

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN
Justice

IAS PART 6

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IVANIS RIVERA,

Index No.: 16907/05

Plaintiff,

-against-

Decision and Order

WOMEN’S HEALTH SERVICES P.C.,
and DR. DMITRY GERBER,

Defendant.

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Presently before this Court is defendants’ motion, made upon completion of plaintiff’s case, for dismissal predicated upon the failure of plaintiff to establish a *prima facie* case. This is a retrial and in view of the fact that each side has elected to waive a trial by jury and have the merits of the case determined by this Court, this Decision shall be rendered in written form and each side shall receive a copy thereof following placement on the record.

FACTS

The cause of action pending before the Court is one sounding in medical malpractice, wherein it is alleged by plaintiff that defendant medical doctor departed from the standards of good and accepted medical practice in the performance of an elective second trimester abortion which resulted in an emergency hysterectomy and the loss of plaintiff’s future ability to bear children.

This Court has heard the testimony of plaintiff, Ivanis Rivera, wherefrom it was ascertained that on March 5, 2005 she presented herself at the offices of All Women’s Healthcare¹ for the performance of an elective second trimester pregnancy termination, which procedure was performed by defendant, Dr. Dmitry Gerber. All Women’s Health Care is also named as co-defendant and for purposes of this decision both defendants shall be considered one and the same.

There is no dispute herein that plaintiff was approximately nineteen (19) weeks and three

¹All Women’s Healthcare is same entity known as Women’s Health Services, P.C.

(3) days pregnant; that following the procedure elected by her, she was relocated from the operating room at All Women's to a recovery room where she remained from 4:56 P.M. until 5:40 P.M. when she began to hemorrhage heavily and was returned to the facility operating room; that upon her return to the facility operating room she was attended by Dr. Gerber who attempted to stop or ameliorate the plaintiff's bleeding by further curettage, uterine massage, and the administration of four medicines used to induce uterine contractions; that those efforts failed and an ambulance was called; that the defendant sought to stem the bleeding temporarily through the use of gauze packing while awaiting the ambulance; and that the plaintiff suffered a loss of approximately 1500 cc's of blood while at the All Women's facility.

It is further undisputed that when the plaintiff arrived at White Plains Hospital she received universal blood transfusions; was removed to the operating room whereat defendant, Dr. Gerber, continued his efforts to stop plaintiff's hemorrhaging; that the ligation of the uterine artery failed to stop such bleeding; and the defendant after failing to find a uterine perforation, which he has stated was one of his differential diagnoses, then proceeded to perform an emergency hysterectomy.

The Court further notes at this juncture that the defendant, upon initial notice of the plaintiff's bleeding in the recovery room, formulated a five point differential diagnosis: (1) abnormal placement of the placenta, which was discounted by an ultrasound performed earlier in the day; (2) retained products of conception, which was ruled out by his further curettage of the uterus and sonogram; (3) bleeding disorder, for which no prior history was divulged by the plaintiff, nor which manifested itself in any discoverable fashion at the time of the procedure; (4) uterine atony, which was addressed by uterine massage and administration of four medications to induce contractions, resulting in a diminution, albeit temporary, of plaintiff's bleeding; and (5) uterine perforation, which in the opinion of the defendant remained unanswered and the most probable cause of the hemorrhage.

Returning to the sequence of events in the former paragraph, the defendant listed perforation of the uterus as the diagnosis he was proceeding under until ruled out.

Following the emergency hysterectomy, the defendant's initial gross examination of the removed uterus failed to reveal any perforation, and the uterus was turned over to the Pathology Department at White Plains Hospital for further examination.

A pathological study of plaintiff's uterus was conducted at White Plains Hospital and a written report thereof was rendered by Dr. Howard Mizrachi, entitled "Surgical Pathology Report" which states that the uterus was collected on March 5, 2005, accessioned on March 7, 2005, and reported on March 11, 2005, said report having been entered into evidence as part of Plaintiff's Exhibit 1 on May 12, 2008.

Under the heading of "Final Pathologic Diagnosis" appear the entries of "uterus with residual gestational endometrium and adenomyosis", and "dilated congested superficial blood

vessels at implantation site”. Under the heading of “Gross Description” appears the unqualified (unequivocal) statement, “There is no evidence of perforation”.

Plaintiff called as an expert witness Dr. Lawrence Borow, a gynecologist. Dr. Borow testified that in his opinion a uterine perforation caused during the performance of Ms. Rivera’s abortion was the “only reasonable explanation” for her hemorrhaging and attributed the alleged injury “with reasonable degree of medical certainty, if it occurred with the sharp curette” to the use of excessive force. Dr. Borow also stated that he could not quantify excessive force.

Dr. Borow also opined that upon a reasonable degree of medical certainty, uterine atony was a cause of Ms. Rivera’s profuse vaginal bleeding, but was not the primary reason for her hospitalization. [Pg. 396, L 9] In response to being asked if uterine atony occurred [Pg. 396, L 15], Dr. Borow stated first [at L 16] “It certainly is not unreasonable”, then again stated [Pg. 406, L 10] “I believe it was an unlikely cause of the uterine bleeding”. Dr. Borow further asserted [Pg. 422, L 20] that he did not know of any other reasonable explanation for a hematoma in the left broad ligament other than a perforation of the left lateral wall of the uterus.

Dr. Borow concluded his testimony by stating [Pg. 464, L 23] that “it is possible” that excessive bleeding can occur in the absence of a perforation with respect to a second trimester abortion. Moreover when questioned by the Court, he specifically stated that he saw nothing in the reports indicating the existence of a perforation. Dr. Borow could not state with absolute certainty that there was a perforation and such an occurrence is in fact that upon which he based his opinion. Simply, the opinion proffered by Dr. Borow was based upon a theory that a laceration of the uterine artery was the most likely cause of bleeding; that in order to lacerate said artery the only reasonable explanation was perforation of the uterine wall; and if said perforation indeed occurred, it was by the use of excessive force, which he could not quantify.

The Court takes note here that Dr. Borow has had very limited experience, by his own admission, in elective termination of pregnancies, and in fact could not recall ever performing a vibrant elective termination. [Pg. 415, L 7]

Plaintiff’s second expert was Dr. Liane Deligdisch, board certified in gynecological pathology with a sub-speciality in oncological pathology. Dr. Deligdisch testified that she reviewed slides of the pathology of the plaintiff’s uterus performed at White Plains Hospital, but when asked to identify what part of the uterus the slides were taken from, was unable to answer conclusively. Dr. Deligdisch’s testimony was presented to the Court on videotape as she was leaving the country during trial.

Dr. Deligdisch was specifically asked several times about a lesion appearing on the slides and whether it was “evidence of” or “consistent with” a perforation of the uterine wall. On each occasion she stated that the lesion was consistent with an “injury” (which was non-specified). Further, Dr. Deligdisch repeatedly referred to the tissue samples as having “been torn” or having a “tear” or “tears”. Throughout her testimony, Dr. Deligdisch never once identified a perforation

to the plaintiff's uterus, nor a specific cause of the referred to, "injury". In fact, plaintiff's expert testified that there was evidence of adenomyosis in the plaintiff's pathology, a pre-existing condition which in and of itself can cause bleeding. Furthermore, when questioned if she showed any deference to the report of Dr. Mizrachi, the performing pathologist who did not find a perforation, she stated [Pg. 83, L 5-6] "well he saw the uterus and I didn't".

DEFENDANT'S MOTION

At the close of plaintiff's case, defendant moved for a motion to dismiss based upon the failure of the plaintiff to establish a *prima facie* case, in other words a motion for judgment as a matter of law pursuant to CPLR §4401.

In support of said motion, defendant argued that plaintiff's expert, Dr. Lawrence Borow's opinion that excessive force was used which caused a perforation of the uterine wall is purely conclusory in that there was no basis upon which said conclusion was made.

Next defendant argued that the expert opinions offered by the plaintiff that there was perforation of the uterine wall caused by excessive force is not supported by the evidence, and in fact contradicted by the testimony and documentary evidence proffered herein.

Further, plaintiff's pathological expert, Dr. Liane Deligdisch's testimony did not conclude that there was a perforation, but only that there was a lesion consistent with an injury, which could have been caused by several factors. Said expert did not offer any testimony that she actually observed a perforation.

Defendant strongly asserted that not only was there no evidence presented that supports plaintiff's claim of a perforation, but even if a perforation occurred, that it was the result of a deviation of the standard of care. Defendant contended that there was no testimony proffered by the plaintiff that the defendant performed the procedure improperly, used improper instruments, or used the instruments improperly.

Finally, it was defendant's contention that the testimony and evidence presented herein, while theoretically and hypothetically could have caused a perforation of the uterine wall and lacerate a uterine artery, does not rise to the level of establishing a *prima facie* case for medical malpractice.

Plaintiff opposed said motion arguing that a perforation of the uterine wall was the most reasonable explanation. Plaintiff described the defendant's defense herein as revisionist in that the defendant stated in several sources that a perforation was suspected, that the left uterine artery was the most likely source of the left broad ligament hematoma, and that uterine atony was not a consideration at the time. Plaintiff argued that the only explanation for the amount of blood loss that the plaintiff sustained was a perforation that involved the uterine artery.

Plaintiff further based his opposition on the premise that the pathologist, Dr. Mizrachi, who examined the uterus and did not find any evidence of a perforation, could not offer another explanation as to what caused the plaintiff to experience profuse bleeding. Plaintiff further relies on Dr. Mizrachi's prior testimony that there is an area of the uterus where a perforation may not be able to be seen.

Plaintiff stated that her expert, Dr. Borow, testified that the only way a perforation of the uterine artery could be established would be with an instrument puncturing through the uterine wall, and that a reasonable conclusion was that the defendant used excessive force which constituted a deviation of the standard of care.

A motion for judgment as a matter of law may be granted where, based on the evidence presented, and granting the plaintiff every favorable inference from the evidence submitted, there is no rational basis upon which a jury could have found for the plaintiff. (see, Godlewska v. Niznikiewicz, 8 A.D.3d 430, 779 N.Y.S.2d 79 [2nd Dept. 2004]; Prestia v. Mathur, 293 A.D.2d 729, 742 N.Y.S.2d 80 [2nd Dept. 2002]; Biggs v. Mary Immaculate Hosp., 303 A.D.2d 702, 758 N.Y.S.2d 83 [2nd Dept. 2003]).

The defendant has the burden of showing that, upon viewing the evidence in a light most favorable to the plaintiff, the plaintiff has not established a *prima facie* case. (see, Nichols v. Stamer, 49 A.D.3d 832, 854 N.Y.S.2d 220 [2nd Dept. 2008]; Godlewska v. Niznikiewicz, supra).

To establish a *prima facie* case of liability in a medical malpractice action, the plaintiff must prove: (1) the standard of care in locality where treatment occurred, (2) that the defendant breached that standard of care, and (3) that breach was the proximate cause of plaintiff's injury. (see, Harper v. Findling, 38 A.D.3d 601, 832 N.Y.S.2d 266 [2nd Dept. 2007]).

Where a plaintiff and their expert witness presents no evidence as to the applicable standard of care, they fail to establish a *prima facie* case of medical malpractice. (see, Harper v. Findling, supra; Pace v. Jakus, 291 A.D.2d 436, 737 N.Y.S.2d 123).

Further, general allegations of medical malpractice, which are conclusory in nature and unsupported by competent evidence are insufficient to establish the requisite elements of a medical malpractice action. (see, Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [Ct. App. 1986]; Anderson v. Lamaute, 306 A.D.2d 232 [2nd Dept. 2003]; Chiorando v. Lucchese, 5/20/2008 N.Y.L.J. 25, (col. 1).

In *Chiorando*, the court held that the expert's conclusory opinion that there was a deviation from the standard of care was not based on the evidence in the record. In *Nichols*, the Court held that the plaintiff's expert testimony was flatly contradicted by the record, thus plaintiff's expert established neither that the defendant departed from accepted medical practice, nor that any such departure was a proximate cause of plaintiff's injuries.

In the case at bar, it is clear that the expert testimony of Dr. Lawrence Borow is conclusory at best, and there is no competent evidence presented by Dr. Borow to support said opinion. Dr. Borow conceded that he was not able to quantify what would constitute excessive force. Furthermore, Dr. Borow conceded that there is no evidence in the record that indicates that there was a perforation. In fact, all of the evidence presented herein sharply negates the existence of a perforation herein. Dr. Borow offered “likely” and “reasonable” conclusions, but reasonable does not rise to the standard of probable. Accordingly, this Court finds Dr. Borow’s expert opinion rendered herein conclusory and not based on the evidence in the record.

In addition the Court notes that Dr Borow’s testimony did not establish the standard of care regarding termination of viable second trimester pregnancies. Dr. Borow not only admitted that he had limited experience in the area, but also that he was not licensed to practice medicine in the State of New York, and evidenced no knowledge whatsoever concerning the criteria for good and accepted medical practice in the gynecological sub-specialty of elective termination of pregnancy procedures.

With respect to the expert testimony of Dr. Liane Deligdisch, the same is also founded upon speculation not supported by the evidence. Dr. Deligdisch opined that there was a lesion that was consistent with an injury. However, not only did Dr. Deligdisch testify that she did not observe a perforation, but that the torn muscle fibers consistent with an injury could have been caused by a mechanical injury, inflammation or chemical. Dr. Deligdisch was unable to specify which slides she observed, or what portion of the uterus said slides represented. Moreover, Dr. Deligdisch testified that the slides indicated evidence of adenomyosis, a pre-existing condition, which could cause bleeding.

The Court further notes that no competent evidence was proffered that would provide any rational basis upon which a jury could find that the defendant improperly performed the elective termination of pregnancy on March 5, 2005; that the defendant utilized improper operative technique; that the defendant failed to recognize and correct uterine atony; that the defendant failed to properly respond to the sign and symptoms of post operative bleeding and hemorrhage; and defendant failed to treat plaintiff’s post operative bleeding thereby necessitating a hysterectomy.

RULING

_____The Court having heard all the testimony presented by the plaintiff in this matter, and having carefully examined the evidence admitted, all of which was stipulated to by each side, and having given careful and diligent deliberation to the same, finds that the Plaintiff has failed to establish a *prima facie* case herein.

Accordingly, defendant’s motion is granted in its entirety, and this matter is dismissed.

Dated: May 28, 2008

LAWRENCE V. CULLEN, J.S.C.