

**Altamirano v Cain**

2007 NY Slip Op 31526(U)

June 4, 2007

Supreme Court, Suffolk County

Docket Number: 0010193/2004

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. EMILY PINES  
Justice of the Supreme Court

MOTION DATE 2-9-07 (005)  
2-13-07 (006, 007)  
2-14-07 (008)

ADJ. DATE 4-27-07  
Mot. Seq. # 005 - MotD  
006 - MG  
007 - MD  
008 - MD

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CONNIE ALTAMIRANO, :  
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Plaintiff, :  
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- against - :  
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: :  
KRISTEN E. CAIN, M.D., GABRIEL A. SAN :  
ROMAN, M.D., LINDA SUNG, M.D., :  
REPRODUCTIVE SPECIALISTS OF NEW :  
YORK, LLP, LAWRENCE J. KESSLER, D.O., :  
SCOTT J. FLASHNER, M.D. and LAWRENCE :  
J. KESSLER, D.O., P.C., EASTERN :  
EMERGENCY PHYSICIANS, P.C., CHRISTINE :  
ANNE CONWAY, M.D. and EASTERN LONG :  
ISLAND HOSPITAL ASSOCIATION, :  
: :  
Defendants. :  
-----X

DUFFY, DUFFY & BURDO  
Attorneys for Plaintiff  
1370 Reckson Plaza, West Tower, 13<sup>th</sup> Floor  
Uniondale, New York 11556-1370  
  
FUMUSO, KELLY, DeVERNA, et al.  
Attys for Deft Eastern L.I. Hospital Assoc.  
110 Marcus Boulevard, Suite 500  
Hauppauge, New York 11788  
  
SHAUB, AHMUTY, CITRIN & SPRATT  
Attys for Defts Cain, San Roman, Sung &  
Reproductive Specialists of N.Y.  
655 Third Avenue  
New York, New York 10017  
  
KELLY, RODE & KELLY  
Attys for Deft Conway  
330 Old Country Road  
Mineola, New York 11501  
  
LEWIS JOHS AVALLONE AVILES, LLP  
Attys for Defts Kessler, Flashner & Eastern  
Emergency Physicians  
425 Broad Hollow Road  
Melville, New York 11747

Upon the following papers numbered 1 to 80 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers) 1 - 18 ; Notice of Cross Motion and supporting papers 19-28; 29-48; 49-66 ; Answering Affidavits and supporting papers 67-74 ; Replying Affidavits and supporting papers 75-76; 77-78; 79-80; Other        ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion (005) by defendant Eastern Long Island Hospital for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability and proximate cause of plaintiff's injuries, or, in the alternative, granting partial summary judgment as to the claimed injuries, is granted on the issue of liability as to its emergency department staff employees only.

**ORDERED** that this motion (006) by defendant Christine Anne Conway, M.D., for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability, unopposed by plaintiff, is granted; and it is further

**ORDERED** that this motion (007) by defendants Lawrence J. Kessler, D.O., Scott J. Flashner, M.D., Lawrence J. Kessler, D.O., P.C., and Eastern Emergency Physicians, P.C., for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability, opposed by plaintiff, is denied; and it is further

**ORDERED** that this motion (008) by defendants Kristen E. Cain, M.D., Gabriel A. San Roman, M.D., Linda Sung, M.D., and Reproductive Specialists of New York, LLP, for an order pursuant to CPLR 3212 granting summary judgment, opposed by plaintiff, is denied.

This is an action premised upon the alleged medical malpractice by defendants in the failure to properly diagnose and treat plaintiff for an ectopic pregnancy. Plaintiff asserts that due to the delay in diagnosing her ectopic pregnancy, she was caused, inter alia, to undergo surgery, including a dilation and curettage, left salpingectomy and lysis of adhesions, and as a result thereof, has suffered pain and emotional distress, and will incur reduced fertility. The complaint sets forth causes of action sounding in medical malpractice, lack of informed consent, and a third cause of action against Eastern Long Island Hospital alleging, inter alia, its negligence in granting and renewing privileges or employment to defendants, residents, nurse practitioners, nurses and other involved in plaintiff's care.

Defendants seek an order granting summary judgment, arguing they were not negligent in their care and treatment of plaintiff, and that the treatment rendered was not the proximate cause of plaintiff's injuries.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home et al*, 253 AD2d 852, 678 NYS2d 503 [2<sup>nd</sup> Dept 1998]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2<sup>nd</sup> Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [3<sup>rd</sup> Dept 1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375, *app denied* 92 NY2d 814, 681 NYS2d 475 [2<sup>nd</sup> Dept 1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2<sup>nd</sup> Dept 1994]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant

has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [2<sup>nd</sup> Dept 1979]).

In motion (005), defendant Eastern Long Island Hospital (hereinafter ELIH) seeks an order granting summary judgment on the issue of liability, arguing there are no triable issues of fact, and there is no proximate cause of plaintiff’s injuries, or, in the alternative, granting partial summary judgment as to the claimed injuries. In support of the application, defendant ELIH has submitted, inter alia, an attorney’s affirmation; affidavit of Patricia Pispisa, Vice President of Patient Care at ELIH; copies of the summons and complaint; answer of defendant ELIH; copy of the verified bill of particulars; an unsigned and unsworn copy of the deposition transcripts of plaintiff Connie Altamirano and defendants Gabriel Alejandro San Roman, M.D. and Linda Sung, M.D.; uncertified copies of the records of ELIH emergency room, Reproductive Specialists of N.Y., Stony Brook University Hospital, and Winthrop University Hospital; affidavit of Thomas Kwiatkowski, M.D., and a partial agreement between ELIH and Scott J. Flashner, M.D. and Lawrence J. Kessler, D.O., P.C. d/b/a United Emergency Physicians.

In support of motion (005) defendant ELI has submitted the affidavit Thomas Kwiatkowski, M.D., a physician duly licensed to practice medicine in the State of New York and board certified in emergency medicine. Defendant’s expert avers that based upon his review of the records of the doctors, hospitals, and pleadings and transcripts, it is his opinion with a reasonable degree of medical certainty that the care and treatment provided to plaintiff by the nursing staff of the emergency department at ELIH was in accordance with good and accepted standards of medical care and practice, and there are no injuries of any kind causally connected to the care and treatment provided by ELIH.

He states that on March 7, 2002, plaintiff presented at Reproductive Specialists with complaints of irregular menses, pelvic pain consistent with endometriosis, mid-cycle bleeding and an inability to conceive. She had three prior miscarriages. On April 26, 2002, plaintiff underwent a lysis of adhesions by Reproductive Specialists and several in vitro fertilizations (IVF). The IVF performed by Reproductive Specialists on October 5, 2003 resulted in a pregnancy for which she continued to be followed by Reproductive Specialists. On October 27, 2003, plaintiff was seen at Reproductive Specialists for complaints of abdominal pain in the left lower quadrant and constipation, stating vaginal bleeding had started October 24, 2003. She was again seen on October 28, 2003 and October 31, 2003 at which time a sonogram was taken and laboratory work was performed. There were discussions concerning spontaneous abortion and ectopic pregnancy, and possibly treating a stable ectopic pregnancy with Methotrexate.

On November 2, 2003, plaintiff presented to the emergency department at ELIH at 9 a.m with complaints of severe left abdominal pain and a pink vaginal discharge. She advised she was six weeks pregnant with variable HCG levels and had been told by her primary care physician that she would miscarry. Ms. Altamirano was then seen by the emergency department physician, Dr. Kessler, who obtained a history, inclusive of, inter alia, appendectomy, lysis of adhesions, ovarian cysts, and hormone therapy. Defendant Kessler performed a physical examination and made findings of left lower quadrant tenderness and the presence of blood in the vaginal wall. There was no tenderness or enlargement of the uterus. He made an initial diagnosis of ovarian cyst and differential diagnosis of inevitable abortion. Blood test results revealed a beta HCG level of 895.2. Dr. Kessler felt Ms. Altamirano was improving and wrote orders discharging her with instructions to follow up with her Ob/Gyn on or before November 4, 2003. His final diagnoses were ovarian cyst and threatened abortion.

Later that day, plaintiff presented to Stony Brook University Hospital at 8 p.m.. She was examined with findings that her abdomen was non-tender and there was no active vaginal bleeding. A sonogram revealed a fluid collection in the uterus but no definite viable pregnancy. The possibility of an ectopic pregnancy could not be excluded on the sonogram and a follow up sonogram and HCG studies were recommended. After discussing plaintiff's condition with Dr. Cain of Reproductive Specialists, Ms. Altamirano was discharged home with ectopic precautions and told to follow up with her physician in the morning.

On November 3, 2003, Ms. Altamirano presented to Reproductive Specialists where she was examined and a minimal amount of left sided adnexal tenderness was found. A sonogram revealed a questionable left adnexal sac. The impression again was probable ectopic versus spontaneous abortion. Methotrexate was administered. Defendant ELIH's expert further states a note indicates a conversation regarding a probable stable ectopic pregnancy.

On November 4, 2003, Ms. Altamirano presented again to Reproductive Specialists with complaints of increased pain and abdominal tenderness. A sonogram revealed a questionable sac of the left adnexa, but no free fluid. Later that day, she was admitted to Winthrop University Hospital where she underwent a D&C, laparoscopy and removal of the left fallopian tube which was noted to be dilated with blood clots at the fimbriated end.

Defendant ELIH's expert opines with a reasonable degree of medical certainty that the care and treatment provided by the nursing staff of the emergency department was in accordance with good and accepted standards of medical practice and did not proximately cause plaintiff's injuries. He further opined that the nursing staff timely and appropriately performed a triage nursing assessment, obtained plaintiff's vital signs, complaints and prior medical and surgical history and appropriately documented the same in the triage note; appropriately followed the orders of the emergency medicine physician Kessler, and timely and appropriately administered medication and obtained laboratory work as ordered; and was discharged in accordance with defendant Kessler's orders, with appropriate instructions.

It was Dr. Kwiatkowski's further opinion that plaintiff underwent a sonogram several hours later at Stony Brook University Hospital, the sonogram did not definitively diagnose an ectopic pregnancy, the decision to delay surgery from November 2, 2003 to November 4, 2003, was made by physicians having no affiliation to ELIH, and on November 3, 2003, it was the decision of plaintiff's private physicians at

Reproductive Specialists that surgery was not indicated on that day.

In further support of its motion, defendant ELIH has also submitted the affidavit of Patricia Pispisa, Vice President of Patient Care Services at ELIH (defendant ELIH's exhibit N), which affidavit sets forth that on November 2, 2003, Lawrence J. Kessler, D.O. was a physician who provided medical services in the emergency room, but Dr. Kessler was not an employee of ELIH on that day or at any other time. ELIH did not exercise control or direction over any of the professional medical services rendered by Dr. Kessler on November 2, 2003 and did not assign Dr. Kessler to render any professional medical services to plaintiff on November 2, 2003. He was not reimbursed for his professional services and ELIH did not grant him the rights and privileges established for the employees of ELIH. She further states that on November 2, 2003, Dr. Kessler was a member and employee of Scott J. Flashner, M.D. and Lawrence J. Kessler, D.O., P.C. d/b/a United Emergency Physicians a/k/a Eastern Emergency Physicians. In support of this claim, she has annexed as defendant's exhibit O, what appears to be a redacted copy of the contract between ELIH and defendants Kessler and Flashner, who were engaged to provide all the services of an emergency room physician as of March 1, 2003.

Based upon the foregoing, it is determined that ELIH has demonstrated prima facie entitlement to an order granting summary judgment on the issue of liability and proximate cause of plaintiff's claimed injuries on behalf of the staff at ELIH emergency department who rendered care and treatment on November 2, 2003 to Ms. Altamirano, and on the issue that defendants Flashner and Kessler are independent contractors providing emergency medical services at ELIH emergency department.

In motion (006), defendant Conway seeks an order pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability. In support of the application, defendant Conway has submitted, inter alia, an attorney's affirmation; affidavit of Christine Anne Conway; copy of the answer of defendant Conway; copy of the verified bill of particulars; an unsigned and unsworn copy of the deposition of plaintiff Connie Altamirano and Lauren Longo; and an uncertified copy of Stony Brook University Hospital records.

Defendant Conway sets forth in her affidavit (defendant Conway exhibit D) that she is a physician licensed to practice medicine in the State of New York and is board certified in Obstetrics and Gynecology, and to her recollection and after a thorough review of the Stony Brook University Hospital chart regarding the admission of November 2, 2003, she did not render any care and/or treatment to Connie Altamirano, on that date or at any other time.

She avers that she found a stamped copy of her name on a radiology order notice and a final sonogram report, which states, "requested by Christine Conway," and while her stamped name appears on those documents, she did not print, sign or place her name on those documents, she was not contacted to provide care and/or treatment to plaintiff, did not complete any paper work regarding Connie Altamirano's admission at Stony Brook University Hospital, did not prepare any orders, author any progress notes, and had no contact with her. She did not render any care and/or treatment to plaintiff at any point during plaintiff's Stony Brook admission on November 2, 2003 or any time subsequent to or prior to that admission. She also reviewed her office records and a search of the same reveals that at no point in time was Connie Altamirano a patient in her office.

Based upon the affidavit of defendant Conway, it is determined that she has made a prima facie

showing of entitlement to an order granting summary judgment on the issue that she did not order any testing and did not render care and treatment to plaintiff, Connie Altamirano.

In motion (007), defendants Kessler and Flashner and Eastern Emergency Physicians seek an order granting summary judgment, and submit, inter alia, the following in support of the same: an attorney's affirmation; the affidavit of Robert Slutsky, M.D.; copies of the summons and complaint, answer, verified bill of particulars; copies of unsigned, unsworn transcripts of the examinations before trial of plaintiff, Gabriel Alejandro San Roman, Laureen Roman; an uncertified copies of the records of ELIH, Reproductive Specialists of NY, Stony Brook University Hospital, Winthrop University Hospital; and affidavits of defendants Scott J. Flashner and Lawrence J. Kessler.

Defendant Flashner sets forth in his affidavit that he is a physician licensed to practice medicine in the state of New York and is board certified in the field of emergency medicine. In November, 2003, he states he was an officer with Eastern Emergency Physicians, P.C., and as part of his employment with that entity, he rendered services in the emergency room of ELIH. He states he was never affiliated with, nor was he an employee of Lawrence J. Kessler on November 2, 2003. Defendant Flashner states he did not provide any medical care or treatment to plaintiff in this matter and, consequently, none of his alleged actions and/or omissions could have resulted in injury to Connie Altamirano.

Defendant Kessler sets forth in his affidavit (defendant's exhibit Q) that he is a physician licensed to practice medicine in the State of New York, is board certified in emergency medicine, and on November 2, 2003 was working in the emergency room of ELIH. He saw plaintiff in the emergency room on that date, and was the only member of Eastern Emergency Physicians who provided medical care and treatment to Connie Altamirano. He states he is an officer with Eastern Emergency Physicians, P.C.

Dr. Kessler states that when he saw plaintiff, she complained of moderate left lower quadrant pain and informed him she was six weeks pregnant and was advised by her primary care physician that she would miscarry. His initial diagnoses were ovarian cyst and inevitable abortion. He stated she had normal blood work results and was feeling better, so he discharged her with instructions to follow up with her OB/GYN. It is his opinion, based upon a reasonable degree of medical certainty, that consultation with plaintiff's treating OB/GYN was not warranted during her emergency room visit as her abdominal pain eased with the administration of IV fluids, her blood test results were not indicative of a ruptured ectopic pregnancy or internal bleeding, and she expressed she was feeling better and wished to leave. Defendant Kessler also opined that an ultrasound was not warranted while plaintiff was in the emergency room as a pregnancy would not be visible on ultrasound at six weeks, and because of her pain resolved with IV fluids. He further opined that administering Methotrexate on the morning of November 2, 2003 was premature as there was no conclusive evidence of an ectopic pregnancy at that time, and Ms. Altamirano was planning on returning to her treating OB/GYN.

It is determined by this Court that the affidavit of Dr. Kessler is conclusory and self-serving in that it does no more than simply state his actions and imply that he acted in conformity with the appropriate standard of care, though he does not state the same (*see, Mahac v Anderson*, 261 AD2d 811, 690 NYS2d 762 [3<sup>rd</sup> Dept 1999]).

In further support of motion (007), defendants Flashner, Kessler and Eastern Emergency Physicians,

P.C. have submitted the affidavit of Robert Slutsky, M.D. who states he is a physician licensed to practice medicine in the state of New York and is board certified in Internal Medicine, Emergency Medicine, Cardiology and Critical Care. It is Dr. Slutsky's "reasonable medical opinion" that on November 2, 2003, plaintiff was properly evaluated by Dr. Kessler in that he took the proper history, ordered appropriate tests and made the proper recommendation for plaintiff to follow up with her own treating OB/GYN. He states the results of the blood tests ordered by Dr. Kessler were consistent with plaintiff's reported history of an ovarian cyst and impending abortion and were not indicative of a ruptured ectopic pregnancy. Dr. Kessler noted she had a tender ovary, a finding consistent with possible ovarian cyst and inevitable abortion. Therefore, consultation with plaintiff's OB/GYN was not warranted and Dr. Kessler acted in conformity with all applicable medical standards.

Dr. Slutsky also states it is his reasonable medical opinion that an ultrasound was not warranted given plaintiff's past medical history and her resolving complaints of abdominal pain while she was a patient in the emergency room. He further opines that the administration of Methotrexate, a chemotherapy agent used to medically treat an ectopic pregnancy, would be contraindicated in the absence of a conclusive diagnosis of ectopic pregnancy, which diagnosis was not possible on the morning of November 2, 2003. He additionally stated that such medication would customarily be administered by plaintiff's own treating OB/GYN, not an emergency room physician.

Dr. Slutsky further states that plaintiff received all of the above treatment at Stony Brook University Hospital emergency department ten hours later under the supervision of Dr. Sung, and that none of this treatment was successful in averting the plaintiff's ultimate need for a laparoscopy and left salpingectomy on November 4, 2003. It is therefore his opinion within a reasonable degree of medical certainty that the actions of Dr. Kessler were not a substantial factor in causing the plaintiff's alleged injuries.

Defendants Kessler, Flashner and Eastern Emergency Physicians also submitted the transcript of the examination before trial of defendant San Roman wherein he testified that on November 3, 2003 the Methotrexate was given, but that protocol for a second injection a week later was stopped because the patient had an increased severity of pain, with ultrasound and examination findings consistent with ectopic pregnancy on that date, which raised the suspicion that the ectopic was rupturing and that bleeding was occurring internally (defendants' exhibit I). He stated that from reviewing the chart, that she did have a ruptured ectopic pregnancy. A break was taken during the examination before trial, and upon returning, defendant San Roman then testified that it does not appear from the chart that there was a rupture at the time of surgery, and he had no knowledge from any other source that there was a rupture.

It is noted that the copies of the examination before trial transcripts of Kristen E. Cain, M.D. and Linda Sung, M.D. were not included with the moving papers as exhibits G and H, and the page inserted for each exhibit states "To be provided with reply affirmation." However, they were not provided with the Reply.

Based upon the varying opinions set forth in the affidavits submitted by defendants, it is determined that defendants Kessler, Flashner and Eastern Emergency Physicians have demonstrated prima facie entitlement to an order granting summary judgment.

Turning to motion (008) wherein defendants Cain, San Roman, Sung and Reproductive Specialists seek an order pursuant to CPLR 3211(a)(7) and 3212 for an order granting defendants summary judgment

on the issue of liability and proximate cause, defendants have submitted in support of this application, the following, inter alia: copies of the pleadings; copies of the transcripts of the examinations before trial of Connie Altamirano, Kristen Cain, M.D., Linda Sung, M.D., Gabriel San Roman, M.D.; uncertified medical records of Reproductive Specialists, Eastern Long Island Hospital, Stony Brook University Hospital, and Winthrop University Hospital; and the affirmation of defendants' expert Dr. Howard Nathanson, M.D.

Dr. Nathanson states he is a physician licensed to practice medicine in the state of New York and is board certified in Obstetrics and Gynecology. He states with a reasonable degree of medical certainty that the care and treatment rendered to plaintiff, Connie Altamirano, by defendants Kristen Cain, M.D., Gabriel San Roman, M.D., Linda Sung, M.D., and Reproductive Associates were at all times appropriate and in accordance with good and accepted medical practices as they existed in 2002 and 2003, and that the care rendered was not a cause of plaintiff's alleged injuries. He further states that the allegations against the moving defendants as enumerated in the Bills of Particulars are completely without merit as the ectopic pregnancy was timely and appropriately treated with Methotrexate on November 3, 2003; however, the plaintiff ultimately required surgical removal of the left fallopian tube on November 4, 2003.

Dr. Nathanson states plaintiff initially presented to Dr. Cain due to inability to conceive in a prior heterosexual relationship, and that she reported bleeding with orgasm and ovulation. On April 26, 2002, Dr. Cain performed a laparoscopy and hystoscopy which showed adhesions of the upper abdomen and bowel. The examination of the fallopian tubes showed the tubes were open on both sides. Based upon the exam, Dr. Cain did not believe plaintiff had endometriosis, but the hystoscopy revealed a polypoid endometrium and the polyps were removed. Thereafter, between May 2002 and April, 2003, plaintiff underwent intrauterine insemination five times, but experienced spontaneous abortions with each of the confirmed pregnancies in May 2002, September 2002, and November 2002. Genetic testing was negative for any genetic disorders; therefore, Dr. Cain outlined plaintiff's options, including changing the sperm donor and preimplantation genetic diagnosis.

On September 25, 2003, Dr. Cain obtained a baseline sonogram which showed the plaintiff's ovaries were quiet, so she started her on Gonal F multi-dose to allow the ovaries to ripen more than one egg at a time. Plaintiff changed sperm donors, also. On September 29, 2003 and October 1, 2003, plaintiff returned for sonogram checks to determine when she was ready for insemination, which was then done on October 5, 2003. On October 20, 2003, plaintiff returned to Reproductive Specialists with complaints of slight spotting and no cramping. Blood work was drawn and revealed a Progesterone level of 18, confirming she was pregnant. On October 22, 2003, plaintiff was seen by Dr. Sung, and lab work revealed a Beta HCG level of 148 and a Progesterone level of 19. She was instructed to continue her medications and return in one week.

On October 25, 2003, plaintiff contacted Reproductive Specialist of New York as she was spotting. She was seen, and lab work revealed a Beta HCG level of 456 and a Progesterone level of 27.5. Plaintiff then saw Dr. Sung on October 27, 2003 who noted plaintiff is five weeks two days pregnant with complaints of bleeding since October 24, 2003, and left lower quadrant pain which stopped. A sonogram revealed a thickened endometrial lining and a 14 x 11 mm nodular area with a 9x9 cystic center adjacent to the left ovary. Beta HCG testing revealed the level dropped to 326 and that her Progesterone level was 19.9.

As planned, plaintiff returned on October 28, 2003 and was seen by Dr. San Roman who noted plaintiff complained of mild bleeding and improved left lower quadrant pain, which Dr. Nathanson stated that

Dr. San Roman testified that plaintiff's complaints of mild bleeding in view of the decreasing pregnancy hormone levels were significant for a diagnosis of miscarriage. Dr. San Roman's assessment was noted by Dr. Nathanson to be biochemical spontaneous abortion and recurrent pregnancy loss. Her lab work revealed a Beta HCG level of 382.9 and Progesterone level of 27.8. Dr. Cain then spoke with plaintiff and her partner by phone and discussed ruling out an ectopic pregnancy.

Dr. Nathanson states plaintiff returned on October 31, 2003 to Reproduction Specialists and was seen by Dr. Sung. A sonogram taken that day showed plaintiff's endometrial lining thinned to 17 mm and that a pregnancy (sac) was not visualized. An additional 11 x 8 mm questionable para-ovarian cyst was seen adjacent to the left ovary and noted to be difficult to image due to gas. He states Dr. Sung testified that if plaintiff had a normal intrauterine pregnancy, it would be visible on sonography at this stage of the pregnancy, and that the sonogram findings on October 31 were not consistent with an ectopic pregnancy and that it was likely an artifact. Further, a repeat Beta HCG check revealed a level of 649, and Dr. Sung testified it was determined that plaintiff was experiencing an abnormal pregnancy and it was not yet visible on the sonograms and that medical treatment, such as Methotrexate, could be administered. He also set forth that Dr. Sung further stated that if it was an intrauterine pregnancy, the plaintiff could miscarry, or may need a D and C (dilation and curettage). Plaintiff was to return on Monday (November 3, 2003) for a recheck and to obtain Methotrexate labs.

However, states Dr. Nathanson, plaintiff presented to ELIH on November 2, 2003 at 9:10 a.m. with complaints of vaginal bleeding for two days, abdominal pain, and possible miscarriage. Lab work showed a Beta HCG level of 895 and blood was noted in the vault on physical examination. She was discharged with a diagnosis of prenatal abortion and left ovarian cyst. At approximately 8:20 p.m. that same day, plaintiff presented to Stony Brook University Hospital with the chief complaint of spotting. Mucousy blood was noted to be present in the vault upon physical examination, but no active bleeding was noted. The plan was to rule out an ectopic at 5+ weeks. An endovaginal sonogram demonstrated normal ovaries and an irregular ovoid shaped fluid collection in the endometrial cavity with several internal echoes. A rounded ring echo was also noted and indicated to mimic a yolk sac. There was no flow or heart rate seen in the fluid collection, and no fluid was visualized in the cul-de-sac. The impression was noted as no definite viable pregnancy which was concerning for a blighted ovum. Dr. Nathanson states the note indicates an ectopic pregnancy could not be excluded and follow up Beta HCG levels and sonograms were recommended. Results were discussed with Dr. Cain, and plaintiff was to see Dr. Cain in the morning and there was a possibility of a D & C or Methotrexate.

Dr. Nathanson sets forth that plaintiff next returned to defendants on November 3, 2002 and was seen by Dr. San Roman. A sonogram that day revealed an endometrial lining of 16 mm with a 38 x 18 mm clot in the uterus. Measurements of the right and left ovaries were taken and it was noted there was a 46 x 12 mm complex questionable tube. Further, the plaintiff's Beta HcG was 986. Dr. Nathanson stated that Dr. San Roman noted an impression of a probable stable ectopic pregnancy versus spontaneous abortion, and testified that this impression was based upon the notes of the October 31, 2003 visit indicting a beta HCG level of 649, her complaints of intermittent pain and the sonogram findings of that day with a differential including ectopic pregnancy, ovarian lesion, bowel lesion, fibroid or other uterine lesion. Defendants' expert also stated Dr. San Roman testified the 19 x 19 mm complex mass was a new finding, and that a complex mass is partially liquid and partially solid. Physical examination revealed plaintiff did not have rebound upon examination of her abdomen which was flat and non-tender, and she did not have an acute abdomen. Dr. San Roman's

plan was to administer Methotrexate, obtain hemoglobin and hematocrit levels every other day and provide general instructions to plaintiff concerning ectopic pregnancy. Methotrexate was administered that day for which he obtained a consent which specifically states that “ Medical treatment with methotrexate may be unsuccessful, in which case surgery may be required.”

On November 4, 2003, Dr. Sung saw plaintiff who noted plaintiff had a tender abdomen with increased pain. A sonogram showed a 16 x 8 mm clot in the uterus, questionable left adnexal sac and a 16 x 13 mm questionable sac, but no free fluid. Dr. Sung made a differential diagnosis as possible abnormal intrauterine pregnancy versus a left ectopic pregnancy and planned to refer plaintiff to the emergency room at Winthrop University Hospital for possible surgery including a D & C, examination under anesthesia, laparoscopy, left salpingectomy and lysis of adhesions. Plaintiff returned to defendants on November 12, 2003 and Dr. Sung noted a possible future plan of in vitro fertilization, however, plaintiff never returned to these moving defendants.

It is Dr. Nathanson’s opinion within a reasonable degree of medical certainty that plaintiff’s Beta HCG levels were properly monitored; the sonograms were timely and appropriately performed and more frequent sonograms were not needed in the absence of additional complaints; that these defendants did not fail to recognize and appreciate the significance of plaintiff’s increase, decrease and increase in her Beta HCG levels; defendants acted within the standards of care in having plaintiff return to the office in one week from October 22, 2003 to check her lab levels; a sonogram on October 25, 2003 when plaintiff started spotting would not have diagnosed an ectopic or uterine, normal or abnormal pregnancy; and the findings of October 27, 2003 sonogram were not suggestive of an ectopic pregnancy and defendants appropriately monitored plaintiff’s hormone levels.

Dr. Nathanson also opined Methotrexate was not indicated on October 27, 2003; and on October 28, 2003 at five weeks and 4 days pregnancy, it would not be possible to diagnose an ectopic pregnancy, and the increasing and decreasing hormone levels were not sufficient to diagnose an ectopic pregnancy. He further opines that on October 31, 2003, it was appropriate to continue to monitor the patient to ensure she does not have a possible salvageable intrauterine pregnancy and to perform appropriate lab studies to confirm the patient is a candidate for Methotrexate therapy, and that it was not appropriate to administer Methotrexate on that date.

On November 3, 2002, he opines, that it was appropriate to administer Methotrexate if the patient is a candidate, or surgery, including a laparoscopy, salpingostomy, or salpingectomy, and that defendants properly had plaintiff review and sign a consent form for Methotrexate treatment.

He further opines that on November 4, 2003, based upon changes in plaintiff’s symptoms and sonogram findings, that it was appropriate to proceed with surgery; the standard of care requires a salpingectomy when an ectopic pregnancy is suspected, and that the surgical procedures performed by Dr. Sung were appropriate and warranted, and a salpingostomy was not appropriate.

Based upon the foregoing, it is determined that defendants Cain, San Roman, Sung and Reproductive Specialists of New York have demonstrated prima facie entitlement to an order granting summary judgment on the issue of liability.

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2<sup>nd</sup> Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

In opposition to this motion, plaintiff has submitted an attorney's affirmation; the affirmation of plaintiff's expert; and various excerpts from plaintiff's medical records previously submitted by defendants in their moving papers.

Plaintiff's expert sets forth that he/she is a physician duly licensed to practice medicine in the State of New York, and is board certified in Obstetrics & Gynecology and has practiced in this specialty for over forty years. Plaintiff's expert has submitted this affirmation and opinions as to the care and treatment rendered to plaintiff by defendants other than Christine Anne Conway. Plaintiff's expert states that an ectopic pregnancy is one in which a fertilized egg has implanted outside the uterus, and many ectopic pregnancies involve implantation in a fallopian tube which does not provide sufficient space or nurturing tissue for a pregnancy to develop. Consequently, if the embryo grows, it will eventually damage the tube which contains it and can ultimately cause the tube to rupture. Damage to the tube caused by an unruptured ectopic may also result in bleeding from the tube and bleeding in the uterus. Such damage and injuries to the woman's reproductive organs increase the risk that her future ability to conceive will be impaired.

Plaintiff's expert further states that signs and symptoms of an ectopic pregnancy include pelvic and/or abdominal pain, nausea, vomiting and vaginal spotting or bleeding, and since an untreated ectopic pregnancy will cause damage to the woman's reproductive organs, it is vital that an ectopic pregnancy be diagnosed and treated as early as possible, non-surgically through administration of Methotrexate which will dissolve the fertilized egg, and damage to the tube in which the ectopic has implanted may be avoided. Treatment with Methotrexate avoids the risks of surgery, including the risk of scarring of the patient's reproductive organs and impairing the patient's future ability to conceive.

Plaintiff's expert opines that when a woman is pregnant, the HCG (human chorionic gonadotropin) hormone occurs, is detected in the woman's blood, and will increase over the pregnancy with the level ideally doubling every 24 hours. In a viable, uterine pregnancy, a sonogram should be able to detect the presence of an intrauterine sac three weeks after conception. An ectopic pregnancy should be suspected where a woman is known to be pregnant for three weeks, but has HCG levels well below those expected for her gestational time, a uterine sac cannot be detected on sonogram, and instead a nodule adjacent to an ovary is detected, and the woman is experiencing pelvic and/or abdominal pain, nausea, vomiting and vaginal spotting or bleeding.

Plaintiff's expert states that under accepted standards of care in 2003, it was incumbent upon a physician treating a patient in such a condition described in the preceding paragraph to diagnose the woman as having an ectopic pregnancy and to institute aggressive management of the ectopic, including the prompt initiation of Methotrexate treatment.

Also, in 2003, the accepted standard of medical care required that where a female patient presented

to an emergency department complaining of abdominal pain, nausea and vomiting, and had experienced vaginal spotting or bleeding, the physician needed to consider the possibility of an ectopic pregnancy and to include ectopic pregnancy in his differential diagnosis, considering the entire constellation of a patient's signs, symptoms and complaints, and to consider any and all disease processes or conditions which may be causing the same. Each possible condition must then be ruled out via clinical examination, appropriate laboratory tests, or by a referral to an appropriate specialist, starting with the most life-threatening potential conditions first. In 2003, once a physician included ectopic pregnancy in his differential diagnosis, he was required to rule it out and to have a sonogram performed.

Plaintiff's expert sets forth that on October 27, 2003, Ms. Altamirano had signs, symptoms and findings suggestive of a nonviable pregnancy and, of instead, an ectopic pregnancy as evidenced by a drop in an abnormally low level of HGC, the lack of an intrauterine sac, and the presence of a nodule adjacent to her ovary. On October 28, 2003, Ms. Altamirano presented to Reproductive Specialists, was seen by Dr. San Roman for complaints of bleeding and her HGC level was 382.6. The expert states that applying the doubling formula from the baseline of 73 on October 20, 2003, her HCG level should have increased to 1168, and that Dr. San Roman conceded that the abnormally low HCG level was consistent with an ectopic pregnancy, however, he did not include an ectopic pregnancy in his differential diagnosis because the October 27, 2003 sonogram did not show obvious signs of a tubal pregnancy. Instead, he noted his impression as a "biochemical spontaneous abortion" and recurrent pregnancy loss based upon three prior miscarriages.

On October 28, 2003, Ms. Altamirano consulted with Dr. Cain by phone, who discussed the possibility of an ectopic pregnancy based upon her complaints during the conversation, the fact that the HCG level had plateaued, and symptoms and findings contained in Dr. San Roman's note. In 2003, accepted standards of care required a physician to be aware of the patient's recent visits, tests and findings relating to the condition then being assessed, and instead of pursuing treatment for an ectopic pregnancy at this juncture, Dr. Cain merely planned to follow-up with Ms. Altamirano three days later on October 31, 2003.

On October 31, 2003 a sonogram was performed which included the findings that "no sac seen" as well as the cyst adjacent to the left ovary which had been identified on the prior sonogram was now "difficult to image due to gas." Ms. Altamirano's HCG was 649, well below the level of 2336 which would have been expected. Again, the notes at Reproductive Specialists indicate a possible ectopic pregnancy, but again, despite the signs, symptoms and findings consistent with an ectopic pregnancy that had been present for four days, the Reproductive Specialist physicians did not undertake to treat Ms. Altamirano for an ectopic pregnancy.

When Ms. Altamirano presented to the emergency room at Eastern Long Island Hospital where she was seen by Dr. Kessler, she complained of severe left abdominal pain described as sharp cramping, and a pink/bloody vaginal discharge. She advised she was pregnant, had varying HCG levels, and had been told by her primary physician that she would miscarry. Dr. Kessler recorded his "initial impression" as an "ovarian cyst" but ordered an HCG test to assess for an ectopic pregnancy. Plaintiff's expert states that although Dr. Kessler recognized the possibility of an ectopic pregnancy, a sonogram was not performed or ordered, nor was there any attempt by Dr. Kessler to consult with the Reproduction Specialists physicians, even though Ms. Altamirano was being followed by them over the preceding week. Her discharge diagnosis was "threatened miscarriage." She was told to follow up with her primary physician on or before November 4, 2003.

Later that evening of November 2, 2003, however, Ms. Altamirano presented to the emergency room at Stony Brook University Hospital where a pelvic and transvaginal sonogram was performed which revealed "Fluid collection within the uterus and equivocal yolk sac. No definite viable pregnancy is identified. This is concerning for a possible blighted ovum; however the findings are not diagnostic. Also the possibility of an occult ectopic pregnancy cannot be excluded and F/U ultrasound and beta (sic) HCG is recommended." "No free fluid or adnexal masses identified. An ectopic cannot be absolutely excluded." The Stony Brook physician told Ms. Altamirano that she had spoken with Dr. Cain and Dr. Cain said everything looked fine and they would take care of her the following morning. Plaintiff's expert states that again Ms. Altamirano had signs, symptoms and complaints of an ectopic pregnancy for several days and yet the appropriate care was further delayed.

On November 3, 2003, Dr. San Roman diagnosed Ms. Altamirano as suffering from a stable ectopic pregnancy and decided to administer Methotrexate, seven days after she first exhibited signs and symptoms consistent with an ectopic pregnancy (abnormally low HCG, lack of an intrauterine sac and presence of a nodule adjacent to the ovary).

On November 4, 2003, Ms. Altamirano presented to Reproduction Specialists where she was seen by Dr. Sung with severe abdominal pain and tenderness, vomiting, and the sonogram revealed a clot. She was sent to Winthrop University Hospital where a Dilation and Curettage, left salpingectomy and lysis of adhesions was performed. According to Dr. Sung's operative note, the left fallopian tube was dilated and several blood clots were noted. The surgical pathology report noted a "tubal ectopic pregnancy with luminal hemorrhage admixed with chorionic villi and trophoblast."

Plaintiff's expert states with a reasonable degree of medical certainty that Dr. Sung departed from accepted standards of medical care in 2003 by failing to timely diagnose Ms. Altamirano as having an ectopic pregnancy and failing to administer Methotrexate treatment in a timely manner. She had the first opportunity to make the correct diagnosis on October 27, 2003 based upon the decreasing HCG level which was abnormally low, the sonogram did not detect an intrauterine sac which should have been detectable at 22 days into the pregnancy, the sonogram showed a nodule adjacent to her ovary, and she complained of lower left quadrant pain and constipation. Plaintiff's expert further adds that surgery would have been avoided had defendants, including Dr. Sung, not departed from accepted standards of medical care and timely diagnose the ectopic pregnancy.

It is also plaintiff's expert's opinion stated with a reasonable degree of medical certainty that Dr. San Roman similarly departed from accepted standards of medical care by failing to timely diagnose Ms. Altamirano as having an ectopic pregnancy and failing to administer Methotrexate treatment in a timely manner. Those same signs and symptoms which Dr. Sung failed to act upon were prevalent when Dr. San Roman saw Ms. Altamirano on October 28, 2003, and she had been in that state for more than 24 hours. Had Dr. San Roman diagnosed the ectopic pregnancy and commenced Methotrexate treatment, it would have dissolved the ectopic.

Plaintiff's expert also opines with a reasonable degree of medical certainty that Dr. Cain also departed from accepted standards of medical care in 2003 by failing to timely diagnose Ms. Altamirano as having an ectopic pregnancy and failing to administer Methotrexate in a timely manner on October 28, 2003. Alternatively, to the extent that Dr. Cain failed to make herself aware of and/or failed to consider the findings

of the October 27, 2003 sonogram showing the lack of an intrauterine sac and instead a nodule adjacent to Ms. Altamirano's ovary, Dr. Cain departed from accepted standards of care in 2003 by formulating a diagnosis and plan without properly considering all of the patient's signs, symptoms and findings.

Plaintiff's expert also states with a reasonable degree of medical certainty that Dr. Kessler departed from accepted standards of medical care in 2003 by failing to timely diagnose Ms. Altamirano as having an ectopic pregnancy and failing to administer Methotrexate treatment in a timely manner. The accepted standards of medical care in 2003 required an emergency room physician to rule out an ectopic pregnancy, where, as occurred here, a pregnant woman presented with signs and complaints of an ectopic pregnancy, including severe left abdominal pain, sharp cramping, and a pink/blood vaginal discharge. This ruling out process required Dr. Kessler to order a sonogram, but he failed to do so.

Plaintiff's expert further opines with a reasonable degree of medical certainty that the foregoing departures committed in seriatim by Dr. Sung, Dr. San Roman, Dr. Cain and Dr. Kessler, caused and/or substantially contributed to Ms. Altamirano's injuries, as their delays in diagnosing Ms. Altamirano's ectopic pregnancy (a seven-day delay attributed to Dr. Sung, a six-day delay attributed to Dr. San Roman and Dr. Cain, and a one-day delay attributable to Dr. Kessler) prevented Ms. Altamirano's successful, noninvasive treatment with methotrexate. During the delay, the ectopic increased in size and thus damaged the fallopian tube in which it was contained. Consequently, Ms. Altamirano experience pain and suffering, and was forced to undergo surgery and the removal of her fallopian tube, all of which would have been avoided if diagnosis and treatment had been timely made. Thus, opines plaintiff's expert, defendants' departures from accepted standards of care caused or substantially contributed to Ms. Altamirano's injuries.

Based upon the foregoing, it is determined that plaintiff's expert has demonstrated that there are factual issues concerning departures from good and accepted standards of care for the failure by all defendants, as set forth, to timely and properly diagnose Ms. Altamirano with an ectopic pregnancy, and failure to consider the constellation of all the signs, symptoms, including HCG levels, sonogram findings, and physical examination. Plaintiff has further raised factual issues concerning the failure to timely commence treatment with Methotrexate to avoid surgery and loss of the fallopian tube due to damage to the tube by the growing ectopic pregnancy, and reduction in fertility.

Plaintiff's expert has clearly demonstrated there are material factual issues to rebut defendant's experts concerning the actions and alleged failure to act by defendants Kristen Cain, M.D., Gabriel San Roman, M.D., Linda Sung, M.D., Reproductive Specialists of New York, and Dr. Lawrence J. Kessler in failing to timely diagnose the ectopic pregnancy in Ms. Altamirano and the failure to timely administer Methotrexate treatment to dissolve the ectopic pregnancy and obviate the need for surgery and removal of plaintiff's left fallopian tube. As set forth in *Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2<sup>nd</sup> Dept 2005], "[S]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury." Therefore, an order granting summary judgment on the issues of departures, proximate cause and damages is precluded as to defendants Kristen Cain, M.D., Gabriel San Roman, M.D., Linda Sung, M.D., Reproductive Specialists of New York, and Dr. Lawrence J. Kessler.

Accordingly, motion (008) by defendants Kristen E. Cain, M.D., Gabriel A. San Roman, M.D., Linda Sung, M.D., and Reproductive Specialists of New York, LLP, for an order granting summary judgment on

the issue of liability, proximate cause and damages is denied.

Accordingly, motion (007) by defendants Lawrence J. Kessler, D.O., Scott J. Flashner, M.D., Lawrence J. Kessler, D.O., P.C., and Eastern Emergency Physicians, P.C., for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability, proximate cause and damages is denied.

Also, with regard to motion (007), defendant Flashner sets forth in his affidavit that in November, 2003, he was an officer with Eastern Emergency Physicians, P.C., and as part of his employment with that entity, he rendered services in the emergency room of ELIH. He states he was never affiliated with, nor was he an employee of Lawrence J. Kessler on November 2, 2003. He never sets forth what his status with United Emergency Physicians was as United was d/b/a Eastern Emergency Physicians.

Defendant Kessler sets forth in his affidavit (defendant's exhibit Q) that he is a physician licensed to practice medicine in the State of New York, is board certified in emergency medicine, and on November 2, 2003 was working in the emergency room of ELIH. He saw plaintiff in the emergency room on that date, and was the only member of Eastern Emergency Physicians who provided medical care and treatment to Connie Altamirano. He states he is an officer with Eastern Emergency Physicians, P.C.

Under the doctrine of respondeat superior, a corporation, including a professional corporation, is liable for a tort committed by its employees acting within the scope of their employment (*Yaniv v Taub*, 256 AD2d 273, 683 NYS2d 34 [1<sup>st</sup> Dept], *cf.*, *Beauchamp v City of New York*, 3 AD3d 465, 771 NYS2d 129 [2<sup>nd</sup> Dept 2004]). However, a shareholder, employee, or officer of a professional corporation is liable only for negligent or wrongful acts committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation (*Moller v Talliuaga*, 255 AD2d 563, 681 NYS2d 90 [2<sup>nd</sup> Dept 1998]). In that defendants Kessler and Flashner have not provided this Court with any supporting evidence to determine what their relationship is to either corporation, United or Eastern Emergency Physicians, there are factual issues with regard to supervision and control, precluding an order granting summary judgment to defendant Flashner.

Accordingly, that part of motion (007) which seeks an order granting summary judgment to defendant Flashner is denied.

With regard to motion (005) by defendant Eastern Long Island Hospital, ELIH has asserted that defendants Kessler, Flashner and Eastern Emergency Physicians, P.C. are not employees of ELIH. It is well settled that a hospital may be vicariously liable for the malpractice of an emergency room physician, even if that physician is an independent contractor with the hospital (*Felter v Mercy Community Hospital of Port Jervis*, 244 AD2d 385, 664 NYS2d 321 [2<sup>nd</sup> Dept 1997]). "Although generally a hospital may not be held liable for the malpractice of a physician who is not an employee of the hospital ( *see, e.g., Sledziewski v Cioffi*, 137 AD2d 186, 188-189), a hospital may be held vicariously liable for the acts of independent physicians if the patient, as occurred in the case at bar, enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician" ( *Ryan v New York City Health and Hospitals Corporation*, 220 AD2d 734, 633 NYS2d 500 [2<sup>nd</sup> Dept 1995], *citing Meduba v Benedictine Hosp*, 52 AD2d 450, *Noble v Porter*, 188 AD2d 1066; *Agustin v Beth Israel Hospital*, 185 AD2d 203, 205-206; *Soltis v State of New York*, 172 AD2d 919). Here there is no evidence supporting a finding that the exception applied to the general rule that when a patient entered the hospital through the emergency room they seek

treatment from the hospital and not a particular physician (*Padula v Bucalo*, 266 AD2d 524, 698 NYS2d 911 [2d Dept 1999]).

In reviewing that contract (ELIH's exhibit O), the paragraph entitled "INDEPENDENT CONTRACTOR" sets forth that United shall perform all obligations required by this Agreement as an independent contractor. Paragraph 2 B. SERVICES PERFORMED sets forth that United is hereby engaged to be the exclusive provider of (I) professional medical services in emergency medicine, consisting of the services of Physician's and Physician's Assistants trained in the emergency treatment of patients (the "Medical Services") and (ii) certain administrative services (the "Administrative Services") to the Department at ELIH as more fully set forth in this Agreement. ELIH shall not exercise any control or direction over the methods by which United shall perform the Medical Services or Administrative Services provided for in this agreement. Paragraph 3. RESPONSIBILITIES AND OBLIGATIONS OF UNITED is missing and the following page is blank also. Therefore, the responsibilities and obligations of United cannot be determined, and the terms "Medical Services" and "Administrative Services" are not set forth. Therefore, whether or not defendant Kessler, as a physician qualifies as an independent contractor is a factual conclusion to be drawn from the contract itself, the attitude of the parties toward each other, the nature of the work, and other relevant circumstances (*Felter v Mercy Community Hospital of Port Jervis, supra*). Based upon the foregoing, there are factual issues concerning whether defendants Kessler, Flashner and Eastern Emergency Physicians are independent contractors, and whether ELIH is vicariously liable to these defendants for any alleged malpractice on their behalf.

Plaintiff, however, has raised no factual issue concerning the care and treatment rendered to plaintiff by the nursing staff, physician assistants, nurses aides or orderlies, nurse practitioners, or staff employed by ELIH in the emergency room, other than defendants Kessler, Flashner and Eastern Emergency Physicians. Therefore, defendant Eastern Long Island Hospital has demonstrated entitlement to an order granting summary judgment as to those emergency department staff employees only, not inclusive of the treating physicians, defendants Kessler, Flashner and Eastern Emergency Physicians.

Accordingly, motion (005) by defendant Eastern Long Island Hospital for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability and proximate cause of plaintiff's injuries, is granted as to those emergency department staff employees only, not inclusive of the treating physicians, defendants Kessler, Flashner and Eastern Emergency Physicians.

Plaintiff has raised no factual issues with regard to Christine Anne Conway, M.D. who has demonstrated entitlement to an order granting summary judgment.

Accordingly, motion (006) by defendant Christine Anne Conway, M.D., for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability is granted and the complaint is dismissed as asserted against her.

Dated: \_\_\_\_\_

6/4/07

*Emily Pines*  
 \_\_\_\_\_  
 J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION