

**Leung v Gretz**

2020 NY Slip Op 34902(U)

September 1, 2020

Supreme Court, Westchester County

Docket Number: 62537/2018

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X  
MELISSA LEUNG,

Plaintiff,

- against -

HERBERT FRANK GRETZ III,  
GENNIFER LOUISE GELLER and  
WESTCHESTER MEDICAL GROUP, P.C.,

Defendants.  
-----X

**INDEX NO. 62537/2018**

**DECISION/ORDER**

**Mot. Seq. 2**

**Submit Date: 7/22/2020**

**ECKER, J.**

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF relative to the motion of HERBERT FRANK GRETZ III, GENNIFER LOUISE GELLER, and WESTCHESTER MEDICAL GROUP, P.C. (defendants), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint of MELISSA LEUNG (plaintiff), as asserted against each defendant.

In this medical malpractice action, plaintiff sues to recover damages for injuries she allegedly sustained when she underwent a total abdominal hysterectomy on April 22, 2016. She alleges that the surgery was unnecessary and done without her informed consent. Plaintiff thus commenced this suit in 2018. Shortly thereafter, defendants answered, asserting various affirmative defenses and denying any liability. As amplified by her bill of particulars, plaintiff asserts that defendants have deprived her of the ability to bear children since she desired to preserve her fertility, limited her options for treatment, and caused pain and suffering, emotional distress, and other related injuries.

The record reflects that on April 18, 2016, plaintiff, then age 45 — and a practicing ophthalmologist — presented to her personal physician Irene Jong with complaints of frequency urination, pelvic discomfort, leg swelling, feeling bloated, and abdominal distension. Jong ordered a pelvic ultrasound which was interpreted by Geller, a radiologist, who noted a neoplasm (tumor). Geller had previously performed a pelvic ultrasound of plaintiff in May 2012, noting a large fibroid. Plaintiff faults Geller in failing to compare the 2012

and 2016 ultrasound. On April 22, 2016, plaintiff underwent the disputed surgery for a total abdominal hysterectomy performed by Gretz, whereby he removed her uterus, cervix, and fallopian tubes, while leaving her ovaries intact.

Defendants move for summary judgment dismissing the complaint as asserted against them on the grounds that no material issues of fact exist. Plaintiff opposes arguing there are numerous factual issues, among them, that if further imaging had been performed, a fibroid would have been diagnosed and the surgery would have been changed; Geller failed to provide plaintiff and Gretz relevant information concerning the 2012 and 2016 ultrasounds; that based on a discussion with her and Gretz, the surgery for a total hysterectomy should have been performed only if the intraoperative frozen section biopsy showed malignancy; and that Gretz proceeded to perform the total hysterectomy without her consent.

“In order to establish a prima facie case of liability in a medical malpractice action, the plaintiff must show (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury” (*Bueno v Allam*, 170 AD3d 939, 941 [2d Dept 2019] [internal quotation marks and citations omitted]). “A physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure or that any alleged departure was not a proximate cause of the plaintiff’s injuries” (*id.* at 941 [internal quotation marks and citations omitted]; *accord Leigh v Kyle*, 143 AD3d 779, 781 [2d Dept 2016]). “To rebut a defendant physician’s prima facie showing of his or her entitlement to judgment as a matter of law, the plaintiff must demonstrate the existence of a triable issue of fact through the submission of evidentiary facts or materials” (*Khosrova v Westermann*, 109 AD3d 965, 966 [2d Dept 2013]; *see Leigh v Kyle*, 143 AD3d at 781).

Here, plaintiff and Gretz dispute the scope of the authorized consent. At the time of the surgery in question, plaintiff had three children, the youngest of whom was four and had been conceived by in vitro fertilization (IVF), similar to her middle child. All three of plaintiff’s children were delivered by cesarean section. Plaintiff asserts she instructed Gretz to perform the total abdominal hysterectomy only if a frozen section biopsy showed malignancy because she did not want to forgo the ability to bear more children in the future. It was ultimately determined, however, that there was no malignancy.

In support of their motion, defendants submitted, among other things, the medical records of plaintiff in connection with this action, transcripts of Geller and Gretz’s deposition testimonies, and the expert affirmation in support of John Lovecchio, M.D., a physician licensed in New York and board certified in obstetrician/gynecologist (OB/GYN). As interpreted by Geller, the pelvic transvaginal and transabdominal ultrasound performed in April 2016 showed a thickened endometrium (mucous membrane lining the uterus) and a large mass occupying the adnexa (the space where the uterus is found). In light of this finding, Geller referred plaintiff to Gretz due to the size and location of the mass, and the

possibility of malignancy. Gretz — without further diagnostic studies and after a discussion with plaintiff — performed an exploratory laparotomy based on intraoperative findings, which included a total hysterectomy that was ultimately done. The pathology report prepared after the surgery shows there was no pathological diagnosis or malignancy.

Upon reviewing plaintiff's medical records in connection with this action, Lovecchio opines that Geller and Gretz did not violate the standard of medical care under the circumstances. He contests plaintiff's claim that a diagnostic laparoscopy — in contrast to a total abdominal hysterectomy — should have been performed. Lovecchio opines that plaintiff's informed consent was properly obtained by Gretz prior to the surgery since Gretz made a "judgment call" intraoperatively based on his findings, adequately explained the procedure to plaintiff the day before and the day of the surgery, and the two discussed the possible hysterectomy and risks associated therewith. Lovecchio states that the record demonstrates as much since plaintiff had adequate opportunity to review the written consent form before she signed it. Lovecchio believes that plaintiff's suggestion that a myomectomy could have been performed to preserve her uterus is "not consistent with good medicine" and, in any event, her ovaries were maintained for fertility. Lovecchio opines that the Gretz's review of the 2016 pelvic ultrasound, when considered together with Gretz's findings during physical examination and the consent form, were sufficient to obtain plaintiff's approval for the staging laparotomy that resulted in the total hysterectomy.

Further, Lovecchio surmises that Gretz did not have to conduct further testing, regardless of the findings in the 2016 ultrasound. Lovecchio explained that the 2016 ultrasound showed "the appearance of a potential cancer because the tissue was complex, cystic and solid," and, thus, Gretz's finding that there was a neoplasm warranted the course taken by him because a pelvic ultrasound is "the best, most accurate, sensitive and specific imaging of the organs in the pelvis." Lovecchio surmises that Gretz took the prudent course of action irrespective of the large fibroid that was found in the 2012 ultrasound, and that there was no need for further imaging to have been performed on plaintiff since it would not have changed Gretz's recommendation for treatment. Lovecchio opines that even if Gretz knew that it was possible that the pelvic mass might be the same fibroid seen on prior imaging, the mass still had to be removed because it could be malignant since a "benign fibroid can transform into leiomyosarcoma, an aggressive form of cancer with a poor prognosis." Lovecchio added that no testing of plaintiff could be safely done preoperatively to diagnose the large pelvic mass seen in the 2016 ultrasound, nor could a biopsy of mass be done without surgery. Lovecchio states that Gretz properly determined that leaving the pelvic mass would be dangerous. He opines that the hysterectomy performed by Gretz was warranted because leaving plaintiff's uterus "would have increased the risk of bleeding . . . [b]ased on the size of the mass." Lovecchio, therefore, concludes with a reasonable degree of medical certainty that defendants did not deviate from the standard of care inasmuch as the large mass found in plaintiff required intervention to alleviate her significant symptoms, and as a prophylactic measure to avoid the possibility of a neoplasm.

Based on their submissions, defendants demonstrated that they complied with the accepted medical standards of care. Thus, defendants met their initial burden of establishing entitlement to summary judgment (see CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bueno v Allam*, 170 AD3d at 941).

With the burden having shifted to her, plaintiff, in opposition, submitted the expert affirmation of Mark S. Madis, M.D., a physician licensed in New York, board certified in OB/GYN. Madis is duly credentialed, understanding the duties of diagnostic radiologists, particularly as to the field of OB/GYN. He states that he reviewed defendants' submissions, including Lovecchio's affirmation. Madis represents that he is well-versed with the standard of care required of radiologists who interpret a gynecological ultrasound and the need to compare it to prior radiology studies to determine if there has been an interval change in the findings which could explain a patient's new complaints. As Madis explained, this should be done when the physicians are within the same practice group.

As to Geller, Madis opines that she failed to closely review, interpret, or correlate the 2012 ultrasound of a large uterine segment fibroid. Madis urges that the 2012 ultrasound report was readily accessible to Geller on the same electronic medical record system at the hospital, along with the results of the 2016 ultrasound. Madis faults Geller insofar that she did not provide a complete and accurate radiologic differential diagnosis so that Gretz and plaintiff had the necessary information for acquiring informed consent for plaintiff's resultant surgery. Madis concludes that Geller negligently and incorrectly found that "no focal fibroids are appreciated" in the 2016 ultrasound report, without citing her prior 2012 ultrasound showing an interpretation of a large, lower uterine segment fibroid that was present in plaintiff.

With respect to Gretz, Madis opines that performing the total abdominal hysterectomy was a departure from the standard of care without plaintiff's informed consent. Madis faults Gretz in several respects: failing to consider preoperatively her history of a large fibroid; failing to discuss before surgery alternative modalities of surgery to preserve the uterus; failing to obtain an MRI; and his reliance upon incomplete medical information prior to surgery. The foregoing in Madis' view were substantial factors in plaintiff undergoing a total abdominal hysterectomy to be done without her consent. Madis points to the preoperative informed consent documents, wherein the word "possible" appears in several spaces before every component of the contemplated procedure. Madis posits that Gretz failed to offer plaintiff alternate options to avoid a total hysterectomy, such as a "uterine artery embolization and myomectomy following GnRH agonist therapy to shrink the fibroid with preservation of the uterus." Madis noted his review of the deposition testimonies of plaintiff and Gretz, wherein he found that there are discrepancies in their recollection of discussing the non-removal of the uterus if the frozen section showed that the tumor was benign. Madis opines that if the proper studies and comparative reviews had been conducted, the diagnosis would have been a fibroid, and not ovarian cancer, thereby allowing plaintiff to make an enlightened

decision as to whether she should proceed with the surgery. Madis believes that defendants' failure to perform a differential diagnosis, considering plaintiff's complaints and history, was negligent, thus resulting in the unnecessary surgery. Madis further opines that plaintiff's uterus could have been preserved with alternative options for removal of the fibroid had she received accurate information and appropriate treatment from Geller and Gretz. Madis thus concludes that defendants' failure to compare both studies, provide accurate information to plaintiff, and perform the unauthorized total abdominal hysterectomy deviated from the accepted standard of medical care.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions since such conflicting expert opinions will raise credibility issues which can only be resolved by a jury. However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact. In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record" (*Lowe v Japal*, 170 AD3d 701, 702-703 [2d Dept 2019] [internal quotation marks, brackets, and citations omitted]). "An expert opinion that is contradicted by the record cannot defeat summary judgment" (*Schwartz v Partridge*, 179 AD3d 963, 964 [2d Dept 2020]).

Here, defendants stress that Madis misconstrued critical facts, making a misrepresentation insomuch as he stated that Gretz performed the surgery "[e]ven after receiving a frozen section diagnosis of no malignancy." That Madis made a misstatement as to Gretz having had the benefit of a frozen section biopsy during the surgery that was indicative of malignancy does not, in and of itself, mean that the court should utterly disregard Madis' opinions. Madis' misstatement in this regard may well be a factual error that ought to be considered by a trier of fact in assessing a witness's credibility (*see Singh v Rosenberg*, 32 AD3d 840, 842 [2d Dept 2006]). Viewing his affirmation in its totality, Madis' opinions did not contain significant factual errors misconstruing the record, he addressed the detailed affirmation of Lovecchio, and Madis' opinions were not based on bare conclusory assertions (*compare Janelle M. v New York City Health & Hosps. Corp. [Lincoln Hosp.]*, 148 AD3d 519, 519 [1st Dept 2017]; *Macias v Ferzli*, 131 AD3d 673, 676 [2d Dept 2015]). Rather, Madis' opinions were of probative value since he generated triable issues of fact as to whether defendants deviated with the accepted standards of medical practice, and whether such alleged failures proximately caused plaintiff's injuries (*see Joyner v Middletown Med., P.C.*, 183 AD3d 593, 594-595 [2d Dept 2020]; *Nisanov v Khulpateea*, 137 AD3d 1091, 1094-1095 [2d Dept 2016]).

Likewise, the difference in the expert opinions relative to the course of conduct undertaken by Gretz must be resolved by a jury. The parties present several questions of fact on this record — i.e., whether Gretz should have ordered additional diagnostic tests; whether the total hysterectomy was necessary; whether Gretz could have used a different modality to

discern whether the pelvic mass was malignant; and whether he duly obtained informed consent from plaintiff (see *Nisanov v Khulpateea*, 137 AD3d at 1094-1095).

Contrary to defendants' contention that plaintiff does not have a viable case sounding in medical malpractice, the court finds that the experts' conflicting opinions, together with the parties' deposition testimonies and the medical records, militate against awarding defendants' summary judgment (see *Nisanov v Khulpateea*, 137 AD3d at 1094-1095; *Fiorino v North Shore Univ. Hosp. at Glen Cove*, 78 AD3d 1116, 1117 [2d Dept 2010]). The crux of plaintiff's case is that had defendants compared the 2012 and 2016 ultrasounds and performed additional radiology studies such as an MRI or CT scan, Gretz would have diagnosed a fibroid and ruled out ovarian cancer stemming from a non-cancerous growth or malignancy. Though defendants maintain that Geller cannot be liable inasmuch as Gretz decided on the course of conduct he would take — specifically, the staging laparotomy after a consultation with plaintiff — the record evinces that Geller knew of the large mass in plaintiff's uterine cavity and she documented a grossly enlarged uterus. Moreover, Madis' conclusion that Geller violated the standard of care by not reviewing, comparing, and reporting her findings from the 2012 and 2016 ultrasound reports attributes potential liability on her part. Notwithstanding, Madis' opinions that the comparison between the 2012 and 2016 ultrasound reports was required, and that further testing should have been conducted to aid Gretz in determining if there were alternative modalities, indicate that Geller may have failed to take further steps as the qualified radiologist, thus arguably deviating from the accepted standard of medical care.

In sum, the parties provide conflicting credible medical opinions as to whether defendants departed from the requisite standard of care which are to be resolved by the factfinder (see *Dray v Staten Is. Univ. Hosp.*, 160 AD3d 614, 618-619 [2d Dept 2018]; *Loaiza v Lam*, 107 AD3d 951, 953 [2d Dept 2013]; *Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]). Thus, defendants' motion for summary judgment dismissing the complaint as against each of them is denied (see *Fiorino v North Shore Univ. Hosp. at Glen Cove*, 78 AD3d at 1117; see generally *Jacobs v Pothuri*, 2012 NY Slip Op 31320[U] [Sup Ct, New York County 2012]; *Mannix v Is. OB/GYN Ctr.*, 2010 NY Slip Op 30911[U] [Sup Ct, Suffolk County 2010]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by the parties was not addressed by the court, it is hereby denied. Accordingly, it is hereby:

ORDERED that the motion of defendants HERBERT FRANK GRETZ III, GENNIFER LOUISE GELLER, and WESTCHESTER MEDICAL GROUP, P.C., made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint of MELISSA LEUNG (plaintiff), as asserted against each defendant, is denied in its entirety; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court at a date, time, and such manner as hereafter directed by that Part.

The foregoing constitutes the decision and order of the court.

Dated: September 1, 2020  
White Plains, New York

ENTER:

  
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HON. LAWRENCE H. ECKER, J.S.C.

APPEARANCES: Parties appearing via NYSCEF.