SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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RONG LAN LIN,

Plaintiff,

Index No. 805241/2016
Motion Seq. 002 & 003

-v-

DECISION & ORDER

MARGARET WONG, M.D., KATIE ZHANG, M.D., STEPHAN WAN, M.D., STEPHAN WAN, M.D., P.L.L.C.,

Defendants.

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GEORGE J. SILVER, J.S.C.:

Defendants KATIE ZHANG, M.D. ("Dr. Zhang"),[1] MARGARET WONG, M.D. ("Dr. Wong"), STEPHEN WAN, M.D. ("Dr. Wan"), and STEPHEN WAN, M.D., P.L.L.C.[2] (collectively "defendants") move for summary judgment.[3] Plaintiff RONG LAN LIN ("plaintiff") opposes the motion. For the reasons discussed below, the court grants both motions.

On December 13, 2013, plaintiff, then 31-years-old, presented to Stephen Wan, M.D., P.L.L.C. for prenatal care. Plaintiff was seven-weeks-gestation, and had an estimated delivery date of August 1, 2014. Plaintiff's prior prenatal visits were uncomplicated, and her prenatal evaluations were within normal limits. Plaintiff had one prior miscarriage.

On August 6, 2014 at 2:04 p.m.,[4] plaintiff was admitted to Mount Sinai Beth Israel Hospital ("Mount Sinai"). Plaintiff was 40-weeks-gestation, and had irregular contractions every five minutes. Plaintiff denied any significant past medical or surgical history. At 6:28 p.m., Dr. Wong documented category one tracings, and at 7:46 p.m., artificial rupture of membrane revealed

[1] Motion Seq. No. 002.
[2] Motion Seq. No. 003 (Dr. Wong, Dr. Wan, and Stephan Wan, M.D., P.L.L.C.).
[3] Motion Seq. Nos. 002 and 003 will be decided collectively herein.
[4] Drs. Wan and Wong state that plaintiff was admitted to Mount Sinai at 11:40 p.m. on August 5, 2014.

meconium fluid. Dr. Wong evaluated plaintiff at 10:23 p.m., and at 10:30 p.m., Pitocin augmentation was commenced for protracted dilatation.

At 5:03 a.m. on August 7, 2014, Dr. Wong delivered the infant without complication. However, placenta delivery was complicated by separation of the umbilical cord, which resulted in the manual removal of the placenta at 5:12 a.m. Plaintiff's blood loss was 400 cc, and plaintiff had a second-degree laceration, which was repaired. Pitocin was immediately started with uterine massage. Cytotec was also placed rectally. Plaintiff's vital signs were stable, and an exam revealed firm tone of the uterus with no blood clots. Plaintiff was subsequently discharged home.

During a post-partum visit with Dr. Zhang at Stephan Wan, M.D., P.L.L.C. on August 21, 2014, plaintiff complained of heavy bleeding since that morning. Plaintiff had delayed post-partum hemorrhage with persistent symptomatic anemia. Upon examination, Dr. Zhang noted that plaintiff had 100 ml clots in the vagina with small bleeding from the uterine cervix that was two centimeters open. Dr. Zhang performed a bedside ultrasound, which showed retained products of conception. Dr. Zhang diagnosed plaintiff with retained placental tissue, and sent plaintiff to Mount Sinai's emergency room ("ER") for a dilation and curettage ("D&C") procedure.[5]

At 3:00 p.m. that day, plaintiff presented to Mount Sinai's ER, and reported that she had on-and-off bleeding, and that she was passing large clots. Dr. Zhang performed an examination under anesthesia, which revealed that plaintiff was actively bleeding with "pieces of placenta in uterus," as well as a one-centimeter cervical laceration. The plan was to perform a D&C procedure.

Dr. Zhang then performed a suction D&C, which involved using single tooth tenaculum on the cervix under intraoperative sonogram guidance, followed by transabdominal sonogram, which showed a thin endometrial stripe. Plaintiff continued to bleed, and a sharp curettage was

[5] A D&C is a surgical procedure in which the cervix is dilated so that the uterine lining (endometrium) can be scraped with a curette (spoon-shaped instrument) to remove abnormal tissues.

performed. Plaintiff's cervical laceration was then repaired. A bimanual massage was performed, and plaintiff was given Pitocin, IM Methergine, and PR Cytotec. Plaintiff's intraoperative hematocrit ("HCT") was 23% due to continued bleeding, and plaintiff was transfused with one unit of packed cells. Plaintiff was then taken to the recovery room, and subsequently discharged the next morning with only a small amount of bleeding at the time of discharge.

The surgical pathology report of the submitted tissue noted retained placenta, and the final diagnosis was necrotic placental tissue, inflamed smooth muscle consistent with myometrium endometritis, and scant fragments of inflamed endometrial tissue consistent with chronic endometritis.

On August 24, 2014, plaintiff presented to Dr. Zhang with complaints of light-headedness since her D&C procedure. Plaintiff's heart rate was mildly tachycardic at 105 beats per minute, and plaintiff had a fingerstick hemoglobin of 5.19 grams. Plaintiff's physical examination was normal. Dr. Zhang sent plaintiff to the ER for further evaluation.

That same day,[6] plaintiff presented to Mount Sinai's ER. At 4:53 p.m., plaintiff's hemoglobin level was 7.5 grams. A CT scan of plaintiff's abdomen and pelvis described a thickened and heterogenous endometrium, and a small arterial branch adjacent to the right lateral aspect of the extravagated contrast that may represent a source of bleeding. Interventional Radiology reported that plaintiff's abdomen was soft and nontender. Plaintiff was diagnosed with active extravasation, and was discharged home in stable condition.

On August 28, 2014, plaintiff presented to Dr. Wan for a follow-up visit. Plaintiff's hemoglobin level was 7.7 grams. Plaintiff was instructed to undergo iron therapy, and to return in one week. Plaintiff was also given Methergen[7] as a precaution.

[6] Dr. Zhang states that she saw plaintiff at Mount Sinai the following day.
[7] Methergen is a medication used to prevention and control of post-partum hemorrhage.

On September 8, 2014, plaintiff presented to Dr. Wan for a post-partum visit with no reported bleeding for four days. On November 19, 2014, plaintiff presented to Dr. Wong. On November 24, 2014, Dr. Wong noted that plaintiff had amenorrhea[8] since delivery.

On February 25, 2015, plaintiff presented to Dr. Wan, and reported that she had no menses since delivery. A transvaginal ultrasound was performed, which showed no endometrium stripe. Dr. Wan's plan was to conduct a "hormone profile, hysterosalpingogram[9] to establish patency, then Provera or OC challenge."

On March 2, 2015, plaintiff saw Dr. Wan due to amenorrhea. Plaintiff's hormone profile was normal, and Dr. Wan's plan was "Provera challenge," and if that failed, possible oral contraceptive, hysteroscopy, or hysterosalpingogram to rule out Asherman's Syndrome ("AS").[10]

On April 1, 2015, plaintiff returned to Dr. Wan for amenorrhea, with no withdrawal from Provera. A sonogram did not reveal a good endometrial lining, and was concerning for AS or cervical stenosis. Dr. Wan's plan was to perform a diagnostic hysteroscopy[11] to establish cervical patency and to rule out intrauterine adhesions.

On April 7, 2015, Dr. Wan performed a hysteroscopy on plaintiff with Dr. Wong's assistance. Dr. Wan noted "uterine found and scope met resistance 1 cm above the internal os." Plaintiff was referred to Dr. Janelle Luk ("Dr. Luk"), a reproduction endocrinologist, for "HSC exploration and/or resection of adhesions under general anesthesia."

On April 13, 2015, plaintiff saw Dr. David Keefe ("Dr. Keefe") at NYU Langone Medical Center. Dr. Keefe ordered that plaintiff undergo an MRI.

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[8] Amenorrhea is the absence of menstruation
[9] Hysterosalpingogram is a test that diagnoses blocked fallopian tubes.
[10] Asherman's syndrome is an acquired condition that refers to the existence of scar tissue in the uterus.
[11] Hysteroscopy is the visualization of the inside of the uterine cavity by inserting special visualization instruments through the vagina and cervical opening.

On May 7, 2015, plaintiff underwent an MRI, which showed obliteration of the endometrial cavity and adhesions.

On May 20, 2015, plaintiff saw Dr. Luk for secondary amenorrhea with possible AS. Dr. Luk performed a sonohysterogram, which showed a completely adherent uterine cavity with no noted opening of the endometrium, and an operative hysteroscopy, which revealed dense bands of adhesions.

On August 17, 2015, Dr. Jian Qun Huang ("Dr. Huang") performed a hysteroscopic resection of adhesions with retention of Foley balloon for three days. On December 22, 2015, Dr. Huang noted that plaintiff underwent a hysteroscopic resection for AS, but that plaintiff had no menses.

On January 25, 2016, after unsuccessful attempts to recreate the endometrial cavity, Dr. Huang advised plaintiff that the resection of the adhesions of the endometrium was minimally successful, and that plaintiff would be unable to carry a pregnancy to term. Dr. Huang also reported that plaintiff had stage IV AS.

Plaintiff alleges that defendants, individually and collectively, failed to promptly and appropriately diagnose and treat plaintiff's retained placenta and post-partum hemorrhage, which caused plaintiff to develop AS and associated symptoms, including chronic pain, amenorrhea, and infertility.

ARGUMENTS

Based on the record before the court, defendants argue that summary judgment must be granted, because plaintiff cannot establish that defendants' medical treatment of plaintiff deviated from accepted standards of care or proximately caused plaintiff's alleged injuries.

I. Dr. Zhang

In support of her motion, Dr. Zhang annexes the affirmation of Richard V. Grazi, M.D. ("Dr. Grazi"), a physician board-certified in obstetrics and gynecology. Dr. Grazi opines that plaintiff presented to Dr. Zhang with a medical emergency, and that plaintiff would have likely developed life-threatening hypovolemia[12] or septic shock had Dr. Zhang not performed the D&C procedure in the manner that she did. As such, Dr. Grazi submits that Dr. Zhang's D&C procedure saved plaintiff's life.

In Dr. Grazi's opinion, there were clear indications for Dr. Zhang to perform a D&C procedure on plaintiff on August 21, 2014 based on plaintiff's presentation. Dr. Grazi notes that plaintiff had significant bleeding two weeks post-delivery, and that plaintiff experienced 1,000 cc of intraoperative blood loss during the procedure[13] itself. Dr. Grazi also highlights that plaintiff had hypotension and tachycardia, and that plaintiff's ultrasound showed evidence of retained products of conception. As such, Dr. Grazi concludes that the standard of care required a curettage until all products of conceptions were evacuated, and plaintiff's hemorrhage could be stopped.

Dr. Grazi also opines that Dr. Zhang's performance of the D&C procedure under ultrasound guidance by suction, followed by gentle curettage, comported with accepted practice.[14] According to Dr. Grazi, a D&C procedure is commonly performed for suspicion of retained placental tissue or "products of conception," and can be an emergency procedure when a patient presents with post-partum bleeding as was the case here. Dr. Grazi outlines that during the

[12] Hypovolemia is a decrease in the volume of blood in the body.
[13] It is unclear whether Dr. Grazi is referring to the placenta removal procedure or the D&C procedure.
[14] To specify, during the procedure, the anterior lip of the cervix was identified and grasped with a single tooth tenaculum. A 14 mm flexed suction cannula was placed through the cervix up to the fundus, and the location was confirmed via intraoperative sonogram. Electric suction was used, and multiple passes of the 14 mm cannula were performed. Retained placenta was retrieved, and an 8 mm flexible cannula was used to better empty the uterus. At the end of the procedure, a transabdominal ultrasound showed a thin endometrial stripe.

procedure, the cervix is first dilated, followed by removal of the lining or contents of the uterus by suction, followed by curettage.

Specifically, Dr. Grazi posits that the suction and the size of the suction cannulas that Dr. Zhang used during the first part of the procedure were appropriate. Dr. Grazi also avers that Dr. Zhang appropriately performed a curettage to evacuate retained tissue from the uterus based on plaintiff's presentation, evidence of retained products and placental tissue in the uterus, and plaintiff's continued bleeding as reflected by plaintiff's intraoperative blood loss. Dr. Grazi further submits that Dr. Zhang appropriately continued the "gentle curettage" only until a "gritty" sensation was appreciated. Dr. Grazi explains that the "gritty" sensation reflects that the uterus was empty of retained products of conception. In that regard, Dr. Grazi maintains that the appreciation of grittiness or uterine "cri" does not reflect that Dr. Zhang traumatized the myometrium or muscle layer of the uterus. Rather, Dr. Grazi concludes that it is normal to feel the myometrium at the end of a D&C procedure as this demonstrates that Dr. Zhang reached the junction of the endometrium and the myometrium.

Dr. Grazi also asserts that plaintiff's D&C pathology is "reflective" of a significant amount of retained necrotic placental tissue. Dr. Grazi notes that the tissue was described as necrotic with endometrial tissue consistent with chronic endometritis, which reflects the presence of chronic infection in the endometrial tissue. Dr. Grazi also contends that the degree of intraoperative bleeding and retained products was likely secondary to an area of placenta accreta[15] in a corner of the uterus. Dr. Grazi further submits that even if there was no abnormal placentation, the amount of placental tissue in plaintiff's uterus, along with scant fragments of inflamed endometrial tissue

[15] Placenta accrete is a complication of pregnancy where the placenta is embedded too deeply in the uterine wall, and fails to detach after childbirth.

as documented by pathology, and plaintiff's continued hemorrhage during the procedure, "validate" Dr. Zhang's performance of the curettage.

Similarly, Dr. Grazi opines that the description of myometrium along with placental tissue on plaintiff's D&C pathology is not reflective of an improperly performed D&C procedure. According to Dr. Grazi, the presence of myometrium does not in and of itself reflect an overly aggressive curettage since a curettage must be performed until all retained products of conception are removed, and the hemorrhage is stopped. In that regard, Dr. Grazi asserts that while a post-partum D&C is a risk factor for AS, which occurs in up to 40% of patients undergoing a post-partum D&C, the development of AS after a D&C for retained placenta, and a finding of myometrium tissue on pathology are not reflective of an improperly performed procedure. Rather, Dr. Grazi elaborates that even the "gentlest" curettage can affect the basal layer of the endometrium, particularly in a patient like plaintiff who had undergone a prior D&C procedure.

Dr. Grazi further opines that there was no injury to plaintiff's uterine artery during the D&C procedure based on a CT scan performed at plaintiff's subsequent presentation to the ER. According to Dr. Grazi, there would have been concurrent hemoperitoneum requiring a laparotomy, or embolization of the injured vessel had there been injury to plaintiff's uterine artery. Dr. Grazi also notes that the Interventional Radiologist stated that there was no need for embolization at that time, which shows the absence of injury to the uterine artery. As such, Dr. Grazi concludes that because there was no further bleeding, and no need for embolization or surgical repair, there was no injury to the uterine artery during the D&C procedure.

Dr. Grazi also opines that the small site of injury on plaintiff's cervix during the D&C procedure was a risk of the procedure, and likely occurred from placement of the tenaculum. Dr. Grazi proffers that a small area of localized injury on the cervix during a D&C occurs frequently,

and is not a deviation from good and accepted practice. Moreover, Dr. Grazi highlights that the injury was appropriately recognized and repaired intraoperatively without any permanent effect.

Additionally, Dr. Grazi posits that infection is a significant causative factor for the development of AS. Dr. Grazi contends that chronic or subacute endometritis can result in the formation of adhesions and scars, and that it is not uncommon to see myometrium on pathology from a D&C, particularly if a patient has a large amount of tissue which must be curetted.

Dr. Grazi further opines that it was appropriate to administer Pitocin, Methergine, and Cytotec along with bimanual massage to increase the contractility of the uterus during the D&C procedure. In that regard, Dr. Grazi concludes that it would have been improper to administer these medications prior to the D&C procedure as plaintiff first required removal of the retained tissue.

Finally, Dr. Grazi opines that plaintiff adequately consented to the D&C procedure. Dr. Grazi highlights that it is not standard practice to advise a patient of the specific risk of AS although AS is an identified risk of the procedure. Dr. Grazi also avers that plaintiff consented to the risk of a hysterectomy, and that accepting the risk of a hysterectomy is a "fortiori acceptance" of the risk of AS.

II. Dr. Wong, Dr. Wan, and Stephan Wan, M.D., PLLC ("defendants")

Defendants argue that any claims for negligent hiring, negligent supervision, and lack of informed consent must be dismissed because plaintiff does not assert a cause of action for these claims in her complaint. Similarly, defendants assert that any claims for vicarious liability against Dr. Wan in his individual capacity must be dismissed since each party for whom Dr. Wan would be vicariously liable was employed by Stephan Wan, M.D., PLLC, and not Dr. Wan individually.

In support of their motion, defendants annex the affirmation of Winfred S. Tovar, M.D., M.S., FACOG ("Dr. Tovar"), a physician board-certified in obstetrics and gynecology. Dr. Tovar

opines that Dr. Wong's actions leading up to plaintiff's delivery comported with the standard of care. Dr. Tovar highlights that plaintiff had a normal prenatal course, and that there were never any indicia of abnormality or issues with the placenta prior to delivery. Dr. Tovar also notes that Dr. Wong timely and properly monitored plaintiff and performed examinations, none of which revealed the potential for a retained placenta. Dr. Tovar further points out that defendants properly managed plaintiff's labor, and that plaintiff's sonography was always normal. As such, Dr. Tovar avers that there was no reason to believe that plaintiff's placenta would not deliver normally after the delivery of the fetus.

Dr. Tovar also opines that Dr. Wong's manual delivery of the placenta was within the standard of care.[16] Dr. Tovar highlights that Dr. Wong testified that while attempting to place forceps to deliver the placenta, she noted cord separation from the placenta, and that while the cord is typically used to gently assist in the removal of the placenta, she did not pull on the placenta. Dr. Tovar also asserts that there is no evidence to show that Dr. Wong pulled on the placenta.

Dr. Tovar further opines that once Dr. Wong manually delivered the placenta Dr. Wong properly examined the placenta, [17] and took all indicated measures to ensure that there was no retained placenta.[18] In that regard, Dr. Tovar contends that the standard of care does not require an ultrasound after manual extraction of the placenta since an ultrasound is only performed if there is a concern for retained products, if the placenta is not intact, or if the patient is bleeding heavily

[16] Dr. Wong testified that after the infant came out, she cut the cord. Dr. Wong then clamped the cord, and had her other hand on the maternal abdomen, at which time she felt the cord separate from the placenta. Next, Dr. Wong placed her dominant hand into the vaginal canal to feel for the cervix, and then entered the uterine cavity. Dr. Wong felt for the plane where the uterus and the placenta met, and then removed the placenta.

[17] Dr. Wong looked at the front and back of the placenta as well as the surrounding membranes. The placenta looked intact.

[18] Dr. Wong placed her hand in the uterine cavity two more times to make sure that there was no retained tissue in the uterine cavity.

post-partum. As such, Dr. Tovar notes that none of these concerns existed based on Dr. Wong's description of the placenta and plaintiff's immediate post-delivery course. Similarly, Dr. Tovar maintains that it is not the standard of care to send the placenta to pathology as it is sufficient for a physician to look at the placenta, and determine whether it is grossly intact, which Dr. Wong did.

Additionally, Dr. Tovar opines that plaintiff was properly discharged from the hospital. Dr. Tovar notes that plaintiff had normal post-delivery lochia,[19] plaintiff's vital signs post-delivery were stable, and plaintiff was recovering well from her delivery.

As to Dr. Wan, Dr. Tovar opines that contrary to plaintiff's claim, there is no evidence that Dr. Wan used non-sterile equipment in treating plaintiff, and that even if Dr. Wan used non-sterile equipment, any possible exposure to non-sterile equipment did not cause or contribute to plaintiff's alleged injuries. Likewise, Dr. Tovar asserts that contrary to plaintiff's claim that Dr. Wan negligently discharged plaintiff from his care, plaintiff's care was never interrupted, and was otherwise timely and proper. Dr. Tovar also reiterates that plaintiff was properly discharged from the hospital.

Similarly, Dr. Tovar opines that plaintiff's claim that Dr. Wan's delayed evaluation and treatment led to plaintiff's onset of AS is without merit. Dr. Tovar notes that Dr. Wan and his practice properly provided plaintiff with discharge instructions and a follow up routine when plaintiff left the hospital. Dr. Tovar also highlights that nothing in plaintiff's condition at discharge, or "until [the time] she returned to the office" with new onset of heavy bleeding indicated the possibility of retained placenta or other uterine problems that could lead to AS.

Finally, Dr. Tovar opines that with respect to plaintiff's lack of informed consent claim against Dr. Wong, Dr. Wong gave plaintiff instructions, and advised plaintiff of her condition and

[19] Lochia is vaginal discharge after vaginal delivery.

treatment options. As such, Dr. Tovar posits that a reasonably prudent person in plaintiff's position would have consented to the care and treatment that plaintiff received.

III. Plaintiff's Opposition

In support of plaintiff's opposition,[20] plaintiff annexes the affirmation of a physician board-certified in obstetrics and gynecology.[21] Plaintiff's expert opines that defendants should have evaluated and adequately treated plaintiff's low hemoglobin levels prenatally to decrease her chance of developing an infection. According to plaintiff's expert, most patients at 28-weeks-gestation have low hemoglobin levels, and therefore, the proper treatment is to prescribe iron pills since patients with anemia due to pregnancy are less equipped physiologically to fight infections.

In plaintiff's expert's opinion, Dr. Wong departed from accepted medical practice by "pulling or us[ing] force to deliver the placenta." According to plaintiff's expert, signs that suggest detachment of the placenta include a gush of blood from the vagina, lengthening of the umbilical cord outside the uterus, rising of the uterine fundus in the abdomen, and the uterus becoming firm and globular. Plaintiff's expert explains that when these clinical signs are not observed, pulling of the umbilical cord will result in the separation of the cord from the placenta. In that regard, plaintiff's expert maintains that Dr. Wong's failure to observe the physiological changes that occur during placental separation resulted in the avulsion of the umbilical cord from the placenta.

Plaintiff's expert also opines that Dr. Wong did not carefully observe the placenta cotyledons[22] after delivery to confirm that the placenta was completely removed and that all the

[20] Plaintiff submits identical opposition papers and identical expert affirmations in response to both motions for summary judgment.
[21] As plaintiff has redacted the name of her expert, the expert will be referred to as "plaintiff's expert" herein.
[22] The placental cotyledon is composed of a core of fetal vessels surrounded by maternally derived cytotrophoblast cells.

cotyledons were intact. Rather, plaintiff's expert notes that plaintiff's pathology report from the D&C procedure showed that 77.9 grams of placenta tissue was negligently left behind. According to plaintiff's expert, because a placenta generally weighs approximately 470 grams, 1/6 of the placenta was left in plaintiff's uterus two weeks after delivery. Plaintiff's expert further elaborates that this is a known source of infection, and can lead to endometritis, as it did in plaintiff's case.

Additionally, plaintiff's expert opines that Dr. Wong's description of how she performed the procedure is inadequate because Dr. Wong failed to describe the steps she took during the delivery. Plaintiff's expert also opines that because manual removal of the placenta is "regarded as a surgical procedure," Dr. Wong should have changed into a sterile gown and used sterile gloves prior to inserting her hand into the uterus, however, there is no evidence that Dr. Wong did so. According to plaintiff's expert, Dr. Wong's failure to change her gown and gloves is more likely than not the source of plaintiff's subsequent infection. Plaintiff's expert also notes that plaintiff was not given a complete blood count ("CBC") test to assess for anemia, or antibiotic therapy "for prophylaxis against infection" prior to her discharge.

To summarize, plaintiff's expert opines that Dr. Wong, Dr. Wan, and Stephen Wan M.D. P.L.L.C. departed from the standard of care by failing to prescribe/administer iron pills despite plaintiff's low blood count during her prenatal period. Plaintiff's expert also opines that Dr. Wong and Stephen Wan M.D. PLLC departed from the standard of care by 1) using excessive force, and causing plaintiff's umbilical cord to separate from the placenta, 2) failing to wait a sufficient amount of time for the placenta to be spontaneously delivered, 3) failing to properly examine the placenta after delivery, 4) failing to employ sterile technique during the delivery of the placenta, 5) failing to order a CBC and antibiotics prior to plaintiff's discharge, and 6) allowing plaintiff to be discharged although she had remaining placental tissue in her uterus.

As to Dr. Zhang, plaintiff's expert asserts that Dr. Zhang did not attempt to stop plaintiff's bleeding on August 21, 2014. Plaintiff's expert also contends that although Dr. Zhang testified that plaintiff's hematocrit was 5.7 grams on August 21, 2014, Dr. Zhang did not order a CBC prior to plaintiff's D&C procedure to test for anemia. Similarly, plaintiff's expert highlights that because Dr. Zhang's examination under anesthesia confirmed that plaintiff was "actively bleeding" on August 21, 2014, Dr. Zhang departed from accepted medical practice by failing to send plaintiff to the ER at that time accompanied by a physician in the ambulance.

In plaintiff's expert's opinion, Dr. Zhang departed from the standard of care by improperly performing plaintiff's D&C procedure. Plaintiff's expert notes that Dr. Zhang failed to address plaintiff's active bleeding to avoid more blood loss, and inappropriately used a single tooth tenaculum on plaintiff's cervix. Plaintiff's expert also highlights that after "completing the D&C, which [Dr. Zhang] confirmed by trans-abdominal sonogram, showed 'thin endometrial stripe' and a 'gritty uterine cry.'"[23] Plaintiff's expert further submits that Dr. Zhang departed from the standard of care by deciding to "again curette" the endometrium rather than administer medication to contract the uterus "in lieu of the fact that [plaintiff] was bleeding."

Additionally, plaintiff's expert posits that the pathology report from plaintiff's D&C procedure revealed "necrotic placental tissue inflamed smooth muscle consistent with myometrium and scant fragments of inflamed endometrium tissue," which represents an "overly aggressive performance of a D&C on a post-partum patient." According to plaintiff's expert, the performance of a D&C procedure, "particularly on a pregnant patient," should not involve the muscle of the uterus. Rather, plaintiff's expert explains that during a D&C procedure, a physician should attempt to gently remove the superficial deep endometrium (inner layer of the uterus) and

[23] Plaintiff's expert's statement is unclear and incoherent.

endometrial layer without injuring the myometrium (middle layer of the uterus). Plaintiff's expert also notes that AS can result from excessive damage inflicted on the inside of the uterus during a D&C procedure.[24] As such, plaintiff's expert concludes that this was a major contributing factor to plaintiff's "severe AS," which was confirmed by Drs. Luk and Huang.

IV. Dr. Zhang Reply

In reply, Dr. Zhang argues that plaintiff alleges for the first time that Dr. Zhang failed to order a preoperative CBC, inappropriately used a single tooth tenaculum on plaintiff's cervix, and failed to send plaintiff to the ER. Dr. Zhang avers that plaintiff's bill of particulars only claims that Dr. Zhang negligently performed the D&C procedure, Dr. Zhang failed to properly use the right cannula during the procedure, and that Dr. Zhang failed to provide medication to make the uterus contract to expel and eliminate retained placenta.

Additionally, Dr. Zhang argues that plaintiff's expert does not explain how Dr. Zhang's performance of D&C procedure was improper. Similarly, Dr. Zhang asserts that plaintiff's expert does not address Dr. Grazi's opinion that chronic or subacute endometritis can result in the formation of adhesions and scar tissue, leading to the development of AS. Likewise, Dr. Zhang maintains that plaintiff's expert ignores Dr. Grazi's opinion that even the most gentle curettage, which is necessary in the presence of post-partum hemorrhage and retained placenta, can predispose a patient to AS, particularly if the patient has had a prior D&C procedure.

Finally, Dr. Zhang argues that contrary to plaintiff's assertion that all defendants were "substantial factors" in causing plaintiff to develop AS, each defendant had a distinct role in

[24] Plaintiff's expert explains that AS is a uterine condition that occurs when scar tissue forms inside the uterus and/or the cervix, and is characterized by variable scarring inside the uterine cavity.

treating plaintiff. As such, Dr. Zhang submits that she would be liable only for a separate injury, or the aggravation of an injury.

V. Dr. Wong, Dr. Wan, and Stephan Wan, M.D., P.L.L.C.'s ("defendants") Reply

In reply, defendants argue that plaintiff impermissibly raise new theories of liability in opposition, including that defendants failed to administer iron pills beginning on April 23, 2014.

Defendants also assert that plaintiff's argument that Dr. Wong's pulled or used force to deliver the placenta is conclusory and meritless. Rather, defendants reiterate that Dr. Wong handed the infant to plaintiff or the nurse after delivery, and that after clamping the cord, Dr. Wong felt the cord separate from the placenta. Similarly, defendants aver that plaintiff's assertion that Dr. Wong failed to wait a sufficient amount of time for spontaneous delivery of the placenta is conclusory. By contrast, defendants highlight that Dr. Wong testified that she manually delivered the placenta upon feeling that the cord was separated from the placenta.

Defendants further maintain that while plaintiff's expert states that "generally, a placenta weighs approximately 470 grams, which means that approximately 1/6 of the placenta was left in the uterus," plaintiff's expert does not refer to plaintiff's placenta specifically. Defendants also underscore that there is no breakdown of how much tissue in the pathology report was placenta, rendering plaintiff's expert's calculations speculative.

DISCUSSION

To prevail on summary judgment in a medical malpractice case, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause the patient's injury (*Roques v. Noble*, 73 A.D.3d 204, 206 [1st Dept. 2010]). In claiming treatment did not depart from accepted standards, the movant must provide

an expert opinion that is detailed, specific and factual in nature (*see e.g.*, *Joyner-Pack v. Sykes*, 54 A.D.3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts in the record or personally known to the expert (*Roques*, 73 A.D.3d at 207). The expert cannot make conclusions by assuming material facts which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 A.D.3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id*. *quoting Wasserman v. Carella*, 307 A.D.2d 225, 226 [1st Dept. 2003]).

Once defendant makes a *prima facie* showing, the burden shifts to plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, plaintiff must submit an expert affidavit attesting that defendant departed from accepted medical practice and that the departure proximately caused the injuries (*see, Roques*, 73 AD3d at 207). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2nd Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the factfinder (*id*.).

Here, defendants set forth separate *prima facie* showings in favor of dismissal, as evidenced by the submission of defendants' medical records, and defendants' expert affidavits, all of which attest to the fact that defendants' treatment of plaintiff was in accordance with accepted standards of care and did not proximately cause plaintiff's alleged injuries. To be sure, defendants' expert affirmations are detailed and predicated upon ample evidence within the record. As defendants have made a *prima facie* showing, the burden shifts to plaintiff.

I. Preliminary Matters

"It is axiomatic that a plaintiff cannot defeat a summary judgment motion that made out a prima facie case by merely asserting, without more, a new theory of liability for the first time in the opposition papers" (*Biondi v. Behrman*, 149 A.D.3d 562, 563–64 [1st Dept. 2017]; *Abalola v. Flower Hosp.*, 44 A.D.3d 522, 522, 843 N.Y.S.2d 615, 616 [1st Dept. 2007]).

Here, plaintiff has impermissibly raised new theories of liability in opposition to defendants' motions for summary judgment. Notably, plaintiff's allegations that defendants failed to administer iron pills, and failed to order a pre-operative CBC were not pleaded in plaintiff's complaint or bills of particulars. Similarly, plaintiff's bill of particulars does not mention that Dr. Zhang failed to send plaintiff to the ER on August 21, 2014 (*see, Marti v. Rana*, 173 A.D.3d 576, 577 [1st Dept. 2019]). Accordingly, these claims must be dismissed.

Notwithstanding the same, Dr. Zhang has sufficiently demonstrated that she called Mount Sinai's ER on August 21, 2014, and made arrangements for plaintiff to go there immediately to begin preparations for the D&C procedure since plaintiff was actively bleeding.[25] Likewise, Dr. Zhang has shown that she assessed plaintiff's hemoglobin level before sending plaintiff to the ER, and that a CBC was performed at Mount Sinai prior to plaintiff's D&C procedure. Similarly, Dr. Wong's supplemental affirmation sets forth ample evidence to warrant dismissal of plaintiff's claim that Dr. Wong did not use sterile technique during the procedure.[26] Accordingly, these claims must be dismissed.

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[25] Of note, plaintiff concedes that, "[Plaintiff] was diagnosed with retained placental tissue and *sent to the Mount Sinai Beth Israel Emergency Room* for evaluation and admission for dilation and curettage" on August 21, 2014 [emphasis added].

[26] Dr. Wong states that she "donned sterile gloves and a gown before making any contact with the infant… Once sterile gloves and gown were donned, I did not make contact with anything other than the infant that was delivered, forceps applied to the cord, a sterile towel, and the vaginal canal to the uterus. After the infant was delivered and handed off, I applied a sterile towel to the mother's lower pelvis, and then my left (non-dominant) hand was applied to that towel to massage the uterus to limit bleeding until the placenta

Moreover, plaintiff fails to establish how any of these allegations resulted in plaintiff's development of AS, amenorrhea, or infertility. For instance, plaintiff fails to show any causal connection between defendants' alleged failure to administer iron pills and plaintiff's alleged injuries. Accordingly, these claims must be dismissed as a matter of law.[27]

I. Dr. Zhang

Substantively, plaintiff has failed to raise a triable issue of fact sufficient to preclude summary judgment. Notably, while plaintiff asserts that Dr. Zhang improperly performed plaintiff's D&C procedure, plaintiff does not address the standard of care, or how Dr. Zhang departed from the standard of care. Rather, plaintiff states that Dr. Zhang failed to address plaintiff's active bleeding to avoid more blood loss, and inappropriately used a single tooth tenaculum on plaintiff's cervix. However, plaintiff does not offer any explanation as to how these alleged departures caused or contributed to plaintiff's development of AS, or what measures Dr. Zhang should have taken instead in order to comport with the standard of care (*see, Schwartz v. Partridge*, 179 A.D.3d 963, 963 [2d Dept. 2020] ["Although the plaintiff's expert pointed to complications that arose during the decedent's IV therapy . . . he failed to set forth how either of the defendants could have prevented such complications or how the defendants were negligent in responding to those complications."]).[28] Accordingly, Dr. Zhang is entitled to summary judgment as a matter of law.

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was spontaneously delivered." Dr. Wong continues that, "At no time from donning the sterile gown and gloves to manually delivering the & placenta did my hands come in contact with anything that was not sterile other than the delivered infant who had just come from where my hand had to go to manually deliver the placenta, and the placenta itself. The plaintiff/mother's uterus was never contacted by any external source of infection during this delivery, including during manual delivery of the placenta."

[27] Because plaintiff only alleges that Dr. Wan failed to prescribe/administer iron pills despite plaintiff's low blood count during her prenatal period, Dr. Wan is entitled to summary judgment as a matter of law.

[28] *See also, Shekhtman v. Savransky*, 154 A.D.3d 592, 593 [1st Dept. 2017] ["Liability is not supported by an expert offering only conclusory assertions and mere speculation that the condition could have been

Similarly, while plaintiff avers that AS can result from excessive damage inflicted on the inside of the uterus during a D&C procedure, plaintiff fails to proffer any evidence to show that Dr. Zhang "inflicted" any damage, let alone "excessive damage," during the performance of the D&C procedure (*id.*).

Likewise, plaintiff's contention that Dr. Zhang improperly decided to "again curette" the endometrium rather than administer medication to contract the uterus does not establish any causative connection to plaintiff's alleged injuries. By contrast, Dr. Zhang has demonstrated that she properly administered intraoperative medication, and that her administration of Pitocin, Methergene, and Cytotec along with bimanual massages to increase contractility of the uterus was appropriate during the D&C procedure. Moreover, plaintiff has failed to address or dispute Dr. Grazi's opinion that it would have been improper to administer these medications prior to the D&C procedure as the retained tissue needed to be removed first. Accordingly, there are no triable issues of fact here sufficient to preclude summary judgment.

Additionally, plaintiff's assertion that the findings on the D&C pathology report represent an "overly aggressive performance of a D&C" is conclusory and speculative (*see, e.g., Rodriguez v. Montefiore Med. Ctr.*, 28 A.D.3d 357, 357 [1st Dept. 2006] [granting summary judgment where "plaintiff's expert offered only conclusory assertions and mere speculation that her cancer would have been discovered earlier and would not have spread if appellants had more aggressively pursued her, and expedited and tracked her follow-up visits more actively"]). Notably, plaintiff fails to establish how the presence of myometrium on the pathology report indicates that Dr. Zhang improperly performed the D&C procedure, or that the D&C procedure caused or contributed to

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discovered and successfully treated had the doctors not deviated from the accepted standard of medical practice."]; *Kaplan v. Hamilton Med. Assocs., P.C.*, 262 A.D.2d 609, 610 [2d Dept. 1999] [granting defendants summary judgment where plaintiff's expert "merely stat[ed] in conclusory terms that [defendants] should have diagnosed and treated his bacterial endocarditis sooner"]).

plaintiff's alleged injuries (*see,* e.g., *Henry v. Duncan*, 169 A.D.3d 421, 421 [1st Dept. 2019]; *Biondi v. Behrman*, 149 A.D.3d 562, 565 [1st Dept. 2017] [granting defendants summary judgment where plaintiff's expert did not explain how pre-surgical testing would have changed the result, and advanced only conclusory opinions that a specific infection was somehow the cause of her injuries]). Moreover, plaintiff's expert's opinion that the performance of a D&C procedure, "particularly on a pregnant patient," "should not involve the muscle of the uterus" is irrelevant and inapplicable here, as plaintiff was two weeks post-partum at the time of the D&C procedure.

Furthermore, Dr. Zhang has set forth ample undisputed evidence that the presence of myometrium on pathology does not in and of itself reflect an overly aggressive curettage. Indeed, plaintiff fails to address or refute Dr. Grazi's opinions that a curettage must be performed until all retained products of conception are removed, and that even the "gentlest curettage" can affect the basal layer of the endometrium, particularly in a patient like plaintiff who had undergone a prior D&C procedure. Plaintiff also fails to dispute Dr. Grazi's opinion that while a post-partum D&C procedure is a risk factor for AS, the development of AS after a D&C procedure, and a finding of myometrium tissue on pathology are not reflective of an improperly performed procedure. Because plaintiff has failed to raise any issues of triable fact with respect to Dr. Zhang, Dr. Zhang is entitled to judgment as a matter of law.

II. Dr. Wong, Dr. Wan, and Stephan Wan, M.D., P.L.L.C

Plaintiff has also failed to raise a triable issue of fact as to Dr. Wong. Contrary to plaintiff's claim, there has been no showing that Dr. Wong pulled or used force to deliver the placenta. Even if plaintiff had established that Dr. Wong pulled or used force to deliver the placenta, plaintiff fails to demonstrate how Dr. Wong's alleged actions caused or contributed to plaintiff's alleged injuries. Similarly, plaintiff has failed to establish how Dr. Wong's alleged failure to observe the

physiological changes that occur during placental separation resulted in the "avulsion of the umbilical cord from the placenta" (*id.*; *see also, Garrett v. Univ. Assocs. in Obstetrics & Gynecology, P.C.*, 95 A.D.3d 823, 826 [2d Dept. 2012]). While plaintiff's expert highlights that there are signs that suggest detachment of the placenta, including, *inter alia*, a gush of blood from the vagina and the lengthening of the umbilical cord outside the uterus, plaintiff's expert does not indicate whether plaintiff exhibited any of these signs, or specify which signs, if any, were present at the time of delivery (*see, e.g., DiMitri v. Monsouri*, 302 A.D.2d 420, 421 [2d Dept. 2003] [granting defendants summary judgment where plaintiff's expert's affirmation "merely stated in a conclusory fashion that the plaintiff's ulnar nerve was exposed to undue prolonged pressure as a result of being improperly positioned during surgery, without making specific factual references to the positioning of the plaintiff."]). Accordingly, there are no triable issues of fact here sufficient to preclude summary judgment.

Additionally, plaintiff fails to establish how Dr. Wong's alleged failure to describe the steps she took during delivery, failure to provide antibiotic therapy, and failure to carefully observe the placenta cotyledons after the delivery caused or contributed to plaintiff's alleged injuries (*see, e.g., Henry*, 169 A.D.3d at 421, *supra* ["The injury itself cannot be the only basis to conclude that a departure occurred."]). To be sure, plaintiff improperly speculates that because a placenta generally weighs approximately 470 grams, and plaintiff's D&C pathology revealed 77.9 grams of tissue, Dr. Wong must have left behind 1/6 of the placenta in the uterus. However, as defendants correctly submit, plaintiff's argument is sweeping, and fails to consider, address, or dispute the fact that the pathology report describes the specimen as "necrotic placental tissue, inflamed smooth muscle consistent with myometrium and scant fragments of inflamed endometrial tissue consistent with chronic endometritis" "admixed with blood clot." Accordingly, based on plaintiff's failure to

address or rebut Dr. Wong's arguments, Dr. Wong is entitled to summary judgment as a matter of law.

As Drs. Zhang and Wong are entitled to summary judgment, plaintiff's claims for vicarious liability against Dr. Wan and Stephan Wan, M.D., P.L.L.C. are dismissed.

As Dr. Wan is entitled to summary judgment, plaintiff's claims for vicarious liability against Stephan Wan, M.D., P.L.L.C. are dismissed.

As plaintiff has failed to address or rebut defendants' arguments with respect to any claims for lack of informed consent, negligent hiring, and negligent supervision, these claims are hereby dismissed.

Based on the foregoing, it is hereby

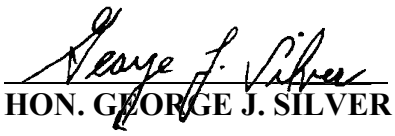
ORDERED that Dr. Zhang's motion for summary judgment is GRANTED in its entirety; and it is further

ORDERED that Dr. Wong, Dr. Wan, and Stephan Wan, M.D., P.L.L.C.'s motion for summary judgment is GRANTED in its entirety; and it is further

ORDERED that the clerk is directed to enter judgment in favor of defendants, and dismissing this case accordingly.

This constitutes the decision and order of the court.

Dated: July 1, 2020



HON. GEORGE J. SILVER