At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of February, 2020.

PRESENT:

HON. BERNARD J. GRAHAM,
Justice.

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V.W, AN INFANT BY HER MOTHER AND NATURAL GUARDIAN, LAVONIE WHARTON AND LAVONIE WHARTON, INDIVIDUALLY

Plaintiffs,

- against -

Index No. 504320/16

NATAN HARATZ, M.D., BRANDON BELL, M.D., RUTH ORTIZ, RN, CATHY LAROCCA, RN, ANNE GUDI , CNM, PETER STICCO, M.D., GARRY FIASCONARO, M.D.,ANNA NEYSTAT, M.D., MAHINO TALIB, M.D., ADVANCED WOMEN'S IMAGING & PRENATAL TESTING AND NEW YORK METHODIST HOSPITAL, A.K.A METHODIST HOSPITAL PHYSICIANS ORGANIZATION, INC.,

Defendants.

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The following papers numbered 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	6
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this medical malpractice action, defendants Natan Haratz-Rubenstein, M.D., s/h/a Natan Haratz, M.D., (Dr. Haratz-Rubenstein), Advanced Women's Imaging & Prenatal Testing (AWI) and New York Methodist Hospital, a/k/a Methodist Hospital Physicians Organization (Methodist) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff V. W. (infant plaintiff), by her

mother and natural guardian Lavonie Wharton (Ms. Wharton), and Ms. Wharton, individually, as asserted against these defendants.

Background Facts and Procedural History

The instant action arises out of the alleged negligent treatment of plaintiffs by defendants from November 4, 2013 through April 4, 2014. Ms. Wharton first presented to the Methodist OB clinic on November 1, 2013, and a physical examination was performed as well as laboratory and diagnostic testing. It was determined that Ms. Wharton was 14 weeks pregnant and in her second trimester. A nutritional assessment was performed by a registered dietician as it was determined that Ms. Wharton was underweight, and reported poor to fair appetite with poor food choices. She was prescribed prenatal vitamins with folic acid, given a referral for an ultrasound and directed to return in four weeks. An ultrasound was performed on November 4, 2013, which showed a normal fetal heart rate and findings consistent with the gestational age of the fetus. A follow-up ultrasound was suggested to be performed at 20-22 weeks gestation for a complete fetal anatomy evaluation. Ms. Wharton returned to the Methodist OB clinic on November 29, 2013 at 18 2/7 weeks gestation, and again on December 23, 2013 at 21 weeks gestation and had normal check-ups with the Fundal Height (FH)[1] measuring 18 cm and 21cm, respectively. Fetal growth scans performed at AWI on December 17, 2013 and January 14, 2014 revealed normal amniotic fluid levels. Fetal anatomy and interval fetal growth were also deemed appropriate.

Ms. Wharton did not return to the OB clinic until February 19, 2014 at 30 weeks gestation, having skipped her 25-week appointment. She had gained seven pounds since her

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[1] Fundal height is generally defined as the distance from the pubic bone to the top of the uterus measured in centimeters. After 20 weeks of pregnancy, the fundal height measurement often matches the number of weeks pregnant (https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/expert-answers/fundal-height/faq-20057962)

previous visit and, upon examination, the FH was 25 cm (which was a size measuring less than the date of her pregnancy). In addition, blood work was performed which revealed a low red blood cell count. Ms. Wharton was referred to AWI for a fetal growth scan and directed to return to the OB clinic in two weeks. On February 27, 2014, at 31 weeks gestation, she presented to AWI for an ultrasound which revealed the gestational age to be 29 weeks and an expected fetal weight (EFW) of 1,264 grams, which was in the 25th percentile. Ms. Wharton was directed to have a follow-up fetal growth evaluation in three weeks.

She returned to the OB clinic on March 5, 2014, at 32 weeks gestation, for a routine visit. She had complaints of abdominal pain, but denied loss of fluid, bleeding or contractions. Ms. Wharton had lost four pounds from her prior visit and the FH measurement was still measuring less than the date of gestation. A non-stress test was performed and the fetal heart rate (FHR) was 135 beats per minute (BPM). The records indicate that the examining doctor noted the February 27, 2014 fetal growth scan which indicated that the fetus was in the 25th percentile, and further noted that the mother was small and the baby's father was "not big" suggesting that the fetus' small size could be constitutional. On March 20, 2014, Ms. Wharton went to AWI at 33 4/7 weeks pregnant for an ultrasound which revealed a FHR of 140 BPM, gestational age of 30 5/7 weeks, and an EFW of 1,636 grams (3 lbs, 9 oz), which was in the 10th percentile for this stage of gestation. A follow-up fetal growth study in two weeks was recommended, as well as twice weekly antenatal testing with Doppler studies. The record reveals that Ms. Wharton missed appointments at AWI on March 27 and 31, 2014. Ms. Wharton returned to AWI on April 3, 2014, at 35 4/7 weeks pregnant, for a fetal growth scan due to the indication of borderline intrauterine growth restriction (IUGR). She testified that her appointment was at 12:00 p.m., but that she waited

20-30 minutes to be seen. However, the AWI sign-in sheet indicates that she signed in her arrival time at the AWI office at 1:22 p.m. for a 1:00 p.m. appointment. It appears that Ms. Wharton was brought into an examining room approximately 20 minutes later. Upon examination, a fetal heart monitor was placed on Ms. Wharton at approximately 2:48 p.m. registering a baseline of 120 BPM with minimal variability noted. However, deceleration to 90 BPM for 80 seconds was noted at 3:25 p.m. The medical records indicate that the fetus suffered bradycardia, which occurs when the fetal heart rate is below normal for an extended period of time, and there was also a loss of beat to beat variability. Ms. Wharton was transferred to labor and delivery, via wheelchair, at 3:32 p.m.. An IV was started at 3:42 p.m. and blood was drawn for testing. An emergency cesearean section was ordered and Ms. Wharton was taken to the operating room, where anaesthesia was administered at 3:48 p.m. and an incision was made at 3:51 p.m. The labor and delivery chart indicates that a live female infant was delivered at 3:52 p.m. with APGAR scores of 0, 0, and 2 at 1, 5 and 10 minutes, respectively. Neonatal Intensive Care Unit (NICU) doctors attended to the infant immediately, and the NICU notes indicate that the baby was pale, with no heart rate appreciated upon delivery. Positive pressure ventilation was initiated and the infant was then intubated. Epinephrine and normal saline were administered intravenously and chest compressions were started. The infant plaintiff was transferred to the NICU. A serial arterial blood gas test was performed which demonstrated severe metabolic acidosis, and a test to assess fetomaternal hemorrhage was performed to measure the amount of fetal blood in the mother's circulation. The test indicated significant fetomaternal hemorrhage. The infant plaintiff was subsequently transferred to New York Presbyterian Hospital/Weill Cornell on April 4, 2014.

By summons and complaint filed on or about May 23, 2016, plaintiffs brought the instant medical malpractice action against defendants Dr. Haratz-Rubenstein, Dr. Brandon Bell, Dr. Peter Sticco, Ruth Ortiz, RN, Cathy LaRocca, RN, Anne Gudi, CNM, Garry Fiasconaro, MD, Anna Neystat MD., Mahino Talib, MD., AWI and Methodist.[2] Among other things, the complaint alleged that the individual doctors and nurses were negligent and otherwise departed from good and accepted standards of obstetrical care during the prenatal care and labor and delivery of the infant, and that this departure proximately caused the infant's injuries, including brain damage, severe encephalopathy[3], respiratory distress, and inability to communicate. Discovery is now complete and, on or about May 28, 2019, the remaining defendants have moved for summary judgment dismissing plaintiffs' claims.

Summary Judgment Standard

"To prevail on a motion for summary judgment in a medical malpractice action, the defendant must 'make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient's injuries'" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826-827 [2016], quoting *Matos v Khan*, 119 AD3d 909, 910 [2014]; *see Kerrins v South Nassau Communities Hosp.*, 148 AD3d 795, 796 [2017]). "In order to sustain this burden, the defendant is only required to address and rebut the specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" (*Schuck v Stony Brook Surgical Assoc.*, 140 AD3d 725, 726 [2016], citing *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2015]; *see Schwartzberg v*

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[2] Pursuant to an April 24, 2019 stipulation of discontinuance, the action was discontinued with prejudice as against Drs. Bell, Sticco, Fiasconaro, Neystat and Talib, as well as Nurses Ortiz and LaRocca..

[3] Encephalopathy is any disorder of the brain (Stedman's Medical Dictionary, 636 [28th ed 2006]).

Huntington Hosp., 163 AD3d 736, 738 [2018]; *Bhim v Dourmashkin*, 123 AD3d 862, 865 [2014]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2010]).

"'In opposition, a plaintiff then must submit material or evidentiary facts to rebut the defendant's prima facie showing that he or she was not negligent in treating the plaintiff'" (*Dolan v Halpern*, 73 AD3d 1117, 1118-1119 [2010], quoting *Langan v St. Vincent's Hosp. of N.Y.*, 64 AD3d 632, 633 [2009] [internal quotation marks and citations omitted]). "[P]laintiff need only raise a triable issue of fact regarding 'the element or elements on which the defendant has made its prima facie showing'" (*McCarthy*, 139 AD3d at 826 quoting *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 819 [2014]). Further, "general allegations of medical malpractice that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a malpractice defendant's motion for summary dismissal" (*Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 927 [2010], citing *Fileccia v Massapequa Gen. Hosp.*, 99 AD2d 796 [1984], *affd* 63 NY2d 639 [1984]).

Similarly, a plaintiff's expert's affidavit that is conclusory or speculative is insufficient to raise a triable issue of fact in opposition to a defendant's prima facie showing where the expert fails to set forth any basis for his or her opinion and fails to address the specific assertions made by defendant's expert (*see Rivers v Birnbaum*, 102 AD3d 26, 45-46 [2012]; *see generally Senatore v Epstein*, 128 AD3d 794, 795 [2015]; *Bendel v Rajpal*, 101 AD3d 662, 663 [2012]). Further, it is well settled that summary judgment may not be awarded in a medical malpractice action where the parties offer conflicting expert opinions, which present a credibility question requiring a jury's resolution (*see Loaiza v Lam*, 107 AD3d 951, 953 [2013]; *Dandrea v Hertz*, 23 AD3d 332, 333 [2005]).

Finally, "'[i]n a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant'" (*Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 [2005], quoting *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 852 [1998], *lv denied* 92 NY2d 818 [1999])."'A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, "as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury'" (*Semel v Guzman*, 84 AD3d 1054, 1055-1056 [2011], quoting *Goldberg v Horowitz*, 73 AD3d 691, 694 [2010], quoting *Alicea v Ligouri*, 54 AD3d 784, 786 [2008]).

Defendants' Motion

Defendants move for summary judgment dismissing plaintiffs' complaint which alleges negligent treatment between November 4, 2013 and April 4, 2014. Specifically, plaintiffs allege that defendants failed to: provide proper prenatal and obstetrical care for a high risk pregnancy, timely diagnose IUGR, timely admit plaintiff to the hospital and refer her to a specialist, order appropriate laboratory tests, monitor fetal well being and fetal heart rate, and timely and properly administer medication. In support of their motion for summary judgment, the moving defendants rely on the expert affirmation of Dr. Victor Rosenberg (Dr. Rosenberg), a New York state-licensed physician, board certified in Obstetrics and Gynecology and Maternal Fetal Medicine. Dr. Rosenberg affirms that he reviewed all of the relevant documents related to this matter. He opines that none of the moving defendants departed from the accepted standards of medical care in their treatment of Ms. Wharton

during her prenatal visits, or during her delivery at Methodist, and that none of their actions or omissions were the proximate cause of the infant plaintiff's alleged injuries. Specifically, Dr. Rosenberg opines that when Ms. Wharton first presented to the Methodist OB clinic on November 1, 2013, a proper and accurate physical examination was performed, and appropriate laboratory and diagnostic testing was obtained which determined that she was 14 weeks pregnant. He notes that defendants appreciated that Ms. Wharton was underweight and recommended nutritional counseling with a registered dietician, appropriately prescribed prenatal vitamins, obstetrical ultrasounds and directed her to return in four weeks. Dr. Rosenberg opines that defendants properly and timely performed an ultrasound on November 4, 2013, which showed a normal fetal heart rate and findings consistent with the gestational age of the fetus, and that the recommendation for a 20-22 week ultrasound was consistent with the American College of Obstetrics and Gynecology guidelines. Dr. Rosenberg further opines that defendants timely and properly performed diagnostic testing and examinations of Ms. Wharton during her November 29, 2013, December 17, 2013, December 23, 2013 visits to the Methodist OB clinic. He notes that on January 14, 2014, at 24 weeks gestation, Ms. Wharton presented to AWI for a fetal growth scan which revealed a gestational age of 22 5/7 weeks, an estimated fetal weight (EFW) of 603 grams which was in the 35th percentile with a FHR of 143 BPM. He opines that the EFW in the 35th percentile was within normal limits and that there was no evidence of IUGR and that the FHR was within normal limits.

Dr. Rosenberg notes that Ms. Wharton failed to appear for her 25 week appointment and next visited the clinic on February 19, 2014, at 30 weeks gestation. An examination on that date revealed the FH was 25 cm, which represented a 5 week lag from the gestational age, and a FHR of 138 BMP. He opines that defendants appropriately referred her to AWI for a fetal growth scan based on this finding. Dr. Rosenberg further opines that there was

no objective evidence of anemia despite Ms. Wharton's hematocrit and hemoglobin laboratory results being flagged as low, opining that her levels were within the normal range for the third trimester of pregnancy. He opines that defendants properly directed Ms. Wharton to return for a follow-up visit within two weeks. Dr. Rosenberg notes that Ms. Wharton had an ultrasound performed on February 27, 2014, which revealed an EFW of 1264 grams (26th percentile) which he opines was within normal limits and did not qualify as IUGR, which he maintains is demonstrated when the EFW is less than the 10th percentile. Dr. Rosenberg further opines that a biophysical profile was performed and a FHR of 132 BPM was measured, all of which demonstrated fetal well being and normal levels of amniotic fluid were measured. He opines that Ms. Wharton was properly directed for follow-up ultrasound testing in three weeks.

Dr. Rosenberg states that while the reported FH of 25 cm on March 5, 2014 was 7 cm less than the fetus' 32 week gestational age, an estimated fetal weight on February 25, 2014 was in the 25th percentile. He therefore concludes that IUGR was not present at that time and that defendants properly directed Ms. Wharton for further testing on March 20, 2014. Moreover, Dr. Rosenberg opines that the recommendation to follow up for twice weekly antenatal testing with Doppler studies reflected defendants being cautious and conservative in managing the pregnancy as this is typically only recommended when the EFW is less than the 10th percentile. He opines that there is no merit to plaintiffs' allegation that defendants failed to timely diagnose and treat IUGR and properly refer her to a specialist and /or perform and interpret diagnostic studies and tests.

With regard to Ms. Wharton's April 3, 2014 appointment at AWI, Dr. Rosenberg opines that defendants timely and appropriately monitored fetal well being via the fetal heart monitor, and that once there were signs of fetal compromise, with an abnormal FHR,

defendants timely and appropriately transferred Ms. Wharton for further obstetrical management, evaluation, intervention and emergent delivery. He opines that the condition of the fetus warranted immediate delivery as there were signs of fetal compromise. He also notes that the caesarean section delivery was timely completed within 14 minutes of Ms. Wharton's arrival in labor and delivery. Dr. Rosenberg opines that the infant plaintiff suffered from a fetomaternal hemorrhage, which is a rare and unpredictable/unpreventable event that results in profound anemia, as suffered by the infant plaintiff, and often leads to stillbirth and death. He concludes that there is nothing that the defendants could have done to prevent this from occurring.

Defendants also argue that plaintiffs' claims for negligent hiring/supervision should be dismissed as they have failed to identify any specific individuals that were negligently hired. Moreover, they note that the doctrine of respondeat superior would hold an employer vicariously liable for any torts committed by its employees acting within the scope of their employment. Defendants further request that the court take judicial notice that there is no formal cause of action alleging a lack of informed consent in plaintiffs' complaint or amended complaint, although it is alleged in the bill of particulars. Finally, defendants argue that as there has been no medical malpractice on their part, Ms. Wharton's derivative claim for damages such as loss of services, loss of companionship and/or general/ special damages must also be dismissed.

Based upon the foregoing, the court finds that the moving defendants have set forth a prima facie case in favor of dismissal of plaintiffs' medical malpractice/negligence claims, and have demonstrated that there was no departure from accepted standards of medical practice by any of these defendants that proximately caused plaintiffs' injuries (*Stiso v Berlin,*

176 AD3d 888 [2019]; *Aliosha v Ostad*, 153 AD3d 591, 593 [2017]; *Senatore v Epstein*, 128 AD3d 794, 796 [2015]). Thus, the burden shifts to plaintiffs to raise a triable issue of fact.

Plaintiffs oppose defendants' motion arguing that material issues of fact exist regarding the care and treatment they received while under the care of the moving defendants. Specifically, plaintiffs argue that, on April 3, 2014, defendants failed to timely diagnose fetal distress and to timely intervene and perform an emergency cesearean section delivery of the infant plaintiff, which was a departure from the applicable standard of care and proximately caused the infant plaintiff's injuries. In support of these contentions, plaintiffs submit an affirmation from Dr. Martin Gubernick, a physician duly licensed to practice medicine in New York and board certified in obstetrics and gynecology. Dr. Gubernick states that he reviewed all relevant medical records and deposition testimony. He opines, to a reasonable degree of medical certainty, that defendants were negligent and departed from good and accepted medical practice when they failed to diagnose fetal distress at 2:59 p.m. on April 3, 2014, and failed to intervene at that time by administering intravenous fluids and oxygen to Ms. Wharton and repositioning her onto her side. Dr. Gubernick further opines that defendants' failure to perform an emergency caesarean section at that time was a departure from the applicable standard of care that resulted in the infant plaintiff suffering an anoxic brain injury. Thus, he opines that the infant plaintiff would not have suffered the anoxic brain injuries, due to oxygen deprivation, if a caesarean section had been timely performed. In support of this opinion, Dr. Gubernick notes that an electronic fetal monitor was placed on Ms. Wharton at 2:48 p.m and the tracings were relatively normal until 2:59 p.m. at which time a deceleration occurred followed by a FHR of 120 BPM, but without beat to beat variability. He notes that a complete lack of beat to beat variability is a sign of fetal compromise as variability is a function of the fetal autonomic nervous system.

Dr. Gubernick further notes that fetal bradycardia was present at 2:59 p.m.,which is a potentially ominous finding as it can be an indication of fetal decompensation and poor fetal oxygenation Dr. Gubernick opines that the standard of care required immediate intervention at 2:59 p.m. in the form of IV fluids and repositioning of Ms. Wharton, as this would have increased the oxygen delivery to the fetus and increase the blood flow to the placenta. He further opines that, absent this intervention at 2:59 p.m., the standard of care required that the infant be delivered at that time, not over a half hour later. Dr. Gubernick contends that defendants failed to recognize fetal distress until 3:30 p.m. when a physician performed an ultrasound pointing to a notation in the record that states :" . . . transabdominal sonogram showing fetal heart rate of approximately 50 BMP [beats per minute] of unknown duration." Thus, Dr. Gubernick opines that defendants failure to timely recognize fetal distress and intervene resulted in the infant's suffering hypoxic ischemic encephalopathy, an anoxic brain injury.

In reply, defendants argue that plaintiffs failed to allege, in their bill of particulars or CPLR 3101 (d) expert witness disclosure, any departures concerning defendants' failure to intervene by repositioning Ms. Wharton and/or administering IV fluids/oxygen to her, and/or failure to perform an emergency cesearean section. Thus, defendants contend that these theories are being raised for the first time in opposition to defendants' motion and cite various cases in support of this proposition. However, the court finds no merit to this argument. Plaintiffs' bill of particulars allege that defendants failed to timely and properly diagnose and treat Ms. Wharton, failed to timely and properly monitor fetal well being, fetal heart rate and/or fetal movements and failed to timely and properly admit Ms. Wharton to the hospital. Plaintiffs allege that these failures caused a poor prognosis for the infant plaintiff and caused fetal compromise and/or distress. The court therefore finds that the theories

addressed by plaintiffs' expert are not new, or advanced for the first time in opposition to the motion, but rather are based on allegations contained in plaintiffs' bill of particulars. Thus, defendants' assertion that plaintiffs are now seeking to amend their bill of particulars and raise new theories in opposition to their motion for summary judgment is disingenuous and clearly belied by a reading of the bill of particulars.

Next, defendants argue that plaintiffs' expert affirmation fails to raise a question of fact as it is conclusory and fails to rebut Dr. Rosenberg's opinion that Ms. Wharton suffered from a fetomaternal hemorrhage, an unpredictable event which resulted in the infant-plaintiff's injuries and, thus said alleged injuries were not proximately caused by any action or inaction on the part of defendants. Defendants further argue that plaintiffs' expert, Dr. Gubernick, fails to contradict this proposition, but instead opines that the infant's anemia and anoxic brain injury were caused by poor oxygenation at 2:59 p.m. while Ms. Wharton was at AWI.

It is well settled that "'[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions'" (*Elmes v Yelon*, 140 AD3d 1009, 1011 [2016], quoting *Feinberg v Feit*, 23 AD3d 517, 519 [2005]; *see also Nisanov v Khulpateea*, 137 AD3d 1091, 1094 [2016]; *Guctas v Pessolano*, 132 AD3d 632, 633 [2015]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1089 [2014]). Here, plaintiffs' expert's opinion conflicts with Dr. Rosenberg's opinion as to the departure from good and accepted medical practice and the proximate cause of the infant plaintiff's injuries. "Such credibility issues can only be resolved by a jury" (*Feinberg*, 23 AD3d at 519).

However, the court notes that defendants correctly point out that the record indicates that Dr. Haratz-Rubinstein's first contact with Ms. Wharton at AWI was on April 3, 2014 at 3:25p.m., 26 minutes after the 2:59 p.m. departure alleged by plaintiffs' expert. Accordingly,

defendants argue that any care rendered by Dr. Haratz-Rubinstein was not the proximate cause of the injuries alleged and, thus he is entitled to summary judgment dismissing plaintiffs' claims as asserted against him. In addition, defendants further point out that plaintiffs' expert fails to identify a single departure from the standard of care by Methodist Hospital after Ms. Wharton was transferred from AWI to labor and delivery at Methodist Hospital.

Based upon the parties' submission, the court finds that there is no genuine issue of fact as to any departure from accepted practice by Dr. Haratz-Rubinstein or Methodist. Consequently, summary judgment dismissing plaintiffs' complaint as against Dr. Haratz-Rubinstein and Methodist is granted (*see* CPLR 3212 [b]; *Tsitrin v New York Community Hosp.*, 154 AD3d 994, 997 [2017]; *Barrocales v New York Methodist Hosp.*, 122 AD3d 648, 650 [2014]).

However, the court finds that AWI is not entitled to summary judgment dismissing plaintiffs' complaint as against it based on its claimed absence of a departure from the standard of care which proximately caused the injuries alleged. Summary judgment may not be granted in a medical malpractice action where the parties offer conflicting expert opinions requiring a jury's resolution. Since the parties submit conflicting medical expert opinions as to AWI's liability, summary judgment is not appropriate (*see Sheppard v Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235 [2019]; *Dray v Staten Is. Univ. Hosp.*, 160 AD3d 614, 618 [2018]; *Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2017]; *Loaiza v Lam*, 107 AD3d 951, 953 [2013]; *Dandrea v Hertz*, 23 AD3d 332, 333 [2005]). Indeed, viewing the evidence in a light most favorable to plaintiffs, issues of fact exist warranting the denial of that branch of defendants' motion seeking summary judgment dismissing plaintiffs' medical malpractice claims as asserted against AWI. In addition, that

branch of the motion seeking dismissal of Ms. Wharton's derivative claims as asserted against AWI is also denied.

Additionally, defendants request that the court reject any claim for lack of informed consent since this claim was only alleged in plaintiffs' bill of particulars, and not alleged in plaintiffs' complaint/amended complaint. However, in the event the court were to consider this claim, defendants maintain they used appropriate medical judgment to perform an emergent cesearean section and that a reasonably prudent person in Ms. Wharton's position would not have declined to undergo this procedure or any other obstetrical testing that was performed. In opposition, neither plaintiffs, nor their expert, address the issue of lack of informed consent and have failed to demonstrate that Ms. Wharton would not have undergone the caesarean section delivery of the infant plaintiff had she been fully informed of any risks, and that any lack of informed consent was a proximate cause of the injuries alleged (*see Wright v Morning Star Ambulette Servs., Inc.,* 170 AD3d 1249, 1252 [2019]; *Spiegel v Beth Israel Med. Center-Kings Hwy. Div.,* 149 AD3d 1127, 1130 [2017]; *Raucci v Shinbrot,* 127 AD3d 839, 843 [2015]; *Bhim v Dourmashkin,* 123 AD3d 862 [2014]; *Deutsch v Chaglassian,* 71 AD3d 718, 719-720 [2010]; *Rebozo v Wilen*, 41 AD3d 457, 459 [2007]). Thus, to the extent that lack of informed consent was alleged in the bill of particulars, plaintiffs have failed to raise any triable issue of fact as to the validity of such claim. Accordingly, that branch of defendants' motion seeking to dismiss the lack of informed consent claim is granted and said claim is hereby dismissed.

Finally, that branch of defendants' motion seeking to dismiss plaintiffs' negligent hiring and/or supervision claim is granted without opposition and said claim is hereby dismissed.

Based upon the foregoing, the caption of this action is amended as follows:

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V.W., AN INFANT BY HER MOTHER AND NATURAL GUARDIAN, LAVONIE WHARTON AND LAVONIE WHARTON, INDIVIDUALLY

Plaintiffs,

- against - Index No. 504320/16

ADVANCED WOMEN'S IMAGING & PRENATAL TESTING,

Defendant.
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The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. BERNARD J. GRAHAM

KINGS COUNTY CLERK
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