Busching v Chavez
2023 NY Slip Op 35314(U)
December 8, 2023
Supreme Court, Suffolk County
Docket Number: Index No. 623548/2019
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

CRYSTI BUSCHING,

Plaintiff,

-against-

MARTIN CHAVEZ, M.D., PAUL R. BYRNE, M.D., PAUL R. BYRNE, M.D., P.C., IMAN SALEH, M.D., M. BARRA ALLAF, M.D., WOMEN'S CONTEMPORARY CARE ASSOCIATES, P.C., NYU WINTHROP HOSPITAL and NYU LANGONE HEALTH SYSTEM,

Defendants.

Index No.
623548/2019

Motion Seq:
002 Mot D
003 MG
004 Mot D

Decision/Order

The following electronically filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	71-109; 110-140; 141-168
Answering Papers.....	169-227
Reply.....	229; 231-233; 234

This medical malpractice action involves the preterm delivery of stillborn twins by the plaintiff, on December 24, 2017. The stillborn twins had reached approximately twenty-one (21) weeks gestation, which is pre-viability. The condition of the twins was further complicated by what is known as Twin to Twin Transfusion Syndrome (TTTS). TTTS is a somewhat rare condition that can occur in twin pregnancies where the fetuses share a placenta but not an amniotic sac. The abnormality lies in the network of blood vessels that supply oxygen and nutrients essential for development. Essentially, TTTS causes an imbalance of blood flow between the twins, resulting in a "donor" twin and a "recipient" twin. The "donor" twin will experience poor fetal growth because it is transfusing its blood to the "recipient" twin. The "recipient" twin experiences enlargement from the blood volume overload, potentially leading to heart and kidney failure. This syndrome also produces an imbalance in the amount of amniotic fluid in each of the twins' respective amniotic sacs. The "recipient" twin will have excessive

amniotic fluid whereas the "donor" twin will have too little amniotic fluid. TTTS is a condition that is staged, with five accepted stages. It appears undisputed that the twins were diagnosed as Stage I.

Chronology of Events

The plaintiff became pregnant for the first time in February 2017, and that pregnancy terminated when no fetal heartbeat was detected. This pregnancy is not the subject of this action.

The plaintiff became pregnant approximately five months later, in August 2017, learning that she was pregnant with twins, whose stillborn delivery on December 24, 2017 gives rise to this action.

Plaintiff's OB/GYN for these two pregnancies was defendant Paul R. Byrne, M.D. through and including December 18, 2017, which was plaintiff's last visit to Dr. Byrne. Before plaintiff's last appointment with Dr. Byrne, plaintiff saw defendant Iman Saleh, M.D., who was under contract as an employee of Women's Health Professionals at the time plaintiff was a patient. Dr. Byrne and Dr. Saleh both worked in the same OB/GYN practice and in the beginning of the subject pregnancy, plaintiff saw Dr. Saleh on September 11, 2017, September 20, 2017, September 28, 2017, and on October 11, 2017. Dr. Saleh did not see the plaintiff again until the morning of December 24, 2017. After October 11, 2017, plaintiff saw Dr. Byrne on October 23, 2017, November 20, 2017, and then on December 18, 2017, for the last time.

On December 18, 2017, Dr. Byrne referred the plaintiff to maternal fetal medicine specialists, namely defendants Martin Chavez, M.D., and Women's Contemporary Care Associates (WCC). WCC is a practice owned by NYU, and Dr. Chavez is an employee of the NYU defendants. Dr. Chavez diagnosed TTTS and directly managed the plaintiff's care on December 21, 2017 and December 22, 2017. Dr. Chavez advised the plaintiff to return to his office on December 26, 2017.

Before she could return to see Dr. Chavez for the December 26, 2017 appointment, the plaintiff presented to NYU Winthrop University Hospital (the NYU defendants) on December 23, 2017 close to the noon hour, with cramping and back pain that she had been experiencing during the overnight hours. Plaintiff was evaluated to be in preterm labor. In the afternoon of December 23, 2017, Dr. Allaf performed a procedure known as amnio reduction (removing a quantity of amniotic fluid from the larger twin's amniotic sac) in an effort to stop the preterm labor. Although the plaintiff experienced some minimal relief, in the early morning hours of December 24, 2017, contractions were occurring, along with vaginal bleeding, and the attending physician at NYU/Winthrop evaluated that there was a high risk of delivery and a premature rupture of membranes, plus the fact that the twin babies would not be viable at this gestational age. Dr. Saleh was made aware of the situation as she was covering the practice at Women's Health Professionals since it was the Christmas holiday. Dr. Saleh reported to the hospital where she saw bulging membranes protruding through the plaintiff's vagina.

At nearly 9:00 a.m. on December 24, 2017, Dr. Saleh, with the assistance of a resident, performed the delivery of the twins, each of whom was deceased upon delivery. After the

delivery, Dr. Saleh performed a vaginal sweep and an ultrasound to determine if the plaintiff's uterus retained any products of conception/extra tissue.

The plaintiff was released from the hospital on December 25, 2017 after having been administered antibiotics for an elevated temperature on December 24th, following the delivery of the stillborn twins.

On January 3, 2018, plaintiff returned to Women's Contemporary Care Associates (WCC)/Dr. Chavez's office for a follow-up visit complaining of pelvic pain and vaginal bleeding. An ultrasound confirmed that the plaintiff had retained products of conception at the opening of the cervix and in the uterus. The next day, on January 4, 2018, plaintiff underwent a dilation and curettage (D&C) at NYU Winthrop Hospital, performed by a Dr. Cioffi and another physician. A moderate amount of placenta was found to be retained in the uterus. The material had been inside the plaintiff's uterus for approximately ten days, and it had become necrotic.

Plaintiff was subsequently diagnosed with Asherman Syndrome, which is the accumulation of intrauterine adhesions that interfere with the ability to conceive, and which Syndrome can be the result of a D&C in some women.

Ultimately, after surgeries for lysis of the intrauterine adhesions, the plaintiff became pregnant in 2020 and delivered a baby boy at 33 weeks gestation. Since that successful pregnancy and delivery, the plaintiff became pregnant again and gave birth to a second baby in or about 2022.

Summary Judgment Standard in Medical Malpractice Actions

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence of any material issue of fact (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (***Vega v. Restani***, 18 NY3d 499, 505 [2012]). Issue-finding rather than issue determination is the court's function upon a summary judgment motion (***Sillman v. Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404 [1957]).

"'The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage'" (***Whitnum v Plastic and Reconstructive Surgery, P.C.***, 142 AD3d 495, 497 [2d Dept 2016], *quoting* ***Geffner v. North Shore University Hospital***, 57 AD3d 839, 842 [2d Dept 2008]). A defendant "moving for summary judgment must establish, *prima facie*, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries" (***Leigh v Kyle***, 143 AD3d 779 [2d Dept 2016], *quoting* ***Gillespie v New York Hospital Queens***, 96 AD3d 901, 902 [2d Dept 2012]). This showing must be established "through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant's treatment of the plaintiff" (***Jones v. Ricciardelli***, 40 AD3d 935, 935 [2d Dept 2007]). "'Once this showing has been made, a plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the defendant met the *prima facie* burden'" (***Reid v Soults***, 138 AD3d 1087 [2d Dept 2016] *quoting* ***DeGiorgio v Racanelli***, 136 AD3d 734, 737 [2d Dept 2016] [internal quotation marks and citation omitted]).

Dismissal of Informed Consent, Res Ipsa Loquitur Claims and Claims against Dr. Allaf

Although there a number of allegations alleged against the many defendants, the Court notes upon review of all the submitted papers that there is apparently no opposition to dismissal of the claims made against M. Barra Allaf, M.D., nor is there any opposition to dismissal of the claims for lack of informed consent and *res ipsa loquitur* to the extent asserted against all defendants. Accordingly, those claims for lack of informed consent and *res ipsa loquitur* are dismissed as to all defendants, as are all claims and crossclaims against Dr. Allaf.

Dr. Byrne, M.D. and Paul R. Byrne, M.D., P.C. (Motion Sequence 003)

Dr. Byrne and his P.C. seek summary judgment dismissal of all claims and any cross claims asserted against them.

The P.C. seeks summary judgment dismissal because it did not provide any care to plaintiff and so is not vicariously liable for any of the defendants' acts or omissions. This Court finds that based upon Dr. Byrne's affidavit and the testimony of Dr. Saleh, that not only was Dr. Saleh not an employee of Dr. Byrne's practice, but that Dr. Saleh's employment contract at the time of plaintiff's treatment was with Women's Health Professionals, a party not sued herein, nor did the Byrne P.C. render any treatment to the plaintiff. Dr. Byrne attests that the P.C. was his private medical practice from 1997 to 2012, and during that time period that preceded plaintiff's care, he did not employ any other physicians. Dr. Byrne also testified that Women's Health Professionals later became known as Square Care Medical Group.[1] Thus, the P.C. has established its *prima facie* entitlement to summary judgment dismissal of all claims and any crossclaims asserted against it.

Plaintiff's opposition ignores Dr. Saleh's testimony that she was an employee of Women's Health Professionals during the relevant time period and the medical records of plaintiff's care bearing the name "Square Care Medical Group LLP" as well as the name

[1] Square Care Medical Group is also not sued herein.

"Womens [sic] Health Professionals." Plaintiff has failed to raise a triable issue of fact as to the P.C., and so all claims and any crossclaims asserted against it are hereby dismissed.

Paul R. Byrne, M.D. has also established his entitlement to summary judgment dismissal of the claims asserted against him as well as any crossclaims. Among the submitted evidence critical to this determination is the testimony of Dr. Byrne, the testimony of Dr. Chavez, the affirmation of the physician expert, Jodi Lerner, M.D., and the plaintiff's medical records concerning her treatment through December 18, 2017.

As per Dr. Lerner, this evidence demonstrates that all examinations up until December 18, 2017 revealed no abnormalities or concerns. In her opinion, all fetal ultrasounds interpreted by Dr. Byrne were appropriately done, and the 20-week sonogram was the first time that TTTS could be suspected and/or diagnosed. It was only when the plaintiff presented to Dr. Byrne on December 18, 2017 evidencing an excessive weight gain since November 20, 2017, plus the fact that Dr. Byrne was unable to visualize the intervening membrane of the amniotic sacs on ultrasound that he first suspected TTTS and properly referred plaintiff to co-defendant Women's Contemporary Care Associates/Dr. Chavez not only for this issue, but also because plaintiff had some cardiac issues in her family history. Furthermore, Dr. Lerner opined that the plaintiff's cervical length remained within normal limits during the time period when she was treated by Women's Health Professionals/Square/Byrne/Saleh and so there was no departure by not advising Dr. Chavez of any cervical shortening. As a general OB/GYN, Dr. Lerner states that it was not Dr. Byrne's duty to determine if various interventions were indicated to treat TTTS. As noted, Dr. Byrne referred plaintiff to the maternal fetal medicine (MFM) specialist whose duty it was to confirm a diagnosis of TTTS and determine appropriate treatment modalities. "Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient" (***Chulla v. DiStefano***, 242 AD2d 657, 658 [2d Dept 1997]; *see also* ***Meade v. Yland***, 140 AD3d 931, 933 [2d Dept 2016]). In other words, Dr. Byrne's duty of care did not extend to treatment rendered by Dr. Chavez (***Boone v. North Shore University Hospital at Forest Hills***, 12 AD3d 338 [2d Dept 2004]). It was for Dr. Chavez, the MFM specialist, to determine the appropriate treatment for TTTS and to administer that treatment to plaintiff.

Dr. Lerner also opines that Dr. Byrne did not delay in referring the plaintiff to a MFM specialist since not only was there no indication of a problem until December 18, 2017, but also because Dr. Chavez testified that even if the plaintiff had been referred earlier, he would not have engaged in any earlier intervention modalities, meaning Dr. Chavez would not have considered any of the treatment modalities for TTTS (laser fetoscopy/ablation, amnioreduction, or cerclage) before December 18, 2017; Chavez's treatment of the plaintiff would have been the same as he ultimately rendered to plaintiff. Dr. Lerner also points to Dr. Chavez's testimony that even if Chavez had known that plaintiff's cervical length had been 4.1 on December 18, 2017, which was greater than Dr. Chavez's measurement of plaintiff's cervix on December 21, 2017 (2.4), Dr. Chavez would still not have considered invasive intervention. Moreover, according to Dr. Lerner, nothing in the records and testimony reviewed indicated that the plaintiff was in preterm labor; she did not exhibit any signs or symptoms of same on December 18, 2017, and she had a normal cervical length.

As to the retained placenta following delivery of the stillborn twins, that is a risk associated with all vaginal deliveries, but in any event, Dr. Byrne did not deliver the twins, nor render any care and treatment to the plaintiff after December 18, 2017.

Accordingly, Dr. Byrne's evidence submitted in support of his request for summary judgment dismissal of all claims against him demonstrates, *prima facie*, that he did not depart from the standard of care in managing plaintiff's pregnancy during the time period in which he rendered treatment to her, including, *inter alia*, that he did not fail to make timely follow-up appointments, interpret the 20-week sonogram/ultrasound, report cervical shortening, or make a timely referral to MFM, nor did any alleged act and/or omission allegedly committed by Dr. Byrne cause any of the injuries claimed by the plaintiff, including fetal death.

Plaintiff's opposition papers do not contain any expert physician's affirmation/affidavit discussing the substantive care rendered to the plaintiff by defendant Paul R. Byrne, M.D. "'Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause'" (***Whitnum v Plastic and Reconstructive Surgery, P.C.***, ***supra*** at 497, *quoting* ***Novick v South Nassau Communities Hospital***, 136 AD3d 999, 1000 [2d Dept 2016]; ***Meade v Yland***, ***supra*** at 933). The only argument made in opposition to the Byrne defendants' motion is based on the claim that Byrne's P.C. is vicariously liable for the alleged acts and omissions of Dr. Saleh. As noted herein above, that argument is rendered baseless by the submitted evidence.

Accordingly, the plaintiff has failed to raise any triable issue of fact as to the Byrne defendants sufficient to defeat their showing of entitlement to summary judgment dismissal of all claims and any and all crossclaims as asserted against them. The Byrne defendants' motion is granted its entirety.

Dr. Chavez, WCC, and the NYU Defendants (Motion Sequence 002)

After the plaintiff was referred by Dr. Byrne to WCC and Dr. Chavez on December 18, 2017, plaintiff came under WCC's/Chavez's care from December 21, 2017 through January 3, 2018 when WCC contacted the NYU defendants (Dr. Cioffi) to request that he perform a D&C on the plaintiff to remove the retained products of conception the following day, January 4, 2018. As noted in the chronology set forth herein, Dr. Saleh's intervening care and treatment of the plaintiff occurred during this period of time, namely on the morning of December 24, 2017, when Dr. Saleh delivered the stillborn infants.[2]

In support of this motion, the moving defendants submit, *inter alia*, the affirmations of Sharon L. Patrick, M.D., an expert in high-risk obstetrical patients, and Beth W. Rackow, M.D., an expert in reproductive endocrinology. Dr. Patrick's affirmation primarily addresses Dr. Chavez/WCC's care and treatment of the plaintiff, although it addresses claims made against the NYU defendants, but defers discussion regarding Dr. Saleh's care to Dr. Saleh's separate counsel

[2] Dr. Saleh's care and treatment of the plaintiff is addressed in Motion Sequence 004, *infra*.

and separate motion. Dr. Rackow's affirmation principally addresses the claim regarding plaintiff's development of Asherman Syndrome.

As noted, all claims and any and all cross claims are already dismissed as to Dr. M. Barra Allaf.

Regarding Dr. Chavez, both of the moving defendants' experts (Patrick and Rackow) opine that the pregnancy involving the twins was destined to fail by the time she first presented to Dr. Chavez, and that nothing he did or failed to do proximately caused the stillborn delivery. A review of the submitted papers both in support and in opposition to this motion reveal that the essence of the determination to be made is whether Dr. Chavez is entitled to summary judgment dismissal of two departures from accepted practice, namely the alleged failure to investigate, diagnose and treat preterm labor, and the alleged failure to perform laser ablation of certain blood vessels and other interventions for TTTS prior to preterm labor becoming uncontrollable/ no later than December 22, 2017.

It appears from the papers that the plaintiff is not contesting any of the substantive care and treatment rendered to the plaintiff by the NYU defendants, namely the D&C performed by Dr. Cioffi on January 4, 2018. In fact, the expert affirmations submitted with plaintiff's opposition papers do not address the D&C procedure or the development of Asherman Syndrome as an alleged result of that procedure, nor do those affirmations controvert Dr. Rackow's expert opinion that Asherman Syndrome is a known biological response to procedures such as D&Cs, plus the fact that plaintiff possessed unavoidable risk factors for developing Asherman Syndrome, including an infection, the need for the post-partum D&C to remove products of conception following delivery of the stillborn twins, and the fact that she had undergone another D&C earlier in the same year. Plaintiff does not contest Dr. Rackow's opinion that the D&C performed on January 4, 2018 was performed appropriately and within the standard of care. Accordingly, summary judgment dismissal of all substantive claims of medical malpractice as asserted against the NYU defendants is warranted and hereby granted.

Likewise, the claims based on vicarious liability for the acts and omissions of the Byrne and Saleh defendants are also dismissed since "a hospital may not be held for the acts of [a physician] who was not an employee of the hospital, but one of a group of independent contractors" (***Hill v. St. Clare's Hospital***, 67 NY2d 72, 79 [1986]). "Nor is affiliation of a doctor with a hospital or other medical facility, not amounting to employment, alone sufficient to impute the doctor's negligent conduct to the hospital or facility" (***Id.***). The submitted evidence demonstrates that Drs. Byrne and Saleh were clearly not employees of the NYU Hospital defendants;[3] therefore, any alleged malpractice committed by either of them cannot be imputed to the NYU defendants. Moreover, there is no evidence in the record, including the testimony of the plaintiff herself, that the theory of apparent or ostensible agency by estoppel is applicable here. The plaintiff was eminently aware that the practice of Drs. Byrne and Saleh was entirely separate from that of NYU (*cf.* ***Dragotta v. Southampton Hospital***, 39 AD3d 697 [2d Dept 2007]).

[3] The Byrne defendants have also been determined to be entitled to summary judgment dismissal of the claims asserted against them; therefore, the NYU defendants would not be vicariously liable even if the Byrne defendants were considered employees.

However, the question as to whether the NYU defendants are vicariously liable for the acts and omissions of Dr. Chavez under the theory of respondeat superior (*see* ***Russell v. River Manor Corp.***, 216 AD3d 827, 830 [2d Dept 2023]) cannot be determined upon this motion since Dr. Chavez has failed to demonstrate his *prima facie* entitlement to summary judgment on the two aforementioned departures. Dr. Patrick's affirmation is internally contradictory. Aside from her sweeping conclusion that the pregnancy was destined to fail by the time that plaintiff saw Dr. Chavez, thereby implying that nothing he did or did not do would have made any difference and justifying the wait-and-see approach, she sets forth the treatments for TTTS as being expectant management (wait-and-see monitoring), fetoscopic laser ablation of the errant blood vessels creating the imbalance of blood flow, amnioreduction (removing a quantity of amniotic fluid from the larger amniotic sac), and cerclage (effectively sewing shut the cervix).

While Dr. Patrick states that "it would not be a deviation from the standard of care to offer amnioreduction in some cases [of Stage I TTTS]," she does not explain why amnioreduction was not performed by Dr. Chavez when he first encountered the plaintiff. Dr. Patrick also states that laser ablation on the plaintiff in this case would have been a deviation from the standard of care, but she does not articulate why this is her opinion other than to say that the procedure carries risks that outweigh potential benefits, in light of the odds that the condition would self-correct.

In another seemingly contradictory collection of statements, Dr. Patrick writes that "[p]ursuant to good and accepted medical practice, cerclage is not generally considered until the cervix is 2 to 2.5 cm, and in many cases, such as this one, the standard of care does not mandate administration of a cerclage for a cervix at 2 to 2.5 cm and, even if indicated, it is not generally required to be performed on an urgent basis." Plaintiff's cervix had shortened to 2.4 cm on her first visit to Dr. Chavez, and on the very next day, her cervix measured 2.2 cm. Dr. Patrick's explanation of the .2 cm difference in cervical length from one day to the next is equivocal; she states that it is "clinically insignificant and *more likely* reflective of subjective measuring techniques than a significant change in cervical length" (emphasis added) but shortening of the cervix is undisputedly also consistent with preterm labor. Moreover, Dr. Patrick's reference to the length of plaintiff's cervix as "stable" appears to be refuted by the record since there was a reduction in length by 2 cm from December 18, 2017 and an additional .2 cm from December 21 to December 22 despite attempting to attribute that latter reduction to measurement error.

Dr. Chavez himself testified that the plaintiff's cervix was not within normal limits on December 21, 2017, that he considered it to be "short," and "[i]t raised a question as to whether this was getting shorter." He also acknowledged that he did not review any of Dr. Byrne's records in connection with the referral, which records contain measurements of plaintiff's cervical length, including the last measurement of 4.1 cm taken on December 18, 2017. Despite the fact that the plaintiff's cervix was obviously becoming shorter, Dr. Chavez testified that it did not raise further concerns because he was having her come back within 24 hours, on December 22, 2017. Yet, he acknowledged that plaintiff was at risk for preterm labor.

As to whether Dr. Chavez failed to investigate and diagnose that plaintiff was in preterm labor when he first saw her, and on the next day, Dr. Patrick at says that plaintiff's onset of labor "was not clearly apparent on the two occasions in which [plaintiff] presented to Dr. Chavez," while she also states that, "*in hindsight*, based upon her subsequent presentation on December 23, 2017, as well as her clinical course at the hospital, it is my opinion that [plaintiff's] preterm, periviable delivery was unavoidable when she presented to Dr. Chavez on December 21, 2017 and December 22, 2017" (emphasis added). She follows with her statement that "[p]lacement of a cerclage in the context of preterm labor is contraindicated" because "in the context of preterm labor [cerclage] would fail and likely result in tearing of the patient's cervix. Consequently, it is my opinion that Dr. Chavez did not depart from the standard of care by not placing a cervical cerclage on [plaintiff]." These remarks are directly followed by Dr. Patrick's statements that Dr. Chavez's decision to closely follow the plaintiff in order to monitor her cervical length in anticipation of possible cerclage represented good and accepted medical practice. The contradictions are stunning, and so Dr. Patrick's affirmation is not persuasive because it is ambiguous.

Dr. Patrick also writes, "[a]s we know, [plaintiff's] signs of active labor *became more pronounced* in the hours following her December 22, 2017 presentation to Dr. Chavez," and there was an "*exacerbation* of symptoms so quickly following her presentation to Dr. Chavez" (emphasis added). By the use of that language, Dr. Patrick, at the very least, raises an issue of fact as to whether the signs of labor were evident when plaintiff presented to Dr. Chavez, if not essentially concedes that the signs were there for Dr. Chavez to investigate and diagnose preterm labor.

When asked if he thought that plaintiff was not in preterm labor, Dr. Chavez answered, "I was concerned that she would be at risk because of her clinical scenario." He also testified that he did not have enough "data points" to make that determination from the ultrasound evaluation. When asked if he investigated for contractions on December 21, 2017, Dr. Chavez did not directly answer with a yes or no; rather, he testified that his practice typically presses down on the fundus to see if a contraction can be reproduced but he could not recall specifically with this case. Moreover, he testified that he does perform that pressing down on the fundus, but the sonographer performs it, so he could not speak for that individual other than to say that it is customary for them to do that. When Dr. Chavez was asked if he believed that the plaintiff was in preterm labor on the next day, December 22, 2017, he answered, "I believed she was at risk because of her clinical scenario."

Dr. Chavez was asked if in light of the fact that plaintiff was in labor within 48 hours of December 22, 2017, would he still attribute the cervical shortening from 2.4 cm to 2.2 cm to measurement variability or to preterm labor. His answer, though long, was that "it's impossible to say that one aspect of a clinical evaluation would actually lead to that," and that it was "unclear" if that cervical shortening was or was not related to the eventual birth. Dr. Chavez also acknowledged that he did not consider any other investigations to see whether or not plaintiff was in fact in preterm labor, but he again acknowledged during his deposition that "[h]er clinical scenario already put her at risk for preterm labor. . .because of her multiples, because of the

polyhydramnios, because of the cervical length. She was already at risk for that." Interestingly, Dr. Chavez testified that the clinical scenario for the plaintiff on December 22, 2017 did not indicate cerclage as a treatment, nor was amnioreduction indicated on that date although the reasoning for that is undeveloped. Dr. Chavez also testified that laser ablation/fetoscopy was not indicated in TTTS Stage I. Dr. Chavez's deposition testimony is as ambiguous as his expert's affirmation submitted in support of this motion.

Since Dr. Chavez has not carried his *prima facie* burden, there is no need to consider the plaintiff's papers in opposition, although had the initial burden been met, the affidavit of Dr. Bootstaylor and the affirmation of Dr. Quintero, who created the staging system for TTTS, would have raised issues of fact as to the alleged failure to recognize the signs of preterm labor and to employ appropriate treatment, including laser ablation/fetoscopy on December 21, 2017 or December 22, 2017 in order to stop the abnormal blood flow from the donor twin to the recipient twin, followed by amnioreduction and then cerclage for stability as of December 22, 2017. As explained by Dr. Quintero, the excess amniotic fluid resulting from TTTS places excessive pressure on the cervix which "is the gatekeeper of pregnancy." Excessive pressure on the cervix results in shortening, contractions, and labor.

Motion Sequence 002 is granted in part and denied in part as set forth herein above.

Dr. Saleh (Motion Sequence 004)

Dr. Saleh initially saw the plaintiff in the early stages of her pregnancy; however, those visits do not constitute the crux of the claimed departures alleged against Dr. Saleh. It is her delivery of the stillborn twins and the failure to perform a uterine sweep/properly perform the necessary acts to ensure that the uterus is empty that form the essential claims against her. Plaintiff alleges that as a result of not performing a uterine sweep, or performing it negligently, products of conception remained in plaintiff's uterus requiring plaintiff to undergo the D&C on January 4, 2018.

A review of the papers submitted in support of and in opposition to this motion serve to distill the alleged departure down to whether Dr. Saleh failed to timely discover and remove retained placenta by performing a manual examination of the plaintiff's uterus to make sure that there were no retained products of conception remaining after the delivery. For the same reasons that Dr. Byrne is found by this Court to be entitled to summary judgment on the claims related to the diagnosis and treatment of TTTS, so is Dr. Saleh. Furthermore, Dr. Saleh's last contact with the plaintiff before delivery of the stillborn twins was October 11, 2017.

Dr. Saleh testified that she was covering the practice over the Christmas holiday period, and that is why she delivered plaintiff's stillborn twins. She also acknowledged that preterm delivery itself is a risk factor for retained placenta. According to her testimony, her custom and practice is to do an ultrasound after delivery "to evaluate the uterine lining, and make sure that there is no retained products of conception, no extra tissue there, just to make sure that there is a clean endometrial strip." When asked if she in fact performed that ultrasound on the plaintiff, Dr. Saleh answered that "it is my custom and practice so I would say yes." She also testified that it is her "custom and practice" to document the ultrasound findings in the hospital chart. While

the hospital records refer to an antepartum ultrasound, there are no findings of the ultrasound reported in the hospital chart.

Dr. Saleh explained that the placenta is examined after it is expelled to determine if there is any part of it missing or if it is intact. When asked if the placenta is delivered intact is the ultrasound done, Dr. Saleh answered, "[s]o in these situations where preterm delivery is preterm my custom and practice would be doing a bimanual exam myself to get a feel of the uterus and interior of the uterus and also to do an ultrasound to look at the lining, endometrial lining." She further explained that the bimanual exam is a vaginal examination by hand. Dr. Saleh was asked if part of her manual vaginal exam included examining in the area of the cervical os, to which she replied that she would have examined the cervical os and the uterus. Dr. Saleh recalled having performed the vaginal examination on the plaintiff, but that it is not documented in the chart: "[u]nfortunately, I don't see it documented" although it is her "custom and practice" to document the manual exam in her delivery notes. A review of the hospital records, however, reveals an entry that a vaginal sweep was performed. There is no additional notation that any sweep of the uterus itself was performed.

It is undisputed that Dr. Cioffi removed a "moderate" amount of retained tissue as opposed to a "scant" amount on January 4, 2018, mostly from inside plaintiff's uterus posteriorly, and some at the cervical os.

Defendant's expert, Gil Michael Farkash, M.D., opines that Dr. Saleh exercised all care reasonably necessary to prevent and limit injury, and that her treatment and care of the plaintiff was in accordance with the applicable standards of care, and the injuries were not caused, contributed, or created by any act or omission on the part of Dr. Saleh.

Specifically, as to the antepartum events, Dr. Farkash explains the limitations of ultrasound to diagnose retained products of conception because "[t]he difficulty with ultrasonic findings though is that they are based on signs that can also be found in the normal postpartum uterus."

Opining that Dr. Saleh's post-delivery examination was reasonable and without deviation or departure from good and accepted practice, he utterly fails to address the "moderate" amount of retained placenta found inside the plaintiff's uterus found by Dr. Cioffi on January 4, 2018. In fact, he does not even mention the January 4, 2018 D&C or Dr. Cioffi's findings. Stating the obvious, Dr. Farkash writes that it is his opinion that "retained tissue identified during an ultrasound on January 3, 2018 was not revealed on the postpartum ultrasound performed before plaintiff's discharge from NYU Winthrop." Critically, he does not explain why the retained tissue was not found on the post-partum ultrasound that Dr. Saleh performed. Perhaps the reason that the tissue was not identified on ultrasound after the delivery is provided by Dr. Farkash himself, and that is because the ultrasound has limitations. For all these reasons, Dr. Farkash's affirmation is lacking in critical respects, and so it fails to eliminate all questions of fact as to the claim that Dr. Saleh failed to conduct a proper post-partum/manual uterine examination for retained products of conception.

Inasmuch as Dr. Saleh has failed to establish her *prima facie* entitlement to summary judgment as a matter of law on the issue as to whether she conducted a proper post-delivery examination for retained products of conception, there is no need to consider the plaintiff's papers submitted in opposition.

Dr. Saleh's summary judgment motion is granted in part and denied in part as set forth herein above.

The foregoing constitutes the Decision and Order of this Court.

Dated: December 8, 2023
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]