

Carioscia v Welischar
2012 NY Slip Op 32801(U)
November 21, 2012
Supreme Court, Suffolk County
Docket Number: 10-8387
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX No. 10-8387
CAL No. 12-00447MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 8-7-12 (#005)
MOTION DATE 8-2-12 (#006)
ADJ. DATE 11-14-12
Mot. Seq.# 005 - MG
006 - MotD; CASEDISP

-----X
JESSICA CARIOSCIA and DYLAN
CARIOSCIA,

Plaintiffs,

VICTOR M. SERBY, ESQ.
Attorney for Plaintiffs
255 Hewlett Neck Road
Woodmere, New York 11598-1452

- against -

KELLY, RODE & KELLY, LLP
Attorney for Defendant Doctors Welischar
and Lochner, and Stony Brook Gynecology
330 Old Country Road
Mineola, New York 11530

JULIE WELISCHAR, M.D.; and MEGAN
LOCHNER, M.D.; and SUSAN FISH, NP; and
STONY BROOK GYNECOLOGY &
OBSTETRICS P.C., and DRS. JOHN and/or
JANE DOES 1-6,

Defendants.

FUREY, KERLEY, WALSH, MATERA
and CINQUEMANI, P.C.
Attorney for Defendant Susan Fish, NP
2174 Jackson Avenue
Seaford, New York 11783

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Upon the following papers numbered 1 to 45 read on these motions for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers (005) 1 - 19; (006) 20-37; Notice of Cross Motion and supporting papers ___;
Answering Affidavits and supporting papers 38-40; Replying Affidavits and supporting papers 41 - 42, 43 - 45; Other ___;
(~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (005) by defendant, Susan Fish, N.P., pursuant to CPLR 3212 for
summary judgment dismissing the complaint as asserted against her is granted, and the complaint as
asserted against her is dismissed; and it is further

ORDERED that motion (006) by the defendants, Megan Lochner, M.D., and Stony Brook
Gynecology & Obstetrics P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint
as asserted against them on the bases that they bear no liability in this action is granted and the complaint
as asserted against them is dismissed with prejudice; and if is further

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ORDERED that to the extent that movants argue in motion (006) that they are not vicariously liable for the acts of Susan Fish, N.P., that branch of the motion has been rendered academic by the decision in motion (005) and is denied as moot; and it is further

ORDERED that the branch of motion (006) which seeks a discontinuance as to defendant Julie Welischar, M.D. is granted on the basis of the Stipulation of Discontinuance executed by the parties.

In this medical malpractice action, the plaintiffs, Jessica Carioscia and Dylan Carioscia, seek damages personally and derivatively, premised upon the alleged negligent departures from the good and accepted standards of medical care and treatment and on the bases that the defendants violated New York State Education Law § 29.2, § 6350 (33), §6902 (3), §29.1 (9), § 29.2 (7), § 6530 (37), and § 6530 (17). On September 20, 2007, defendant Julia Welischar, M.D. performed a cesarean section delivery on Jessica Carioscia, a 34 year old female. After the plaintiff was discharged home from the hospital, she developed a post-partum hemorrhage on October 1, 2007, for which she was seen at the office of Stony Brook Gynecology & Obstetrics, P.C. by Susan Fish, N.P. who removed a blood clot from the uterus, ordered blood work, and discharged her home with instructions. Later that day, the plaintiff began to hemorrhage again. She consulted by telephone with Megan Lochner, M.D. at Stony Brook Gynecology & Obstetrics, P.C.; however, Dr. Lochner did not see or examine her and gave advice over the phone. Shortly thereafter, the plaintiff again began to hemorrhage very heavily and was taken by ambulance to Stony Brook University Hospital emergency room where she was seen by defendant Lochner and transfused with 14 units of blood, fresh frozen plasma, Factor VII and other blood products. An emergency D&C and emergency hysterectomy were performed. Thereafter, the plaintiff was advised that she may have been transfused with tainted blood and would need periodic testing for AIDs, hepatitis and other blood borne diseases.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503[2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff

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must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

In motion (005), Susan Fish, N.P. seeks summary judgment dismissing the complaint as asserted against her on the bases that she did not negligently depart from the accepted standards of care and treatment, that she did not abandon or neglect the plaintiff and at all times complied with New York State Education Law; and that there is nothing that she did or did not do which proximately caused the injuries claimed by the plaintiffs. In support of this application, defendant Fish has submitted, inter alia, an attorney's affirmation; the affidavits of Gary L. Mucciolo, M.D. and Catherine Pearsall, PhD; memorandum of law; copies of the summons and complaint, defendant's answers and demands, and plaintiffs' verified bill of particulars; copies of transcripts of the examinations before trial of Jessica Carioscia and Dylan Carioscia, both dated January 6, 2011, Julie Welischar, M.D. dated March 7, 2011, Megan C. Lochner, M.D. dated April 8, 2011, Susan Fish, N.P. dated August 23, 2011, all of which are in admissible form; and uncertified copies of plaintiff's medical records.

Gary Mucciolo, M.D., the expert for defendants Lochner and Stony Brook Gynecology & Obstetrics, P.C., has affirmed that he is licensed to practice medicine in New York State and is board certified in obstetrics and gynecology. He set forth his work experience and stated that he has delivered hundreds of babies by cesarean section and has diagnosed and treated multiple cases of postpartum hemorrhages. It is Dr. Mucciolo's opinion within a reasonable degree of medical certainty that Susan Fish, N.P. did not deviate or depart from the accepted medical standards of care and treatment of the plaintiff, and that there was nothing that she did or failed to do which cause the event which occurred.

Dr. Mucciolo, M.D. stated that this case involved a delayed postpartum hemorrhage in a patient who had undergone three deliveries by cesarean section in 2004, 2006, and September 20, 2007. The last delivery by cesarean section, with a tubal ligation, was performed at Stony Brook University Hospital on September 20, 2007, by Julie Welischar, M.D., Jessica Carioscia's primary treating physician from Stony Brook Obstetrics & Gynecology, P.D. The procedures were performed uneventfully and without complications, and the baby had no medical issues related to the delivery. However, during the subject surgery, Dr. Welischar encountered a "window," or thin area of the uterus which she repaired at the time of the delivery with suture material. The plaintiff was discharged home

on September 24, 2007 with a hematocrit level of 28.7, post delivery. She experienced no bleeding until October 1, 2007, when she experienced some bleeding and was seen at about 3:00 p.m. at the office of Stony Brook Gynecology & Obstetrics, P.C. by Susan Fish, a nurse practitioner permitted to examine, diagnose and treat patients. Defendant nurse practitioner Fish took a history, performed a speculum exam and bimanual pelvic examination wherein she palpated the uterus and removed a moderate blood clot from the os of the cervix. She ordered a complete blood count to check the hemoglobin and hematocrit, checked the plaintiff's vital signs, including heart rate and blood pressure. The plaintiff was discharged home and told to call the office if the bleeding restarted or worsened. The plaintiff's blood work revealed a hematocrit of 34.9. Although outside the reference range of 35.0 to 47, it would be considered normal for a patient who is ten days postpartum following a cesarean section, and it was higher than it was upon discharge from Stony Brook Hospital following the delivery.

Dr. Mucciolo continued that about an hour after seeing N.P. Fish, the bleeding started again, so the plaintiff called the practice and spoke with the on-call physician for the practice, Megan Lochner, M.D., who advised her that she had already spoken to Susan Fish, N.P., as was the usual custom and practice in a case of postpartum bleeding. After ascertaining that the plaintiff had no racing heart, dizziness, lightheadedness or shortness of breath, Dr. Lochner advised the plaintiff to monitor the situation and to call back if the symptoms changed. Thereafter, the plaintiff's husband called back, as the plaintiff was having increased bleeding. The plaintiff was advised to go to Stony Brook Hospital, where she was found to be actively bleeding. A sonogram confirmed significant active bleeding, but no retained products of conception. Dr. Mucciolo stated that this situation presented a medical emergency, and thus Dr. Lochner performed a dilation and curettage to stop the bleeding, as an appropriate first step. The D&C was unsuccessful, and a hysterectomy had to be performed.

Dr. Mucciola stated that the occurrence of the uterus becoming suddenly atonic with loose muscle tone and failing to contract leading to a hemorrhage is something that can occur. The reason is not known. As the uterus is a very vascular organ, when the uterus fails to contract, it becomes a conduit for a large amount of blood loss, including hemorrhaging. Thus, the drastic remedy of surgical removal of the uterus is a life-saving procedure. Dr. Mucciola continued that the pathology report from the hysterectomy indicated the diagnosis of sub-involution of the uterus, indicating that the hemorrhage was due to the failure of the uterus to contract. The fact that the hemorrhaging came from the placental bed meant that the failure to contract occurred where the placenta was attached to the uterine wall. In that no products of conception were recovered during the D& C, there was nothing left behind at the delivery which caused or contributed to the hemorrhage.

Dr. Mucciola concluded that there was nothing which Nurse Practitioner Fish did which caused these events to occur, as when she first saw the plaintiff, her presentation was consistent with normal postpartum bleeding, and her evaluation of the uterus was appropriate. The complete blood count taken after the office visit, and before the hemorrhaging occurred, indicated that there was normal post-operative bleeding and not a postpartum hemorrhage. Dr. Mucciola stated that the hemorrhage was caused by sub-involution of the uterus which occurred without negligence on the part of any physician or medical care provider. He added that Nurse Practitioner Fish's treatment of the plaintiff was appropriate. She was qualified to perform the bimanual examination. Because the plaintiff's bleeding stopped, a sonogram was not required. Ordering the complete blood count was appropriate to monitor

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the blood loss. There was nothing in the plaintiff's presentation to the office on October 1, 2007 when she was seen by Nurse Practitioner Fish which required any further investigation or action by her. It was appropriate to advise the plaintiff to call back if the bleeding started again or worsened. Dr. Lochner was appropriately advised by Nurse Practitioner Fish about the findings on the office visit. Dr. Mucciola concluded that the blood test results of a hemoglobin of 11.4 and hematocrit of 38.9 indicted that the plaintiff had not lost a significant amount of blood up until the time of the CBC, obtained just after the office visit.

Catherine Pearsall, PhD, set forth that she is a Family Nurse Practitioner and Adult Nurse Practitioner and has been licensed to practice in New York State since 1995. She set forth her work experience, which includes care of the postpartum patient, and stated that she is familiar with postpartum hemorrhage and delayed postpartum hemorrhage. She set forth the materials which she reviewed and opined that based upon a review of the written practice protocols for defendant Susan Fish, N.P., as required under New York State Education Law § 6902 (3), Susan Fish was acting and practicing in accordance with those practices and protocols and well within the statutory limitations of a nurse practitioner. The decision to order blood work was in accordance with the protocol. She continued that New York State Education Rule § 29.1 (9) was not violated in that the care and treatment provided was well within her authority given her education, training, and Nurse Practitioner Certificate.

Pearsall continued that there was no requirement for the plaintiff to be seen by a physician based upon the plaintiff's presentation, and Susan Fish's evaluation and diagnosis of the plaintiff was not in violation of the regulations. She opined that her care and treatment was not negligent, careless or unskilled, and she did not depart from accepted standards of care in her profession and business. None of the care and treatment rendered by defendant Fish is causally related to any injuries sustained by the plaintiff. Pearsall continued that Susan Fish did not abandon or neglect Jessica Carioscia within the meaning of Education Law §29.2 (1) as she took an appropriate history, appropriately evaluated and examined the plaintiff, ordered appropriate testing, advised the plaintiff to contact the office if there was any change in her status or if the bleeding returned, and she reported the visits and her findings to Dr. Lochner. Pearsall opined within a reasonable degree of medical certainty that the treatment provided by defendant Fish was appropriate and conformed to the standards of care in the community and conformed with the rules, regulations, practices, and guidelines of the Department of Education and Commission of Education Guidelines.

Based upon the foregoing, it has been established prima facie that Nurse Practitioner Fish was not negligent and did not depart from the accepted standard of care in the care and treatment provided to the plaintiff, and that there is nothing that she did or did not do which proximately caused injury to the plaintiff.

In motion (006), Megan Lochner, M.D. and Stony Brook Gynecology & Obstetrics. P.C. seek summary judgment dismissing the complaint. These moving defendants also seek summary judgment on the issue that Stony Brook Gynecology & Obstetrics. P.C. is not vicariously liable for the acts of its employee, Susan Fish, N.P., who is represented by the law office of Furey, Kerley, Walsh, Matera & Cinquemani, P.C. However that part of the application has been rendered academic by the decision in motion (005) dismissing the complaint as asserted against N.P. Fish.

In support of this application, the moving defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaints, answers served by all defendants, and plaintiffs' verified bills of particular; copies of transcripts of the examinations before trial of Jessica Carioscia and Dylan Carioscia, both dated January 6, 2011, Julie Welischar, M.D. dated March 7, 2011, Megan C. Lochner, M.D. dated April 8, 2011, Susan Fish, N.P. dated August 23, 2011, Robert O'Keefe, M.D. dated December 12, 2011, all of which are in admissible form; defendants' office records; uncertified records from Stony Brook University Hospital which are not in admissible form; the affidavit of Victor R. Klein, M.D. dated July 6, 2011; a copy of the practice agreement between Susan T. Fish, N.P. and Dr. Mark Funt and Dr. Robert O'Keefe; and a Stipulation of Discontinuance of the action with prejudice as to Julie Welischar, M.D. dated April 8, 2011, which as been signed only by the plaintiffs and counsel for defendant Welischar, and has not been filed (see CPLR 3217).

The defendants Megan Lochner, M.D. and Stony Brook Gynecology & Obstetrics, P.C. also seek to have the Stipulation of Discontinuance "So Ordered." Co-defendant N.P. Fish has not opposed this part of the application and has offered no expert affirmation against co-defendant Julie Welischar, M.D.

Accordingly, that branch of motion (006) which seeks to have the Stipulation of Discontinuance with prejudice as to defendant Julie Welischar, M.D. is granted and the Stipulation is deemed "So Ordered" and the moving defendants are directed to Settle the Order and to file same.

Victor R. Klein, M.D., the defendants' expert averred that he is licensed to practice medicine in New York and is board certified in obstetrics and gynecology and maternal fetal medicine, and has been actively engaged in practice in those three areas. He has delivered hundred of babies by cesarean section and has diagnosed and treated postpartum hemorrhage on numerous occasions. He set forth the plaintiff's obstetrical history, including her delivery by Julie Welischar, M.D. by cesarean section on September 20, 2007. He stated that the delivery was without complications, and the infant without medical issues. He noted that Dr. Welischar encountered a "window" or thin area of the uterus which was repaired with sutures during the surgery. A tubal ligation was also performed at plaintiff's request and authorization. She was discharged home on September 24, 2007, and encountered no problems in the nature of bleeding until October 1, 2007.

Dr. Klein stated that Susan Fish saw the plaintiff at the office of Stony Brook Gynecology and Obstetrics, P.C. at 3:00 p.m. that same day for the bleeding, at which time a clot was removed. Dr. Klein described the examination and care and treatment performed by Fish during that visit, including the finding of a clot which was removed. The vital signs were normal and the plaintiff's condition was stable as the bleeding stopped, so neither a sonogram nor an examination by a physician was needed. A blood test was obtained by the plaintiff, as ordered by Fish, as per the standard of care, and the plaintiff returned home at about 4:00 p.m. Dr. Klein opined that the plaintiff's presentation to Fish was entirely consistent with normal postpartum bleeding. After about one hour, the bleeding started again, so contact was made with Megan Lochner, M.D., who was on call for the group. Dr. Lochner had already spoken to N.P. Fish who advised her of the plaintiff's earlier visit to the office. Dr. Lochner advised the plaintiff that she was having some residual postpartum bleeding, and appropriately instructed her to monitor the situation to see if the bleeding would stop, and to call back if she felt faint or if her heart was racing or the bleeding worsened. One hour later, the plaintiff's husband called Dr. Lochner, advising that the

bleeding increased and that she felt faint. The plaintiff was transported by ambulance to the hospital and was seen by Dr. Lochner at 8:05 p.m. Dr. Lochner testified that there was a liter of blood on the stretcher and the plaintiff's blood pressure was 70 by palpation. Physical examination confirmed significant bleeding and an ultrasound showed more blood in the uterus, but no retained products of conception.

Dr. Klein continued that this was a medical emergency for which Dr. Lochner immediately performed a D & C (dilation and curettage) which did not successfully stop the bleeding. No retained products of conception were found, thus indicating that there was nothing left behind in the uterus from the cesarean section that could have caused or contributed to the hemorrhage. He stated that the D&C and hysterectomy were appropriately performed, and that the hysterectomy was performed when the D&C did not have the desired effect of stopping the bleeding. The administration of blood and blood products was appropriate, and due to the severe blood loss, the plaintiff developed DIC (disseminated intravascular coagulation) which affected the clotting of the blood. The plaintiff successfully recovered and was discharged home. Dr. Klein stated that the plaintiff was required to undergo testing due to the fact that some of the blood product she received were from an organ recipient and may have been tainted, but all testing was negative for blood borne diseases.

Dr. Klein stated that the cause of the uterus suddenly becoming atonic with lose muscle tone, failing to contract, and causing hemorrhage, is unknown. What is known to a degree of medical certainty is that this hemorrhage was caused by subinvolution of the uterus, a condition which occurs without negligence on the part of any physician. Once the hemorrhage occurs, a D&C and hysterectomy are appropriate and necessary measures to take to stop the bleeding. When the uterus failed to contract, the blood loss became massive, and a hysterectomy removing the uterus was then performed as a life-saving measure. It was noted that the bleeding occurred at the placental bed, and not at the same location that the thin uterine window was located. Dr. Klein opined that there were no departures or deviations from acceptable medical standards by Megan Lochner, M.D. or N.P. Fish in their care and treatment of the plaintiff, and that there is nothing that they did or did not do which caused the hemorrhage to occur.

Based upon the foregoing, Megan Lochner, M.D. and Stony Brook Gynecology & Obstetrics have established prima facie entitlement to summary judgment dismissing the complaint as asserted against them and as against Susan Fish, N.P. on the issue of vicarious liability.

In opposition to these motions, the plaintiffs have submitted the redacted affirmation of their expert physician, but have not provided an unredacted copy of the affirmation to this court as required (*Marano v Mercy Hospital*, 241 AD2d 48, 670 NYS2d 570 [2d dept 1998]). The plaintiffs' expert set forth that he is licensed to practice medicine in New York State, that he is board certified in internal medicine, and that he is an adjunct professor of pathophysiology at the City University of New York. However, plaintiffs' expert has not qualified himself as an expert in the field of obstetrics and gynecology, or set forth his education and training, and the basis for his expertise in obstetrics and gynecology. Additionally, the defendants oppose such expert affirmation submitted by the plaintiffs.

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“To qualify as an expert, the witness should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. Thus, if a physician possesses the requisite knowledge and expertise to make a determination on the issue presented, he need not be a specialist in the field. The question of whether a physician may testify regarding the standard of accepted medical practice outside the scope of his specialty can be a troublesome one, but appellate courts have rejected claims of error directed at a physician’s qualifications to offer an opinion outside the scope of his specialty when the witness’s specialty is closely related to th specialty at issue” (see *Maria Ofelia Nino De Hernandez v Lutheran Medical Center*, 46 AD3d 517, 850 NYS2d 460 [2d Dept 2007]; *Enu v Thomas Sobol*, 171 AD2d 302, 576 NYS2d 378 [3d Dept 1991]). A physician need not be a specialist in a particular field, if he nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented (*Humphrey v Jewish Hospital and Medical Center of Brooklyn*, 172 AD2d 494, 567 NYS2d 737 [2d Dept 1991]; *Joswick v Lenox Hill Hospital*, 161 AD2d 352, 555 NYS2d 104 [1st Dept 1990]). Here, the plaintiff’s expert has not provided this court with a copy of his curriculum vitae, has not set forth his work experience and training in medicine, or the basis for his opinions concerning obstetrics and gynecology and the duties and responsibilities of a nurse practitioner or of a physician practicing in the field of obstetrics and gynecology. Thus, the reliability of his opinions has not been established.

Inasmuch as summary judgment is the procedural equivalent of trial, and the credibility of expert witnesses often presents a significant issue for the trier of fact, it would be inappropriate to consider the redacted affirmation without an unredacted affirmation having been submitted to the court for in camera inspection (*Marano v Mercy Hospital, supra*). It is determined that even if the plaintiffs’ expert qualified as an expert with regard to defendant N.P. Fish, and an unredacted copy of that affirmation were submitted to this court for in camera review, the plaintiffs’ expert has not raised a factual issue to preclude summary judgment from being granted to defendant N.P. Fish. or Dr. Lochner and Stony Brook Gynecology & Obstetrics, P.C. Although the plaintiff’s expert has set forth certain departures from the standard of care by N.P. Fish, he also set forth that had Dr. Lochner properly intervened, the plaintiff would not have needed all the blood transfusions, and that it was a departure from the standard of care for Dr. Lochner not to consider that the plaintiff was in the early stages of DIC when Dr. Lochner spoke with the plaintiff who complained of excessive bleeding. Thus, based upon the plaintiffs’ expert opinion, it has been established by him that any of the alleged acts or omissions by N.P. Fish were not the proximate cause of the plaintiff’s injuries based upon the alleged departures by Dr. Lochner.

Accordingly, motion (005) which seeks summary judgment dismissing the complaint as to defendant Susan Fish, N.P. is granted and the complaint as asserted against her is dismissed with prejudice. That part of motion (006) wherein Megan Lochner, M.D. and Stony Brook Gynecology & Obstetrics seek summary judgment on the basis that they are not vicariously liable for the acts of Susan Fish, N.P. has been rendered academic based upon the dismissal of the complaint as to defendant Fish, and is denied as moot.

The plaintiffs’ expert concludes to a reasonable degree of medical certainty that the medical care rendered to the plaintiff by each of the defendants was substandard and deviated from good and acceptable standards of medical care and treatment, which deviations were substantial factors in causing and/or exacerbating the injuries claimed by the plaintiff.

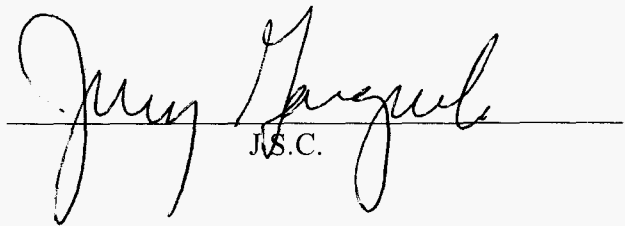
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While plaintiff's expert set forth that the plaintiff was at the beginning of DIC when she saw N.P. Fish, he does not support this conclusory opinion with any evidentiary proof, such as the CBC results or other blood tests, or how the plaintiffs' presentation was consistent with any thing but normal postpartum bleeding. The plaintiffs' expert addressed the intervening acts of Dr. Lochner who spoke to the plaintiff on the telephone, but did not see and examine her, or send her to the emergency room for evaluation when she first spoke to the plaintiff. He stated that the plaintiff testified that the bleeding never resolved. He continued in a conclusory statement that had the plaintiff's condition been timely diagnosed by the defendants, then the plaintiff would have avoided the severe complications of DIC, massive blood loss, and hysterectomy. He continued in a conclusory manner that the plaintiff could have been treated with oxytoxics, uterovaginal packing, or dilation and curettage, and thus avoided hemorrhage and the risk of HIV/AIDS from having received blood from an organ donor recipient. It has not been established that any of the blood tests for HIV or other blood borne diseases were positive to date to support the expert's opinion. He continued that had Dr. Lochner properly intervened, that the plaintiff would not have needed all of the blood transfusions. The plaintiff's expert does not opine how the alternative treatments would have avoided transfusions and a hysterectomy, or their likelihood of success. Thus, even if the plaintiffs' expert demonstrated his qualifications as an expert in the subject area of medicine, and even if an unredacted expert affirmation were provided to this court, it is determined that the plaintiffs' expert has failed to raise a factual issue to preclude summary judgment.

Accordingly, motion (006) is granted and the complaint as asserted against Megan Lochner, M.D. and Stony Brook Gynecology & Obstetrics is dismissed with prejudice.

Settle Order

Dated: Nov. 21, 2012


 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

HON. JERRY GARGUILO