NO: LLI-CV-24-6035314-S : SUPERIOR COURT

SHAUNA CRUZ, ADMINSTRATRIX OF THE ESTATE OF AAMORIA CRUZ ET AL : J.D. OF LITCHFIELD

V. : AT TORRINGTON

HARTFORD HEALTHCARE CORPORATION ET AL : JUNE 12, 2024

OFFICE OF THE CLERK SUPERIOR COURT
2024 JUN 13 A 9:17
JUDICIAL DISTRICT OF LITCHFIELD
STATE OF CONNECTICUT

MEMORANDUM OF DECISION

The plaintiffs commenced the instant action by way of summons and complaint against Hartford Healthcare Corporation, the Charlotte Hungerford Hospital, Neal Mandell, M.D., Physicians for Women's Health, LLC d/b/a Litchfield County OB/GYN, and Corey Teagarden, M.D. (the defendants). The defendant Neal Mandell, M.D. (Dr. Mandell) moves to dismiss the claims against him. For the following reasons his motion is granted.

For purposes of the defendants' motion to dismiss, the court assumes the truth of the following allegations made by the plaintiffs in their complaint.

FACTS

On December 18, 2021, the plaintiff Shauna Cruz, who was approximately twenty-eight weeks pregnant, arrived at the Emergency Department at the Charlotte Hungerford Hospital, reporting abdominal discomfort and vaginal bleeding. Ms. Cruz's blood pressure was 159/120 at 5:58 a.m. and she was transferred to labor and delivery, arriving on the unit at 6:12 a.m. A repeat blood pressure was taken and recorded at 139/79 at 6:24 a.m. Per report, Ms. Cruz was monitored for an hour and a half, and the fetal heart rate was in the 120s with acceleration to the 130s. Abruption labs were sent, and a fibrinogen level was later normal at 349.

AC 6/13/24 • JDNO sent 108.10

At 7:47 a.m., Ms. Cruz reported two episodes of diarrhea and vomiting and at 7:52 a.m. she reported sharp cramping in her lower abdomen. Ms. Cruz was sent off the unit to the Radiology Department at 7:55 a.m. for an obstetrical ultrasound to assess the fetus and placenta.

During Ms. Cruz's initial ultrasound, the fetal heart rate was documented to be 128 bpm. A subsequent scan found the fetus to be bradycardic to the 90s and steadily dropping. There were sonographic findings consistent with evolving placental abruption and Ms. Cruz was experiencing worsening abdominal pain.

Ms. Cruz was returned to the labor and delivery unit at 8:39 a.m. and Dr. Mandell notified Dr. Papov of the ultrasound findings and the fetal bradycardia at 8:40 a.m. Dr. Mashburn was simultaneously alerted and directed that Ms. Cruz be taken to the operating room (OR) for a possible emergency cesarean section. The neonatology and anesthesia teams were also paged STAT to the OR. At 9:01 a.m., Dr. Mashburn's ultrasound failed to demonstrate fetal heart tones. At 9:04 a.m., the OR staff called out to the front desk requesting the radiologist to report to the OR STAT. When Dr. Mandell and his equipment did not arrive, a second attempt was made to contact him at 9:14 a.m., a third attempt was made at 9:18 a.m., and at 9:24 a.m., Dr. Mandell arrived at the bedside. Dr. Mandell's ultrasound also showed no fetal cardiac activity thus confirming a fetal demise.

Ms. Cruz was informed by the defendants that the likely cause of death was placental abruption, and that, even had a timely caesarian delivery been performed, the chance of survival would have been almost zero. This is false. At twenty-eight weeks gestation, had Ms. Cruz's baby been properly monitored and timely delivered via emergency cesarean section, she would have had a 90 percent chance of survival or better. The final pathology report was later

consistent with placental abruption. The plaintiffs allege that Dr. Mandell was negligent in failing to communicate the bradycardia to Dr. Papov and the labor floor in a timely fashion.

Attached to the plaintiffs' complaint was a letter authored by a physician board certified in obstetrics and gynecology, who serves as the Director and Chief of Obstetrics and Gynecology Services at Optimus Healthcare (author). The author states that Dr. Mandell observed bradycardia either immediately before or during his ultrasound evaluation in radiology. The author further states that information regarding his observations were reported to the obstetrician within one minute of Ms. Cruz returning to the labor and delivery floor. The author states that Dr. Mashburn was unable to detect fetal heart tones and requested confirmation from a radiologist. The author also states that Dr. Mandell was called three times STAT yet took twenty minutes to arrive in the OR. The author then states "***[i]n the small chance*** that there was still cardiac activity not seen by Dr. Mashburn, the additional 20 minute delay ensured that this would be highly unlikely in this preterm fetus." (Emphasis added.). The author concludes "based on a reasonable degree of medical certainty, Dr. Mandell's critical delay in communicating the bradycardia to Dr. Papov and the labor floor in a timely fashion, as well as Dr. Papov's delay in being present and available to assess Ms. Cruz once the fetal bradycardia was detected resulted in cumulative delays which ultimately prevented life-saving measures from being performed by an emergency c-section, thus contributing to the untimely death of the fetus."

Dr. Mandell moves to dismiss under General Statutes § 52-190a arguing that the plaintiffs failed to attach a written expert opinion that meets the requirements of § 52-190a. For the following reasons, the court grants Dr. Mandell's motion.

DISCUSSION

A Motion to Dismiss for Failure to Attach an Adequate Opinion Letter

Under § 52-190a (c), the failure to obtain and file the certificate of good faith inquiry is grounds for the dismissal of a medical malpractice action.

Most recently, the Connecticut Supreme Court held that "the opinion letter requirement [as set forth in § 52-190a] is a unique, statutory procedural device that does not implicate the court's jurisdiction in any way. . . . [F]or purposes of the motion to dismiss pursuant to § 52-190a (c), the sufficiency of the opinion letter is to be determined solely on the basis of the allegations in the complaint and on the face of the opinion letter . . . ." *Carpenter* v. *Daar*, 346 Conn. 80, 87, 287 A.3d 1027 (2023).

"[T]he inquiry under § 52-190a is squarely and solely framed by the allegations in the complaint, rendering the only question at the motion to dismiss stage whether the author of the opinion letter is a similar health care provider to the defendant as their respective qualifications are pleaded in the complaint and described in the opinion letter." Id., 125.

General Statutes § 52-184c (c) provides in relevant part, "*[i]f the defendant health care provider . . . holds himself out as a specialist*, a 'similar health care provider' is one who . . . (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider.'" (Emphasis added.).

"In deciding a motion to dismiss . . . the court must take the facts alleged in the complaint, including facts necessarily implied from the allegations, and construe them in the light most favorable to the pleader." *Kelly* v. *Albertsen*, 114 Conn. App. 600, 605–06, 970 A.2d

787 (2009). "[P]leadings should be read broadly and realistically, rather than narrowly and technically . . . ." (Citation omitted; internal quotation marks omitted.) *Carpenter* v. *Daar*, supra, 346 Conn. 127. "[C]ourts do not interpret pleadings so to require the use of talismanic words and phrases." (Internal quotation marks omitted.) Id., 130.

"[T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Citations omitted; internal quotation marks omitted.) Id., 128–29.

However, "[w]hile the courts must take as true the facts alleged in the complaint, it cannot be aided by the assumption of any facts not therein alleged." *Bridgeport Garden Apartments, Inc.* v. *Hymans*, Superior Court, judicial district of Fairfield, Docket No. BRSP066198 (July 9, 2008, *Owens, J.T.R.*) (citing *Fraser* v. *Henninger*, 173 Conn. 52, 60, 376 A.2d 406 (1977)). "Although pleadings must be construed broadly and realistically, rather than narrowly and technically . . . this does not mean that we may read into the [pleadings] a prayer for relief or factual allegations that simply are not there. . . . The court should view the facts in a broad fashion . . . to include facts that are necessarily implied by and fairly provable by the allegations but . . . avoid enlarging the allegations of the complaint by assuming facts that are clearly not alleged." (Citations omitted; internal quotation marks omitted.) *Currin* v. *National*

NAACP, Superior Court, judicial district of Hartford, Docket No. CV-19-5061244-S (July 19, 2022, *Rosen, J.*).

1. That Portion of the Action Against Dr. Mendall Is Dismissed

There is a split of authority as to whether portions of a malpractice action as opposed to the entire action may be dismissed for an insufficient certificate of good faith inquiry under § 52-190a.

"The majority view of the judges of the Superior Court appears to be that § 52-190a authorizes only dismissal of the action not sections of it." (Internal quotation marks omitted.) *Recinos* v. *McCarthy*, Superior Court, judicial district of Waterbury, Docket No. CV-15-6028101-S (January 6, 2016, *Zemetis, J.*).

The minority view is that claims within a medical malpractice action may be dismissed if not supported by a proper opinion letter under § 52-190a. See *Jansone* v. *Hartford Hospital*, Superior Court, judicial district of Hartford, Docket No. CV-12-6030589-S (October 25, 2012, *Scholl, J.*) (dismissing vicarious liability count against hospital "to the extent it raises claims of medical negligence against health care providers who practice in specialties other than general surgery, orthopedic surgery and/or anesthesiology" where "[n]one of the parties have argued that procedurally such an order is inappropriate").

"This court agrees with this reasoning and concludes that it also is consistent with the Supreme Court's decision in *Carpenter* v. *Daar*, supra, 346 Conn. 80 to dismiss some, but not all, of the counts. As that case held, the dismissal prescribed by § 52-190a is a statutory device that . . . plays a nonjurisdictional, merits-related, gatekeeping function. . . . [I]t makes sense that some claims against an institutional defendant that are not supported by the necessary opinion letter may be dismissed while others go forward. Moreover, the decision to dismiss counts . . .

which are not supported by an opinion letter . . . is a merits-related, gatekeeping function." (Citation omitted; internal quotation marks omitted.) *Puzone* v. *Biggs*, Superior Court, judicial district of New Haven, Docket No. CV-22-6126997-S (July 3, 2023, *Stewart, J.*). In *Puzone*, the court dismissed three counts which were not supported by the opinion letter appended to the complaint.

At least one other court found that dismissing part of a claim was consistent with the nature and purpose of § 52-190a. "To conclude otherwise would be to countenance at least part of a claim that is asserted without reasonable inquiry to establish grounds for a good faith belief of medical negligence." (Internal quotation marks omitted.) *Castano* v. *Hartford Hospital*, Superior Court, judicial district of Hartford, Docket No. CV-19-6114198-S (February 24, 2020, *Noble, J.*). In *Castano*, the plaintiff brought a medical malpractice action against numerous health care providers, with nine or more individual providers being identified by name in the complaint. The court reviewed thirty-seven specific allegations of negligence in one paragraph of the first count and dismissed three sub-paragraphs that were "not addressed by the opinion letters." Id.

In *Castano*, the court noted that many if not most of the judges that held portions of a medical malpractice action could not be dismissed relied upon a 2007 decision, *Behling* v. *Aronow*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-06-5001692-S (March 12, 2007, *Adams J.*). However, "the court in *Behling* did not have the benefit of the Supreme Court's decision issued seven years later in *Wilkins* which clarified that a written opinion by a health care provider similar to that of a hospital employee for whose conduct the hospital is claimed to be vicariously liable is required by § 52-190a. Moreover, the reasoning in *Behling* would allow suit against several unassociated health care providers, all from different

disciplines, whose combined medical negligence was alleged to cause a plaintiff injury, upon the offering of a written opinion from a health care provider similar, as that term is defined in § 52-184c, to just one of the defendant health care providers. Neither the statute nor *Wilkins* provides for an exception to the written opinion letter requirement for health care providers whose medical negligence is not yet known. Such a result would frustrate the purpose of § 52-190a which is to inhibit a plaintiff from bringing an inadequately investigated cause of action . . . claiming negligence by a health care provider; *Wilcox* v. *Schwartz*, 119 Conn. App. 808, 813, 990 A.2d 366 (2010), aff'd, 303 Conn. 630, 37 A.3d 133 (2012); and, concurrently, prevent frivolous medical malpractice actions. *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 54, 12 A.3d 885 (2011)." (Internal quotation marks omitted.) *Castano* v. *Hartford Hospital*, supra, Superior Court, Docket No. CV-19-6114198-S.

Here, the court agrees with the minority view. That is an individual health care provider who has been sued, may move to dismiss the claims against him, for failure to attach a proper certificate of good faith inquiry, even if the plaintiff attaches an adequate certificate of good faith inquiry as to other defendants. Part of the matter may be dismissed. The entire case need not be subject to dismissal. To hold otherwise, would be to allow a plaintiff to sue multiple defendants in different medical specialties by attaching only one letter from one practitioner in one discrete medical specialty. This would frustrate the purpose of § 52-190a by allowing a plaintiff to bring an inadequately investigated cause of action against a health care provider.

2. The Author of the Opinion Letter Is Not a Similar Health Care Provider to Dr. Mendall

Because the opinion letter appended to the complaint is not from a physician in the same specialty as Dr. Mendall, the plaintiffs' claims against Dr. Mendall must be dismissed.

The medical professional signing a certification letter under §§ 52-190a and 52-184c (c) must practice or be board certified in the same specialty. *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 727, 104 A.3d 671 (2014).

In *Carpenter*, the plaintiff sued the defendant, a general dentist, alleging that he performed root canal surgery and had negligently failed to diagnosis and treat an infection in the plaintiff's tooth. *Carpenter* v. *Daar*, supra, 346 Conn. 88. "Pursuant to § 52-184c (c), the plaintiff further alleged that Daar [the defendant] held himself out as a specialist in endodontics on Shoreline's website by indicating that he had completed hundreds of hours of training in endodontics and by providing a general explanation of the nature of that dental specialty." Id. The plaintiff in *Carpenter* attached a letter from a licensed dentist who was board certified in endodontics. Id., 88–89. The defendants moved to dismiss arguing that the opinion letter was not from a similar health care provider, as the defendant was not a specialist in endodontics and did not hold himself out to be one. Id., 86–87. The trial court granted the defendants' motion to dismiss, and the appellate court affirmed. Id., 96. The Supreme Court reversed. Id., 88.

"[T]he inquiry under § 52-190a is squarely and solely framed by the allegations in the complaint, rendering the only question at the motion to dismiss stage whether the author of the opinion letter is a similar health care provider to the defendant as their respective qualifications are pleaded in the complaint and described in the opinion letter.

***

"[T]he plaintiff's claim [is that] . . . the contents of the complaint adequately allege that . . . Daar held himself out as a specialist endodontist . . . Solomon, a professor of endodontics, is a similar health care provider to an endodontic specialist. . . .We agree with the plaintiff and

conclude that a broad and realistic reading of the face of the complaint and opinion letter establishes their compliance with § 52-190a.

***

"Quoting from Shoreline's website in support of the allegation, the operative complaint alleges that Daar held himself out as a practitioner of [e]ndodontics, stating on [Shoreline's] website that he has completed hundreds of hours of training in [e]ndodontics. The complaint then states that Shoreline's website describes [e]ndodontics, in part, as . . . the dental specialty that deals with tissues and structures located inside the tooth and explains root canal therapy. A broad and realistic reading of the allegation that Daar held himself out as a practitioner in the specific field of endodontics, with the accompanying description of the field of endodontics and his extensive training in that field, triggers the applicability of § 52-184c (c) with respect to the selection of a similar health care provider to author the good faith opinion letter required by § 52-190a." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 125–29.

Here, the letter appended to the complaint is from a board-certified obstetrician and gynecologist. Unlike *Carpenter*, the plaintiffs have not alleged that Dr. Mendall held himself out as a board-certified obstetrician and gynecologist. Rather, the plaintiffs contend that Dr. Mendall was functioning "as part of the Labor and Delivery team during the events at issue, and his involvement consisted of taking an obstetrical ultrasound to assess the fetal heart rate."

In the letter appended to the complaint, the board-certified obstetrician and gynecologist opines that Dr. Mandell observed bradycardia either immediately before or during his ultrasound evaluation in radiology. The author further states that information regarding his observations were reported to the obstetrician within one minute of Ms. Cruz returning to the labor and delivery floor. The author states that Dr. Mashburn was unable to detect fetal heart tones and

requested confirmation from a radiologist. The author also states that Dr. Mandell was called three times STAT yet took twenty minutes to arrive in the OR. The author then states "***[i]n the small chance that there was still cardiac activity*** not seen by Dr. Mashburn, the additional 20 minute delay ensured that this would be highly unlikely in this preterm fetus." (Emphasis added.). The author concludes "based on a reasonable degree of medical certainty, Dr. Mandell's critical delay in communicating the bradycardia to Dr. Papov and the labor floor in a timely fashion, as well as Dr. Papov's delay in being present and available to assess Ms. Cruz once the fetal bradycardia was detected resulted in cumulative delays which ultimately prevented life-saving measures from being performed by an emergency c-section, thus contributing to the untimely death of the fetus."

Dr. Mendall is alleged to be a radiologist, not an obstetrician and gynecologist. Allegations that Dr. Mendall was part of the labor and delivery "team" does not save the plaintiffs' claims against Dr. Mendall from dismissal here because there is no opinion letter from a radiologist. The plaintiffs have not cited, and counsel conceded at oral argument he cannot cite a case holding that a certificate from a physician in one specialty may be used to support a claim against a physician in a completely different specialty. Indeed, the plain language of §§ 52-190a (a) and 52-184c (b) provides otherwise. A similar health care provider is certified, trained, and experienced in the same specialty or same discipline. Here, it is undisputed that Dr. Mendall is in a different specialty (radiology) from the author of the opinion letter (obstetrics and gynecology). Thus, the court does not find that the letter attached to the complaint is from a similar health care provider as the defendant, pursuant to § 52-184c (c). Accordingly, this court has no choice but to dismiss the claims brought against Dr. Mendall under § 52-190a (c).

3. The Plaintiffs' Claims Against Dr. Mendall Necessarily Required an Opinion Letter

The plaintiffs next claim that no expert testimony is needed for their claims that Dr. Mendall's delay contributed to the fetus' demise. However, the length of time to complete a proper ultrasound examination is not a matter so clear and obvious as to obviate the necessity of an expert opinion at all.

"Generally, the plaintiff must present expert testimony in support of a medical malpractice claim because the requirements for proper medical diagnosis and treatment are not within the common knowledge of laypersons. . . . An exception to the general rule [requiring] expert medical opinion evidence . . . is when the medical condition is obvious or common in everyday life. . . . Similarly, expert opinion may not be necessary as to causation of an injury or illness if the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief. . . . Expert opinion may also be excused in those cases where the professional negligence is so gross as to be clear even to a lay person. . . .

"[I]t is clear that the plaintiff's allegations of negligence do not rise to the level of the kind of obvious and egregious violation of an established standard of care . . . that Connecticut courts have considered to be gross negligence, requiring no expert testimony. . . . (needle found in patient after hernia operation) . . . (needle left in patient after delivery of child) . . . (lacerations to patient's leg in removal of cast) . . . (piece of surgical instrument left in patient after nasal operation) . . . (human tissue clearly labeled For Investigational Use Only and Laboratory Sample—For Testing Only was grafted upon decedent) . . . (chiropractor, not licensed to issue prescriptions, prescribed medication not approved by Federal Drug Administration to decedent, who was undergoing cancer treatment) . . . ." (Citations omitted; internal quotation marks

omitted.) *Dimmock* v. *Lawrence & Memorial Hospital, Inc.*, 286 Conn. 789, 813–14, 945 A.2d 955 (2008).

Here, the length of time it took Dr. Mendall to complete his ultrasound examination of Ms. Cruz in the Radiology Department was not such an obvious and egregious violation of an established standard of care that no expert witness was required.

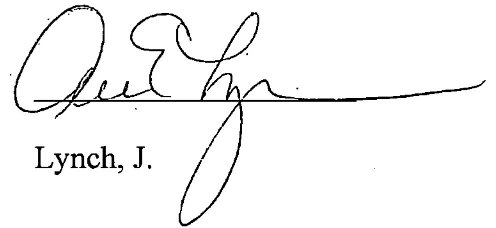
Moreover, to prevail upon their medical malpractice claim, the plaintiffs must establish that the defendant's alleged negligent conduct was a cause in fact and the proximate cause of the decedent's injuries and death. See, e.g., *Poulin* v. *Yasner*, 64 Conn. App. 730, 735, 781 A.2d 422, cert. denied, 258 Conn. 911, 782 A.2d 1245 (2001). "The test for cause in fact is [w]ould the injury have occurred were it not for [the defendant's] negligent . . . conduct . . . ? . . . Proximate cause is defined as [a]n actual cause that is a substantial factor in the resulting harm . . . . The substantial factor test, in truth, reflects the inquiry fundamental to all proximate cause questions; that is, whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence." (Citations omitted; internal quotation marks omitted.) *Purzycki* v. *Fairfield*, 244 Conn. 101, 113, 708 A.2d 937 (1998), overruled on other grounds by *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014).

A review of the author's opinion letter establishes that the plaintiffs have no expert opinion in this regard. That is the author himself/herself states that Dr. Mendall reported that the fetus was bradycardic within one minute of returning Ms. Cruz to the labor and delivery unit. To the extent the plaintiffs claim Dr. Mendall was negligent in taking twenty minutes to respond to the OR, the author himself/herself indicates that it was unlikely that the fetus still had cardiac activity. Thus, the plaintiffs have no expert opinion that the purported delays caused the fetus' demise.

Similarly, it is not so obvious or apparent that Dr. Mendall's twenty-minute delay in responding to the OR caused the fetus' death such that no expert opinion is needed. Because the plaintiffs have not disclosed a board-certified radiologist to opine that Dr. Mendall violated the standard of care and his alleged violations are not so obvious or apparent such that no expert opinion is needed, the claims against Dr. Mendall are not supported under §§ 52-190a and 52-184c and should be dismissed.

CONCLUSION

Wherefore all the foregoing reasons, the court grants Dr. Mendall's motion to dismiss.



Lynch, J.