

Penski v New York Presbyt. Columbia Univ. Med. Ctr.

2023 NY Slip Op 32641(U)

July 31, 2023

Supreme Court, New York County

Docket Number: Index No. 805263/2017

Judge: Judith N. McMahon

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

PRESENT: HON. JUDITH N. MCMAHON PART 30M

Justice

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TRACY PENSKI, DAVID PENSKI,

Plaintiff,

- v -

NEW YORK PRESBYTERIAN COLUMBIA UNIVERSITY
MEDICAL CENTER, COLUMBIA UNIVERSITY, MARY
D'ALTON, DOROTHY PRZYDZIAL SMOK, CARA GRIMES

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendants' motion for summary judgment pursuant to CPLR 3212 is granted to the extent that the complaint¹ is severed and dismissed as unopposed against the defendants New York Presbyterian/Columbia University Medical Center, Mary D'Alton, M.D. and Cara Grimes, M.D. Plaintiffs' second cause of action for lack of informed consent is also severed and dismissed. The balance of the motion is denied. Defendant Columbia University may be held vicariously liable at the time of trial for any negligence found on the part of its employee, the defendant Dorothy Smok, M.D.

This matter arises out of allegedly negligent obstetrical and gynecological care rendered to the 39-year-old plaintiff, Tracy Penski, from July 2, 2014, through February 3, 2015. Plaintiffs claim, *inter alia*, that the defendants failed "to take appropriate measures to diagnose placenta accreta pre-delivery, to take cognizance of plaintiff's history of vaginal bleeding pre-delivery, to

¹ The Complaint lists three causes of action: medical malpractice, lack of informed consent, and a derivative cause of action on behalf of plaintiff-spouse, David Penski (*see* NYSCEF Doc. No. 2).

perform proper diagnostic studies including ultrasound/MRI to rule out placenta accreta pre-delivery, to perform a C-section, and to diagnose retained placenta post-delivery" (*see* Plaintiffs' Verified Bill of Particulars; NYSCEF Doc. No. 83, para 1). It is alleged that defendants' failures were a cause of Mrs. Penski's "postpartum hemorrhage, sepsis, uterine adhesions, hysterectomy, and loss of childbearing capacity" (*id.*, para. 7), and that Dr. Shock's negligent performance of two dilation and curettage ("D&C") procedures contributed to a finding of Asherman's syndrome², which necessitated plaintiff's hysterectomy on November 10, 2016. For their part, defendants maintain that they adhered to the standard of care in all respects, and that plaintiff's injuries and complications were a result of naturally occurring placenta accreta, which could not be diagnosed prenatally.

FACTUAL BACKGROUND

It is undisputed that following a nearly full-term pregnancy, plaintiff delivered a healthy male baby via normal spontaneous vaginal delivery on January 16, 2015. Dr. Smok (who was covering for plaintiff's regular OB/GYN, Dr. D'Alton) delivered the baby and attempted to manually extract the placenta when it was not expelled thirty minutes after the birth, but the doctor was unable to deliver the placenta in its entirety.³ As a result, plaintiff was brought to the operating room and her consent was obtained for Dr. Smok to perform a "suction dilation and curettage for retained placenta" ("D&C") under ultrasound guidance. At the conclusion of the D&C, the uterus was noted to be well contracted with no active bleeding, and plaintiff was taken

² Asherman's syndrome is a condition where scar tissue forms inside the uterus and/or cervix, reducing the uterine space.

³ The pathology report from the failed attempt at manual extraction of the placenta shows that tissue was removed in fragmented pieces during the procedure was "torn" and the "rupture site distance from the disc cannot be determined." The fragmented placental tissue analyzed by pathology measured 20.0 x 12.0 x 3.5 cm "in aggregate dimension."

to the recovery room in stable condition. She was discharged two days later, on January 18, 2015, with instructions to follow up with Dr. D'Alton.

Once home, plaintiff began to experience fever, back pain, and cough. She testified that she attempted to call Dr. D'Alton on January 19th but was unable to get through. On January 20, 2015, Mrs. Penski presented to Columbia University with a fever of 101.6 and was seen by Dr. Smok, who immediately transferred her to the hospital for a workup as to the cause of the fever. At 2:57 p.m. plaintiff was triaged with a chief complaint of palpitations, and back pain of 9/10 which became worse when taking a deep breath. Plaintiff's fever was now 103, and she was tachycardic to 163 beats per minute. A January 21, 2015, abdominal and pelvic CT scan revealed an approximately 4.0 x 2.6 x 2.1 cm lobulated enhancing lesion located in the fundus to the right side, likely representing retained products of conception. Given plaintiff's continued spike in fevers despite antibiotics, a D&C was recommended for removal of infected products of conception. Plaintiff was thereafter consented for her second D&C.

On January 22nd defendant Dr. Cara Grimes performed a suction D&C under ultrasound guidance. Surgical pathology revealed extensive products of conception which she removed from the uterus during this second procedure. Plaintiff was stable for discharge on January 24, 2015, and she was instructed to follow up with Dr. Smok on February 3, 2105.

On February 2nd, however, plaintiff returned to Dr. Smok with a report of "a gush of blood that was pouring out" while she was nursing but slowed after that initial episode. Dr. Smok advised plaintiff that no further retained products of conception were suspected based upon clinical exam, the ultrasound appearance of the endometrium, and because she had already undergone two D&Cs. The plan was to treat plaintiff with oral methergine every eight hours for two days.

On February 5, 2015, plaintiff obtained a second opinion from an OB/GYN in New Jersey, who performed an ultrasound which was significant for “abnormal thickened heterogenous endometrium with increased vascularity measuring 2.4 cm” which the doctor indicated was suspicious for retained products of conception. It was also discussed that the differential diagnosis for this finding included blood clots. The doctor recommended that a further D&C be performed⁴.

On February 6th plaintiff was evaluated by Dr. David Butler, an OB/GYN familiar with Mrs. Penski’s extensive OB/GYN care going back to 2004. Dr. Butler noted that plaintiff had an arcuate uterus which was well contracted and 8-10 weeks in size. He also noted a “2.4 cm uniform stripe” and “no area of increased tissue.” Lochia was noted in the vagina. Dr. Butler recommended rest and advised plaintiff that if she began to bleed again to any great extent, she would likely require a hysterectomy. He also ordered an ultrasound, performed in July of 2015, which was inconclusive for a diagnosis of Asherman’s Syndrome. Plaintiff’s complaints of pelvic pain continued, and a subsequent hysterosalpingogram “showed occlusion of 60% of the cavity as a result of Asherman’s Syndrome.”

On November 10, 2016, plaintiff underwent a planned laparoscopic assisted vaginal hysterectomy and bilateral salpingectomy. This surgery revealed a 6-week size uterus with a uterine cavity that was completely adherent, yielding a definitive diagnosis of Asherman’s Syndrome.

APPLICABLE LAW AND ANALYSIS

To prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence

⁴ It is undisputed that plaintiff had one abortion at age 17, a spontaneous miscarriage in March of 2014 and a D&C in May of 2014 to treat a right paraovarian cyst associated with pelvic pain.

demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). “Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v. Rozbruch*, 91 AD3d 147 [1st Dept. 2012]).

In support of the motion, defendants submit, *inter alia*, the expert affirmation of Adiel Fleischer, M.D. (*see* NYSCEF Doc. No. 80) who is board certified in maternal fetal-medicine, obstetrics, and gynecology. Dr. Fleischer opines to a reasonable degree of medical certainty that “all of the care rendered was well within the standard of care and that there is no evidence that it was the proximate cause of the plaintiff’s injuries” (*id.*, para 69), and is unequivocal that: (1) there was no evidence of plaintiff having placenta accreta that could have been diagnosed by Dr. D’Alton; (2) labor and delivery were appropriately managed within the standard of care by Dr. Smok; (3) Dr. Grimes properly evaluated plaintiff for and successfully performed the second D&C on January 22, 2015, and (4) the two D&C procedures did not yield a diagnosis of Asherman’s syndrome.

According to Dr. Fleischer, plaintiff showed no prenatal evidence of placenta accreta (*i.e.*, the placenta growing too deeply into the uterine tissue) and, according to his review of the ultrasounds (1) there was “no evidence whatsoever of placenta accreta” to warrant additional testing (*id.*, para. 72); (2) the number of prenatal ultrasounds performed were over and above the standard of care and an MRI was not indicated since plaintiff was not high risk for placenta accreta; (3) plaintiff’s history of vaginal bleeding pre-delivery was appreciated, and she was closely monitored with detailed physical examinations and numerous ultrasounds; (4) labor and

delivery were appropriately managed and adequately supervised by Dr. Smok and there was no indication that plaintiff should have had a c-section; (5) it was appropriate for Dr. Smok to attempt manual delivery of the placenta and the doctor removed the placenta and products of conception to the extent possible; (6) Dr. Smok recognized the likelihood of retained placenta based on the placental tissue coming out in fragments, appropriately recommended a D&C on January 16th, and appropriately removed the observed products of conception during the D&C procedure; (7) plaintiff was appropriately evaluated for her respiratory complaints during her subsequent presentation to NYPH, and when those results were negative, for a pelvic cause of her symptoms; (8) plaintiff was appropriately treated with antibiotics both on January 16, 2015 and during her January 22nd admission to NYPH; (10) Dr. Grimes appropriately performed the second D&C under ultrasound guidance and the appropriate imaging was performed prior, during and after the procedure to confirm that all additional products of conception had been removed; (11) Dr. Smok correctly assessed plaintiff on February 2, 2015 informing her that no further interventions were needed, and plaintiff was appropriately discharged both on January 18th and January 24, 2015. Dr. Fleischer concludes that plaintiff's infection was caused by her abnormal placenta and not by the treatment rendered, and that neither her Asherman's syndrome or hysterectomy were the result of negligence.

Dr. Fleischer's expert affirmation is detailed, specific and factual in nature and is based upon the facts in the record (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]; *see also Pascocello v. Jibone*, 161 AD3d 516 [1st Dept. 2018]; [*internal citations omitted*]). Accordingly, "[t]he affirmation of defendants' expert was sufficient to meet defendants' *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that any

such departure was not a proximate cause of plaintiffs' alleged injuries" (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1st Dept. 2018]).

"Where a defendant makes a *prima facie* entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact" (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 570 [1st Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1st Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1st Dept. 2017]).

In opposition to the motion, plaintiff submits the expert affidavit of an OB/GYN, Gary R. Brickner, M.D. (*see* NYSCEF Doc. No. 109), who opines to a reasonable degree of medical certainty that Dr. Smok departed from the standard of care by failing to take special care to remove all products of conception during the D&C performed on January 16, 2015, and that this departure was a substantial factor in causing plaintiff to develop Asherman's syndrome. Plaintiff's expert is emphatic that "a straight line can be drawn from her undergoing multiple D&Cs that month to her developing Asherman's syndrome, which was diagnosed in 2016" (*id.*, para. 49).

Specifically, Dr. Brickner sets forth that Dr. Smok departed from the standard of care "in failing to completely remove the retained products of conception" on January 16, 2015, as evidenced by "the large amount of placental tissue missed" and opines that "these retained products of conception following a D&C specifically performed to remove this tissue is unacceptable and is clear evidence of a substandard D&C by Dr. Smok on that date" (*id.*, para 43). Dr. Brickner further opines that the second D&C in this case, required once the infection

had set in, dramatically raised the chances that Mrs. Penski would go on to develop Asherman's syndrome in this scenario and would not have been necessary, had the first D&C been done correctly to standard (*id.*, para. 45). Additionally, his review of Dr. Smok's operative report from the January 16th procedure indicates that: (1) the curetting technique was insufficient, the uterine cavity was inadequately evaluated, and Dr. Smok "did not use a careful, systematic, and repetitive approach to curetting of the endometrium, and (2) no post-procedure imaging was performed to confirm that the products of conception had been adequately removed.

Finally, Dr. Brickner disagrees entirely with Dr. Fleischer's opinion that it is not a deviation of the standard of care to require a second procedure for removal of additional products of conception, since a D&C performed for the sole purpose of removing retained placenta must succeed in doing so, and Dr. Smok's failed manual attempt at extracting the retained placenta in the first place tore and fragmented the placenta, creating the necessity of performing the D&C (*id.*, para 54).

The affidavit of plaintiffs' expert raised clear questions of fact sufficient to defeat summary judgment in favor of Dr. Smok. "The medical experts' conflicting opinions...raise issues of fact that must be resolved at trial" (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477, 478 [1st Dept. 2018]). As such, Dr. Smok's motion for summary judgment must be denied

Accordingly, it is

ORDERED that the motion for summary judgment by the defendants New York Presbyterian/Columbia University Medical Center, Columbia University, Mary D'Alton, M.D., Dorothy Przuzydial Smok, M.D. and Cara Grimes, M.D., is granted to the extent that the complaint is severed and dismissed as against New York Presbyterian/Columbia University Medical Center, Mary D'Alton, M.D., and Cara Grimes, M.D., ; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the defendant Columbia University may be held vicariously liable for any negligence that the jury may find relative to defendant Dorothy Przydzial Smok, M.D., and it is further

ORDERED that plaintiffs' cause of action for lack of informed consent is severed and dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of New York Presbyterian/Columbia University Medical Center, Mary D'Alton, M.D., and Cara Grimes, M.D. dismissing plaintiffs' complaint; and it is further

ORDERED that the parties shall appear in **Part 40 on September 14, 2023**, to select a trial date.

7/31/2023
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

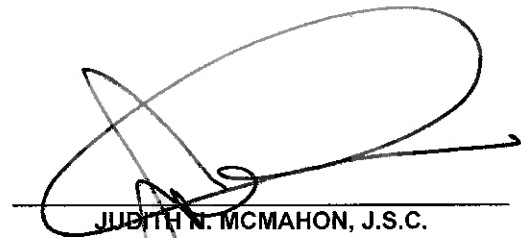
CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE



JUDITH N. MCMAHON, J.S.C.

Hon. Judith N. McMahon
J.S.C.