

Fargo v Escamilla

2010 NY Slip Op 33026(U)

October 13, 2010

Supreme Court, Suffolk County

Docket Number: 35294/2006

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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DEIDRE FARGO, as Mother and Natural Guardian
of JORDAN K. FARGO, an infant,

Plaintiff,

-against-

GLORIA MERCEDES ESCAMILLA, M.D.,
CONTEMPORARY WOMEN'S OBGYN CARE,
P.C., BRIAN PATRICK MCKENNA, M.D.,
CONTEMPORARY WOMEN'S MEDICAL CARE,
P.C., CAROLINE ANGELA FIERRO, M.D.,
MARTINA MARIE FRANDINA, M.D., BRUCE
ALAN MEYERS, M.D., UNIVERSITY
ASSOCIATES IN OBSTETRICS &
GYNECOLOGY, P.C., AND ST. CATHERINE OF
SIENNA MEDICAL CENTER,

Defendants.

-----X

PLAINTIFF'S ATTORNEY:

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INDEX NO.: 35294/2006

CALENDAR NO.: 200900860MM

MOTION DATE: 1/17/2010

MOTION NO.: 003 MD

004 MOT D

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Upon the following papers numbered 1 to 35 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-13; Notice of Cross Motion and supporting papers 14-28; Answering Affidavits and supporting papers 29-31; Replying Affidavits and supporting papers 32-35; ~~Other~~ _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (motion sequence no. 003) by the defendants, Caroline Angela Fierro, M.D., Bruce Alan Meyer, M.D., and University Associates in Obstetrics & Gynecology, P.C. pursuant to CPLR 3212 R. for an order granting summary judgment dismissing plaintiffs' complaint, is denied and it is further

ORDERED that this motion (motion sequence no. 004) by the defendants, Gloria Mercedes Escamilla, M.D., Brian Patrick McKenna, M.D. and Contemporary Women's Care, P.C., pursuant to CPLR R. 3212 for an order granting summary judgment dismissing plaintiffs' complaint, is granted as to defendant Brian Patrick McKenna, M.D and the complaint is dismissed

with prejudice as asserted against him; and that part of motion (004) which seeks summary judgment dismissing the complaint as asserted against Gloria Mercedes Escamilla, M.D. and Contemporary Women's Care, P.C. is denied.

The complaint of this action sets forth causes of action sounding in medical malpractice, lack of informed consent, and negligent hiring on behalf of the infant plaintiff, Jordan K. Fargo, by his mother and natural guardian, Deidre Fargo, arising out of the alleged negligence of the defendants during the care and treatment rendered to the infant's mother during her pregnancy, labor and delivery, resulting in the premature birth of the infant plaintiff, and the alleged negligence of the defendants in their care and treatment of the infant plaintiff, causing the infant plaintiff to sustain severe and serious injury, including brain damage.

In support of the motion (003), brought by the defendants Caroline Angela Fierro, M.D., Bruce Alan Meyer, M.D., and University Associates in Obstetrics & Gynecology, P.C., the movants have submitted, inter alia, an attorney's affirmation; copies of the pleadings, answers, verified bill of particulars; a copy of the plaintiff's medical records; and the affidavit of Denise A. Guidette, M.D.

Denise A. Guidette, M.D., the expert for the defendants Caroline Angela Fierro, M.D., Bruce Alan Meyer, M.D., and University Associates in Obstetrics & Gynecology, P.C., has submitted an affidavit wherein she sets forth that she reviewed various materials including the plaintiff's verified bill of particulars and pertinent medical records and the testimonies of the parties to this action. However, a copy of the moving defendants' testimonies referred to have not been provided with the moving papers, or an affidavit by any of the moving defendants in support of the motion as required pursuant to CPLR 3212. Additionally, the affidavit of Denise Guidette, M.D., notarized in the State of Florida, does not comport with the requirements of CPLR 2309. Therefore, the moving papers are insufficient as a matter of law.

Dr. Guidette avers that she is a physician licensed to practice medicine in the States of New York and Florida and is board certified in Obstetrics and Gynecology with a subcertification in the field of Maternal-Fetal Medicine. Dr. Guidette also states that it is her opinion based upon a reasonable degree of medical certainty that the defendants did not depart from good and accepted medical practice with respect to any involvement they had with the care and treatment of Deidre Fargo and the infant plaintiff, Jordan Fargo.

Dr. Guidette sets forth that at the time of her presentation to St. Catherine of Siena Hospital on May 21, 2000, Deidre Fargo was a 34-year old female who had no living children and had two terminated pregnancies. Her last menstrual period was December 1, 1999 and her estimated date of confinement was September 7, 2000. At about 7:55 a.m., Dr. Gloria Escamilla conducted a speculum examination which revealed bulging membranes and no palpable cervix. The bedside sonogram indicated the fetus was in a breech position with hourglassing membranes. The cervix appeared to be two centimeters dilated and two centimeters in length. Mefoxin, Bethamethasone and Indocin, a tocolytic, was administered and she was advised of the mode of delivery and need for transport. She was thereafter transported to Stony Brook University Hospital. Arrangements for transport were accepted by Dr. Bruce Meyer. Dr. Guidette sets forth

that there is no evidence in the chart to support that Dr. Meyer ever examined or treated Deidre Fargo, with his role limited to accepting transfer of the plaintiff to Stony Brook. Dr. Guidette does not set forth the standard of care for a physician accepting a transfer such as Deidre Fargo presenting at approximately twenty-five weeks gestation with bulging, hourglassing membranes, no palpable cervix, breech presentation, a cervix two centimeters dilated and two centimeters in length, and how Dr. Meyer complied with the standard of care. Therefore, even if Dr. Guidette's affidavit were in admissible form, and the affidavit of Dr. Meyer, or a copy of his deposition transcript were provided to this court, Dr. Guidette has not established prima facie entitlement to summary judgment dismissing the complaint against Dr. Meyer (*Winegrad v N.Y.U. Medical Center*, supra).

Accordingly, that part of motion (003) which seeks summary judgment dismissing the complaint against Dr. Meyer is denied.

Turning to that part of motion (003) wherein Dr. Carolyn Fierro seeks summary judgment dismissing the complaint as asserted against her, Dr. Guidette does not establish *prima facie* entitlement to summary judgment dismissing the complaint. Even if an affidavit or affirmation were submitted by Dr. Fierro, or a copy of her deposition transcript were provided with the moving papers, Dr. Guidette does not set forth any of the circumstances of the examinations or care and treatment rendered by Dr. Fierro upon Ms. Fargo's presentation to Stony Brook, or the standard of care to be complied with by Dr. Fierro. Dr. Guidette has just set forth in a conclusory manner that Dr. Fierro properly determined that delivery was imminent and the only safe mode of delivery was by cesarean section, and that she did not depart from good and accepted medical practice and did not cause or exacerbate any of the infant's claimed injuries. Therefore, Dr. Fierro and University Associates in Obstetrics & Gynecology have not demonstrated prima facie entitlement to summary judgment dismissing the complaint (*Winegrad v N.Y.U. Medical Center*, supra).

Accordingly, the motion (003) brought by Dr. Fierro is denied in its entirety.

In support of their motion (004), the defendants Gloria Mercedes Escamilla, M.D., Brian Patrick McKenna, M.D. and Contemporary Women's Care, P.C. have submitted, inter alia, an attorney's affirmation; copies of the pleadings, answer and demands, verified bill of particulars; partial copies of the plaintiff's medical records; copies of the transcripts of the examination before trial of Deidre Fargo dated November 19, 2007, Gloria Escamilla, M.D. dated September 3, 2008; and the affirmation of the moving defendants' expert Henry Prince, M.D.

Deidre Fargo testified at her examination before trial that she did not have diabetes or any other illness, never had an abnormal PAP smear, never had any cervical surgeries prior to 1999 but did have a history of colitis as a child, a heart murmur, two shoulder surgeries, two abortions for non-medical reasons at age 18 and 24, and had been diagnosed with a uterine fibroid and was having heavy bleeding and cramping about a year prior to becoming pregnant, but received no treatment for the fibroid. In 1998 she reported to Dr. Bern that she was having difficulty conceiving during that past year and was referred for a sonogram after which she learned she had a fibroid. She then started going to Women's Contemporary Care in September 1999 and saw Dr. Brian McKenna for fertility consultation. After examination, Dr. McKenna recommended a procedure to "blow out" her tubes. When that procedure was performed, she learned that she had

two occluded tubes. She next saw Dr. McKenna in January 2000 as she had performed a home pregnancy test and learned she was pregnant. Blood work was performed and she was given a prescription for prenatal vitamins. She was then seen by Dr. McKenna in February 2000 and had a sonogram and urine test. She was referred for an amniocentesis as she was told she could be at genetic risk as she was over thirty-five years of age. However, she stated, the test result was normal.

In March she saw Dr. Escamilla and was told there was a fetal heartbeat. She thought a sonogram was done which she stated was normal. She thought she may have rescheduled some appointments thereafter. She thought she saw Dr. Escamilla on May 18, 2000, but was not sure. On May 20, 2000, she was tired and had a little back pain in her lower back in the early afternoon. That night she felt like she had to go to the bathroom, but couldn't and rested back in bed. Later she felt she had to go to the bathroom, stood up and felt a bulge, went into the bathroom and pushed the bulge back into the vagina, which bulge she described as slimy. She went back to bed and later that evening, about 9:30, her husband spoke to her sister-in-law the nurse, Linda Kazalski, who suggested that she call Dr. Escamilla. About 10:00 p.m. she called service and thought she might have told service what her complaints were, and shortly after she received a call back from Dr. Escamilla whom she stated she told how she felt, and advised Dr. Escamilla that she felt like she had a bulge when she stood up. She said Dr. Escamilla asked her to stand up again, which she did, but did not feel the bulge again and she told Dr. Escamilla she could not see it. She then had her husband look. He could see nothing and she told that to Dr. Escamilla, whom she stated told her it was probably just a hemorrhoid. She was not sure if she made any other calls to any other medical professionals besides Dr. Escamilla after that. She then went to sleep and woke up about 6:30 a.m. When she attempted to go to the bathroom she felt the bulge again and stated she had some bleeding which she described as heavy. Again, she pushed the bulge back up into her vagina. About 7:00 a.m. she called Dr. Escamilla, reached service, and Dr. Escamilla returned her call within five minutes. She advised Dr. Escamilla what happened and was advised to go to St. Catherine's although she lived in Levittown. She was met in the emergency room at St. Catherine's by Dr. Escamilla shortly after arrival and was put on the monitor. She testified that Dr. Escamilla told her she was in labor and she could have a D&C, which she understood to be an abortion, or she could deliver the baby. She stated she was aware that the baby could have disabilities such as blindness or cerebral palsy. She stated she was never told by Dr. Escamilla that she had an incompetent cervix at the time, that her cervix was dilated, or how far into labor she was. She was told she had to be transferred by ambulance to Stony Brook as they had the NICU. Upon arrival to Stony Brook, she was seen by Dr. Fierro in the emergency department who told her she was going to perform a cesarean section. She did not know if any other doctors examined her. She did not remember being advised of any risks with regard to her baby who weighed one pound thirteen ounces when he was born. She remembered he did not cry when he was born and she asked if he was alright, but she could not remember what she was told. She said Dr. Escamilla came into the operating room at Stony Brook but did not participate in the delivery. She thought Dr. Escamilla called her about a year later and left a message but she did not speak with her.

Gloria Mercedes Escamilla, M.D. testified at her examination before trial that she has been licensed in the State of New York to practice medicine and is Board Certified in Obstetrics and Gynecology. Deidre Fargo was her patient at Contemporary Women's Care where she was a partner with Dr. McKenna. She had an independent recollection of Deidre Fargo and saw her

twice prior to her presentation to St. Catherine's Medical Center. She became a patient at the group on September 23, 1999 where she was first seen by Dr. McKenna. Ms. Fargo had a history of two prior terminations of pregnancy at ages 18 and 24, and was 35 years old at her presentation to the group. Dr. Escamilla testified that prior terminations and mechanical dilation of the cervix would be considered with regard to cervical incompetence and the cervix would be kept under observation. She reviewed the note of the prior attending physician found in the record and examined Ms. Fargo on February 18 and April 14, 2000. She stated that there was no reason which would warrant checking Ms. Fargo's cervix up to and including May 17, 2000. She testified that had she received a phone call from Ms. Fargo on May 20, 2000 and was advised that Ms. Fargo felt a bulge from her uterus into her vagina, she would have told her to go to the hospital to be evaluated. However, she testified, Ms. Fargo did not call her the evening of May 20, 2000. On the morning of May 21, 2000 she did receive a telephone call from Ms. Fargo between 6:00 a.m. and 8:00 a.m. wherein Ms. Fargo advised her that she felt something come out of the vagina last evening and pushed it back in, and then again this morning at which time she noted bleeding. Dr. Escamilla therefore told Ms. Fargo to go to the closest hospital.

Ms. Fargo presented to St. Catherine of Siena Medical Center. Upon examination, her differential diagnoses were cervical incompetence and pre-term labor. She also considered the possible need for steroids for fetal lung maturation for possible premature delivery. When she examined Ms. Fargo at the hospital, Ms. Fargo told her there were no contractions, no vaginal discharge, no loss of fluids, and she was feeling fetal movement, but Ms. Fargo complained of the bulge. Dr. Escamilla felt there were some mild rare occasions of contractions, there were membranes bulging into the vagina, and the cervix was not palpable on exam, either due to the bulging membranes or because there was full dilation. Upon performing a sonogram, she visualized a single intrauterine pregnancy (SIUP), breech presentation, hourglassing of the membranes and she saw a cervix which appeared to be approximately 2 cm long and 2 cm dilated. Thereafter, a formal sonogram was done by radiology to determine the baby's weight, confirm her findings, and to give that information to Stony Brook. Her working diagnosis was cervical incompetence versus preterm labor, but her diagnosis before transferring Ms. Fargo was cervical incompetence at 25 weeks. Risks, benefits, and prematurity were discussed with Ms. Fargo and her husband, as well as the need for classical cesarean section for delivery secondary to breech position and early gestational age. Arrangements were made to transfer her to Stony Brook University Hospital, but there was no indication at this point that a cesarean section needed to be performed in the very near future based upon her current exam. Steroids to enhance lung maturity and decrease the risk of intra cerebral hemorrhage at 25 weeks, and antibiotics for possible infection were given. She considered viability at 24 weeks. She did not perform a rescue cerclage on Ms. Fargo as the membranes were already in the vagina and she could not see the cervix to get to it. She placed Ms. Fargo in Trendelenburg position with her legs higher than the head of the bed. She left the decision for a cerclage to Stony Brook.

The Stony Brook Hospital record indicates that on May 21, 2000, that Ms. Fargo arrived at 10:15 a.m. from St. Catherine's. At approximately 12:30 p.m., a premature infant, whose birth weight was 836 grams, was delivered by cesarean section and was transferred to the NICU under the care of the neonatologists after the delivery. The infant's APGAR score was 3/7. The mother's history in the labor record on May 21, 2000 at 7:53 a.m. reveals that Ms. Fargo stated "last night I was straining to go to the bathroom to have a B.M. I felt something protrude from my

vagina.” Her husband stated ‘it looked like a round ball.’” She went back to bed. She had no pain or bleeding. In the morning she went to the BR and noticed she had some vaginal bleeding-bright red in color and some pressure. She called her Dr. and came here for an evaluation by Dr.”

Henry Prince, M.D., the expert for Gloria Mercedes Escamilla, M.D., Brian Patrick McKenna, M.D. and Contemporary Women’s Care, P.C. set forth in his affirmation that he is licensed to practice medicine in the state of New York and is board certified in Obstetrics and Gynecology. Dr. Prince sets forth those records he reviewed, including the deposition transcripts of the plaintiff and Dr. Escamilla.

In his affirmation, Dr. Prince set forth Ms. Fargo’s pertinent medical history and prenatal visits with the defendants. He indicated that Ms. Fargo’s last period was December 1, 1999 and her estimated delivery date was September 7, 2000. At the first office visit with the aforementioned defendants on January 14, 2000, physical examination revealed Ms. Fargo had a gestational age of six weeks and two days, a fetal heart rate was detected, the cervix was closed and long. Ultrasound was performed and vital signs were obtained. On February 18, 2000, at eleven weeks into her pregnancy, Ms. Fargo was seen by Dr. Escamilla, and findings were not remarkable. Ms. Fargo presented for additional visits on March 17, 2000, April 4, 2000. At the May 17th visit with Dr. McKenna, with a gestational age of 23 weeks and five days, fetal movement and a positive fetal heart rate was determined. No pre-term labor signs and symptoms were present on that date.

Dr. Prince sets forth that Dr. Escamilla testified at her deposition that her next contact with Ms. Fargo was on May 21, 2000 between 6:00 and 8:00 a.m. when notified by service. He states there is no indication in any of the records that the patient contracted Dr. Escamilla or Dr. McKenna at any time prior to the morning of May 21, 2000, and it was her groups’ practice to document telephone calls made or received by the office and to note the disposition of “after-hour” calls. She had been on call the evening before and carried a cell phone and a beeper in the event answering service needed to contact her. Dr. Escamilla learned during that telephone call on May 21, 2000 that on May 20, 2000 at about 10:00 p.m., that Ms. Fargo was straining to go to the bathroom to have a bowel movement when she felt something protrude from her vagina and pushed it back in. There was no bleeding or pain. The following morning when she went to the bathroom she noticed some bright red bleeding and felt pressure. Dr. Escamilla testified that ordinarily she would have the patient proceed to the hospital closest to the patient’s home, she referred her to St. Catherine’s in that Ms. Fargo indicated her preference to be evaluated by her own physicians.

Upon arrival to St. Catherine’s at 7:53 a.m., Dr. Escamilla examined Ms. Fargo and vital signs were obtained. Small amount of odorless vaginal bleeding and staining was noted on the patient’s pad, and she complained of some lower back ache and mild and rare contractions. Speculum examination at 8:14 a.m. revealed membranes bulging into the vagina with no cervix palpable. Ms. Fargo was maintained in Trendelenburg position and a sonogram was performed revealing the infant was a footling breech, about 880 grams (1lb. 15 oz.), normal amount of amniotic fluid, and the cervix was dilated 1.85 cm with bulging membranes extending through the cervical os into the upper portion of the vaginal canal. Dr. Escamilla discussed with Ms. Fargo and her husband and that Ms. Fargo had an incompetent cervix with some funneling of

membranes and amniotic fluid through her cervix and the need for transfer to Stony Brook and a classical cesarean section secondary to positioning. Mefoxin, Betamethasone and Indocin were administered. Ms. Fargo was transported to Stony Brook University Hospital at about 10:15 a.m.

It is Dr. Prince's opinion within a reasonable degree of medical certainty that the care and treatment rendered by Dr. Escamilla and Dr. McKenna and Contemporary Women's Care, P.C. to Ms. Fargo and the infant comported with good and accepted medical practice and that their care and treatment was not and could not be the proximate cause of the infant plaintiff's alleged injuries. He states that there was nothing by way of medical history or clinical presentation which would have raised a suspicion for cervical incompetence prior to twenty five weeks gestation requiring a cerclage which is placed between thirteen and sixteen weeks gestation where a patient has had prior pregnancy losses consistent with cervical incompetence or a history of cervical trauma known to cause cervical incompetence. Ms. Fargo's medical history was properly obtained and it was determined that her previous pregnancies were terminated electively in the first trimesters. Thus, there was no evidence of prior cervical incompetence. There was no evidence of cervical trauma or that the prior pregnancies had any effect on her cervix. There were no signs of pre-term labor during the pre-natal visits and findings upon examination were consistent with the infant's gestational age. The cervix was closed and long with no cervical dilation or cervical incompetence found upon examination on January 14, 2000. The standard of care did not require the obstetricians to perform an examination of the patient's cervix at each and every office visit. The April 4, 2000 sonogram at North Shore University Hospital at a gestational age of 19 weeks, confirmed that Ms. Fargo was not at risk for cervical incompetence and the cervix was normal, with no signs of cervical incompetence such as funneling, shortening or hourglassing of membranes.

Dr. Prince states that at the May 21, 2000 visit with Dr. McKenna, no signs of pre-term labor or cervical incompetence were reported or noted upon examination. Thereafter, Dr. McKenna did not see Ms. Fargo before she contacted Dr. Escamilla on May 21, 2000. Dr. Prince opines that Dr. Escamilla appropriately recommended Ms. Fargo proceed to the hospital for an immediate evaluation based upon her consideration of possible cervical incompetence as part of her differential diagnosis. Upon Ms. Fargo's arrival, Dr. Escamilla then provided care and treatment which comported with good and accepted medical practice in that she immediately evaluated the patient upon proper examination, performance of a bedside sonogram, and clinical findings, which she promptly diagnosed as cervical incompetence and considered pre-term labor due to mild uterine contractions. There was no rupture of the membranes and Ms. Fargo was appropriately medicated with Indocin suppository, a tocolytic to reduce premature contractions, Betamethasone to enhance fetal lung development and an antibiotic. Dr. Prince opines that Dr. Escamilla took all appropriate steps to prolong the pregnancy, promote fetal lung development and prevent bacterial infection. He further opines that the standard of care did not require the placement of an emergency or rescue cerclage prior to May 21, 2000 as there were no clinical indications of cervical incompetence. Rescue cerclages are only placed in an attempt to prolong a pregnancy after a period of observation to rule out infection and premature labor, and that infection, rupture of membranes and labors are all significant risks of rescue cerclage. Dr. Prince opines that the decision to either perform a rescue cerclage or deliver was appropriately made at Stony Brook University Hospital. Dr. Escamilla did not participate in the delivery at Stony Brook.

Based upon the foregoing, it is determined that the moving defendants, McKenna, Escamilla and Contemporary Women's Care, P.C., have demonstrated *prima facie* entitlement to summary judgment dismissing the complaint as asserted against them.

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 [2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [1997]).

In opposing motion (004) by the defendants McKenna, Escamilla, and Contemporary Women's Care, the plaintiffs have submitted an expert's affirmation¹ attesting to a deviation or departure from accepted practice which departures were the competent producing cause of the plaintiff's alleged injuries. The plaintiff's expert sets forth to being duly licensed to practice medicine in the State and is board certified in Obstetrics and Gynecology. The records and materials reviewed have been set forth with an opinion within a reasonable degree of medical certainty that there is no dispute that up until May 20, 2000 that Ms. Fargo's pregnancy was progressing and the fetus was developing normally.

The plaintiffs' expert states, that based upon the testimony by Ms. Fargo, she spoke with Dr. Escamilla on the night of May 20, 2000 and advised her that she felt a bulge in her vagina and pushed it back in. Plaintiffs' expert further states that Dr. Escamilla testified that if a woman called her with complaints of back pain and a bulge from the uterus into the vagina, she would consider those to be significant obstetrical complaints from a patient of Ms. Fargo's gestational age, and it would constitute a potential obstetrical emergency and it would be considered a departure to fail to send that patient to the hospital. The plaintiffs' expert opines with a reasonable degree of medical certainty that Dr. Escamilla departed from accepted standards of care on the night of May 20, 2000 by not appreciating the potential for an obstetrical emergency; not making a differential diagnosis including cervical incompetence; not advising the patient to go to the nearest tertiary care facility; and by not ensuring that the patient be immediately evaluated for cervical incompetence and the possibility of preterm labor, which would have included the performance of a cerclage, placement on bedrest, trendelenburg position, and administration of tocolytic agents and corticosteroids if deemed necessary at the time. The failure to diagnose and treat cervical incompetence and/or preterm labor, and to treat with tocolytics or corticosteroids on the evening of May 20, 2000 is a causative factor in injury as a result of preterm birth, which preterm birth could have been, within reasonable probability, avoided.

The plaintiffs' expert also states that assuming, *arguendo*, that Dr. Escamilla was not contacted on May 20, 2000, her failure to properly instruct Ms. Fargo on May 21, 2000, as to which hospital to go to constituted departures from accepted standards of care and that she should

¹The Court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name and State. In addition, the Court has returned the unredacted affirmations to the plaintiff's attorney.

have been instructed to go to the nearest tertiary care hospital. There were issues concerning Ms. Fargo testifying she was told to go to St. Catherine's and not to the nearest hospital, and she did not ask to go to St. Catherine's, and that Dr. Escamilla testified that she told Ms. Fargo to go to the nearest hospital but Ms. Fargo said she was going to St. Catherine's. The plaintiff's expert opines that having the patient travel to St. Catherine's was a departure from accepted standards of care in light of the fact that St. Catherine's was not capable of handling the situation; and in light of the patient living 27 miles from St. Catherine's and only 1.9 miles from Nassau County Medical Center, and shorter distances to other hospitals which were equipped to deal with the situation. This delayed the necessary and time sensitive treatment that Ms. Fargo required to forestall the delivery of the infant and permit the use of corticosteroids for a period of time to permit benefit and is a substantial contributing factor in causing injury to the infant.

The plaintiffs' expert further opines that the departures by Dr. Escamilla resulted in the loss of chance to prevent the preterm labor and/or preterm birth of the infant, to at least prevent the delivery of the infant until corticosteroids had an opportunity to be effective.

Based upon the foregoing, it is determined that the plaintiffs have failed to raise a triable issue of fact as to the defendant Dr. Brian Patrick McKenna, but have raised triable issues of fact which preclude summary judgment being granted as to the defendants Gloria Mercedes Escamilla, M.D. and Contemporary Women's Care, P.C.

Accordingly, that part of motion (004) which seeks summary judgment dismissing the complaint as asserted against Dr. Brian Patrick McKenna is granted and the complaint is dismissed with prejudice as asserted against him; and that part of motion (004) which seeks summary judgment dismissing the complaint as asserted against Dr. Gloria Mercedes Escamilla and Contemporary Women's Care, P.C. is denied.

Dated: October 13, 2010

PAUL J. SABELLO, JR.

J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION