

**Carducci v Lenox Hill Hosp.**

2015 NY Slip Op 30326(U)

March 9, 2015

Supreme Court, New York County

Docket Number: 805060/12

Judge: Alice Schlesinger

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
PAMELA CARDUCCI and LOUIS A. CARDUCCI, JR.,

Plaintiffs,

Index No.805060/12  
Motion Seq. No.001

-against-

LENOX HILL HOSPITAL and SAUL R. STROMER, M.D.,

Defendants.

-----X  
SCHLESINGER, J.:

The defendant Dr. Saul Stromer, an obstetrician/gynecologist and the sole defendant left in this case,<sup>1</sup> is now moving for summary judgment dismissing all the claims against him. Alternatively, defendant requests partial summary judgment dismissing the claims for reckless treatment and lack of informed consent. As plaintiffs have confirmed that they are not opposing the dismissal of the claims specified in the alternative request, the Court will solely consider whether Dr. Stromer is entitled to have the entire action against him dismissed.

What should be discussed at the outset of this decision, and central to this case, are the circumstances surrounding the aftermath of the delivery of Mrs. Carducci's baby on October 14, 2009 at 16:52 or 4:52 p.m. Immediately thereafter, Mrs. Carducci began to bleed excessively, a bleeding that could not be stopped.

What is paramount here is that the treatment rendered was a lifesaving hysterectomy by Dr. Stromer. The operative report by Dr. Stromer indicates that Mrs. Carducci was in very critical condition and that during the operation itself she suffered

---

<sup>1</sup> Plaintiffs discontinued the claims against defendant Lenox Hill Hospital by Stipulation dated September 24, 2014.

two cardiac arrests. Therefore, what I find troubling about the opposition and what dictates my ultimate conclusion here is that the opposition affidavit from Dr. Michael Kreitzer, also an obstetrician/gynecologist, never confronts this significant fact and fails to provide departures that are relevant to it.

Mrs. Carducci was a patient of Dr. Stromer before the events of 2009 and, in fact, gave birth to a baby in 1996 that the doctor delivered. All went well with that pregnancy and delivery. Mrs. Carducci wanted to become pregnant again but was having difficulty conceiving. Ultimately, in January 2009 with the help of IVF (in vitro fertilization) at Advanced Fertility Services (AFS), she became pregnant. Before the IVF, AFS did a hydrosonogram, which showed Mrs. Carducci's uterine cavity to be normal.

In March 2009, when Mrs. Carducci was 11 weeks pregnant, she returned to Dr. Stromer. During the ensuing pregnancy, the doctor took care to scrutinize what was going on. In this regard, he sent the patient for 12 prenatal sonograms performed at the Center for Maternal Fetal Medicine and Gynecology from April 3, 2009 through October 13, 2009. Dr. Stromer reviewed the reports, and nothing suggested the presence of placenta accreta. Placenta accreta is a situation during pregnancy when the placenta encroaches and sticks to the uterus. When this happens, and is noted for the first time after delivery of the baby, the doctor is faced with a difficult or even emergency situation in removing the placenta after the birth. That appears to be what happened here.

The October 13 ultrasound, as interpreted by the defendant, was normal and showed that the baby's weight would be above 7 lbs. Dr. Stromer wanted his patient to

give birth no later than the next day, and when she came in on the fourteenth she was already 2 centimeters dilated and 80% effaced. Therefore, the delivery went forward and all was well with the birth. The baby weighed in at 5lbs and 1oz, but had excellent APGAR scores of 9 and 9 at 1 and 5 minutes.

That is when a normal birth turned into an emergency. The bleeding started almost immediately. Dr. Stromer first took conservative measures such as a balloon used as a tamponade for the uterus, but this technique proved to be ineffective. So, as stated earlier, he performed a lifesaving hysterectomy wherein he removed the patient's uterus, right fallopian tube and right ovary. In the course of that surgery, the patient's right ureter was injured, although when Mrs. Carducci saw Dr. Stromer for the last time in his office on December 17, 2009, approximately two months after the birth, she was doing well.<sup>2</sup>

In support of Dr. Stromer's motion is an affidavit from Dr. Henry Prince, an obstetrician/gynecologist licensed to practice medicine in New York and board certified in this specialty. He has reviewed all the hospital and other records as well as the deposition testimony. He begins his statement with the opinion, stated with a reasonable degree of medical certainty after his extensive review, that the defendant Dr. Stromer did not depart from accepted standards of medical care. He adds that none of the treatment that Dr. Stromer provided was the proximate cause of any of plaintiff's injuries.

Dr. Prince then proceeds to discuss the background that led up to the circumstances of this excessive bleeding, which again occurred right after Mrs.

---

<sup>2</sup> The injured ureter and its consequences are the sole injury claimed in this action.

Carducci's baby was born. In the course of this discussion, he refers to the condition placenta accreta and explains that it is a rare event. Dr. Prince describes it as a situation when the placenta invades the uterine wall during pregnancy. He indicates that certain women are particularly at risk for this situation. However, Mrs. Carducci did not fit into that profile.

Dr. Prince also tells us that placenta accreta is usually diagnosed with ultrasounds, but not always. From post-operative studies, the expert opines that the mother had placenta accreta that was not observed during the pregnancy. But when the placenta did not detach from the uterus, the condition was suspected.

Dr. Prince provides the Court with this explanation, involving the rarity of this condition and its failure to be detected, because the plaintiffs in their Bill of Particulars primarily claimed that the malpractice here concerned the failure to diagnose placenta accreta and address it before the delivery. As it turns out, that is no longer a claim made by the plaintiffs. What that means in terms of this decision will be discussed after Dr. Prince's opinions have been fully discussed.

Dr. Prince, as noted before, opines with a reasonable degree of medical certainty that during the prenatal period, Dr. Stromer had no reason for suspecting placenta accreta because there were no signs or symptoms of the condition and Mrs. Carducci had none of the risk factors associated with it. Dr. Prince adds here that if there had been a diagnosis or suspicion of placenta accreta, the mother would have had a C-section.

When Dr. Prince addresses the injury here, which occurred during the hysterectomy, he says (at ¶23, p. 7) that:

The fact that there was an injury to the right ureter during the emergency lifesaving hysterectomy does not mean the surgery was performed in a negligent manner. Injury to a ureter during an emergency lifesaving hysterectomy in the face of massive bleeding and distorted anatomy from placenta accreta is a known complication of such surgery even when the procedure is performed entirely properly.

The expert believes that the right kidney was obstructed from a surgical stitch that compressed the ureter. In conclusion, Dr. Prince emphasizes that time was of the essence once Dr. Stromer concluded that surgery was necessary to control the bleeding and save his patient's life.

As stated earlier, the opposition consists of an affidavit from Dr. Michael Kreitzer, an obstetrician/gynecologist licensed in New Jersey who has been board certified since 1974. He also has examined all the records, the affidavit of Dr. Prince, and the deposition of Dr. Stromer. He first questions why it took more than an hour after delivery to begin the hysterectomy, but he does say that this timing is not a departure.

Interestingly, in light of his statement about how long it took to bring Mrs. Carducci to surgery, it seems inconsistent that many of his departures concern various measures that arguably should have been done before the surgery occurred. This position appears somewhat contradictory because, while in the first instance Dr. Kreitzer is opining that an apparent emergency should have been attended to faster, on the other hand he opines about departures that would have taken more time and would necessarily have delayed that same surgery.

The departures he presents include Dr. Stromer's failure to first attempt to use blunt curettage of the endometrium following the uterine exploration. But he does not

explain why or how that departure is related to the injury to the ureter. He next takes issue with the failure of Dr. Stromer to use ring forceps placed on the cervix to facilitate its complete removal. Similarly, he says that a supra-cervical hysterectomy (subtotal) could have been done and would not have put the lower ureter in jeopardy.

His most significant opinion is that it was a departure for Dr. Stromer to fail to make every effort to identify the ureter during the removal of the uterus, right tube and right ovary. Dr. Kreitzer points out that, according to the defendant, the right ureter was cut during the uterine artery ligation. Dr. Kreitzer says this injury can occur when a total hysterectomy is done because the artery is ligated at the level of the cervix, in close proximity to the ureter. But in a supra-cervical hysterectomy, the artery is ligated significantly higher in the uterus and further away from the ureter.

Finally, in Dr. Kreitzer's penultimate paragraph, he gives a laundry list of "other techniques that could have/should have been used to stop the uterine bleeding, but were not used prior to the actual removal of the uterus. These included the use of tourniquets, the ring forceps to interrupt the blood supply and/or various suture techniques through the avascular spaces of the broad ligament, or the use of the B-Lynch Suturing Technique." (§13, p.3) He then says that none of these techniques was used and that the failure to use them or to consider a supra-cervical hysterectomy were deviations from good and accepted practice that ultimately resulted in the injury to the ureter. Significantly, plaintiffs never criticize the decision to perform a hysterectomy, and it seems for good reason.

Dr. Kreitzer in his last paragraph states that the surgery was "necessary". However, for the reasons stated, he opines that the care and treatment rendered to the

patient was not in conformity with good and accepted medical practice and was the proximate cause of the injury to the ureter.

The reply is an angry one, which is not appropriate here. First, counsel insists that the affidavit of Michael Kreitzer is untimely and therefore should not be considered by me. Why is this the case? Counsel argues that at various times during the course of discovery, up until the time the plaintiff filed a Note of Issue, the defense was never served with an expert witness disclosure statement, despite that a request for such disclosure was made by serving on counsel for the plaintiffs a Notice to Produce Expert Witness and Information two years before plaintiffs filed the Note of Issue. This motion for summary judgment followed soon after the Note of Issue and was served by Dr. Stromer on the plaintiffs on September 17, 2014. Defense counsel notes that plaintiffs did not serve their expert witness disclosure until December 24, 2014, when they served their opposition papers to the motion.

I do not see anything wrong with the above scenario. In this county, in medical malpractice cases, despite a request sometimes made by defense counsel during discovery for expert information, plaintiffs typically are not directed to file expert witness disclosure statements until dispositive motions have been decided and the case has been placed on the trial calendar. Therefore, Dr. Kreitzer's affidavit is not untimely. While it may ultimately be inadequate, it is not untimely.

However, with regard to Dr. Kreitzer's opinion vis-a-vis the Bill of Particulars earlier served on the defense, it did seem apparent that the plaintiff in her opposition had altered the theory of her complaint. Whereas earlier, the claim was that placenta accreta should have been diagnosed during the patient's pregnancy so as to avoid the

emergency that occurred, that claim was now not discussed at all. Rather, the departures alleged in opposition to the motion had to do with various things that Dr. Stromer should have done before or during the surgery. Because of her argument that these were new theories not readily discernable earlier, defense counsel submitted a reply affidavit from Dr. Prince, which dealt with the allegations raised for the first time in the opposition. I find this was proper. Therefore, I will consider the substance of Dr. Prince's opinions given in reply.

However, before doing that, I want to discuss a claim made by defense counsel, which I do not find persuasive. That claim is that Dr. Kreitzer's affidavit is deficient and inadequate because the doctor fails to include in his credentials that he has had experience with emergency situations such as this. The alleged omission is true. But Dr. Prince, who has provided two affidavits to the Court, suffers from the same failure to detail his own experiences in emergency situations. The entirety of the credentials that both experts provide is that they are board certified and licensed in obstetrics and gynecology.

In Dr. Prince's supplementary papers, he demonstrates the deficiencies in the opinions provided by Dr. Kreitzer. Dr. Prince first states that Dr. Stromer did attempt conservative treatment before proceeding to surgery, which was proper. Secondly, Dr. Prince says that it is entirely a matter of surgical judgment as to what organs need to be removed during an emergency hysterectomy. Here he states the fact, assumed by all at this point, that Mrs. Carducci was suffering from placenta accreta with extensive bleeding. Therefore, surgical judgment determined the steps that had to be taken to achieve homeostasis.

With regard to using ring forceps or other procedures such as applying tourniquets or sutures before proceeding to the surgery, Dr. Prince points out that the patient suffered several cardiac arrests during the hysterectomy and that there was no time to employ other techniques. With regard to the failure to identify the ureter, whereas this might have been possible during a routine hysterectomy, this situation was anything but that. Further in this regard, the anatomy was distorted and there was massive bleeding.

As to the blunt curettage for the endometrium recommended by Dr. Kreitzer, according to Dr. Prince this claim also lacks merit. Dr. Prince says this technique does not work when the placenta is stuck to the uterine wall and there are no boundaries between the placenta and the uterine wall. He adds that blunt curettage would be contraindicated in this situation, as it could cause damage to the integrity of the uterine wall.

Finally, Dr. Prince blames all that happened on the late discovery of placenta accreta. It was this condition that caused the distorted anatomy, the excessive bleeding, and the emergency hysterectomy. It was this hysterectomy performed by Dr. Stromer that saved Mrs. Carducci's life.

### **Discussion**

In considering the expert affidavits supplied by both sides, I understand that the granting of a motion for summary judgment deprives the plaintiff of her day in court. But despite that fact, I find that such a decision is the correct one here. The plaintiffs' theory clearly changed. It was no longer the improper failure to diagnose placenta accreta. Rather, it was Dr. Kreitzer's opinion that other methods should have been

used to stop the bleeding and /or to identify the ureter. But that position simply never considers the fact that this hysterectomy had to be done as an emergency to save the patient's life before she bled to death.

Further, Dr. Prince in his additional affidavit is particularly effective in noting Dr. Kreitzer's failure to acknowledge this emergency. He also explains why the various procedures suggested by Dr. Kreitzer would not have worked, and he criticizes Dr. Kreitzer's failure to explain how the ureter could have been identified in this emergency where the abdominal cavity was filled with blood.

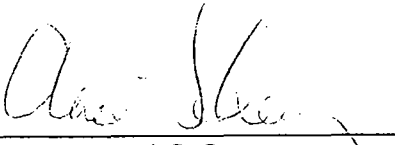
For all these reasons, but primarily the inadequacy of Dr. Kreitzer's affidavit as contrasted with the convincing nature of Dr. Prince's affidavits, I find that Dr. Stromer has not only made out a prima facie case for summary judgment, but also has successfully removed any factual issues left to be decided. Therefore, defendant is entitled to summary judgment.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Saul R. Stromer, M.D., is granted and the complaint is dismissed in its entirety. The Clerk is directed to enter judgment accordingly.

Dated: March 9, 2015

MAR 09 2015

  
\_\_\_\_\_  
J.S.C.  
ALICE SCHLESINGER