment and Dr. Halfon asked me how things were going. The night prior I had noticed that the baby was moving differently, and it felt like a little less but when he did move...he was very intense. Like his head or his butt was out, but they were big movements. He was moving but it was definitely less, and he definitely wasn’t kicking...[s]he put the ultrasound wand on my belly, and she shook it and she said, ‘oh, you’re right. He doesn’t want to kick’” (*id.*, pp. 84-85). When asked how the baby’s movements were after she left the August 14, 2019 appointment, Mrs. Harwood stated: “**the same as they were when I was at the appointment...they were different. They were less.** He wasn’t kicking. No change from what I described to Dr. Halfon” (*id.*, p. 88; emphasis supplied).

At her March 4, 2022 deposition (*see* NYSCEF Doc. No. 48), Dr. Halfon testified: “I asked her, is the baby moving? And she said yes. It was a little lower yesterday, but today is normal. Something to that effect” (*id.*, pp. 59-60).

² Dr. Halfon testified that she referred plaintiff for the biophysical profile test to be conservative, given that plaintiff was not her patient; defendants maintain that there is no evidence that Dr. Halfon supplied the indication listed on the report of “decreased fetal movement.”

breech presentation, but that “the fetal heart rate was not visualized on today’s exam.” A diagnosis of intrauterine fetal demise was made.

Plaintiff elected to proceed with induction of labor. At delivery on the morning of August 16, 2019, there was a double footing breech. Thick meconium was noted, and a nuchal cord was wrapped around the neck five times.

An autopsy determined that the cause of the infant’s death was fetal hypoxia/asphyxia for 12-18 hours secondary to nuchal cord x 5. The placenta appeared normal and without evidence of abruption.

MOTION FOR SUMMARY JUDGMENT AND EXPERT OPINIONS

In support of their motion, defendants rely, *inter alia*, upon the July 21, 2022 affirmation of OB/GYN Peter Bernstein, M.D. (*see* NYSCEF Doc. No. 31) who opines within a reasonable degree of medical certainty that “the defendants never departed from the standard of care in their treatment of the plaintiff, and that no aspect of the care and treatment provided by the defendants contributed to or caused any of the injuries and/or damages alleged by the plaintiffs” (*id.*, *para* 28). Dr. Bernstein is unequivocal that “the performance of the cephalic version and the unsuccessful attempt to adjust the fetal position from breech to vertex during the version had no effect on the plaintiff’s claimed injuries, particularly the fetal demise” (*id.*, *para* 36), and critically, that “one cannot reliably diagnose nuchal cord on biophysical profile or sonogram.” Dr. Bernstein concludes that “nothing defendants did or did not do proximately caused the nuchal cord to not be identified prior to delivery” (*id.*, *para*. 43).

As for **Dr. Perera**, Dr. Bernstein finds that she (1) properly managed the plaintiff’s prenatal care by regularly performing sonograms and nuchal, anatomy and growth scans; (2) timely scheduled and properly performed an external cephalic version on August 5, 2019 which

was within the standard of care of 36-37 weeks, based upon the identification of the breech presentation on the July 30, 2019 sonogram; (3) properly and fully explained the risks of the version procedure; (4) reviewed precautions and properly instructed plaintiff to call or to go to the hospital if she felt reduced movement after the failed version, and (5) properly monitored plaintiff after the version. According to Dr. Bernstein, since no evidence was found of placental abruption, fetal distress, or any abnormality at any of the prenatal visits or ultrasound exams prior to the diagnosis of the fetal demise, then the version performed by Dr. Perera could not be and was not a proximate cause of plaintiffs' claimed injuries.

As for **Dr. Halfon**, plaintiffs maintain that she should have ordered the biophysical profile on a stat basis on August 14, 2019, rather than allow plaintiff to wait until the morning of August 15, 2019, and that she departed from the acceptable standard of care by not immediately ordering that test in response to a complaint of decreased fetal movement made on August 14th. According to plaintiffs, the biophysical profile would have immediately uncovered fetal distress which in turn would have led to an immediate and healthy delivery of the baby boy on August 14, 2019.

Dr. Bernstein is unequivocal that **Dr. Halfon** was not required to order the biophysical profile ultrasound immediately, based on the findings of positive fetal movement and normal fetal heart rate on the August 14, 2019 sonogram. Dr. Bernstein explains that (1) plaintiff's report of reduced fetal movement on August 13, 2019 was consistent with fetal sleep cycles and the space occupying size of a third trimester fetus; (2) Dr. Halfon's instructions on labor precautions and kick counts were proper and within the standard of care, and (3) the presence of a nuchal cord "cannot even be considered an abnormal finding given that it is present in 20-25% of deliveries" (*id.*, para 43). According to Dr. Bernstein, "it was not a departure from the

standard of care...that the nuchal cord was not identified *in utero*, and nothing defendants did or did not do proximately caused the nuchal cord to not be identified prior to delivery” (*id.*).

Plaintiffs oppose the motion for summary judgment, maintaining, *inter alia*, that a significant factual dispute exists as to whether Mrs. Harwood told Dr. Halfon that she was experiencing decreased fetal movement the night before her office visit, as well as on the day of her office visit, on August 14, 2019.

The Court notes at the outset that plaintiffs’ expert does not address Dr. Perera’s alleged liability, nor do plaintiffs attempt to establish causation between Dr. Perera’s care and any of plaintiff’s claimed injuries, including fetal demise. Accordingly, summary judgment must be awarded to Dr. Perera. Summary judgment must also be awarded to defendant NYPH on plaintiffs’ claims for negligent hiring and supervision as those claims are duplicative (*see Vermont Mutual Insurance Co. v. McCabe & Mack, LLP*, 105 AD3d 837 [2d Dept. 2013]). Finally, inasmuch as plaintiffs’ opposition is silent as to any allegations regarding lack of informed consent, summary judgment must also be granted to Dr. Halfon and NYPH severing and dismissing plaintiffs’ Third Cause of Action (*see also DeChico v. Northern Westchester Hosp. Ctr.*, 73 AD3d 838 [2nd Dept. 2010]).

In further opposition to the motion, plaintiffs rely upon the redacted expert affirmation of an OB/GYN, (*see* NYSCEF Doc. No. 44) who opines that Dr. Halfon “departed from good and accepted medical practice in not performing a biophysical profile and/or a non-stress test the day of Mrs. Harwood’s prenatal visit [August 14, 2019] to determine fetal well-being and further, *if it was done, it would have revealed a fetus that needed to be delivered immediately*. Moreover, *if the fetus was delivered that day, it would not have succumbed to fetal hypoxia/asphyxia*” (*id.*, *para* 13; [emphasis supplied]).

According to plaintiffs' expert, (1) Mrs. Harwood's complaints of experiencing less fetal movement the night before her August 14th visit, and her sense that when she did feel the fetus, the feeling was much more intense, should have caused immediate concern and investigation; (2) the bedside sonogram performed by Dr. Halfon is not comparable to the ultrasound used in the hospital setting since it does not assess critical factors such as fetal movement, muscle tone and breathing movements, and is only useful for obtaining a heartbeat; (3) if, as stated by plaintiff, the baby was moving less and not kicking on the day prior to her visit and **on the day of her office visit**, then the standard of care required a stat non-stress test and/or biophysical profile, and the failure to order one was a departure from the standard of care and a substantial factor in causing the baby's death *in utero*; (4) the NYPH record reflecting that the indication for the biophysical profile was "decreased fetal movement," made it "unacceptable and a departure from the standard of care to postpone evaluating fetal status until the next day." Plaintiff's expert concludes with a reasonable degree of medical certainty that a biophysical profile performed on August 14, 2019, would have shown, more likely than not, abnormal findings requiring immediate delivery that day [and] [h]ad delivery taken place on August 14, 2019, the infant would have been born alive" (*id.*, para 27).

APPLICABLE LAW AND ANALYSIS

To make out a *prima facie* case of medical malpractice, a plaintiff must show that a defendant deviated from accepted medical practice and that the alleged deviation proximately caused injury or death (*see Koepfel v. Park*, 228 AD2d 288, 289 [2d Dept. 1996]). A medical malpractice defendant moving for summary judgment meets his initial burden by establishing that he or she did not deviate from accepted medical practice or proximately cause the injury (*Mattis v. Keen, Zhao*, 54 AD3d 610, 611 [2d Dept. 2008]). The burden then shifts to plaintiff to

produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*see Sisko v. New York Hosp.*, 231 AD2d 420, 422 [1996]; *lv dismissed* 89 NY2d 982 [1997]).

In reviewing defendants' motion for summary judgment, the Court must accept plaintiff's facts as true, and draw all reasonable inferences in the light most favorable to the plaintiffs (*see Asabor v. Archdiocese of New York*, 102 AD3d 524 [1st Dept. 2013]; [internal citations omitted]). The standard for determining the motion is whether there are any genuine and material disputed issues of fact. Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is even arguable (*see Glick & Dolleck v. Tri-Pac Expert Corp.*, 22 NY2d 439, 441 [1968]). Critically, "it is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v. American Lung Assn.*, 90 NY2d 93 [1997]). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict" (*Anderson v. Liberty Lobby, Inc.*, 477 US 242, 255 [1986]).

Here, while the defendants have made a *prima facie* showing for entitlement to summary judgment dismissing the complaint, plaintiffs have successfully raised a triable issue of fact as to whether Dr. Halfon departed from the standard of care by not immediately sending the plaintiff to the hospital for a biophysical profile. Whether or not plaintiff did complain to Dr. Halfon about diminished fetal movement on August 13, 2019 and on August 14, 2019, despite the doctor's contemporaneous notes from the visit, is a decision for the jury. Given plaintiff's deposition testimony and the opinion of plaintiff's expert that a stat biophysical profile would have revealed fetal distress within the critical twelve-to-fourteen-hour time frame for the baby to have been born safely, summary judgment must be denied to Dr. Halfon. Likewise, to the extent

that Dr. Halfon may be liable for the unfortunate outcome in this case, the defendant NYPH bears vicarious responsibility for the doctor's conduct based on the undisputed testimony that Dr. Halfon was an employee of NYPH on August 14, 2019 (*see* EBT of Johanna Halfon, M.D. NYSCEF Doc. No. 48, p.8-9).

Accordingly, it is

ORDERED that that branch of the motion for summary judgment by defendant Dr. Hemashi Perera is granted in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendant Dr. Hemashi Perera dismissing the complaint; and it is further

ORDERED that that branch of the motion for summary judgment by defendant NYPH is granted to the extent that plaintiffs' Fifth Cause of Action is dismissed in its entirety; and it is further

ORDERED that plaintiffs' Third Cause of Action for lack of informed consent is dismissed in its entirety; and it is further

ORDERED that the Clerk enter judgment severing and dismissing plaintiffs' Third and Fifth Causes of Action against the remaining defendants; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the parties appear before this Court for a pre-trial conference via Microsoft Teams on **March 21, 2023 at 10:00 a.m.**

Hon. Judith N. McMahon
J.S.C.

1/13/2023

DATE

JUDITH N. MCMAHON, JSC

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE