SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2529-21

ISAIAH JOHNSON, JR., an infant, by his Guardian ad litem, SARINA GOTT, and SARINA GOTT and ISAIAH JOHNSON, individually,

Plaintiffs-Appellants,

v.

OWOBAMOSHOLA SHONOWO, M.D., STEVEN GOLDBERG, M.D., STEVEN BERKMAN, M.D., EUMENA DIVINO, M.D., BAY OBSTETRICS & GYNECOLOGY, RARITAN BAY MEDICAL CENTER, RUTGERS-THE STATE UNIVERSITY and S.A.S. OBGYN, LLC,

Defendants-Respondents,

and

BORISLAVA BURT-LIBO, M.D.,

Defendant.

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Argued May 8, 2023 – Decided October 31, 2023

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-7183-16.

Connor C. Turpan argued the cause for appellants (Blume, Forte, Fried, Zerres & Molinari, PC, attorneys; Carol L. Forte, of counsel and on the briefs; Connor C. Turpan, on the briefs).

Beth Ann Hardy argued the cause for respondents Steven Berkman, M.D., and Rutgers-The State University (Farkas & Donohue, LLC, attorneys; David Christopher Donohue, of counsel; Beth Ann Hardy, on the brief).

Russell J. Malta argued the cause for respondents Owobamoshola Shonowo, M.D., Steven Goldberg, M.D. and Emena Divino, M.D. (Orlovsky Moody Schaaff Conlon Bedell McGann & Gabrysiak, attorneys; Russell J. Malta, on the brief).

John M. Hockin, Jr., argued the cause for respondent Raritan Bay Medical Center (Ronan, Tuzzio & Giannone, PA, attorneys; John M. Hockin and Garrett DeSantis, on the brief).

The opinion of the court was delivered by

MITTERHOFF, J.A.D.

Infant plaintiff Isaiah Johnson, Jr. (Isaiah), and his parents, plaintiffs Sarina Gott (Gott) and Isaiah Johnson (Johnson), appeal the trial court's orders of summary judgment dismissing their claims against five obstetricians, Steven Goldberg, Steven Berkman, Eumena Divino, Owobamoshola Shonowo, and

Borislava Burt-Libo, and three medical facilities (collectively defendants, unless individually named), claiming medical malpractice as a result of Isaiah being born in 2014 with sickle cell disease. Plaintiffs contend that defendant-physicians, all of whom had treated Gott's initial pregnancy in 2011, deprived them of the opportunity to make an informed decision regarding the 2014 pregnancy by failing to ensure that Johnson was tested for the sickle cell trait in 2011 after test results revealed that Gott was a carrier for the sickle cell trait. We affirm.

Sickle cell disease is an inherited genetic disease caused by mutation in the gene that codes for the production of the normal adult hemoglobin, known as HbA. When the sickle cell mutation is present, the person produces a hemoglobin variant known as HbS. Patients with this disease are anemic since they cannot make sufficient new cells to replace the damaged ones. Both parents must carry the HbS gene for a child to have sickle cell disease. When they do, there is a 25% chance that their child will have sickle cell disease. Both Gott and Johnson carry that gene but have not developed the disease. Johnson did not find out that he carried the gene until after Isaiah was born.

While pregnant in January 2011, Gott had routine bloodwork performed at Bay Obstetrics. The bloodwork revealed that she was a carrier of the sickle

cell gene. Gott stated in her deposition that when she was informed of the result by phone by someone from the medical practice, the individual asked her whether Johnson also had the trait. Gott replied that she did not know but would ask Johnson's mother. After speaking with his mother, Gott called the practice and informed them that Johnson's mother had told her that Johnson did not have the sickle cell trait. Johnson's mother confirmed that conversation.

Gott received prenatal care from Goldberg, Divino, Berkman and Shonowo. She stated that she saw Goldberg in February 2011 and Berkman in March 2011, and that neither they, nor any of the other defendants, discussed the sickle cell finding with her. However, Berkman stated in his answers to interrogatories that he

> had a conversation with Ms. Gott wherein he reviewed with her the results of her blood work showing that she was positive for [the] sickle cell trait and advising her of the importance to having the father of the baby tested as well. He advised her that if they were both positive there would be a 1 in 4 chance that the baby could have sickle cell disease. He advised her that the father of the baby could come to the office and have his blood drawn for the test[;] however, Ms. Gott responded that the father was negative for [the] sickle cell trait.

Berkman saw Gott four more times during her pregnancy.

Goldberg, who saw Gott five times during the 2011 pregnancy, stated in his answers to interrogatories that Gott had been advised Johnson should be tested for sickle cell, but she had stated that he was negative for the trait.

Shonowo saw Gott twice in January 2011, once in February and one time in March. At the February appointment, Shonowo reviewed the results of the lab tests, including the positive finding for sickle cell. Shonowo also shared the information with Gott's mother.

Divino saw Gott in late May 2011, and delivered the baby, Arianna, on September 4, 2011. Divino stated that her office chart contained a notation that Gott had been advised Johnson should be tested for sickle cell, but that she had responded that he was negative for the trait. Arianna tested positive for the sickle cell trait as part of the newborn screening.

Gott became pregnant again in 2014. She only saw Shonowo for her prenatal care at S.A.S. Obgyn. Shonowo saw Gott about ten times during the pregnancy. Testing again revealed that Gott was a carrier for the sickle cell trait. Shonowo claimed that she discussed the significance of those results with Gott during a July 2014 appointment. Shonowo did not test Johnson for the trait based on the family history she had been given by Gott.

Isaiah was born on December 20, 2014. In May 2015, he was diagnosed with sickle cell disease. Johnson was then tested for the sickle cell trait and the result was positive.[1]

Plaintiffs offered two board certified obstetricians, Richard Luciani and Gary Brickner, to testify regarding the applicable standard of care. Luciani stated the applicable standard of care required "legitimate confirmation" of Johnson's sickle cell carrier status. Defendants deviated from that standard of care in the 2011 pregnancy by failing to appropriately document Johnson's sickle cell status. In addition, according to Luciani, proper testing would have given Gott the opportunity to terminate the 2014 pregnancy if she so chose.

The applicable standard of care, according to Brickner, requires obstetricians "to be as certain as possible of the sickle status" of the father once it is known that the mother either carried the trait or had the disease. "The requirement cannot be satisfied by obtaining a history from a significant other, spouse or family member . . . if the [father] is alive, available and willing to undergo laboratory testing". Brickner concluded that defendants deviated from that standard of care by "failing to fully and correctly evaluate" Johnson after it

[1] Subsequently, Gott voluntarily terminated six pregnancies before giving birth to a child diagnosed before viability with sickle cell disease.

became known that Gott was a sickle cell carrier. Rather, they "incorrectly relied on a history obtained" through Johnson's mother "when there was no indication that he was either unavailable or unwilling to go for laboratory testing". Since such testing did not occur, Shonowo was required to do so during the 2014 pregnancy, according to Brickner.

Defendants' medical expert, Danial Small, a physician, stated that when a pregnant patient is identified as a carrier of sickle cell it is appropriate to determine whether the father is a carrier of the sickle cell trait or has sickle cell disease. He found that defendants appropriately relied on the history provided by Gott during the 2011 pregnancy, after she had spoken to Johnson's mother regarding his carrier status, and appropriately informed her of the importance of having Johnson tested. Therefore, according to Small, defendants did not deviate from the applicable standard of care.

Defendants also offered Anthony Quartell, a physician, as a medical expert. He stated that physicians

> cannot force people to come and have tests. We cannot demand that tests be done. We cannot order that tests have to be done. And we most certainly cannot and should not tell our patients that we don't believe them when they give us a bonafide historical fact obtained from a reliable source.

The motion court, in granting summary judgment to defendants,[2] initially found that defendants did not violate any duty to Gott because Gott was informed that she carried the sickle cell trait, and she had inquired as to whether Johnson also was a carrier. While the court noted that Gott disputed that Berkman had a conversation with her regarding the sickle cell test and Johnson's status, it stated that "it is undisputed that plaintiff was told of her status, and she at least inquired about father of the baby status."

The court also found that Shonowo's management of the 2014 pregnancy constituted a superseding cause:

> Dr. Shonowo conducted a separate and independent examination of Sarina Gott, and had a duty to inquire into the sickle cell status of the father of the baby, and manage the pregnancy that resulted in the birth of Isaiah Johnson with sickle cell disease. There is no reason to extend liability to the physicians that were involved in the management of [the] 2011 pregnancy, because Dr. Berkman owed no duty to Sarina Gott in 2014 . . . because the physician/patient relationship had been terminated . . . .

On appeal, plaintiffs argue that the court erred in granting summary judgment to defendants because New Jersey recognizes their claim for

[2] Although the only defendant the court discussed was Berkman, the decision was applicable to all defendants, save the claim against Shonowo solely related to the 2014 pregnancy.

preconception negligence and because any negligence by Shonowo in conjunction with the second pregnancy did not constitute a superseding cause relieving defendants from liability for negligence in the first pregnancy.

We review the trial court's grant of summary judgment de novo, reviewing the record to determine whether there are any issues of material fact and, if not, whether the undisputed facts viewed in the light most favorable to the non-moving party entitle the moving party to judgment as a matter of law. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Plaintiffs do not argue that summary judgment was improperly granted because of a disputed issue of material fact. Rather, they claim that defendants were not entitled to summary judgment as a matter of law; specifically, because preconception negligence is a recognizable tort in New Jersey and the question of whether Shonowo's treatment of the second pregnancy constituted a superseding cause could only be resolved by the trier of fact.

In Schroeder v. Perkel, 87 N.J. 53, 57 (1981), the issue was the propriety of a summary judgment grant to the defendant physicians in a wrongful birth action on behalf of a child born with cystic fibrosis, a hereditary disease. The parents alleged that the failure of the defendants to diagnose cystic fibrosis in

their first child deprived them of the opportunity to make an informed choice whether to have a second child. Ibid. The Court held that since the first child exhibited symptoms of cystic fibrosis, and the parents had asked about testing her for the disease, the physicians in question breached the duty of care they owed the parents by failing to do so. Id. at 66. "The defendants should have foreseen that parents of childbearing years . . . would, in the absence of knowledge that [the first child] suffered from cystic fibrosis, conceive another child." Id. at 65.

In Lynch v. Scheininger, 162 N.J. 209, 213 (2000), the Court addressed an issue of first impression "concerning recognition of and limitations on a physician's liability for a preconception tort allegedly resulting in harm to a child conceived after the negligence occurred." In 1984, the plaintiff gave birth to a stillborn child, whose condition was caused by the incompatibility of the maternal and fetal blood Rh factors. Id. at 214. A drug existed that could have prevented that condition if administered before antibodies were produced. Id. at 214-15. One of the defendant obstetricians failed to diagnose the condition during the pregnancy. Id. at 215.

In 1986, the plaintiff instituted a malpractice suit against that physician. Ibid. While the action was pending, the plaintiff gave birth to a child with

significant and permanent neurological disabilities caused by the condition that led to the 1984 stillbirth. Ibid. The plaintiff brought a new action against the physician and another physician whom she had consulted after the stillbirth alleging that their failure to diagnose and treat the mother's condition during and immediately after the 1984 pregnancy increased the risk of harm to children subsequently conceived. Id. at 215-16. In addition, they brought a wrongful birth claim relating to the child born with the neurological disabilities based on the defendants' failure to inform them of the risks of a future pregnancy. Id. at 218. The prior action against Scheininger settled while preserving the claims in the second action. Id. at 216.

The two main issues at trial were whether the alleged malpractice during the 1984 pregnancy was a proximate cause of the child's disabilities and whether the plaintiff parents acquired knowledge that the blood incompatibility condition posed a danger to the health of children born after the stillbirth. Id. at 217-18. After the jury was unable to reach a verdict, the court granted the defendants' motion to dismiss the malpractice claim because the parents' knowledge constituted a superseding cause. Id. at 219.

The Supreme Court stated that New Jersey recognizes "a medical malpractice cause of action based on preconception negligence that allegedly

resulted in injury to a child conceived after the negligence occurred." Id. at 232. The Court held, based on the trial record, that the plaintiffs' voluntary decision to conceive another child did not constitute a supervening cause precluding the imposition of liability. Id. at 225-26, 233, 235.

While Schroeder and Lynch support the validity of plaintiffs' claim for preconception negligence, they do not directly address the question of whether the grant of summary judgment was appropriate in this case. Although Schroeder was an appeal from a summary judgment grant, the plaintiffs in that case, unlike here, were totally unaware of the disease in question because of the physician's failure to diagnose. Similarly, Lynch was a failure to diagnose case. The issue here is not a failure to diagnose; defendants were aware that Gott was a carrier of the disease and so informed plaintiffs. Rather, it is an alleged failure to ensure that Johnson was, or had been, tested for the sickle cell trait. Thus, it is a question of whether defendants had the duty to have Johnson tested even though they had been told by Gott that Johnson did not carry the gene.

To establish liability for negligence, the plaintiff must demonstrate that the defendant owed him or her a duty of care. Kelly v. Gwinnell, 96 N.J. 538, 544 (1984). Whether a duty exists is ultimately a question of public policy and fairness. Reed v. Bojarski, 166 N.J. 89, 106 (2001); Taylor by Taylor v. Cutler,

306 N.J. Super. 37, 41-42 (App. Div. 1997), aff'd o.b., 157 N.J. 525 (1999). The inquiry involves weighing the relationship of the parties, the nature of the risk, and the public interest in the proposed solution. Reed, 166 N.J. at 106. It is also fact-specific, and the result must "lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct." Taylor, 306 N.J. Super. at 42 (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)).

The foreseeability of the resulting harm is the significant factor in determining the scope of a party's duty. Lynch, 162 N.J. at 232 (quoting Hill v. Yaskin, 75 N.J. 139, 144 (1977)); Taylor, 306 N.J. Super. at 42. "Foreseeability is a fluid concept that escapes a simple definition." Taylor, 306 N.J. Super. at 44. It "embodies an element of awareness or knowledge on the part of the [defendant] that the class of persons represented by the plaintiff were at risk as a result of the [defendant's] conduct." Id. at 47.

Physicians have a "duty to warn those known to be at risk of avoidable harm from a genetically transmissible condition." Safer v. Estate of Pack, 291 N.J. Super. 619, 625 (App. Div. 1996). That is what defendants did in this instance. In addition, they urged that Johnson be tested. Once informed that Johnson was negative for the trait, defendants satisfied the duty they owed

plaintiffs. Plaintiffs fail to establish that defendants were obligated to go further, or how they would go about it. Accordingly, we agree with the motion court that the 2011 defendants did not owe a duty to affirmatively pursue testing of Johnson after Gott informed the practice that he was negative for the trait.

The remaining issues on appeal, concerning whether Shonowo's assumption of Gott's care for her 2014 pregnancy was a superseding cause and whether the court erred in admitting the expert testimony of defendants' licensed health insurance expert, Susan Combs, are rendered moot.

Affirmed.