

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
C.A. NO. 07-00909(H)

JENNIFER RAPER

Plaintiff,

vs.

PLANNED PARENTHOOD
LEAGUE OF MASSACHUSETTS,
INC., and ALLISON
BRYANT, M.D.

Defendants

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**JOINT PRE-TRIAL
MEMORANDUM**

I. AGREED UPON FACTS

- A. The Plaintiff, Jennifer Raper, a 42 year old mother of four presented to Planned Parenthood League of Massachusetts, Inc., on April 9, 2004 for a termination of her pregnancy.
- B. The defendant, Allison Bryant, M.D., was at all times relevant to the allegations in this case, a physician licensed to practice medicine in the Commonwealth of Massachusetts.

II. STATEMENT OF THE PARTIES

A. PLAINTIFF'S POSITION

The plaintiff expects the evidence will show that the defendants departed from acceptable standards of medical care in failing to properly perform an abortion on April 9, 2004 which caused an unwanted pregnancy to continue which resulted in a wrongful birth.

B. DEFENDANTS' POSITION

The Defendants deny plaintiff's allegations of negligence in the medical care and treatment that Dr. Bryant delivered to Ms. Raper on April 9, 2004. Planned Parenthood League of Massachusetts, Inc., expects the evidence will show that its policies and procedures with respect to first trimester abortions complied with state and federal regulations. In addition, Dr. Bryant contends that the care and treatment that she delivered to Ms. Raper on April 9, 2004 complied with the standard of care expected of the average qualified obstetrician/ gynecologist, and that nothing she did or failed to do caused or contributed to any injury to Jennifer Raper.

In brief, Dr. Bryant is a physician licensed to practice in Massachusetts, board certified in obstetrics and gynecology. In 2004, Dr. Bryant was a fellow in maternal fetal medicine at Brigham & Women's Hospital. She had performed abortions at Brigham & Women's Hospital. In April 2004, she was working as a per diem physician at Planned Parenthood League of Massachusetts, Inc., and performing abortions. The evidence will show that the treatment she delivered to Jennifer Raper on April 9, 2004, fully complied with the applicable standard of care at the time and under the circumstances. Indeed, Dr. Bryant's actions are fully supported by defense expert, Dr. Delli-Bovi, who will testify at trial.

The evidence will show that not only did Dr. Bryant comply with the standard of care, but that nothing she did or failed to do caused any compensable harm to Jennifer Raper. The evidence will show that Jennifer Raper, forty-two years old at the time, and mother of four, with an obstetrical history of multiple prior abortions and one miscarriage, presented to Planned Parenthood League of Massachusetts, Inc., on April 9,

2004, requesting that her tenth pregnancy be terminated. She signed a "First Trimester Abortion Consent" form from the Massachusetts Department of Public Health, which indicated among other things, the risk of a continued pregnancy. She also signed Planned Parenthood's Request for the Provision of Surgery or Other Special Services/Procedures and a Request for the Provision of Medical Services, both of which indicate that she had been given information about the risks and benefits of the procedure. Ms. Raper read the paperwork prior to having the abortion performed. While at Planned Parenthood, Ms. Raper was given adequate time to read the consent form and she did not ask any questions prior to the procedure.

The Defendants expect the evidence will show that prior to the abortion, an ultrasound was performed on Ms. Raper. Dr. Bryant reviewed both the report and the images, prior to performing the procedure. After she gave a cervical block and dilation, Dr. Bryant introduced a suction tip catheter. After gross examination of the tissue, Dr. Bryant requested another ultrasound for incomplete tissue. Although Dr. Bryant does not recall the procedure that she performed on Ms. Raper, based on her usual and customary practice and her review of the records, Dr. Bryant is expected to testify to what she did during Ms. Raper's abortion procedure on April 9, 2004. In examining the products of conception after the termination of six weeks, Dr. Bryant looked for the presence of chorionic villi, gestational sac, and decidua tissue. She then did a repeat pass with the curette and removed additional tissue. Ms. Raper recalled two passes with the suction catheter. Dr. Bryant again examined the tissue under a back light, in a specimen dish filled with water. Dr. Bryant performed a gross tissue examination and documented that she had identified decidua, chorionic villi, and gestational sac, consistent with Planned

Parenthood's written policy. The volume of aspiration correlated with the gestational age.

Further, the Defendants expect the evidence will be that Ms. Raper spoke with someone at Planned Parenthood after the procedure about the necessity for follow up and indicated that she would be returning to her own provider for her post-procedure follow-up. She further understood the importance of a follow up visit, and signed a form indicating that she was aware of and understood the discharge instructions. Ms. Raper was then discharged from Planned Parenthood League fo Massachusetts, Inc., after receiving an injection of Depo-Provera and Plan B with refills. She understood that the shot of Depo-Provera was good for three months.

The evidence will show that on May 14, 2004 Ms. Raper presented to Mattapan Community Health Center for her post-abortion follow up. Ms. Raper informed both the staff and Dr. Eleonu that she had had an abortion on April 9, 2004, and was there for a follow up visit. Dr. Eleonu is a board certified obstetrician/gynecologist, who trained at Boston City Hospital. Ms. Raper was told it was too soon prior [sic] to the abortion and that she should return in four to six weeks. No post-procedure check was performed. No vaginal examination was performed. No urine testing was done. Ms. Raper was eleven weeks pregnant at that time. Ms. Raper did not call Planned Parenthood or Dr. Bryant after this visit or at any other time after April 9, 2004.

Ms. Raper returned to the Mattapan Community Health Center a "couple weeks later" in June, but doesn't recall whether a vaginal examination was performed at that time. On July 16, 2004, Ms. Raper returned to MCHC for an annual check up and "family planning" visit. Although the uterus was described as normal, average in size,

The defendants deny that they were negligent in any way and further maintain that the medical care and treatment rendered by them was appropriate and consistent with the standard of care expected of the average qualified gynecologist. The defendants further maintain that there was nothing they did or allegedly failed to do that caused or contributed to the plaintiff's pregnancy to continue.

B. DEFENDANTS' DESCRIPTION

This is a medical malpractice action in which the plaintiff, Jennifer Raper, alleges that the Defendants, Allison Bryant, M.D., and Planned Parenthood League of Massachusetts, inc., were negligent in their care and treatment of Ms. Raper on April 9, 2004 in failing to perform a first trimester abortion. The plaintiff further alleges that as a direct result of the Defendants' departures from the standard of care, Ms. Raper had an unwanted pregnancy and delivered a healthy baby girl on December 7, 2004.

The Defendants deny that they were negligent or that any agents or employees of Planned Parenthood League of Massachusetts, Inc., were negligent in their care and treatment of Ms. Raper. The Defendants assert that the care and treatment of Ms. Raper complied with the requisite standard of care at all times and state and federal regulations, and that nothing they did or failed to do caused Ms. Raper any harm or injuries.

IV. LEGAL ISSUES

The Plaintiff is not aware of any unusual legal issues at this time. However, she reserves the right to bring any such issues to the Court's attention prior to trial.

The Defendants maintain Dr. Laser's expected testimony fails to meet the standard for relevance and reliability set forth in Daubert v. Merrill Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993), Commonwealth v. Lanigan, 419 Mass. 15 (1994), and Canavan's Case, 432 Mass. 304 (2000), and therefore is inadmissible. The defendants expect to file a motion to preclude Dr. Laser's opinions on the grounds there is no scientific evidence in the medical literature to support his opinions.

V. WITNESSES

A. PLAINTIFFS' WITNESSES

1. Jennifer Raper
25 Vera Street
Dorchester, MA 02129
2. Allison Bryant, M.D.
San Francisco, CA 94110
3. Joseph Braunstein, Esq.
Riemer/Braunstein
Three Center Plaza
Boston, MA 02108
4. Mark Laser, M.D.
999 Silver Lane, Suite 2A
Trumble, CT 06611
5. Dana Hewins, PhD
Lakeville, MA

In addition, the Plaintiff reserves the right to call any health care provider who treated Jennifer Raper and reserves the right to call any non-expert witnesses named by the Defendants. The Plaintiff further reserves the right to supplement this list prior to trial.

B. DEFENDANTS' WITNESSES

1. Allison Bryant, M.D.
Lexington, MA
2. Jill Bresky
Cambridge, MA
3. Theresa Roberts, RN
Jamaica Plain, MA

4. Pamela Wallace
5. Benjamin Eleonu, M.D.
Mattapan Community Health Center
6. Anne Dixon, M.D.
Boston, MA
7. Linda Howard, R.N.
Framingham, MA
8. Paula Rockwood, R.N.
Cambridge, MA
9. Pam Longtin, R.N.
Braintree, MA

The Defendants reserve the right to call any and all witnesses identified by the Plaintiff in the Pre-Trial Memorandum. In addition, the Defendants reserve the right to call any health care professional, including physicians, health care providers, therapists, counselors, whose identity is contained in the medical records of Plaintiff as a witness at trial. The Defendants also reserve the right to call witnesses not listed, in rebuttal to Plaintiff's witnesses, and to seasonably supplement this list either before or during trial.

VI. EXPERT WITNESSES

A. PLAINTIFFS' EXPERTS

1. Mark R. Laser, M.D.

Dr. Laser is a physician who holds board certification in the field of Obstetrics and Gynecology. He is currently an OB/GYN physician and founding member of Women's Health Care in Bridgeport, CT.

Dr. Laser is familiar with the standard of care with respect to the performance of abortions in female patients such as Jennifer Raper in April of 2004.

Dr. Laser is expected to testify in accordance with the opinions he set forth in his opinion letter to the medical tribunal dated August 30, 2007. In addition, Dr. Laser is expected to testify on Ms. Raper's pre-natal course following her discharge from Planned Parenthood on April 9, 2004. He is further expected to testify that following the patient's unsuccessful abortion, she was given a contraception shot, Depo-Provera. That one of the side effects of Depo-Provera is amenorrhea. (no period)

Dr. Laser's opinions are based on his review of the medical records of Jennifer Raper, along with other discovery as well as his education, training and experience in the field of internal medicine.

2. Dana Hewins, Ph.D.

Dr. Hewins is an economist who is expected to set forth the cost, in present terms, of the custodial care Jennifer Raper must provide to her daughter, Jada, who was born on 12/7/04.

The economic report of Dr. Hewins has not as yet been prepared, but as soon as it is received by plaintiff's counsel, a copy will be forwarded to counsel for the defendants.

B. DEFENDANTS' EXPERT

Laurent C. Delli-Bovi, M.D.
Brookline, MA

Dr. Delli-Bovi is a practicing obstetrician/gynecologist in Brookline, Massachusetts. She obtained her medical degree from Pennsylvania State University College of Medicine in 1976 and then did a Residency training in obstetrics and gynecology at Brigham & Women's Hospital. She is licensed to practice medicine in the Commonwealth of Massachusetts. Throughout her professional career, her practice has included the provision of abortion services as part of the comprehensive obstetric and gynecological services offered to women from adolescence to women in their 80's and 90's.

Dr. Delli-Bovi is expected to testify based on her review of the records and pleadings in Jennifer Raper's medical malpractice action against Planned Parenthood League of Massachusetts, Inc., (Planned Parenthood) and Allison Bryant, M.D. Dr. Delli-Bovi reviewed pertinent policies and procedures of Planned Parenthood with respect to the provision of first trimester abortions. Dr. Delli-Bovi further reviewed the expert designations, deposition testimony, pertinent state and federal regulations, and medical literature with respect to first trimester abortions. eAll of her testimony is expected to be to a degree of medical certainty.

Dr. Delli-Bovi is expected to testify that Dr. Bryant complied with the standard of care of the average qualified obstetrician/gynecologist in April 2004 when she performed the first trimester abortion for Ms. Raper. Dr. Delli-Bovi is expected to testify that in her opinion, and to a reasonable degree of medical certainty, nothing that Dr. Bryant did, or failed to do, caused Ms. Raper's alleged injuries.

More specifically, Dr. Delli-Bovi is expected to testify regarding abortions in general and more specifically with respect to first trimester abortions. She may testify with respect to how a pregnancy is dated and how an abortion procedure is performed. She will testify based on her education, training and experience as an obstetrician/gynecologist who has performed abortions in out-patient settings. Dr. Delli-Bovi is expected to testify based on her knowledge and understanding of the standard of care concerning gross tissue examinations by reproductive health clinics in Massachusetts in 2004, the medical literature regarding the risks of first trimester abortions, and the medical and scientific literature concerning the examination of fresh tissue aspirate by the obstetrical surgeon after surgical abortions compared to the examination of tissue aspirate by outside pathologists.

Dr. Delli-Bovi is expected to testify that a first trimester abortion is defined as an abortion performed at 6.0 weeks up to 11 weeks six days after the last menstrual period. According to the report from Ms. Raper of her last menstrual period and by ultrasound, Ms. Raper's pregnancy was 6 weeks and three days gestation on April 9, 2004. She had a first trimester abortion performed that day. She is further expected to testify that one of the well recognized risks of first trimester abortions is that of a continued pregnancy. The risk is rare, but the risk of a continued pregnancy is acknowledged in the medical literature and is included in the Massachusetts Department of Public Health First Trimester Abortion Consent Form, both of which were given to Ms. Raper and signed by her on April 9, 2004.

Dr. Delli-Bovi is expected to testify that the medical literature has shown that inspection of the fresh tissue aspirate after surgical abortion helps to reduce morbidity cause by failed or incomplete abortion and may lead to early diagnosis of ectopic pregnancy. She may testify regarding the American College of Obstetricians and Gynecologists standards published in 1989, recommending immediate postoperative tissue examination after surgical abortion. She may be expected to testify that based on clinical studies in the medical literature, Planned Parenthood received a waiver from the Massachusetts Department of Public Health in June 2003, allowing a gross examination

of all tissue specimens to be performed by the clinician who performed the procedure before the patient left the facility. The findings were to be recorded in the chart, as they was done by Dr. Bryant.

Dr. Delli-Bovi is expected to testify regarding the clinical guidelines of Planned Parenthood League of Massachusetts, Inc., and that those guidelines require the clinician to examine the tissue by flotation in water and inspected, preferably by utilization of back lighting. The tissue evaluation of first trimester abortal tissue is considered to be complete if the clinician identifies deciduas, chorionic villi and a sac, and the volume of aspirated tissue correlates with the estimated gestational age.

Based on her education, training and experience Dr. Delli-Bovi is expected to testify that the clinical guidelines of Planned Parenthood League of Massachusetts, Inc., are consistent with those followed by pathologists in laboratories. Further, Dr. Delli-Bovi is expected to testify that, based on her education, training and experience, the standard of care in 2004 did not require an ultrasound to be performed following a first trimester surgical abortion procedure if the clinician has positively identified decidua, chorionic villi and a sac. Peer-reviewed medical literature has found that routine pathology examination by outside pathologists offered no obvious benefit and led to unnecessary follow-up and intervention in some cases. Based on peer-reviewed medical studies, neither an examination by a pathologist or by the clinician at the time of the surgical abortion is better at detecting continuing pregnancy.

Based on her education, training and experience and her review of the clinical records, of Dr. Bryant's deposition transcript, and of Ms. Raper's deposition transcript, Dr. Delli-Bovi is expected to testify that Dr. Bryant complied with the clinical guidelines of Planned Parenthood League of Massachusetts, Inc., and the standard of care of the average qualified obstetrician/gynecologist in the performance of a first trimester surgical abortion of Jennifer Raper on April 9, 2004, and in her gross examination of the products of conception. There was nothing that Dr. Bryant or Planned Parenthood should have done differently in the care and treatment of Ms. Raper on April 9, 2004.

Dr. Delli-Bovi is further expected to testify that it was reasonable and within the standard of care for Dr. Bryant and the other clinicians at Planned Parenthood League of Massachusetts, Inc., to rely on Ms. Raper's report that she would have her post-abortion follow-up with another physician. The Planned Parenthood records indicate that she was advised of the possibility of continuing pregnancy and the importance of a post-op exam was stressed to Ms. Raper. She had gone for post-operative visits following her previous abortions.

Dr. Delli-Bovi is expected to testify regarding the post-abortion follow-up visits. Because of the risks that may be associated with a first trimester abortion, she is expected to testify that the standard of care is for the patient to be seen by a health care provider two to three weeks after a surgical abortion. The Massachusetts Department of Public Health specifically advised patients of the importance of follow-up care on its Consent Form for First Trimester Abortions, which was signed by Ms. Raper.

Dr. Delli-Bovi is expected to testify that Jennifer Raper signed the Massachusetts Department of Public Health First Trimester Abortion Consent Form on April 9, 2004, indicating that she had read and understood the information, including the possible medical problems associated with a surgical abortion. Although Ms. Raper followed the advice she received at Planned Parenthood regarding the need for a follow-up examination, she did not receive appropriate care by the clinicians at Mattapan Community Health Center. Dr. Delli-Bovi is expected to testify that at no time after April 9, 2004 did Ms. Raper or anyone on her behalf contact Planned Parenthood League of Massachusetts, Inc., with respect to her abortion procedure and/or follow-up care.

Dr. Delli-Bovi is expected to testify regarding the visits to Mattapan Community Health Center that Ms. Raper made between May 14, 2004 and September 15, 2004. More specifically, Dr. Delli-Bovi is expected to testify that when Ms. Raper presented at Mattapan Community Health Center on May 14, 2004 and reported that she had an abortion at Planned Parenthood on April 9, 2004, she did not receive a post-operative check. Dr. Eleonu, a board certified obstetrician/gynecologist, signed the note. Based on Ms. Raper's last menstrual period and on hindsight, Ms. Raper was eleven weeks pregnant at the time of that visit. Based on her education, training and experience, Dr. Delli-Bovi is expected to testify that had a proper post-operative visit, including a vaginal examination, been performed, the continuing pregnancy would have been discovered, and Ms. Raper could have still had a first trimester abortion.

In addition, Dr. Delli-Bovi is expected to testify that when Ms. Raper returned to Mattapan Community Health Center on July 16, 2004, she was twenty weeks pregnant in retrospect. She reported that she did not want to continue with Depo-Provera as her birth control method. She had received only one dose of Depo-Provera and that was on April 9, 2004 at Planned Parenthood. Based on her education, training and experience, and the medical literature, Dr. Delli-Bovi is expected to testify that the contraceptive and medical effects of Depo-Provera last for three months. When Ms. Raper was seen on July 16, 2004 at Mattapan Community Health Center, more than three months had elapsed since her receipt of the Depo-Provera at Planned Parenthood. Ms. Raper was no longer protected by the Depo-Provera shot she had received on April 9, 2004.

Dr. Delli-Bovi is expected to testify that in hindsight, Ms. Raper was 20 weeks pregnant when she was seen at Mattapan Community Health Center on July 16, 2004, but her uterus is described as normal, average sized and anterior. No pregnancy test was done. Her last menstrual period is noted as February 24, 2004. The note was signed by Dr. Eleonu, her provider. Had her pregnancy been discovered on July 16, 2004, Ms. Raper could have had a legal second trimester abortion in Massachusetts.

On August 11, 2004, Ms. Raper was seen at Mattapan Community Health Center and a note is written that she had discontinued her Depo-Provera and was there to sign a consent for a tubal ligation. Ms. Raper reported a weight gain of twenty pounds. No pregnancy test was done.

On September 15, 2004, Ms. Raper returned to the Mattapan Community Health Center and was seen by a nurse practitioner. The note is signed by Dr. Eleonu. Ms. Raper complained of increased weight gain and bloating. It was noted that her last menstrual period was February 24, 2004, prior to her surgical abortion. Her abdomen was described as "very obese." Although the nurse practitioner questioned the cause of her amenorrhea (cessation of menstrual periods), she incorrectly noted that Ms. Raper had been on Depo-Provera for a "very long time." No pregnancy test was performed. At the time, Ms. Raper was 29 weeks pregnant.

Based on her education, training, and experience, and on her review of the records, and deposition transcripts in this case, it is Dr. Delli-Bovi's opinion to a reasonable degree of medical certainty that the care provided to Ms. Raper at Mattapan Community Health Center was a deviation from the standard of care. Although Ms. Raper reported her April 9, 2004 abortion to the health care providers at the Community Health Center, she did not receive a post-abortal follow-up check; there was lack of follow-up with respect to her contraception and she was erroneously believed to be protected by Depo-Provera; her amenorrhea and breast tenderness were incorrectly attributed to Depo-Provera; there was a lack of follow-up on her consistent reports of amenorrhea and weight gain and bloating; there was a failure to order a pregnancy test; and her uterus was described as normal when she was actually twenty weeks pregnant.

Based on her experience, education and training, Dr. Delli-Bovi may testify that Ms. Raper's continuing pregnancy should have been discovered by the average qualified obstetrician/gynecologist on May 14, 2004.

Dr. Delli-Bovi is expected to testify regarding Plaintiff's expert Mark Laser, M.D., failure to include the negligence of Dr. Eleonu and Mattapan Community Health Center in his criticisms of Planned Parenthood and Dr. Bryant. Based on the medical and scientific literature in 2004, Dr. Delli-Bovi may testify that Dr. Laser is incorrect in stating that "a properly performed termination of pregnancy done at six weeks and three days should *never* result in a failure to achieve the desired result." Emphasis added. The risk of a continuing pregnancy is well-recognized and can result in the absence of negligence. Dr. Delli-Bovi may testify that she is not aware of any medical literature that states that there is no risk of a continuing pregnancy if a properly performed abortion is done at six weeks and three days.

Finally, based on her education, training and experience, to a reasonable degree of medical certainty, Dr. Delli-Bovi is expected to testify that the continuation of Ms. Raper's pregnancy in 2004 was caused by the negligence of her providers at Mattapan Community Health Center and not by anything the Defendants Planned Parenthood League of Massachusetts, Inc., or Dr. Bryant did or failed to do on April 9, 2004, the only time that they had contact with Ms. Raper.

The above represents a summary of the opinions and expected testimony of Dr. Delli-Bovi. The Defendants reserve the right to supplement this opinion or otherwise address any other additional opinions or evidence introduced or which arises at trial.

VII. LENGTH OF TRIAL

5-6 Full Trial Days

VIII. DAMAGES

The Defendants assert that the Plaintiff's claim of damages is unfounded insofar as Ms. Raper's child is healthy.

VIII. SETTLEMENT DISCUSSIONS

The Plaintiff made a demand for settlement on September 21, 2010. No offers have been made.

The Plaintiff,
Jennifer Raper
by her Attorney,



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The Defendants,
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