Kayel v El-Bab
2010 NY Slip Op 33979(U)
July 21, 2010
Sup Ct, Suffolk County
Docket Number: 21594/2005
Judge: William B. Rebolini

[* 1]

Short Form Order

PUBLISH

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Timothy Kayel, Jr., an infant by his Father and Natural Guardian, Michelle Kayel,

Plaintiff,

-against-

Zeinab M. Fath El-Bab, M.D., Andrew H. Nataloni, M.D., J. Gerard Quirk, Jr., M.D., Paul L. Ogburn, M.D., University Associates in Obstetrics & Gynecology, P.C., Joseph A. Spataro, M.D., Zeinab, Nataloni & Spataro, M.D.'s, Central Suffolk Hospital, Ernst Jean Paul, Jr., M.D., Eastern Long Island Hospital and Scott J. Flashner, M.D. and Lawrence J. Kessler, D.O., P.C. d/b/a United Emergency Physicians,

Defendants.

Index No.: 21594/2005

Attorneys [See Rider Annexed]

Motion Sequence No.: 003; MG
Motion Date: 5/11/09
Submitted: 5/19/10

Motion Sequence No.: 004; XMD
Motion Date: 5/11/09
Submitted: 5/19/10

Motion Sequence No.: 005; MG
Motion Date: 6/11/09
Submitted: 5/19/10

Motion Sequence No.: 006; MD
Motion Date: 6/25/09
Submitted: 5/19/10

Motion Sequence No.: 007; MG
Motion Date: 6/30/09
Submitted: 5/19/10

Motion Sequence No.: 008; MD
Motion Date: 7/15/09
Submitted: 5/19/10

Upon the following papers numbered 1 to 30 read on these motions and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 4, 9 - 15, 16 - 19, 20 - 23, 24 - 27; Notice of Cross Motion and supporting papers, 5 - 8; Answering Affidavits and supporting papers 28 - 30.

In this medical malpractice action, plaintiff Michelle Kayel ("Mrs. Kayel"), as mother and natural guardian of the infant plaintiff, Timothy Kayel, Jr., seeks damages for alleged departures in accepted medical practice in her care which caused permanent injuries to the infant plaintiff, from March 28, 2003 through June 30, 2003. The record reveals that Mrs. Kayel presented to defendant Zeinab Fath El-Bab ("Zeinab"), her obstetrician, for prenatal care for her second pregnancy. A sonogram performed on April 22, 2003 revealed placenta previa, the attachment of the placenta at a lower portion of the uterus which partially covered the os of the cervix, the opening to the uterus. The record reveals that Mrs. Kayel was advised to limit her activities and to stay on bed rest. Mrs. Kayel was admitted several times to defendant Peconic Bay Medical Center ("Peconic Bay"). There is no dispute that defendants Zeinab and Nataloni were private attending physicians who had admitting privileges at Peconic Bay and were not employees or agents of Peconic Bay. Mrs. Kayel was also seen at defendant Eastern Long Island Hospital by the emergency room doctor, defendant Ernst Jean Paul, Jr., M.D.

On June 11, 2003, Mrs. Kayel was airlifted from defendant Eastern Long Island Hospital to Stony Brook University Hospital Medical Center ("Stony Brook") for heavy vaginal bleeding and possible miscarriage. Defendant J. Gerald Quirk provided a consult and defendant Paul L. Ogburn treated Mrs. Kayel from June 12 through June 14, 2003. On June 29, 2003, she returned to Peconic Bay with complaints of passing large blood clots and bleeding. Mrs. Kayel was transferred from Peconic Bay to nonparty Stony Brook University Hospital Medical Center ("Stony Brook") on June 30, 2003, where nonparty Dr. Pinney delivered the infant plaintiff, Timothy Kayel, Jr. by caesarean section. Mrs. Kayel returned for post operative follow up appointments with defendant Zeinab.

By way of the bill of particulars, Mrs. Kayel alleges, *inter alia*, that defendants departed from accepted medical practice by their failure: to timely order and/or recommend the use of outpatient tocolytic medications; to timely and properly administer magnesium sulfate; to timely and properly order and/or recommend the use of home uterine activity monitoring; to properly discharge the plaintiff from Stony Brook in June 2003; to timely investigate the cause of Mrs. Kayel's vaginal bleeding, forestall and/or prevent preterm labor and delivery, order and require complete bed rest, and keep proper records. In addition, Mrs. Kayel alleges that defendants improperly caused her to suffer preterm labor, permitted her placenta previa to progress, permitted her to suffer a placental abruption and failed to implement treatment plans based upon fetal viability. Mrs. Kayel also alleges that Peconic Bay and Eastern Long Island were vicariously liable for the negligent acts of their employees, including defendants Zeinab, Nataloni, Paul, Flashner, Kessler and United Emergency Physicians. Mrs. Kayel further alleges that defendants negligently caused, *inter alia*, the following injuries to the infant plaintiff: retinal detachment, amblyopia, nystagmus, astigmatism, left orchiopexy, chronic lung disease, oral motor weakness, decreased IQ and poor coordination.

Defendant Peconic Bay now moves for summary judgment and defendants Zeinab and Nataloni cross move for summary judgment dismissing the action insofar as asserted against them. Defendants Quirk, Ogburn and University Associates in Obstetrics and Gynecology, P.C., Eastern Long Island Hospital and Paul, Flashner and Kessler, doing business as United Emergency Physicians, also move for summary judgment dismissing the action.

The motion by defendants Ernst Jean Paul, Jr., M.D., Scott J. Flashner, M.D., and Lawrence J. Kessler, D.O., P.C., doing business as United Emergency Physicians, for summary judgment was made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (see, Brill v. City of New York, 2 NY3d 648 [2004]; Thompson v. Leben Home for Adults, 17 AD3d 347 [2nd Dept., 2005]; see also, Bressingham v. Jamaica Hosp. Med. Ctr., 17 AD3d 496 [2nd Dept., 2005]). Accordingly, such motion is denied as untimely.

The elements of proof in an action to recover damages for medical malpractice are deviation or departure from accepted practice in the medical community and evidence that such departure was a proximate cause of injury or damage (see, Thompson v. Orner, 36 AD3d 791 [2nd Dept., 2007]; Lyons v. McCauley, 252 AD2d 516 [2nd Dept.,1998], *app denied* 92 NY2d 814 [1998]; Bloom v. City of New York, 202 AD2d 465 [2nd Dept., 1994]). "O n a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (Williams v. Sahay, 12 AD3d 366 [2nd Dept., 2004]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). To prove a *prima facie* case of medical malpractice, a plaintiff must establish that the defendant's negligence was a substantial factor in producing the alleged injury (see, Derdiarian v. Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v. Rafla-Demetrious, 224 AD2d 674 [2nd Dept.,1996]) by submitting a physician's affidavit of merit attesting to a departure from accepted practice (see, Domaradzki v. Glen Cove Ob/Gyn Associates, 242 AD2d 282 [2nd Dept., 1997]). A conflict in medical opinions in a medical malpractice action precludes a finding of summary judgment (see, Viti v. Franklin Gen. Hosp., 190 AD2d 790 [2nd Dept.,1993]).

A hospital may be held liable for the malpractice of a physician with whom it has an employment relationship, yet mere affiliation of a physician with a hospital is insufficient to impute the physician's negligent conduct to the hospital (see, Hill v. St. Clare's Hospital , 67 NY2d 72 [1986]). No liability can attach to the hospital unless it has been shown to be independently negligent (see, Hill v. St Claire's Hospital, 67 NY2d 72 [1986]). A physician's affiliation with a hospital in the form of admitting privileges does not, by itself, give rise to vicarious liability on the part of the hospital (see, Ruane v. Niagra Falls Mem. Med. Ctr., 60 NY2d 908 [1983]). "The law is clear that a hospital is protected from liability when it follows the direct and explicit orders of the attending physician unless its staff knows that the doctor's orders are so clearly contraindicated by

normal practice that ordinary prudence requires inquiry into their correctness" (Toth v. Community Hospital at Glen Cove, 22 NY2d 255 [1968]; Killeen v. Reinhardt, 71 AD2d 851 [2nd Dept.,1979]).

Defendants Peconic Bay and Eastern Long Island Hospital ("Eastern Long Island") have demonstrated their *prima facie* entitlement to judgment as a matter of law by establishing that their employees were not negligent in the care and treatment of Mrs. Kayel and that they were not vicariously liable for the care rendered by defendants Zeinab, Nataloni and Paul (see, Hill v. St. Clare's Hospital, 67 NY2d 72 [1986]; Toth v. Community Hospital at Glen Cove , 22 NY2d 255 [1968]). Defendants submit, *inter alia*, the pleadings, the bill of particulars, the plaintiff's hospital medical record, deposition testimonies of defendants Zeinab and Nataloni, an affirmation by Barry Kramer, M.D., an affidavit by Patricia Pispiso, an affirmation by Nimaroff, M.D. and a copy of the agreement between Eastern Long Island Hospital and United Emergency Physicians.

Dr. Kramer avers that he is a physician duly licensed to practice medicine in the State of New York. He avers that defendant Peconic Bay did not depart from accepted standards of medical care in the treatment of Mrs. Kayel. He notes that Mrs. Kayel waived the depositions of the hospital employees. Upon a review of the hospital medical records, the office records of defendant Zeinab, and deposition testimony, Dr. Kramer opines with a reasonable degree of medical certainty that Mrs. Kayel was appropriately managed during all admissions to Peconic Bay on March 28, 2003, April 1, 2003, June 1 through June 2, 2003 and June 29 through June 30, 2003. In addition, there is no evidence that the hospital staff failed to adequately carry out any instructions or medical orders. Therefore, it is Dr. Kramer's opinion that Peconic Bay also did not deviate from the accepted standard of care in connection with the care and treatment of the Mrs. Kayel. There was no action or inaction by the employees or agents of Peconic Bay that in any way contributed to or caused the injuries for which Mrs. Kayel is now seeking to recover on behalf of the infant. Dr. Kramer further opines that there were never any acts or omissions by defendant Zeinab or defendant Nataloni, during any of Mrs. Kayel's admissions, that should have caused Peconic Bay or any of its agents to attempt to modify or overrule the plan of treatment as set out and implemented by defendant Zeinab or defendant Nataloni.

Patricia Pispisa avers that she is the vice president of patient care services at defendant Eastern Long Island Hospital. On June 11, 2003, defendant Paul was a physician who provided professional medical services in the emergency room to plaintiff. Defendant Paul was not an employee of the hospital on June 11, 2003 or at any other time. The hospital did not control or direct the professional medical services rendered by defendant Paul on June 11, 2003 and did not assign defendant Paul to render any professional medical services to the plaintiff on June 11, 2003. Ms. Pispisa states that a contract between Eastern Long Island Hospital and United Emergency Physicians provided that United Emergency Physicians was to be the exclusive provider of professional medical services in the emergency room. The contract also specified that the physicians

who were retained by United Emergency Physicians were not employees of Eastern Long Island Hospital. Ms. Pispisa further stated that rules and regulations were in effect regarding the treatment of obstetric patients on June 11, 2003.

Dr. Nimaroff avers that he is a physician duly licensed to practice medicine in the State of New York. He is board certified in obstetrics and gynecology. He opines with a reasonable degree of medical certainty that the care and treatment provided to Mrs. Kayel by the nursing staff of the emergency department at Eastern Long Island Hospital on June 11, 2003, was in accordance with good and accepted standards of medical and nursing care and practice and that there are no injuries of any kind causally connected to any of the care and treatment provided by the emergency department of Eastern Long Island Hospital. It is also Dr. Nimaroff's opinion with a reasonable degree of medical certainty that the rules and regulations which were in effect at Eastern Long Island Hospital on June 11, 2003, were proper and appropriate with respect to the care and treatment for obstetric patients, including high risk obstetric patients, who present to the emergency department. The rules and regulations indicate that the patient is to be stabilized in the emergency department and fetal status evaluated, and that a patient with vaginal bleeding less than 35 weeks gestation and/or pre term labor less than 35 weeks gestation shall be transferred to a tertiary care center such as Stony Brook University Hospital.

The moving defendants have established their entitlement to judgment as a matter of law (see, Lifshitz v. Beth Israel Med.Ctr.-Kings Highway Div., 7 AD3d 759 [2nd Dept., 2004]). Thus, the burden shifted to plaintiff to respond with rebutting medical evidence demonstrating a departure from accepted medical procedures (see, Starr v. Rogers,44 AD3d 646 [2nd Dept., 2007]; Whalen v. Victory Mem. Hosp., 187 AD2d 503 [2nd Dept., 1992]).

In opposition, Mrs. Kayel submits, *inter alia*, the affirmation of her medical expert, whose name has been redacted in accordance with Carrasquillo v. Rosencrans, 208 AD2d 488 (2nd Dept., 1994). The original unredacted affidavit has been submitted to the Court for inspection under separate cover.[1] The expert states that he is a physician duly licensed to practice medicine in the State of New York and is board certified in obstetrics and gynecology and maternal-fetal medicine. The Court finds that the expert has failed to address the issue of vicarious liability by Peconic Bay for the alleged departures by defendants Zeinab and Nataloni and Eastern Long Island for the alleged departures by defendant Paul and other emergency room physicians employed by United Emergency Physicians. In addition, Mrs. Kayel has failed to raise an issue of fact regarding negligence by the

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[1]The 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. In addition, the Court has returned the unredacted affirmation to the plaintiff's attorney.

employees of Peconic Bay and Eastern Long Island, since the expert's opinions are not supported by the evidence in the record (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). Accordingly, the motions by Peconic Bay and Eastern Long Island for summary judgment are granted.

Defendant Spataro has demonstrated his prima facie entitlement to judgment as a matter of law by establishing with admissible evidence that he never treated Mrs. Kayel (see, Winegrad v. N.Y. Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. New York, 49 NY2d 557 [1980]). In support, defendant submits, *inter alia*, his personal affidavit and a portion of Mrs. Kayel's examination before trial. In his affidavit, defendant states that he is duly licensed to practice medicine in the State of New York and is board certified in obstetrics and gynecology. He states that he never treated, cared for, diagnosed or saw Mrs. Kayel. He never spoke with defendant Zeinab or defendant Nataloni about her. He never discussed her care and treatment with any physicians or care providers and never saw her while she was at Peconic Bay. He further states that he is the sole practitioner in a practice of medicine specializing in obstetrics and gynecology. His patients are billed under his tax identification number. Although he worked in the same suite as defendants Nataloni and Zeinab, he was not in a partnership with either doctor, he was not an employee of either doctor, he was not an agent of either doctor and he was not a servant of either doctor. He pays for all his supplies, electricity, phones, staff and rent and pays his own separate malpractice insurance premiums. He also does not share profits with either doctor and has sole control over his practice without input from defendants Nataloni and Zeinab. In her deposition, Mrs. Kayel testified that she did not know who defendant Spataro is and that defendant Spataro had not treated her during any of her prenatal hospitalizations.

Defendant Spataro has established his entitlement to judgment as a matter of law. Thus, the burden shifted to Mrs. Kayel to respond with rebutting medical evidence demonstrating a departure from accepted medical procedures (see, Starr v. Rogers, 44 AD3d 646 [2nd Dept., 2007]; Whalen v. Victory Memorial Hosp., 187 AD2d 503 [2nd Dept., 1992]). In opposition, Mrs. Kayel submits the affirmation of her counsel and the aforementioned redacted affirmation by her expert. However, Mrs. Kayel has failed to raise an issue of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]), inasmuch as the attorney's affirmation is not probative in a motion for summary judgment since he has no personal knowledge (see, Zuckerman v. New York, 49 NY2d 557 [1980]) and the expert failed to address this issue. Accordingly, the motion by defendant Spataro for summary judgment is granted.

Turning to the motions for summary judgment by defendants Zeinab, Nataloni, Quirk, Ogburn and University Associates in Obstetrics and Gynecology, P.C., defendants submit, *inter alia*, the deposition testimonies of defendants Zeinab, Nataloni and Quirk, office records of defendant Zeinab, plaintiff's medical records from Peconic Bay and Stony Brook and affirmations by Barry Kramer, M.D. and James T. Howard, Jr., M.D.

Defendant Zeinab testified that she is duly licensed to practice medicine in the State of New York. She has admitting privileges at Peconic Bay and has a private practice in obstetrics and gynecology. Defendant states that she has no partners in her practice, however, she has a verbal agreement with defendant Nataloni to cover her patients when she is off. She shares office space with defendant Nataloni, defendant Spataro, M.D. and nonparty Dr. Allam.

Defendant Zeinab stated that she was Mrs. Kayel's obstetrician. She delivered her first child in August, 2002, by caesarean section. Defendant stated that she had advised Mrs. Kayel to avoid another pregnancy so soon after the first delivery and that complications could occur. However, she learned on March 4, 2003 that Mrs. Kayel was again pregnant. An obstetric sonogram was performed which revealed a single viable eight week two day intrauterine gestation with a small subchorionic hemorrhage. The fetal heart rate was 153 beats per minute. At that time, defendant instructed Mrs. Kayel to refrain from heavy lifting. On March 26, 2003, an obstetric sonogram revealed a single viable intrauterine gestation at eleven weeks three days. The subchorionic hemorrhage had resolved. The fetal heart rate was 162 beats per minute. On April 22, 2003, an obstetric sonogram revealed a single viable sixteen week one-day intrauterine gestation with total placenta previa. The fetal heart rate was 141 beats per minute. At this time, defendant stated that she considered Mrs. Kayel to be a high risk patient and planned to refer her to a perinatologist after 24 weeks gestation, when the fetus was considered to be viable. Defendant advised her to avoid intercourse and heavy lifting, to stop smoking and to begin complete bed rest. On May 29, 2003, an obstetric sonogram revealed a single viable intrauterine gestation at twenty-one weeks one day with total placenta previa. Defendant stated that, throughout the pregnancy, Mrs. Kayel had no premature contractions and, therefore, did not require the use of tocolytics, which are used to stop premature contractions, at home. On June 1, Mrs. Kayel was admitted to Peconic Bay with complaints of heavy bleeding with clots. She was placed on complete bed rest. On June 2, defendant was paged by the nursing staff that Mrs. Kayel did not wish to stay any longer in the hospital. Defendant and the hospital staff were unable to find Mrs. Kayel in the hospital and learned that Mrs. Kayel had been smoking outside. Mrs. Kayel was discharged on June 3, and instructed to remain on bed rest.

On June 11, Mrs. Kayel was seen in the emergency room at Eastern Long Island Hospital. The doctor on duty, defendant Paul, performed a manual vaginal examination despite being advised by Mrs. Kayel that no manual examinations were to be done due to her condition. Mrs. Kayel then began to bleed vaginally and was air-lifted to Stony Brook, where a tocolytic, magnesium sulfate, was administered. Defendant was notified of this incident and stated that she made a complaint to Eastern Long Island Hospital regarding the contraindication of manual vaginal examinations in patients with placenta previa.

Defendant stated that at the June 17 appointment, a sonogram showed a new small hematoma in the placenta, which defendant opines was caused by the vaginal examination performed by defendant Paul. The sonogram also revealed a single viable intrauterine gestation at twenty-three weeks three days with total placenta previa. The fetal heart rate was 146 beats per minute. Defendant next saw Mrs. Kayel on June 26 in the office. A sonogram showed that the hematoma was unchanged and that there was active fetal movement and fetal heart beat. Mrs. Kayel did not complain of any contractions, abdominal pain or bleeding. During the weekend of June 29, 2003, defendant stated that she went out of town and left coverage of her patients to defendant Nataloni. Defendant called the Peconic Bay labor and delivery staff, as is her custom when she is away, to check if any of her patients have been admitted. She learned that Mrs. Kayel was admitted and spoke to her. Mrs. Kayel was passing blood clots after a day of walking around a country fair in Greenport. Defendant also learned that defendant Nataloni was in the hospital and had seen Mrs. Kayel. Defendant later learned that Mrs. Kayel was transferred to Stony Brook, where she delivered the infant by caesarean section at 25 weeks gestation. Defendant stated that she followed Mrs. Kayel postoperatively in the office.

Defendant Nataloni testified that he saw Mrs. Kayel on June 29 and 30, 2003. He states that Mrs. Kayel conceded that she was at a street fair all day, began to pass bright red blood at home and called him at approximately 5:00 p.m. Defendant was in the delivery room at Peconic Bay at the time and advised Mrs. Kayel to come to the hospital immediately. Upon examination after she arrived at 9:00 p.m., he noted that she was not in preterm labor. He ordered lab tests and a clotting profile demonstrated that there was no placental abruption. He felt that Mrs. Kayel was stable and he went home. He was called at 11:15 by the nursing staff who reported a new onset of bleeding and contractions. Defendant ordered intravenous fluids and magnesium sulfate. He returned to Peconic Bay, suspected a placental abruption and determined that Mrs. Kayel would need to be transferred to Stony Brook. Unfortunately, the Stony Brook ambulance crew had another priority when they were called by the nurses and arrived at 3:40 a.m. He ordered a blood transfusion and, after its administration, plaintiff was transferred via ambulance at 4:37 a.m. Defendant Nataloni later learned that Mrs. Kayel had delivered the infant by caesarean section.

Dr. Kramer avers that Mrs. Kayel was consistently and adequately followed by private attending physicians Zeinab and Nataloni. Mrs. Kayel was appropriately monitored and advised of the risks of placenta previa and the necessary precautions. He opines with a reasonable degree of medical certainty that defendants Zeinab and Nataloni treated her appropriately and did not depart from accepted standards of medical care during her pregnancy. In addition, the decision to transfer Mrs. Kayel to Stony Brook on June 30, 2003, by defendant Nataloni was timely and in accordance with good medical practice. Defendants Zeinab Fath El-Bab and Nataloni have established their entitlement to judgment as a matter of law by establishing that they did not depart from accepted

medical standards in their care and treatment of Mrs. Kayel which caused injuries to the infant plaintiff.

Dr. Howard avers that he is a physician duly licensed to practice medicine in the State of New York and is board certified in the specialty of obstetrics and gynecology. Upon review of the deposition testimony of defendant Quirk, the office records of defendant Zeinab and the medical records of Peconic Bay and Stony Brook, it is his opinion, to a reasonable degree of medical certainty, that defendants Quirk, Ogburn and University Associates acted in accord with good and accepted obstetrical/gynecological practice in the care and treatment of Mrs. Kayel. Additionally, it is his opinion, to a reasonable degree of medical certainty, that the care and treatment rendered by these three parties was not a substantial factor in any of the alleged injuries to Mrs. Kayel or the infant plaintiff.

Based upon his review of the record, the care and treatment by defendant Ogburn was limited to one consult with Mrs. Kayel's doctor on June 11, 2003, as well as the receipt of a telephone call for the transfer of the plaintiff on June 30, 2003. On June 11, 2003, plaintiff presented to Eastern Long Island Hospital emergency department with complaints of cramping and vaginal bleeding. After evaluation in the emergency room by the attending physician, Mrs. Kayel was transferred to Stony Brook where she was evaluated by a resident and attending physician. She was admitted to labor and delivery at 9:00 a.m. and Dr. Ogburn subsequently consulted as a maternal fetal medicine specialist. It is Dr. Howard's opinion to a reasonable degree of medical certainty that this consultation was in accord with good and accepted obstetrical practice. The care recommended by defendant Ogburn was instituted, the contractions did abate and Mrs. Kayel did not deliver the non-viable infant prior to her discharge on June 14. In addition, it is Dr. Howard's opinion to a reasonable degree of medical certainty that defendant Ogburn acted in accord with good and accepted medical practice in his limited involvement of the receipt of the telephone call of June 30, 2003 and the agreement that it would be appropriate to transfer Mrs. Kayel to Stony Brook for expectant management, in order to provide neonatal intensive care to the infant plaintiff.

Dr. Howard further opines to a reasonable degree of medical certainty that the care and treatment rendered by defendant Quirk, between June 12 and June 14, 2003, was in accord with good and accepted obstetrical practice. It is further his opinion that none of the care and treatment rendered by defendant Quirk was a substantial factor in any alleged injuries of the plaintiff. During this admission, Mrs. Kayel was seen by defendant Quirk three times. Her condition improved under the care of defendant Quirk. There is no evidence that the physical examination by defendant Quirk caused the premature delivery of the infant plaintiff. Rather, given the information known to date regarding the events on or about June 29, 2003, it is Dr. Howard's opinion, to a reasonable degree of medical certainty, that Mrs. Kayel experienced spontaneous preterm labor and bleeding on June 29 unrelated to the care and treatment rendered to her between June 11 and June 14, 2003.

Considering the fact that her pregnancy had not changed at office visits subsequent to June 14, it is clear that there was a spontaneous change in her condition on June 29. Finally, Drs. Zeinab and Nataloni both testified that Mrs. Kayel stated on June 29, 2003, that she was not on bed rest as directed, ambulated at a local street festival and thereafter experienced additional bleeding and uterine contractions. If true, such activity would be the cause of the premature delivery of the infant and the resultant conditions from which he now suffers. Therefore, it is Dr. Howard's opinion, to a reasonable degree of medical certainty, that the delivery of the infant on June 30, 2003 was not the result of any of the care and treatment of defendants Quirk or Ogburn, such that their care was not a substantial factor in any of the alleged medical conditions of the infant. In addition, Dr. Howard opines that the claims against defendant University Associates in Obstetrics and Gynecology, P.C., as they relate to defendants Quirk and Ogburn, should similarly be dismissed for the above reasons.

The moving defendants have established their entitlement to judgment as a matter of law. Thus, the burden shifted to plaintiff to respond with rebutting medical evidence demonstrating a departure from accepted medical procedures (see, Starr v. Rogers, 44 AD3d 646 [2nd Dept., 2007]; Whalen v. Victory Mem. Hosp., 187 AD2d 503 [2nd Dept., 1992]).

In opposition, Mrs. Kayel submits the aforementioned redacted affirmation of her expert. The expert avers that he is a perinatologist and is experienced in the evaluation, diagnosis and treatment of high risk pregnancies, including patients with placenta previa and those who are at risk for and are in preterm labor. The expert states, *inter alia*, that defendant Zeinab departed from accepted standards of medical care when she failed to refer Mrs. Kayel to a perinatologist after the diagnosis of placenta previa was made on April 22, 2003; failed to provide home uterine activity monitoring; and failed to admit Mrs. Kayel to the hospital and place her on complete bed rest upon learning that she was noncompliant at home. In addition, the expert states, *inter alia*, that defendant Nataloni departed from accepted standards when he treated Mrs. Kayel for seven hours on June 29 at Peconic Bay and failed to transfer her immediately to Stony Brook upon being notified of her complaints of vaginal bleeding. The expert also states that defendants Zeinab, Nataloni, Quirk, Ogburn and University Associates departed from accepted standards of care by their failure to provide corticosteroids in an effort to accelerate fetal lung maturity after reaching 24 weeks gestation. It is the expert's opinion with a reasonable degree of medical certainty that the aforementioned departures from accepted standards of care by the defendants were substantial contributing factors of the severe and permanent injuries incurred by the infant plaintiff. Such departures substantially decreased or diminished the infant's opportunity for a longer gestation and deprived him of a chance to be injury-free. This conflicting opinion precludes a finding of summary judgment (see, Viti v. Franklin General Hospital, 190 AD2d 790 [2nd Dept., 1993]).

Accordingly, the motion by defendants Zeinab M. Fath El-Bab, M.D. and Andrew H. Nataloni, M.D. is denied. In addition, the motion by defendants J. Gerald Quirk, Jr., M.D., Paul L.

Ogburn, Jr., M.D. and University Associates in Obstetrics and Gynecology, P.C. is denied. The motion by Ernst Jean Paul, Jr., M.D., Scott J. Flashner, M.D. and Lawrence J. Kessler, D.O., doing business as United Emergency Physicians is denied as untimely. The motions by Peconic Bay Medical Center, sued herein as Central Suffolk Hospital, Joseph A. Spataro, M.D. and Eastern Long Island Hospital are granted.

The claims against Peconic Bay Medical Center, Spataro and Eastern Long Island Hospital, dismissed herein, are severed and the plaintiff's remaining claims shall continue.

Based on the foregoing, it is

ORDERED that the motion (003) by defendant Peconic Bay Medical Center, sued herein as Central Suffolk Hospital, for summary judgment dismissing the action is granted; and it is further

ORDERED that the cross motion (004) by defendants Zeinab M. Fath El-Bab, M.D. and Andrew H. Nataloni, M.D. for summary judgment dismissing the action is denied; and it is further

ORDERED that the motion (005) by defendant Joseph A. Spataro, M.D. for summary judgment dismissing the action is granted; and it is further

ORDERED that the motion (006) by defendants J. Gerald Quirk, Jr., M.D., Paul L. Ogburn, Jr., M.D., and University Associates in Obstetrics and Gynecology, P.C. for summary judgment dismissing the action is denied; and it is further

ORDERED that the motion (007) by defendant Eastern Long Island Hospital for summary judgment dismissing the action is granted; and it is further

ORDERED that the motion (008) by defendant Ernst Jean Paul Jr., M.D., Scott J. Flashner, M.D., and Lawrence J. Kessler, D.O., P.C., doing business as United Emergency Physicians for summary judgment dismissing the action is denied as untimely.

Dated: July 21, 2010

HON. WILLIAM B. REBOLINI, J.S.C.