

**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