

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 22-00242

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

JAZMON E., INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF K.W.,
PLAINTIFF-APPELLANT-RESPONDENT,

V

ORDER

STEPHEN MECHTLER, M.D.,
DEFENDANT-RESPONDENT-APPELLANT,
KALEIDA HEALTH, DOING BUSINESS AS MILLARD
FILLMORE SUBURBAN HOSPITAL,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

BROWN CHIARI, LLP, BUFFALO (MICHAEL R. DRUMM OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

EAGAN & HEIMER PLLC, BUFFALO (LAUREN A. HEIMER OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 21, 2022. The order, among other things, granted the motion of, among others, defendant Kaleida Health, doing business as Millard Fillmore Suburban Hospital, for summary judgment dismissing the complaint against it, and denied in part the motion of defendant Stephen Mechtler, M.D. for summary judgment.

It is hereby ORDERED that the order so appealed from is affirmed without costs for reasons stated at Supreme Court.

All concur except OGDEN, J., who dissents in part and votes to modify in accordance with the following memorandum: I respectfully dissent, in part, in this medical malpractice action, wherein plaintiff seeks to recover damages for injuries allegedly sustained by plaintiff's child during birth. Plaintiff appeals and defendant Stephen Mechtler, M.D. cross-appeals from an order that, among other things, denied Mechtler's motion for summary judgment dismissing the complaint against him, except for certain allegations in plaintiff's bill of particulars for failure to address those allegations in opposition to the motion, and granted the motion of defendant Kaleida Health, doing business as Millard Fillmore Suburban Hospital

(Kaleida), among others, insofar as it sought summary judgment dismissing the complaint against it.

When reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party (see *Robinson v Strong Mem. Hosp.*, 98 AD2d 976, 976 [4th Dept 1983]). Assuming, arguendo, that Kaleida met its initial burden on the motion insofar as it sought summary judgment dismissing the complaint against it, I agree with plaintiff that her submission of the expert affidavit raised a triable issue of fact (see *Atkins v Piazza*, 281 AD2d 884, 884 [4th Dept 2001]), and thus Supreme Court erred in granting the motion to that extent. I would therefore modify the order accordingly.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court