

Must a Lawyer Try to Find Another Expert to Support a Client's Legal Position Where the Chosen Expert May Not Fully Do So?

Expert witnesses, each of whom is fully qualified, often disagree in their opinions based upon the same facts submitted to them. This is especially common in the area of medical malpractice and, specifically, in cases involving a question of whether the physician or physicians breached the duty of care and, if so, whether the patient sustained damages as a result of that breach. On occasion an unsuccessful medical outcome will prompt the patient's lawyer to consider pursuing a medical malpractice claim. In most instances the lawyer will retain a medical expert witness to review the medical file and offer an expert opinion. But what if the lawyer retains an expert who possesses all of the appropriate credentials in the relevant area of medical practice but who offers an opinion that is found to be legally insufficient to sustain the medical malpractice claim? What duty does the lawyer have to "expert shop" in the hope that another expert will render a stronger opinion in favor of the patient? A New York appellate court recently considered this issue in a difficult case.

In *Healy, etc., et al. v. Finz & Finz, P.C.*, 2011 NY Slip Op 1616; 82 A.D.3d 704; 918 N.Y.S.2d 500 (Sup. Ct., App. Div.), the appellate court considered the trial court's denial of a defense motion for summary judgment in a legal malpractice action arising out of the alleged mishandling of a medical malpractice action. The underlying medical malpractice action concerned the treatment of one of two surviving triplets after the third triplet had died in utero. Two male triplets had been sharing a placenta, while a female triplet had her own placenta. When one of the males died, the treatment strategy was to prolong the pregnancy in an effort to reduce the risk for low birth weight in the two surviving triplets. Unfortunately the surviving male was born "with a form of cerebral palsy that renders him dependent on others for his basic needs." The medical experts involved in the medical malpractice case did not dispute that the surviving male's medical condition was caused by having shared a placenta with his

deceased brother. The medical question presented was whether his condition at birth would have been avoided if the physicians had performed an emergency cesarean section immediately upon learning of the brother's death.

The family of the triplets retained counsel to pursue a medical malpractice claim against the treating physicians. The lawyer's "theory of the case was that the doctors should have delivered the surviving babies immediately after learning of Sean's [the triplet who did not survive] death and that the delay caused Kevin's [the surviving male triplet] injury."

The experts retained by the lawyer for plaintiffs could not state when the injury to the surviving male had occurred to a reasonable degree of medical certainty. They acknowledged that it could have happened immediately after his brother's death, meaning that an immediate emergency delivery may not have avoided the injury. As a result, most of the defendant doctors moved for summary judgment, and the one defendant who went to trial obtained a directed verdict on the basis that "the plaintiffs could not establish the proximate cause element of medical malpractice."

In the subsequent legal malpractice action the defendant law firm presented "the affirmations of three physicians, in which they stated that the surviving male's injury was caused by (the brother's) death." In response, plaintiffs presented the affirmation of an expert physician of their own, who stated that the damage sustained by the surviving boy "would have occurred over time," both following and caused by the death of his brother. Plaintiffs "also submitted the affirmation of an attorney, who stated that the firm failed to exercise the care and skill commonly exercised by a member of the legal profession, because its attorneys failed to find an appropriate medical expert."

Based upon this record, defendant law firm moved for summary judgment, contending that plaintiffs could not show causation for the alleged negligence of the treating physicians because the harm could have occurred when the harm was unavoidable, i.e., that it occurred immediately upon the brother's death, when there was insufficient time to avoid this harm by performing an emergency cesarean section. In other words, defendant law firm contended that, as a matter of law, plaintiffs could not prevail on the "case within a case" because they could not prove damages as a result of the treating physician's alleged negligence.

The trial court denied the motion. But New York's intermediate appellate court reversed, finding that "attorneys



Avoiding Liability



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are free to select among reasonable courses of action in prosecuting clients' cases without thereby exposing themselves to liability for malpractice." In its view, defendant law firm had established a prima facie case that "its choice of experts in this case was a reasonable course of action, and the plaintiffs failed to raise a triable issue of fact in opposition." It rejected the assertion of plaintiffs' expert that defendant law firm chose the wrong expert as "conclusory" at best and, as a result, insufficient to sustain a cause of action for legal malpractice. Therefore, the appellate court rejected the declaration of plaintiffs' expert as "insufficient to raise a triable issue of fact in opposition to the motion for summary judgment."

In reaching its conclusion, the appellate court first considered the elements for establishing a medical malpractice claim — the "case within a case" — which is the appropriate analysis under these circumstances for determining whether plaintiffs had sustained damages as a result of the physicians' alleged breach of duty. Because the appellate court found that defendant law firm's choice of medical experts "was a reasonable course of action," it excused defendant law firm for failure to look for other equally qualified experts to offer stronger expert support for the medical malpractice claim. The court, however, reached this conclusion by finding, as a matter of law, that defendant law firm had reasonably chosen an expert but also by rejecting, as a matter of law, the medical expert offered by plaintiffs in the legal malpractice action. Therefore, although it did reject the medical opinion offered by plaintiffs' expert in the legal malpractice action, it was apparently not required to do so in order to find in the

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defendant law firm's favor. In other words, the court's finding that the defendant law firm had exercised reasonable judgment, as a matter of law, was sufficient to trump the fact that plaintiffs had a competent medical opinion to contradict the opinion of the medical experts that defendant law firm had reasonably retained in the underlying medical malpractice case.

What lesson does this case teach? Surely legal duty of care suggests that the lawyer is under a duty to keep shopping for experts until he or she has found one who will support the legal position of his or her client beyond any doubt or question. But this case would suggest, as a matter of law, the opposite conclusion, and that a lawyer is under no duty to keep looking for an expert to support his or her client's position should the first expert reasonably chosen not fully support the client's legal position at trial.