

**Nesbeth v St. Luke's Hosp.**

2014 NY Slip Op 30501(U)

March 4, 2014

Supreme Court, New York County

Docket Number: 115266/10

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS  
Justice

PART 6

NESBETH, JORDANNE, ETAL.

INDEX NO.

115266/10

MOTION DATE

1/17/13

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -  
ST. LUKE'S HOSPITAL, ETAL.

The following papers, numbered 1 to 6 were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits \_\_\_\_\_

3, 4

Replying Affidavits \_\_\_\_\_

5

6

Cross-Motion:  Yes  No

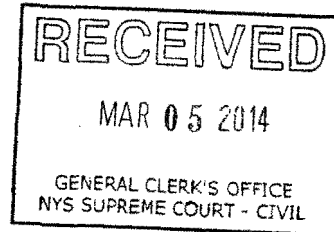
Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER &

JUDGMENT

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).



Dated: 3/4/13

LOBIS  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
JORDANNE NESBETH AND NICHOLAS NESBETH,

Plaintiffs,

Index No. 115266/2010

-against-

**Decision, Order, and  
Judgment**

ST. LUKE'S HOSPITAL, ROOSEVELT HOSPITAL,  
CONTINUUM HEALTH PARTNERS, INC., ELAN LEVY,  
M.D., JAMIE BRYAN, M.D.,

**UNFILED JUDGMENT**

Defendants.

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

-----X  
JOAN B. LOBIS, J.S.C.:

This action arises out of Jordanne Nesbeth's miscarriage on July 20, 2009. Plaintiffs raise the following allegations: medical malpractice, negligent mishandling of the Plaintiffs' stillborn's remains and loss of sepulcher, breach of warranty related to mishandling of the stillborn's remains, negligent infliction of emotional distress, loss of services, and gross negligence. All Defendants, St. Luke's Hospital, Roosevelt Hospital, Continuum Health Partners, Inc., Elan Levy, M.D., and Jamie Bryan, M.D., move for dismissal and summary judgment pursuant to Rule 3211(a)(7) and 3212 of the Civil Practice Law and Rules. Plaintiffs Jordanne and Nicholas Nesbeth oppose the motion. For the following reasons, Defendants' motion is granted in part and denied in part.

On July 20, 2009, Jordanne Nesbeth, who was between eighteen and nineteen weeks pregnant, began to feel abdominal pain and pressure. Concerned that she was having a miscarriage, she went to St. Luke's Emergency Department. At 2:53 am, Ms. Nesbeth was triaged. She was seen

by Dr. Elan Levy, the resident on duty in the emergency room, and Dr. Jamie Bryan, the attending physician. Abdominal palpation did not elicit any pain. Dr. Levy performed a bedside abdominal ultrasound, which demonstrated a normal intrauterine pregnancy and a normal fetal heart rate. Plaintiffs allege that they requested multiple times to see an obstetrician but that Dr. Levy declined their request and responded that an obstetrician was not necessary. Dr. Levy claims that Dr. Bryan consulted with an obstetrician by telephone, but no telephone consultation is described in the medical record. At 5:35 am, Ms. Nesbeth was discharged.

Once she was at home, Ms. Nesbeth noticed a bloody discharge when she went to urinate. Sometime between 6:11 am and 6:26 am, Dr. Levy and Dr. Bryan again treated Ms. Nesbeth. They repeated their previous examination, including a pelvic examination and bedside ultrasound. The pelvic examination showed that the patient was actively bleeding but an intact os was still noted. The ultrasound showed that there was little or no fluid around the fetus and decreased fetal movement, but there was a detectable fetal heart rate. Plaintiffs allege that during the internal examination, Ms. Nesbeth felt pain, and there was a large gush of fluid. The Plaintiffs claim that they saw the fetal heart rate decrease rapidly on the monitor.

At this time, Dr. Levy called for an obstetrical consultation. The fetus was determined to be non-viable. Plaintiffs allege that the obstetrician told them that “the baby had died and if she had been alerted earlier, she could have ‘done something.’” Plaintiffs also allege that the obstetrician said that “the emergency room doctors, Dr. Levy and Dr. Bryan were not obstetricians and were not specialized for such situations.”

Ms. Nesbeth was transferred to Roosevelt Hospital (“Roosevelt”) for delivery of the non-viable fetus. At Roosevelt, Ms. Nesbeth was given medicine to aid dilating the cervix. She was also given a bedpan for urination. Prior to 1:30 pm, Plaintiffs claim that Ms. Nesbeth felt the fetus emerging. Plaintiffs allege that Mr. Nesbeth informed the staff, but they told him it was not time for delivery yet. According to Plaintiffs, at 1:30 pm, Ms. Nesbeth self-delivered the fetus into the bedpan.

Plaintiffs allege that after the fetus was taken from Ms. Nesbeth, there is no chain of custody documented. They state that the Roosevelt-Site Morgue Book contains conflicting information and lacks proper recording information. Plaintiffs were assigned a social worker, Shoshana Simkovich, who asked if they wanted to make burial arrangements for the fetal remains. Plaintiffs allege that when they asked if they could take the fetal remains home, Ms. Simkovich told them that they “can’t take a dead body.” On July 27, 2009, Plaintiffs had a telephone conversation with Ms. Simkovich, who allegedly informed them that they had a month to make arrangements for the remains but that the remains would be “safe at the hospital.” Over three telephone conversations between August 10, 2009, and September 15, 2009, the Nesbeths claim that they were told they could arrange for a private burial, a city burial in Potter’s Field, or have the hospital dispose of the remains. Plaintiffs could not afford a private burial, and rejected a Potter’s Field burial.

Between July 2009 and April 2010, the remains were held at Roosevelt. Defendants claim that to best preserve the remains Roosevelt placed them in formaldehyde. In April 2010, the remains were released to the Plaintiffs, who sent them for DNA testing. DNA testing was not

possible, however, as the remains were too degraded due to the storage in formaldehyde. The Nesbeths also made arrangements for cremation of the remains.

Defendants now move for failure to state a cause of action pursuant to Section 3211(a)(7) of the Civil Practice Law and Rules to dismiss the Plaintiffs' cause of action for loss of sepulcher rights and negligent mishandling of the remains. Defendants also seek dismissal of any claim for breach of warranty, gross negligence, punitive damages, negligent infliction of emotional distress, and loss of services. They also seek summary judgment pursuant to Section 3212 on Plaintiffs' medical malpractice claims.

In their motion, Defendants argue that though loss of sepulcher is recognized by New York courts, no court has recognized the cause of action in similar circumstances. Defendants assert that they never prevented the Plaintiffs from possessing the fetal remains. Defendants also claim that no law required them to hold the remains by means that would allow for genetic testing two years after miscarriage. They cite to Article 205 of New York City Health Code, in which human remains are defined as a conceptus which has completed twenty-four weeks or more of gestation. They also cite to Section 405.9(f) in Title 10 of the New York Codes, Rules and Regulations, which addresses hospital admission and discharge, arguing that it applies only to fetuses over twenty weeks uterogestation.

As to the medical malpractice cause of action, the Defendants contend that there was no departure from the good and accepted standards of medical care. In support they provide the

affirmation of Carol Livotti, M.D., a board certified obstetrician licensed to practice medicine in the State of New York. Dr. Livotti asserts that an eighteen week old fetus is not viable and that the miscarriage was unavoidable. She claims that Dr. Levy and Dr. Bryan examined the patient and responded to the examination results appropriately. She maintains that because the initial examination results were normal and there was no vaginal bleeding, that the standard of care did not require a consultation with an obstetrician or dictate that a pelvic examination be performed. She also states that though Defendants did speak with an obstetrician, it was not required. When Ms. Nesbeth was readmitted to the hospital, she had vaginal bleeding and a gush of fluid, including a “fluid filled sac.” A pelvic examination then revealed a closed os with no bulging membranes and blood in the vault. Dr. Livotti contends that the pelvic examination was warranted at the second presentation due to the bleeding, which previously was not present.

Defendants argue that a breach of warranty claim must be distinct from the medical malpractice claim. They assert that it must be dismissed as it is redundant of the medical malpractice and loss of sepulcher claims. They contend that separate and apart from those two claims, there is no offer, acceptance or consideration.

Defendants also state that the “punitive damages claims” must be dismissed. They maintain that punitive damages may only be awarded in cases with evidence of malice, vindictiveness, or criminal intent or conduct that is intentionally outrageous with wanton disregard for the public safety. They argue that the Plaintiffs have no evidence that there was any motivation by malice, vindictiveness, or criminal intent, and, if there is any evidence, it is not “clear and

convincing.” Lastly, Defendants contend that claims for emotional distress and loss of services can only survive independently with a viable claim of medical malpractice.

In response, Plaintiffs allege that Defendants’ motion is untimely. They point out that the note of issue was filed on July 24, 2013, and the motion should have been filed by September 22, 2013. They aver that it was only filed on September 24, 2013. Plaintiffs claim that the order to show cause required service by regular mail on or before September 26, 2013, but that the order was not served until September 30, 2013.

In opposing Defendants’ motion, Plaintiffs claim that the Defendants interfered with the Plaintiffs’ right to immediate possession of their property: the fetal remains. They allege that Roosevelt should have stored the remains in the morgue refrigerator instead of formaldehyde and that Plaintiffs still do not know whether the remains they received were theirs. Plaintiffs claim that the city and state regulations cited by Defendants are inapposite. Furthermore, they argue that since Defendants consider the remains as fetal tissue then a permit to bury and remove the remains was not required by Public Health Law Section 4162.

Plaintiffs also argue that triable issues of fact exist as to the medical malpractice cause of action. In support, they offer the affidavit of John Di Iorio, M.D., who is board certified in Obstetrics and Gynecology and licensed to practice medicine in the State of New York. Dr. Di Iorio asserts that upon Ms. Nesbeth’s initial presentation, Dr. Levy and Dr. Bryan should have performed a pelvic vaginal examination. Dr. Di Iorio claims that without an examination, no determination

could have been made as to whether there were any problems with the pregnancy. He claims that this was a departure from the standard of care. Additionally, Dr. Di Iorio states that it was a departure to not perform a trans-vaginal ultrasound as a trans-abdominal ultrasound cannot show changes with the cervix. He contends that this is especially important because Ms. Nesbeth recently had surgery for ovarian cancer and a dilation and curettage procedure. Any surgical procedure on the cervix, according to Plaintiffs' expert, can weaken or scar the cervix and predispose the patient to an incompetent os. Dr. Di Iorio also argues that an OB/GYN consultation was required and not having one was a departure. Plaintiffs' expert also states that prior to the second admission, the fetus was viable and could have been saved with a cerclage stitch. Lastly, he explains that the Defendants were not timely in providing medical care for Ms. Nesbeth and that this delay was also a departure and resulted in the loss of Ms. Nesbeth's fetus.

Plaintiffs also dispute Defendants' characterization of the breach of warranty claim. Plaintiffs assert that the breach of warranty claim is related to the negligent mishandling of the fetal remains. They maintain that the remains are quasi-property that was left in the care of the hospital. They claim that they relied on the hospital's express assurance that the property would be safe, and that the remains were mishandled and damaged. Plaintiffs compare the hospital retaining the remains with leaving a piece of jewelry at a pawn shop that then damages or loses the jewelry.

Lastly, Plaintiffs address gross negligence. They claim that the hospital's actions were so outrageous in its mishandling of the remains and in the treatment of Ms. Nesbeth, that a jury should be entitled to decide whether these actions constituted gross negligence. They contend that

the parents expressly requested immediate possession of the remains, and the hospital disregarded the parents' legal right.

In reply, Defendants assert that their motion was timely, and maintain that they are entitled to summary judgment. They provide a signed and notarized affidavit of service by mail. The affidavit of service indicates that service was made on September 26, 2013.

On the substance of the motion, Defendants argue in reply that there was no loss of sepulcher rights since there was no authorized autopsy, the next of kin knew of the fetal demise, and the fetal remains were never lost or misplaced. They contend that the evidence does not demonstrate that the hospital wrongfully withheld the remains but that the hospital stored them while the Plaintiffs decided what they wanted to do. They aver that there are no regulations, codes or statutes imposing any obligation on health care providers with regard to remains that are under twenty weeks of gestational age. Finally, they assert that the Plaintiffs offered no support for their claim that the storage of the remains in formaldehyde was inappropriate.

On the medical malpractice claims, Defendants also contend that the affirmation of Dr. Di Iorio is speculative and not based on materials in the record. They attach an affirmation from their expert, Dr. Livotti. Dr. Livotti points out that Dr. Di Iorio concedes that the termination of Ms. Nesbeth's pregnancy could not have been prevented when the patient re-presented at the emergency room at 6:22 am, and, as a result, the departures Dr. Di Iorio describes as occurring during the second presentation by Ms. Nesbeth could not have caused her injuries. Dr. Livotti explains that Ms.

Nesbeth, during her first visit, had a vaginal examination and so Dr. Di Iorio's claim that a pelvic examination was required is incorrect. Additionally, Dr. Livotti contends that based on the evidence the patient's external os and cervix were closed even during the pelvic examination, and that Dr. Di Iorio concedes to this point. Furthermore, she argues Dr. Di Iorio's theory that the os was incompetent is unsupported by evidence.

On the breach of warranty claim, Defendants claim that the fetal remains were kept safe and no assurances were violated. They maintain that the hospital only promised to keep the remains until August 2009, even though it kept the remains safe for almost two years. They argue that the Plaintiffs cannot show specific assurances or violations. Lastly, they contend that Plaintiffs have not shown any evidence of wanton, malicious, willful or near criminal conduct on the Defendants' part, which would be necessary for punitive damages.

In a sur-reply, which this Court permitted, Plaintiffs first address the medical malpractice cause of actions. They deny the allegations that Dr. Di Iorio included information that was not on the record and that the process by which a pregnancy may be salvaged or lost is more complicated than what Defendants describe. In another affirmation, Dr. Di Iorio agrees that the miscarriage was inevitable during Ms. Nesbeth's second presentation at 6:22 am. He maintains that the malpractice occurred during the first visit due to the failure to perform a proper pelvic examination. Dr. Di Iorio contends that even though the cervix was closed upon the second emergency room visit, it is not inconsistent to state that the external os is closed while an incompetent os was in the process of developing as opening of the external os is the final stage of

the process. He argues that a closed external os indicates that the process was still in early stages so a cerclage stitch could have salvaged the pregnancy. He claims that a proper vaginal examination during Ms. Nesbeth's first visit would have revealed whether the cervix was shortening, which would indicate that an incompetent os was in the process of developing.

Plaintiffs also argue in sur-reply that Defendants had no legal right to deprive Plaintiffs of the right to dispose of the remains privately. Plaintiffs contend that there is no law or regulation cited to support the Defendants' position. Lastly, Plaintiffs deny that Defendants held the fetal remains for an extended period of time while the Nesbeths decided what they wanted to do. Plaintiffs allege that the hospital gave them "the runaround" and that it took time to locate the fetal remains.

The Court first considers Plaintiffs' claim that the motion was untimely. The Order to Show cause indicates that the motion was filed on September 23, 2013. September 22, 2013, was the last day under the Court's rules for making a motion. September 22, 2013, however, was a Sunday, so the motion was properly filed on the next business day. See General Construction Law § 25-a(1). Though Plaintiffs claim that service was made on September 30, 2013, the affidavit of service indicates that service was made on September 26, 2013. My order to show cause required service on Plaintiffs by regular mail by that date. Accordingly, the Court finds that the motion is timely.

The Court next considers the Defendants' motion to dismiss. C.P.L.R. § 3211(a)(7) provides that "[a] party may move for judgment dismissing one or more causes of action asserted

against him on the ground that . . . the pleading fails to state a cause of action[.]” In reviewing motions to dismiss, it is axiomatic that this Court reviews the record in the light most favorable to the non-moving party and accords that party the benefit of every possible favorable inference. E.g., Leon v. Martinez, 84 N.Y.2d 83, 88 (1994); see also AG Capital Funding Partners, L.P. v. State Street Bank and Tr., 5 N.Y.3d 582, 590-91 (2005) (moving party must show documentary evidence conclusively refutes plaintiff’s allegations); id. at 476 (any deficiencies in complaint may be amplified by supplemental pleadings and other evidence). The Court must “determine only whether the facts as alleged fit within any cognizable legal theory[.]” Leon, 84 N.Y.2d at 87.

The common law right to sepulcher has a history that stretches thousands of years,<sup>1</sup> but the modern understanding of this right can be traced to the New York Court of Appeals decision in Darcy v. Presbyterian Hospital in City of New York, 202 N.Y. 259 (1911). In the action, the mother of John Darcy sought to recover damages for interference and prevention of her right to receive the body of her deceased son from the Presbyterian Hospital. The hospital did not release the body and performed an autopsy even after Ms. Darcy refused to give consent. The Court held that the next of kin has a right to possession of a dead body for the purpose of preservation and burial, and that “this right the law will recognize and protect from any unlawful mutilation of remains by awarding damages for injury to the feelings and mental suffering resulting from the wrongful acts[.]” Id. at 262.

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<sup>1</sup>For a fuller history, see the Appellate Division’s decision in Melfi v. Mt. Sinai, 64 A.D.3d 26 (1st Dep’t 2009).

The Court of Appeals discussed the right again in the 1917 decision for Finley v. Atlantic Transport Co., 220 N.Y. 249 (1917). The Court held that a next of kin had a legal right to the possession of the body for burial but clarified that “there is no right of property in a dead body in the ordinary acceptance of the term[.]” Finley, 220 N.Y. at 255. Recovery was for “mental anguish, suffering, and nervous shock.” Id. at 258. It took until 1975 for the Court of Appeals to clarify the nature of the property right in sepulcher cases. The Court stated that prior cases had “been grounded on a violation of the relative’s quasi-property right in the body[.]” but the property right “is little more than a fiction; in reality the personal feelings of the survivors are being protected.” Johnson v. State, 37 N.Y.2d 378, 382 (1975) (internal citations omitted). The purpose of this legal fiction is to provide a means of recovery for emotional injuries to the relative resulting from a wrongful act that prevents a proper funeral or burial. Melfi, 64 A.D.3d at 38.

In Melfi v. Mount Sinai Hospital, the First Department stated that interference with a body can be shown by unauthorized autopsy, inadvertent disposal of remains, or failure to notify the next of kin of death. 64 A.D.3d at 39. The common law right of sepulcher also includes preservation for the purposes of burial or funeral arrangements. See id. at 38. To bring a loss of sepulcher cause of action, a plaintiff, the decedent’s next of kin, must show interference with the plaintiff’s right to possession of the remains and that the interference caused mental anguish. The next of kin’s mental anguish is generally presumed. Id. at 39.

Section 4160 of the Public Health Law defines a fetal death as a “death prior to expulsion or extraction from its mother of a product of conception.” Public Health Law Section

4162 states in relevant part:

“the removal, transportation, burial or other disposition of remains resulting from a fetal death, other than fetal tissue . . . under twenty weeks uterogestation, shall be subject to the provisions of this article applicable to the removal, transportation, and burial of the body of a deceased person, and a burial or removal permit of prescribed form shall be required.”

Under Section 4162, fetal tissue under twenty weeks, which would include the fetus in this matter, is not required to be treated in the same manner as a deceased person for the purposes of burial and removal permits.

New York law has not extended sepulcher rights to fetal remains under twenty weeks of gestational age. The Appellate Division in Emeagwali v. Brooklyn Hospital Center stated that the common law right of sepulcher applies to stillbirths. See Emeagwali v. Brooklyn Hosp. Ctr., 60 A.D.3d 891 (2d Dep’t 2009) (citing Klumbach v. Silver Mount Cemetery Ass’n, 268 N.Y.525 (1935)). The stillbirth in Emeagwali, however, was at twenty one and a half weeks of gestation, and, as a result, the holding does not conflict with Public Health Law Section 4162. Emeagwali v. Brooklyn Hosp. Ctr., 815 N.Y.S.2d 494 (Sup. Ct. Kings Cty. 2006). Prior to 1967, the language of Sections 4160 and 4162 used the term “stillbirths” instead of “fetal deaths.” In 1967, when the terms were modernized, the legislature expressly excluded fetal deaths occurring prior to twenty weeks uterogestation from burial and removal permit requirements.

Based on the facts in this case, no cognizable legal theory has been advanced to support Plaintiffs' claim that Defendants should have immediately given possession of the fetal remains to the Nesbeths. The Court is unaware of case law where loss of sepulcher has been successfully claimed due to a failure to provide fetal remains of the gestational age in this case to plaintiffs. In this case, instead of simply disposing of the fetal remains, the hospital treated them as it would have treated remains that were over twenty weeks, by preserving them until funeral arrangements were made. That the hospital applied Public Health Law 4162 to the remains, despite being under twenty weeks, is not an actionable wrong. Though Public Health Law 4162 does not require treating fetal remains resulting from a fetal death under twenty weeks uterogestation as those over twenty weeks, Plaintiffs have not shown that Defendants violated any law in retaining the remains while Plaintiffs arranged for their disposition.

The Nesbeths' failure to make funeral arrangements or accept a Potter's Field burial left the hospital in a precarious position: the Plaintiffs expected the hospital to preserve the fetal remains for an indefinite period of time. By offering to give the remains to a funeral director or allowing for a Potter's Field burial, Defendants went beyond their statutory obligations. See Public Health Law § 4162. They even preserved the remains by what they believed were the best possible means, as other means of preservation, they contend, would have led to an even greater degradation of the remains. Plaintiffs expected preservation to allow for genetic testing. This is outside the scope of the common law right of sepulcher since, as discussed above, preservation is for the purpose of burial and funeral arrangements. See Melfi, 64 A.D.3d at 38. Furthermore, since common law sepulcher rights do not extend to fetal remains of this gestational age, issues relating to chain of

custody or proper identification of remains through genetic testing need not be addressed.

This Court finds that there is no cognizable legal theory for a breach of warranty claim. Plaintiffs erroneously compare the possession of the remains to the possession of the products of in vitro fertilization procedures (“IVF”). See Kass v. Kass, 235 A.D.2d 150 (2d Dep’t 1997). The legal frameworks of IVF and the possession of fetal remains are not comparable. A bailment analysis would treat the remains as “personal property for some particular purpose, or a mere deposit, upon a contract express or implied, and that after such purpose has been fulfilled it shall be redelivered to the person who delivered it[.]” Mays v. New York, New Haven & Hartford Railroad Co., 97 N.Y.S.2d 909, 911-912 (1st Dep’t 1950). There is no case law that describes fetal remains as personal property. As discussed above, any quasi-property right status for remains is a legal fiction. Johnson, 37 N.Y.2d at 382. A loss of sepulcher cause of action provides a means of recovery for mental anguish, not for damage to the remains as “[t]he law is not primarily concerned with the extent of the physical injury to the bodily remains but with whether there were improper actions and whether such actions caused emotional or physical suffering to the living kin.” Melfi, 64 A.D.3d at 38 (quoting Scarpaci v. Milwaukee Cty., 96 Wis.2d 663, 672 (1980)).

The Court next considers the Defendants’ motion for summary judgment on Plaintiffs’ cause of action for medical malpractice. In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep’t 2007). A movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and

admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where a defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown “sufficient to require a trial of any issue of fact.” Id.

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep’t 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep’t 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 206. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify “in what way” a patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep’t 2010). A defendant’s expert opinion must “explain ‘what defendant did and why.’” Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep’t 2003)). Conclusory medical affirmations or expert opinions that fail to address a plaintiff’s essential factual allegations are insufficient to establish prima facie entitlement to summary judgment. 73 A.D.3d at 206. Once a defendant establishes a prima facie case, a plaintiff must then rebut that showing by submitting an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure

proximately caused the alleged injuries. Id. at 207.

This Court finds that Defendants have established a prima facie case for summary judgment for the medical malpractice cause of action. Dr. Carol Livotti, Defendants' expert, concludes to a degree of reasonable medical certainty that there was no departure from the accepted standards of medical care. Dr. Livotti explains that an eighteen week fetus is not viable and that the miscarriage was unavoidable. The Plaintiffs have rebutted the Defendants' prima facie showing in so far as arguing that Defendants departed from the standard of care during Ms. Nesbeth's first presentation at St. Luke's Hospital. Dr. Di Iorio disputes Dr. Livotti's claim that a pelvic examination was unnecessary because it is possible that Ms. Nesbeth's cervix was developing incompetence. He also argues that the fetus was viable and could have been saved with a cerclage stitch during the first presentation to St. Luke's Hospital but concedes that during the second presentation and at Roosevelt Hospital the fetus was no longer viable. There are significant disputes on the claims of malpractice during Ms. Nesbeth's first visit to the emergency room. As Plaintiffs' expert concedes that any wrongful acts could only have occurred during Ms. Nesbeth's first presentation to St. Luke's Hospital, the Court finds summary judgment appropriate in so far as Plaintiff's claims include the second presentation to St. Luke's Hospital and stay at Roosevelt Hospital.

The motion to dismiss claims of negligent infliction of emotional distress and loss of services is denied. Defendants do not contest that, absent summary judgment on Plaintiffs' medical malpractice cause of action, there is a cognizable legal theory on which to base these causes

of action. As summary judgment has not been granted in the entirety on Plaintiffs' medical malpractice claims, there are no grounds to dismiss the claims.

Lastly, the Court is not convinced that Plaintiffs have presented any evidence of gross negligence or the need for the remedy of punitive damages. Punitive damages are recoverable when conduct is wantonly dishonest, grossly indifferent to patient care, or malicious or reckless. Schiffer v. Speaker, 36 A.D.3d 520 (1st Dep't 2007). A defendant must "manifest evil or malicious conduct beyond any breach of professional duty." Dupree v. Giugliano, 20 N.Y.3d 921, 924 (2012). Conduct that rises to gross negligence "smacks of intentional wrongdoing" or is wantonly dishonest and aimed at the public. Apple Bank for Savings v. PricewaterhouseCoopers LLC, 70 A.D.3d 438 (1st Dep't 2010). Nothing in this record supports the claim that the Defendants' culpability rose to the level of gross negligence or moral turpitude necessary to warrant punitive damages. Accordingly, it is

ORDERED and ADJUDGED that Defendants' motion to dismiss is granted for Plaintiffs' second cause of action for loss of sepulcher rights; for the third cause of action for breach of warranty; and for the seventh cause of action for gross negligence and punitive damages; and it is further

ORDERED and ADJUDGED that summary judgment is granted to the extent Plaintiffs claim that there may have been medical malpractice during Ms. Nesbeth's second presentation to St. Luke's Hospital or any presentation at Roosevelt Hospital; and it is further

ORDERED that the parties appear for a pre-trial conference on April 1, 2014.

Dated: *Mar. 4*, 2014

ENTER:



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JOAN B. LOBIS, J.S.C.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).