

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

DIANA HONEGHAN and HARRINGTON
HONEGHAN,

Plaintiffs,

- against -

INDEX NO. 2342/2004

MOTION
DATE May 30, 2006

FRANK KALAFATIC, M.D., et al.,

Defendants.

MOTION
CAL. NO. 13 & 14

The following papers numbered 1 to 18 read on this motion by the defendants Okoro C.J. Ukpabi, M.D. and Nassau West Obstetrics and Gynecology, P.C. for summary judgment dismissing the plaintiffs' complaint. The defendant Frank Kalafatic, M.D. moves for partial summary judgment dismissing the plaintiffs' second cause of action based upon lack of informed consent pursuant to Public Health Law §2805-d.

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Upon the foregoing papers the motions are determined as follows:

On April 21, 2003, the plaintiff Diana Honeghan appeared at Nassau West Obstetrics and Gynecology, P.C. ("Nassau West") for an emergent appointment with Okoro C.J. Ukpabi, M.D. ("Ukpabi"). The plaintiff had previously treated with Ukpabi in November of 2002. At that time Ukpabi performed a surgical removal of the plaintiff's left ovary and fallopian tube as well as a large tumor.

At the visit on April 21st the plaintiff complained to Ukpabi of abnormal bleeding and a late period but no complaints of pain were made. The plaintiff informed Dr. Ukpabi that her last menstrual period was on

March 19th and that a home pregnancy test she had performed was positive. Dr. Ukpabi drew blood to detect for the presence of Beta HCG (Human Chorionic Gonadotropin) which is an indicator both of pregnancy and its normalcy. Dr. Ukpabi also performed a physical exam of the plaintiff and a transvaginal pelvic sonogram which failed to reveal the presence of a gestational sac in the plaintiff's uterus. After the exam, Dr. Ukpabi instructed the plaintiff to return in four days.

On April 25, 2003, the plaintiff appeared for her appointment with Dr. Ukpabi. The plaintiff informed Dr. Ukpabi that she was no longer experiencing spotting and remained pain free. The plaintiff's Beta HCG results had been received and indicated that the plaintiff's level on April 21st was 996. Dr. Ukpabi drew more blood from the plaintiff for a further Beta HCG test and instructed the plaintiff return on April 28th or immediately upon experiencing any pain. The results of the Beta HCG test, received sometime later, showed the plaintiff had a level of 2986 on April 25th.

The plaintiff did not appear for her next scheduled appointment with Dr. Ukpabi, on April 28th but telephoned to inform him that she would no longer be treating with him. Instead, on April 25th, plaintiff went to see the defendant Frank Kalafatic, M.D. ("Kalafatic") and decided to continue her treatment with him.

On May 16, 2003, the plaintiff returned to Dr. Ukpabi on an emergency basis complaining of severe abdominal pain. Dr. Ukpabi diagnosed the plaintiff with an ectopic pregnancy and immediately operated on the plaintiff and removed her remaining fallopian tube where the embryo had lodged.

The plaintiff in her complaint asserts that Dr. Ukpabi departed from the standard of care by failing to expediently diagnose the plaintiff's ectopic pregnancy which resulted in the loss of her remaining fallopian tube thereby rendering her sterile.

It is incumbent upon a defendant moving for summary judgment in a medical malpractice action to present evidence in admissible form showing a prima facie entitlement to judgment in its favor as a matter of law (See, Winegrad v New York University Medical Center, 64 NY2d 851; Zuckerman v City of New York, 49 NY2d 557).

Upon establishing a prima facie case, the burden shifts to the plaintiff to show the existence of a genuine factual issue requiring a trial or a satisfactory excuse for failing to demonstrate an issue of fact (See, Alvarez v Prospect Hospital, 68 NY2d 320; Vermette v Kenworth Truck Company, 68 NY2d 714). To raise a triable issue of fact in a medical malpractice action a plaintiff must proffer expert medical opinion evidence, based upon record facts, stating "specific findings and conclusions tending to establish the essential elements of medical

malpractice" (Taylor v St. Vincent's Medical Center of Richmond, 236 AD2d 461; see also, Dunlop v Sivaraman, 272 AD2d 570). Affidavits containing "only bare conclusory allegations and assumed facts not supported by the evidence" do not meet this standard (See, Mendez v City of New York, 295 AD2d 487; Spergel v Rubenstein, 243 AD2d 556). It is axiomatic that the "[t]he requisite elements of proof in a medical malpractice [action] are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage" (Amsler v Verrilli, 119 AD2d 786).

The defendants submitted an affirmation from their medical expert, Joel Cooper, M.D., an obstetrician and gynecologist. Dr. Cooper opined that the accepted standard of care was met by the treatment provided to the plaintiff by Dr. Ukpabi. Dr. Cooper averred that at the time the plaintiff discontinued treating with Dr. Ukpabi, it was not possible to diagnose the plaintiff's pregnancy as ectopic. Specifically, Dr. Cooper stated in his affidavit that an abnormal pregnancy, like an ectopic one, is indicated by a low Beta HCG level. He further averred that the plaintiff's Beta HCG level had increased normally from April 21st to April 25th, namely 1.6 to 2 times per 48 hours, and was "squarely within" the normal range on April 25th. Moreover, Dr. Cooper opined that with respect to other indicia of an ectopic pregnancy, abdominal pain and bleeding, the plaintiff never complained of the former and the later was reported to him at the April 25th visit as having ceased.

When reviewed with the accompanying deposition transcripts and the medical records, the court finds defendants Dr. Ukpabi and Nassau West have made a prima facie showing that the treatment rendered to the plaintiff did not depart from the accepted standard of care (See, Alvarez v Prospect Hospital, 68 NY2d 320, 325; Holbrook v United Hospital Medical Center, 248 AD2d 358).

In opposition, the plaintiffs submitted the affirmation of their expert who is an obstetrician and gynecologist. Plaintiff's expert opined that Dr. Ukpabi departed from the standard of care by not performing a further transvaginal pelvic sonogram on April 25th to definitively rule out whether the plaintiff had an ectopic pregnancy. The doctor averred that since the plaintiff's Beta HCG level was near what he described as "the discriminatory level" on April 21st, a second sonogram was required by accepted standards of care. The expert further claims that a sonogram on April 25th would have revealed the absence of an intrauterine gestational sac which, coupled with the plaintiff's Beta HCG being above the discriminatory level, would have led to a diagnosis of an ectopic pregnancy. Surgical intervention at that time, it is opined, would have prevented the rupture and loss of the plaintiff's fallopian tube. The expert's determinations set forth in his affirmation are sufficiently detailed to raise issues of fact and

"set forth the specific factors appearing in the . . . medical records which led him to his conclusions" (Menzel v Plotnick, 202 AD2d 558).

The defendants' expert, Dr. Cooper, in an affidavit annexed to the defendants' reply papers, avers that Dr. Ukpabi's election not performing a sonogram on April 25th is a "false issue" since, as a general matter, a gestational sac can not be visualized until the sixth week of gestation and the plaintiff was only three to four weeks pregnant. Although the ability to visualize a gestational sac was not specifically addressed by the plaintiff's expert in his affirmation, the expert's opinion concerning the requirement for a sonogram on April 25th includes, by implication, an opinion that a sonogram at that point in time was capable of ascertaining the existence of a gestational sac and is sufficient in this regard. At best, the reply affirmation of Dr. Cooper raises another issue of fact to be determined by the trier of fact.

Additionally, the failure of plaintiff's expert to comment on Dr. Cooper's opinion regarding the plaintiff leaving Dr. Ukpabi's care is not fatal as plaintiff's expert opined that a diagnosis of ectopic pregnancy should have been made on April 25th which was before plaintiff left Dr. Ukpabi's care.

The factual resolution of the need for a sonogram and the effect of plaintiff's failure to continue her treatment with Dr. Ukpabi properly lies with the trier of fact. Accordingly, after considering the evidence in a light most favorable to the plaintiffs (See, Kelly v Media Services Corp, 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), the motion for summary judgment by the defendants Okoro C.J. Ukpabi, M.D. and Nassau West Obstetrics and Gynecology, P.C. is denied.

The motion by the defendant Dr. Kalafatic to dismiss the plaintiffs' second cause of action based upon lack of informed consent pursuant to Public Health Law §2805-d is granted. A cause of action for lack of informed consent can be stated in a situation where a plaintiff alleges a "wrong complained of arose out of some affirmative violation of plaintiff's physical integrity" (Iazzetta v Vicenzi, 200 AD2d 209, 212-213; see also, Martin v Hudson Valley Associates, 13 AD3d 419, 420). Here, the "wrong complained of" is the failure of Dr. Kalafatic to diagnose the plaintiff's ectopic pregnancy and the resultant loss of her remaining fallopian tube. Here, it can not be disputed that neither of these wrongs arose out of any intrusion into the plaintiff's body. Moreover, contrary to the plaintiffs' assertion, failure to diagnose an ailment or neglecting to "recommend surgery at a time when more beneficial results could have been obtained" definitively can not form the basis of a claim for lack of informed consent (Campea v Mitra, 267 AD2d 190, 191; see also, Smith v Fields, 268 AD2d 579, 580; Schel v Roth, 242 AD2d 697).

Accordingly, the plaintiff's second cause of action as against the defendant Dr. Kalafatic based upon lack of informed consent pursuant to Public Health Law §2805-d is dismissed and the plaintiff is directed to serve, within 10 days of service of a copy of this order, an amended

bill of particulars deleting any reference to a claim based upon Public Health Law §2805-d against Dr. Kalafatic.

Dated: July 17, 2006

Peter J. Kelly, J.S.C.