No. 1

Kristi Foote et al.,
Respondents,
v.
Albany Medical Center Hospital,
et al.,
Appellants,
Khristeena Kingsley,
Defendant.

Robert A. Rausch, for appellants Albany Medical Center Hospital et al.
Adam H. Cooper, for appellant Baerthlein.
Katherine W. Dandy, for appellants Evanczyck et al.
Daniel S. Ratner, for appellants Birth & Beyond Midwifery Practice of Oneonta, PLLC et al.
Michael J. Hutter, for respondents.

CIPARICK, J.:

Plaintiffs Kristi Foote and Tim Sheridan are the parents of a child born in August 2003 with Joubert Syndrome, a neurological disorder causing abnormalities in brain development and function and resulting in developmental and behavioral deficits. After the child's birth, plaintiffs commenced this

medical malpractice "wrongful birth" action (see Becker v Schwartz, 46 NY2d 401, 409 [1978]) against numerous medical providers who allegedly failed to detect and/or failed to inform them of the abnormal cerebellar development of the fetus. Plaintiffs allege that steps would have been taken to terminate the pregnancy had they been properly informed. They seek damages for the extraordinary expenses involved in caring for their severely disabled child, including medical treatment and supplies, surgical treatment, physical therapy, vision therapy, occupational therapy, a home health aide, and special educational services.

Defendants moved for summary judgment dismissing the complaint, submitting expert affirmations stating that the extraordinary expenses necessary for the child's care have been and will continue to be completely covered by certain enumerated governmental programs. In opposition to defendants' motion, plaintiffs submitted the affirmation of Dr. Joseph Carfi, M.D., who prepared a "life care plan" and report detailing the care required for the child. According to Dr. Carfi, the government programs referenced by defendants' experts provided only a "minimum level of services" so as to create a "basic floor of opportunity." Dr. Carfi also took the position that "optimal care" for the child required more services than those provided by government programs and, as a result, plaintiffs had or would be forced to bear out-of-pocket expenses related to the child's

special medical and educational needs. Supreme Court granted defendants' motion for summary judgment, concluding that plaintiffs had failed to raise a triable issue of fact as to whether they had or would incur extraordinary expenses in providing for the medical and educational care of their son.

On plaintiffs' appeal, the Appellate Division unanimously reversed (see Foote v Albany Med. Ctr. Hosp., 71 AD3d 25 [3d Dept 2009]). Although it agreed that most of plaintiffs' expenses in caring for the child had been and would continue to be covered under government programs, the Appellate Division concluded that the aid received by plaintiffs for such programs would, under the statutory collateral source rule, merely serve to offset any award of damages made after trial (see id. at 28). The Appellate Division also concluded that Dr. Carfi's "affirmation, report and life-care plan, which distinguish between the 'basic floor' of services provided by public education and the level necessary to meet all of the son's needs, [were] sufficient to raise a question of fact" for trial (id.). Because Supreme Court had not considered defendants' alternative basis for summary judgment -- that plaintiffs could not establish a deviation from the applicable standard of medical care -- the Appellate Division remitted for consideration of that issue.

The Appellate Division granted defendants leave to appeal and certified a question inquiring whether it erred, "as a matter of law, in reversing . . . the order of the Supreme Court

. . . and remitting the matter to Supreme Court for further proceedings." We now affirm and answer the certified question in the negative.

In Bani-Esraili v Lerman (69 NY2d 807 [1987]), we explained that, in a "wrongful birth" action, the parents' "legally cognizable injury" is "the increased financial obligation arising from the extraordinary medical treatment rendered the child during minority" (id. at 808; see also Alquijay v St. Luke's-Roosevelt Hosp. Ctr., 63 NY2d 978, 979 [1984]; Becker, 46 NY2d at 413). Here, the Appellate Division properly concluded that defendants' motion for summary judgment should have been denied. Dr. Carfi's life care plan, report and affirmation are sufficient to demonstrate the existence of a triable factual issue whether plaintiffs have or will incur extraordinary financial obligations relating to the care of their son. In particular, a question of fact exists whether there is a difference between the resources provided by government programs and the extraordinary medical and other treatment or services necessary for the child during minority. We thus agree with the Appellate Division that "[t]he existence of government programs . . . will not, as a matter of law, eliminate plaintiffs' financial obligation for their son's extraordinary medical and educational expenses" (Foote, 71 AD3d at 29 [citations omitted]).

In light of our conclusion, we need not reach and express no opinion about the additional ground for denial of the

motion for summary judgment, set forth by the Appellate Division, that, pursuant to the statutory collateral source rule (see CPLR 4545 [a]), "the availability of another source of compensation does not obviate" plaintiffs' injury but, instead, can only offset any damages awarded after trial (Foote, 71 AD3d at 28). That issue, along with issues pertaining to liens, if any, and the underlying medical malpractice issues remain open for consideration by Supreme Court.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

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Order affirmed, with costs, and certified question answered in the negative. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Decided February 15, 2011