

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CENTRAL RABBINICAL CONGRESS OF:
THE USA & CANADA, *et al.*,

Plaintiffs,

vs.

NEW YORK CITY DEPARTMENT OF
HEALTH & MENTAL HYGIENE, *et al.*,

Defendants.

Case No. 12-Civ.-7590

Judge Naomi Reice Buchwald

AFFIDAVIT OF ROBERT SIMINS

1. I am an attorney licensed to practice law in the State of New York, and have so practiced for the past 26 years.

2. Over the last 7½ years, I have defended various community interests *pro bono* from actions by the New York City Department of Health and Mental Hygiene (“DOH”) against the practice of *metzitzah b’peh* (“MBP”) and am co-counsel on behalf of plaintiffs in this case.

3. Reference is made to the Declaration of Dr. Thomas Farley, M.D., M.P.H. and accompanying exhibits (“Farley Decl.”) in which Dr. Farley states, based on 11 cases of neonatal herpes reported by the DOH, that MBP “can and has transmitted herpes to newborns.” (Farley Decl., ¶ 5.) Based on my experience with these cases and in this matter generally, Dr. Farley and his co-Defendants prefer to base their claimed link between HSV-1 and MBP on speculation, mischaracterization of the facts, and a telling, consistent refusal to pursue hard evidence.

The DOH’s Refusal To Agree to a Reasonable Protocol for DNA Testing

4. The indisputable “gold standard” for confirming whether a suspected person is the actual source of transmitted HSV-1 is to show an identity between the DNA of the virus in the infected person with the DNA of the virus obtained from the suspected source. As stated in the literature cited by Dr. Farley: “Identity by molecular typing of viral isolates from the mohel and the infants would be necessary to prove the presumed source of transmission.” (Farley Decl., Exh. J, at 3.)

5. As counsel to Mohel A, one of the *mohelim* accused by the DOH of transmitting HSV-1 through MBP, I first raised the idea of DNA testing at a meeting on April 6, 2005, with representatives of the DOH, including Wilfredo Lopez (then the DOH

General Counsel), Martha Robinson, and Roslyn Windholz. Also present were Gabriel Taussig and Michelle Goldberg-Cahn of the New York City Law Department, who are both of counsel to Defendants in this action.

6. At that time, the DOH was pursuing an action to ban Mohel A from continuing to practice MBP due to his association with 3 cases of HSV-1, two of whom were twins. I suggested that prior to doing so, all parties would benefit from proving by DNA testing whether Mohel A was actually the source of the viruses in these infants as claimed by the DOH. Since Mohel A never had symptoms of HSV-1 such as cold sores from which virus could be easily obtained, I was concerned that no viral isolate might ever be obtainable from him, even though the literature discusses the possibility of asymptomatic shedding into saliva. Instead, I offered that the DOH compare the viral DNA of one of the twins with that of the third infant. If they matched, Mohel A would ban himself from doing MBP forever, so no further enforcement action by the DOH would be necessary. On the other hand, I proposed that if they didn't match—which would prove that the three infants had *not*, contrary to the DOH theory, been infected by a common source—then the DOH would discontinue their action against him.

7. The DOH considered this proposal for a month. However, at a subsequent meeting on May 5, 2005, with the attendance of the then-Commissioner of the DOH himself, I was told that there was no extant virus for the third infant, so that the proposal was moot.

8. Recognizing the importance of DNA testing to determine whether a link existed between MBP and HSV, the New York State Public Health Council unanimously adopted in May 2006 a Circumcision Protocol regarding the Prevention of Neonatal Herpes Transmission (the "NYS Protocol"), which Dr. Farley attaches as Exhibit Q to his declaration. The NYS Protocol resulted from months of discussions with the Rabbinical Council, consisting of a broad spectrum of Hasidic and non-Hasidic Orthodox rabbis, for which I served as legal representative, and from input by neonatal experts around the country, including the National Institutes of Health and Dr. Richard Whitley, one of Defendants' expert witnesses in this case. The minutes of the Public Health Council meeting adopting the NYS Protocol ("Council minutes") are attached as Exhibit 1 to this affidavit.

9. The NYS Protocol provides for an unbiased investigation of the source of HSV-1 in an infant infected after a circumcision with MBP. Such an investigation would include testing not only the *mohel*, but also up to 4 primary caregivers. (*See* Farley Decl., Exh. Q, § IV.C.)

10. Where a case of HSV-1 occurs after MBP, the *mohel* would refrain from performing MBP for up to 45 days during the period of investigation. (*Id.* § III.A.) If the *mohel* had antibodies for the same herpes virus type as the baby contracted (*i.e.*, HSV-1 and not HSV-2), then he would undergo daily mouth swabs for as much as a month of swabbing. (*Id.* § IV.C.2.)

11. If the *mohel* were DNA-linked to the virus in the infant, he would be banned from performing MBP for life. (*Id.* § IV.D.1.) If he were shown not to be linked, then he would be clear to continue practicing MBP. (*Id.* § IV.D.2.A.)

12. If a link or non-link to the *mohel* could not be determined because virus could not be obtained from the *mohel* and no other person was DNA-linked to the infant, then the *mohel* could choose either to continue testing while refraining from MBP, or to take 500 mg. of the anti-viral medication valacyclovir daily if he frequently performed circumcisions, or daily for 3 days prior to a circumcision if he performed circumcisions occasionally. (*Id.* § IV.D.3.)

13. Community cooperation would be required as long as the local health department in whose jurisdiction the investigation were occurring agreed to the terms of the NYS Protocol. (*Id.* § III.B.)

14. At the official signing ceremony of the NYS Protocol on June 12, 2006, the DOH sent observers but would not agree to its terms. When signed, the NYS Protocol governed every health department in the State of New York – except the DOH. Stated another way, the NYS Protocol applied to 57 of New York State’s 62 counties. The only 5 outliers were the 5 counties of New York City under the jurisdiction of the DOH. The NYS Protocol was subsequently endorsed by dozens of rabbis in New York and Israel and was recently adopted by the State of Israel. Unfortunately, with a change in administration in Albany, the NYS Protocol was unilaterally abandoned by New York State.

15. Later in June 2006, the DOH again refused to adopt the provisions of the NYS Protocol in connection with a new investigation in New York City, despite urging by plaintiff CRC. See attached Exhibit 2.

16. Over the years, I have also urged the adoption of the NYS Protocol by the DOH, most recently at a meeting with Dr. Farley and other governmental officials and community leaders in the summer of this year. Such a suggestion has been consistently and categorically rejected.

17. At one point, the DOH offered its own protocol. Unfortunately, its provisions would ban a *mohel* even where MBP might not have been done, where HSV-1 was not laboratory-confirmed, and where the infection presented as little as 0 days and as much as 52 days after a circumcision—well beyond the incubation period that could be attributed to MBP. The DOH was again urged to adopt the NYS Protocol, which it refused to do. (*See* Farley Decl., Exh. O at 14-17.)

18. Thus, while Dr. Farley complains that DNA sequencing has not been done “because families have not identified the circumcisers, or the circumcisers have not allowed themselves to be tested” (Farley Decl., ¶ 65), the NYS Protocol proves that the community was, and remains, perfectly willing—in fact desires—to undergo such testing, as long as it is done in an unbiased fashion to find the real source, and not just to identify

and ban the mohel. The NYS Protocol provided for DNA testing in a spirit of cooperation and with a focus on science, not speculation. It is the DOH that refuses to pursue such testing.¹

The DOH's Mischaracterizations and Omissions Regarding the Reported Cases

19. Given its refusal to pursue concrete DNA evidence, the DOH has been forced to resort to speculation and weak circumstantial evidence about 11 particular cases of neonatal herpes. In some respects, the DOH has even misrepresented or omitted key facts of these cases, many of which I am personally familiar with.

20. For example, Dr. Farley states that "important evidence linking direct oral suction to neonatal herpes comes from a cluster of 3 laboratory-confirmed cases that were linked to a single *mohel*," described as Mohel A. (Farley Decl., ¶ 24.) I have acted as counsel to Mohel A. While Mohel A has admitted performing MBP on two of these infants (who were twins), he has consistently and emphatically denied performing MBP on this third infant.² Further, Mohel A has stated that he saw a rash on the groin area of this infant *prior* to the circumcision and brought it to the attention of the parents as being potentially dangerous. Such a rash would indicate that the infant was infected with herpes before the circumcision even took place. Mohel A submitted to a lie-detector test, which determined that he truthfully stated both (a) that he did not perform MBP on this infant, and (b) that he brought the pre-circumcision rash to the attention of the parents before the circumcision. A copy of the report of this test is attached hereto as Exhibit 3.

21. Another example of mischaracterization involves the case of the baby who died in September 2011 of disseminated HSV-1. (*See* Farley Decl., Exh. K, at 3 tbl. 1.) I have represented the mother of this baby. While Dr. Farley claims, as evidence that the infection was transmitted through MBP, that "herpes blisters appeared on the skin of the genitals and or areas served by the same nerve" (Farley Decl., ¶ 41), the mother of the infant has stated that the first lesion appeared on the infant's *foot*, which for reasons fully explained by Dr. Berman, is not consistent with the theory of transmission through MBP. (*See* Supp. Aff. of Dr. Daniel S. Berman, M.D. ("Berman Supp. Aff."), ¶¶ 23-24.) Nor did the admitting physicians observe any lesions on the infant's genitals. (*See id.*)

22. Similarly, Dr. Farley points to another case that "at first appeared unusual" because the infant developed blisters later than others, but which upon investigation showed that the blisters presented 7 days after a delayed circumcision. Per Dr. Farley, "[t]his remarkable consistency in the timing of infection ... provides further support for a

¹ Dr. Farley's claim that the NYS Protocol shows that the Rabbinical Council agreed about the risk of HSV-1 from MBP (Farley Decl., ¶ 74) is false. The signatories to the NYS Protocol, including the New York State Department of Health, stated that such link was only a "theory in some medical literature." (Farley Decl., Exh. Q at 9.)

² Although Dr. Farley claims that Mohel A "admitted" to performing MBP on this infant (Farley Decl., n.5), such admission was claimed only by the Rockland County Health Commissioner based on an interview with Mohel A; she has since been unable to confirm that such admission actually took place. And the witness that Dr. Farley claims to have seen Mohel A perform MBP on this infant (*see id.*) has actually since admitted that his view was obstructed.

causal association between ritual circumcision and neonatal herpes.” (Farley Decl., ¶ 32.) Dr. Farley omits from this description that the mother of this infant had a history of herpetic lesions, including when she changed the infant’s circumcision dressing. This mother had a habit of biting her index finger—the same finger used to smear ointment on the gauze bandage she would then apply to the circumcision wound. This association of herpetic mouth-to-finger-to-wound clearly explains onset within the incubation period of the delayed circumcision—and has nothing to do with MBP.

I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct to the best of my knowledge.

Executed this 30th day of November, 2012, at Suffern, New York.

Robert Simins
Robert Simins

STATE OF NEW YORK
COUNTY OF New Rochdale

Subscribed and affirmed before me this 30th day of November, 2012.

William R. Milburn
Notary Public
My commission expires on: _____.

WILLIAM R. MILBURN
Notary Public, State of New York
NY 4279531
Qualified in Orange County
Commission Expires 02/26/15

