

**Reyes v Jack D. Weiler Hosp. of the Albert Einstein
Coll. of Medicine**

2015 NY Slip Op 31759(U)

August 21, 2015

Supreme Court, Bronx County

Docket Number: 23653/04

Judge: Douglas E. McKeon

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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JAZMIN REYES,

Plaintiff(s)

- against -

INDEX NO: 23653/04

THE JACK D. WEILER HOSPITAL OF THE
ALBERT EINSTEIN COLLEGE OF MEDICINE
A DIVISION OF THE MONTEFIORE MEDICAL
CENTER, DMITRY GERBER, M.D., MICHAEL
TRAUB, M.D., and JONATHAN TRAMBERT,
M.D.,

DECISION/ORDER

Defendant(s)

-----X

HON. DOUGLAS E. MCKEON

Motion by defendant Jack Weiler Hospital, a division of Montefiore Medical Center ("Montefiore") and Dmitry Gerber, M.D. for summary judgment and an order dismissing plaintiff's complaint is decided as follows.

This is a medical malpractice action seeking damages for the alleged malpractice, lack of informed consent and negligent hiring. The medical treatment in question took place from December 26, 2003 through January 4, 2004. It is alleged that plaintiff sustained an injury to her ureter during a C-section on December 26, 2003 at Montefiore. Plaintiff contends that Montefiore and Dr. Gerber negligently performed the C-section which resulted in the injury. Plaintiff further

alleges negligence and malpractice including failure to diagnose the plaintiff's condition in light of worsening symptoms, significant blood loss, attempting an improper repair of the ureter, failure to refer to proper specialists, failure to order prompt diagnostic testing, failure to treat a urinary tract infection, failure to administer proper antibiotics and failure to obtain informed consent. Because of the malpractice, plaintiff claims she has suffered injury to the ureter, multiple surgical procedures, UTI, leakage, post-operative infection, pain and suffering, and impairment to activities of daily living. Plaintiff further contends that Montefiore negligently hired, retained and supervised its physicians and employees and negligently maintained and altered hospital records.

On December 25, 2003 at 11:00 p.m., the then 20 year old plaintiff presented to Montefiore in labor at 36 weeks of pregnancy. She had contractions every three to five minutes with accelerations and was leaking amniotic fluid. She had active genital herpes lesions at the time. The attending OB/GYN, Dr. Gerber, ordered a C-section to decrease the chances of transmitting the herpes virus to the baby. Dr. Gerber reviewed the plaintiff's history which included an appendectomy and a small bowel obstruction and requested a senior resident to assist him. Dr. Gerber discussed the risks associated with the C-section with the plaintiff including infection, bleeding, injury to other organs, and injury to the fetus. Plaintiff executed an informed consent form for a C-section on December 26, 2003. In the consent form, Dr. Stephanie Terry, a then first year resident at Montefiore, listed the risks of C-

section, including possible damage to adjacent structures, including the ureter etc. Movant has provided the Court with an affidavit from Dr. Terry that she obtained plaintiff's informed consent prior to the C-section.

The C-section occurred within two hours of presentation to Montefiore. Dr. Traub assisted. Dr. Traub agreed that plaintiff was a prime candidate for an immediate C-section based on her presentation with active labor, herpes and ruptured membranes. He further testified that a low transverse C-section as done here) is a safer method than most approaches as it involved less blood loss and reduced risks to future pregnancies. During the C-section, the infant was delivered with Apgar scores of 9 and 9. Dr. Gerber removed the placenta and externalized the uterus. Upon inspection he noted a small three centimeter extension in the left lower uterine segment with no active bleeding. He repaired the extension then repaired the uterine incision without injury to the blood vessel and concluded the surgery. After the operative report was dictated by Dr. Traub, Dr. Gerber changed the length of the uterus incision from 2 cm's to 3 cm's to be more accurate. The operative report described that Dr. Gerber made an incision that allowed access into the abdomen then extended it laterally, Dr. Gerber did not consider the small 3 cm incision to be a complication of the procedure. He did not check for ureteral injury during the C-section because the extension was not in an area near the ureter and there was no suspicion of being close to the ureter. Plaintiff was transferred to recovery in good condition and her post C-section examination was normal. A post-

operative note documents no complaints. At 3:30 a.m. the plaintiff's blood pressure was elevated. Dr. Traub was made aware of this and ordered a urinalysis. Dr. Gerber testified at deposition that this increase in blood pressure could have been due to pain, erroneous measurements, preeclampsia, or anxiety. Also noted at that time was that plaintiff's dressing was wet. Dr. Gerber testified that it was not uncommon for a wound dressing to be saturated after a surgery. The urinalysis was normal. While in recovery plaintiff was found to be walking independently without any complaints. When she was found she informed a nurse that she thought she was supposed to walk around. She was told to remain in bed until later that day after the removal of the Foley Catheter. At 8:30 a.m. plaintiff drank cranberry juice but vomited immediately. She was told to limit her intake to ice chips. Dr. Gerber testified that many patients vomit after surgery because of anesthesia. The Montefiore chart reflects that plaintiff communicated to the staff that she was not in any pain and that later that day she said she felt better. She tended to the newborn baby and did not make any complaints. On December 27th plaintiff was febrile with a 100.58 degree fever. She was given medication but vomited shortly thereafter. Dr. Gerber stated that it was common for patients to vomit after the administration of narcotics, especially post-surgical patients. However, in an abundance of caution, a urinalysis was performed. Normal results returned. Plaintiff's fever was believed to be secondary to breast engorgement. A note documented that the C-section incision was clean, dry and intact and that plaintiff had complained of dizziness

earlier but was currently stable. At 10:00 p.m. that evening plaintiff was still febrile with a 101.12 degree fever and had complained of breast tenderness. The incision was still clean, dry and intact. The plan was to perform another urinalysis and monitor. On December 28th at 1:00 a.m. plaintiff informed the staff that she felt a little dizzy earlier. She had a fever and her staples were oozing. Ice was applied and she was given Percocet for pain. Her temperature decreased to normal and her condition improved. She informed the staff she was feeling better. The incision was checked again and was clean, dry, and intact. However, the plaintiff's temperature was now 101.4 degrees. On December 29, 2003 the plaintiff's Creatine level was measured and found normal. However, her urine culture was positive for a urinary tract infection ("UTI"). The overnight fever was attributed to breast engorgement and she prepared to be discharged home with antibiotics for the UTI.

On December 29th at 9:30 a.m. Dr. Gerber examined plaintiff. She complained of mild left sided pain and Dr. Gerber wanted to rule out the cause of her fevers and left sided pain. Dr. Gerber stated he suspected ureteral injury for the first time on December 29th in light of the fever coupled by pain and elevated Creatine. As such, Dr. Gerber wanted to follow-up on the Creatine and evaluate if they were increasing. If they were increasing he would consider x-rays of the kidneys. Dr. Gerber ordered repeat chemistries, a urology consultation and a CT-scan of the abdomen and pelvis. He changed plaintiff's antibiotics for the UTI out of concern for the elevated Creatine. Plaintiff was evaluated by a specialist of the reproductive and urinary

system at the consult at 6:00 p.m. she complained of lower back pain and abdominal discomfort and fever. At this point she had a 102.38 fever and her Creatine had increased. Furthermore, her urine was positive for culture. As such, an x-ray of the urinary tract, kidneys, bladder, and urethra was performed. The left ureter could not be visualized and the findings were most compatible with obstruction of the left ureter kidney and suspicion for ligation of the left ureter. A CT-scan revealed mild swelling of the ureter and kidney resulting from the blockage of the urinary tract. Because of the radiographic findings and plaintiff's left side pain and fevers, Dr. Trambert performed an emergency nephrostomy which places the catheter through the skin into the kidney to drain urine. This procedure visualized a left ureter obstruction and suggested the need for a drain to the left sided collection system. The plaintiff was seen by a urologist who recommended a follow up nephrostogram in 3 to 4 days with a repair of the left ureteral obstruction/laceration 6 to 12 weeks postoperatively. On December 30th plaintiff was doing well and eating with some complaints of pain for which pain medication was given. She also complained of back pain on December 31st which improved with medication. On January 2, 2004 Dr. Trambert took a special x-ray to determine whether the kidney was draining adequately. This showed a complete obstruction near the junction between the ureter and the bladder. Dr. Trambert attempted to place a stent but was unable to do so. He was able to insert a left nephrostomy tube into the kidney to drain the urine. The plan was to repeat the procedures in two weeks. On January 3rd plaintiff

was out of bed and walking and was discharged home on January 4th in good and stable condition.

On February 2nd plaintiff returned to Montefiore with a left kidney infection. Plaintiff signed out against medical advice to go home to her newborn. On April 28, 2004 she returned to Montefiore for a reimplantation of the left ureter into the bladder by non-party urologist Dr. Hoenig. The plaintiff wished to delay reimplantation surgery due to her postpartum state and inflammatory process. The postoperative course was unremarkable and she was discharged on May 1, 2004. She returned in November 2004 with a kidney infection. She was then hospitalized at St. Barnabas for kidney problems and possible suicide attempt. She was readmitted to St. Barnabas in November 2005 while pregnant where ultrasound studies revealed water inside the kidney. She delivered a second child vaginally. Plaintiff was also treated for UTIs during a subsequent pregnancy in 2007 and delivered her third child by C-section at 33 weeks in 2007.

Movant argues that there were no deviations from accepted standards of medical and obstetrical practice herein by Dr. Gerber or Montefiore. In support of the motion, the Court has been provided with the expert affidavit of Board Certified Obstetrician and Gynecologist Dr. Karen Martin. Dr. Martin states that there are no issues of fact herein to be determined by a jury, that there was no departures herein, and that no deviations from accepted medical practice proximately caused or contributed to any of plaintiff's injuries herein. Dr. Martin opines that plaintiff was a

prime candidate for an immediate C-section and it would have been a deviation from the standard of care not to have performed a C-section. She further states that injury to the ureter during the C-section is a well recognized complication particularly where there is a uterine extension in the lower uterine segment where there are fewer blood vessels and very thin tissue. An extension of a uterine incision occurs commonly during C-section but does not constitute a deviation from good and accepted practice. Here, the small three inch uterine extension is not considered a complication of the C-section and Dr. Gerber did not check for injury because the extension of the laceration was not near the ureter. Dr. Martin further opines that there was no delay in diagnosing the injury to the ureter and at any time and the timing of the diagnosis did not cause or contribute to the injury or change plaintiff's prognosis. Even if injury to the ureter was diagnosed sooner, surgery to reimplant it would not have been indicated during the immediate post-operative period. Furthermore, plaintiff was counseled and decided to delay re-implantation due to the postpartum course and likely inflammation. As such, the performance of surgery to re-implant the ureter in April of 2004 was reasonable and timely. Furthermore, plaintiff's claims that defendants failed to appreciate the rise in Creatine levels is meritless as the levels were always within the normal range and it is not uncommon for Creatine to rise during the immediate postpartum period. Even with a mild fever there was no reason to suspect an injury to the ureter earlier. Dr. Gerber included injury to the ureter in his differential diagnosis and appropriately sought to ascertain

the cause of plaintiff's postoperative fever and left sided flank pain by ordering tests and consultations. In fact he discovered the etiology of plaintiff's complaints.

In opposition, plaintiff argues that there are questions of fact sufficient to defeat the instant motion. Plaintiff has provided the Court with the expert affirmation of Leonard Benedict, M.D. a physician Board Certified in obstetrics and gynecology. This doctor opines that Dr. Gerber and Montefiore departed from good and accepted standards of medical malpractice in treating Ms. Reyes from December 26th through December 29, 2003. This doctor states that Ms. Reyes was inappropriately consented regarding the risks of a C-section. He opines that injury to the ureter is not an accepted risk of a C-section. He further opines that injury to the ureter during the course of a C-section becomes a potentiality in the setting of an extension of the uterine incision in the lower uterine segment such that occurred here. This doctor opines that as indicated by the C-section operative report the 3 cm extension to the left lower uterine incision was not something intentionally created but was a finding made after externalizing the uterus following the delivery. Upon the finding of the extension, defendants should have had a heightened degree of suspicion as to a risk to the left ureter and should have palpated it. Had they done so, they could have determined if reparative action was necessary. The doctor further opines that there was a delay in diagnosing the ureter injury which delay contributed to plaintiff's injuries. Following the surgery there were saturated abdominal dressings. the cause of which was never determined by lab testing. Furthermore, elevated

temperatures on the first postoperative day which continued until the injury was diagnosed should have led to an earlier work up injury and diagnosis of the left utereral obstruction.

In reply, movants argue that two years elapsed between the filing of the Note of Issue and disclosure of plaintiff's expert and that the expert affidavit should not be considered in light of plaintiff's failure to identify the expert during pre-trial discovery as required by defendants' demands. As such, they request that Dr. Benedict's affidavit be rejected and the motion for summary judgment be granted.

Summary judgment is granted as to any claims for lack of informed consent. Defendant has shown that defendant was given an appropriate informed consent including knowledge of potential damage to the ureter. The affidavit of Dr. Terry states that she personally informed plaintiff of the risk of potential damage to the ureter from a C-section. Furthermore, the records reflect that the risks of surgery including a risk to the ureter were discussed by both Dr. Gerber and Dr. Traub. In opposition Dr. Benedict attempts to establish that because the left ureter is not within the surgical field of the C-section no informed consent would address it. However, Dr. Benedict also opines that the risk of injury to the ureter during the course of a C-section does become a potentiality in a setting of an extension in the lower uterine segment. As such, Dr. Benedict concedes that there is indeed a risk of the injury in the setting of the extension of the uterine incision in the lower uterine segment and

it is therefore a proper risk to discuss for informed consent. As the informed consent was more than adequately documented in the medical records herein, that portion of the motion is granted.

According to the affidavit of Dr. Martin, ureteral injury may occur during repair of the uterine extension and does not constitute a deviation from care. However, Dr. Benedict opines that it is within the standard of care to check for injury to the ureter during the C-section resulting from the extension. The Court finds that Dr. Benedict has raised a question of fact as to whether defendants deviated from the appropriate standard of care in failing to intra-operatively examine the left ureter in the setting of the extension of the uterine incision in the lower uterine segment. The Court finds that the disagreement between the experts on this issue requires jury consideration and the summary judgment is denied on this issue.

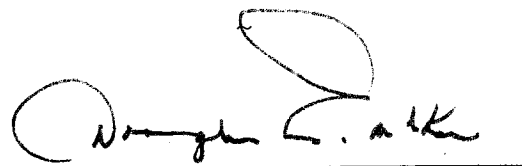
Plaintiff has not demonstrated a triable issue of fact as to whether any delay in the diagnosis herein caused or contributed to plaintiff's injury or changed the prognosis. As such, summary judgment is granted on any issue of negligent delay in diagnosis. Movant has shown that any interval of time in diagnosing the injury did not cause or contribute to or change her prognosis. Even if the injury had been diagnosed earlier, surgery to reimplant the ureter would not have been indicated during the immediate postoperative inflammation in a patient who had just delivered a baby. The performance of surgery to reimplant the ureter in April 2004 was

reasonable and timely and any allegation that it should have been performed earlier is not supported by the medical records.

In sum any claims for lack of informed consent, negligent hiring, or delay in diagnosing the ureteral injury are dismissed. Plaintiff has failed to raise issues of fact sufficient to defeat movant's showing of entitlement to summary judgment with regard to those claims or have failed to show that any delay in diagnosing the injury caused or contributed to it or changed the prognosis. The claim for malpractice in failing to intra operatively examine the left ureter remains as plaintiff has raised a question of fact as to whether it was within the standard of care to check for injury to the ureter during the C-section.

So ordered.

Dated: *August 21, 2015*

A handwritten signature in black ink, appearing to read "Douglas E. McKeon", written over a horizontal line.

Douglas E. McKeon, J.S.C.