

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT**

Vasiu v. Berg

2021 NY Slip Op 01798 (N.Y. Ct. App. 2021) · No. 2017-09209 · Decided March 24, 2021

SUMMARY

The Appellate Division, Second Department reversed an order granting summary judgment to defendants in a medical malpractice action brought by parents of a severely disabled child. The court held that expert credibility issues created triable questions regarding liability and that the record raised issues concerning extraordinary expenses causally related to the child's disabilities and not reimbursed by other sources.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Mark C. Dillon, J.P.; Hector D. LaSalle, J.; Betsy Barros, J.; Francesca E. Connolly, J.
JURISDICTION	New York
DECIDED	March 24, 2021
DOCKET	2017-09209
DISPOSITION	reversed
PROCEDURAL POSTURE	Plaintiffs appealed from an order granting defendants' separate motions for summary judgment dismissing the medical-malpractice complaint insofar as asserted against them.
STANDARD OF REVIEW	Summary judgment is proper only where the movant establishes entitlement to judgment as a matter of law; issues of credibility and competing expert opinions generally must be resolved by a jury.
PRECEDENTIAL VALUE	precedential
PARTIES	Elizabeth Vasiu, et al. v. Robert Berg, Arcadia OB/GYN, P.C., Peter Kratka

TOPICS

medical malpractice

professional negligence

damages

standard of review

appellate procedure

PRACTICE AREAS

medical malpractice

personal injury

appellate procedure

summary judgment

QUESTIONS PRESENTED

1. Whether defendants were entitled to summary judgment on liability where their expert established a prima facie entitlement to judgment but the plaintiffs' opposing expert created a credibility dispute.
2. Whether defendants were entitled to summary judgment on the plaintiffs' claim for extraordinary expenses associated with raising a child with disabilities.
3. Whether parents may recover extraordinary expenses caused by a child's disabilities when those expenses are personal pecuniary losses, causally connected to the child's condition, and not covered by insurance or public programs.

HOLDINGS

1. Summary judgment on liability was improper because the plaintiffs' opposing expert affidavit created a credibility battle between the parties' experts, and credibility issues are for the jury.
2. Summary judgment was improper because the record presented a triable issue of fact as to whether the child's medical conditions caused extraordinary expenses, including additional child-care costs and unreimbursed medical-care and equipment costs.
3. Parents may maintain a cause of action on their own behalf for extraordinary costs incurred in raising a child with a disability, subject to proof of duty, breach, proximate causation, and personal pecuniary loss.

KEY QUOTATIONS

“Parents may maintain a cause of action on their own behalf for the extraordinary costs incurred in raising a child with a disability” ([*1])

“the claimed damages cannot be based on mere speculation, conjecture, or surmise, and, when sought in the form of extraordinary expenses related to caring for a disabled child, must be necessitated by and causally connected to the child's condition” ([*1]-[*2])

“issues of credibility are [best] left to a jury for its resolution” ([*2])

FACTUAL BACKGROUND

The plaintiffs are parents of a severely disabled child. They alleged that the defendant physicians and medical practice negligently failed to diagnose the child's medical conditions in utero and failed to advise them of their options, thereby depriving them of the opportunity to terminate the pregnancy or otherwise avoid the child's conception. They sought recovery for extraordinary pecuniary expenses associated with raising the child, including additional child-care, medical-care, and equipment costs not reimbursed by other sources.

PROCEDURAL HISTORY

The parents of a severely disabled child sued Robert Berg, Arcadia OB/GYN, P.C., and Peter Kratka for medical malpractice based on alleged failures to diagnose the child's conditions in utero and advise the parents of their

options. The Supreme Court, Queens County, granted defendants' motions for summary judgment. The Appellate Division reversed insofar as appealed from and denied the challenged branches of the motions.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The challenged branches of the defendants' separate motions for summary judgment dismissing the complaint insofar as asserted against them were denied. The action therefore proceeds on the surviving claims.

CASES CITED

- Becker v. Schwartz, 46 NY2d 401, 410-413
- Mayzel v. Moretti, 105 AD3d 816, 817
- DeChico v. Northern Westchester Hosp. Ctr., 73 AD3d 838, 840
- B.F. v. Reproductive Medicine Assoc. of N.Y., LLP, 30 NY3d 608, 614
- Mickens v. LaSala, 8 AD3d 453
- Kubik v. Erhart, 78 AD3d 905, 906
- Leto v. Feld, 131 AD3d 590, 592
- Barbuto v. Winthrop Univ. Hosp., 305 AD2d 623, 624
- Stoves v. City of New York, 293 AD2d 666
- Halkias v. Otolaryngology-Facial Plastic Surgery Assoc., 282 AD2d 650

OPINION

PER CURIAM.

Vasiu v Berg (2021 NY Slip Op 01798) Vasiu v Berg 2021 NY Slip Op 01798 Decided on March 24, 2021 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on March 24, 2021 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department MARK C. DILLON, J.P.

HECTOR D. LASALLE BETSY BARROS FRANCESCA E. CONNOLLY, JJ. 2017-09209 (Index No. 700875/15) [*1]Elizabeth Vasiu, et al., appellants, vRobert Berg, etc., et al., respondents, et al., defendants. Sanocki, Newman & Turret, LLP, New York, NY (David B. Turret and Joshua Fogel of counsel), for appellants. McAloon & Friedman, P.C., New York, NY (Gina Bernardi DiFolco of counsel), for respondents Robert Berg and Arcadia OB/GYN, P.C.

Peter C. Kopff, LLC, Garden City, NY (Sarah H. Baker and Kimberly K. Ohrn of counsel), for respondent Peter Kratka. DECISION & ORDER In an action to recover damages for medical malpractice, etc., the plaintiffs appeal from an order of the Supreme Court, Queens County (Peter J. O'Donoghue, J.), entered July 19, 2017.

The order, insofar as appealed from, granted those branches of the separate motions of the defendants Robert Berg and Arcadia OB/GYN, P.C., and the defendant Peter Kratka which were for summary judgment dismissing the complaint insofar as asserted against each of them. ORDERED that the order is reversed insofar as appealed from, on the law, with one bill of costs payable by the respondents appearing separately and filing separate briefs, and those branches of the separate motions of the defendants Robert Berg and Arcadia OB/GYN, P.C., and the defendant Peter Kratka which were for summary judgment dismissing the complaint insofar as asserted against each of them are denied.

The plaintiffs, who are the parents of a severely disabled child, commenced this action against, among others, the defendants Robert Berg and Arcadia OB/GYN, P.C. (hereinafter Arcadia), and the defendant Peter Kratka, alleging that they committed medical malpractice in failing to properly diagnose the child's various medical conditions in utero and advise the plaintiffs of their options.

The plaintiffs seek to recover their pecuniary loss arising from the extraordinary costs of raising a child with severe disabilities. Berg and Arcadia moved, and Kratka separately moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against each of them.

The Supreme Court, among other things, granted those branches of their motions. The plaintiffs appeal. Parents may maintain a cause of action on their own behalf for the extraordinary costs incurred in raising a child with a disability (see *Becker v Schwartz*, 46 NY2d 401, 411-413; *Mayzel v Moretti*, 105 AD3d 816; *DeChico v Northern Westchester Hosp. Ctr.*, 73 AD3d 838, 840).

"To succeed on such a cause of action, which 'sound[s] essentially in negligence or medical malpractice,' [a plaintiff] 'must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by' [the injured party]" (*Mayzel v Moretti*, 105 AD3d at 817, quoting *Becker v Schwartz*, 46 NY2d at 410; see *B.F. v Reproductive Medicine Assoc. of N.Y., LLP*, 30 NY3d 608, 614).

"Specifically, the parents must establish that malpractice by a defendant physician deprived them of the opportunity to terminate the pregnancy within the legally permissible [*2]time period, or that the child would not have been conceived but for the defendant's malpractice" (*Mayzel v Moretti*, 105 AD3d at 817; see *Becker v Schwartz*, 46 NY2d at 410; *DeChico v Northern Westchester Hosp.*

Ctr., 73 AD3d at 840). "[T]he claimed damages cannot be based on mere speculation, conjecture, or surmise, and, when sought in the form of extraordinary expenses related to caring for a disabled child, must be necessitated by and causally connected to the child's condition" (Mayzel v Moretti, 105 AD3d at 817; see Mickens v LaSala, 8 AD3d 453). "Since the plaintiffs' recovery is limited to their personal pecuniary loss, expenses covered by other sources such as private insurance or public programs are not recoverable" (Mayzel v Moretti, 105 AD3d at 817; see Kubik v Erhart, 78 AD3d 905, 906; Mickens v LaSala, 8 AD3d 453).

Contrary to the contention of Berg and Arcadia, they are not entitled to summary judgment dismissing the complaint insofar as asserted against them on the issue of liability. Although the affidavit of their expert did demonstrate their prima facie entitlement to judgment as a matter of law on this issue, the affidavit of the plaintiffs' expert in response presented a credibility battle between the parties' experts, and "'issues of credibility are [best] left to a jury for its resolution'" (Leto v Feld, 131 AD3d 590, 592, quoting Barbuto v Winthrop Univ.

Hosp., 305 AD2d 623, 624; see Stoves v City of New York, 293 AD2d 666; Halkias v Otolaryngology-Facial Plastic Surgery Assoc., 282 AD2d 650). The Supreme Court should also have denied those branches of the respective motions which sought summary judgment on the basis that there is no triable issue of fact with respect to the plaintiffs' claims of extraordinary expenses.

The record demonstrates a triable issue of fact as to whether the child's medical conditions caused the plaintiffs to incur extraordinary expenses, including the cost of child care above what the plaintiffs would have spent had their child been born without disabilities and the costs of medical care and equipment directly attributable to the child's disabilities which were not reimbursed by other sources (see Mayzel v Moretti, 105 AD3d at 817; Kubik v Erhart, 78 AD3d at 906).

DILLON, J.P., LASALLE, BARROS and CONNOLLY, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court