Hegazy v Mount Sinai Hosp.
2023 NY Slip Op 34004(U)
November 9, 2023
Supreme Court, New York County
Docket Number: Index No. 805276/2017
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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NEHAL Y. HEGAZY,

Plaintiff,

- v -

MOUNT SINAI HOSPITAL, BRIAN J. WAGNER, M.D., and FELIPE TUDELA, M.D.,

Defendants.

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INDEX NO. 805276/2017

MOTION DATE 08/08/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163

were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, the defendants Mount Sinai Hospital (Mount Sinai) and Brian J. Wagner, M.D. (together the movants), move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them, and pursuant to CPLR 3211(a)(5) to dismiss the complaint against Wagner as time-barred. The plaintiff opposes the motion. The motion is granted to the extent that, upon deeming the branch of the motion seeking relief pursuant to CPLR 3211(a)(5) to be one for summary judgment, Wagner is awarded summary judgment dismissing the complaint against him as time-barred, and Mount Sinai is awarded summary judgment dismissing so much of the medical malpractice cause of action against it as alleged that its medical personnel failed to diagnose the presence of retained placental tissue in the plaintiff's uterus between January 6, 2015 and January 18, 2015. The motion is otherwise denied, as there are triable issues of fact as to whether Mount Sinai, which continued to treat the plaintiff after Wagner's involvement with her had terminated, may be held vicariously liable

for the malpractice of both Wagner and the defendant Felipe Tudela, M.D., in negligently permitting retained placental tissue to remain in the plaintiff's uterus after a cesarean section procedure on January 5, 2015, and in failing to recognize that condition on January 5, 2015.

II. FACTUAL BACKGROUND

The crux of the plaintiff's claims against the movants is that they departed from good and accepted medical practice in the course of performing a cesarean section procedure upon her at Mount Sinai on January 5, 2015, and in providing post-operative monitoring and care, thus requiring her to undergo a total abdominal hysterectomy on January 18, 2015. Specifically, she alleged that, due to the movants' negligence during the delivery, they permitted retained placental tissue to remain in her uterus that prevented normal uterine involution in the first two weeks after the delivery, thus causing her to sustain uterine atony with hemorrhage on January 18, 2015 that necessitated the hysterectomy.

Prior to 2014, the plaintiff's obstetrical history included one elective termination of a pregnancy and three prior miscarriages. In 2014, the plaintiff, who was then 48 years old, became pregnant with twins, via an in-vitro fertilization (IVF) at Boston IVF, that employed a donor egg, after which she received prenatal care in Rome, Italy, until December 2014. During the course of her prenatal care, the plaintiff was hospitalized in Italy in November 2014 for cholestasis of pregnancy, in which the normal flow of bile in her gallbladder had slowed. On December 22, 2014, at which time she was 33 weeks into her pregnancy, the plaintiff was seen at Mount Sinai for a new maternal-fetal medicine consultation by obstetrician-gynecologist (OB-GYN) Joanne Stone, M.D., the Director of the Mount Sinai Division of Maternal Fetal Medicine. Dr. Stone documented a twin donor egg IVF diamniotic-dichorionic pregnancy, reflecting the presence of two separate amniotic sacs and two separate placentas. At the December 22, 2014 visit, the plan was for the obstetrical surgeon on call at Mount Sinai on January 12, 2015 to deliver the twins on that date.

On January 5, 2015, however, the plaintiff, who was then at 35 weeks and one day into her gestation period, presented to Mount Sinai with ruptured membranes, a diamniotic-dichorionic pregnancy, a blood-clotting enzyme disorder known as MTHFR deficiency, and advanced maternal age. On examination, the plaintiff's cervix was closed and not dilated, with a Category I fetal heart rate tracing. The twins were in breech position, and the rupture of membranes was noted. The plaintiff was admitted to Mount Sinai, blood samples for laboratory testing were obtained, and the hospital administered fluids and antibiotics. Mount Sinai OB-GYN Wagner, who was the physician then on call, assisted by Tudela, a Mount Sinai OB-GYN fellow, performed a cesarean section upon the plaintiff, delivered the twins in breech position, and thereafter manually removed twin placentas. According to the movants, Wagner and Tudela inspected the surfaces of the twin placentas, inspected the uterine cavity, wiped the inside of the uterus with a moist pad, visualized directly into the uterine cavity, and assessed the plaintiff for excessive vaginal bleeding. The movants further alleged that the uterine incision was repaired, hemostasis was visualized throughout, bilateral pericolic gutters were cleared of all clots and debris, and the peritoneum was noted to be hemostatic. The movants estimated that the plaintiff sustained a loss of 800 milliliters of blood. Neither Wagner nor Tudela performed a dilation and curettage procedure.

The plaintiff, however, asserted Wagner and Tudela gave conflicting accounts in their deposition testimony as to the steps that they individually took to ensure the absence of any retained products of conception, noting that Wagner testified that he took six steps to ensure the absence of any retained products of conception, while Tudela testified that he took four steps, and that neither doctor palpated the placentas after the initial visualization and, thus, could not revisualize the placentas subsequent to a palpation.

After completing the procedure, performing these post-operative examinations, and providing other post-operative care on January 5, 2015, Wagner did not provide any further care to the plaintiff.

As the movants described it, between January 5, 2015 and January 9, 2015, during her initial in-patient admission at Mount Sinai, the plaintiff evidenced no excessive or unusual postpartum bleeding. The January 6, 2015 pathology report referable to the placentas, prepared by interpreting pathologist Ninad Patil, M.D., stated that the basilar maternal surfaces---the layer at the feto-maternal junction where the chorionic villi attach to the placenta---were "complete" on both placentas. Dr. Patil thus concluded, at that time, that there were no missing portions of the placentas and that no pieces of placenta were retained in the uterine cavity after the removal of the placentas. The plaintiff's chart described minimal lochia rubra and no clots extant between the January 5, 2015 delivery and the plaintiff's January 9, 2015 discharge from the hospital. On January 6, 2015, her hematocrit level, which measures the volume of red blood cells, as a ratio of red blood cells to the total volume of red blood cells plus plasma, was 32%. The movants alleged that, other than complaints related to the pain from the abdominal incision site, a panic attack, and a January 8, 2015 headache, the plaintiff made no postpartum complaints during the course of her admission. Mount Sinai's records indicated that, between January 9, 2015 and January 17, 2015, the plaintiff did not contact or communicate with its Department of Obstetrics and Gynecology, its Division of Maternal Fetal Medicine, or any of its associated physicians. The plaintiff also did not seek treatment or care from any other physician during that period, although she asserted that she visited Dr. Stone on January 15, 2015 to introduce her to the twin infants.

On January 18, 2015, the plaintiff presented to Mount Sinai with sudden onset of heavy bleeding. She was readmitted to Mount Sinai Hospital on that date, at which time her hematocrit level was 31.2%. On January 18, 2015, Dr. Stone performed an endometrial aspiration of the plaintiff's uterus at Mount Sinai. Clotting medications were administered intraoperatively, but the plaintiff continued to bleed during the endometrial aspiration procedure, resulting in the need for a hysterectomy. Dr. Stone removed tissue specimens from the

endometrial aspiration in the operating room, labeled them as a "product of conception," and forwarded them to the Mount Sinai Department of Pathology

The January 18, 2015 pathology report prepared by Dr. Patil grossly described the endometrial aspiration specimen as blood clots, admixed with white tan fragments of soft tissue, measuring 14 centimeters (cm) by 12 cm by 1 cm in aggregate. Dr. Patil made a histologic diagnosis of the endometrial aspiration sample, concluding that the sample consisted of retained degenerative chorionic villi and decidua, with subinvolution of placental implantation site blood vessels.

III. THE PLAINTIFF'S ALLEGATIONS

In her complaint, the plaintiff alleged that she gave birth at Mount Sinai on January 5, 2015, that Wagner was the attending surgeon who performed a primary low transverse cesarean section via a Pfannenstiel skin incision, and that Tudela assisted Wagner with the procedure. She asserted that, on that date, "and continuing thereafter," all of the defendants were negligent in the treatment and care that they rendered to her. The plaintiff further asserted that, as a consequence of the defendants' negligence, she was caused to undergo a "total abdominal hysterectomy resulting from uterine atony with hemorrhage on post cesarean day thirteen (January 18, 2015) caused by retained placental tissue."

In her bill of particulars as to Wagner, the plaintiff alleged that Wagner improperly performed the low segment transverse cesarean section via a Pfannenstiel skin incision by failing to remove retained placental tissue that, in turn, did not allow for the normal involution of her uterus during the subsequent two-week period. She averred that, since her uterine muscles were stretched due to the retained placenta in the uterus, her uterine muscles were unable to physiologically constrict blood vessels that would have prevented the hemorrhage. The plaintiff further stated that she remained in the hospital for at least three days subsequent to the operation and that, during that hospital stay, she passed a clot enclosed in a membrane that was the size of a tennis ball. In this regard, she alleged that Wagner failed to examine her to

determine if any medical issues existed, and failed to perform a follow-up examination after she passed the clot to determine whether additional after-birth material remained in her uterus.

The plaintiff further asserted that Wagner's failure correctly to diagnose her condition subsequent to her complaints of severe headaches and heavy bleeding during her stay at Mount Sinai from January 5, 2015 through January 9, 2015 constituted malpractice, as did Wagner's alleged failure to monitor her postpartum vaginal bleeding.

The plaintiff essentially reiterated these allegations in connection with her bill of particulars as to Mount Sinai, and also asserted that, prior to being discharged from the hospital, she had informed hospital personnel that she was feeling ill. She asserted that she bled heavily and experienced severe headaches for 10 days subsequent to giving birth, both during her 4-day post-partum stay and thereafter. The plaintiff additionally contended that, on January 15, 2015, she presented those complaints to Dr. Stone, and that the failure of either Dr. Stone or any other Mount Sinai medical personnel correctly to diagnose her with retained placental material in the uterus, either during her initial January 5, 2015 to January 9, 2015 stay, or at any time before her January 18, 2015 hysterectomy, constituted a departure from good and accepted medical practice; she averred in her supplemental bill of particulars that Mount Sinai was vicariously liable for the omissions and failures attributable to Wagner, Tudela, Dr. Stone and other medical employees of Mount Sinai.

IV. THE SUMMARY JUDGMENT MOTION

Tudela, although named as a defendant, was apparently never served with process, and thus did not answer the complaint or appear in the action.

In support of their motion, the movants submitted an attorney's affirmation, the pleadings, the plaintiff's bills of particulars, the transcripts of the parties' deposition testimony, relevant hospital records, a statement of undisputed material facts, and the expert affirmation of internist, OB-GYN, and maternal-fetal medicine specialist Iffath Abbasi Hoskins, M.D. The movants contended that the claims asserted against Wagner were time-barred by the 2-year-

and-six-month limitations period of CPLR 214-a, inasmuch as Wagner only treated the plaintiff when he performed the cesarean section procedure on January 5, 2015 and examined and cleaned her immediately after he completed the procedure on that day. They asserted that, as the surgeon on call on January 5, 2015, Wagner did not examine or treat the plaintiff on any date thereafter, he did not have an obligation to examine her or treat her after completing the procedure and conducting an immediate post-surgical examination, that the continuous treatment doctrine thus did not extend the accrual date for claims against him beyond January 5, 2015, and that this action was commenced on July 17, 2017, or 12 days beyond the July 5, 2017 deadline for commencement of a medical malpractice action against him. They further contended that, in any event, even if Mount Sinai---which did continue treating the plaintiff until at least January 23, 2015---could be held vicariously liable for Wagner's or Tudela's negligence, neither of those physicians nor any other Mount Sinai employee departed from good and accepted medical practice in the course of the cesarean section procedure or in failing to diagnose the presence of retained intra-uterine placental tissue thereafter, inasmuch as the relevant pathology report generated subsequent to the hysterectomy found no evidence of the presence of such tissue.

In her affirmation, Dr. Hoskins concluded that the movants did not depart from good and accepted practice and that, in any event, nothing that they did or did not do caused or contributed to the plaintiff's injuries.

Dr. Hoskins asserted that the plaintiff's hematocrit level on January 6, 2015, the first day after the cesarean section procedure, was not concerning, that examinations on January 6, 2015 and January 7, 2015 revealed that the surgical incision was dry and intact, and that there were no clots or excessive bleeding observed or noted. Upon reviewing the notes made in the plaintiff's chart by Mount Sinai nurses, Dr. Hoskins concluded that their descriptions of the uterus denoted a "well contracted uterus, which indicates an empty uterine cavity without any products of conception." She further reported that "[n]ursing notes specifically document the

absence of any excess bleeding or clots and small amount of rubra lochia on January 8 and 9, on which date the patient was discharged home. On this date, which was post-operative day # 4, the uterine fundus was firm and the patient had no complaints of headache."

Dr. Hoskins noted that the chart for the plaintiff's January 18, 2015 readmission to Mount Sinai reported a *sudden* onset of vaginal bleeding and pain at 6:00 a.m. on that date, rather than continued bleeding over the prior days or weeks. In summarizing the description in the plaintiff's chart of the hysterectomy that Dr. Stone then performed, she noted that

> "the cervix was dilated and 'products of conception and clots' were evacuated from the uterus under direct ultrasound guidance. The uterus continued to bleed profusely and Misoprostol was administered in addition to Hemabate and Methergine. These medications are used to help the uterine muscle contract, in order to stop the bleeding. The patient continued to bleed and repeat ultrasound assessment showed the uterus had refilled with clots and the bleeding persisted. The aspiration device was connected to the cannula and tubing with blood being re-aspirated from the uterine cavity. At this point, the blood appeared to no longer be clotting and appeared to be fresh flowing blood and the uterus did not appear to be clamping down despite fundal massage and the previously mentioned medications. A laparotomy was therefore performed via opening of the prior Pfannenstiel incision, and a supracervical hysterectomy was performed."

She explained that, although Dr. Stone labeled the contents of one of the samples as "products of conception," when Dr. Patil studied them under a microscope to enable him to make a histologic diagnosis, they did not, in fact, consist of excess or retained placental tissue. Dr. Hoskins analyzed the issue as follows:

> "The gross description of specimen source Part B labeled Products of Conception is described as consisting of multiple blood clots admixed with white, tan fragments of soft tissues measuring 14 x 12 x 1 cm in aggregate. The histologic diagnosis (the diagnosis made under a microscope) from the specimen labeled uterus, describes a uterus with hyalinized leiomyoma, indicating degeneration of the fibroid due to the smooth muscle of the uterus being replaced by connective tissue. There was endometrial glandular and stromal breakdown, and subinvolution of the implantation site vessels. The histologic diagnosis of the endometrial aspiration (the second specimen source labeled 'products of conception') describes retained degenerative chorionic villi, decidua (the layer of uterine endometrium that forms during pregnancy) with subinvolution of implantation site vessels."

Dr. Hoskins opined that the labeling of the tissue samples as "products of conception" was not an actual diagnosis, but instead reflected terminology that "is commonly used to denote anything removed from within the uterine cavity during the postpartum period." Rather, according to Dr. Hoskins, the final pathology report identified the samples as villi with decidua (endometrial lining), which "would always by definition, include chorionic villi, as these are the microscopic cells attached to decidua and/or burrowed into the uterine muscle, both of which are considered products of conception that would be found on any postpartum endometrial aspiration." As she described it, the final histologic diagnosis described "retained degenerative chorionic villi and decidua with subinvolution of implantation site vessels," the latter of which "is commonly associated with delayed postpartum bleeding occurring about two weeks after delivery and which fits the clinical presentation of this patient."

Dr. Hoskins agreed with Dr. Patil's conclusion that the aspiration specimen was consistent with an old blood clot and decidua. She asserted that the histologic diagnosis of subinvolution required a substantial amount of endometrial tissue to diagnose, and that any observable white or tan "fragments" represented this old blood clot or decidua. She essentially accepted Dr. Patil's reasoning, as explained in his deposition testimony, that, normally,

> "within a day or two after delivery, the large blood vessels that are patent throughout pregnancy are supposed to close down or involute. This stops the bleeding from the site where the placenta had been attached during the pregnancy. Typically, the maternal utero-placental blood vessels close but in rare situations this does not occur and as here, subinvolution of the placental vessels occurs. This is a rare process, *possibly caused by abnormal interaction of the mother's tissue with extra-villous trophoblasts located deep inside the wall of the uterus which then prevents the blood vessels from closing normally as they should.* The result is delayed postpartum hemorrhage, as occurred in this patient"

(emphasis added). Dr. Hoskins opined that the plaintiff's delayed postpartum hemorrhage, occurring almost two weeks after delivery, was the result of uterine atony that itself was caused by subinvolution of the placental implantation site blood vessels, and not by the presence of retained placental tissue. Dr. Hoskins also explained that microscopic, retained products of

conception such as chorionic villi would not affect the physiologic process of involution unless there were a big chunk of retained placental tissue, which Dr. Patil did not find in his pathology study. She agreed with Dr. Patil that that there was no relationship between the presence of microscopic chorionic villi within the decidua, as was found in the plaintiff's case, and the failure of the placental blood vessels to involute, and that it is not uncommon to find microscopic isolated chorionic villi after removal of the placenta, which Dr. Hoskins agreed had occurred in the plaintiff's case. In attributing the subinvolution of the utero-placental vessels to the presence of chorionic villi, Dr. Hoskins explained that the villi are not grossly visible or appreciated by the sense of touch at the time of delivery or immediately thereafter, and are usually the result of an abnormally adherent placenta, which can occur when the placenta grows deeply into the uterine wall and the villi remain attached to or embedded into the uterine wall following delivery. She asserted that the plaintiff's normal postpartum course of recovery, which developed without excessive vaginal bleeding or excessively low hematocrit levels during her four-day stay in at Mount Sinai, provided further evidence that there were no identifiable unwarranted, retained products of conception at the time of delivery, and no reason or basis to believe or suspect that there were. She ultimately concluded that, given the plaintiff's age and the nature of her placentas, neither the movants nor any other physician could have prevented the delayed bleeding or the need for a hysterectomy.

Dr. Hoskins thus concluded that the movants did not deviate from the applicable standard of care, and that no omissions from the standard of care relating to the movants' treatment of the plaintiff caused or contributed to her alleged injuries, including delayed postpartum hemorrhage, uterine atony, and subinvolution of the utero-placental vessels, or the need for a supracervical hysterectomy. In this regard, she opined that Wagner and Tudela properly performed the cesarean section procedure, that they properly removed the twin placentas, that they comported with the standard of care in the course of inspecting the plaintiff's uterus for excess placental tissue, that they properly and completely removed any and

all tissue that could create complications if permitted to remain, and that they completely wiped and cleaned out the uterus to assure that all placental tissue was removed. Specifically, Dr. Hoskins noted that the basilar maternal surfaces were complete with respect to both placentas, and that this was "reflective of the absence of any apparent retained products of conception that could have been visualized or felt in the uterine cavity at or subsequent to the time of delivery." In other words, Dr. Hoskins opined that Wagner and Tudela not only comported with the standard of practice, but that they, in fact, obtained the desired result, and that, contrary to the plaintiff's contention, they did not leave any excess placental tissue in her uterus.

In opposition to the motion, the plaintiff relied on the same documentation that had been submitted by the movants, and also submitted a counter statement of facts, an attorney's affirmation, the pathology reports referable to the January 5, 2015 and January 18, 2015 procedures, and the expert affirmation of OB-GYN Gary R. Brickner, M.D.

Dr. Brickner opined that Wagner and Tudela departed from good and accepted medical practice by failing to take appropriate steps to assure that all excess placental tissue was completely removed from the plaintiff's uterus subsequent to their delivery of her twins and their efforts to remove the twin placentas. He further asserted that their failures in this regard, as well as the failure of other Mount Sinai medical personnel to appreciate or diagnose the presence of retained placental tissue in a timely manner caused excessive bleeding and the need for the hysterectomy.

According to Dr. Brickner, Wagner reported that he had taken six steps to assure the removal of all extraneous placental tissue from the plaintiff's uterus, specifically, that (1) the plaintiff's uterus was curettaged following the delivery of the twins, (2) her fundus was then massaged, (3) he or Tudela placed a hand into the plaintiff's uterus up to the fundus, thus sweeping out the membranes and placentas, (4) he or Tudela employed clamps to tease out the membranes, (5) he or Tudela employed a lap pad wrapped around one of their hands inside plaintiff's uterus to sweep the cavity, ensuring that it was free of all clots and debris, and (6) they

examined the surface of the placentas to ensure that the placentas appeared intact. Dr. Brickner asserted that Tudela, by way of contrast, identified only four steps, specifically, that (1) the placentas were inspected and removed, (2) either he or Wagner, with their hands, felt inside of the plaintiff's uterus to ensure there was nothing that would be "outside of standards," (3) a moist laparotomy sponge was employed to sweep inside the uterus, and (4) a visual inspection of the uterus was performed.

Dr. Brickner opined that the retained degenerative chorionic villi, as diagnosed by Dr. Patil subsequent to the hysterectomy, and after subjecting the endometrial aspirations to histologic diagnosis, "evidences a significant volume of retained placenta." He further asserted that the standard of care required Wagner and Tudela not merely to visualize the placentas and uterus, but to visualize, palpate, and revisualize the placentas to ensure that no placental fragments remained in the uterus. Dr. Brickner concluded that they departed from this standard of practice by failing to palpate and revisualize the placentas and uterus. Dr. Brickner concluded that this departure resulted in the retention of a significant amount of placental tissue in the plaintiff's uterus that caused the subinvolution thereof, which, in turn, caused post-partum hemorrhaging that necessitated the supracervical hysterectomy.

Dr. Brickner noted that one of two types of retained "products of conception" that had been histologically diagnosed by Dr. Patil were retained degenerative chorionic villi, and not merely chorionic cells. As he explained it, chorionic villi are the functional units of the placenta, He asserted that the presence of these villi in an intact condition indicated that there was "intact coherent placental tissue left in situ [and] not merely stray detached chorionic cells." Dr. Brickner expressly disagreed with Dr. Hoskins and Dr. Patil as to the significance of the report purportedly documenting the condition of the basilar material surfaces of the two placentas, which indicated that no portion of the placentas was missing. Rather, he concluded that that Dr. Patil's diagnosis of the endometrial aspirations, containing a significant volume of retained degenerative chorionic villi, measuring 14 cm by 12 cm by 1 cm, "confirms from a medical

evidentiary basis that a portion of the placenta was missing and retained in the uterine cavity sufficient in bulk to cause subinvolution of plaintiff's uterus." Dr. Brickner characterized that volume of retained tissue as equivalent to "the size expected of a placental cotyledon, the primary anatomical building block of the placenta, and the portion of the placenta that typically gets left in situ after delivery."

Dr. Brickner ultimately asserted that both "the gross description and the final histological diagnosis on surgical pathology" of the endometrial aspiration and hysterectomy "reflected the presence of retained placenta sufficient to cause or contribute to uterine atony, delayed postpartum hemorrhage and subinvolution of the placental vessels and the findings of retained degenerative chorionic villi, as histologically observed." He opined that the presence of this retained placental tissue represented a finding that would be "unexpected" had the proper steps been taken and performed in the proper manner during the cesarean section procedure. Dr. Brickner concluded that the failure of Wagner and Tudela properly to complete that procedure by palpation and revisualization of the uterus after initially wiping it out constituted a departure from the standard of care that proximately resulted in the subinvolution of the uterus, in turn causing postpartum hemorrhage that necessitated the supracervical hysterectomy.

Dr. Brickner did not address the issue of whether any Mount Sinai physician departed from good and accepted practice in failing to diagnose the presence of retained placental tissue between January 6, 2015, which was the first day after the cesarean section procedure, and January 18, 2015, when the plaintiff presented to Mount Sinai with a sudden onset of heavy bleeding. He thus did not address or contradict the movants' contention that the plaintiff sustained a "sudden" onset of excessive vaginal bleeding on the morning of January 18, 2015. Nor did he render an opinion as to whether Dr. Stone, during the plaintiff's January 15, 2015 visit, should have diagnosed the uterine retention of placental tissue.

In an attorney's reply affirmation, the movants' counsel argued that the plaintiff failed to rebut the movants' showing that the claims had not been timely asserted against Wagner. She

further argued, among other things, that Dr. Brickner did not establish that he was sufficiently familiar with the standards of care applicable to histological diagnoses, and that he failed to raise a triable issue of fact as to whether the alleged departures from accepted standards of care caused or contributed to the excessive vaginal bleeding or the need for a hysterectomy, as the opinion was based on assumptions and speculation.

V. SUMMARY JUDGMENT STANDARDS

It is well settled that the movant on 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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively

establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

The court notes that Dr. Brickner is not licensed to practice medicine in New York. Although a medical expert need not be licensed to practice medicine in New York for his or her affidavit to be considered by a court in connection with a summary judgment motion (*see Grey v Garcia-Fusco*, 2020 NY Slip Op 32280[U], *20 n 19, 2020 NY Misc LEXIS 3270, *30 n 19 [Sup Ct, N.Y. County, Jun. 16, 2020]; *Solano v Ronak Med. Care*, 2013 NY Slip Op 30837[U], *7, 2013 NY Misc LEXIS 170, *8-9 [Sup Ct, N.Y. County, Apr. 22, 2013]), Dr. Brickner's affirmation does not constitute admissible evidence to oppose the summary judgment motion since, as a physician who is not licensed to practice medicine in New York, he may not avail himself of the option to submit an unnotarized affirmation in lieu of a notarized affidavit (*see* CPLR 2106[a] [limiting the option to employ an affirmation to a "physician . . . authorized by law to practice in the state"]). The court nonetheless exercises its discretion and directs the plaintiff to submit the content of Dr. Brickner's affirmation in the form of an affidavit (*see* CPLR 2001; *Matos v Schwartz,* 104 AD3d 650, 653 [2d Dept 2013]; *Munoz v New York Presbyterian-Columbia Univ. Med. Ctr.,* 2023 NY Slip Op 31317[U], *19-20, 2023 NY Misc LEXIS 1950, *35-36 [Sup Ct, N.Y County, Apr. 10, 2023] [Kelley, J.]; *Winslow v Syed*, 2021 NY Slip Op 33230[U], *5-6, 2021 NY Misc LEXIS 9432, *13 [Sup Ct, Dutchess County, Apr. 20, 2021]), accompanied by a certificate of conformity, as required by CPLR 2309, which may be filed nunc pro tunc (*see Parra v Cardenas,* 183 AD3d 462, 463 [1st Dept 2020]; *Bank of New York v Singh*, 139 AD3d 486, 487 [1st Dept 2016]; *DaSilva v KS Realty, L.P.,* 138 AD3d 619, 620 [1st Dept 2016]; *Diggs v Karen Manor Assoc., LLC*, 117 AD3d 401, 402-403 [1st Dept 2014]; *Matapos Tech., Ltd. v Compania Andina de Comercio Ltda.*, 68 AD3d 672, 673 [1st Dept 2009]).

A. STATUTE OF LIMITATIONS AS TO CLAIMS AGAINST WAGNER

The movants established, prima facie, that the plaintiff's claims against Wagner are time-barred. Since the plaintiff did not address this issue, she has failed to raise a triable issue of fact in opposition to the movants' showing and, hence, the movants must be awarded summary judgment dismissing the complaint against Wagner.

Initially, the court notes that the movants are seeking relief pursuant to CPLR 3211(a)(5). Reliance on that statute, however, is improper. CPLR 3211(e) provides that

> "At any time *before service of the responsive pleading* is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading"

(emphasis added). The court notes that the movants here preserved the affirmative defense of the statute of limitations by asserting it in their answer as their first affirmative defense; however, in light of the provisions of CPLR 3211(e),

> "[a] motion to dismiss the complaint based on a ground listed in CPLR 3211(a) . . . must be made before answering (*see* CPLR 3211[e]: Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:21). A motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading (*id*.). Summary judgment is, therefore, a post answer device (*id*.). Any of the grounds on which a CPLR 3211 motion could have been made here . . . can he used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (CPLR 3211[e]: Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:20). Having preserved the affirmative defense in their answer, defendants were not also entitled to serve a pre-answer motion to dismiss, which is a procedural irregularity. Defendants [are] required to move for summary judgment on the [CPLR 3211(a)] issue inasmuch as they had served their answer"

(*Lusitano Enters., Inc. v Horton Bros., Inc.*, 2018 NY Slip Op 32011[U], *3-4, 2018 NY Misc LEXIS 3587, *5-6, [Sup Ct, Suffolk County, Aug. 14, 2018]; *see Higgins v Goyer*, 2018 NY Slip Op 33520[U], *2, 2018 NY Misc LEXIS 9607, *3 [Sup Ct, Rensselaer County, Nov. 1, 2018]; *see also McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]).

Consequently, to the extent that the defendant seeks relief pursuant to CPLR 3211(a)(5), such relief is unavailable pursuant to that statute at this juncture, but is available only via a motion for summary judgment pursuant to CPLR 3212 (*see Rich v Lefkovits*, 56 NY2d 276, 282 [1982] ["we answer in the affirmative the question . . . concerning whether defendant may move after answer for summary judgment on his jurisdictional defense"]). Nonetheless, in this case, there are no disputed issues of fact with respect to the last date on which Wagner treated the plaintiff, leaving only a pure issue of law for the court to consider, and the parties clearly have charted a summary judgment course. Hence, the court deems that branch of the motion seeking dismissal of the complaint against Wagner as time-barred to be a motion for summary judgment dismissing the complaint against him as time-barred, without the need for providing additional notice to the parties pursuant to CPLR 3211(c) (*see Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]; *Ramos v Kalsow*, 2023 NY Slip Op 32954[U], *2-3, 2023 NY Misc LEXIS 4648, *2-3 [Sup Ct, N.Y. County, Aug. 24, 2023] [Kelley, J.]; *see also Mic Prop. & Cas. Ins. Corp. v Custom Craftsman of Brooklyn, Inc*., 269 AD2d 333, 334 [1st Dept 2000]).

The statute of limitations applicable to actions to recover for medical malpractice against a private health-care provider is two years and six months, measured from "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act omission or failure" (CPLR 214-a). The "continuous treatment" provision of that statute posits that the limitations period "does not begin to run until the end of the course of treatment when the course of treatment which includes the wrongful acts or omissions has run continuously and is *related to the same original condition or complaint*" (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991] [internal quotation marks omitted] [emphasis added]; *see Massie v Crawford*, 78 NY2d 516, 519 [1991]; *McDermott v Torre*, 56 NY2d 399, 405 [1982]; *Borgia v City of New York*, 12 NY2d 151, 155 [1962]; *Jajoute v New York City Health & Hosps. Corp*., 242 AD2d 674, 676 [1st Dept 1997]).

The Appellate Division, First Department, has not adopted the bright-line rule articulated by the Appellate Division, Second Department, in decisions such as *Sherry v Queens Kidney Ctr*. (117 AD2d 663, 664 [2d Dept 1986]), which holds "that treatment is not considered continuous when the interval between treatments exceeds the period of limitation." Rather, the First Department has articulated a more nuanced rule that takes account of a "plaintiff's belief" that he or she "was under the active treatment of defendant at all times, so long as" the treatments did not "result in an appreciable improvement" in the patient's condition (*Devadas v Niksarli*, 120 AD3d at 1006). Even where a "plaintiff pursued no treatment for over 30 months after" the initial, allegedly negligent surgical treatment (*id*. at 1005),

> "[i]n determining whether continuous treatment exists, the focus is on whether the patient believed that further treatment was necessary, and whether he [or she] sought such treatment (*see Rizk v Cohen*, 73 NY2d 98, 104 [1989]). Further, this Court has suggested that a key to a finding of continuous treatment is whether there is 'an ongoing relationship of trust and confidence between' the patient and physician (*Ramirez v Friedman*, 287 AD2d 376, 377 [1st Dept 2001])."

(*id*.at 1006). Where such a situation obtains,

> "[c]ases such as *Clayton v Memorial Hosp. for Cancer & Allied Diseases* (58 AD3d 548 [1st Dept 2009]) are inapplicable . . . , to the extent they reiterate that 'continuous treatment exists "when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past"' (58 AD3d at 549, quoting *Richardson v Orentreich*, 64 NY2d at 898-899)"

(*id*. at 1007).

Applying the First Department's articulation of the law, as this court must (*see D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]), the court concludes that the movants made the necessary prima facie showing that Wagner's last treatment of the plaintiff was more than two years and six months prior to the July 17, 2017 commencement of this action, and that the plaintiff failed to raise a triable issue of fact as to whether the continuous treatment doctrine tolled the limitations period applicable to claims against him so that her commencement of the action on July 17, 2015 was timely as to him. Nor is there anything in the record suggesting that

Wagner was anything more than the surgeon who was on call when the plaintiff required an cesarean section procedure on an emergent basis, or that the plaintiff deemed Wagner to be her physician after that date. Rather, all of the evidence suggests that the plaintiff only deemed Mount Sinai and Dr. Stone to have a continuing physician-patient relationship with her, as reflected by her decision to visit Dr. Stone with her newborn twins on January 15, 2015, and the fact that it was Dr. Stone who performed the hysterectomy on January 18, 2015.

The court notes that the movants do not argue that the action is time-barred as to Mount Sinai, based on the fact that Dr. Stone and other Mount Sinai personnel treated the plaintiff between December 22, 2014 and January 18, 2015, and at least until January 23, 2015 with respect to post-operative care referable to the hysterectomy. Thus, even though the claims against Wagner himself must be dismissed as time-barred, and Tudela may not be held individually liable both because he was never served with process and because he was a medical fellow acting solely under the direction of an attending physician (*see Murphy v Drosinos,*179 AD3d 461, 462 [1st Dept 2020]; *Poter v Adams*, 104 AD3d 925, 927 [2d Dept 2013]), Mount Sinai may still be held vicariously liable for their negligence (*see Hill v St. Clare's Hosp*., 67 NY2d 72, 79 [1986]) under the continuous treatment doctrine since its medical personnel continued to treat the plaintiff for the same prior condition from the time of her readmission on January 18, 2015 until at least January 23, 2015 (*see Artale v St. Francis Hosp*., 10 AD3d 439, 440 [2d Dept 2004]).

B MEDICAL MALPRACTICE BASED ON DEPARTURES FROM GOOD AND ACCEPTED PRACTICE

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr*., 70 AD3d 15, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp*., 10 AD3d 521, 522 [1st

Dept 2004]). Where a physician fails properly to diagnose a patient's condition, thus providing less than optimal treatment or delaying appropriate treatment, and the insufficiency of or delay in treatment proximately causes injury, he or she will be deemed to have departed from good and accepted medical practice (*see Zabary v North Shore Hosp. in Plainview,* 190 AD3d 790, 795 [2d Dept 2021]; *Lewis v Rutkovsky*, 153 AD3d 450, 451 [1st Dept 2017]; *Monzon v Chiaramonte*, 140 AD3d 1126, 1128 [2d Dept 2016] ["(c)ases . . . which allege medical malpractice for failure to diagnose a condition . . . pertain to the level or standard of care expected of a physician in the community"]; *O'Sullivan v Presbyterian Hosp. at Columbia Presbyterian Medical Ctr.*, 217 AD2d 98, 101 [1st Dept 1995]).

A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or by establishing that the plaintiff was not injured by such treatment (*see McGuigan v Centereach Mgt. Group, Inc*., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy the burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital,* 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id*., quoting *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Moreover,

as noted, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and/or opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.,* 68 NY2d at 325; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24).

The movants established, prima facie, that they did not depart from good and accepted medical practice in performing the cesarean section procedure or in taking all steps to ensure that there was no placental tissue retained in the plaintiff's uterus. They further established that nothing that they did or did not do caused or contributed to the subinvolution of the plaintiff's uterus, the concomitant hemorrhaging, or the need for a hysterectomy. Contrary to the movants' contentions, however, the plaintiff raised a triable issue of fact as to whether Wagner and Tudela departed from good and accepted medical standards in the manner in which they engaged in efforts to remove all placental tissue from the uterus, whether there was indeed a

retention of a significant amount of excess and unwarranted placental tissue in the plaintiff's uterus immediately subsequent to the cesarean section procedure, and whether that retention of tissue caused the uterine subinvolution, the vaginal hemorrhaging, and the need for a hysterectomy. The court rejects the movants' contention that Dr. Brickner failed to establish a foundation for his expertise in assessing the significance of the size of the tissue specimen taken from the plaintiff during her hysterectomy, as he established that he had knowledge of the expected appearance and volume of chorionic villi and other placental tissue. Hence, that branch of the motion seeking summary judgment dismissing the medical malpractice cause of action against Mount Sinai, to the extent that it alleged that Mount Sinai was vicariously liable for Wagner and Tudela's negligence in completing the cesarean section procedure and failing to diagnose the presence of retained placental tissue on January 5, 2015 must be denied. Inasmuch as the plaintiff failed to raise a triable issue of fact as to whether Dr. Stone or any other Mount Sinai-affiliated physician committed malpractice in failing to diagnose the presence of retained placental tissue between January 6, 2015 and the plaintiff's readmission to the hospital on January 18, 2015, that branch of the motion seeking summary dismissal of that portion of the medical malpractice claim must be granted.

The movants' remaining contentions are without merit.

VI CONCLUSION

In light of the foregoing, it is

ORDERED that, on the court's own motion, the branch of the motion of the defendants Mount Sinai Hospital and Brian J. Wagner, M.D., which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against Brian J. Wagner, M.D., as time-barred, is deemed to constitute a branch of the motion which is for summary judgment dismissing the complaint against Brian J. Wagner, M.D., as time-barred; and it is further,

ORDERED that the motion of the defendants Mount Sinai Hospital and Brian J. Wagner, M.D., for summary judgment dismissing the complaint insofar as asserted them is granted to the

extent that summary judgment is awarded to Brian J. Wagner, M.D., dismissing the complaint insofar as asserted against him, and to Mount Sinai Hospital dismissing so much of the medical malpractice cause of action against it as is premised upon its failure to diagnose and treat the plaintiff's condition from January 6, 2015 through January 18, 2015, the complaint is dismissed insofar as asserted against Brian J. Wagner, M.D., the claim to recover for failure to diagnose the plaintiff's condition between January 6, 2015 and January 18, 2015 is dismissed insofar as asserted against Mount Sinai Hospital, and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant Brian J. Wagner, M.D.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against Brian J. Wagner, M.D.; and it is further,

ORDERED that the remaining parties are directed to appear for an initial pre-trial settlement conference before the court on December 20, 2023, at 11:00 a.m., in Room 304 of 71 Thomas Street, New York, New York 10013, at which time they shall be prepared to discuss both the possibility of resolving the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

11/9/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**