SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL PART: 50**

DEBRA KEEVAN and EDWARD KEEVAN,

INDEX NO.:8357/03

Plaintiff,

MOTION DATE:3-6-06

-against- **SUBMIT DATE: 4-20-06**

SEQ. NUMBER - 007

TERRY RIFKIN, M.D., MICHAEL NIMAROFF, M.D., VICTOR KLEIN, M.D., ANITA SADATY, M.D., GREAT NECK OBSTETRIC AND GYNECOLOGY, P.C., NORTH SHORE UNIVERSITY HOSPITAL and SUSAN MALONEY, M.D.,

Defendants

----------x

The following papers have been read on this motion:

Notice of Motion, dated 2-13-06..... 1
Affirmation in Opposition, dated 3-27-06..... 2
Physician's affirmation, dated 3-9-06.....3
Reply Affirmation, dated 4-14-06.....4

Upon the foregoing papers it is ordered that this motion by the defendants Terry Rifkin, M.D. and Great Neck Obstetric & Gynecology, P.C. pursuant to CPLR 3212 for summary judgment is granted and the complaint is dismissed as against these defendants.

In this medical malpractice action, the plaintiff Debra Keevan alleges that she was

injured, *inter alia*, as a result of the negligence of defendant Terry Rivkin, M.D., in that he failed to diagnose the presence of a blood condition that can and did lead to excessive bleeding, and failed to account for the same in her care and treatment. Dr. Rivkin and his practice group, defendant Great Neck Obstetric & Gynecology, P.C., move for summary judgment on the ground that any departures from good and accepted medical practice were not the proximate cause of her several claimed injuries, including a hysterectomy leading to sterility. All are related to the bleeding that nearly cost the plaintiff her life. [1]

Initially, the Court must reject a procedural argument made by the plaintiffs. Contrary to their claim, the defendants' summary judgment motion is timely. The fact that it was made beyond the time specified in an initial certification order is of no moment, as this order was stricken by the Court. The time period therefore runs not from that order, but from the new date set in a subsequent certification order, under which date this motion was timely made (*see, Kampf v Bank of New York,* 259 AD2d 439 [1999]).

Turning to the merits, the facts relevant to this motion are not disputed. Plaintiff Debra Keevan, pregnant with twins, was a patient of Dr. Rifkin's and the practice group in July of 2002. On July 15, blood was drawn at the group's office. The result revealed an elevated partial thromboplastin time ("PTT"), which is a measure of the clotting time for blood plasma. The plaintiff was seen again on July 17 by Dr. Rifkin, who ordered another PTT test to ascertain whether the first result was the result of a laboratory error. No further

---

[1] Related allegations also concern neurological damage causing a "foot drop," which is directed primarily to defendant North Shore University Hospital. By order dated February 17, 2005, the Court (Covello, J.) denied this party's motion for summary judgment.

action concerning the test was taken by this defendant, who sent the plaintiff home.

Early the next morning, July 18, the plaintiff went into labor and experienced a spontaneous rupture of her membranes. She was admitted to North Shore University Hospital. Dr. Rivkin there performed a Caesarian section and delivered the twins. He did not consider the procedure to have been performed on an emergency basis, however. Dr. Rivkin again took no additional action as a result of the PTT test, including, among other possible actions, informing the anesthesiologist of the elevated number. [2] Nevertheless, it should be noted at this juncture that the plaintiffs have not asserted that the delivery by Caesarian section was itself inappropriate under the circumstances, or that delivery could have been delayed beyond July 18.

The second PTT test number that resulted from the blood taken on July 17 was also elevated. The reason was that the plaintiff's blood contained Acquired Factor VIII Inhibitor ("Factor VIII inhibitor"), an antibody which breaks the chain in blood chemistry needed to permit normal clotting. Untreated, this can cause unstoppable bleeding.

The morning after the delivery, July 19, 2002, a complete blood count (CBC) revealed that the proportion of the blood that consists of packed red blood cells (hematocrit), and the oxygen-bearing blood component, hemoglobin, were critically low, indicating the bleeding that was in fact occurring. A hematology consultation was requested on that day (apparently by another member of the practice group), and a physician in that specialty suspected the

---

[2] The anesthesiologist himself noted the PTT reading on the chart, and on that basis administered a general anesthetic instead of an epidural injection into the spine, which plaintiffs contend would have led to paralysis.

presence of the Factor VIII inhibitor. The patient began to receive blood products and blood component therapy. On July 22, Factor VIII inhibitor was confirmed by subsequent test, and the hematologist ordered the administration of the drug Solumedrol, a steriod which is intended to suppress the body's production of the Factor VIII inhibitor, and another drug, FactorVIII Inhibitor Bypassing Activity ("FEIBA"). Notwithstanding the administration of these drugs, the plaintiff continued to bleed through July 25.

On that date, and with other hematologists now involved, the drug NovoSeven was substituted for FEIBA, and the Solumedrol was dropped in favor of intravenous immunoglobulin. Nevertheless, the plaintiff continued to bleed. On July 26, with plaintiff's condition now grave, Solumedrol was resumed and the drug Amicar was started; it functions by preventing clots from dissolving, and its use places a patient at risk for pulmonary embolism, stroke, myocardial infarction and death. Not surprisingly, it is not disputed that in 2002 this drug was not considered to be first-line therapy for a patient with Factor VIII inhibitor. Serious bleeding continued until July 31, when it finally diminished and stopped sometime between August 2 and 3, some twelve or thirteen days after treatment for the Factor VIII inhibitor began, and some fifteen or sixteen days after administration of blood products were begun.

However, the Factor VIII antibodies were noted to persist, and to destroy them the drug Rituxan was ordered, a drug normally associated with the treatment of cancer, with the first dose being administered on August 3. Finally, on August 4, it was recorded that the plaintiff no longer required blood transfusions. On August 9, she received another dose of Rituxan, and continued to receive some of the other drugs noted above. She was discharged

on August 16 after a third dose of Rituxan.

The movants do not attempt to demonstrate that there were no departures from good and accepted medical practice, but rather focus on proximate cause, asserting, in effect, that any failure by them to respond appropriately to the PTT test, diagnose and then act on the presence of Factor VIII inhibitor immediately were not substantial factors in causing the damages alleged. Accordingly, the Court need not and will rule on whether an issue of fact exists with regard to such departures, and they will be assumed for purposes of this application.

In support of the motion, these defendants submit, *inter alia,* the affidavit of Richard Hirschman, M.D., Board Certified in Internal Medicine, with sub-certifications in Hematology and Medical Oncology. He states that the plaintiffs contend that in view of the PTT number Rifkin should have obtained an immediate consultation on July 17, and notes that the plaintiffs claim that this would have led to the commencement of treatment for the Factor VIII inhibitor on July 17 or 18, with NovoSeven, steriods and Rituxan.

Dr. Hirschman acknowledges that in 2002, as well as today, that the standard of care for a patient with Factor VIII inhibitor was to involve a physician certified in Internal Medicine with a sub-certification in Hematology, and to commence treatment upon its diagnosis. Upon a stated review of the relevant medical records and the record of the present action, and by specific references to and explanations thereof, he opines, within a reasonable degree of medical certainty, that the treatment begun on July 22, 2002 and described above comported with good and accepted medical treatment.

More important to the present movants, he also opines, within a reasonable degree of

medical certainty, that even if Factor VIII inhibitor had been diagnosed on July 17, the treatment described above would not have been different. The outcome for the plaintiff would have been the same. Her damages were caused by the bleeding, and that bleeding would have continued notwithstanding the treatment she received, as is borne out by the medical record to which Dr. Hirschman refers. Accordingly, the Court finds that the moving defendants have made a *prima facie* showing of their entitlement to judgment as a matter of law. They have submitted by proof in admissible form that the defendants' conduct was not a proximate cause/substantial factor in causing the injuries alleged, which is essential to make out a case in medical malpractice (*Jonassen v Staten Is. Univ. Hosp.*, 22 AD3d 805 [2005]; *Raymundo v Westchester Cty. Med. Ctr.*, 292 AD2d 437 [2002]; *Davenport v County of Nassau,* 279 AD2d 497 [2001]; *Prete v Rafla-Demetrious*, 224 AD2d 674 [1996]; *Fritz v Southside Hosp.*, 182 AD2d 671 [1992]; *Ferrara v South Shore Orthopedic Assocs.*, 178 AD2d 364 [1991]). The burden therefore shifts to the plaintiffs to demonstrate that questions of fact exist concerning the issue of proximate cause meriting a trial (*see, e.g., Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

As a preliminary matter, the Court notes that it has accepted and considered the opposing medical expert submitted by the plaintiffs, [3] notwithstanding the defendants' objection thereto. While there is no Board sub-certification in hematology claimed by the expert, the expert is Board Certified in Internal Medicine – the same certification held by the

---

[3] The name and signature of the expert were redacted in the copy served upon the defendants, but the original, signed by the affirmant, has been provided to the Court and thus has been considered (*see, Vega v Mount Sinai-NYU Med. Ctr. Health Sys.*, 13 AD3d 62 [2004]). It has been sealed so that a review of the court file will not lead to disclosure of the expert's identity.

defendants' expert – and has treated patients with bleeding disorders, including those with Factor VIII inhibitor disorders. In this Court's view, that is sufficient for purposes of finding that the expert's opinion is reliable and that no additional foundation is needed (*see generally, Bossio v Fiorillo,* 210 AD2d 836 [1994] (defendants' criticism of the physician's expertise is jury matter); *cf., Behar v Coren,* 21 AD3d 1045 [2005] (pathologist not qualified to render opinion regarding surgical and gastrointestinal treatment administered to infant patient)).

Nevertheless, the Court agrees with the moving defendants that the plaintiffs' expert has failed to raise an issue of fact with regard to proximate cause. As noted earlier, for purposes of this motion the Court assumes a departure from good and accepted medical practice because the defendants have not based this motion on a claim that no such departure occurred. Accordingly, those portions of the plaintiffs' expert's affirmation that have to do with the defendants' negligence (*inter alia,* failing to act promptly on the PTT reading, not informing the anesthesiologist before a proposed administration of an epidural injection into the base of the spine, failing to call in a hematologist to see the patient until after the delivery, and, in general, failing to allow for an opportunity for diagnosis of Factor VIII inhibitor and commencement of immediate treatment) cannot serve to defeat this motion, except to the extent that plaintiffs can show that one or more of these alleged departures was a substantial factor in causing Debra Keevan's injuries.

In that regard, the expert does not take issue with the defendants' showing that the care and treatment rendered to the patient by the hematologists, first called in on July 19, 2002, was appropriate. The expert also does not state that Dr. Rifkin himself should have

commenced treatment of the patient based on the first PTT result he saw on July 17, as opposed to calling in a hematologist on an emergency basis (Ptf. Expert Aff., at 5). Nor, as described above, do the plaintiffs or their expert assert that a Caesarian section should not have been performed at all on July 18.

Therefore, the question becomes whether there is any demonstration that had a hematologist been called in on July 17 and a diagnosis of Factor VIII inhibitor made, the outcome would have been different. That showing has not been made. Although the plaintiffs' expert states that by July 19, "precious time had been lost" (Ptf. Expert Aff., at 7), the expert never explains how or in what manner any of the blood therapies the expert describes would have reduced the volume or chronology of Debra Keevan's bleeding if they been started on July 17, which as described above went on for some two weeks. Merely stating, for example, that had the therapies been started earlier "her medical course would have been significantly different in that she would not have required the embolization of her iliac artery... [and] the supracervical hysterectomy thereafter performed due to the failure of the embolization to stop her bleeding" (Pltf. Expert Aff., at 8) does not amount to such an explanation. This may explain how the bleeding caused the injuries, but it does not address the key question of whether the two-day delay in commencement of treatment by a hematologist made a significant difference in the progress of the bleeding itself.

Put somewhat differently, the expert does not provide a medical explanation as to how the loss of these days caused the unfortunate outcomes described in the complaint or bill of particulars. Consequently, the Court must find that the expert's conclusion that "early and timely diagnosis and treatment of the acquired Factor VIII deficiency suffered by DEBRA

KEEVAN would have allowed her a significant opportunity to avoid the hemorrhagic complications suffered, the treatments required for same and the complications of said treatments..." (Ptf. Expert Aff., at 9) is unsupported by specific explanations and the record as a whole, and is insufficient to meet the defendants' *prima facie* showing (*see, Rodriguez v Montefiore Med. Ctr.*,_ AD3d_, 2006 NY Slip Op 02992, 2006 WL 1028845 [2006]; *Wicksman v Nassau County Health Care Corp.*, _AD3d_, 811 NYS2d 778 [2006]; *Bullard v St. Barnabas Hosp.*, _AD3d_, 810 NYS2d 78 [2006]).

Accordingly, the motion is granted.

This shall constitute the Decision and Order of this Court

ENTER

DATED: May 1, 2006

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Sullivan, Papain, Block
McGrath & Cannavo, P.C.
Attorneys for Plaintiffs
55 Mineola Boulevard
Mineola, NY 11501

ENTERED
MAY 04 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Martin Clearwater & Bell, LLP
By: Thoms Kraczynski
Attorneys for Defendants
Terry Rifkin, M.D. and Great Neck Obstetric and Gynecology, P.C.
90 Merrick Avenue, Ste. 610
East Meadow, NY 11554

Heidell, Pittoni, Murphy & Bach
Attorneys for Defendant
North Shore University Hospital
99 Park Avenue
New York, New York 10016