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| Sanmiguel v Grimaldi |
| 2020 NY Slip Op 35651(U) |
| May 14, 2020 |
| Supreme Court, Bronx County |
| Docket Number: Index No.: 24515/2013E |
| Judge: George J. Silver |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19A**

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**VERONICA SANMIGUEL, as Administrator of the Estate
of KEEGAN DAYLE KARP, Deceased, and VERONICA
SANMIGUEL, Individually,**

Index No. 24515/2013E
Motion Seq. 004, 005, 006

Plaintiff,

-v-

DECISION & ORDER

**MERYL Y. GRIMALDI, M.D., JULIE CROCCO,
C.N.M., and ST. BARNABAS HOSPITAL,¹**

Defendants.

-----X
GEORGE J. SILVER, J.S.C.:

Defendants ST. BARNABAS HOSPITAL (“St. Barnabas”),² MERYL Y. GRIMALDI, M.D. (“Dr. Grimaldi”),³ and JULIE CROCCO, C.N.M.⁴ (“CNM Crocco” collectively “defendants”) move for summary judgment. Plaintiff VERONICA SANMIGUEL (“plaintiff”), as administrator of the estate of KEEGAN DAYLE KARP (“the infant”), deceased, and plaintiff, individually, oppose the motions.⁵ For the reasons discussed below, the court denies St. Barnabas and CNM Crocco’s motions, and grants Dr. Grimaldi’s motion in part.

On July 1, 2012, plaintiff, then 32-years-old, was admitted to St. Barnabas at 41-weeks-gestation for induction of labor. Plaintiff’s due date was initially June 23, 2012, but plaintiff did not go into labor naturally before July 1, 2012. On July 2, 2012, at 3:15 p.m., defendants induced plaintiff’s labor with the administration of Cervidil. At approximately 3:23 p.m., a Cook’s cervical

¹ Pursuant to an order dated December 4, 2019, the caption has been amended to only include these remaining defendants.

² Motion Seq. No. 004.

³ Motion Seq. No. 005.

⁴ Motion Seq. No. 006.

⁵ Motion Seq. Nos. 004-006 will be decided collectively herein.

balloon was used to dilate plaintiff's cervix. At 3:45 p.m. there were decelerations in fetal heart rate. At 6:55 p.m., Pitocin induction was started.

On July 3, 2012,⁶ at 5:59 a.m., Dr. Grimaldi performed an internal examination, and noted that plaintiff's cervix was fully dilated and 100% effaced. At 7:01 a.m., plaintiff was fully dilated, and Pitocin was increased. At 7:47 a.m., the fetal monitoring tracings showed minimal variability and recurrent decelerations in fetal heart rate.

At approximately 9:51 a.m., the fetal monitoring strips showed that there was fetal bradycardia.⁷ Dr. Grimaldi was called, and came to the delivery room at approximately 10:05 a.m. Dr. Grimaldi requested a vacuum, and attempted two vacuum extractions prior to ordering an emergency c-section. While Dr. Grimaldi was attempting a vacuum assisted delivery, CNM Crocco and other staff began preparing for an emergency c-section in case it became necessary.

During the c-section, CNM Crocco provided some visual assistance to Dr. Grimaldi, and assisted with retraction. At 10:23 a.m., Dr. Grimaldi delivered the infant by c-section. The infant's Apgar scores were 0, 3, and 4 at one, five, and ten minutes, respectively, and there were no physical abnormalities noted. The infant had no heart rate initially, and was resuscitated upon delivery. The infant was also immediately intubated with an endotracheal tube ("ETT"), and bag valve ventilation was accomplished through the ETT tube. Chest compressions were administered, and at five minutes, the infant's heart rate was greater than 100 beats per minute. However, the infant had no respiratory effort, and remained unresponsive.

⁶ Dr. Grimaldi states that she first treated plaintiff on July 2, 2012 at 6:39 p.m. Plaintiff, however, notes that Dr. Grimaldi testified that she ordered the removal of the Cook's balloon at 1:41 a.m. on July 3, 2012. By contrast, St. Barnabas asserts that Dr. Grimaldi took over plaintiff's care at approximately 9:51 a.m. on July 3, 2012.

⁷ Bradycardia is a slower than normal heartrate.

At ten minutes of life, the infant was transported to the neonatal intensive care unit where he was placed on a mechanical ventilator with 100% oxygen. At 11:01 a.m., the infant's blood pH was 6.85, and at 1:25 p.m., the infant's blood pH was 7.32. At noon, during the insertion of an umbilical line, the infant had focal seizure activity involving the lips and right arm. Phenobarbital was administered, however, the seizures persisted. Another dose of phenobarbital was administered.

An x-ray of the infant's chest revealed a right upper lobe infiltrate and hyper expansion of the lung, and an abdomen x-ray revealed mildly dilated loops of bowel. Blood cultures were obtained, and Gentamicin and Ampicillin antibiotics were administered. The infant's blood cultures were negative, and the infant remained lethargic and unresponsive to stimuli.

At 3:05 p.m., the infant was transferred to MONTEFIORE MEDICAL CENTER ("Montefiore"). At Montefiore, the infant was taken off of life support measures, and passed away at 7:26 p.m. on July 11, 2012. The cause of the infant's death was neonatal encephalopathy⁸ ("NE").

Plaintiff alleges that as a result of defendants' failure to timely perform a c-section, the infant suffered injuries during the course of plaintiff's labor and delivery, which resulted in the infant's death.

ARGUMENTS

Based on the record before the court, defendants argue that summary judgment must be granted, because plaintiff cannot establish that defendants' treatment of the infant deviated from accepted standards of care or proximately caused the infant's alleged injuries and/or death.

⁸ Neonatal encephalopathy is a syndrome that involves depressed or disturbed neurological function, often caused by lack of oxygen during birth.

I. St. Barnabas

In support of its motion, St. Barnabas annexes the affirmation of Sean Bailey, M.D. (“Dr. Bailey”), a physician board-certified in pediatrics and neonatal/perinatal medicine. Dr. Bailey opines that St. Barnabas properly treated the infant, and did not cause or contribute to the infant’s demise. According to Dr. Bailey, the attending physicians fully managed the infant’s neonatal care, and the employees of St. Barnabas appropriately followed the attending physicians’ decisions and orders. Dr. Bailey contends that the infant was born in extreme distress, and that the hospital staff acted appropriately and efficiently in their care and treatment of the infant. As such, Dr. Bailey contends that because the attending physicians’ decisions and orders were a reasonable exercise of medical judgment, it was unnecessary for St. Barnabas’ employees to countermand the attending physicians’ treatment choices for the infant.

Additionally, Dr. Bailey asserts that the infant’s low Apgar scores and acidosis likely came from a decrease in blood flow and oxygen to the brain and other organs, and that St. Barnabas promptly corrected the acidosis by administering intravenous fluids and by adjusting the ventilator support. Dr. Bailey also opines that St. Barnabas immediately noted, and properly treated the infant’s seizures with phenobarbital. Similarly, Dr. Bailey posits that St. Barnabas timely transferred the infant to a facility where advanced neurologic care with selective head cooling was administered, thereby providing the infant with the best chance of an improved outcome. Specifically, Dr. Bailey notes that Montefiore comported with the standard of care in 2012 by instituting brain cooling within six hours of the infant’s birth. As such, Dr. Bailey concludes that nothing could have been done differently to change the infant’s outcome after birth.

St. Barnabas also annexes the affirmation of DENISE GUIDETTI, M.D. (“Dr. Guidetti”),⁹ a physician board-certified in obstetrics, gynecology, and maternal fetal medicine. Dr. Guidetti opines that the delay in the performance of plaintiff’s c-section was not attributable to Nurse Tina Messina-Johnson (“Nurse Johnson”).¹⁰ Dr. Guidetti highlights that Nurse Johnson appropriately called Dr. Grimaldi at 9:54 a.m. in response to the fetal bradycardia noted at approximately 9:51 a.m. Dr. Guidetti also points out that Dr. Grimaldi was in the room at approximately 10:05 a.m. when the fetal monitoring strips were becoming “somewhat worse,” at which time Dr. Grimaldi requested a vacuum, and attempted two vacuum exemptions prior to ordering an emergent c-section. In that regard, Dr. Guidetti maintains that as a nurse, it was Nurse Johnson’s responsibility to document a problematic or potentially problematic tracing, and to call for the assistance of an attending physician. Dr. Guidetti also submits that since Nurse Johnson was accompanied by CNM Crocco, it was both women’s responsibility to timely contact the attending physician in response to the fetal bradycardia. Still, Dr. Guidetti avers that Nurse Johnson does not have the ability to force an attending physician into a room, or have the authority to call for an emergent c-section.

In addition, Dr. Guidetti opines that St. Barnabas’ nursing staff properly monitored plaintiff, and appropriately documented their findings. Dr. Guidetti also reiterates that Nurse Johnson correctly noted fetal bradycardia, and properly contacted the attending physician. Dr. Guidetti further highlights that Dr. Grimaldi’s actions were an exercise of independent medical judgment as Dr. Grimaldi was responsible for determining the correct course of treatment in light of fetal bradycardia and ominous fetal heart tracings. As such, Dr. Guidetti concludes that it was

⁹ By letter dated November 19, 2019, St. Barnabas notified the court that Dr. Guidetti incorrectly stated that she was licensed to practice medicine in New York. However, Dr. Guidetti’s New York license had expired at that time. In its reply, St. Barnabas submitted a corrected affirmation of Dr. Guidetti along with a certificate of conformity. Accordingly, there are no issues with Dr. Guidetti’s expert affirmation.

¹⁰ St. Barnabas notes that plaintiff has discontinued this action against Nurse Johnson on July 7, 2017.

not incumbent upon Nurse Johnson or any other nursing staff at St. Barnabas to take further action once Dr. Grimaldi was contacted and present in the room.

In that regard, St. Barnabas further argues that liability cannot be imposed because no member of St. Barnabas' nursing staff exercised any independent judgment. Rather, St. Barnabas asserts that the attending physicians rendered all relevant treatment and decisions. Alternatively, St. Barnabas argues that if the court finds that it is liable, it would only be vicariously liable for the malpractice of the private attending physicians, Drs. Grimaldi and Lezcano.¹¹

II. Dr. Grimaldi

Dr. Grimaldi only seeks summary judgment with respect to plaintiff's second, fourth and fifth causes of action of the amended complaint.

Dr. Grimaldi seeks to preclude plaintiff from asserting a cause of action for emotional/mental distress, and loss of service, comfort, and companionship at the time of trial. Dr. Grimaldi contends that plaintiff's claim for emotional distress fails as a matter of law because New York does not permit a mother to claim emotional or mental damages stemming from the loss of a child where the infant survived eight days before dying. In that regard, Dr. Grimaldi notes that plaintiff only seeks to recover damages for emotional pain and suffering caused by the death of the infant as opposed to an independent injury; however, because the infant passed away eight days after birth, plaintiff cannot recover for emotional pain and suffering.

Similarly, Dr. Grimaldi argues that plaintiff's claim that she was deprived of her child's society, comfort, or affection are barred as matter of law since such claims are not compensable.

¹¹ Plaintiff executed a stipulation of discontinuance as to Dr. Lezcano. However, some of the co-defendants did not sign the stipulation, and the court has not so-ordered the stipulation.

Likewise, Dr. Grimaldi maintains that she is entitled to summary judgment as to plaintiff's claim for lack of informed consent. According to Dr. Grimaldi, plaintiff consented to the "induction of labor," and on June 25, 2012, plaintiff was aware that the plan was to induce labor if it did not occur naturally by July 1, 2012. Dr. Grimaldi also highlights that when plaintiff returned to St. Barnabas on July 1, 2012, plaintiff signed a document in which she provided informed consent for "obstetrical care including vaginal delivery, urine toxicology, and possible operative or cesarean delivery." Moreover, Dr. Grimaldi posits that even if plaintiff's informed consent document did not contemplate the insertion of a Cook's balloon, the Cook's balloon was inserted prior to Dr. Grimaldi's involvement in plaintiff's care and treatment.

Lastly, Dr. Grimaldi argues that plaintiff provided her informed consent for use of the vacuum extractor even if the informed consent document does not encompass the use of the same. Dr. Grimaldi further avers that the alleged failure to obtain plaintiff's informed consent for the use of the vacuum extractor is not the proximate cause of plaintiff's alleged injuries in her individual capacity.

III. CNM Crocco

CNM Crocco does not annex an expert affirmation in support of her motion for summary judgment, but instead relies on Dr. Guidetti's affirmation submitted in support of St. Barnabas' motion. CNM Crocco reiterates that Dr. Guidetti opines that St. Barnabas did not depart from the standard of care in its treatment of plaintiff and the infant, and that St. Barnabas did not proximately cause any injury to plaintiff or the infant.¹²

CNM Crocco also argues that she was not involved in plaintiff's prenatal care, or plaintiff's care upon admission at St. Barnabas for induction of labor. Specifically, CNM Crocco notes that

¹² CNM Crocco summarizes portions of Dr. Guidetti's affidavit, which does not bear repeating here.

she began her shift at 8:00 a.m. on July 3, 2012, at which time plaintiff was under the care and treatment of an attending physician. CNM Crocco also highlights that she was in the room when plaintiff was pushing, and when a non-reassuring fetal heart rate was noted, at which time the attending OB/GYN was promptly notified, and reported to plaintiff's room. CNM Crocco further posits that she was not authorized or trained to perform a vacuum assisted delivery or c-section delivery, and that she was not involved in obtaining plaintiff's informed consent for a c-section delivery. Similarly, CNM Crocco maintains that she was not involved in the resuscitation, intubation, or neonatal care of the infant.

Additionally, CNM Crocco argues that plaintiff's bill of particulars does not allege a failure to obtain informed consent with any specificity. Rather, CNM Crocco contends that plaintiff vaguely states that, "Plaintiff claims an informed consent was not given to the Defendant for treatment," "Plaintiff was not any advised of any of the risks," and that "Plaintiff was never given the option to ask about the risks because she was never told the risks, benefits, or alternatives, and therefore there was no basis for the Plaintiff to request said information." As such, CNM Crocco argues that plaintiff's lack of informed consent claim should be dismissed as to her.

IV. Plaintiff's Opposition

In opposition to all three motions for summary judgment, plaintiff annexes the affirmation of Mark L. deFazio, M.D. ("Dr. deFazio"), a physician board-certified in obstetrics and gynecology. Dr. deFazio opines that defendants departed from the standard of care by 1) not notifying a physician when Nurse Kaitlyn Greenough ("Nurse Greenough") inserted a Cook's balloon to dilate plaintiff's cervix, 2) not having a physician attend to plaintiff to determine whether the induction of labor should continue, 3) not performing an internal examination, determining the progress of plaintiff's labor, or calculating a Bishop's score prior to the insertion

of the Cook's balloon, 4) not performing an internal examination, or calculating a Bishop's score to determine the likelihood that Pitocin induction would result in a vaginal delivery, and 5) not determining the progress of plaintiff's labor prior to the start of Pitocin induction at 6:55 p.m.

In Dr. deFazio's opinion, Dr. Grimaldi failed to assure fetal well-being prior to continuing with the induction of plaintiff's labor, which had been in progress for approximately 36 hours. Dr. deFazio highlights that Dr. Grimaldi testified that at 1:41 a.m. on July 3, 2012, she ordered the removal of the Cook's balloon, and that she recorded an internal exam of plaintiff, which indicated that plaintiff's cervix was four centimeters dilated, 90% effaced, with "no indication of the station of the presenting part." Dr. deFazio also points out that while Dr. Grimaldi noted that a pelvic exam at 4:17 a.m. showed that plaintiff's cervix was seven centimeters dilated, 90% effaced, and that the presenting part was at a -1 station, Dr. Grimaldi does not note or mention the status of the fetus, or the decelerations in the fetal heart rate at that time.

Dr. deFazio also opines that when the fetal monitoring tracings showed minimal variability and recurrent decelerations at 7:47 a.m. on July 3, 2012, St. Barnabas' nurses should have notified the attending physicians or the midwives, who could have ascertained the status of the fetus, and determine whether the induction of labor should continue. According to Dr. deFazio, this departure allowed, caused, and/or permitted the fetus to continue to experience unremitting distress. Similarly, Dr. deFazio asserts that the nurses allowed plaintiff to push in an effort to "effect progress of labor" despite the diminished variability in fetal heart rate, lack of any objective evidence of progress, and recurrent decelerations which continued unabated. As a result, Dr. deFazio submits that this departure caused, permitted, and/or contributed to ongoing fetal hypoxia.¹³

¹³ Hypoxia is a decreased level of oxygen in the body.

Dr. deFazio further asserts that CNM Crocco was pushing with plaintiff in an effort to continue labor although CNM Crocco did not first perform an internal exam, determine the progress of labor, or review the fetal monitoring strips, which showed deep decelerations. According to Dr. deFazio, the standard of care required CNM Crocco to call a physician, and to stop plaintiff from pushing until fetal well-being could be determined. However, Dr. deFazio avers that despite the fetus' instability, CNM Crocco failed to remain with plaintiff. Dr. DeFazio notes that the labor flowsheets document that CNM Crocco was called back to plaintiff's room at 9:54 a.m.

Additionally, Dr. deFazio opines that defendants failed to perform an internal exam during "the process of the second stage of labor." Dr. deFazio notes that at 10:03 a.m., an internal scalp monitor was applied to the fetus, however, there was no documented internal exam during plaintiff's second stage of labor. According to Dr. deFazio, the lack of timely and appropriate evaluations during the second stage of labor caused the infant to sustain intra-utero hypoxia, ischemia,¹⁴ and asphyxia¹⁵ that was of a magnitude so as to cause the infant's low Apgar scores, seizures, an arterial blood gas labeled as a "panic value," and death as a consequence of NE.

Dr. deFazio also opines that Dr. Grimaldi departed from the standard of care by using a vacuum extractor on two occasions to effect delivery despite the presence of fetal bradycardia. Dr. deFazio highlights that the fetal heart rate tracings revealed bradycardia starting at approximately 9:51 a.m., however, although the fetal heart rate did not recover, Dr. Grimaldi determined that the first vacuum extractor was unable to make a seal, and called for a second vacuum extractor, which she applied at 10:15 a.m. According to Dr. deFazio, the use of a vacuum extractor was not indicated, and Dr. Grimaldi's use of the same contributed to the delay in the delivery of the

¹⁴ Ischemia is the inadequate blood supply to tissues, usually caused by a problem in the blood vessel.

¹⁵ Asphyxia occurs when there is a deficient supply of oxygen to the body.

distressed fetus, as evidenced by the continued fetal bradycardia. Dr. deFazio further submits that Dr. Grimaldi did not attempt to determine fetal well-being, or the need to perform an expedient c-section delivery, which plaintiff had consented to upon her admission at St. Barnabas.

Similarly, Dr. deFazio opines that St. Barnabas departed from accepted practice by failing to perform a timely c-section delivery. As a result, Dr. deFazio contends that the infant was subjected to protracted intra-uterine hypoxia and trauma occasioned by an approximately five-hour second stage of labor. Dr. deFazio notes that the infant's Apgar scores of 0, 3, and 4 at one, five, and ten minutes of life are consistent with severe neurological insult and protracted intra-utero hypoxia/ischemia as evidenced by the fetal heart rate tracings. Dr. deFazio also highlights that Dr. Lezcano, who was present during the delivery, testified that the infant had hypertonia¹⁶ and clonus,¹⁷ which are consistent with perinatal asphyxia. Dr. deFazio further points out that upon admission at Montefiore, the infant had twitching of his extremities, hypertonia, and no gag or suck reflex, which are consistent with hypoxic ischemic encephalopathy that develops when there is a lack of oxygen to the fetus' brain. Additionally, Dr. deFazio notes that Dr. Lezcano testified that an MRI of the infant's head on July 10, 2012 showed a cephalohematoma¹⁸ ("CH") and subdural hemorrhage ("SH"), and that trauma, prolonged labor, and a vacuum extractor can cause CH and SH. Dr. deFazio also notes that the cause of the infant's death was NE, which Dr. Lezcano testified is a constellation of signs and symptoms that develop in newborns who are deprived of oxygen in utero. Moreover, Dr. deFazio highlights that the infant's arterial cord blood gas at about 30 minutes of life was described as a "panic value," with a pH of 6.849, and a base excess of -23, consistent with intrapartum hypoxia.

¹⁶ Hypertonia is increased muscle tone, and lack of flexibility.

¹⁷ Clonus is a type of neurological condition that creates involuntary muscle contractions.

¹⁸ Cephalohematoma is a collection of blood between an infant's scalp and the skull.

Lastly, Dr. deFazio opines that had Dr. Grimaldi and CNM Crocco rendered timely and appropriate care to plaintiff and the infant, and had St. Barnabas carefully monitored plaintiff and the infant during labor, and performed a timely and appropriate c-section delivery (which plaintiff consented to), the infant would have avoided brain damage and death.

Plaintiff also annexes her own affidavit in which she states that she repeatedly requested a c-section delivery, and that she did not consent to the use of a vacuum extractor, or the second attempt to effect delivery with a vacuum extractor.

V. St. Barnabas' Reply

In reply, St. Barnabas annexes a supplemental affidavit of Dr. Guidetti, who opines that St. Barnabas' nurses properly discharged their "duties of documentation," and adequately advised the attending physicians of plaintiff's status. In that regard, St. Barnabas reiterates that nurses do not make treatment decisions, including whether a c-section is indicated, the timing of a c-section, or whether to use a vacuum extractor. Rather, St. Barnabas emphasizes that it is the role of Dr. Grimaldi, the attending physician, and CNM Crocco, the midwife, to manage the labor and delivery, and to make decisions about a c-section, and whether to attempt a vacuum extraction.

St. Barnabas also argues that while plaintiff asserts that the vacuum extractors failed to effectuate delivery, this is a medical malpractice action, and plaintiff never asserted a defective equipment claim. Finally, St. Barnabas avers that plaintiff improperly seeks to hold it liable for acts of malpractice "during time periods and by physician" not identified in the bill of particulars.¹⁹

¹⁹ St. Barnabas' argument is unclear, and lacks specificity. Moreover, paragraph six of plaintiff's affirmation alleges acts of malpractice that occurred on July 3, 2012 with respect to St. Barnabas' nurses. Accordingly, St. Barnabas' argument will be disregarded.

VI. Dr. Grimaldi's Reply

In reply, Dr. Grimaldi argues that plaintiff concedes that summary judgment should be granted in Dr. Grimaldi's favor with respect to count two of plaintiff's amended complaint. Dr. Grimaldi also contends that plaintiff does not address her argument with respect to plaintiff's claim for the loss of her child's society, comfort, and affection (count five).

Additionally, Dr. Grimaldi underscores that she is entitled to summary judgment as to plaintiff's claim for lack of informed consent as plaintiff failed to show that the alleged lack of informed consent proximately caused plaintiff's alleged injuries. Dr. Grimaldi also posits that plaintiff does not claim that the use of the vacuum extractor caused any injury to plaintiff, and that plaintiff does not claim that she suffered any independent physical injury. Dr. Grimaldi further submits that plaintiff's alleged injuries were caused by the loss of her child as opposed to an affirmative violation of her physical integrity.

VII. CNM Crocco's Reply

In reply, CNM Crocco clarifies that plaintiff only argues that CNM Crocco should have stopped her from pushing, and that CNM Crocco should have re-assessed fetal well-being when she saw plaintiff at 9:44 a.m. on July 3, 2012. CNM Crocco reiterates that when she first became involved with plaintiff, plaintiff was under Dr. Grimaldi's care, plaintiff's labor was proceeding according to Dr. Grimaldi's plan, and that plaintiff was already pushing in accordance with that plan. CNM Crocco also notes that when she was at plaintiff's bedside at 9:44 a.m., the infant's heart rate was reassuring, and that in the minutes that followed, she placed a fetal scalp electrode due to loss of contact on the fetal heart monitor. CNM Crocco contends that while the initial heart rate was acceptable, she called Dr. Grimaldi in response to a deceleration in the heart rate, and that Dr. Grimaldi was present three minutes into the deceleration. CNM Crocco further submits that

while she could not recall if she had seen plaintiff prior to 9:44 a.m., she knew that plaintiff was already pushing when she started her shift at 8:00 a.m.

DISCUSSION

To prevail on summary judgment in a medical malpractice case, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause the patient's injury (*Roques v. Noble*, 73 A.D.3d 204, 206 [1st Dept. 2010]). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 A.D.3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts in the record or personally known to the expert (*Roques*, 73 A.D.3d at 207). The expert cannot make conclusions by assuming material facts which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 A.D.3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 A.D.2d 225, 226 [1st Dept. 2003]).

Once defendant makes a *prima facie* showing, the burden shifts to plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, plaintiff must submit an expert affidavit attesting that defendant departed from accepted medical practice and that the departure proximately caused the injuries (*see, Roques*, 73 AD3d at 207). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2nd Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the factfinder (*id.*).

I. St. Barnabas

Here, St. Barnabas set forth a *prima facie* showing in favor of dismissal, as evidenced by the submission of defendants' medical records, and St. Barnabas' expert affidavits, all of which attest to the fact that St. Barnabas' treatment of plaintiff/the infant was in accordance with accepted standards of care and did not proximately cause plaintiff/the infant's alleged injuries. To be sure, St. Barnabas' expert affirmations are detailed and predicated upon ample evidence within the record. As St. Barnabas has made a *prima facie* showing, the burden shifts to plaintiff.

In response to St. Barnabas' *prima facie* showing, plaintiff raises triable issues of fact sufficient to preclude summary judgment. Notably, while St. Barnabas asserts that it properly treated plaintiff and the infant, plaintiff raises several instances in which St. Barnabas departed from the standard of care. For instance, contrary to St. Barnabas' argument that its nurses properly monitored plaintiff, and appropriately documented their findings, plaintiff avers that St. Barnabas did not do anything in response to the recurrent decelerations in fetal heart rate noted on the monitoring strips. Specifically, plaintiff maintains that the fetal monitoring tracings showed recurrent decelerations from approximately 3:00 a.m. to 9:51 a.m. on July 3, 2012, however, no one was called, and no one evaluated or treated plaintiff. By contrast, St. Barnabas asserts that the nurses properly discharged their "duties of documentation," and adequately advised the attending physicians of plaintiff's status. To that end, St. Barnabas highlights that Nurse Johnson correctly noted fetal bradycardia, and appropriately contacted the attending physician, Dr. Grimaldi. Accordingly, there are triable issues of fact here sufficient to preclude summary judgment.

The parties also disagree as to whether St. Barnabas departed from the standard of care by not performing a timely c-section delivery. While St. Barnabas submits that the delay in the performance of plaintiff's c-section was not attributable to Nurse Johnson as Nurse Johnson

properly called Dr. Grimaldi at 9:54 a.m. in response to the fetal bradycardia, plaintiff avers that there are discrepancies as to when Nurse Johnson called Dr. Grimaldi. Specifically, plaintiff notes that while Dr. Grimaldi claims that Nurse Johnson called her at 9:51 a.m., Dr. Grimaldi testified that she was called after 9:54 a.m., and that Nurse Johnson testified that she did not know who called Dr. Grimaldi at 9:54 a.m.²⁰ As there are triable issues of fact as to whether St. Barnabas timely notified Dr. Grimaldi as to the status of plaintiff and the infant in light of the decelerations in fetal heart rate, summary judgment must be denied.

Moreover, plaintiff raises a triable issue of fact as to whether St. Barnabas' alleged failure to timely perform a c-section delivery caused or contributed to the infant's alleged injuries and/or death. Plaintiff posits that the nurses' failure to notify the attending physicians or midwives as to the recurrent decelerations in fetal heart rate caused and/or permitted the fetus to continue to experience unremitting distress. By contrast, St. Barnabas underscores that Nurse Johnson correctly noted fetal bradycardia, and properly contacted Dr. Grimaldi, however, Nurse Johnson does not have the ability to force an attending physician into a room, or have the authority to call for an emergent c-section delivery. In further rebutting plaintiff's argument, St. Barnabas emphasizes that nurses do not make treatment decisions, and that it was not incumbent upon Nurse Johnson or any other nursing staff to take further action once Dr. Grimaldi was contacted and present in the delivery room. Rather, St. Barnabas asserts that it is the role of the attending physician and the midwife to manage plaintiff's labor and delivery, and that Dr. Grimaldi's actions were an exercise of her independent medical judgment. In that regard, St. Barnabas argues that Dr.

²⁰ Similarly, the existence of factual disputes as to when Dr. Grimaldi began treating plaintiff further supports denial of summary judgment. Notably, while Dr. Grimaldi asserts that she first treated plaintiff at 6:39 p.m. on July 2, 2012, plaintiff highlights that at 1:41 a.m. on July 2, 2012, Dr. Grimaldi ordered that the Cook's balloon be removed, and that at 4:17 a.m., Dr. Grimaldi documented that plaintiff underwent a pelvic exam.

Grimaldi was responsible for determining the correct course of treatment in light of fetal bradycardia and ominous fetal heart tracings. Because these issues cannot be resolved by the facts before the court, summary judgment must be denied.

Finally, there is a triable issue of fact as to whether St. Barnabas' acts/omissions caused or contributed to the infant's alleged injuries and/or death. While St. Barnabas argues that nothing could have been done differently to change the infant's outcome, plaintiff posits that had St. Barnabas carefully monitored plaintiff and the infant during labor, and performed a timely and appropriate c-section delivery, the infant would have avoided brain damage and death. Accordingly, there are triable issues of fact here sufficient to preclude summary judgment.

As there are triable issues of fact as to whether St. Barnabas' nurses departed from good and accepted medical practice in their care and treatment of plaintiff and the infant, St. Barnabas' application to limit liability only as to the acts of Dr. Grimaldi is denied.

II. Dr. Grimaldi

Dr. Grimaldi's motion for summary judgment only addresses counts two, four, and five of plaintiff's amended complaint, and does not specifically address whether Dr. Grimaldi's treatment of plaintiff comported with the standard of care, or whether Dr. Grimaldi's care and treatment of plaintiff proximately caused any injuries alleged in this case.

As plaintiff has conceded that count two of plaintiff's amended complaint should be dismissed as to Dr. Grimaldi, such claim is hereby dismissed.

As plaintiff does not address or oppose Dr. Grimaldi's motion with respect to plaintiff's claim for loss of her child's society, comfort, and affection, Dr. Grimaldi's application to dismiss this claim is granted. Moreover, plaintiff's claim for loss of her child's society, comfort, and affection is not compensable under applicable law (*see, George v. Windham*, 169 A.D.3d 876, 878

[2d Dept. 2019] [“[I]n New York, the law will not compensate a parent for the loss of a child’s affection and companionship when a child is injured.”] [citations omitted]; *Charles v. Suvannavejh*, 28 Misc. 3d 1157, 1161 [Sup. Ct. Bronx County 2009] [“In no instance may a parent claim loss of a child’s society, comfort, or affection.”]; *Devito v. Opatich*, 215 A.D.2d 714, 715 [2d Dept. 1995]).

However, there is a triable issue of fact as to whether plaintiff consented to Dr. Grimaldi’s use of a vacuum extractor to attempt to deliver the infant. Notably, while plaintiff argues that she did not consent to the use of the first or second vacuum extractor, Dr. Grimaldi maintains that plaintiff signed an informed consent document for treatment for “obstetrical care including vaginal delivery, urine toxicology, and possible operative or cesarean delivery,” which encompasses the application of the vacuum extractor. Additionally, the parties dispute whether the use of the vacuum extractor proximately caused plaintiff’s alleged injuries. For instance, while plaintiff submits that the use of the vacuum extractor was contraindicated, and that its use caused and/or contributed to the infant’s hypoxia, ischemia, and asphyxia, Dr. Grimaldi asserts that the alleged failure to obtain informed consent for the application of the vacuum extractor did not proximately cause plaintiff’s individual injuries (*see, Lyons v. Vassar Bros. Hosp.*, 30 A.D.3d 477, 478 [2d Dept. 2006]). Because these issues cannot be resolved by the facts before the court, summary judgment must be denied as to plaintiff’s lack of informed consent claim against Dr. Grimaldi.

III. CNM Crocco

CNM Crocco failed to establish a *prima facie* showing of entitlement to summary judgment. Notably, CNM Crocco’s sole reliance on St. Barnabas’ expert’s affirmation, absent any showing by an expert on her behalf that she did not depart from the standard of care, or proximately caused plaintiff/the infant’s alleged injuries, is insufficient to set forth a *prima facie* showing in

favor of dismissal (*see, Roques*, 73 A.D.3d at 206, *supra*; *Schofield v. Borden*, 117 A.D.3d 936, 937 [2d Dept. 2014]; *Iulo v. Staten Island Univ. Hosp.*, 106 A.D.3d 696, 697 [2d Dept. 2013]; *James v. Wormuth*, 74 A.D.3d 1895, 1895 [4th Dept. 2010]).

Moreover, even if Dr. Guidetti's affirmation were sufficient to establish CNM Crocco's *prima facie* burden, plaintiff has nonetheless raised triable issues of fact sufficient to preclude summary judgment. Notably, while plaintiff asserts that CNM Crocco was pushing with plaintiff in an effort to continue labor although CNM Crocco did not first perform an internal examination, determine the progress of labor, or review the fetal monitoring strips, CNM Crocco argues that she was in the room when plaintiff was already pushing. Similarly, contrary to plaintiff's claim that CNM Crocco should have stopped plaintiff from pushing until fetal well-being could be determined, CNM Crocco emphasizes that when she first became involved with plaintiff's care, plaintiff was under Dr. Grimaldi's care, plaintiff's labor was proceeding according to Dr. Grimaldi's plan, and that plaintiff was already pushing in accordance with that plan. Likewise, while plaintiff asserts that the standard of care required CNM Crocco to call a physician, CNM Crocco underscores that Dr. Grimaldi was promptly notified in response to the deceleration in fetal heart rate, and that Dr. Grimaldi was present in the room three minutes into the deceleration in fetal heart rate. Accordingly, there are triable issues of fact here sufficient to preclude summary judgment.

Furthermore, the court denies CNM Crocco's application to dismiss plaintiff's lack of informed consent claim. Any claims as to the vagueness of the allegations in plaintiff's bill of particulars should have been raised prior to the instant motion (*see, e.g., Ritt by Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 560 [1st Dept. 1992] ["While we agree with defendant's contention [that plaintiff's bill of particulars' response] is vague, we note that defendant did not move for a

further bill of particulars . . . and therefore defendant will not now be heard to complain that plaintiff's response was insufficient."]).

Accordingly, it is hereby

ORDERED that defendant ST. BARNABAS HOSPITAL's motion for summary judgment is DENIED in its entirety; and it is further

ORDERED that MERYL Y. GRIMALDI, M.D.'s application to dismiss counts two and four of plaintiff's amended complaint is GRANTED; and it is further

ORDERED that MERYL Y. GRIMALDI, M.D.'s application to dismiss plaintiff's claim for lack of informed consent is DENIED; and it is further

ORDERED that JULIE CROCCO, C.N.M.'s motion for summary judgment is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear for a virtual or in-person conference before the court (the parties will be further notified of the conferencing approach in advance of the designated date) on June 26, 2020 (time to be determined).

This constitutes the decision and order of the court.

Dated: May 14, 2020



HON. GEORGE J. SILVER