Millschappell v Dupret
2014 NY Slip Op 32099(U)
July 1, 2014
Sup Ct, Bronx County
Docket Number: 309221/08
Judge: Stanley B. Green
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

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NAOMI MILLSCHAPPELL,

Plaintiff(s),

INDEX №.: 309221/08

-against-

DR. HEIDI DUPRET, DR. AKINLAJA, DR. PADILLIA AFFLACK, DR. REISS, DR. EBRAHIMI, DR. LUCIE SEDLACKE, AND BRONX LEBANON HOSPITAL CENTER,

Defendant(s).

DECISION

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HON. STANLEY GREEN:

The motion by Dr. Heidi Dupret, Dr. Phabillia Afflack s/h/a Dr. Padillia Afflack and Dr. Andrezej Reiss, s/h/a Dr. Reiss, for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is granted only to the extent that all claims against Dr. Heidi Dupret are dismissed.

Plaintiff claims that as a result of defendants' failure to timely and properly diagnose and treat a pseudoaneurysm or vascular lesion, she suffered serious injuries, including a hysterectomy, hemorrhaging, surgical menopause and related injuries.

On April 20, 2007, plaintiff, presented to Bronx Lebanon emergency room, 31 weeks pregnant and in active labor. She was transferred to Labor and Delivery, where Dr. Dupret, the on-call attending OB/GYN, performed an emergency Caesarean section, assisted by Dr. Akinlaja, a resident. The surgery went without complications and plaintiff's wound was closed with

staples. On April 21, 2007, plaintiff was discharged from the hospital, without her baby.

On April 24, 2007, plaintiff returned to Bronx Lebanon to have her stitches removed. At that time, doctors noted that there was serosanguineous discharge from the wound and decided to admit her to the hospital. Plaintiff was treated with minor surgery to open the wound and drain the serosanguineous fluid, antibiotics and fluid replacement. Dr. Forrester, the attending physician responsible for plaintiff's care, called a consult for the wound infection with Dr. Reiss, the Chief of the Obstetrics, and later with Dr Mikhail, the Chairman of the Obstetrics and Gynecology. Dr. Reiss examined plaintiff and changed the antibiotic coverage to a triple antibiotics. A CT scan was performed which confirmed the collection of fluid was under the skin. The CT report also included an incidental finding of:

> "A small densely enhancing lesion within the uterus that may represent a pseudoaneurysm. If there is no significant vaginal bleeding, a dedicated study can be performed when the acute phase has subsided."
>
> The "ADDENDUM" to the report reads:
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> "In addition to above findings, please note that there is dense enhancement of an artery within the anterior mid uterus (Image #68), which is highly suspicious for pseudoaneurysm of a branch of the uterine artery. If there is abnormal vaginal bleeding then further evaluation is recommended with CT angiography of the uterine artery for possible eventual embolization."
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> The finalized report by Dr. Alhusayni, an Interventional Radiologist, reads:
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> "A small densely enhancing lesion within the uterus that may represent a pseudoaneurysm. If there is no significant vaginal bleeding, a dedicated study can be performed when the acute phase has subsided."

During this admission, Dr. Sedlacke, a resident, discussed plaintiff's care and the CT scan results with Dr. Reiss, Dr. Mikhail and her Chief Resident, Dr. Gavara. Dr. Reiss' opinion was that the best option was to observe for bleeding and Dr. Mikhail was in agreement. Plaintiff was

discharged on April 30, 2007.

On May 6, 2007, while visiting her baby in the NICU, plaintiff had a sudden hemorrhage of approximately 1500 cc's of blood. She was taken to the Recovery Room on the Labor and Delivery floor. Dr. Afflack, a staff attending physician, examined plaintiff and started IV's. She learned that plaintiff had a possible pseudoaneurysm and placed her on a conservative regimen. Then plaintiff had a second bleed of 500 cc's. Dr. Afflack called Dr. Patel, an interventional radiologist, to assess plaintiff to see if she was a candidate for immediate embolization of the uterine artery, but Dr. Patel advised her that he could not assemble a team until 8:00 a.m. the next morning. Dr. Afflack contacted Dr. Riess. Dr. Riess was considering an immediate transfer to Albert Einstein College of Medicine, but plaintiff had a third bleed. At that point, Dr. Riess agreed it was too risky to transfer plaintiff because her condition was unstable and her blood studies were critically low. Plaintiff was taken to the operating room where Dr. Afflack performed a supra cervical hysterectomy, assisted by Dr. Riess.

Defendants seek dismissal of the complaint on the ground that the care and treatment rendered by them was at all times proper and in accordance with good and accepted medical practice. In support of the motion, defendants submit the affirmation of Dr. Lorey Pollack. Dr. Pollack opines that Dr. Dupret's actions and judgments in delivering the infant by emergency caesarian were in accordance with good and accepted practice section, that the technique used by Dr. Dupret and Dr. Akinlaja were in accordance with good medical practice, and that none of the plaintiff's problems were due to a breach of the standard of care by them. He explains that with a pre-term fetus in a breech presentation, vaginal delivery is contraindicated because of the high risk of entrapment of the head.

Dr. Pollack also opines that Dr. Reiss and Dr. Afflack did not depart from accepted standards of care in their treatment of plaintiff and none of the alleged departures were the proximate cause of the claimed injuries.

Dr. Pollack opines that Dr. Reiss' opinion, that the best option was to not do anything but observe for bleeding, was validated by the Chair of the department and was in agreement with the recommendation of Dr. Alhusayni, the radiologist who read the CT. He explains that the CT study that was done in April was to look for signs of infection and that in order to diagnose and differentiate whether a vascular lesion is an AV Malformation, pseudoaneurysm, or AV Shunt, a dedicated CT pelvis arterial study is necessary. He notes that the CT report indicates that if the patient is hemorrhaging, an embolization should be tried, but plaintiff was not experiencing any abnormal bleeding. He states that "according to the radiologist, who recites standard practice for 2007", plaintiff was not a candidate for a dedicated study since she was in the acute phase of an infection (two weeks from diagnosis and while the patient is on antibiotic coverage) and also the acute phase of postpartum (approximately six weeks), which ends upon involution of the uterus. Thus, he opines that Dr. Reiss properly assessed the situation and used his best clinical judgment in recommending continued observation for plaintiff at that time.

With respect to the May 6, 2007 admission, Dr. Pollack opines that Dr. Afflack properly treated her and contacted Dr. Patel for an evaluation of plaintiff to see if she was a candidate for embolization. He notes that after the call, plaintiff had another bleed and that Dr. Afflack called Dr. Reiss and it was determined that plaintiff was too unstable for transfer and an emergent hysterectomy needed to be performed. He opines that Dr. Afflack showed superior judgment in referring decisions to the most experienced staff members, that Dr. Reiss used sound medical

judgment in a situation that has no standard of care, and that none of the alleged departures were the proximate cause of the claimed injuries.

Plaintiff contends that the motion by Dr. Dupret is moot because a stipulation of discontinuance has been submitted along with her motion papers. She contends that the motion by Dr. Afflack and Dr. Reiss must be denied because they have failed to make a prima facie showing of entitlement to judgment as a matter of law. Plaintiff also contends that the affirmations of her experts raise triable issues of fact which preclude a grant of summary judgment.

In opposition to the motion, plaintiff submits the affirmation of a physician who is board certified in Diagnostic Radiology and Vascular and Interventional Radiology. This expert opines that Dr. Reiss departed from good and accepted standards of medical practice by failing to undertake further diagnostic studies and/or otherwise identifying and treating the "vascular lesion" when it was first identified on the CT scan and "well before" her massive bleeding episodes. The expert explains that pseudo-aneurysms can be life-threatening and are prone to enlargement, rupture and thrombosis. The expert disagrees with Dr. Pollack's opinion that plaintiff was not a candidate for a dedicated study because she was in the acute phase of an infection and post-partum and opines that where there is suspicion for a lesion (pseudoaneurysm), further studies are necessary and should be undertaken to clarify the issue and identify the lesion. The expert opines that the standard of care requires an angioplasty and embolization which is both diagnostic and therapeutic. He states that he has treated postpartum hemorrhage with embolotherapy in the "acute phase" and that "mere observation is a departure from good and accepted standards of care and practice."

Plaintiff also submits the affirmation of a physician who is board certified in Obstetrics and Gynecology. This expert also opines that Dr. Reiss departed from good and accepted standards of care and practice at the time of plaintiff's second admission by failing to order that plaintiff undergo dedicated studies once it was known that she might have a pseudoaneurysm. This expert also opines that Dr. Afflack and Dr. Reiss departed from good and accepted standards of care and practice on May 6, 2007, by failing to take steps to identify the source of the bleed or otherwise attempting to stop the bleeding short of a hysterectomy. The expert opines that good and accepted standards of care dictate that the first line of treatment of postpartum hemorrhage include the use of medications and when these fail, conservative surgical options should be attempted, including B-Lynch suture, intrauterine balloon, uterine artery ligation, hypogastric ligation and interventional radiology for embolization and that only if these methods fail, should a hysterectomy be pursued. The expert explains that if plaintiff's bleeding was the result of uterine atony due to her recent infection, medical management would more likely than not have been effective in controlling or stopping her bleeding and that if the bleeding was due to the pseudoaneurysm of the uterine artery, uterine artery ligation would more likely than not have controlled and stopped the bleeding. The expert opines that by failing to attempt these measures on May 6, 2007, Drs. Afflack and Reiss departed from good and accepted standards of medical practice and care and as a result, plaintiff suffered serious injuries, including a postpartum hemorrhage, hysterectomy and the inability to carry children in the future.

In reply to plaintiff's opposition, defendants contend that summary judgment should be granted to Dr. Dupret as the stipulation simply shifts the liability for any acts or omissions by her to Bronx Lebanon. Defendants also contend that plaintiff's expert OB/GYN gives a conclusory

opinion without testimony or evidence that the bleed was caused by "atony of the uterus," that the interventional radiologist's opinion is contrary to the standard of care at the time and that failure to use conservative measures such as a B-Lynch suture or uterine artery ligation were not pled in the bill of particulars. Defendants also submit a supplemental expert affirmation addressing plaintiff's experts' opinions that a dedicated vascular study should have been performed on a post partum uterus such as plaintiff's and the conservative measures and alternative surgeries plaintiff claims should have been employed on May 6, 2007.

Defendant's expert opines that embolization in the postpartum period was selective in 2007 and states that he is unaware of prophylactic use of this modality. He agrees with the report of Dr. Husayni, who suggests that embolization is used only if the patient is bleeding. He notes that the American College of Gynecologists (ACOG) recommended that patients undergoing an embolization not become pregnant and that he has never witnessed a dedicated vascular study being performed on a postpartum uterus. He also notes that there are contraindications, such as infection in the organ being studied. He opines that there is no factual basis for plaintiff's expert obstetrician's opinion that the bleed occurred as a result of uterine atony, that conservative therapy is not done where there is a massive bleed and is generally highly ineffective, and not recommended, if employed in a uterus that is seventeen days postpartum because the uterus is usually resistant. He opines that the indications to perform any of those procedures were not present and that one is trained to do exactly what Dr. Afflack did with massive bleeding and impending shock, to perform a definitive surgery to stop the bleeding (a hysterectomy) before the patient goes into shock.

In a medical malpractice action, a defendant physician establishes prima facie entitlement

to summary judgment when he establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (Roques v. Noble, 73 AD3d 204). Once the defendant has met his prima facie burden, the burden shifts to the plaintiff to present competent evidence sufficient to show that the defendant departed from accepted standards of practice and that such departure was a proximate cause of the plaintiff's injuries (Kafka v. New York Hospital, 228 AD2d 332). In order to sustain this burden, the plaintiff must present expert testimony that the defendant's conduct constituted a deviation from the requisite standard of care (Berger v. Becker, 272 AD2d 565). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice do not suffice to defeat defendant physician's motion (Alvarez v. Prospect Hospital, 68 NY2d 320). The expert's opinion must be based on facts in the record or personal knowledge (Cassano v. Hagstrom (5 NY2d 643).

Despite plaintiff's contention to the contrary, the opinion of Dr. Pollack, that defendants did not depart from the accepted standard of care is sufficient to establish their prima facie entitlement to judgment as a matter of law (Roques, supra). Thus, the burden shifted to plaintiff to present competent evidence sufficient to raise a material issue of fact as to whether defendants' conduct constituted a departure from the accepted standard of care (Berger, supra).

Initially, it is noted that although plaintiff has submitted a stipulation of discontinuance of this action against Dr. Dupret, counsel for defendants has rejected it because it indicates that Bronx Lebanon remains vicariously liable for all acts or omission of Dr. Dupret. Therefore, Dr. Dupret's motion for summary judgment has been considered on the merits and, there being no

competent evidence that Dr. Dupret departed from the accepted standard of care, her motion for summary judgment is granted.

As to Dr. Reiss and Dr. Afflack, while Dr. Pollack opines that Dr. Afflack properly treated plaintiff on May 6, 2007 and that Dr. Reiss and Dr. Mikhail "used sound medical judgment in a situation that has no standard of care," the opinions of plaintiff's experts, that Dr. Reiss departed from the accepted standards of care in his treatment of plaintiff during her second and third admissions by failing to undertake further studies and failing to attempt to stop or control the postpartum hemorrhage with medication and/or surgical options less drastic than a hysterectomy, are sufficient to raise triable issues of fact as to whether Dr. Reiss departed from good and accepted practice in his treatment of plaintiff during her second admission, from April 24-29 and on May 6, 2007, which precludes a grant of summary judgment.

While defendants contend that plaintiff's expert radiologist "is guilty of giving a standard of care and his practice that does not pertain to the issues in this case, and applies this standard to a situation where one essential fact, namely that the patient must be bleeding , is missing," plaintiff's expert clearly opines that plaintiff should have undergone elective transcatheter embolotherapy prior to her massive vaginal bleeding episode and this opinion, though contrary to that of Dr. Pollack, is sufficient to raise issues of fact and credibility that cannot be resolved on a motion for summary judgment"(Cregan v. Sachs, 65 AD3d 101). As to Dr. Afflack, the opinion of plaintiff's obstetrician, that Dr. Reiss and Dr. Afflack departed from the standard of care on May 6, 2007, when plaintiff presented with a post-partum hemorrhage, by failing to take steps to identify the source of the bleeding and, when interventional radiology was not available and transfer was deemed too risky, by failing to attempt to stop the bleeding by conservative surgical

options before pursing a hysterectomy, raises triable issues of fact as to whether Dr. Reiss and Dr. Afflack departed from good and accepted practice in their treatment of plaintiff on May 6, 2007 and proximately caused the claimed injuries. The particular conservative measures, though not specifically alleged, fall within the scope of the departures alleged in the bill of particulars. Accordingly, the motion for summary judgment by Dr. Dupret is granted and the motion for summary judgment by Drs. Afflack and Reiss is denied.

Movant shall serve a copy of this order with notice of entry on the Clerk of the Court who shall enter judgment dismissing the complaint as against Dr. Heidi Dupret.

This constitutes the decision and order of the court.

Dated: July 1, 2014

STANLEY GREEN, J.S.C.