

<b>Semper v Karamitsos</b>
2020 NY Slip Op 32899(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**

**PART 6**

*Justice*

**TULIP SEMPER AND ERIC HOLLOMAN,**

**INDEX NO. 805182/2015**

**Plaintiffs,**

**MOTION DATE**

**- against-**

**MOTION SEQ. NO. 7**

**MOTION CAL. NO.**

**HARRY KARAMITSOS, M.D., KAMEELAH PHILLIPS, M.D., SERGUEI V. DOLGOPOLOV, M.D., LENO)( 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  No

Under Motion Sequence 7, Jeffrey A. Mazlin (“Dr. Mazlin”) moves for summary judgment. Plaintiffs Tulip Semper (“Ms. Semper”) and Eric Holloman (collectively, “Plaintiffs”) oppose the motion.

**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 Dolgoplov. 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 respiratory 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.” *Id.* at 324. “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.

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].

"As a general rule, employers are held vicariously liable for their employee's torts only to the extent that the underlying acts were within the scope of the employment." *Adams v. New York City Transit Auth.*, 88 N.Y.2d 116, 119 [1996]. The rule extends to medical facilities, who can be vicariously liable for the negligence or malpractice of their employees including their physicians. *Hill v. St. Clare's Hosp.*, 67 NY2d 72 [1986].

"A physician who owns a medical clinic held out to the public as offering medical services may be liable vicariously for treating doctor's malpractice, notwithstanding that physician/owner neither participates in nor controls diagnosis or treatment." *Hill*, 67 NY2d at 74.

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. *Id.* at 588.

## Discussion

Dr. Mazlin submits the expert affidavit of Michael Arato, M.D. ("Dr. Arato"), a physician licensed to practice medicine in the State of New York and Board

Certified in obstetrics and gynecology. According to Dr. Arato's Affirmation, he reviewed the pertinent medical records; deposition transcripts; and pleadings. Dr. Arato opines with a reasonable degree of medical certainty that Dr. Mazlin "did not deviate from the accepted standards of medical care in the care and treatment of the plaintiff on 1/3/13."

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. Arato opines "that Ms. Semper was appropriately treated at Eastside Gynecology by Dr. Mazlin." Dr. Arato states that:

A sonogram was done which revealed a twin gestation, both measuring 9 weeks EGA. Twin A was viable. Twin B had no heart beat. A "fibroid uterus" was also noted.

Dr. Arato opines that Dr. Mazlin attempted a surgical termination of pregnancy, which was not contraindicated. Dr. Arato opines that "In accordance with good and accepted medical practice, a surgical informed consent was obtained from Ms. Semper noting that she was advised of several risks including a failed procedure, hemorrhage and infection, along with the associated benefits and alternatives to the [termination of pregnancy]."

Dr. Arato states that Dr. Mazlin's note states that Ms. Semper has an "enlarged fibroid uterus" and that the cavity was 20 cm. Dr. Arato opines that "In accordance with good medical practice and the standard of care, Dr. Mazlin properly determined that the [termination of pregnancy] could not be performed at Eastside Gynecology and the patient was directed to go to the hospital." Dr. Arato opines that "[a]ll patients undergoing first trimester [termination of pregnancy] should receive antibiotics to reduce the risk of infection." Dr. Arato opines that "As required by good medical practice and the standard of care, the plaintiff was given doxycycline, an antibiotic, 100 mg PO BID for 3 days." Dr. Arato opines that "[t]here is no evidence that Ms. Semper had any type of infection by the time she had the D&C performed by Dr. Phillips, four days after she was discharged from Eastside Gynecology on January 3, 2013."

Dr. Arato opines “to a reasonable degree of medical certainty that Dr. Mazlin cannot be held responsible for an infection alleged to have been caused by an improperly sanitized surgical instrument.” Dr. Arato opines that “Dr. Mazlin would not have been involved in sterilizing any instruments or materials used during the attempted [termination of pregnancy] procedure at issue.” Dr. Arato opines “within a reasonable degree of medical certainty that sometimes an organism can be resistant to even proper sterilization techniques.” Dr. Arato further opines that “Infection is a known risk of any surgery.” Dr. Arato opines that “Plaintiff was advised of such risk and she assumed the associated risks when she signed the informed consent form.” Dr. Arato opines that “there is no evidence that the diagnosis of infection and sepsis is related or connected to the procedure attempted by Dr. Mazlin.”

Dr. Mazlin makes a *prima facie* showing of entitlement to summary judgment on Ms. Semper’s medical malpractice and informed consent claims. Dr. Mazlin, through Dr. Arato’s Affirmation, demonstrates that the medical care Dr. Mazlin 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’ experts 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 opines “that Ms. Semper was not a candidate for a termination of pregnancy in a clinical setting because she was a high risk patient due to her morbid obesity of 300 lbs. and large fibroid uterus and thus a termination of pregnancy was contraindicated.” Plaintiffs’ Gynecology Expert opines that “[i]t was a departure from good and accepted medical practice to attempt to perform a termination of pregnancy in a clinical setting and Ms. Semper should have instead received a medical termination which would have been much safer and effective.” 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 Dr. Mazlin along with Dr. Phillips, 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. Mazlin should have immediately directed his patient to the hospital and, failing that, should have directly contacted Dr. Phillips. He should have communicated to her the reasons for the canceled procedure and the likelihood of uterine perforation and in doing so should have strongly recommended admission.”

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 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 testimony, p. 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 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 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, 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).

Plaintiff's 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 where 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 by Dr. Mazlin to not send Ms. Semper to the hospital immediately upon her presentation on January 3, 2013 after Dr. Mazlin's failed abortion. Plaintiffs' Infectious Disease Expert states that "the 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." Instead, Dr. Mazlin should have acted on suspicion of infection.

Plaintiffs' Infectious Disease Expert contends that perforation with dilation should arouse suspicion for infection and an obese patient such as plaintiff, with a twin gestation should be monitored with repeated blood draws in a hospital setting. The expert assumes Dr. Mazlin should have seen his dilator pierce the uterus and

thus he should have immediately directed Ms. Semper to a hospital setting to watch for infection. This opinion is based upon the faulty conclusion that Dr. Mazlin perforated the uterus.

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 "it 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 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 Gynecological 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.

"[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, [] should be given no probative force and [are] insufficient to withstand summary judgment." *Diaz*, 99 NY2d at 544.

Plaintiffs' Expert does take issue with Dr Arato's conclusory opinion that "Dr. Mazlin attempted a surgical termination of pregnancy, which was not contraindicated." Plaintiff's Expert opines "that Ms. Semper was not a candidate for a termination of pregnancy in a clinical setting because she was a high risk patient due to her morbid obesity of 300 lbs. and large fibroid uterus and thus a termination of pregnancy was contraindicated." Plaintiffs' Gynecology Expert opines that "[i]t was a departure from good and accepted medical practice to attempt to perform a termination of pregnancy in a clinical setting and Ms. Semper should have instead received a medical termination which would have been much safer and effective." There is no record of Dr. Mazlin having discussed a medical termination, specifically a pill, (as there is a record of such discussion with Dr. Phillips after the failed abortion) with Ms. Semper. There is simply a form which Ms. Semper signed indicating she was informed of the risks, benefits and alternatives. Plaintiffs' expert opinions do raise an issue of fact as to whether or not Dr. Mazlin should have attempted the termination of pregnancy in a clinical setting on January 3, 2013. Accordingly, Dr. Mazlin's motion for summary judgment is partially granted and partially denied.

Wherefore it is hereby

ORDERED that Defendant Jeffrey A. Mazlin, M.D.'s motion for summary judgment is granted in part and denied in part consistent with the above; and it is further

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

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

**Dated: September 1, 2020**

ENTER:   
J.S.C.

**HON. EILEEN A. RAKOWER**

Check one:     FINAL DISPOSITION     NON-FINAL DISPOSITION