Spiegel v Goldstein
2014 NY Slip Op 32338(U)
August 25, 2014
Supreme Court, Suffolk County
Docket Number: 10-7090
Judge: Jr., Andrew G. Tarantino
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SHORT FORM ORDER

INDEX No. 10-7090
CAL. No. 13-02002MM

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 4-8-14
ADJ. DATE 7-22-14
Mot. Seq. # 004 - MG
005 - MG; CASEDISP

TALI SPIEGEL and DANIEL SPIEGEL,

Plaintiffs,

- against -

IRWIN GOLDSTEIN, M.D., JOHN DOE, M.D., LONG ISLAND OB/GYN, THOMAS A. DAVENPORT, M.D., LAURENCE T. GLICKMAN, M.D., LONG ISLAND PLASTIC SURGICAL GROUP, P.C., NORTH SHORE UNIVERSITY HOSPITAL AT PLAINVIEW and WINTHROP UNIVERSITY HOSPITAL,

Defendants.

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Upon the following papers numbered 1 to 54 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (004) 1-26; (005) 27-46; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 47-49; Replying Affidavits and supporting papers 50-no affidavit of service; 51-52; Other 53,54 affidavits of plaintiff's expert; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by defendants, Thomas A. Davenport, M.D., Laurence T. Glickman, M.D., and Long Island Plastic Surgery Group, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that motion (005) by defendants, Irwin Goldstein, M.D. and Long Island OB/GYN, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted.

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In this action for medical malpractice, the plaintiff, Tali Spiegel, seeks damages for personal injuries caused by the defendants' allegedly negligent departures from the accepted standards of medical care and treatment. Causes of action for lack of informed consent, and a derivative claim on behalf of her spouse, Daniel Spiegel, have been asserted as well. The plaintiff was under the care and treatment of defendants Irwin Goldstein, M.D. and Long Island OB/GYN relating to the delivery of her baby via cesarean section on August 27, 2007. The delivery was effectuated with a pfannensteil incision. Following surgery, the plaintiff experienced pain in the incision and came under the care of defendants Thomas A. Davenport, M.D., Laurence T. Glickman, M.D., and Long Island Plastic Surgery Group, P.C. Dr. Davenport, assisted by Dr. Glickman, performed surgery on April 14, 2009, for excision of an ilioinguinal nerve neuroma after conservative measures failed. Thereafter, the plaintiff continued to complain of pain in the same area as well as additional pain over the genitofemoral nerve. Surgery was performed by Dr. Davenport on November 10, 2009 for excision of the recurrent iliofemoral neuroma and also for a genitofemoral neuroma. Thereafter, the plaintiff continued to complain of numbness and burning pain over the mons pubis and underwent nerve block treatment by a pain management physician.

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 (***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 general rule in New York is that an expert cannot base an opinion on facts he did not observe and which are not in evidence, and that the expert testimony is limited to facts in evidence (*see* ***Allen v Uh***, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom***, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts, Inc.***, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2005]). Uncertified medical records are not in admissible form.

In support of motion (004), defendants Thomas A. Davenport, M.D., Laurence T. Glickman, M.D., and Long Island Plastic Surgery Group, P.C. submitted, inter alia, an attorney's affirmation; the affirmation of Joseph Feinberg, M.D.; copies of the summons and complaint, defendants' answers which contain no crossclaims, demands, plaintiffs' verified bill of particulars; uncertified records of, Rudansky & Winter, and Dr. Beer which are not in admissible form pursuant to CPLR 3212 and 4518: certified copies of records from Rheumatology Associates, Long Island OB/GYN Associates, Long Island Spine Rehabilitation Medicine, North Shore LIJ Hospital, Winthrop University Hospital, Long Island Plastic Surgical, Ronny Hertz, M.D., Mark Yland, M.D.; transcripts of the examinations before trial of Tali Spiegel, Daniel Spiegel, Irwin Goldstein, M.D. dated December 7, 2012, Thomas Davenport, M.D. dated August 7, 2012, and Laurence Glickman dated November 9, 2012.

In support of motion (005), defendants Irwin Goldstein, M.D. and Long Island OB/GYN submitted, inter alia, an attorney's affirmation; the affirmation of John L. Lovecchio, M.D.; copies of the summons and complaint, defendants' answers which contain no crossclaims, demands, plaintiffs' verified bill of particulars;

transcripts of the examinations before trial of Tali Spiegel, Daniel Spiegel, Irwin Goldstein, M.D., Thomas Davenport, M.D., and Laurence Glickman, all of which are double-sided and do not comport with 22 NYCRR 202.5; and certified medical records from Long Island OB/GYN Associates, North Shore LIJ Hospital, Winthrop University Hospital, Manhattan Center for Pain Management, Ronny Hertz, M.D.; and an unauthenticated photograph. In searching the record, it is noted that admissible deposition transcripts are provided with motion (004).

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 [1999]). To prove a prima facie case of medical malpractice, a plaintiff 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***, 224 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 [2nd Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Bloom v City of New York***, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

"The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (***Toomey v Adirondack Surgical Assoc.***, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Machac v Anderson***, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

In support of motion (004), defendants Thomas A. Davenport, M.D., Laurence T. Glickman, M.D., and Long Island Plastic Surgery Group, P.C. submitted the affirmation of Joseph Feinberg, M.D. who affirms that he is licensed to practice medicine in New York State and is board certified in general surgery and plastic and reconstructive surgery. He set forth his education and training, his current work experience, and the records and materials he reviewed. It is Dr. Feinberg's opinion within a reasonable degree of medical certainty that Thomas Davenport, M.D., Laurence Glickman, M.D., and Long Island Plastic Surgery Group, P.C. did not commit any departures from accepted medical practice in connection with the treatment rendered to Tali Spiegel, and that they did not proximately cause any of the injuries claimed by the plaintiff.

Dr. Feinberg set forth that the plaintiff underwent a cesarean section on August 27, 2007 via pfannensteil incision, and initially complained of pain at the incision site. On March 6, 2008, Dr. Goldstein referred the plaintiff for ultrasound of the anterior abdominal wall in the region of the cesarean section scar, which failed to detect any significant abnormalities. Dr. Goldstein then referred the plaintiff to surgeon, Dr. Jeffrey Nussbaum, who saw her on May 15, 2008 for complaints of pain at the lateral edge of the scar. In June, 2008, the plaintiff began physical therapy for her back, and also therapy for the scar tissue release at the incision, without relief. In December 2008, when the plaintiff saw Dr. Bogorad for a two year history of back pain and for left groin pain following the cesarean section, Dr. Bogorad, after testing and evaluation, thought the etiology of the groin pain may be related to a neuropathic injury to the ilioinguinal nerve. Dr. Goldstein then referred the plaintiff to Dr. Davenport for treatment of a possible nerve entrapment. When Dr. Davenport saw the plaintiff on January 19, 2009, he found sensitivity in the left lateral cesarean section scar, likely neurocentric, which proved positive for neuroma with a Lidocaine provocative test. Dr. Davenport's impression was ilioinginal nerve

neuroma, for which he proposed surgery, advised the plaintiff of the risks of the procedure wherein he would excise the neuroma and bury the nerve in the muscle to prevent or limit pain.

Dr. Feinberg continued that on April 14, 2009, the plaintiff was admitted to Winthrop University Hospital for a resection of the ilioinguinal nerve and implantation of the nerve into the muscle, which was performed by Dr. Davenport with Dr. Glickman assisting. The nerve was found encased in scar tissue which was traced to the primary branch of the inguinal nerve, the neuroma was excised, and the nerve was buried in the oblique muscle. Pathology documented fibroadipose tissue with a small neuroma. However, postoperatively, the plaintiff continued to complain of neuroma-like pain for which Dr. Davenport recommended scar massage therapy on June 17, 2009 which was unsuccessful, however, the pain was responsive to Lidocaine injections. By October 15, 2009, it was determined that there was a recurrence of the neuroma of the ilioinguinal nerve, and that there was also a neuroma of the genitofemoral nerve relating to pain into the left vulva. Risks and benefits of the proposed second surgery were provided to the plaintiff by Dr. Davenport who admitted the plaintiff to Winthrop University Hospital on November 10, 2009, at which time he found a neuroma of the inguinal nerve buried in the muscle, and a branch of the genitofemoral nerve transversing through the canal imbedded in the scar tissue. He excised the ilioinguinal nerve and buried it deep within the belly of the muscle away from the skin. He identified a neuroma of the genitofemoral nerve, excised the neuroma, and buried the nerve deep within the adjacent muscle.

Dr. Feinberg stated that on November 30, 2009, the plaintiff complained to Dr. Davenport of pain in the supra pubic area, and was recommended to have pain management. On December 7, 2009, she was seen by both Dr. Glickman and Dr. Davenport with complaints of pain in the center of the mons pubis toward the vagina and into the medial left thigh. On January 4, 2010, the plaintiff reported numbness on the left side and pain in the central mons area for which pain management was recommended. On February 1, 2010, the plaintiff complained of burning pain in her inner thigh, unrelieved by the genitofemoral nerve injection, consistent with smaller cutaneous nerve referred pain. When the plaintiff saw Dr. Glickman on February 17, 2010, he advised her that she had a poor outcome despite their best efforts. Dr. Feinberg stated that the plaintiff was administered a nerve block in October, 2010 with complete numbness in her usual painful sites-90% relief, however, she did not continue with nerve block treatment due to insurance issues.

Dr. Feinberg opined that it is his opinion that Dr. Davenport and Dr. Glickman did not depart from good and accepted medical practice in the treatment of Tali Spiegel, whom he stated, suffered from an ilioinguinal nerve entrapment syndrome following a cesarean section. Dr. Feinberg stated that an ilioinguinal nerve entrapment may occur in the absence of negligence and medical malpractice. He continued that it was appropriate to recommend surgery for the excision of the ilioinginal nerve neuroma on April 14, 2009, after conservative measures failed to provide relief from pain. The plaintiff was provided proper informed consent. Dr. Feinberg continued that the surgical procedure performed by Dr. Davenport on April 14, 2009 was performed within good and accepted medical practice, including the incision, excision of the ilioinguinal neuroma, and burying it in the muscle, as supported by the medical records. He stated that it was appropriate to recommend physical therapy and scar massage therapy, and to administer Lidocaine /Marcaine blocks. Subsequently, it was appropriate to recommend surgery for the recurrence of the neuroma, for which risks and benefits, and alternatives, were provided to the plaintiff, including advising the plaintiff of continued pain, burning and numbness. It was documented that the plaintiff responded that she would 'trade the numbness for the pain."

Dr. Feinberg opined, that based upon the records and photographs, the surgery of November 10, 2009 was performed in accordance with good and accepted medical practice, including the incision, the excision of the neuroma of the inguinal nerve and burying it into the muscle, and the excision of the neuroma of the genitofemoral nerve and burying it into the muscle. Dr. Feinberg further opined that the neuroma at the

genitofemoral branch of the nerve was not the result of the surgery of April 14, 2009, but was a result of the initial cesarean section, and that such neuroma may occur in the absence of negligence and medical malpractice. Following the second surgery, the plaintiff continued to complain of burning pain over the mons pubis, which, Dr. Feinberg stated, was not the result of any negligence or malpractice by Dr. Davenport or Dr. Glickman. Dr. Feinberg added that plaintiff's allegation regarding injury to the iliohypogastric nerve is unsupported by the record which demonstrates such nerve was not injured. He additionally stated that Dr. Glickman assisted in the surgery and took photographs, and that Dr. Davenport performed the surgeries.

Based upon the foregoing, it is determined that Thomas A. Davenport, M.D., Laurence T. Glickman, M.D., and Long Island Plastic Surgery Group, P.C. have established prima facie entitlement to summary judgment dismissing the complaint asserted against them by showing that they did not depart from the standard of care, that they provided informed consent to the plaintiff, and that they did not proximately cause plaintiff's injuries.

Irwin Goldstein, M.D. testified to the extent that prior to the delivery of the plaintiff's baby on August 27, 2007, she had a history of frequent urinary tract infections, vaginal pain, vulvodynia for which she used biofeedback, and premenstrual syndrome. During her first pregnancy, she experienced anemia, blood cells in her urine, urinary tract infections, and first trimester bleeding for which she was placed at high risk. At the delivery of her first child, the plaintiff sustained a fourth degree laceration which Dr. Goldstein stated he repaired. Thereafter, she had some urinary incontinence and went for physical therapy to address it. He advised her with her second pregnancy that, due to the prior laceration, she could have an increased chance of further rectal injury with another delivery and a possible long-term sequela. The plaintiff opted for a cesarean section for the delivery of her second child.

Dr. Goldstein testified that at the time of the plaintiff's cesarean delivery, he made the horizontal pfannensteil incision. He stated that the general location of the incision is planned according to where the symphysis pubis is, and the incision is generally two finger breaths above the symphysis pubis. Alice clamps are placed on the right and left edges of the incision to serve as a measuring device to go from the midline out. Dr. Goldstein stated that he works on the right side and would have placed the right clamp. He had an assistant, either Dr. Rosenberg or Koka, who placed the left clamp and also placed the skin staples at the end of the procedure. The incision is about four to five or five to six inches in length. He described the procedure used from the operative record. Dr. Goldstein testified that there are nerves in all areas of the incision and there is nothing done to protect the nerves in the area of the incision. Most have numbness in the area of the incision afterwards. He stated that the ilioinquinal nerve and the iliohypogastric nerve are more lateral to either side than where the incision was made. He has never seen the genitofemoral nerve on a cesarean section. His incision was not in the vicinity of the nerves. When shown a picture of the plaintiff's scar, taken June 23, 2011, Dr. Goldstein stated that the incision did not look like the one he would have made as it seems longer on the left as it extends more laterally.

Postoperatively, the plaintiff have normal incisional pain and it was noted to be healing well. When the staples were removed on September 4, 2007, the incision was noted to be well healed. The plaintiff returned on September 10, 2007, for an incision check, as per his routine, and the incision was well healed. The plaintiff had occasional lower abdominal pain for 20 to 30 seconds, which was to be expected. On September 25, 2007, the plaintiff presented with a possible urinary tract infection and a breast exam as her breasts were engorged. The incision was noted to be healing well. On October 3, 2007, the plaintiff saw Dr. Goldstein's assistant for a breast infection for which she was placed on medication to treat. On October 15, 2007, she had a routine six-week check. Her incision was well healed. She was referred to a urologist due to frequent bladder infections and renal colic, and to a hematologist for her blood issues and thrombolphilia. On November 12, 2007, the plaintiff

called Dr. Goldstein's office and stated she was feeling well and wanted to know if she could exercise. She had no complaints relating to her abdomen or incision.

Dr. Goldstein stated that it was not until March 4, 2008 that the plaintiff came to his office with complaints of pain above the incision, left more than right. A 1 cm nodule was noted on the left side and above the incision (lateral and superior to the incision). He sent her for a sonogram and to be seen by a general surgeon to make sure it was not a hernia. He stated that Dr. Grappell interpreted the sonogram as negative. The plaintiff next presented on May 12, 2008 for complaints of pain in the left lower quadrant and tenderness 1 cm above the incision, so he sent her for a surgical consult that same day. On October 2, 2008, the plaintiff presented with complaints of pain on the left side of her abdomen for a couple months. She had moderate blood in her urine. She was referred for physical therapy for the incisional pain, and to Dr. Nussbaum, the surgeon who saw her previously. He had referred her for a CAT scan, and on November 11, 2008, he spoke with the radiologist who noted a .6 cm density anterior to the right psoas muscle, which could correspond to a small calcified mesenteric lymph node or to perhaps an appendicitis. She also saw a neurologist. In January, 2009, she was going for an EMG.

Dr. Goldstein stated that the plaintiff returned on December 23, 2008 with complaints of vaginal bleeding for two to three weeks and pain in the same location, her left lower abdomen. She had seen a neurologist. He spoke with Dr. Schwartz, a gynecologic oncologist for possible referral to him. However, pursuant to their discussion, they thought the plaintiff had nerve entrapment syndrome, so he referred the plaintiff for consult with Dr. Davenport, a plastic surgeon who treated nerve entrapment syndrome, and who was recommended by Dr. Schwartz. Dr. Davenport, he stated, indicated in his operative note of April 14, 2009 that the pain was approximately 4 cm from the midline underneath the scar, which Dr. Goldstein stated would be consistent with an 8 cm or five inch scar, so he had no reason to doubt Dr. Davenport's note. Dr. Davenport also indicated that he excised the cesarean scar when he performed the surgery. Dr. Goldstein testified that he believed that Dr. Davenport's surgery extended the original cesarean scar. Dr. Goldstein also stated that whether it was scar tissue or an entrapment, that it was from the cesarean section

In support of motion (005), Irwin Goldstein, M.D. and Long Island OB/GYN submitted the affirmation of John L. Lovecchio, M.D., a physician licensed to practice medicine in New York who is board certified in obstetrics & gynecology and gynecologic oncology. He set forth his education and training, and work experience, as well as the records and materials he reviewed. It is Dr. Lovecchio's opinion within a reasonable degree of medical certainty that Dr. Goldstein and Long Island OB/GYN did not depart from good and accepted standards of care and treatment, Dr. Goldstein did not negligently transect nerves when he created the incision leading to the development of neuromas, and he did not proximately cause the injuries alleged by the plaintiff, Tali Spiegel. He further opined that Dr. Goldstein did not fail to timely diagnose and properly treat neuromas from January 15, 2009 through February 17, 2010, and that he did not cause her to develop complex regional pain syndrome.

Dr. Lovecchio continued that Dr. Goldstein delivered the plaintiff's second child by cesarean section at Plainview Hospital on August 27, 2007, because the plaintiff had a fourth degree rectal laceration during the vaginal delivery of her first child. Dr. Lovecchio stated that Dr. Goldstein properly performed the cesarean section in all respects, including the pfannensteil incision which was appropriately made two finger breadths above the symphysis pubis, and extended horizontally for five to six inches. He indicated there were no intraoperative issues or complications that would have contributed to the plaintiff developing neuromas postoperatively. He stated that incisional pain, and the development of a postoperative neuroma, are known complications of any type of surgery and can occur spontaneously without any malpractice.

Following the cesarean section, the plaintiff experienced a well-healing incision, and her postoperative pain subsided before she was discharged home on August 31, 2007. Dr. Lovecchio stated that Dr. Goldstein examined the plaintiff on September 4, 10 and 25, 2007, and October 3 and 15, 2007, indicating a well-healed incision. On November 17, 2007, when the plaintiff called his office and spoke with Midwife Susan Gerkin, she advised Ms. Gerkin that she wished to start exercising because she was feeling well and not experiencing any abdominal or incisional pain. The first indication that there was a healing issue was seven months following the cesarean section when the plaintiff presented to Dr. Goldstein on March 4, 2008 with complaints of pain above the pfannensteil incision, at which time Dr. Goldstein palpated a 1 cm nodule on the left side of the incision and properly concluded that she had developed a neuroma. Dr. Goldstein, stated Dr. Lovecchio, timely and appropriately referred the plaintiff for a pelvic ultrasound and referred her to Jeffrey Nussbaum, M.D. who referred her for physical therapy to possibly reduce the pain. When the pain did not resolve, Dr. Goldstein timely and appropriately referred the plaintiff to plastic surgeon Dr. Davenport on December 23, 2008, as Dr. Davenport had expertise in treating nerve entrapments.

Dr. Lovecchio stated that the development of a neuroma several months after a surgical procedure cannot be prevented. In fact, he stated, a neuroma can spontaneously occur and spontaneously heal without any treatment. It is known to form as a result of scarring following surgery, and there is nothing that Dr. Goldstein or Long Island OB/GYN Associates could have, or should have done to prevent the development of a neuroma in this case.

Based upon the foregoing, it is determined that Irwin Goldstein, M.D. and Long Island OB/GYN have established prima facie entitlement to summary judgment dismissing the complaint asserted against them on the issues that they did not depart from the standard of care, that they provided informed consent to the plaintiff, and that they did not proximately cause plaintiff's injuries.

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]).

The plaintiffs opposed these motions with a redacted version of an expert affirmation without providing an unredacted copy of said expert affirmation for this court's *in camera* inspection (***Marano v Mercy Hospital***, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; ***Rubenstein v Columbia Presbyterian Medical Center***, 139 Misc.2d 349, 527 NYS2d 680 [NY County 1988]; ***Rose v Horton Medical Center***, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]) with the opposing papers. A redacted version of an expert affidavit lacks evidentiary value (***Marano v Mercy Hospital***, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]). "A party may successfully oppose a summary judgment motion without disclosing the names of the party's expert witnesses. In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an unredacted original is provided to the court for its in camera inspection (***Marano v Mercy Hospital***, *supra*). This procedure preserves the confidentiality of plaintiff's medical expert while also fulfilling plaintiff's obligation in opposing defendant's motion (***Rubenstein v Columbia Presbyterian Medical Center***, 139 Misc.2d 349, 527 NYS2d 680 [NY County 1988]). However, with this court's permission, two unidentical, unredacted affidavits, each dated July 8, 2014, have now been provided, accompanied by letters dated July 30, 2014 from plaintiff's counsel and from counsel for defendant Goldstein, concerning substantive changes made to the original affidavit, and the alleged reasons for those changes.

Having considered the affidavit of plaintiff's expert, it is concluded that the plaintiff's expert failed to raise a factual issue to preclude the granting of summary judgment. Plaintiff's expert is a physician licensed to practice medicine in New Jersey, specializes in pain management, and is board certified in anesthesiology with subcertification in pain medicine. Plaintiff's expert stated that a substantial portion of his practice involves the evaluation of medical records and information to determine the cause of injury to patients and whether the care conformed to the accepted standards of medical practice, however, he does not indicate his experience in the actual practice of medicine. He indicated he is experienced in reviewing medical records, interpreting medical records, and is thus familiar with the standard of care in multiple fields of medicine.

Plaintiff's expert averred that he interviewed and examined the plaintiff, but does not indicate the date of such examination or his findings at the time.

It is determined that plaintiffs' expert's opinion that defendant Goldstein improperly performed the cesarean section on the plaintiff is unsupported by the record. Plaintiff's expert opinion is overbroad and conclusory, and he does not set forth any specific departure in performing a cesarean section. Although he stated that the plaintiff stated that her incision was more lateral to the left than a customary pfannensteil incision, only hearsay statements unsupported by evidentiary proof have been submitted by plaintiff. No affidavit or affirmation from a physician who allegedly advised plaintiff that her incision was more lateral to the left has been provided, and there is no statement that the placement of such incision was the proximate cause of the plaintiff's alleged injuries. Plaintiff's expert does not indicate where the incision was, and how it was a departure from the standard of care, or what the standard of care is, for determining the site of a pfannensteil incision. Significantly, he does not indicate whether the plaintiff was referring to the appearance of her scar before or after the surgeries by Dr. Davenport.

While plaintiff's expert opined that Dr. Goldstein should have referred the plaintiff for pain management or neurology by March 4, 2008, he does not opine that such referral would have changed the outcome or offered relief to the plaintiff, nor does he offer the care and treatment which would have been provided. Plaintiff's expert stated in a conclusory manner that had Dr. Goldstein not damaged the ilioinguinal nerve, the plaintiff would not have sought treatment from Dr. Davenport or Dr. Glickman. However, he has not established how or when the ilioinguinal nerve was damaged, and does not indicate whether it was injured at the time of surgery or as a result of scar tissue formation and entrapment. He continued that the two surgeries by Dr. Davenport caused new chronic pain traveling to the center of the mons pubis toward the vagina, however, his statement is conclusory and he does not set forth any departures by defendants Davenport or Glickman, or any opinion that such pain or injury would not have occurred but for defendants' negligence.

The plaintiff's expert stated that the plaintiff was referred by Dr. Goldstein to Dr. Grappell six months and eight days after her incisional pain started, and that Dr. Goldstein did not treat the plaintiff for the painful nodule located at the edge of the scar. However, in an inconsistent statement, he stated that Dr. Grappell noted clinical sensitivity to pressure on the left lateral margin of the cesarean section, and that "no masses, seroma, intraperitoneal abnormalities, or hernias were identified." There was no finding by Dr. Grappell of a mass, lump, nodule, or neuroma, only palpable lumpy areas associated with subcutaneous fatty tissue. Thus, while Dr. Goldstein referred the plaintiff for a sonogram and to be seen by Dr. Grappell, Dr. Grappell found nothing which he could treat. The plaintiff's expert does not set forth the standard of care and does not opine what treatment Dr. Goldstein should have provided pursuant to the standard of care.

Where an expert's opinion, set forth in an affidavit, is conclusory or speculative and without basis in the record, it is rendered inadmissible (*see* ***Espinal v Jamaica Hospital Medical Center***, 71 AD3d 723, 896 NYS2d 429 [2d Dept 2010]). Here, it is determined that plaintiff's expert's affidavit contains opinions which are

conclusory and speculative, and unsupported by the record. He has not set forth the standard of care for performing a pfannensteil incision and has not demonstrated how Dr. Goldstein departed from such standard of care. Plaintiff's expert has not set forth the anatomic location of the nerves which are the subject of this action, or indicated that the nerves were located in the area of the incision, and what the standard of care is in that regard. The plaintiff's expert does not address the statements by defendants' experts that neuromas may occur in the absence of negligence, and that the neuromas did not occur in the absence of negligence or a basis to support the same. Plaintiff's expert does not address the issue of smaller cutaneous nerve referred pain either. Thus, plaintiffs' expert has failed to raise a factual issue with regard to proximate cause or departures from the standard of care.

Based upon the foregoing, it is determined that the plaintiffs have failed to raise a triable issue of fact to preclude summary judgment from being granted to the moving defendants.

Accordingly, motions (004) and (005) are granted and the complaint, as asserted against the moving defendants, is dismissed.

Dated: AUG 2 5 2014

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION