

Dray v Staten Is. Univ. Hosp.
2022 NY Slip Op 32994(U)
September 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 500510/14
Judge: Genine D. Edwards
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At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of September, 2022.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

-----X

RINAT DRAY,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 500510/14

STATEN ISLAND UNIVERSITY HOSPITAL,

LEONID GORELIK,

METROPOLITAN OB-GYN ASSOCIATES, P.C.,

and JAMES C. DUCEY,

Defendants.

Mot. Seq. No. 23-25

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The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion/Cross Motion, Affirmations,

and Exhibits Annexed.....392-411; 412-422; 424-440

Affirmations in Opposition and Exhibits Annexed..... 442; 445-463; 466

Reply Affirmations.....465; 469

In this action to recover damages for negligence and medical malpractice, the following motions and cross-motion were consolidated for disposition:

In Seq. No. 23, defendants Leonid Gorelik, M.D. (incorrectly sued herein as Leonid Gorelik) (“Dr. Gorelik”), and Metropolitan Ob-Gyn Associates, P.C. (“Metropolitan” and, collectively with Dr. Gorelik, the “Gorelik defendants”), jointly move for summary judgment dismissing all claims as against them;

In Seq. No. 24, defendants James C. Ducey, M.D. (incorrectly sued herein as James C. Ducey) (“Dr. Ducey”), and Staten Island University Hospital (“SIUH” and,

collectively with Dr. Ducey, the “Ducey defendants”) jointly move for summary judgment dismissing all claims as against them; and

In Seq. No. 25, plaintiff Rinat Dray (“plaintiff” or “mother”) cross-moves for partial summary judgment as to liability on her medical malpractice claim as against the Gorelik defendants.

Background

On Tuesday, July 26, 2011,¹ the mother (a private patient of Dr. Gorelik and his employer, Metropolitan) underwent – in derogation of her asserted right to refuse treatment – a repeat C-section at SIUH for delivery of her third child (the “repeat C-section” or “C-section”). At 32 years of age at the time, the mother had two prior consecutive C-sections (performed at different nonparty hospitals) for delivery of her two older children. Dr. Gorelik’s *primary* and *secondary* reasons for the C-section, as documented in the mother’s SIUH chart, were “[r]epeat in labor” and “[a]bnormal fetal heart rate,” respectively.² The *primary* reason for the C-section (*i.e.*, “repeat in labor”) apparently referred to the combination of: (1) the mother’s allegedly slow progress in labor in the six-hour period immediately preceding the C-section (*i.e.*, her allegedly insufficient cervical dilation, as well as the allegedly slow fetal descent, in the six hours counting from the time of her arrival to SIUH at 6:25 am³ until the first surgical incision for the C-section at 2:48 pm); and (2) her two prior C-sections. The *secondary* reason for

¹ Unless otherwise indicated, all references are to year 2011.

² See SIUH’s Intrapartum Record at 000022.

³ See Ambulance Arrival Report for July 26 (part of the SIUH records).

the C-section (*i.e.*, the “abnormal fetal heart rate”) apparently referred to Dr. Gorelik’s conclusion at 12:20-12:30 pm on July 26 that the fetal monitoring strips became “concerning.”⁴

As a general rule, prior C-sections cause adhesions between (among other areas) maternal bladder and uterus. Those adhesions can be dense in consistency and extensive in length. Where, as here, the maternal adhesions between her bladder and uterus were dense (as well as extensive) from her two prior C-sections, her risk for a bladder injury during yet another (or “higher order”) C-section was appreciable. In that regard, the mother required a preoperative assessment for bladder injury during the repeat C-section. However, rather than that path, and convinced that his medical license was “on the line” unless he placed the mother on the operating table emergently,⁵ Dr. Gorelik allegedly failed to undertake several easily performable, non-surgical steps to improve the fetal well-being after the fetal monitoring strips became “concerning” to him at 12:20-12:30 pm; for example, by having the mother repositioned on her hospital bed and/or by having her provided with supplemental oxygen. Nor had Dr. Gorelik (if SIUH’s records were credited) assessed the fetal well-being by an alternative method of fetal scalp stimulation.

⁴ Although approximately two hours earlier at 10:39 am, the mother had passed heavy meconium (a potential sign of fetal distress) when her membranes ruptured, Dr. Gorelik, *at that time*, allegedly had not appeared concerned with the fetal well-being. See SIUH’s Intrapartum Record at 000022. Plaintiff’s expert, Katharine Morrison, M.D., endorsed Dr. Gorelik’s actions regarding the mother’s passage of meconium. See Dr. Morrison’s Affirmation, ¶ 47 (“The presence of meconium was not a decisive factor. It occurs in at least 15% of deliveries. It can be associated with a stressed baby but it is not a one to one relationship. Here, in the face of reassuring [fetal heart rate] tracings, the tracing outweighs the meconium. Most babies with meconium are perfectly fine, not stressed or compromised.”) (NYSCEF No. 447).

⁵ According to the mother (at page 340, line 19 of her deposition transcript), Dr. Gorelik allegedly told her that he “care[d] only about [his medical] license,” rather than her wellbeing or that of her unborn child.

Faced with the mother's entrenched refusal to the C-section (echoed by her mother and witnessed by her doula, both of whom were at the bedside), Dr. Gorelik called Dr. Ducey, SIUH's Director of Maternal Fetal Medicine, at approximately 1:30 pm. Dr. Ducey, upon review of the fetal monitoring strips at the mother's bedside (but without physically examining her) and after his telephonic consultation with SIUH's in-house counsel, effectively directed the mother to prepare for the C-section, according to his deposition testimony as reproduced in the margin.⁶ As both agreed that the fetal monitoring strips were "concerning," Drs. Ducey and Gorelik escorted the mother to the operating room ("OR") for an emergent C-section.⁷ With the mother being prepped for the C-section by Dr. Gorelik's residents in the OR,⁸ Dr. Ducey departed from the premises to see his own patients elsewhere. With Dr. Ducey's departure, Dr. Gorelik remained the only attending surgeon tasked with performing a third repeat C-section on a patient who, as noted, had already undergone two prior C-sections.⁹

The beginning of the C-section took place as anticipated. Shortly after making his first surgical incision at 2:48 pm, Dr. Gorelik encountered some of the expected

⁶ See Dr. Ducey's EBT tr at page 46, lines 4-9 ("*And I [Dr. Ducey] had told her [the mother] that we were going to do the C-Section. I actually escorted them [i.e., the mother and Dr. Gorelik] to the operating room, and I told [the mother] . . . to get on the operating table. She got on the operating table, and then I left.*") (emphasis added).

⁷ See Dr. Ducey's EBT tr at page 46, lines 4-9 (as quoted above).

⁸ See Intraoperative Record – Post Op Notes, Pre-Op Diagnosis: *Emergent* repeat cesarean section (NYSCEF No. 408) (part of SIUH's Records) (emphasis added).

⁹ See Dr. Ducey's EBT tr at page 49, lines 5-16 ("Q. Do you know if Dr. Gorelik knew the patient [plaintiff] was likely to have adhesions? A. Yes. Q. How do you know? A. . . . When you have had two previous C-Sections, . . . you frequently encounter adhesions on the third C-Section.").

adhesions at a relatively superficial rectus-muscle level.¹⁰ Working at the rectus-muscle level, Dr. Gorelik was able to separate at the midline (and thereupon to dissect) the rectus muscles to make further way inside her abdominal cavity. He then entered the mother's peritoneum and identified her uterus.¹¹ As soon as Dr. Gorelik identified the uterus, however, neither he *nor Dr. Ducey who, in the interim, had appeared at his side in the OR*, as more fully explained below, paused to separate the adhering bladder from the mother's uterus. Rather, as Dr. Gorelik's operative report attested, he (*and/or Dr. Ducey*) hastily incised the mother's lower uterine segment to extract the fetus.¹² As a result, the mother's bladder was cut through and lacerated in two distinct areas (one laceration was in the bladder's posterior portion, while the other laceration was in the bladder's anterior portion). As SIUH's records reflected, the baby was actually delivered (at least partially) through the mother's bladder.¹³

As reflected by the italicized text, Dr. Ducey intervened to assist Dr. Gorelik in the course of the C-section. According to Dr. Ducey, he had telephoned the Labor & Delivery building approximately 30 minutes after his departure from the OR and, upon

¹⁰ See Dr. Gorelik's Report of Operation at 1 (SIUH's Records at 000041).

¹¹ *Id.* at 1-2 (SIUH's Records at 000041-000042).

¹² Dr. Ducey's deposition testimony (at page 53, lines 21-24) that Dr. Gorelik was attempting to dissect the bladder off the lower uterine segment prior to delivery was contradicted by Dr. Gorelik's operative report which indicated that he had *not* tried to dissect the bladder. See Dr. Gorelik's Report of Operation at 2 (SIUH's Records at 000042) ("*The uterus was entered sharply and the incision was extended laterally with the surgeon's digits [fingers]. The baby was delivered atraumatically and handed off to the awaiting pediatricians.*") (emphasis added).

¹³ See Dr. Gorelik's Report of Operation at 2 (SIUH's Records at 000042) ("*Once the baby was delivered, an examination of the operative field was performed and it was noted that the incision into the uterus was made through the overlaying bladder.*") (emphasis added).

learning that Dr. Gorelik had not yet delivered the baby, rushed back to the OR, scrubbed in, and assisted Dr. Gorelik with completing the 27-minute-long C-section.¹⁴ The deposition testimony, when closely examined, was unclear as to whether Dr. Ducey alone (or whether both he and Dr. Gorelik) lacerated the mother's bladder in multiple places.¹⁵

The mother's bladder lacerations required immediate surgical repair. Nonparty urologist Natchum Katlowitz, M.D. ("Dr. Katlowitz"), responded to the urgent call for assistance coming from the OR. At 3:32 pm (or 17 minutes after the baby was delivered), the mother was intubated, placed under general anesthesia, and underwent surgical repair of her bladder, with the placement of an in-dwelling suprapubic draining catheter.¹⁶ Dr. Katlowitz's operating report confirmed that the baby had been delivered (at least in part) through the mother's bladder that "had been scarred down [*i.e.*, adhered] to the

¹⁴ See Dr. Ducey's EBT tr at page 46, lines 15-25 ("About 30 minutes later [following his departure from the Labor & Delivery building], I [Dr. Ducey] called to see how the baby was. I heard the baby hadn't been delivered yet. I came back to the hospital and went into the [Labor & Delivery] operating room. I asked how come the baby wasn't out yet. He [Dr. Gorelik] said there was a lot of adhesions. I said do you want me to scrub in to help you, and he said yes. I scrubbed in to help him. I assisted in the surgery. After the baby was out, I left."); at page 47, line 5 to page 48, line 2 (setting forth substantially the same deposition testimony). See also Anesthesia Record, dated July 26, 2011 (reflecting that the repeat C-section lasted 27 minutes counting from the first surgical incision at 2:48 pm until the baby's delivery at 3:15 pm) (NYSCEF No. 408) (part of SIUH's Records).

¹⁵ Compare Dr. Ducey's EBT tr at page 50, line 17 to page 51, line 4 ("I [Dr. Ducey] incised the bladder with a scalpel."); page 53, lines 13-15 ("I [Dr. Ducey] was entering the uterus [when the laceration occurred].") with Dr. Gorelik's EBT tr at page 133, line 5 to page 134, line 10 (testifying that Dr. Ducey caused the laceration by applying *hand pressure* to the general area of the mother's bladder); and compare further with plaintiff's EBT tr at page 353, line 23-24; and page 354, line 8-10 (testifying that Dr. Ducey was not present in the operating room during her C-section, and that she was awake, though under the combined spinal-epidural analgesia, during her C-section).

¹⁶ See Dr. Katlowitz's Report of Operation at 1-2 (SIUH's Records at 0000043-0000044).

uterus.”¹⁷ Dr. Katlowitz’s report also described the injuries that the mother sustained to her bladder during her C-section.¹⁸

Dr. Katlowitz’s surgical repair of the mother’s bladder lasted approximately 2 hours and 40 minutes, with surgery ending at 6:16 pm.¹⁹ Because of the ensuing reparative surgery, the mother’s blood loss (for both the C-section and surgery) totaled 1,400 mL, which appeared to have been higher than the expected blood loss during a typical C-section. On the other hand, the newborn was non-macrosomic and healthy (with his Apgar score of 9, on the scale of 1 to 10, at one and five minutes post-delivery).

Five days later on Sunday, July 31, the mother (together with her newborn whom she had been breast-feeding during their concurrent hospital stays) was discharged from SIUH, with her suprapubic catheter remaining in place. Within two weeks, the suprapubic catheter was removed by Dr. Katlowitz in the outpatient setting. The mother allegedly developed various physical and psychological injuries as the consequence of the C-section, the iatrogenic bladder lacerations, and the surgical repair of her lacerated bladder.

In January 2014, plaintiff commenced the instant action against the Gorelik and Ducey defendants (collectively, “defendants”). The Gorelik and Ducey defendants

¹⁷ *Id.* at 1 (SIUH’s Records at 000043).

¹⁸ According to Dr. Katlowitz (at page 1 of his Report of Operation, as reproduced at 000043 of SIUH’s Records), the mother sustained two separate intraoperative lacerations to her bladder; first, “[a] Mercedes-Benz [*i.e.*, an inverted Y-shape] laceration of the *posterior* bladder”; and second, “a slightly zig-zag laceration in the *anterior* bladder with the posterior transection going lateral to lateral,” with “the *anterior* laceration going cephalad and caudad [*i.e.*, proceeding in the direction from head to toes], almost in a Z[]plasty type fashion” (emphasis added).

¹⁹ See Anesthesia Record, dated July 26, 2011 (NYSCEF No. 408) (part of SIUH’s Records).

separately joined issue. Following extensive motion practice and multiple appeals,²⁰

plaintiff's claims were limited to the following:

(1) the *negligence* claim as against all defendants (as pleaded in the first cause of action of the Amended Verified Complaint, dated April 11, 2014, as amplified by her bills of particulars) (collectively with the bills of particulars, the "amended complaint") to the extent such claim was premised on their failure to timely summon a patient advocate or bioethics department, failure to timely advise plaintiff of the function or existence of the patient advocate or bioethics department, and/or other failures related to communicating the patient bill of rights and the SIUH policies regarding the performance of C-sections, rather than allowing vaginal deliveries (collectively, the "failure to consult" claim); and

(2) the *medical malpractice* claim as against all defendants (as pleaded in the second cause of action of the amended complaint) to the extent that such claim was premised on: (a) the alleged need for performing the C-section emergently (the "medical necessity" claim); and (b) the techniques utilized during the C-section (the "proper technique" claim).

To be clear, plaintiff's *vicarious* liability claim against the Ducey defendants for the acts/omissions of the Gorelik defendants was dismissed by order, dated May 10, 2016 (Jacobson, J.). Although the May 10th order footnoted (at pages 6-7) the possibility of the

²⁰ See *Dray v. Staten Is. Univ. Hosp.*, 160 A.D.3d 614, 75 N.Y.S.3d 59 (2d Dept., 2018) (appeals and cross-appeals from the May 12, 2015 and October 29, 2015 orders [Jacobson, J.]); *Dray v. Staten Is. Univ. Hosp.*, 160 A.D.3d 620, 74 N.Y.S.3d 69 (2d Dept., 2018) (appeals from the May 10, 2016 order [Jacobson, J.]); *Dray v. Staten Is. Univ. Hosp.*, 2019 WL 13079315 (Sup. Ct., Kings County, October 4, 2019 [Edwards, J.], *appeal perfected* 2019-12617 (2d Dept.) (awaiting scheduling for oral argument).

Ducey defendants' *direct* liability for the acts/omissions of the Gorelik defendants, plaintiff raised no theories of direct liability in the affirmation of her expert, Katharine Morrison, M.D., with respect to the care and treatment rendered to her at SIUH *prior to* approximately 1:30 pm on July 26, 2011 when Dr. Ducey was called by Dr. Gorelik to her bedside, such as the Ducey defendants' alleged failure (again, prior to approximately 1:30 pm on July 26, 2011) to make advance preparations in anticipation of the repeat C-section.²¹

After discovery was completed and a note of issue/certificate of readiness was filed, the instant motions and cross-motion were timely served. At oral argument, the instant motions and cross-motion were fully submitted, with the Court reserving decision on May 20, 2022. Additional facts are stated when relevant to the discussion below.

Discussion²²

As noted, the Gorelik and Ducey defendants separately moved for summary judgment dismissing plaintiff's two remaining claims, whereas she cross-moved for partial summary judgment as to liability on her medical malpractice claim as against the Gorelik defendants. Each of plaintiff's two remaining claims is discussed seriatim below.

Negligence (Failure to Consult)

²¹ Accord Dr. Morrison's Affirmation, ¶ 54 ("Both Dr. Ducey [*i.e.*, when he was so informed] and Dr. Gorelik had an obligation to find a more experienced provider to assist Dr. Gorelik [with the repeat C-section].").

²² In the interest of brevity, the recitations of the well-established standards for summary judgment and of the elements of a medical malpractice claim are omitted. See *e.g. Buch v. Tenner*, 204 A.D.3d 635, 166 N.Y.S.3d 243 (2d Dept., 2022).

The Gorelik and Ducey defendants each made a prima facie showing – by way of (1) Dr. Ducey’s affidavit, dated December 22, 2021; (2) Dr. Ducey’s deposition testimony, and (3) the deposition testimony of nonparty Philip Roth, M.D., the Chairperson of the Perinatal Bioethics Committee – that summoning and consulting a patient advocate or bioethics department in the mother’s case would *not* have prevented Dr. Gorelik from performing the repeat C-section. At the time in question, SIUH was governed by the self-promulgated (but subsequently rescinded) “Maternal Refusal Policy”²³ that permitted Dr. Ducey (both as Dr. Gorelik’s superior and as the decision-maker in this case) to override *any* mother’s refusal to a C-section if certain conditions (in Dr. Ducey’s or another decision-maker’s point of view) were satisfied.²⁴

In opposition to defendants’ prima facie showing, plaintiff failed to raise a triable issue of fact, inasmuch as the affirmation of her expert Katharine Morrison, M.D. (“Dr. Morrison”), neither addressed the Maternal Refusal Policy generally, nor the specific assertions of lack of causation made by Drs. Ducey and Roth. *See Murray v. Central Is. Healthcare*, 205 A.D.3d 1036, 169 N.Y.S.3d 118 (2d Dept., 2022).

²³ See SIUH Administrative Policies and Procedure Manual, Subject, “Managing Maternal Refusals of Treatment Beneficial for the Fetus,” effective May 2008 (NYSCEF No. 409). By Plan of Correction, dated April 27, 2018, as submitted by SIUH to the New York State Department of Health, SIUH withdrew the aforementioned policy (NYSCEF No. 322).

²⁴ See Dr. Ducey’s Affidavit, dated December 22, 2021, at 1 (NYSCEF No. 421); Dr. Ducey’s EBT tr at page 39, line 9 to page 40, line 9; page 43, line 6 to page 46, line 9 (NYSCEF No. 404); Dr. Roth’s EBT tr at page 28, lines 16-21 (testifying that “if there is true clinical emergency, not of the type that requires making a decision over the next few days but rather deciding right now in minutes[,] often consulting the ethics committee is impractical and really not feasible”) (NYSCEF No. 417).

Medical Malpractice

As stated, plaintiff's extant medical malpractice claim consisted of two subparts: (1) the "medical necessity" claim (*i.e.*, whether an emergent C-section was necessary); and (2) the "proper technique" claim (*i.e.*, whether the techniques utilized by Dr. Gorelik and Dr. Ducey during her C-section were proper, and whether the intraoperative multiple bladder lacerations that she sustained were an acceptable risk of her C-section). As noted, plaintiff cross-moved for partial summary judgment on liability on both aspects of her medical malpractice claim only as against the Gorelik defendants.

Turning initially to the portions of *defendants' motions* for summary judgment dismissing the medical malpractice claim as against them, the Court found that the competing affirmations of the parties' experts raised triable issues of material fact as to both the departure and causation elements in both the "medical necessity" and "proper technique" aspects of plaintiff's medical malpractice claim. Whereas the opening affirmation of the board-certified obstetrics/gynecology expert James Gerald Quirk, M.D., dated December 17, 2021 ("Dr. Quirk's opening affirmation"), established *prima facie* that neither the Gorelik nor the Ducey defendants departed from the accepted standard of care (nor proximately her injuries) with regard to both aspects of her medical malpractice claim,²⁵ the affirmation of plaintiff's expert, Dr. Morrison, identified triable issues of material fact in such detail, within her 22-page affirmation, that only highlights

²⁵ The Ducey defendants (separately from the Gorelik defendants) relied on Dr. Quirk's opening affirmation. *See* NYSCEF No. 422 (reproducing Dr. Quirk's opening affirmation in support of the Ducey defendants' summary judgment motion).

need to be reproduced herein.²⁶ Starting with the “medical necessity” aspect of plaintiff’s medical malpractice claim, Dr. Morrison opined (in contravention of the opinions set forth in Dr. Quirk’s opening affirmation²⁷) that Drs. Gorelik and Ducey each “misinterpreted the fetal [monitoring] strips; prematurely declared an arrest of [plaintiff’s] labor; [and] failed to [under]take well established methods to ensure fetal wellbeing [*i.e.*, maternal repositioning and supplemental oxygenation].”²⁸

Proceeding to the “proper technique” aspect of plaintiff’s medical malpractice claim, Dr. Morrison listed (likewise in contradiction of the opinions set forth in Dr. Quirk’s opening affirmation) a number of departures on the part of Dr. Gorelik (and vicariously by Metropolitan as to Dr. Gorelik), as well as on behalf of Dr. Ducey (and vicariously by SIUH as to Dr. Ducey). In particular, Dr. Morrison opined that:

(1) Drs. Gorelik and Ducey each had ample time in which to assemble an experienced surgical team (which should have included an ob-gyn or gynecologist) for the C-section that, in Dr. Morrison’s view, was not emergent;²⁹

²⁶ See Dr. Morrison’s Affirmation, dated February 25, 2022 (NYSCEF No. 447).

²⁷ Although the Ducey defendants further relied (in addition to Dr. Quirk’s opening affirmation) on Dr. Ducey’s affidavit, dated June 25, 2015 (NYSCEF No. 421), the latter’s affidavit was entitled to little weight because it was self-serving, conclusory in nature, and essentially repetitive of Dr. Ducey’s pretrial testimony.

²⁸ See Dr. Morrison’s Affirmation, ¶¶ 26-47.

²⁹ The Court declined to take judicial notice of Dr. Gorelik’s profile on the Healthgrades Website as an experienced obstetrician. Healthgrades is one of many consumer-oriented online resources for patients to find and connect with physicians and hospitals. Dr. Gorelik’s general experience, his role (to the extent relevant) in prior medical-malpractice actions and his specific actions (or omissions) in this case would be for the jury, with the aid of expert testimony, to evaluate. The Court also declined to take judicial notice of ACOG Practice Bulletin Nos. 54 and 115, respectively. Both Practice Bulletins, having been withdrawn sometime after their issuance, were not provided to the Court by the Gorelik defendants or any

(2) Dr. Gorelik should have used a quick (or merely a five-minute-long) retrograde distension of the bladder to distinguish it from the uterus (the “retro-fill procedure”),³⁰ instead of hastily performing the C-section with the goal of extracting the fetus rapidly but with less caution than would have been exercised in a well-thought-out, preplanned procedure;³¹ and

(3) the dual locations (and the extent) of bladder lacerations – an “unusual slicing of the bladder” (in Dr. Morrison’s opinion) – spoke of “a gross use of excessive and misdirected force” during the C-section.³²

Further, Dr. Morrison opined that the foregoing departures proximately caused or contributed to plaintiff’s injuries.

other party.

³⁰ See Dr. Morrison’s Affirmation, ¶¶ 50-51 and in particular ¶ 50 in which Dr. Morrison opined, *inter alia*, that:

“A standard safety measure known to Dr. Gorelik (but omitted) was the retrograde distension of the bladder or ‘filling the bladder from below.’ We use [baby] formula because it is sterile, white, and easily available. This procedure can be done before entering the uterus to improve visibility and access. It distends the bladder immediately and allows for careful dissection of the bladder away from the uterus” (footnote omitted).

³¹ According to Dr. Morrison, contrary to the Gorelik defendants’ contention (in ¶ 12 of their counsel’s reply affirmation), it could be reasonably concluded from the record that the mother’s preexisting adhesions from her prior C-sections, coupled with Dr. Gorelik’s failure to prepare the mother’s bladder by way of the retro-fill procedure prior to the repeat C-section (rather than the purported “swelling [and] edema” from the delay in performing the repeat C-section), “ultimately caused [a] poor visualization” of the mother’s bladder and uterus, as well as the ensuing poor outcome.

³² As Dr. Morrison explained (in ¶ 56 of her affirmation):

“This bladder injury is an unusual one – an incision through the anterior and posterior aspect[s] of the organ. Typically, there might be a tear in the posterior aspect of the bladder, the part that is adherent to the uterine wall, that is torn as the surgeon tries to tease it off the portion of the uterus – the lower uterine segment – that needs to be exposed and incised to deliver the baby. But only a highly inexperienced Ob/Gyn would not recognize that the bladder still overlies the lower uterine segment, and slice through the anterior and posterior. . .” (italics in the original; underlining added).

Accordingly, there were triable issues of material fact as to both the departure and causation elements regarding both aspects of plaintiff's medical malpractice claim. *See e.g. Jagenburg v. Chen-Stiebel*, 165 A.D.3d 1239, 85 N.Y.S.3d 558 (2d Dept., 2018); *Loaiza v. Lam*, 107 A.D.3d 951, 968 N.Y.S.2d 548 (2d Dept., 2013); *Goldberg v. Horowitz*, 73 A.D.3d 691, 901 N.Y.S.2d 95 (2d Dept., 2010).

Turning next to plaintiff's cross-motion for partial summary judgment as to liability on her medical malpractice claim as against the Gorelik defendants, the Court found that although Dr. Morrison's affirmation was sufficient to defeat the branches of defendants' motions that were for summary judgment dismissing plaintiff's medical malpractice claim as against them, such expert affirmation was insufficient to establish that plaintiff was entitled to partial summary judgment.

In opposition to plaintiff's cross-motion, the Gorelik defendants submitted a further affirmation from their board-certified obstetrics/gynecology expert James Gerald Quirk, M.D., dated April 20, 2022 ("Dr. Quirk's further affirmation").³³ With respect to the "medical necessity" aspect of plaintiff's medical malpractice claim, Dr. Quirk's further affirmation opined (in direct contradiction with Dr. Morrison's position) that the repeat C-section was emergent because: (1) the fetal heart monitoring tracings were, by and large, non-reassuring; (2) the mother, being post-dates at 41 weeks and 3 days,

³³ See Physician Affirmation in Opposition to Plaintiff's Cross-Motion for Summary Judgment, dated April 20, 2022 (NYSCEF No. 468). To be clear, the Court considered Dr. Quirk's further affirmation solely in the context of the Gorelik defendants' opposition to plaintiff's cross-motion for partial summary judgment on liability as against them. To be even clearer, the Court did not consider Dr. Quirk's further affirmation in the context of defendants' motions.

exhibited a delayed progress of labor by the time of her repeat C-section, as evidenced by, inter alia, her documented arrest in cervical dilatation; (3) the mother had a low likelihood (if at all) of delivering her baby vaginally in light of her two prior cesarean deliveries; and (4) the mother was at risk for uterine rupture (including dehiscence of her preexisting uterine surgical scars).³⁴ Confirmatory of Dr. Quirk's expert opinion regarding the emergent nature of the C-section was the post-operative, pathology-examination findings of "acute chorioamnionitis" (*i.e.*, an infection of the placenta and amniotic fluid), as well as of "acute funisitis" (*i.e.*, inflammation of the connective tissue of the umbilical cord); namely, that at the time of her C-section, the mother was harboring an infection which, by then, had spread from her placenta to the umbilical cord.³⁵

Finally, with respect to the "proper technique" aspect of plaintiff's medical malpractice claim, Dr. Quirk's further affirmation opined (in opposition to that of Dr. Morrison) that under the circumstances of plaintiff's case (particularly, in light of her preexisting extensive uterine adhesions), her bladder injuries in the course of the repeat C-section were "a recognized and accepted complication of [her] surgery."³⁶ Furthermore, in the context of plaintiff's cross-motion for partial summary judgment (when the record must be viewed in a light most favorable to the Gorelik defendants),

³⁴ See Dr. Quirk's further affirmation, ¶¶ 11, 13-14, 16, 20-21, and 26.

³⁵ See Final Specimen Report of Placenta and Cord, dated July 27, 2011 (NYSCEF No. 408) (part of SIUH's Records).

³⁶ See Dr. Quirk's further affirmation, ¶¶ 28-31 and 37.

Dr. Gorelik's and Dr. Ducey's respective deposition testimony that Dr. Ducey (rather than Dr. Gorelik) lacerated plaintiff's bladder must be accorded some weight.³⁷

As a side note, Dr. Quirk's further affirmation ignored Dr. Morrison's opinion (in ¶ 50 of her affirmation) that Dr. Gorelik should have performed the retro-fill procedure *before* starting the C-section. Rather, Dr. Quirk's further affirmation mischaracterized a retro-fill procedure as a methylene blue staining, even though the two procedures were conceptually different. A retro-fill procedure, as described by Dr. Morrison, was intended to prevent *pre*-operative injuries to the bladder, whereas a methylene blue staining, as described by Dr. Quirk, was a *post*-operative method for identifying *post*-operative bladder injuries.³⁸ Aside from the aforementioned mischaracterization, however, Dr. Quirk's further affirmation, when considered in its entirety, was sufficient to rebut plaintiff's *prima facie* showing regarding both aspects of her medical malpractice claim as against the Gorelik defendants.³⁹

³⁷ See Dr. Quirk's further affirmation, ¶ 34.

³⁸ Compare Dr. Morrison's affirmation, ¶ 50 ("[T]he retrograde distension of the bladder or 'filling the bladder from below' . . . can be done *before* entering the uterus to improve visibility and access. It distends the bladder immediately and allows for careful dissection of the bladder away from the uterus.") with Dr. Quirk's further affirmation, ¶ 35 ("Methylene blue is used *following* repair of bladder injuries, to ensure no hole or leak remains prior to closing the patient.") (emphasis added in each instance).

³⁹ Dr. Quirk's *ad hominem* attack on plaintiff – that "a simple read of the records indicates a clear intention on the part of the plaintiff to pave way for a lawsuit" (in ¶ 22 of his further affirmation) – was generally unprofessional and, in particular, unbecoming to a physician who (according to his autobiographic recitation in ¶ 7 of his further affirmation) actively practiced obstetrics for 41 years from 1978 to 2019. Likewise unprofessional (at least at this stage of litigation) was for the Gorelik defendants (in ¶¶ 88-91 of their counsel's reply affirmation) to attack plaintiff's expert Dr. Morrison as a frequently sued "natural birth" provider. The parties are well advised to remember that this Court will not countenance such behavior moving forward.

The Court considered the parties' remaining contentions and found them to be unavailing.

Conclusion

Upon the foregoing and after oral argument, it is

ORDERED that in Seq. No. 23, the Gorelik defendants' joint motion for summary judgment dismissing all claims as against them is *granted solely to the extent* that plaintiff's "failure to consult" claim (*i.e.*, the remainder of her first cause of action as pleaded in her amended complaint) is dismissed as against them; and *the remainder of their motion is denied*; and it is further

ORDERED that in Seq. No. 24, the Ducey defendants' joint motion for summary judgment dismissing all claims as against them is *granted solely to the extent* that plaintiff's "failure to consult" claim (*i.e.*, the remainder of her first cause of action as pleaded in her amended complaint) is dismissed as against them; and *the remainder of their motion is denied*; and it is further

ORDERED that in Seq. No. 25, plaintiff's cross-motion for partial summary judgment as to liability on her medical malpractice claim as against the Gorelik defendants is *denied in its entirety*; and it is further

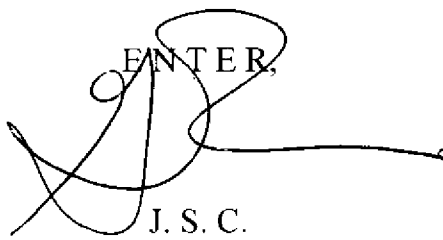
ORDERED that for the avoidance of doubt, this action shall proceed solely on plaintiff's medical malpractice claim (as pleaded in the second cause of action of her

amended complaint) insofar as such claim is predicated on the “medical necessity” and “proper technique” aspects thereof; and it is further

ORDERED that plaintiff’s incoming counsel, Burns & Harris, is directed to electronically serve a copy of this decision and order with notice of entry on the respective defendants’ counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that the parties are directed to appear for an ADR conference, in person, in courtroom 775 on November 30, 2022 at 12PM.

This constitutes the decision and order of this Court.


J. S. C.
HON. GENINE D. EDWARDS