Semper v Karamitsos
2020 NY Slip Op 32896(U)
September 1, 2020
Supreme Court, New York County
Docket Number: 805182/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER ***Justice*** **PART 6**

TULIP SEMPER AND ERIC HOLLOMAN, **INDEX NO. 805182/2015**

Plaintiffs, **MOTION DATE**

- against- **MOTION SEQ. NO. 4**

MOTION CAL. NO.

HARRY KARAMITSOS, M.D., KAMEELAH PHILLIPS, M.D., SERGUEI V. DOLGOPOLOV, M.D., LENOX HILL HOSPITAL OF THE NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., RONALD BLATT, M.D., JEFFREY A. MAZLIN, M.D., EAST SIDE GYNECOLOGY SERVICES, P.C. and RONALD BLATT, M.D., P.C.,

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answer — Affidavits — Exhibits ____________________________________
Replying Affidavits
Cross-Motion: Yes X No

Under Motion Sequence 4, Defendants Harry Karamitsos, M.D. ("Dr. Karamitsos"), and Kameelah Phillips, M.D. ("Dr. Phillips"), move for summary judgment. Plaintiffs Tulip Semper ("Ms. Semper") and Eric Holloman (collectively, "Plaintiffs") do not oppose Dr. Karamitsos' motion. Plaintiffs oppose Dr. Phillips' motion. Plaintiffs cross move for an Order precluding the defendants in this matter from asserting the benefits of CPLR Article 16, with respect to any acts or omissions of Dr. Karamitsos in the event that Dr. Karamitsos is awarded summary judgment.

Factual Background

On December 19, 2012, Ms. Semper, then 41 years old, presented to New York Downtown Hospital with complaints of vaginal bleeding. Plaintiff was given a transvaginal ultrasound, which showed a closed cervix and a uterus that appeared to be "10 weeks" in size. Ms. Semper was diagnosed with a complete spontaneous abortion/miscarriage and was discharged home on December 20, 2012, with instructions to obtain follow up care. Prior to this visit, Ms. Semper had not been aware that she was pregnant.

On December 21, 2012, Ms. Semper presented to Manhattan Physicians Group and was seen by Bertha Bogdan, NP. Ms. Semper was given a transvaginal ultrasound which noted a large intermural myoma. Ms. Semper was sent for an ultrasound and it was performed on the same day by Dr. Jay Lee, M.D. The ultrasound report showed a dominant central myoma measuring 6.3 x 5.8 x 5.4 cm. and a uterus that is anteverted measuring 12.3 x 6.5 x 10.0 cm. There was no sonographic evidence of intrauterine gestation. There is an addendum, which notes a discrepancy in the size of the uterus from a prior study of October 25, 2012.

On December 28, 2012, Ms. Semper presented to the Emergency Department at LHH. Ms. Semper reported right lower abdominal pain. Ms. Semper underwent a transvaginal ultrasound which revealed a single intrauterine pregnancy with an estimated gestational age of 9 weeks. On December 28, 2012, Ms. Semper was discharged from LHH with a plan to follow up with Dr. Karamitsos.

On December 31, 2012, Ms. Semper returned to LHH with complaints of vaginal bleeding and abdominal pain. Drs. Christine Haines and Karamitsos evaluated Ms. Semper. A repeat ultrasound was performed on Ms. Semper. The ultrasound revealed a single intrauterine pregnancy with an estimated gestational age of 9 weeks, 5 days. The uterus was noted to be anteverted and enlarged measuring 26.2 x 13.8 x 17.4 cm. A large intramural fibroid or focal adenomyosis was noted in the posterior uterine body measuring 15.4 x 8.6 x 14.1 cm. Labs revealed blood in the urine. Ms. Semper elected to terminate the pregnancy. On December 31, 2012, Ms. Semper was discharged from LHH with a referral to be seen by Dr. Phillips for the termination of pregnancy.

On January 3, 2013, Ms. Semper presented to East Side Gynecology Services, PC (“East Side Gynecology”) for the termination of pregnancy. Ms. Semper’s medical history included epilepsy, high blood pressure and anemia. Ms. Semper’s weight was recorded as 300 lbs. and her height was 5’4”. Abnormal findings were noted as a “Fibroid, Tumor, Ovarian cyst.” Under “General Examination,” the following findings were noted: “General Appearance: NAD, Pleasant, Heart: NSR, No murmurs, Lungs: Clear to auscultation; Abdomen: Soft, NT/ND, No masses felt, Vagina: Grossly normal. Cervix: Normal appearing; No lesions; Negative cmt. Adnexa: Normal, No masses. Uterus: 9 weeks.”

The East Side Gynecology records indicate that a real time obstetrical transvaginal ultrasound was performed on Ms. Semper prior to the procedure. A note by Michele Ries at 8:19 a.m. states that the ultrasound revealed a twin gestation.

Gestation A had a positive fetal heart rate and Gestation B had a negative fetal heart rate.

Dr. Mazlin attempted the procedure to terminate the pregnancy. When asked what instruments he uses for a first trimester abortion of pregnancy, Dr. Mazlin testified, "The instruments that are used are a speculum to open up the vagina; Betadine swabs put in the vagina; something called a tenaculum which is placed on the cervix to hold it steady; dilators which are used to enter the cervix and uterus; suction catheter placed in the uterus to remove tissue; curettes which are used to remove placental fragments; and a sonogram which is used to watch the whole thing." (Dr. Mazlin's deposition at page 19:23-20:11). Dr. Mazlin testified, "All of this is done under sonographic guidance, so I am constantly looking at the sonogram to see how I'm doing, looking back and forth. But it is right next to the patient, so I can see both with the same visualization." (Dr. Mazlin's deposition at page 20:19-20:24).

Dr. Jeffrey Davis administered the anesthesia. Dr. Mazlin explained that he used dilators to open the cervix and to measure the cavity of the uterus. The records show that "Plaintiff has an enlarged fibroid uterus. The cavity is 20 cms from os (sic) making it impossible to reach. The pt cannot have the procedure done at this center and should go to the hospital for the termination of pregnancy." Dr. Mazlin stopped the procedure. Ms. Semper was advised that the abortion was not performed and that she had to follow-up with her primary gynecologist to perform the procedure in the hospital settings.

On January 3, 2013, at 10:05 am, Dr. Mazlin called Dr. Phillips and arranged for Dr. Phillips to see Ms. Semper immediately after she left East Side Gynecology. Ms. Semper was instructed not to take anything by mouth, ensuring that she remained appropriate for the administration of anesthesia. Ms. Semper left East Side Gynecology with a prescription for Doxycycline.

On January 3, 2013, Ms. Semper presented to Dr. Phillips at Manhattan's Physician Group.

Ms. Semper reported continued bleeding. Dr. Phillips performed a vaginal examination and documented the following: "internal Gyn: Examination of the vagina found no active bleeding, old blood. Cervix is 1 cm dilated. The uterus is Fundal Ht: 24 cm, Ovaries palpable, normal in size; no masses. Bladder is normal. Last PAP: 10/25/2012. No CVA tenderness."

The "Assessment/Plan" was as follows:

> Unplanned pregnancy (V22.2) Patient desparately (sic) desires termination due to fear that she will miscarry due to fiboirds (sic). Has history of 16w SAB that she is in counseling (for over one year). Patient also with fear of T21 given her age and SAB of twin. Discussed likelihood of normal pregnancy however unable to perform screen until at least 11 weeks. Discussed high risk nature of procedure including risk of infection, transfusion, exlap with possible hysterectomy. Patient verbalized understanding. I advised her to discuss with husband if risks outweigh benefits prior to proceeding with termination. Will order bloodwork and schedule pending decision to proceed with D&C. Needs blood work and medical clearance prior to OR.
>
> TVUS noted fundal pregnancy with + FH. Large intermural myoma unclear if obstructing endometrium
>
> Plan to pretreat with cytotec to decrease dilation requirements.
>
> Fibroid uterus (218.9)
>
> Morbid obesity (278.01)

Ms. Semper recalled a conversation with Dr. Phillips on January 3, 2013 that there were "two choices, the hospital or orally, a pill" to terminate the pregnancy. Ms. Semper testified that Dr. Phillips "told me the risk, the pill comes down gradually, you just bleed a lot, and when you are in the hospital, she can do a D&C in the hospital." (Ms. Semper's deposition at 142:11-16).

There was a telephone conversation between January 3, 2013 and January 7, 2013 that Ms. Semper recalls with Dr. Phillips. Ms. Semper testified that after the January 3, 2013, Dr. Phillips called her "to discuss the 24 abortion pill, the pill." As for the substance of the telephone conversation, Ms. Semper testified, "I don't know exactly what the conversation was, but she wanted me to take the abortion pill." Ms. Semper testified that Dr. Phillips advised her that the pill "was her first choice" because "[i]t was easier." Ms. Semper testified that she responded, "okay" to Dr. Phillips. Ms. Semper testified that she did not recall "why" she did not

get the pill. Ms. Semper testified, “I’m not sure if the insurance covered it or not. Ms. Semper further testified that she believes she had another conversation with Dr. Phillips before January 7, 2013. Ms. Semper testified that Dr. Phillips “had to call me back about the pill.” Ms. Semper did not recall the substance of that follow-up call. (Ms. Semper’s deposition; page 148-150).

Ms. Semper’s termination of pregnancy was scheduled for January 7, 2013 with Dr. Phillips at LHH.

On January 4, 2013, Ms. Semper presented to Manhattan Physicians Group to obtain medical clearance for the procedure. Ms. Semper’s vital signs and physical examination were within normal limits. Ms. Semper’s EKG was normal.

On January 7, 2013, Ms. Semper presented to LHH to undergo a D&C procedure. Dr. Phillips performed a D&C procedure under ultrasound guidance and under general anesthesia. The post-operative findings were consistent with a 15 cm posterior fibroid, a 24-week size fibroid uterus and products of conception. The repeat ultrasound of the uterus performed during the procedure showed a thin endometrial lining and no retained products of conception. No active bleeding was noted. Ms. Semper was discharged home with no complaints. Ms. Semper was prescribed Tylenol and Motrin for pain, Doxycycline, and told to place nothing in her vagina for two weeks.

On January 8, 2013, as noted in pharmacy records, Ms. Semper filled a prescription for Doxycycline. On January 10, 2013, Ms. Semper returned to the Emergency Department at LHH with complaints of severe lower abdominal pain associated with nausea and vomiting, fever, chills, and generalized weakness. The symptoms started that day. Ms. Semper denied experiencing urinary symptoms or diarrhea and constipation. The record also notes “Pt admits that she did not [take] antibiotics as she was recommended.” Plaintiff was evaluated by Dr. Karamitsos and admitted for further treatment.

On January 11, 2013 and into January 12, 2020, Ms. Semper underwent an exploratory laparotomy, a cystoscopy, bilateral ureteral stent placement, supracervical abdominal hysterectomy and a right salpingo-oophorectomy. According to the operative report, the surgeons were Drs. Karamitsos, Phillips, and Dolgopolov. The abdomen was packed and left open pending prognosis. The preoperative diagnosis was sepsis, acute renal failure, fibroid uterus and endometritis. The post-operative diagnosis was sepsis, acute renal failure, fibroid

uterus and endometritis. She returned to the operating room two days later to close the abdomen.

On January 13, 2013, a cervical culture came back positive for MRSA. Ms. Semper developed acute repertory distress syndrome (ARDS), acute renal failure (ARF), deep venous thrombosis (DVT), and disseminating intravascular coagulopathy (DIC). Ms. Semper was discharged on January 27, 2013.

Summary Judgment Standard

CPLR § 3212 provides in relevant part, that a motion for summary judgment,

> shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party… [t]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

A defendant moving for summary judgment in a medical malpractice case has the burden of making a prima facie showing of entitlement to judgment as a matter of law by showing that "there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged" by introducing expert testimony that is supported by the facts in the record. *Rogues v. Nobel*, 73 AD3d 204, 206 [1st Dept. 2010].

Once the defendant has made this showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 (1986). Specifically, a plaintiff "must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact." *Alvarez*, 68 NY2d at 324.

A plaintiff "must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." *Rogues*, 73 AD3d at 207. "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." *Id.* at 325. An affidavit from an expert which sets "forth general conclusions, misstatements of evidence and unsupported assertions, is insufficient to demonstrate a defendant's failure to comport with accepted medical practice, or that any such failure was the proximate cause of plaintiff's injuries." *Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 (1st Dept 2008).

Competing expert affidavits alone are not sufficient to overcome summary judgment. "[C]ompeting experts almost always disagree; the question here is whether the claim of plaintiff's expert . . . is sufficiently supported in the record to raise an issue for the trier of fact." *De Jesus v. Mishra*, 93 AD3d 135, 138 (1st Dept 2012). Further, "opinion evidence must be based on facts in the record or personally known to the witness" and "cannot reach his conclusion by assuming material facts not supported by evidence." *Cassano v. Hagstrom*, 5 NY2d 643, 646 (1959). "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment." *Diaz v. New York Downtown Hospital*, 99 NY2d 542, 544 (2002) (internal citations omitted).

Pursuant to Public Health Law § 2805-d(2), "[t]he right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body."

"To prevail on such claim, a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of her injuries." *Balzola v Giese*, 107 AD3d 587, 588 (1st Dept 2013). A defendant moving for summary judgment on a lack of informed consent claim must show *inter alia* that there is no factual dispute as to whether the plaintiff was informed "of any foreseeable risks, benefits or alternatives" of the treatment rendered. *Balzola*, 107 AD3d at 588.

Dr. Karamitsos' Motion for Summary Judgment

Dr. Karamitsos submits the expert affidavit of Edgar O. Mandeville, M.D. ("Dr. Mandeville") in support of his motion. Dr. Mandeville is a physician licensed to practice medicine in the State of New York and a Diplomate of the American Board of Obstetrics and Gynecology. Dr. Mandeville states that he has reviewed, *inter alia*, the pleadings; medical records; and deposition transcripts. Dr. Mandeville's opinions are given "with a reasonable degree of medical certainty."

Dr. Mandeville opines that Dr. Karamitsos "did not depart from accepted standards of medical practice with respect to any of the care and treatment [he] provided to Tulip Semper nor is any of the treatment provided by [] Dr. Karamitsos [] the proximate cause of the injuries alleged in this lawsuit."

Dr. Mandeville opines "that all treatment provided to Tulip Semper during her January 10, 2013 to January 27, 2013 Lenox Hill Hospital admission conformed entirely with good and accepted standards of medical practice and that the treatment provided to Ms. Semper by Dr. Phillips and Dr. Karamitsos during this admission saved the patient's life and is not proximately related to any of the plaintiff's alleged injuries."

Dr. Mandeville states that Dr. Karamitsos, along with Dr. Phillips, appropriately assessed Ms. Semper when she was admitted to LHH on January 10, 2013 and properly treated her throughout her admission. Dr. Mandeville notes that Ms. Semper had no further contact with Dr. Karamitsos after her discharge from LHH on January 27, 2013. Dr. Mandeville further opines that the care that Dr. Phillips provided to Ms. Semper from her admission to LHH on January 10, 2013 to her discharge on January 27, 2013 met the standard of care and was not proximately related to any of Ms. Semper's claimed injuries.

Dr. Mandeville states that based on LHH's medical records, Ms. Semper was believed to be septic upon her readmission on January 10, 2013. Dr. Mandeville states that she "was immediately and appropriately treated for septic shock with intravenous antibiotics. Infectious disease, hematology surgical and urology consultations were obtained and the plan was to attempt to get her hemodynamically stable, treat the presumed infection conservatively and stabilize her as much as possible should surgery be necessary." Dr. Mandeville states that the treating physicians could not have known the specific pathogen causing the sepsis before the results of the cervical culture were available on January 13, 2013. Dr. Mandeville

states that when Ms. Semper's vital signs began to deteriorate in the early morning hours of January 12, 2013, Ms. Semper was taken to surgery to remove the likely source of infection in the uterus.

Dr. Mandeville states that even if "there was no culture of the uterus performed during the hysterectomy surgery on January 12, 2013, it is my opinion with reasonable medical certitude that the alleged failure to perform such a culture is not proximately related to any of the patient's claimed injuries." Dr. Mandeville states that "[t]he only ramification of there having been no uterine culture result was that the patient was kept on broad spectrum antibiotic as well as antibiotic for MRSA in case the uterus had been infected with an organism other than the MRSA that had been found on the cervical culture."

Dr. Mandeville opines that the hysterectomy that Dr. Karamitsos and Dr. Phillips performed on Ms. Semper on January 12, 2013 met the standard of care. Specifically, Dr. Mandeville states that "the uterus was removed as it was reasonably felt that this was the likely source of the patient's sepsis." Dr. Mandeville explains that "the right ovarian artery was noted to be bleeding after the uterus was removed and when the bleeders could not be identified the right ovary was appropriately removed." Dr. Mandeville opines "the hysterectomy performed by Drs. Karamitsos and Phillips, even in the face of DIC, was necessary and indicated to remove the likely source of infection and save the patient's life." Dr. Mandeville further notes that Ms. Semper signed two consent forms prior to the hysterectomy and "that any reasonable patient in plaintiff's position would have consented to the surgery performed by Drs. Karamitsos and Phillips to attempt to save their life even having been advised of all potential risks associated with the surgery including need for use of ureteral stents, bowel perforation (which did not occur), hysterectomy, bilateral salpingo-oophorectomy and lysis of adhesions."

Dr. Mandeville concludes "that the fact Tulip Semper developed a MRSA infection following her D & C on January 7, 2013 does not mean Dr. Phillips or Dr. Karamitsos departed in any way from accepted standards of care with regard to treatment provided to her. Nothing either defendant did caused the infection."

Dr. Karamitsos makes a *prima facie* showing of entitlement to summary judgment. Dr. Karamitsos, through Dr. Mandeville's Affirmation, demonstrates that the medical treatment that Dr. Karamitsos provided to Ms. Semper was within the standard of care and was not the proximate cause of the claimed injuries.

The burden now shifts to Plaintiffs to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Lindsay-Thompson*, 147 AD3d at 639. Specifically, to repeat, in a medical malpractice claim, a plaintiff "must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." *Rogues*, 73 AD3d at 207. Plaintiffs do not submit an affidavit from a physician attesting that Dr. Karamitsos "departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." *Id.* Plaintiffs do not oppose Dr. Karamitsos' motion. Therefore, Dr. Karamitsos' motion for summary judgment is granted without opposition.

Plaintiffs' cross motion for an Order precluding the defendants in this matter from asserting the benefits of CPLR Article 16, with respect to any acts or omissions of Dr. Karamitsos is denied.

"Article 16 does not require a defendant to disclose, prior to the time of trial, any individual or entity whose liability will be invoked by that defendant." *Andersen v. Beaton*, 2009 WL 9435543 at *3 [N.Y. Sup Ct, New York County 2009] (citing *Marsala v. Weintraub,* 208 AD2d 680 [2d Dept. 1994]; *Rodi v. Landau,* 170 Misc.2d 180 [Supreme Court, Rockland County, J. Howard Miller, Oct. 29, 1996]). The court explained:

> As recently pointed out in *Carmona v. Mathisson*, 2009 WL 792565 [Supreme Court, Bronx County, J. Dominic R. Massaro, Jr., March 23, 2009], where a Court dismisses an action on summary judgment, it does not substantively decide the issues of a parties negligence, it simply finds that the opponent to such motion has failed to meet its burden of proof, in opposing the motion. Therefore, that Court held that a defendant should not be foreclosed from seeking apportionment of fault against a party in connection with Article 16 of the CPLR, even if the tortfeasor that the defendant seeks to assign fault to was an original party to the action who successfully had the action against them dismissed, having summary judgment granted in its favor. This Court agrees with the decision in *Carmona, supra,* and believes that "equity and the interests of justice" require that Dr. Beaton be permitted to introduce evidence at trial of any negligence on the part of Mount Sinai in connection with the care and treatment rendered to plaintiff

> herein, and have the jury apportion fault between them, if they are both found to be negligent.

Andersen, 2009 WL 9435543 at *4.

In *Greco v. Offor*, 2019 WL 4861956, *3-4 [N.Y. Sup Ct, New York County 2019], the court noted that, "While the Appellate Division, First Department has not ruled on the issue as to whether a defendant waives his or her right to Article 16 apportionment where he or she fails to oppose a co-defendant's motion for summary judgment, the trial courts are divided on this issue." The court then proceeded to state that it "is inclined to follow the holding as set forth by the New York County Supreme Court in *Andersen v. Beaton* (No. 1039882007, 2009 WL-9435543, at *4, *supra)*." The *Greco* court, in following *Andersen*, denied the plaintiff's application to preclude co-defendants from asserting their rights under Article 16 at trial where the plaintiff did not oppose the defendants' motion for summary judgment.

Any decision with respect to the Article 16 rights of the remaining defendants is referred to the Trial Court to be decided at the close of the evidence.

Therefore, Plaintiffs' motions for an Order precluding the defendants in this matter from asserting the benefits of CPLR Article 16, with respect to any acts or omissions of Dr. Karamitsos is denied.

Dr. Phillips' motion for summary judgment

Dr. Phillips submits the expert affidavit of Dr. Mandeville in support of her motion for summary judgment.

Plaintiffs submit two opposing expert affidavits. Plaintiffs submit a redacted expert affirmation from a physician licensed to practice medicine in the State of New York and Board Certified in the field of Obstetrics and Gynecology ("Plaintiffs' Gynecology Expert"). Plaintiffs also submit a redacted expert affidavit from a physician duly licensed to practice medicine in the State of New Jersey and board certified in Internal Medicine and Infectious Disease ("Plaintiffs' Infectious Disease Expert").

Dr. Mandeville opines that Dr. Phillips' care and treatment of Ms. Semper did not deviate from accepted standards of care. Dr. Mandeville further opines that the

injuries claimed by Ms. Semper were not proximately caused by any act or omission by Dr. Phillips.

Dr. Mandeville opines that the D&C that Dr. Phillips performed on Ms. Semper on January 7, 2013 was within the accepted standards of medical practice. Dr. Mandeville explains that "Dr. Phillips performed the D&C under ultrasound guidance and as per her operative report the uterus was appropriately evacuated of products of conception until a gritty texture was noted which is the indication products of conception have been adequately removed."

Dr. Mandeville opines that the timing of the D&C that Dr. Phillips performed on Ms. Semper was appropriate. Dr. Mandeville explains that Dr. Philips appropriately recommended that the D&C be performed in a hospital setting and advised Ms. Semper of the risks and gave her time to consider whether she wanted to have the procedure. Dr. Mandeville states, "Waiting from January 3 to January 7, 2013 certainly did not expose the patient to any increased risks. Dr. Mazlin had not broken the water nor had he used a curette in the uterus." Dr. Mandeville states that Ms. Semper "was not febrile and had no signs of infection as of the time Dr. Phillips started the D&C, indicating the patient had not become septic between the procedure started by Dr. Mazlin and the D&C performed by Dr. Phillips."

Dr. Mandeville opines that "it is not the standard of care to provide prophylactic antibiotics to a patient prior to a D&C." Dr. Mandeville states that in any event, Dr. Mazlin had prescribed an antibiotic to Ms. Semper in the days prior to the D&C. Dr. Mandeville further notes that Ms. Semper had been medically cleared for the procedure and had no signs of sepsis.

Dr. Mandeville opines that Dr. Phillips obtained Ms. Semper's informed consent before she performed the D&C as shown in Dr. Phillips' note regarding her visit with Ms. Semper on January 3, 2013 and the consent form Ms. Semper signed prior to the procedure on January 7, 2013.

Dr. Mandeville states that Ms. Semper's claim that "Dr. Phillips failed to timely diagnose a fetal twin demise has no merit" in light of Dr. Phillips' note in her pre-operative diagnosis that "twin gestation at 10 weeks 3 days with twin A demise and questionable prognosis for twin B with chronic vaginal bleeding."

Dr. Mandeville opines that Ms. Semper "was given appropriate antibiotic coverage in conjunction with the D&C performed by Dr. Phillips." Dr. Mandeville states that Ms. Semper was given intravenous Kefzol during and after the D&C and

given Ancef intravenous before her discharge. Dr. Mandeville states that "[t]hese are standard antibiotics used in conjunction with gynecologic surgery in an attempt to try to prevent infection" and "[i]t is not routine to prescribe antibiotics for a patient to take upon discharge after a D&C." Dr. Mandeville states that Dr. Phillips had nevertheless prescribed an antibiotic to Ms. Semper after the D&C, and notes that Ms. Semper said she had not taken it when she was admitted to LHH on January 10, 2013.

Dr. Mandeville further opines that the care that Dr. Phillips provided to Ms. Semper from her admission to LHH on January 10, 2013 to her discharge on January 27, 2013 met the standard of care and was not proximately related to any of Ms. Semper's claimed injuries.

Dr. Mandeville states that based on LHH's medical records, Ms. Semper was believed to be septic upon her readmission on January 10, 2013. Dr. Mandeville states that she "was immediately and appropriately treated for septic shock with intravenous antibiotics. Infectious disease, hematology, surgical and urology consultations were obtained and the plan was to attempt to get her hemodynamically stable, treat the presumed infection conservatively and stabilize her as much as possible should surgery be necessary." Dr. Mandeville states that the treating physicians could not have known the specific pathogen causing the sepsis before the results of the cervical culture were available on January 13, 2013. Dr. Mandeville states that when Ms. Semper's vital signs began to deteriorate in the early morning hours of January 12, 2013, Ms. Semper was taken to surgery to remove the likely source of infection in the uterus.

Dr. Mandeville states that even if "there was no culture of the uterus performed during the hysterectomy surgery on January 12, 2013, it is my opinion with reasonable medical certitude that the alleged failure to perform such a culture is not proximately related to any of the patient's claimed injuries." Dr. Mandeville states that "[t]he only ramification of there having been no uterine culture result was that the patient was kept on broad spectrum antibiotic as well as antibiotic for MRSA in case the uterus had been infected with an organism other than the MRSA that had been found on the cervical culture."

Dr. Phillips makes a *prima facie* showing of entitlement to summary judgment on Ms. Semper's medical malpractice and informed consent claims. Dr. Phillips, through Dr. Mandeville's Affirmation, demonstrates that the medical care Dr. Phillips provided to Ms. Semper met the standard of care and did not proximately cause Ms. Semper's claimed injuries. This showing shifts the burden to Plaintiffs to

demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Lindsay-Thompson*, 147 AD3d at 639.

Turning now to Plaintiffs' expert affirmations: the Gynecology Expert opines that Dr. Mazlin "inserted a dilator 20 cm. inside Ms. Semper's uterine cavity and perforated her uterus;" Plaintiffs' Infectious Disease Expert opines that "the uterine perforation and open cervix created a clear pathway for uterine and cervical infection."

Plaintiffs' Gynecology Expert states that Ms. Semper presented to Dr. Phillips' office on January 3, 2013 with a pain score of 10/10 and the records noted that she was in moderate distress and obese. Plaintiffs' Gynecology Expert states that Dr. Phillips' examination of Ms. Semper showed that her cervix was 1cm. dilated. Plaintiffs' Gynecology Expert disagrees with "Dr. Mandeville's claim that the timing of the D&C performed by Dr. Phillips was appropriate." Plaintiffs' Gynecology Expert opines "Defendant [Dr. Phillips] departed from good and accepted medical practice in failing to immediately send Ms. Semper, a high-risk patient due to her morbid obesity, possible twin gestation, a large fibroid uterus and an open cervix to the hospital for evaluation and management including possible D&C when she presented on January 3, 2013 after the failed abortion, which included Dr. Mazlin inserting a dilator 20 cm. into and through the uterine cavity." Plaintiffs' Gynecology Expert opines "that this departure was a proximate cause of and a substantial factor in bringing about Ms. Semper's pain and suffering and claimed injuries."

Plaintiffs' Infectious Disease Expert states that Dr. Phillips, along with Dr. Mazlin, both individually and collectively "were the proximate causes of and substantial factors in bringing about the uterine MRSA infection and the results." Plaintiffs' Infectious Disease Expert opines that Dr. Phillips "communicated with Dr. Mazlin to understand what happened during the surgical abortion" and "should have understood that hospitalization, infectious disease consultation, a review and restructured course of antibiotic therapy, serial blood cultures, serial vital signs and all the benefits that could have accrued and would have accrued to the patient had she been admitted to the hospital on January 3rd were necessary to best care for and protect the patient."

To begin, a perforated uterus is not found in the record, and not supported by any of the evidence. To conclude the uterus was perforated when Dr. Mazlin inserted a dilator 20cm into the uterine cavity is pure speculation. Plaintiffs' Gynecology Expert opines, "In a pregnancy of approximately 9 weeks gestation, the

length of the endometrial cavity would be approximately 8-10 cm. from the internal os to the fundus. Therefore, it is my opinion within a reasonable degree of medical certainty that on January 3, 2013 when Dr. Mazlin inserted the dilator up 20 cm., he must have inserted it past the cavity and through the uterus, thus perforating the uterus." Ms. Semper's abnormally large fibroid uterus and its measurements are amply documented in the record: a large uterus measuring approximately 24 weeks on bedside ultrasound on January 3, 2013 by testimony of Dr. Phillips; with a cavity of 20cm from os to fundus on January 3, 2013 by Dr. Mazlin; and 18.7 cm from fundus to the line of cervical amputation on pathology after the uterus was removed on January 12, 2013. The expert's opinion is not based upon the facts in this record. This is not a typical 9 week uterus.

When Dr. Mazlin was asked whether the procedure he performed on Ms. Semper on January 3, 2013 "cause[d] a break in the skin inside the vagina, the cervix or the uterus," Dr. Mazlin responded, "No." (Dr. Mazlin's deposition at page 71:8-15). Dr. Phillips testified that she performed a physical exam of Ms. Semper and an ultrasound on Ms. Semper on January 3, 2013. Dr. Phillips testified "that [her] physical examination [of Ms. Semper] indicated that she was not actively bleeding, that she had not had any leakage of fluid that would indicate her water was broken, and that she had fibroid uterus, and [her] bedside ultrasound noted that she was, in fact, pregnant." (Dr. Phillips' deposition at pages 101:22-102:8). Dr. Phillips further testified that "[t]here were no signs and symptoms that she had undergone a procedure prior to coming to [her]." (Dr. Phillips' deposition at page 102:23-25).

Further, there were multiple opportunities for objective appreciation of a perforation. There were ultrasounds done on: January 3, 2013, January 7, 2013, and January 10, 2013. The procedures on January 3, 2013 and January 7, 2013 were done under ultrasound guidance. On January 12, 2013, Ms. Semper underwent an open surgery where the surgeons were looking for sources of infection. During that surgery, with the abdomen open, the physicians found no evidence of a perforation. Pathology after the removal of the uterus found no uterine perforation. (see pathology report annexed to Dr. Phillips' motion as Exhibit N4, pp. 569-570).

Plaintiffs' Gynecology Expert explains that the only evidence of a perforation would have been during Dr. Mazlin's attempted D&C and it would have been visualized on the ultrasound. Plaintiffs' Gynecology Expert opines "that a perforation of the uterus would not have been necessarily visible during the D&C performed on January 7, 2013 or the surgery performed on January 11, 2013 because a perforation of the uterus is often not visible due to the sponge-like tissues of the uterus. However, it would have been visible under ultrasound guidance at the time

of perforation." Plaintiffs' Gynecology Expert criticizes Dr. Mazlin for not using ultrasound guidance; however, such a statement is contrary to the evidence as indicated above. Dr. Mazlin testified that he performs this procedure under ultrasound guidance and there is nothing to indicate that he did not do so in Ms. Semper's case.

There was no evidence of infection prior to January 10, 2013. Ms. Semper showed no signs of infection on January 3, 2013, or on January 4, 2013 when she was cleared for surgery after bloodwork and EKG. Ms. Semper showed no signs of infection on January 7, 2013 when she was admitted to the hospital and Dr. Phillips performed the D&C. Ms. Semper did not have fever. Ms. Semper exhibited normal pain associated with a D&C. It was not until January 10, 2013 that Ms. Semper showed any signs or symptoms of infection when she presented at LHH with complaints of severe lower abdominal pain associated with nausea and vomiting, fever, chills, and generalized weakness, which started that day. It was not until January 13, 2013 that the growth of a vaginal culture revealed the presence of MRSA.

Plaintiffs' experts claim that it was a departure for Dr. Phillips not to send Ms. Semper to the hospital immediately upon her presentation on January 3, 2013 after Dr. Mazlin's failed abortion. Plaintiffs' Infectious Disease Expert concedes there were no signs and symptoms that would have indicated infection, except she had a perforated uterus with dilation and she was obese and required hospital attention. Plaintiffs' Infectious Disease Expert states:

> [T]he incubation period for MRSA is often 1 to 10 days. Therefore, it is likely that Ms. Semper would not have been showing signs and symptoms of infection on January 3, 2013 when she presented to Dr. Phillips after the failed abortion, on January 4, 2013 when she presented to Manhattan Physicians for medical clearance for the D&C procedure and on January 7, 2013 when she presented to Lenox Hill Hospital for the D&C procedure, since the infection was still within the incubation period. In addition, it is further my opinion that the pathology report for the D&C procedure performed on January 7, 2013 would not have shown signs of infection since Ms. Semper's infection was still within the incubation period.

Plaintiffs' own Infectious Disease Expert establishes that Dr. Phillips' would not have had any indication of infection, and that waiting from January 3, 2013 to January 7, 2013 to perform the D&C could delay efforts to treat the infection.

There is no support for Dr. Phillips to have prescribed antibiotics on January 3, 2013. Dr. Mandeville explains that the water was not broken, there was no indication there was a perforation, there was no active bleeding, and it is not routine to prescribe prophylactic antibiotics for a D&C. Dr. Mazlin prescribed Ms. Semper antibiotics on January 3, 2013 and Dr. Phillips prescribed Ms. Semper antibiotics on January 7, 2013. Further, Ms. Semper also received antibiotics intravenously in both the January 3, 2013 and January 7, 2013 procedures. There were no signs of an infection prior to January 10, 2013.

Plaintiffs' experts claim repeatedly that Ms. Semper's "perforated uterus and open cervix" caused an open pathway for infection.

Plaintiffs' Gynecology Expert opines that "Ms. Semper had a *perforated uterus and open cervix*, which created a pathway [for infection] and thus, Ms. Semper required hospital care, including a culture and/or laparoscopy and further observation because she was at high risk for infection." (emphasis added). Plaintiffs' Gynecology Expert opines "that Ms. Semper should have been immediately sent by defendants to the hospital, instead of instructing her to return to her gynecologist, Dr. Kameelah Phillips after the failed abortion" because "[i]t was the standard of care to immediately send Ms. Semper to the hospital for further procedures and tests because she had a *perforated uterus and an open cervix* which required infection control, including a culture and/or laparotomy and further observation for infection." (emphasis added). Plaintiffs' Gynecology Expert opines "that any antibiotics which Ms. Semper received, including intravenous when she was at East Side Gynecological Services, P.C. and the oral antibiotic, Doxycycline to take at home for 3 days, would not have made a difference in reducing the risk of infection in a patient such as Ms. Semper who had a *perforated uterus and an open cervix*, which created an open pathway for infection." (emphasis added). Plaintiffs' Gynecology Expert further opines "that Ms. Semper ['s] infection with MRSA was caused as a result of her discharge from East Side Gynecology Services, P.C. with a *perforated uterus and an open cervix*." (emphasis added).

Plaintiffs' Infectious Disease Expert opines, "Simply put, *the uterine perforation and the open cervix* created a clear pathway for uterine and cervical infection." (emphasis added).

Having already determined that the perforation is based on speculation, an opinion founded on a perforation must be disregarded. The Experts do not claim that Ms. Semper's dilation of 1 cm alone (without perforation) with no other signs or symptoms of infection required Ms. Semper's immediate hospitalization on January 3, 2013.

Plaintiffs' Infectious Disease Expert states, "Confronted with a diagnosis or suspicion of MRSA, proper practice would not require the administration of Doxycycline but would obligate the clinician to treat with Vancomycin. It is also very important to note in analyzing this matter, that MRSA has an incubation period of between 1 and 10 days. A typical initial course of treatment for the bacteria would be the administration of Vancomycin for AT LEAST 7 to 10 days."

The leap, however, is why one would suspect MRSA based solely on dilation. Plaintiffs' Infectious Disease Expert concedes that the only reason there may be suspicion of MRSA would be a perforation and dilation. There were no signs of a perforation when Ms. Semper presented to Dr. Phillips on January 3, 2013 and January 7, 2013 or thereafter. There is no evidence of perforation in the record. Additionally, the first confirmation of what pathogen to target with treatment, MRSA, and thus Vancomycin, was the return of the vaginal culture on January 13, 2013. Thus, Dr. Phillips could not have been responsible for the failure to have prescribed a different course of antibiotics.

"[C]ompeting experts almost always disagree; the question here is whether the claim of plaintiff's expert . . . is sufficiently supported in the record to raise an issue for the trier of fact." *De Jesus*, 93 AD3d at 138. Here, Plaintiffs' experts have reached their conclusions by "assuming material facts not supported by evidence." *Cassano,* 5 NY2d at 646. Plaintiffs' experts' "ultimate assertions are speculative or unsupported by any evidentiary foundation [and] the opinion[s] should be given no probative force and [are] insufficient to withstand summary judgment." *Diaz*, 99 NY2d at 544. Plaintiffs' expert opinions therefore fail to raise an issue of fact with regard to Dr. Phillip's treatment of Ms. Semper because they are not based on the evidence in the record.

Accordingly, Dr. Phillips' motion for summary judgment is granted and the Complaint is dismissed as against Dr. Phillips.

Wherefore it is hereby

ORDERED that Defendant Harry Karamitsos, M.D.'s motion (Motion Sequence 4) for summary judgment is granted without opposition in its entirety and the action is severed and dismissed as against Defendant Harry Karamitsos, M.D., and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendant Kameelah Phillips, M.D.'s motion (Motion Sequence 4) for summary judgment is granted in its entirety and the action is severed and dismissed as against Defendant Kameelah Phillips, M.D., and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiffs' cross motion (Motion Sequence 4) for an Order precluding the defendants in this matter from asserting the benefits of CPLR Article 16, with respect to any acts or omissions of Defendant Harry Karamitsos, M.D., is denied; and it is further

ORDERED that the remaining parties are to appear for a pretrial conference on October 30, 2020 at 10:00am.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: September 1, 2020

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION