SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JEANINE CLAY as Mother and Natural Guardian of Infant, JALAI CLAY and JEANINE CLAY, individually,

Plaintiff,

-against-

ELANA KASTNER, M.D., WOMEN'S CONTEMPORARY CARE ASSOCIATES, P.C., PRENATAL ASSOCIATES, WINTHROP UNIVERSITY HOSPITAL, FRANKLIN HOSPITAL and GODWIN ONYEIKE, M.D.,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 9204/07
Motion Seq. Nos.: 01, 02, 03, & 04

DECISION AND ORDER

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In motion sequence number one, defendant, Winthrop University Hospital [hereinafter Winthrop], moves pursuant to CPLR §3212, for an order granting summary judgment, dismissing all causes of action as alleged in the plaintiff's complaint.

In motion sequence number two, defendant, Godwin Onyeike, M.D., moves pursuant to CPLR §3212, for an order granting summary judgment dismissing all the causes of action contained in the

plaintiff's complaint.

In motion sequence number three, defendant, Franklin Hospital Medical Center [hereinafter Franklin Hospital], moves pursuant to CPLR §3212, for an order dismissing all the causes of action contained in the plaintiff's complaint.

In motion sequence number four, defendants, Elana Kastner, M.D. and Women's Contemporary Care Associates, P.C. d/b/a Perinatal Associates, move pursuant to CPLR §3212, for an order dismissing the within complaint, as well as any other claims asserted against said defendants.

Factual Background:

On or about August 29, 2004, the plaintiff, Jeanine Clay, presented to Women's Contemporary Care Associates, P.C. [hereinafter WCCA], complaining of a recurrent yeast infection, frequent urination and the absence of menses (*see* Cohen Affirmation in Support at Exh. G at pp. 14, 17; *see also* Exh. D). On said date the plaintiff was seen by Dr. Rebecca Rudesill, M. D., who ordered various tests, including a urinalysis to determine whether or not the plaintiff was suffering with a urinary tract infection (*see* Exh. G at pp.15, 19, 20). In addition to revealing the presence of Group B streptococci, the urinalysis revealed that the plaintiff was pregnant (*id.* at p. 23; *see also* Exh. D). An ultrasound conducted on September 17, 2004 indicated that the size of the fetus was consistent with eight weeks and one day (*id.* at Exh. D).

On October 4, 2004 and October 13, 2004, the plaintiff again presented to WCCA (*id.* at Exh. G at pp. 13, 24, 25; *see also* Exhs. D, H). On the latter of these two visits, the plaintiff, who was 13 weeks pregnant and suffering with a yeast infection, was seen by defendant, Dr. Elana Kastner, M.D. (*id.*). Subsequently, on November 10, 2004, the plaintiff was again examined by Dr. Kastner, at which time the plaintiff "was in the middle of treating [the] yeast infection," for which she was taking the drugs Nystatin and Monistat (*id.* at Exh G at pp.36, 38; *see also* Exh. D). On November 16, 2004, the plaintiff spoke

with Dr. Kastner by phone and complained of a "fishy odor" and reported that the Monistat was not effective in treating the yeast infection (*id.* at Exh. G at pp. 37, 38). On the following day, the plaintiff presented to Dr. Kastner, who observed the presence a brownish discharge, which the doctor examined under a microscope and determined the presence of a vaginal infection (*id.* Exh. G at pp. 42, 43).

On December 7, 2004, the plaintiff underwent a repeat ultrasound, the results of which indicated that the fetus was in a breech position (*id.* at Exh. D). On December 21, 2004, the plaintiff presented to Dr. Kastner with continuing complaints of vaginal discharge and a fishy odor (*see* Exh. G at p. 48, 49, 50). The plaintiff reported that she had failed to take the drug Flagyl, which had been previously prescribed by Dr. Kastner for the treatment of bacterial vaginitis (*id.* at p. 49). Dr. Kastner strongly urged the plaintiff to take the prescribed medications and warned the plaintiff of the dangers attendant to preterm labor (*id.*).

On January 11, 2005, the plaintiff presented to the emergency department of Winthrop, where she was seen by then resident, Dr. Mona Cho, M.D., as well as Chief Resident, Dr. Marjorie Jean-Michel, M.D (*id.* at Exh. E). The plaintiff reported that commencing that morning she had experienced left lower quadrant abdominal cramping, as well as clear fluid loss (*id.*). The plaintiff additionally complained of vaginal itching, which had persisted for the past two days (*id.*). Dr. Cho ordered a battery of tests to rule out infection and the rupture of membranes (*see* Cohen Affirmation in Support at ¶ 17). Said testing included, cervical and uterine cultures, a urinalysis, a fetal Fibronectin test, a ferning test, a Nitrazine test, as well as an ultrasound, the result of the later established that the cervical length was within normal range (*id.*; *see also* Exh. E). Upon examination, Dr. Cho noted the absence of contractions or vaginal bleeding (*id.* at Exh. E).

The plaintiff was discharged from Winthrop on January 11, 2005, with instructions to "keep [her]

next doctors appointment," which was scheduled for the following day (*id.* at Exh. F at p. 300). Notwithstanding said appointment, the plaintiff elected not to keep same as she "felt ok to go to work" (*id.* at Exh. F at 300). At the time of her discharge from Winthrop, the Nitrazine test was positive, the ferning test was negative, and the results of the cervical cultures and the Fibronectin test were still pending (*id.* at Exh. E).

On January 13, 2005, the plaintiff began experiencing contractions and accordingly presented to the labor and delivery department of Franklin Hospital at approximately 9:15 p.m. (*see* Varriale Affirmation in Support at Exh. H). The Admission Form indicates that the plaintiff had a temperature of 100 degrees and reported that she was experiencing contractions, some spotting and possible fluid leakage since January 11, 2005 (*id.*). The plaintiff was initially seen by Lena Loban, R.N., who after completing an assessment, held the belief that the plaintiff was having contractions consistent with preterm labor (*see* Varriale Affirmation in Support at ¶8; *see also* Exh. F). As a result, Nurse Loban contacted defendant, Dr. Godwin Onyeike, M.D., who conducted a vaginal examination of the plaintiff at 10:05 p.m. (*see* Varriale Affirmation in Support at ¶9; *see also* Exhs. G, I). Based upon said examination, Dr. Onyeike was of the opinion that the plaintiff was in preterm labor and accordingly ordered intravenous hydration, steroids and magnesium sulfate to arrest the contractions (*see* Varriale Affirmation in Support at ¶¶9, 10; *see also* Exhs. G, I). Additionally, Dr. Onyeike initiated procedures to facilitate the plaintiff's transfer to Long Island Jewish Medical Center, which was necessitated due to Franklin Hospital's lack of a perinatal ICU (*see* Varriale Affirmation in Support at ¶10; *see also* Exh. G). At 11:50 p.m., the plaintiff was placed into the ambulance for transport to Long Island Jewish Medical Center (*see* Varriale Affirmation in Support at ¶15; *see also* Exh. J). However, prior to departing the hospital, the plaintiff gave birth in the ambulance and was accordingly brought back into the hospital for care and

treatment (*id.*).

Upon reentry into the emergency room, the infant had "intermittent respirations" and "no palpable pulse" (*see* Shapiro Affirmation in Support at Exh. A at ¶7; *see also* Exh. F). As a result, "supplemental oxygen was given, chest compressions were performed, positive pressure ventilation was done, mouth and nose were suctioned with bulb suction, [and] cardiac massage was performed" (*id.*). Additionally, a neonatologist was called who "intubated the baby and over a period of 45 minutes, administered five doses of epinephrine via the endotracheal tube, four doses of Sodium Bicarbonate via an IV, and IV fluids" (*id.*). The infant's heart rate thereafter improved "to 100 beats per minute and arrangements were made to transfer the baby to Long Island Jewish Medical Center" (*id.*).

On January 14, 2005, the infant was admitted to Schneider Children's Hospital, where she remained until April 19, 2005 (*id.* at ¶9; *see also* Exh. F). Upon admission, the infant plaintiff was diagnosed with various medical conditions including "extreme prematurity, respiratory distress syndrome, presumed sepsis, hypothermia, hypotension and anemia" (*see* Shapiro Affirmation in Support at Exh. A at ¶9). The infant plaintiff was also diagnosed with "group B strep sepsis," a "porencephalic cyst," and "decreased vision in one eye" (*id.* at¶¶9, 10, 14).

As a result of the foregoing, the underlying action was commenced on May 24, 2007, and contains causes of action sounding in medical malpractice, lack of informed consent, as well as loss of services, the latter of which is asserted by plaintiff, Janine Clay (*see* Cohen Affirmation in Support at Exh. B). The various applications respectively interposed by the moving parties herein thereafter ensued and are determined as set forth hereinafter.

Applicable Law

"In order to establish liability of a physician for medical malpractice, a plaintiff must prove that

the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Stukas v Streiter*, 2011 WL 833959 [2d Dept 2011]; *Geffner v North Shore Univ. Hospital,* 57 AD3d 839 [2d Dept 2008]; *Flanagan v Catskill Regional Medical Center*, 65 AD3d 563 [2d Dept 2009]. When moving for dismissal of a complaint sounding in medical malpractice, a defendant physician bears the burden of establishing the absence of a departure from accepted medical practice, or if there was a departure, that the plaintiff was not injured as a result thereof (*Ellis v Eng*, 70 AD3d 887 [2d Dept 2010]; *Williams v Sahay*, 12 AD3d 366 [2d Dept 2004]).

Once a defendant has made a *prima facie* showing, the plaintiff "must submit evidentiary facts or materials to rebut the defendant's *prima facie* showing, so as to demonstrate the existence of a triable issue of fact" (*Deutsch v Chaglassian*, 71 AD3d 718 [2d Dept 2010]; *Shichman v Yasmer*, 74 AD3d 1316 [2d Dept 2010]; *Rizzo v Moseley*, 74 AD3d 942 [2d Dept 2010]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). In opposing a defendant's motion for summary judgment, a plaintiff cannot rebut a defendant's *prima facie* showing by proffering general allegations, which are merely conclusory in nature and unsupported by competent evidence, the substance of which tends to demonstrate the essential elements of the cause of action (*Arkin v Resnick*, 68 AD3d 692[2d Dept 2009]; *Taylor v Nyack Hospital*, 18 AD3d 537 [2d Dept 2005]; *Holbrook v United Hosp., Medical Center*, 248 AD2d 358 [2d Dept 1998]).

With regard to a cause of action predicated upon lack of informed consent, Public Health Law §2805-d [2] provides that "The right of action to recover for medical * * * malpractice based upon a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body."

Further, it has been held that "[t]o state a cause of action for lack of informed consent, plaintiff must allege that the wrong complained of arose out of some affirmative violation of plaintiff's physical integrity" (*Smith v Fields*, 268 AD2d 579 [2d Dept 2000] quoting *Iazzetta v Vicenzi*, 200 AD2d 209 [3d Dept 1994]; *Flanagan v Catskill Regional Medical Center*, 65 AD3d 563 [2d Dept 2009], *supra*).

Winthrop's motion for Summary Judgment

The Court initially addresses the application for summary judgment interposed by defendant, Winthrop. In support thereof, counsel for the moving defendant provides the expert affirmation of Dr. Nancy Kirshenbaum, M.D., who is board certified in Obstetrics, Gynecology, as well as in Maternal-Fetal Medicine and has been "the Director of Maternal Fetal Medicine at the Westchester Division of Montefiore Medical Center since 2008"(*see* Kirshenbaum Affirmation at ¶¶1, 3). Dr. Kirshenbaum has been practicing Obstetrics and Gynecology since 1986 and has "seen, consulted on, and treated hundreds of patients * * * diagnosed [with] preterm labor"(*see* Kirshenbaum Affirmation at ¶¶1, 3).

Dr. Kirshenbaum avers that based upon her review of the relevant medical records, as well as the pleadings and deposition transcripts, together with her training and experience, "to a reasonable degree of medical certainty "all care and treatment rendered to Ms. Clay at Winthrop on January 11, 2005 was done so within accepted standards of medical care"(*id.* at ¶4, 5). More particularly, the defendant's expert opines that while the Nitrazine test was presumably positive, this "test alone is not definitive * * * [and] is viewed in the context of other tests performed" (*id.* at ¶10). Dr. Kirshenbaum states that "in light of the negative ferning test, the lack of pooling of fluid noted by the resident upon examination, the lack of contractions, and the unremarkable cervical length, it was appropriate and within the standard of care for the patient to be discharged on January 11, 2005"(*id.* at ¶13). Dr. Kirshenbaum further states that "had the fetal Fibronectin results been available on January 11, 2005, a positive result would not have changed the

management or decision to discharge the patient, with reassessment scheduled for the following day" (*id.* at ¶17).

In addition to the foregoing, and with particular respect the plaintiff's action sounding in lack of informed consent, counsel for the defendant argues that as the plaintiff did not undergo any invasive procedures while at Winthrop, said cause of action must be dismissed (*see* Cohen Affirmation in Support at ¶¶36, 38).

In the instant matter, the Court finds that the defendant has demonstrated its entitlement to judgment as a matter of law dismissing the plaintiff's complaint (*Ellis v Eng*, 70 AD3d 887 [2d Dept 2010], *supra*; *Williams v Sahay*, 12 AD3d 366 [2d Dept 2004], *supra*). Here, with regard to the action sounding in medical malpractice, Dr. Kirshenbaum expressly opined that based upon her review of the record, as well as her training and experience in Obstetrics and Gynecology, "all care and treatment rendered to Ms. Clay at Winthrop on January 11, 2005 was done so within accepted standards of medical care" (*id.*).

With regard to the claims predicated upon lack of informed consent, the plaintiff alleges that Winthrop failed to advise her of the risks attendant to preterm delivery, failed to advise her that she should have been on bed rest, and failed to advise her of the risks attendant to her discharge. However, as the plaintiff has failed to allege that she underwent any invasive procedures, the scope of which violated her physical integrity, said action must be ***dismissed*** (*Smith v Fields*, 268 AD2d 579 [2d Dept 2000], *supra*).

In response to the defendant Winthrop's application, counsel for the plaintiff has elected not to submit any opposition thereto (*see* Myers Reply Affirmation at Exh. A).

Therefore, based upon the foregoing, motion sequence number one interposed by defendant,

Winthrop University Hospital, for an order granting summary judgment dismissing all causes of action as alleged in the plaintiff's complaint, is hereby ***granted***.

Motion for Summary Judgment interposed by defendant, Dr. Onyeike

The Court now addresses the application interposed by defendant, Godwin Onyeike, M.D., who moves for an order granting summary judgment dismissing the within complaint. With particular respect to this defendant, the plaintiff alleges, *inter alia*, that Dr. Onyeike failed to provide Janine Clay with the proper obstetrical care and treatment when she presented to Franklin Hospital on January 13, 2005, and that said failure resulted in the delivery of the infant plaintiff in the ambulance, as opposed to Franklin Hospital (*see* Varriale Affirmation in Support at 16; *see also* Exh. D).

In support of the instant application, counsel provides the annexed affirmation of Dr. Henry Prince, M.D., who is board certified in Obstetrics and Gynecology (*see* Varriale Affirmation in Support at Exh. A at ¶1). Dr. Prince is currently in private practice in Obstetrics and Gynecology and serves as an attending physician at a metropolitan area hospital (*id.*). Dr. Prince avers that he has reviewed various documents relevant to the underlying action, including the deposition transcripts of the parties, the pleadings, and the medical records of WCCA, Winthrop and Franklin Hospital (*id.* at ¶3). Dr. Prince states that upon said review, coupled with his training and experience in the field of Obstetrics and Gynecology, "with a reasonable degree of medical certainty, the care and treatment provided to the plaintiff, by Godwin Onyeike, M.D., was at all times in conformity with accepted standards of medical practice" (*id* at ¶7). Specifically, Dr. Prince opines that Dr. Onyeike "promptly determined that the plaintiff was in fact in preterm labor, and undertook appropriate measures to address the same," including

"the provision of intravenous antibiotics, Tocolysis[1], and intravenous hydration," as well as ordering "intramuscular steroids, to help protect the infant's lungs in the event that she was born prematurely" (*id.* at ¶7).

Dr. Prince further states that as "Franklin General Hospital did not have a neonatal intensive care unit available to address the medical needs of the premature infant," Dr. Onyeike's decision to transfer the plaintiff to Long Island Jewish Medical Center was "proper" (*id.* at ¶¶8, 9). Dr. Prince particularly opines that prior to the transfer, "Dr. Onyeike properly determined not to perform any additional vaginal examinations on the plaintiff" as any "additional vaginal examinations would [have] elevat[ed] the risk of transmitting infection to the infant" (*id.* at ¶10, 11, 13).

Finally, with particular regard to the plaintiff's consent for her treatment and transfer to Long Island Jewish Medical Center, Dr. Prince opines that he has reviewed the documents relating thereto and based thereon "the plaintiff's informed consent for treatment and transfer were properly obtained * * * and the various risks and alternatives to the treatment were explained to the plaintiff" (*id.* at ¶14).

In opposing the instant application, counsel for the plaintiff provides the redacted affirmation of a medical doctor, who is "duly licensed to practice medicine in the State of New York" and "board certified in the field of obstetrics and gynecology" (*see* Corrado Affirmation in Opposition at Exh. A at ¶1). The plaintiff's expert avers that he or she has reviewed the documents relevant to the within action and based thereon sets forth what he or she believes to be various departure in accepted standards of medical practice engaged in by Franklin Hospital in general and Dr. Onyeike in particular.

Initially, the plaintiff's experts states that "[t]he fact that the infant was born in the ambulance bay

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[1] Tocolysis, is a term which refers to the arresting of labor (*see* Varriale Affirmation in Support at Exh. G at pp. 28-29).

of Franklin Hospital after the delayed transport finally arrived - as a result of the complete and utter failure of *everyone* involved at Franklin Hospital to conduct even a cursory visual examination of Ms. Clay - in an of itself is an egregious departure from good and accepted medical practice" (*id.* at ¶25 [emphasis in original]).

With particular respect to Dr. Onyeike, the expert opines that said defendant failed to reassess the plaintiff "prior to her delivery in the ambulance bay of Franklin" and that said failure "was a departure from good and accepted medical practice" (*id.* at ¶¶3, 4, 37, 38, 46, 47, 52). More specifically, the expert posits that "a simple repeat pelvic exam, which is the standard of care in the evaluation of preterm labor, prior to transfer, would have alerted the defendant to the imminent delivery that occurred not more than ten minutes after the transfer" (*id.* at ¶43). To this point, the expert states that "Ms. Clay did not complain of leaking fluid" and accordingly "there would be absolutely no increased risk of infection or other deleterious effect from digital pelvic exams" (*id.* at ¶¶33, 34, 44). With particular respect to the critical necessity of a second vaginal exam, plaintiff's expert states that "it is impossible to make the diagnosis of preterm labor without performing a subsequent pelvic exam" and that such an examination "is critical because it allows an obstetrician not only to confirm the diagnosis of preterm labor, but also * * * to assess how fast labor was progressing" (*id.* at ¶39, 48).

The plaintiff's expert ultimately concludes that "an unconscionable departure from expectable [sic] standards was done by Defendant Onyeike in allowing a severely preterm infant to be delivered in an ambulance bay without the neonatology staff for over the first nine minutes of life" (*id.* at ¶¶42 ,51).

Having carefully reviewed the record, the Court finds that the defendant has demonstrated his entitlement to judgment as a matter of law as to the cause of action sounding in medical malpractice, as

well as that sounding in lack of informed consent[2] (*Ellis v Eng*, 70 AD3d 887 [2d Dept 2010], *supra*; *Williams v Sahay*, 12 AD3d 366 [2d Dept 2004], *supra*;). Here, Dr. Prince clearly stated that "the care and treatment provided to the plaintiff, by Godwin Onyeike, M.D., was at all times in conformity with accepted standards of medical practice" (*id.*). Moreover, Dr. Prince specifically opined that "Dr. Onyeike properly determined not to perform any additional vaginal examinations on the plaintiff" as any "additional vaginal examinations would [have] elevat[ed] the risk of transmitting infection to the infant"(*id.*).

In opposing the defendant's application, the Court finds that the plaintiff has failed to raise a triable issue of fact (*Taylor v Nyack Hospital*, 18 AD3d 537 [2d Dept 2005], *supra*; *Holbrook v United Hosp., Medical Center*, 248 AD2d 358 [2d Dept 1998], *supra*). Initially, while the plaintiff's expert states that "everyone" at Franklin Hospital failed to conduct a "cursory visual examination of Ms. Clay," said assertion is squarely contradicted by the record (*id.; Deutsch v Chaglassian*, 71 AD3d 718 [2d Dept 2010], *supra*; *Shichman v Yasmer*, 74 AD3d 1316 [2d Dept 2010]; *Rizzo v Moseley*, 74 AD3d 942 [2d Dept 2010], *supra*). Here, the medical records, as well as the deposition testimony, quite clearly establish that Dr. Onyeike conducted a vaginal examination of the plaintiff, the results of which led Dr. Onyeike to conclude that the plaintiff was indeed in preterm labor.

Additionally, in the supporting affirmation, the plaintiff's expert explicitly states that as the plaintiff "did not complain of leaking fluid" there would have been no increased risk of infection from additional digital pelvic examinations. However, a review of the Admitting Record from Franklin

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[2] With respect to the action sounding in lack of informed consent, the Court notes that the plaintiff does not offer any substantive opposition to the defendant's prima facie showing and accordingly the action is dismissed (*Smith v Fields*, 268 AD2d 579 [2d Dept 2000]).

Hospital indicates that upon presenting to the hospital, the plaintiff had a temperature of 100 degrees and specifically complained of possible fluid leakage since January 11, 2005(*id.*). Here, notwithstanding the plaintiff's symptoms, which are plainly recited in the Admitting Record, the plaintiff's experts fails to either address same or to render an opinion as to their significance or lack thereof (*Arkin v Resnick*, 68 AD3d [2d Dept 2009], *supra*).

Further, while the plaintiff's expert opines that "it is impossible to make the diagnosis of preterm labor without performing a subsequent pelvic exam," said assertion is belied by the deposition testimony of Dr. Onyeike, wherein he stated that upon his first and only examination of the plaintiff, he determined that she was in preterm labor. Plaintiff must submit evidentiary facts or materials to rebut the defendant's *prima facie* showing to the existence of a triable issue of fact. (*Deutsch v Chaglassian*, 71 AD3d 718 [2d Dept 2010], *supra*; *Shichman v Yasmer*, 74 AD3d 1316 [2d Dept 2010]; *Rizzo v Moseley*, 74 AD3d 942 [2d Dept 2010], *supra*).

Finally, the plaintiff's expert concluded that the defendant departed from acceptable standards of medical practice "in allowing a severe preterm infant to be delivered in an ambulance bay without the neonatology staff for over the first nine minutes of life." However, a review of the EMS records, as well as those from Franklin Hospital, indicate that the infant plaintiff was brought back into Franklin Hospital "within one minute of delivery" (*id.*).

Based upon the foregoing, motion sequence number two by Defendant, Godwin Onyeike, M.D., made pursuant to CPLR §3212, which seeks an order granting summary judgment dismissing all the causes of action contained in the plaintiff's complaint, is hereby ***granted***.

Motion for Summary Judgment by Franklin Hospital Medical Center

The Court now addresses the application interposed by, Franklin Hospital, which seeks an order

dismissing the plaintiff's complaint in its entirety. In support thereof, counsel provides the Affirmation of Dr. Ivan Hand, who is licensed to practice medicine in New York and is "board certified in pediatrics and neonatology"(*see* Shapiro Affirmation in Support at Exh. A at ¶1). Dr. Hand is also the Director of the Division of Neonatology at Queens Hospital Center and is accordingly "familiar with the standards of care that existed in 2005 for the resuscitation of infants and the treatment of preterm labor"(*id.*).

Dr. Hand states that he has "reviewed the medical records from Franklin Hospital Medical Center * * * and from Schneider's Children's Hospital (Long Island Jewish Medical Center)" and that based thereon "with a reasonable degree of medical certainty that the care and treatment provided to the infant-plaintiff at Franklin * * * in no way departed from accepted standards of care" (*id.* at ¶3). More specifically, the defendant's expert states that "Franklin * * * and its staff appropriately assessed and treated the infant's condition when she was brought from the ambulance into the emergency department" and "stabilized the patients's condition, elevated her heart rate, restored perfusion and allowed a safe transfer from Franklin * * * to LIJMC for appropriate follow-up and monitoring" (*id.* at ¶13). The expert further states "to a reasonable degree of medical certainty, that the infant plaintiff's poor neurologic outcome including motor, cognitive and behavioral problems, as well as visual difficulties in one eye, are related to her extreme prematurity and not to the resuscitation" (*id.* at ¶15).

In addition to the foregoing, counsel for Franklin Hospital argues that as the actions to resuscitate the infant plaintiff were emergent in nature, the plaintiff's claims predicated upon lack of informed consent must be dismissed (*see* at Shapiro Affirmation in Support at ¶¶19-22).

In opposing the instant application, the plaintiff's expert opines that "Franklin * * * departed from good and accepted medical practice by failing to evaluate Ms. Clay in a timely manner, failing to re-evaluate her preterm labor * * *, failing to re-evaluate her at the time of transport to determine if she was

stable for transport as she clearly was not" (*see* Corrado Affirmation in Opposition at Exh. A at ¶52). The expert further opines that "each of the departures, individually and collectively, was a significant factor and proximate cause in the resulting injuries sustained by both plaintiffs * * * primarily evidenced through the fact that the infant was without oxygen for a period of no less than nine minutes - which unequivocally resulted in some measure of brain damage to the infant * * *" (*id.* at ¶53).

Upon review of the record, the Court finds that based upon the above referenced affirmation of Dr. Hand, Franklin Hospital has demonstrated its entitlement to judgment as a matter of law on the actions sounding in medical malpractice and lack of informed consent (*Ellis v Eng*, 70 AD3d 887 [2d Dept 2010], *supra*; *Williams v Sahay*, 12 AD3d 366 [2d Dept 2004], *supra*; *Smith v Fields*, 268 AD2d 579 [2d Dept 2000], *supra*). In opposition to the defendant's *prima facie* showing, the plaintiff has failed to raise a triable issue of fact (*Taylor v Nyack Hospital*, 18 AD3d 537 [2d Dept], *supra*; *Holbrook v United Hosp., Medical Center*, 248 AD2d 358 [2d Dept 1998], *supra*).

Here, the plaintiff's expert opines that the defendant engaged in numerous departures which were "primarily evidenced through the fact that the infant was without oxygen for a period of no less than nine minutes." However, such an assertion is plainly contradicted by the record evidence (*Deutsch v Chaglassian*, 71 AD3d 718 [2d Dept 2010], *supra*; *Shichman v Yasmer*, 74 AD3d 1316 [2d Dept 2010]; *Rizzo v Moseley*, 74 AD3d 942 [2d Dept 2010], *supra*). In the instant matter, as extrapolated from the EMS Records, the infant plaintiff "was delivered in an ambulance prior to departure for NSUH" and the "baby and mother [were] brought into Franklin * * * within one minute of delivery."[3] Moreover, the hospital records indicate that upon being brought back into the emergency room, the oxygen for the baby

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[3] *see* Shapiro Affirmation in Support at Exh. E).

was "on"[4] (*id.*).

Thus, based upon the foregoing, motion sequence number three interposed by the defendant, Franklin Hospital Medical Center, for an order granting summary judgment dismissing the plaintiff's complaint, is hereby **granted**.

Motion for Summary Judgment by Kastner and WCCA

The Court now turns to the application interposed by defendants, Elana Kastner, M.D. and WCCA, which seeks an order dismissing the within complaint, as well as any other claims asserted against said defendants.

In support of the instant application, counsel provides the Affirmation of Dr. Victor Klein, M.D., who is duly licensed to practice in New York and is "board certified in Obstetrics and Gynecology, with a subcertification in Maternal Fetal Medicine and Clinical Genetics" (*see* Klein Affirmation in Support at p.1). Dr. Klein avers that he has reviewed all of the medical records and pleadings relevant to the within action and that based upon said review "with a reasonable degree of medical certainty, the care and treatment provided by Dr. Kastner and those associated with WCCA was consistent with good and accepted medical practices and nothing they did or failed to do caused injury to the plaintiff" (*id.* at pp. 8, 10, 12).

In the instant matter, the Court finds that based upon the affirmation of Dr. Klein and the opinions contained therein, the moving defendants have demonstrated their entitlement to summary judgment dismissing the plaintiff's claims predicated upon medical malpractice (*Ellis v Eng*, 70 AD3d 887 [2d Dept 2010], *supra*; *Williams v Sahay*, 12 AD3d 366 [2d Dept 2004], *supra*). Further, with respect to the action based upon lack of informed consent, as the plaintiff has failed to allege an "affirmative violation"

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[4] *see* Shapiro Affirmation in Support at Exh. F).

of her physical integrity perpetrated by the moving defendants, the Court finds that said defendants have demonstrated their entitlement to summary judgment dismissing same (*Smith v Fields*, 268 AD2d 579 [2d Dept 2000], supra; *Flanagan v Catskill Regional Medical Center*, 65 AD3d 563 [2d Dept 2009], *supra*).

In response to defendants' instant application, counsel for the plaintiff has elected not to submit any opposition thereto (*see* Myers Reply Affirmation at Exh. A).

Therefore, based upon the foregoing, motion sequence number four, Elana Kastner, M.D. and Women's Contemporary Care Associates, P.C. d/b/a Perinatal Associates, interposed pursuant to CPLR §3212, for an order dismissing the within complaint, as well as any other claims asserted against said defendants, is hereby ***granted*** . It is hereby

ORDERED, that the defendants' motions are **granted** and the plaintiff's complaint is **dismissed**.

All applications not specifically addressed are ***Denied***.

This constitutes the Decision and Order of the Court.

DATED: April 19, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

ENTERED
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