

U.S. DISTRICT COURT DISTRICT OF MASSACHUSETTS

Andrew Gorbey, by and through his Mother &)
Next Friend, Sherri Maddox;)
Keenan Stapleton, by and through his Mother &)
Next Friend, Felicia Clark;)

Plaintiffs,)

v.)

American Journal of Obstetrics & Gynecology;)
Elsevier, Inc.;)
The Bond Clinic;)
Henry Lerner, M.D.;)
Eva Salamon, M.D.;)

Defendants.)

Civil Action No.: 1:11-cv-11259-NMG

COMPLAINT AND JURY DEMAND

JURISDICTION: The United States District Court has jurisdiction over this matter on the basis of diversity of citizenship pursuant to 28 U.S.C., Sections 1332 and 1441 et seq., as the parties are citizens of different states.

COMES NOW, Plaintiffs brings suit against Defendants for unfair and deceptive business practices that have injured Plaintiffs, under M.G.L. c.93A § 9.

1. Plaintiff Andrew Gorbey, by and through his Mother and Next Friend, Sherri Maddox, resides at P.O. Box 2705 Stafford, Virginia 22555.
2. Plaintiff Kennan Stapleton, by and through his Mother and Next Friend, Felicia Clark, resides at 8619 South Elizabeth Chicago, Illinois 60602.
3. Defendant American Journal of Obstetrics and Gynecology is an academic, medical publication published by Elsevier, Inc.
4. Defendant Elsevier is a corporation with offices at 600 John F. Kennedy Boulevard, Ste 1800, Philadelphia, PA 19103-2899.

5. Defendant Eva Salamon, M.D. is a medical professional practicing medicine at 199 Ave B. N.W. Winter Haven, Florida 33881.
6. Defendant Henry Lerner, M.D. is a medical professional practicing medicine at Newton-Wellesley Obstetrics & Gynecology, P.D. at 2000 Washington Street Suite 768 Newton, Massachusetts 02462.
7. Defendant Bond Clinic is a professional corporation operating a multi-specialty medical facility at 500 E. Central Avenue, Winter Haven, Florida 3388.

COUNT I

8. Plaintiffs incorporate herein the allegations contained in Paragraphs 1 through 7.
9. Plaintiff Andrew Gorbey suffered a birth injury during delivery, noted in his medical records as a shoulder dystocia. Plaintiff Gorbey continues to suffer from a permanent brachial plexus injury. The delivering doctor was Dr. Mary Shuman. By and through his mother, Plaintiff Andrew Gorbey brought a medical malpractice claim against Dr. Mary Shuman on September 25, 2009 in the Circuit Court for the City of Fredericksburg, Virginia. Andrew Gorbey's brachial plexus injury is permanent and has caused and will cause him pain and suffering for the remainder of his life. The court found against minor-Plaintiff Gorbey.
10. Plaintiff Keenan Stapleton suffered a birth injury during his delivery, as noted in his medical records as a shoulder dystocia and continues to suffer from a permanent brachial plexus injury. The delivering doctor was Dr. Monica Moore. By and through his mother, Plaintiff Stapleton brought suit against Dr. Moore in Circuit Court of Cook County, Illinois. Keenan Stapleton's brachial plexus injury is permanent and has caused and will cause him pain and suffering for the remainder of his life. The court found against minor-Plaintiff Stapleton.
11. During the trials of *Gorbey v. Shuman* and *Stapleton v. Moore*, counsel for each defendant-doctor introduced, used, and relied upon an article published in 2008 in an Elsevier, Inc. publication, American Journal of Obstetrics & Gynecology. This article is titled "Permanent Brachial Plexus Injury Following Vaginal Delivery Without Physician Traction or Shoulder Dystocia." The authors are Henry Lerner, M.D., practicing at

Harvard Medical School in the Department of Obstetrics & Gynecology, and Eva Salamon, M.D. practicing at the Bond Clinic in Florida.

12. The Lerner-Salamon article is a case report that claims that the paper is the “first unambiguous case of a baby born vaginally without physician traction, and even without the occurrence of shoulder dystocia, that resulted in a permanent brachial plexus injury.” Lerner, H.M. & Eva Salamon, *Permanent brachial plexus injury following vaginal delivery without physician traction or shoulder dystocia*, AMERICAN J. OF OBSTETRICS & GYNECOLOGY (March 2008). The Lerner-Salamon article also states, “This case of permanent brachial plexus injury following a vaginal delivery unassociated with shoulder dystocia or physician traction verified by the delivering physician, delivery room personnel, and the patient herself demonstrates unequivocally that not all permanent brachial plexus injury is due to physician traction.”
13. However, the hospital record indicates that the box for shoulder dystocia was checked off and was then crossed out by Dr. Salamon and “soft tissue dystocia” was filled in and a note about the child suffering a shoulder dystocia is also present in the records.
14. The case report was based on a birth of Glorianne Wilson, a minor, who was delivered by Dr. Eva Salamon. Glorianne Wilson suffered a left Erb’s palsy at birth and continues to suffer from her brachial plexus injury.
15. Dr. Henry Lerner has admitted to not having read the labor and delivery notes before writing and submitting the case report during expert witness testimony during the *Cortez v. Thacker* case in Illinois.
16. Dr. Eva Salamon testified under oath in a deposition in *Wilson v. Salamon* on September 7, 2006 that she used traction in the delivery of Glorianne Wilson. When asked about her use of traction in the delivery of babies, Dr. Salamon answered, “For every delivery I used gentle downward traction.” When asked “Are you more particular about that when you diagnose a shoulder dystocia, or suspect a shoulder dystocia should I say?”, Dr. Salamon answered, “No because I’m careful every time I do a delivery.” It was clarified, “And you’re careful to use gentle downward traction in light of a shoulder dystocia because more traction could result in a brachial plexus injury.” Dr. Salamon answered, “Yes.” Dr. Salamon again acknowledges the use of traction in the same deposition: “I

- did not feel there was a shoulder dystocia because the baby delivered with ease, without an undue increased traction required to delivery. So to me it was a normal delivery.”
17. Authors of the published paper, Eva Salamon, M.D. and Henry Lerner, M.D. prepared and submitted for publication a case report that was inaccurate, false, misleading and did not reflect the facts of the delivery in question.
 18. Medical experts in medical malpractice trials rely and reference literature published in the Journal of Obstetrics and Gynecology as it is plainly recognized as an accurate and truthful source of medical opinion and used by medical professional as a platform to publish recent medical-related findings.
 19. On December 18, 2008, Elsevier, Inc. and the American Journal of Obstetrics and Gynecology refused to retract the case report, or issue any further statement about the case reports untruthfulness and deceptive nature, even with the knowledge that medical experts in trial would reference the report to establish a premise that the actual facts of the Wilson case do not support.
 20. Authors of the published paper, Eva Salamon M.D., Henry Learner, M.D., and the Journal of Obstetrics & Gynecology as well as Elsevier failed to publish a truthful and accurate account of the delivery.
 21. The Defendants’ failure to accurately write and subsequently publish truthful a scientific articles constitutes a violation of M.G.L. c. 93A as unfair or deceptive acts or practices.
 22. At all times relevant, the Defendants were engaged in trade or commerce.
 23. The fraudulent preparation and subsequently submission of an untruthful and blatantly false case report to a major publisher of medical articles is a deceptive act that directly and substantially affects the people of the Commonwealth.
 24. Medical malpractice expert witnesses have relied on the Lerner-Salamon case report, which contains the falsities. The article will continue to be incorrectly relied upon during litigation proceedings despite the articles deceptive nature. It has great potential to cause harm to the people of the Commonwealth bringing a medical malpractice suit. Defense counsel defending doctors will rely on this deceptive case report in future suits to prove the lack of medical malpractice when the article is false, deceptive, and unfair. The Journal is published on the Internet and because of the opportunity for vast dissemination, is a threat to the training of medical professionals that encounter a shoulder dystocia

during delivery and is a hindrance to treatment of children who suffer a shoulder dystocia at birth and a permanent brachial plexus injury.

25. The article's deceptive content has and will be used in medical malpractice trials as the article, and in its present state is very favorable for doctor-defendants, causing prejudice to plaintiff-minors. If used in litigation proceedings, defense counsel will be relying on a blatantly false report and thus, will be misleading the court and tribunal as to the veracity of the case report.
26. But for the use of the deceptive article in the principle case of the defense, Plaintiff Gorbey and Plaintiff Stapleton would have been successful at trial and judgment would have been made for the Plaintiffs in their respective matters.
27. On May 13, 2011, Plaintiff Stapleton sent the Defendants, via certified mail, return receipt requested, postage prepaid, a written demand for relief pursuant to G.L. c.93A §9, identifying the claimants and reasonably describing the unfair and deceptive acts or practices relied upon and the injuries suffered. Copies of the demand letters are attached hereto as Exhibit A. The exhibits, which were provided with the demand letters, are included as well in Exhibit C.
28. On May 23, 2011, Plaintiff Gorbey sent the Defendants, via certified mail, return receipt requested, postage prepaid, a written demand for relief pursuant to G.L. c.93A §9, identifying the claimants and reasonably describing the unfair and deceptive acts or practices relied upon and the injuries suffered. Copies of the demand letters are attached hereto as Exhibit B. The exhibits, which were provided with the demand letters, are included as well in Exhibit C.
29. On June 6, 2011, Henry Lerner, M.D., represented by counsel, replied to Plaintiffs' demand letter. A copy of the June 6th letter is attached hereto as Exhibit D.
30. On June 16, 2011, Eva Salamon, M.D., represented by counsel, replied to Plaintiffs' demand letter. A copy of the June 16th letter is attached hereto as Exhibit E.
31. On June 17, 2011, Elsevier, Inc., represented by counsel, replied to Plaintiffs' demand letter. A copy of the June 17th letter is attached hereto as Exhibit F.
32. As a result of the foregoing, Plaintiff Andrew Gorbey had been damaged in the amount of \$3,000,000.

33. As a result of the foregoing, Plaintiff Kennan Stapleton had been damaged in the amount of \$3,000,000.

WHEREFORE, Plaintiffs Andrew Gorbey and Kennan Stapleton request this court to:

- (1) Award, on Count I, judgment for Plaintiff Andrew Gorbey;
- (2) Award, on Count I, judgment for Plaintiff Keenan Stapleton;
- (3) Prohibit the dissemination and use of the Lerner-Salamon article in litigation proceedings; or
- (4) Award such other and further relief to Plaintiffs Andrew Gorby and Keenan Stapleton as this Court deems just and equitable.

JURY DEMAND

Plaintiffs demand a Jury Trial on all issues properly triable to a jury.

Plaintiffs,
By their attorney,



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