SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

RINAT DRAY, *Plaintiff-Appellant*, v. STATEN ISLAND UNIVERSITY HOSPITAL et al., *Defendants-Respondents*.	No. 2019-12617 Index No. 500510/2014 Supreme Court Kings County **ORDER TO SHOW CAUSE**

Upon the annexed affirmation of Blair Greenwald, Assistant Solicitor General, and the exhibits attached thereto,

LET plaintiff-appellant and defendants-respondents show cause before this Court, located at 45 Monroe Place, Brooklyn, New York 11201, on the _____ day of _____, 2023, at 9:30 a.m., or as soon thereafter as counsel may be heard, why an Order should not be made and entered granting the State of New York leave to file an amicus curiae brief, and any other relief the Court may deem just and proper; and, sufficient cause therefor appearing, it is hereby

ORDERED that the State's motion for leave to submit an amicus curiae brief is granted; and it is further

ORDERED that service of a copy of this order to show cause, and the papers upon which it was made, be made upon counsel for plaintiff-appellant Rinat Dray:

Michael M. Bast
Michael M. Bast, P.C.
20 Pierrepont Street, #2A
Brooklyn, New York 11201
<michael@michaelbastlaw.com>
(718) 852-2902

Alternative mailing address:

26 Court Street, Suite 1811
Brooklyn, New York 11242

counsel for defendants-respondents Leonid Gorelik and Metropolitan Ob-Gyn Associates, P.C.:

John T. Evans
Rawle & Henderson LLP
14 Wall Street, 27th Floor
New York, New York 10005
<jevans@rawle.com>
(212) 323-7072

and counsel for defendants-respondents Staten Island University Hospital and James J. Ducey:

Kathryn M. Beer
Mauro Lilling Naparty LLP
100 Crossways Park Drive West, Suite 310
Woodbury, New York 11797
<kbeer@mlnappeals.com>
(516) 487-5800

on or before the _____ day of _____, 2023, by:

___ NYSCEF, Elec. Filing Rules of App. Div. (22 NYCRR) pt. 1245;

___ Electronic mail, Practice Rules of the App. Div. (22 NYCRR) § 1250.1(c)(4), and Rules of the App. Div., 2d Dep't (22 NYCRR) § 670.4(d);

___ U.S. Mail, CPLR 2103(b)(2); or

___ Overnight courier, CPLR 2103(b)(6),

shall be deemed sufficient service thereof.

NOTE: On the return date all motions and proceedings are deemed submitted. Oral argument is not permitted. Practice Rules of the App. Div. (22 NYCRR) § 1250.4(a)(8).

Dated: Brooklyn, New York
September ___, 2023

_____
Associate Justice
Appellate Division, Second Department

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

RINAT DRAY, *Plaintiff-Appellant*, v. STATEN ISLAND UNIVERSITY HOSPITAL et al., *Defendants-Respondents*.	No. 2019-12617 Index No. 500510/2014 Supreme Court Kings County

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

BLAIR GREENWALD, an attorney duly admitted to practice in the courts of this State, affirms the following under penalty of perjury:

1. I am an Assistant Solicitor General in the Office of the Attorney General of the State of New York, which represents movant the State of New York in this matter. I submit this affirmation in support of the in support of the State's motion for leave to submit an amicus curiae brief in support of plaintiff-appellant. A copy of the State's proposed amicus brief is attached as an exhibit to this affirmation.

2. I make this affirmation based on personal knowledge and on information and belief, based upon my review of this office's files,

conversations with office colleagues and counsel for the parties, and the attached exhibits.

3. The above-captioned appeal arises from a decision of Supreme Court, Kings County (Edwards, J.), filed October 9, 2019. Ex. B at 3-17. The decision granted the defendants' motions to reargue their motions to dismiss the additional claims in plaintiff's second amended verified complaint, which added claims of discrimination under the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL).

4. On October 31, 2019, plaintiff timely noticed an appeal. Ex. B at 1-2 (Notice of Appeal); *see* Ex. C (Notice of Entry, dated October 16, 2019).

5. On or about August 28, 2023, this Court calendared the appeal for argument on September 15, 2023.

6. On August 29, 2023, I notified counsel for all parties by electronic mail that the State was planning to move this Court for leave to file an amicus brief. Counsel for plaintiff consents to the requested relief on the condition that the Court does not adjourn oral argument. Counsel for defendants Dr. Leonid Gorelik and Metropolitan OB-GYN

Associates, P.C., and counsel for defendants Staten Island University Hospital and Dr. James Ducey do not consent to this relief.

7. On September 8, 2023, at approximately 5 p.m., I provided counsel for all parties with an advance copy of these motion papers.

8. For the reasons further explained in the State's proposed amicus brief, Supreme Court erred in finding that a state interest in fetal life required dismissal of the plaintiff's claims of discrimination under the NYSHRL and NYCHRL. Supreme Court failed to apply the well-accepted framework for analyzing claims of discrimination under these statutes and instead cited irrelevant abortion jurisprudence to elevate a purported state interest in fetal life that has no application to the discrimination claims at issue in this case.

9. The State has a strong interest in the correct interpretation and application of the NYSHRL and parallel provisions in the NYCHRL, which serve to protect its people from unlawful discrimination, including in the context of pregnancy. The State also has a strong interest in preserving pregnant plaintiffs' rights to make reproductive health care decisions absent undue interference. In addition, the State has an interest in ensuring that all patients are able to give or deny informed

consent to any proposed procedure or treatment. *See* New York State Department of Health, New York State Hospital Patients' Bill of Rights (2019), https://www.health.ny.gov/publications/1500/. If left undisturbed, Supreme Court's improper and overbroad analysis of the NYSHRL and NYCHRL claims here will hinder pregnant plaintiffs' ability to seek relief as authorized by the Legislature and undermine the protections embodied in New York's laws.

10. Permitting the State to file the amicus brief will assist the Court in analyzing the NYSHRL and NYCHRL claims here without substantial prejudice to the defendants. Supreme Court's reasoning relies on a purported state interest in fetal life, a finding that the State is uniquely positioned to address. Meanwhile, the attached amicus brief of less than 20 pages is limited to this narrow issue and does not inject any new issues on appeal.

CONCLUSION

WHEREFORE, the State respectfully requests that the Court grant the State leave to file the attached amicus brief without adjourning the argument calendared for September 15, 2023, and award any other relief that the Court may deem just and proper.

Dated: New York, New York
September 8, 2023

BLAIR GREENWALD
Assistant Solicitor General

EXHIBIT A

To be submitted

Supreme Court of the State of New York
Appellate Division – Second Department

No. 2019-12617

RINAT DRAY,

Plaintiff-Appellant,

v.

STATEN ISLAND UNIVERSITY HOSPITAL, LEONID GORELIK, METROPOLITAN OB-GYN ASSOCIATES, P.C., and JAMES J. DUCEY,

Defendants-Respondents.

BRIEF FOR AMICUS CURIAE STATE OF NEW YORK

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, New York 10005
(212) 416-6102
blair.greenwald@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
ESTER MURDUKHAYEVA
Deputy Solicitor General
GALEN SHERWIN
Special Counsel
BLAIR J. GREENWALD
Assistant Solicitor General
of Counsel

Dated: September 8, 2023

Supreme Court, Kings County – Index No. 500510/14

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION AND INTERESTS OF AMICUS CURIAE 1

QUESTION PRESENTED 3

STATEMENT OF THE CASE 4

A. Statutory Background 4

B. Factual Background 5

C. Procedural History 8

ARGUMENT

SUPREME COURT ERRED IN DISMISSING DRAY'S CLAIMS UNDER THE STATE AND CITY HUMAN RIGHTS LAWS 11

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page(s)**

Board of Educ. of Union Free School Dist. No. 2, E. Williston, Town of N. Hempstead v. New York State Div. of Human Rights, 42 A.D.2d 49 (2d Dep't 1973) 4

Broadnax v. Gonzalez, 2 N.Y.3d 148 (2004) 13-14

Byrn v. New York City Health & Hosps. Corp., 31 N.Y.2d 194 (1972) 13, 15

Chauca v. Abraham, 30 N.Y.3d 325 (2017) 4

Crouse-Irving Memorial Hospital v. Paddock, 127 Misc. 2d 101 (Sup. Ct. Onondaga County 1985) 15

Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2218 (2022) 2

Dray v. Staten Is. Univ. Hosp., 160 A.D.3d 614 (2d Dep't 2018) 8

Elaine W. v. Joint Diseases N. Gen. Hosp., 81 N.Y.2d 211 (1993) 4, 11, 14, 19

International Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) 14

Kouri v. Eataly N.Y. LLC, 199 A.D.3d 416 (1st Dep't 2021) 11

Matter of Fosmire v. Nicoleau, 75 N.Y.2d 218 (1990) 13, 16

Matter of Jamaica Hospital, 128 Misc. 2d 1006 (Sup. Ct. Queens County 1985) 15

Cases **Page(s)**

People v. Jorgensen,
26 N.Y.3d 85 (2015) 14

Laws & Regulations

Ch. 1, 2019 N.Y. Laws (Legis. Retrieval Sys.) 2

Executive Law § 296(2)(a) 4

Penal Law § 125.05 ..... 14, 16

Public Health Law § 2599-aa(2) 16

N.Y.C. Admin. Code § 8-107(4)(a)(1) 4

47 R.C.N.Y. § 2-09(b) 5

Miscellaneous Authorities

N.Y. Dept. of Health (DOH), New York State Hospital Patients' Bill of Rights (2019), https://www.health.ny.gov/publications/1500/ 2

INTRODUCTION AND INTERESTS OF AMICUS CURIAE

The State of New York submits this amicus curiae brief in support of plaintiff-appellant Rinat Dray. Dray alleges that defendants-respondents—a hospital, practitioner group, and several physicians—discriminated against her on the basis of pregnancy and sex by performing a cesarean section (c-section) over her consistent objection. There is no dispute that Dray had capacity to object to the procedure and that she was informed of the comparative risks of continuing with vaginal delivery. Although Supreme Court, Kings County (Edwards, J.) correctly recognized that competent pregnant adults, like nonpregnant competent adults, have the right to refuse medical care, it erroneously found that defendants (all non-state actors) had authority to unilaterally overrule Dray's objection based on a hypothetical state interest in fetal life. Supreme Court then dismissed Dray's claims under the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL) as a matter of law. This Court should reverse.

The State has a strong interest in the correct interpretation and application of the NYSHRL and parallel provisions in the NYCHRL, which protect persons in the State from unlawful discrimination,

including in the context of pregnancy. The State also has a strong interest in preserving the right of pregnant persons to make reproductive health care choices without undue interference. As the Legislature declared in the Reproductive Health Act of 2019, "it is the public policy of New York State that every individual possesses a fundamental right of privacy and equality with respect to their personal reproductive decisions and should be able to safely effectuate those decisions." *See* Ch. 1, 2019 N.Y. Laws, pg. 1 (Legis. Retrieval Sys.). And the State has taken numerous measures after the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2218, 2284 (2022), to ensure that New York remains a nationwide leader in protecting the equal rights and bodily autonomy of pregnant persons. Finally, the State has a strong interest in ensuring that all patients are able to give or deny informed consent to any proposed procedure or treatment. *See* N.Y. Dept. of Health (DOH), New York State Hospital Patients' Bill of Rights (2019), https://www.health.ny.gov/publications/1500/.

If accepted by this Court, Supreme Court's improper analysis of Dray's discrimination claims will interfere with the State's interests in several respects. First, Supreme Court's decision would allow third

parties to unilaterally override decisions of pregnant persons (and only pregnant persons) based on a purported state interest in protecting fetal life. New York law does not permit such concerns, standing alone, to override the informed medical decisions of the pregnant persons who will be subject to the procedure or treatment. Second, Supreme Court erroneously assumed that "tak[ing] into account concern for the fetus" requires overriding Dray's decision to decline a c-section. To the contrary, the record in this case establishes that Dray shared defendants' interest in delivering a healthy baby. New York law entitles Dray and other pregnant persons to make the decision about how to best effectuate any such interest upon being informed of the benefits and risks of proceeding with or declining a medical procedure.

QUESTION PRESENTED

Whether Supreme Court erred in dismissing Dray's NYSHRL and NYCHRL claims on the ground that the performance of a c-section over a pregnant patient's objection is nondiscriminatory as a matter of law due to a purported state interest in fetal life.

STATEMENT OF THE CASE

A. Statutory Background

The NYSHRL declares it unlawful for any "owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation" to deny individuals "because of . . . sex" the "accommodations, advantages, facilities or privileges thereof." Executive Law § 296(2)(a). State courts have recognized that "distinctions based solely upon a woman's pregnant condition constitute sexual discrimination." *Elaine W. v. Joint Diseases N. Gen. Hosp.*, 81 N.Y.2d 211, 216 (1993); *see also Board of Educ. of Union Free School Dist. No. 2, E. Williston, Town of N. Hempstead v. New York State Div. of Human Rights*, 42 A.D.2d 49, 52-53 (2d Dep't 1973), *aff'd on op.*, 35 N.Y.2d 673 (1974). Accordingly, a hospital policy or practice that "singles out pregnant women for treatment different from treatment afforded those with other medical or physical impairments is . . . suspect." *Elaine W.*, 81 N.Y.2d at 216.

The NYCHRL provides similar protections, which are interpreted at least as broadly as the NYSHRL. *See* N.Y.C. Admin. Code § 8-107(4)(a)(1); *Chauca v. Abraham*, 30 N.Y.3d 325, 329, 332-33 (2017). Rules issued by the New York City Commission on Human Rights

governing the Commission's implementation and interpretation of the NYCHRL provide that "[a] covered entity cannot use its concerns about maternal or fetal safety as a reason for discrimination." 47 R.C.N.Y. § 2-09(b). The rules list several examples, including "[a] hospital policy [that] allows medical providers to override the informed consent of a patient with capacity to provide consent only when the patient is pregnant." *Id.* § 2-09(b)(1)(vi).

B. Factual Background[1]

On July 26, 2011, Dray was admitted to Staten Island University Hospital as a pregnant patient undergoing labor contractions. Dray had previously delivered two children by c-section but chose to deliver this time via vaginal delivery. Upon getting pregnant this third time, Dray told the practice group providing her with prenatal care—Metropolitan OB-GYN Associates, P.C.—that she was aware of the risk of a vaginal delivery, chose to have a vaginal delivery, and would not sue if she suffered injuries because of that choice. (*See* A. 71-72, 336-337, 387.)

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[1] The following facts are drawn from the proposed second amended complaint and attached exhibits (Appendix (A.) 166-199), and from Dray's affidavit (A. 70-76).

Upon arriving at the hospital at approximately 8 a.m. on July 26, Dray was examined by Dr. Leonid Gorelik of Metropolitan OB-GYN Associates. (A. 72; *see* A. 167.) At that time, Dray was three centimeters dilated and her water had not yet broken. Dr. Gorelik told Dray that she should have a c-section, but Dray told him that she was aware that c-sections had risks and did not want one. (A. 72.) Dray considered returning home to have a vaginal delivery by her doula but could not do so given the strength of her contractions. (A. 73.)

An hour later, at approximately 9 a.m., Dr. Gorelik told Dray that a c-section was not immediately necessary and that she could try a vaginal delivery. Dray signed a consent form acknowledging the risks of and choosing to have a vaginal delivery. (A. 73; *see* A. 195.)

At approximately 11 a.m., Dr. Gorelik informed Dray that he wanted to do a c-section because a vaginal birth was not good for the fetus. Dr. Gorelik checked on Dray again at approximately 1 p.m. and did not see any change in dilation. (A. 73.)

At approximately 1:30 p.m., Dr. James Ducey, a physician at Staten Island University Hospital, spoke with Dray about having a c-section. He told her that no doctor at the hospital would perform a vaginal birth and

that she could not be transferred to another hospital. Dray responded that she had researched and understood the risks and chose to have a vaginal delivery instead of a c-section. (A. 73-75; *see* A. 167.)

At approximately 2 p.m., Dr. Gorelik returned. He told Dray that he would examine her only if she agreed to a c-section and signed a consent form, which Dray refused to do. (A. 74; *see* A. 198 (unsigned consent form for c-section).) Dr. Gorelik also told Dray that he would obtain a court order allowing him to perform a c-section, but he never filed an application for such relief. (A. 74-75; *see* A. 169.)

Dray requested an ultrasound to see the fetus, which was refused. (A. 74.) Shortly thereafter, Dr. Gorelik, accompanied by Dr. Ducey and several nurses, stated that the fetus was in distress and Dray would be taken to the operating room for a c-section. Dray continued to ask for more time and did not provide consent for the c-section. At no point did Dray lack capacity to provide informed consent. (A. 74.)

At approximately 2:45 p.m.—less than seven hours after Dray was admitted to the hospital—Dray was taken into surgery for a c-section. Dray delivered a healthy baby but suffered injuries to her bladder during

the surgery. She remained hospitalized for six days following the procedure. (A. 75.)

C. Procedural History

In 2014, Dray filed this action against Dr. Gorelik, Metropolitan OB/GYN Associates, Dr. Ducey, and Staten Island University Hospital in Supreme Court, Kings County, seeking damages based on personal injuries resulting from the c-section. She raised a variety of claims, including medical malpractice and negligence based on defendants' determination that a c-section was necessary and their performance of a c-section without her consent. *See Dray v. Staten Is. Univ. Hosp.*, 160 A.D.3d 614, 616 (2d Dep't 2018).

Supreme Court granted the defendants' motions for summary judgment to dismiss as untimely those claims sounding in intentional tort based on defendants' performance of the c-section without Dray's consent. *See id.* at 617. This Court affirmed that ruling on appeal and remanded for further proceedings on the medical malpractice claim. *Id.* at 618.

On remand, Dray moved to amend the complaint, which Supreme Court permitted over defendants' opposition. (*See* A. 55-199.) Among

other amendments, Dray added claims of discrimination under the NYSHRL and NYCHRL. (A. 183-184.) She alleged that defendants had implemented a policy to override pregnant patients' refusal to undergo a c-section (the "Maternal Refusal Policy"), and that this policy constituted discrimination based on sex. (A. 178, 183-184; *see* A. 190-193 (excerpt from hospital administrative procedures manual: "Managing Maternal Refusals of Treatment Beneficial for the Fetus" (May 2008).)

In 2019, on the defendants' motions, Supreme Court dismissed Dray's new claims, including her claims under the NYSHRL and NYCHRL. (A. 14-17.) Instead of applying the standard analysis for discrimination claims, Supreme Court relied on abortion jurisprudence to find that the State has an interest in protecting fetal life that can override a pregnant patient's consent to treatment, and that defendants' policy effectuated that interest (notwithstanding the fact that defendants were not state actors). (A. 15-17.) Dray timely appealed the order of dismissal to this Court. (A. 2, 18-20.)

Meanwhile, in April 2018, DOH issued a Statement of Deficiencies and Plan of Correction to Staten Island University Hospital. (A. 374-379.) *See* Letter from Kathleen Gaine, MPA, Regional Program Director, DOH,

to Donna Proske, R.N., Executive Director, Staten Island University Hospital-North (Apr. 20, 2018).[2] DOH explained that it had investigated the incident with Dray and the hospital's maternal refusal policy. DOH found that the hospital "failed to afford a pregnant woman the right to refuse treatment" and "did not implement a pregnant woman's decision not to have a Cesarean -Section." (A. 374.) The hospital then submitted to DOH a plan of correction that described a revised policy for final adoption by the hospital's medical executive committee. Under the revised policy, if a pregnant patient with capacity refuses treatment, "the patient should be fully informed of any change in clinical condition and any indication that her health or that of the fetus is at risk." (A. 375.) If she "continues to refuse" treatment, her "decision should be followed." (A. 375.)

[2] The letter is attached as Exhibit D to the State's motion for permission to file a brief as amicus curiae.

ARGUMENT

SUPREME COURT ERRED IN DISMISSING DRAY'S CLAIMS UNDER THE STATE AND CITY HUMAN RIGHTS LAWS

Supreme Court erred in dismissing Dray's claims under the NYSHRL and NYCHRL. (*See* A. 20-21.) Instead of applying the standard discrimination analysis, Supreme Court incorrectly applied an outdated abortion framework to elevate a purported state interest in fetal life that has no role in the State's anti-discrimination laws, and that Dray shared in any event.

Under the NYSHRL and NYCHRL, a court considers (i) whether a policy or action discriminates against the plaintiff as a member of a protected class, and (ii) whether the defendant has provided a legitimate, nondiscriminatory reason for that policy or action. *See, e.g.*, *Kouri v. Eataly N.Y. LLC*, 199 A.D.3d 416, 415 (1st Dep't 2021). The correct question here is therefore whether the hospital's policy or action in overriding a pregnant patient's refusal of treatment discriminates against pregnant patients. If it does, then the hospital may provide a legitimate, nondiscriminatory reason for its policy or action. *See, e.g.*, *Elaine W.*, 81 N.Y.2d at 215 (finding hospital's proffered medical explanation for its discriminatory policy, disputed by other evidence, did not

validate hospital's exclusion of pregnant patients from its drug treatment program).

Supreme Court failed to apply this well-accepted framework and instead cited outdated abortion jurisprudence to find a purported state interest in protecting fetal life after the first 24 weeks of pregnancy. Specifically, the court determined that the hospital policy did not discriminate against pregnant patients because the policy "take[s] into account concerns for the fetus." (A. 16.) Without assessing any specific factual allegations in the amended complaint regarding the threat (or absence of threat) to the life or health of the fetus in this case, the court dismissed the discrimination claims based on the purported state interest in the "rights of a viable fetus." (A. 16.)

There is no reasoned basis for the court's incorporation of abortion jurisprudence into this case. The NYSHRL and NYCHRL have never been interpreted to allow for consideration of fetal rights in ascertaining whether an act or policy is discriminatory. Nor does it make sense to do so here because this case is not about abortion but about consent to medical treatment during childbirth. It is a well-established principle of common law that a competent adult may refuse even necessary, life-

sustaining treatment. *Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 226 (1990). The proper analysis here would thus compare pregnant patients' exercise of such a right to nonpregnant patients' exercise of such a right, independent of any purported rights of a fetus.

It would also be inappropriate to incorporate an abortion framework into the analysis of New York State's anti-discrimination law because it is well established that New York law does not recognize unborn fetuses as having cognizable legal interests. As Supreme Court correctly acknowledged, "a fetus is not a legally recognized person until there is a live birth." (A. 15.) And the Court of Appeals has made clear that the State "Constitution does not confer or require legal personality for the unborn." *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 203 (1972). Under the common law, although a born child can bring suit for harms suffered in utero, and a pregnant person can recover for emotional harms suffered as a result of a miscarriage or stillbirth, an individual cannot bring wrongful death claims on behalf of an unborn fetus. *See Broadnax v. Gonzalez*, 2 N.Y.3d 148, 154-55 (2004). New York's statutory law is also consistent with this principle, defining a "person" who can be the victim of a homicide as "a human being who has been born

and is alive." Penal Law § 125.05; *see People v. Jorgensen*, 26 N.Y.3d 85, 90-91 (2015). And under the common law, a born child can bring suit for harms suffered in utero, and a pregnant person can recover for emotional harms suffered as a result of a miscarriage or stillbirth. But an individual cannot bring wrongful death claims on behalf of an unborn fetus. *See Broadnax v. Gonzalez*, 2 N.Y.3d 148, 154-55 (2004).

Moreover, Supreme Court's overbroad reasoning here could be extended to compel—or withhold—medical treatment of pregnant persons far outside the context of childbirth delivery options. Fetal protection interests could be used to justify forced medication or other forms of coerced prenatal care, or conversely, withholding of medical treatments, or even regulating pregnant women's conduct more broadly. Such determinations rest on the paternalistic assumption that pregnant people are less capable than others of making medical and practical decisions that are best for themselves and for their pregnancies, and reflects and reinforces archaic gender stereotypes. *See International Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991); *Elaine W.*, 81 N.Y.2d at 216. This approach runs counter to New York's strong protection of the

right to make reproductive healthcare decisions, up to and including abortion, and to consent to medical treatment, as well as New York law's longstanding refusal to recognize a fetus as a person with cognizable legal interests. *See Byrn,* 31 N.Y.2d 194, 203.

Supreme Court's formulation of the purported state interest in fetal life is further undermined by the court's misplaced reliance on two trial court decisions permitting treatment over objection that were issued nearly four decades ago and are divorced from the facts of this case. (*See* A. 16.) In *Crouse-Irving Memorial Hospital v. Paddock*, the trial court authorized blood transfusions over the mother's objection *after* a c-section, not before, and was therefore considering the risks to the health and safety of a born child rather than an unborn fetus. 127 Misc. 2d 101, 104 (Sup. Ct. Onondaga County 1985). In *Matter of Jamaica Hospital*, another trial court found that an 18-week-old "fetus [was] a potentially viable human being in a life-threatening situation" and authorized a blood transfusion for the pregnant person to preserve "the life of the unborn fetus." 128 Misc. 2d 1006, 1007 (Sup. Ct. Queens County 1985) (emphasis added). The court's foundational finding is simply wrong since, as previously discussed, New York law does not recognize a fetus as a

human being. *See, e.g.*, Penal Law § 125.05. To the extent any precedential value remained of these cases, the RHA has now confirmed that "comprehensive reproductive health care is a fundamental component of every individual's health, privacy and equality," and that a pregnant patient has the "fundamental right" to made reproductive decisions, including to choose to carry a pregnancy to term, give birth, or have an abortion. *See* Public Health Law § 2599-aa(2). Supreme Court therefore erred in finding that this purported state interest justified the hospital's decision in this case to perform a c-section over objection, pursuant to the Maternal Refusal Policy.

In any event, Supreme Court erred in finding that this purported state interest justified the c-section over objection that occurred in this case. The court's reasoning is flatly inconsistent with the principles governing judicial consideration of applications for medical treatment over objection; such applications require individualized consideration of the particular facts at hand. *See, e.g.*, *Matter of Fosmire*, 75 N.Y.2d at 225 (explaining multiple findings a court should make regarding a patient's competence before authorizing medical treatment over objection). No such individualized assessment was conducted in this case, as it is

uncontested that the hospital did not seek a court order. Instead, it acted unilaterally in overriding the patient's express wishes, as the Maternal Refusal Policy permitted it to do.

The court's reasoning also conflicts with established medical guidelines, which direct physicians to provide counseling and obtain informed consent to treatment to achieve the best result in a particular case in compliance with the patient's wishes. As set forth in the Committee Opinion of the American College of Obstetricians and Gynecologists (ACOG), "[p]regnancy is not an exception to the principle that a decisionally capable patient has the right to refuse treatment, even treatment needed to maintain life." (A. 136-137.) Such refusals can present "a range of minor to major risks to the patient or the fetus," which "can be distressing for the health care team." (A. 137.) But, "as in all clinical encounters," the provider "should be guided by the ethical principle that adult patients who are capable decision makers have the right to refuse recommended medical treatment." (A. 137.) As the ACOG opinion recognizes, "pregnant women typically make clinical decisions that are in the best interest of their fetuses," such that "the interests of the pregnant woman and the fetus converge." (A. 138.) The provider's role

is to engage in an informed consent process—ideally beginning before the decision needs to be made and continuing as circumstances change—and provide directive counseling so that the patient has sufficient and necessary information to make the best clinical decision for her. (A. 137-138.)

In this case, Dray at all times shared the interest in ensuring a healthy birth. Dray asserts that she was in labor for less than seven hours, was always capable of informed consent, and continued to object to a c-section. She also states that the defendants refused to provide an ultrasound to show her the status of the fetus shortly before the surgery. Based on the facts alleged here, the defendants were not precluded from providing additional counseling to inform Dray of any specific risks to the health and safety of herself and the fetus by continuing the vaginal delivery, and the benefits of proceeding to a c-section. These facts, however, do not on their own justify forced treatment of Dray without her consent. Once informed of the risks and benefits, Ms. Dray was entitled to determine the course of her own medical treatment in accordance with accepted medical standards.

In sum, Dray's allegations stated a valid discrimination claim. She alleges that she was subject to a c-section against her wishes because of

her pregnancy. *See Elaine W.*, 81 N.Y.2d at 215. Supreme Court's justification for the hospital's performance of the c-section, the purported state interest in fetal life, has no place in the analysis under the NYSHRL and NYCHRL. New York does not recognize an interest in fetal life that would on its own justify overriding a pregnant person's wishes regarding the manner of childbirth.

CONCLUSION

This Court should vacate Supreme Court's decision dismissing the NYSHRL and NYCHRL claims and remand for further proceedings.

Dated: New York, New York
September 8, 2023

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Amicus Curiae

By: _____
BLAIR J. GREENWALD
Assistant Solicitor General

28 Liberty Street
New York, NY 10005
(212) 416-6102
blair.greenwald@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
ESTER MURDUKHAYEVA
Deputy Solicitor General
GALEN SHERWIN
Special Counsel for Reproductive Justice
BLAIR J. GREENWALD
Assistant Solicitor General of Counsel

PRINTING SPECIFICATIONS STATEMENT

Pursuant to Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

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EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

RINAT DRAY,

Plaintiff(s),

-against-

NOTICE OF APPEAL

STATEN ISLAND UNIVERSITY HOSPITAL, LEONID GORELIK, METROPOLITAN OB-GYN ASSOCIATES, PC. and JAMES J. DUCEY

Defendant(s). Index No. 500510/14

----------x

PLEASE TAKE NOTICE that the plaintiff hereby appeals to the Supreme Court Appellate Division in and for the Second Judicial Department from an Order made in this action dated October 1, 2019 by the Hon. Genine D. Edwards, Justice of the Supreme Court and entered in the office of the County Clerk on or about October 4, 2019.

Plaintiff hereby appeals from every part of the order from which she is aggrieved.

Dated: Brooklyn, NY
October 30, 2019

Yours, etc.,

Michael M. Bast, P.C.
Attorney for Plaintiff
by:
26 Court Street, Suite 1811
Brooklyn, NY 11242
(718) 852-2902

To:

Belair & Evans, LLP Attorneys for Defendants Gorelik and Metropolitan 90 Broad Street, 14th floor New York, NY 10004 (212) 344-3900	Gerspach Sikoscow LLP Attorneys for Defendants SIUH and Ducey 40 Fulton Street New York, NY 10038 (212) 422-0700

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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Michael M. Bast, P.C.
Attorney for Plaintiff
by:_____
26 Court Street, Suite 1811
Brooklyn, NY 11242
(718) 852-2902

At an IAS Term, Part 80 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 1st day of October 2019.

PRESENT:

HON. GENINE D. EDWARDS,
Justice.

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RINAT DRAY,

Plaintiff,

- against -

Index No. 500510/14

STATEN ISLAND UNIVERSITY HOSPITAL, LEONID GORELIK, METROPOLITAN OB-GYN ASSOCIATES, P.C., AND JAMES J. DUCEY,

Defendants.

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The following e-filed papers read herein:	NYSCEF Docket No.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	264-265, 273-274
Opposing Affidavits (Affirmations)	306
Reply Affidavits (Affirmations)	334, 335

Upon the foregoing papers, defendants Staten Island University Hospital (SIU Hospital) and James J. Ducey, M.D. (Dr. Ducey), move for an order: (1) pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), dismissing with prejudice Rinat Dray's (plaintiff) causes of action sounding in breach of contract, fraud, false advertising and gender discrimination (the sixth through twelfth causes of action); or, in the alternative, (2) pursuant to CPLR 2221 granting leave to reargue SIU Hospital and Dr. Ducey's prior cross-motion to dismiss these

MS 18, 19

claims which was denied in this Court's order dated January 7, 2019, and, upon reargument, granting dismissal of the above noted causes of action. Defendants Leonid Gorelik, M.D. (Dr. Gorelik), and Metropolitan Ob-Gyn Associates, P.C., (Metropolitan), similarly move for an order, pursuant to CPLR 3211 (a) (7), dismissing the sixth through the twelfth causes of action.

FACTUAL AND PROCEDURAL BACKGROUND

On July 26, 2011, Dr. Gorelik delivered plaintiff's third child by way of a cesarean section at SIU Hospital over her express objection and despite her desire to give birth by way of a spontaneous vaginal delivery. In order to proceed with a vaginal delivery despite the two preceding cesarian sections, plaintiff chose non-party Dr. Dori, an Obstetrician-Gynecologist (Ob-Gyn) employed by or associated with Metropolitan, who told plaintiff that he was willing to let plaintiff try to proceed by way of a vaginal delivery.

At around 8:00 a.m., on July 26, 2011, plaintiff, who was experiencing contractions, proceeded to SIU Hospital, but found that Dr. Dori was not available. Dr. Gorelik, another Ob-Gyn associated with Metropolitan, was present and examined plaintiff. While Dr. Gorelik initially told plaintiff that she should proceed by way of a cesarean section, he later agreed to let plaintiff try to proceed by way of a vaginal delivery. By early afternoon, however, Dr. Gorelik told plaintiff that it wasn't good for the baby and that plaintiff should proceed by way of a cesarean section. Thereafter, Dr. Gorelik consulted with Dr. Ducey, SIU Hospital's director of obstetrics, who likewise agreed that plaintiff should undergo a cesarean

section, and he attempted to convince plaintiff to undergo such procedure. Plaintiff refused to grant her consent, and Dr. Ducey, after consulting with Arthur Fried (Fried), senior vice president and general counsel of SIU Hospital, determined that it would take too long to obtain a court order allowing the procedure over plaintiff's objections, and, with the concurrence of Fried, Dr. Gorelik made the decision to proceed with a cesarean section despite plaintiff's objections. A cesarean section was performed by Dr. Ducey and Dr. Gorelik. Plaintiff's son was healthy upon delivery. Plaintiff, however, suffered a cut to her bladder, the repair of which required additional surgery immediately following the completion of the C-section. SIU Hospital discharged plaintiff on July 31, 2011.

Plaintiff commenced the instant action on January 22, 2014 by filing a summons and complaint. In an amended verified complaint, plaintiff alleged causes of action for negligence, medical malpractice, lack of informed consent, violations of Public Health Law § 2803-c (3) (e) and 10 NYCRR 405.7, and punitive damages based on allegations that defendants, among other things, performed the cesarean section against plaintiff's will, caused or allowed the injury to plaintiff's bladder during the cesarean section and failed to properly repair the laceration to her bladder, and failed to properly evaluate plaintiff and the fetal monitoring strips in choosing to proceed with a cesarean section rather than allowing a vaginal delivery. Defendants, in separate motions, moved to dismiss, as untimely, plaintiff's causes of action to the extent that they were based on the performance of the cesarean section over the objection of plaintiff, and to dismiss the fourth cause of action

based on violations of Public Health Law § 2803-c (3) (e) and 10 NYCRR 405.7, for failing to state a cause of action. As is relevant here, in an order dated October 29, 2015, the Court (Jacobson, J.) granted the portions of defendants' motions that were based on statute of limitations grounds, but, in an order dated May 12, 2015, the Court (Jacobson, J.) denied the portions of the motions seeking dismissal of the fourth cause action based on violations of Public Health Law § 2803-c (3) (e) and 10 NYCRR 405.7.

On appeal of these orders, the Appellate Division, Second Department, affirmed the dismissal of the action to the extent that it was based on the performance of the cesarean section over plaintiff's objection, emphasizing that the essence of that claim is an intentional tort for which a one-year statute of limitations applies, and that plaintiff "could not avoid the running of the limitations period by attempting to couch the claim as one sounding in negligence, medical malpractice, or lack of informed consent." *Dray v. Staten Is. Univ. Hosp.*, 160 A.D.3d 614, 75 N.Y.S.3d 59 (2d Dept. 2018); *Dray v. Staten Is. Univ. Hosp.*, 160 A.D.3d 620, 74 N.Y.S.3d 69 (2d Dept. 2018). The Second Department, however, found that the Court erred in denying the portion of the motion to dismiss the fourth cause of action. In doing so, the Second Department held that it was clear from the statutory scheme that Public Health Law § 2803-c applies to nursing homes and similar facilities and does not apply to hospitals. The Second Department also held that, while 10 NYCRR 405.7, which requires patients be afforded certain rights, applies to hospitals and may be cited in support of a medical malpractice cause of action, it does not give rise to an independent private right

of action. *See Dray*, 160 A.D.3d 614, 75 N.Y.S.3d 59; *Dray*, 160 A.D.3d 620, 74 N.Y.S.3d 69.

As a result of these determinations, plaintiff's claims against defendants were effectively limited to a negligence action relating to the failure to follow hospital rules relating to summoning a patient advocate group and a bioethics panel, medical malpractice relating to whether it was necessary to perform the cesarean section instead of the vaginal delivery,[1] and medical malpractice relating to the injury to her bladder. Plaintiff thereafter moved to amend the complaint to add causes of action for: (1) breach of contract; (2) fraud; (3) violations of consumer protection statutes (General Business Law §§ 349 and 350); (4) violations of equal rights in public accommodations (Civil Rights Law § 40); and violations of the New York State and City Human Rights Laws (Executive Law art 15; Administrative Code of the City of NY § 8–101, et seq.). These causes of action are all primarily based on documents plaintiff appended to the then proposed amended complaint, which are made a part thereof under CPLR 3014, and which include SIU Hospital's internal administrative policies relating to "Managing Maternal Refusals of Treatment Beneficial for the Fetus" (Maternal Refusal Policy), documents SIU Hospital gave plaintiff upon her admission, and plaintiff's own affidavit dated September 11, 2014.

The documents SIU Hospital provided to plaintiff included the patient bill of rights,

[1] In other words, the medical malpractice in this respect does not relate to any issue of consent, but rather relates to whether the decision to proceed with the cesarean section was a departure from accepted medical practice.

a form all New York hospitals are required to provide to patients upon admission (10 NYCRR 405.7 [a] [1], [c]), which, as relevant here, informed plaintiff that as a patient, "you have the right, consistent with law, to," among other things, "[r]efuse treatment and be told what effect this may have on your health," and the form plaintiff signed in which she consented to the performance of the vaginal delivery. Of note, in addition to specifically mentioning the vaginal delivery, the consent form contains a provision stating, as relevant here, that "I understand that during the course of the operation(s) or procedure(s) unforeseen conditions may arise which necessitate procedure(s) different from those contemplated" and one stating "I acknowledge that no guarantees or assurances have been made to me concerning the results intended from the operation(s), or procedure(s) or treatment(s)." SIU Hospital also provided plaintiff with a consent form for the cesarean section that plaintiff refused to sign.

In addition to these documents provided to plaintiff, SIU Hospital's internal Maternal Refusal Policy provided for the overriding of a pregnant patient's refusal to undergo treatment recommended for the fetus by the attending physician when: (a) the fetus faced serious risk; (b) the risks to the mother were relatively small; © there was no viable alternative to the treatment, the treatment would prevent or substantially reduce the risk to the fetus, and the benefits of the treatment to the fetus significantly outweighed the risk to the mother; and (d) the fetus was viable based on having a gestational age of over 23 weeks and having no lethal untreatable anomalies. This policy also required, among other things,

that the attending physician consult with SIU Hospital's director of maternal fetal medicine, that the ultimate decision was to be made in consultation with a representative of the SIU Hospital's office of legal affairs, and that a court order be obtained if time permitted.

After receipt of plaintiff's motion to amend, SIU Hospital and Dr. Ducey cross-moved, pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), to dismiss the proposed causes of action and Metropolitan and Dr. Gorelik cross-moved for an order denying the proposed amendments and for costs and counsel fees for the motion. This Court, in an order dated January 7, 2019, granted plaintiff's motion to amend, and denied defendants' cross motions. In doing so, the Court found that defendants failed to meet their burden of demonstrating the insufficiency of plaintiff's proposed claims. Following the Court's order, plaintiff filed the second amended complaint on January 23, 2019.

It is in this context that defendants' instant motions must be considered. As this Court finds that the sufficiency of plaintiff's proposed amendments and whether they are barred by documentary proof warrants reargument. *See Castillo v. Motor Veh. Acc. Indem. Corp.*, 161 A.D.3d 937, 78 N.Y.S.3d 162 (2d Dept. 2018); *Ahmed v. Pannone*, 116 A.D.3d 802, 984 N.Y.S.2d 104 (2d Dept. 2014); CPLR 2221 (d) (2).

While a motion for leave to amend the complaint should be freely given, such a motion should be denied where the proposed claim is palpably insufficient, such as where the proposed claim would not withstand a motion to dismiss under CPLR 3211 (a) (7). *See Lucido v. Mancuso*, 49 A.D.3d 220, 851 N.Y.S.2d 238 (2d Dept. 2008); *Norman v. Ferrara*,

107 A.D.2d 739, 484 N.Y.S.2d 600 (2d Dept. 1985); *See also Perrotti v. Becker, Glynn, Melemed & Muffly LLP*, 82 A.D.3d 495, 918 N.Y.S.2d 423 (1st Dept. 2011). In considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" *Mawere v. Landau*, 130 A.D.3d 986, 15 N.Y.S.3d 120 (2d Dept. 2015) (internal quotation marks omitted); *see Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007).

BREACH OF CONTRACT

"A breach of contract claim in relation to the rendition of medical services by a hospital [or physician] will withstand a test of legal sufficiency only when based upon an express promise to affect a cure or to accomplish some definite result." *Catapano v. Winthrop Univ. Hosp.*, 19 A.D.3d 355, 796 N.Y.S.2d 158 (2d Dept. 2005); *see Detringo v. South Is. Family Med., LLC*, 158 A.D.3d 609, 71 N.Y.S.3d 525 (2d Dept. 2018); *Nicoleau v. Brookhaven Mem. Hosp. Ctr.*, 201 A.D.2d 544, 607 N.Y.S.2d 703 (2d Dept. 1994). Here, contrary to plaintiff's assertions, a definite agreement not to perform a cesarean section cannot be found by a reading of the patient bill of rights form, the consent forms and other documents provided to plaintiff upon her admission. Notably, the consent form that plaintiff did sign expressly states that other procedures for which consent is not expressly given might be necessary and states that the consent form itself is not a promise or a guarantee of a

particular result. Further, plaintiff's refusal to sign the consent form for the cesarean section does not create an agreement by defendants accepting her refusal. Finally, the "provisions of the 'Patient Bill of Rights' do not constitute the requisite 'express promise' or special agreement with the patient so as to furnish the basis for a breach of contract claim." *Catapano*, 19 A.D.3d 355, 796 N.Y.S.2d 158; *see Detringo*, 158 A.D.3d 609, 71 N.Y.S.3d 525.

FRAUD

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Euryclea Partners, LP v. Seward & Kissel, LLP*, 12 N.Y. 553, 883 N.Y.S.2d 144 (2009). Here, plaintiff's fraud claim is premised on the above noted consent forms and the patient bill of rights, which plaintiff asserts constitute a representation that plaintiff would be entitled to proceed with a vaginal delivery and could refuse the cesarean section. Plaintiff further asserts that this representation was knowingly false in view of the Maternal Refusal Policy, the provisions of which allow for the overriding of maternal refusal of consent under certain circumstances. Accepting this view of the documents, however, plaintiff's fraud claim is insufficient to state such a claim, as any fraudulent inducement was not collateral to the purported contract. *See Joka Indus., Inc. v. Doosan Infacore Am. Corp.*, 153 A.D.3d 506, 59 N.Y.S.2d 506 (2d Dept. 2017); *Stangel v. Chen*, 74 A.D.3d 1050, 903 N.Y.S.2d 110 (2d Dept. 2010).

Moreover, as discussed with respect to plaintiff's contract claims, the consent forms do not constitute a promise that plaintiff would not have to undergo a cesarean section or that her refusal would not be overridden. Similarly, the patient bill of rights, the provisions of which every hospital is mandated to provide to patients under 10 NYCRR 405.7 (a) (1), ©, does not constitute a promise by SIU Hospital or the defendant doctors. Also, by expressly stating that a patient's right to refuse treatment is definitive to the extent that the right is "consistent with law," the patient bill of rights suggests that the right to refuse treatment may not be an absolute right. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 704 N.Y.S.2d 177 (1977). Plaintiff has thus failed to plead that there was any misrepresentation. In any event, plaintiff, in her own affidavit that was submitted in support of the motion to amend and which can be considered as a basis for dismissal, *see Held v. Kaufman*, 91 N.Y.2d 425, 671 N.Y.S.2d 429 (1998); *Norman*, 107 A.D.3d 739, 484 N.Y.S.2d 600, asserts that Dr. Gorelik was resistant to her proceeding by way of a vaginal delivery from the time he first saw her in the hospital, an assertion that demonstrates that defendants were not misleading plaintiff, or at least that plaintiff could not justifiably rely on the patient bill of rights in this respect. *See Shalam v. KPMG, LLP*, 89 A.D.3d 155, 931 N.Y.S.2d 592 (1st Dept. 2011).

GENERAL BUSINESS LAW §§ 349 & 350

The protections against deceptive business practices and false advertising provided by General Business Law §§ 349 and 350 may apply to the provision of medical services. *See Karlin v. IVF Am.*, 93 N.Y.2d 282, 690 N.Y.S.2d 495 (1999). These General Business

Law sections, however, are not implicated by plaintiff's allegations here, which, to the extent that they are based on the consent forms, relate only to her personal treatment and care and cannot be deemed to be consumer oriented. *See Greene v. Rachlin*, 154 A.D.3d 814, 63 N.Y.S.3d 78 (2d Dept. 2017); *Kaufman v. Medical Liab. Mut. Ins. Co.*, 92 A.D.3d 1057, 938 N.Y.S.2d 367 (3d Dept. 2012). Without an ability to rely on these consent forms, plaintiff's deceptive business practices claims rest solely on the provisions of the patient bill of rights. 10 NYCRR 405.7 (a) (1) and ©. As 10 NYCRR 405.7 does not give rise to an independent private right of action, *See Dray*, 160 A.D.3d 614, 75 N.Y.S.3d 59, plaintiff may not circumvent this legislative intent by bootstrapping a claim based on a violation of 10 NYCRR 405.7 onto a General Business Law §§ 349 or 350 claim. *See Schlesenger v. Valspar Corp.*, 21 N.Y.3d 166, 969 N.Y.S.2d 416 (2013); *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107 (2d Cir. 2017).

In any event, the regulatory mandated dissemination of the patient bill of rights simply cannot be compared to the multi-media dissemination of information that the Court of Appeals found in *Karlin* to constitute deceptive consumer oriented conduct in violation of General Business Law §§ 349 and 350. *Karlin*, 93 N.Y.2d 282, 690 N.Y.S.2d 495. And, as noted with respect to the discussion of the fraud claims, by expressly stating that a patient's right to refuse treatment is conditioned upon that right being "consistent with law," the patient bill of rights suggests that the right to refuse treatment is not an absolute right. As such, the representations of the patient bill of rights in conjunction with SIU Hospital's

internal Maternal Refusal Policy did not mislead plaintiff or other patients in any material way. *See Gomez-Jimenez v New York Law Sch.*, 103 A.D.3d 13, 956 N.Y.S.2d 54 (1st Dept. 2012); *Andre Strishak & Assoc. v. Hewlett Packard Co.*, 300 A.D.3d 608, 752 N.Y.S.2d 400 (2d Dept. 2002); *Abdale v. North Shore-Long Is. Jewish Health Sys., Inc.*, 49 Misc. 3d 1027, 19 N.Y.S.3d 850 (Sup Ct, Queens County 2015).

CIVIL RIGHTS AND HUMAN RIGHTS LAWS

Plaintiff cannot state a cause of action based on Civil Rights Law § 40, which applies to discrimination in public accommodations, because that statute pertains only to discrimination against "any person on account of race, creed, color or national origin" and does not extend to gender discrimination or discrimination based on a plaintiff's pregnancy. *See DeCrow v. Hotel Syracuse Corp.*, 59 Misc. 2d 383, 298 N.Y.S.2d 859 (Sup Ct, Onondaga County 1969); *Seidenberg v. McSorleys' Old Aile House, Inc.*, 317 F. Supp. 593 (SDNY 1970).

On the other hand, the State and City Human Rights Laws bar discriminatory practices in places of public accommodations because of sex or gender and extend to distinctions based solely on a woman's pregnant condition. *See Elaine W. v Joint Diseases N.Gen. Hosp.*, 81 N.Y.2d 211, 597 N.Y.S.2d 617 (1993); *see also Chauca v. Abraham*, 30 N.Y.3d 325, 67 N.Y.S.2d 85 (2017); Executive Law § 296 (2) (a); Administrative Code of the City of NY § 8–107 (4). In the proposed pleading, plaintiff's causes of action based on the City and State Human Rights Laws are based solely on a claim that SIU Hospital's Maternal

Refusal Policy facially violates these provisions. The determination of whether the Maternal Refusal policy is one that makes distinctions based solely on a woman's pregnant condition turns on a patient's rights in refusing treatment.

Under the long held public policy of this state, a hospital cannot override the right of a competent adult patient to determine the course of his or her medical care and to refuse treatment even when the treatment may be necessary to preserve the patient's life. *See Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 551 N.Y.S.2d 876 (1990); *Matter of Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266 (1981). The Court of Appeals, however, noted that when an "individual's conduct threatens injury to others, the State's interest is manifest and the State can generally be expected to intervene." *See Matter Fosmire*, 75 N.Y.2d 218, 551 N.Y.S.2d 876. While a fetus is not a legally recognized person until there is a live birth, Penal Law § 125.05 (1); *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 335 N.Y.S.2d 390 (1972), the State recognizes an interest in the protection of viable fetal life after the first 24 weeks of the pregnancy, *see Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) (state has compelling interest in protecting fetal life at the point of viability),[2] by holding a mother liable for neglect for drug use during a pregnancy, *Matter of Stefanal Tyesah C.*, 157

[2] In this respect, the Court notes that, until January 22, 2019, the Penal Law criminalized abortions and self abortions that took place after 24 weeks of gestation where the life of the mother was not at risk. *See* former Penal Law §§ 125.05 (3), 125.40, 125.45, 125.50, 125.55 and 125.60, repealed by L. 2019, ch. 1, § 5-10. Although these amendments decriminalized abortion, they specifically allow an abortion to be performed only if the fetus is not viable, if the mother's health is at risk, or if it is within 24 weeks of the commencement of the pregnancy. *See* Public Health Law § 2500-bb; L. 2019, ch. 1, § 2.

A.D.2d 322, 556 N.Y.S.2d 280 (1st Dept. 1990), and by allowing an infant born alive to sue for injuries suffered in utero. *See Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); *Ward v. Safejou*, 145 A.D.2d 836, 43 N.Y.S.3d 447 (2d Dept. 2016).

New York trial courts have found that this interest in the well being of a viable fetus is sufficient to override a mother's objection to medical treatment, at least where the intervention itself presented no serious risk to the mother's well being. *See Matter of Jamaica Hosp.*, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (Sup Ct, Queens County 1985); *Matter of Crouse-Irving Mem. Hosp. v. Paddock*, 127 Misc. 2d 101, 485 N.Y.S.2d 443 (Sup Ct, Onondaga County 1985), and the Appellate Division, Second Department, has also so found, albeit in dicta. *Matter of Fosmire v. Nicoleau*, 144 A.D.2d 8, 536 N.Y.S.2d 492 (2d Dept. 1989), *affd.* 75 N.Y.2d 218, 551 N.Y.S.2d 876 (1990).

In view of this legal background, and regardless of whether it is ultimately determined that a mother may refuse consent to medical procedures regardless of the risk the procedure may present to the fetus, SIU Hospital's Maternal Refusal Policy clearly presents an attempt to comply with the law relating to the refusal to consent to procedures where the rights of a viable fetus are at stake. As such, while the Maternal Refusal Policy only affects pregnant woman, the policy's interference in a pregnant woman's refusal decision only applies under circumstances such that the distinctions it makes are not solely based on a woman's pregnant condition, but rather, take into account concern for the fetus, and thus, the policy does not constitute discrimination based solely on sex or gender under the City and State Human

Rights Laws.

CONCLUSION

In conclusion, this Court grants reargument, vacates it's January 7, 2019 decision and order to the extent that the Court found that plaintiff's proposed causes of action sufficient to state causes of action, and denies plaintiff's motion to amend her complaint.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. GENINE D. EDWARDS

2019 OCT -4 AM 8:21

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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RINAT DRAY,

Index No.: 500510/14

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STATEN ISLAND UNIVERSITY HOSPITAL, LEONID GORELIK, METROPOLITAN OG-GYN ASSOCIATES, PC. and JAMES J. DUCEY,

ORDER WITH NOTICE OF ENTRY

Defendant(s).
==========X

S I R S:

PLEASE TAKE NOTICE, that the within is a true copy of a Decision and Order rendered by the Honorable Genine D. Edwards of the within named Court on October 4, 2019 and entered in the office of the Clerk of the within named Court on October 4, 2019

Dated: New York, New York
October 16, 2019

Yours, etc.,

GERSPACH SIKOSCOW LLP

By: Kristen J. Halford /ss
Kristen J. Halford
Attorneys for Defendants
STATEN ISLAND UNIVERSITY HOSPITAL
and JAMES J. DUCEY, M.D. s/h/a
JAMES J. DUCEY
40 Fulton Street, Suite 1402
New York, New York 10038
(212) 422-0700

TO: MICHAEL M. BAST, P.C.
Attorneys for Plaintiff
26 Court Street, Suite 1811
Brooklyn, New York 11242
(718) 852-2902

BELAIR & EVANS, LLP
Attorneys for Defendants
LEONID GORELIK, M.D. and
METROPOLITAN OB/GYN ASSOCIATES, P.C.
90 Broad Street, 14th Floor
New York, New York 10004
(212) 344-3900

At an IAS Term, Part 80 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 1st day of October 2019.

PRESENT:

HON. GENINE D. EDWARDS,
Justice.

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- against -

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claims which was denied in this Court's order dated January 7, 2019, and, upon reargument, granting dismissal of the above noted causes of action. Defendants Leonid Gorelik, M.D. (Dr. Gorelik), and Metropolitan Ob-Gyn Associates, P.C., (Metropolitan), similarly move for an order, pursuant to CPLR 3211 (a) (7), dismissing the sixth through the twelfth causes of action.

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On July 26, 2011, Dr. Gorelik delivered plaintiff's third child by way of a cesarean section at SIU Hospital over her express objection and despite her desire to give birth by way of a spontaneous vaginal delivery. In order to proceed with a vaginal delivery despite the two preceding cesarian sections, plaintiff chose non-party Dr. Dori, an Obstetrician-Gynecologist (Ob-Gyn) employed by or associated with Metropolitan, who told plaintiff that he was willing to let plaintiff try to proceed by way of a vaginal delivery.

At around 8:00 a.m., on July 26, 2011, plaintiff, who was experiencing contractions, proceeded to SIU Hospital, but found that Dr. Dori was not available. Dr. Gorelik, another Ob-Gyn associated with Metropolitan, was present and examined plaintiff. While Dr. Gorelik initially told plaintiff that she should proceed by way of a cesarean section, he later agreed to let plaintiff try to proceed by way of a vaginal delivery. By early afternoon, however, Dr. Gorelik told plaintiff that it wasn't good for the baby and that plaintiff should proceed by way of a cesarean section. Thereafter, Dr. Gorelik consulted with Dr. Ducey, SIU Hospital's director of obstetrics, who likewise agreed that plaintiff should undergo a cesarean

section, and he attempted to convince plaintiff to undergo such procedure. Plaintiff refused to grant her consent, and Dr. Ducey, after consulting with Arthur Fried (Fried), senior vice president and general counsel of SIU Hospital, determined that it would take too long to obtain a court order allowing the procedure over plaintiff's objections, and, with the concurrence of Fried, Dr. Gorelik made the decision to proceed with a cesarean section despite plaintiff's objections. A cesarean section was performed by Dr. Ducey and Dr. Gorelik. Plaintiff's son was healthy upon delivery. Plaintiff, however, suffered a cut to her bladder, the repair of which required additional surgery immediately following the completion of the C-section. SIU Hospital discharged plaintiff on July 31, 2011.

Plaintiff commenced the instant action on January 22, 2014 by filing a summons and complaint. In an amended verified complaint, plaintiff alleged causes of action for negligence, medical malpractice, lack of informed consent, violations of Public Health Law § 2803-c (3) (e) and 10 NYCRR 405.7, and punitive damages based on allegations that defendants, among other things, performed the cesarean section against plaintiff's will, caused or allowed the injury to plaintiff's bladder during the cesarean section and failed to properly repair the laceration to her bladder, and failed to properly evaluate plaintiff and the fetal monitoring strips in choosing to proceed with a cesarean section rather than allowing a vaginal delivery. Defendants, in separate motions, moved to dismiss, as untimely, plaintiff's causes of action to the extent that they were based on the performance of the cesarean section over the objection of plaintiff, and to dismiss the fourth cause of action

based on violations of Public Health Law § 2803-c (3) (e) and 10 NYCRR 405.7, for failing to state a cause of action. As is relevant here, in an order dated October 29, 2015, the Court (Jacobson, J.) granted the portions of defendants' motions that were based on statute of limitations grounds, but, in an order dated May 12, 2015, the Court (Jacobson, J.) denied the portions of the motions seeking dismissal of the fourth cause action based on violations of Public Health Law § 2803-c (3) (e) and 10 NYCRR 405.7.

On appeal of these orders, the Appellate Division, Second Department, affirmed the dismissal of the action to the extent that it was based on the performance of the cesarean section over plaintiff's objection, emphasizing that the essence of that claim is an intentional tort for which a one-year statute of limitations applies, and that plaintiff "could not avoid the running of the limitations period by attempting to couch the claim as one sounding in negligence, medical malpractice, or lack of informed consent." *Dray v. Staten Is. Univ. Hosp.*, 160 A.D.3d 614, 75 N.Y.S.3d 59 (2d Dept. 2018); *Dray v. Staten Is. Univ. Hosp.*, 160 A.D.3d 620, 74 N.Y.S.3d 69 (2d Dept. 2018). The Second Department, however, found that the Court erred in denying the portion of the motion to dismiss the fourth cause of action. In doing so, the Second Department held that it was clear from the statutory scheme that Public Health Law § 2803-c applies to nursing homes and similar facilities and does not apply to hospitals. The Second Department also held that, while 10 NYCRR 405.7, which requires patients be afforded certain rights, applies to hospitals and may be cited in support of a medical malpractice cause of action, it does not give rise to an independent private right

of action. *See Dray*, 160 A.D.3d 614, 75 N.Y.S.3d 59; *Dray*, 160 A.D.3d 620, 74 N.Y.S.3d 69.

As a result of these determinations, plaintiff's claims against defendants were effectively limited to a negligence action relating to the failure to follow hospital rules relating to summoning a patient advocate group and a bioethics panel, medical malpractice relating to whether it was necessary to perform the cesarean section instead of the vaginal delivery,[1] and medical malpractice relating to the injury to her bladder. Plaintiff thereafter moved to amend the complaint to add causes of action for: (1) breach of contract; (2) fraud; (3) violations of consumer protection statutes (General Business Law §§ 349 and 350); (4) violations of equal rights in public accommodations (Civil Rights Law § 40); and violations of the New York State and City Human Rights Laws (Executive Law art 15; Administrative Code of the City of NY § 8–101, et seq.). These causes of action are all primarily based on documents plaintiff appended to the then proposed amended complaint, which are made a part thereof under CPLR 3014, and which include SIU Hospital's internal administrative policies relating to "Managing Maternal Refusals of Treatment Beneficial for the Fetus" (Maternal Refusal Policy), documents SIU Hospital gave plaintiff upon her admission, and plaintiff's own affidavit dated September 11, 2014.

The documents SIU Hospital provided to plaintiff included the patient bill of rights,

[1] In other words, the medical malpractice in this respect does not relate to any issue of consent, but rather relates to whether the decision to proceed with the cesarean section was a departure from accepted medical practice.

a form all New York hospitals are required to provide to patients upon admission (10 NYCRR 405.7 [a] [1], [c]), which, as relevant here, informed plaintiff that as a patient, "you have the right, consistent with law, to," among other things, "[r]efuse treatment and be told what effect this may have on your health," and the form plaintiff signed in which she consented to the performance of the vaginal delivery. Of note, in addition to specifically mentioning the vaginal delivery, the consent form contains a provision stating, as relevant here, that "I understand that during the course of the operation(s) or procedure(s) unforeseen conditions may arise which necessitate procedure(s) different from those contemplated" and one stating "I acknowledge that no guarantees or assurances have been made to me concerning the results intended from the operation(s), or procedure(s) or treatment(s)." SIU Hospital also provided plaintiff with a consent form for the cesarean section that plaintiff refused to sign.

In addition to these documents provided to plaintiff, SIU Hospital's internal Maternal Refusal Policy provided for the overriding of a pregnant patient's refusal to undergo treatment recommended for the fetus by the attending physician when: (a) the fetus faced serious risk; (b) the risks to the mother were relatively small; © there was no viable alternative to the treatment, the treatment would prevent or substantially reduce the risk to the fetus, and the benefits of the treatment to the fetus significantly outweighed the risk to the mother; and (d) the fetus was viable based on having a gestational age of over 23 weeks and having no lethal untreatable anomalies. This policy also required, among other things,

that the attending physician consult with SIU Hospital's director of maternal fetal medicine, that the ultimate decision was to be made in consultation with a representative of the SIU Hospital's office of legal affairs, and that a court order be obtained if time permitted.

After receipt of plaintiff's motion to amend, SIU Hospital and Dr. Ducey cross-moved, pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), to dismiss the proposed causes of action and Metropolitan and Dr. Gorelik cross-moved for an order denying the proposed amendments and for costs and counsel fees for the motion. This Court, in an order dated January 7, 2019, granted plaintiff's motion to amend, and denied defendants' cross motions. In doing so, the Court found that defendants failed to meet their burden of demonstrating the insufficiency of plaintiff's proposed claims. Following the Court's order, plaintiff filed the second amended complaint on January 23, 2019.

It is in this context that defendants' instant motions must be considered. As this Court finds that the sufficiency of plaintiff's proposed amendments and whether they are barred by documentary proof warrants reargument. *See Castillo v. Motor Veh. Acc. Indem. Corp.*, 161 A.D.3d 937, 78 N.Y.S.3d 162 (2d Dept. 2018); *Ahmed v. Pannone*, 116 A.D.3d 802, 984 N.Y.S.2d 104 (2d Dept. 2014); CPLR 2221 (d) (2).

While a motion for leave to amend the complaint should be freely given, such a motion should be denied where the proposed claim is palpably insufficient, such as where the proposed claim would not withstand a motion to dismiss under CPLR 3211 (a) (7). *See Lucido v. Mancuso*, 49 A.D.3d 220, 851 N.Y.S.2d 238 (2d Dept. 2008); *Norman v. Ferrara*,

107 A.D.2d 739, 484 N.Y.S.2d 600 (2d Dept. 1985); *See also Perrotti v. Becker, Glynn, Melemed & Muffly LLP*, 82 A.D.3d 495, 918 N.Y.S.2d 423 (1st Dept. 2011). In considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" *Mawere v. Landau*, 130 A.D.3d 986, 15 N.Y.S.3d 120 (2d Dept. 2015) (internal quotation marks omitted); *see Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007).

BREACH OF CONTRACT

"A breach of contract claim in relation to the rendition of medical services by a hospital [or physician] will withstand a test of legal sufficiency only when based upon an express promise to affect a cure or to accomplish some definite result." *Catapano v. Winthrop Univ. Hosp.*, 19 A.D.3d 355, 796 N.Y.S.2d 158 (2d Dept. 2005); *see Detringo v. South Is. Family Med., LLC*, 158 A.D.3d 609, 71 N.Y.S.3d 525 (2d Dept. 2018); *Nicoleau v. Brookhaven Mem. Hosp. Ctr.*, 201 A.D.2d 544, 607 N.Y.S.2d 703 (2d Dept. 1994). Here, contrary to plaintiff's assertions, a definite agreement not to perform a cesarean section cannot be found by a reading of the patient bill of rights form, the consent forms and other documents provided to plaintiff upon her admission. Notably, the consent form that plaintiff did sign expressly states that other procedures for which consent is not expressly given might be necessary and states that the consent form itself is not a promise or a guarantee of a

particular result. Further, plaintiff's refusal to sign the consent form for the cesarean section does not create an agreement by defendants accepting her refusal. Finally, the "provisions of the 'Patient Bill of Rights' do not constitute the requisite 'express promise' or special agreement with the patient so as to furnish the basis for a breach of contract claim." *Catapano*, 19 A.D.3d 355, 796 N.Y.S.2d 158; *see Detringo*, 158 A.D.3d 609, 71 N.Y.S.3d 525.

FRAUD

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Euryclea Partners, LP v. Seward & Kissel, LLP*, 12 N.Y. 553, 883 N.Y.S.2d 144 (2009). Here, plaintiff's fraud claim is premised on the above noted consent forms and the patient bill of rights, which plaintiff asserts constitute a representation that plaintiff would be entitled to proceed with a vaginal delivery and could refuse the cesarean section. Plaintiff further asserts that this representation was knowingly false in view of the Maternal Refusal Policy, the provisions of which allow for the overriding of maternal refusal of consent under certain circumstances. Accepting this view of the documents, however, plaintiff's fraud claim is insufficient to state such a claim, as any fraudulent inducement was not collateral to the purported contract. *See Joka Indus., Inc. v. Doosan Infacore Am. Corp.*, 153 A.D.3d 506, 59 N.Y.S.2d 506 (2d Dept. 2017); *Stangel v. Chen*, 74 A.D.3d 1050, 903 N.Y.S.2d 110 (2d Dept. 2010).

Moreover, as discussed with respect to plaintiff's contract claims, the consent forms do not constitute a promise that plaintiff would not have to undergo a cesarean section or that her refusal would not be overridden. Similarly, the patient bill of rights, the provisions of which every hospital is mandated to provide to patients under 10 NYCRR 405.7 (a) (1), ©, does not constitute a promise by SIU Hospital or the defendant doctors. Also, by expressly stating that a patient's right to refuse treatment is definitive to the extent that the right is "consistent with law," the patient bill of rights suggests that the right to refuse treatment may not be an absolute right. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 704 N.Y.S.2d 177 (1977). Plaintiff has thus failed to plead that there was any misrepresentation. In any event, plaintiff, in her own affidavit that was submitted in support of the motion to amend and which can be considered as a basis for dismissal, *see Held v. Kaufman*, 91 N.Y.2d 425, 671 N.Y.S.2d 429 (1998); *Norman*, 107 A.D.3d 739, 484 N.Y.S.2d 600, asserts that Dr. Gorelik was resistant to her proceeding by way of a vaginal delivery from the time he first saw her in the hospital, an assertion that demonstrates that defendants were not misleading plaintiff, or at least that plaintiff could not justifiably rely on the patient bill of rights in this respect. *See Shalam v. KPMG, LLP*, 89 A.D.3d 155, 931 N.Y.S.2d 592 (1st Dept. 2011).

GENERAL BUSINESS LAW §§ 349 & 350

The protections against deceptive business practices and false advertising provided by General Business Law §§ 349 and 350 may apply to the provision of medical services. *See Karlin v. IVF Am.*, 93 N.Y.2d 282, 690 N.Y.S.2d 495 (1999). These General Business

Law sections, however, are not implicated by plaintiff's allegations here, which, to the extent that they are based on the consent forms, relate only to her personal treatment and care and cannot be deemed to be consumer oriented. *See Greene v. Rachlin*, 154 A.D.3d 814, 63 N.Y.S.3d 78 (2d Dept. 2017); *Kaufman v. Medical Liab. Mut. Ins. Co.*, 92 A.D.3d 1057, 938 N.Y.S.2d 367 (3d Dept. 2012). Without an ability to rely on these consent forms, plaintiff's deceptive business practices claims rest solely on the provisions of the patient bill of rights. 10 NYCRR 405.7 (a) (1) and ©. As 10 NYCRR 405.7 does not give rise to an independent private right of action, *See Dray*, 160 A.D.3d 614, 75 N.Y.S.3d 59, plaintiff may not circumvent this legislative intent by bootstrapping a claim based on a violation of 10 NYCRR 405.7 onto a General Business Law §§ 349 or 350 claim. *See Schlesenger v. Valspar Corp.*, 21 N.Y.3d 166, 969 N.Y.S.2d 416 (2013); *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107 (2d Cir. 2017).

In any event, the regulatory mandated dissemination of the patient bill of rights simply cannot be compared to the multi-media dissemination of information that the Court of Appeals found in *Karlin* to constitute deceptive consumer oriented conduct in violation of General Business Law §§ 349 and 350. *Karlin*, 93 N.Y.2d 282, 690 N.Y.S.2d 495. And, as noted with respect to the discussion of the fraud claims, by expressly stating that a patient's right to refuse treatment is conditioned upon that right being "consistent with law," the patient bill of rights suggests that the right to refuse treatment is not an absolute right. As such, the representations of the patient bill of rights in conjunction with SIU Hospital's

Internal Maternal Refusal Policy did not mislead plaintiff or other patients in any material way. *See Gomez-Jimenez v New York Law Sch.*, 103 A.D.3d 13, 956 N.Y.S.2d 54 (1st Dept. 2012); *Andre Strishak & Assoc. v. Hewlett Packard Co.*, 300 A.D.3d 608, 752 N.Y.S.2d 400 (2d Dept. 2002); *Abdale v. North Shore-Long Is. Jewish Health Sys., Inc.*, 49 Misc. 3d 1027, 19 N.Y.S.3d 850 (Sup Ct, Queens County 2015).

CIVIL RIGHTS AND HUMAN RIGHTS LAWS

Plaintiff cannot state a cause of action based on Civil Rights Law § 40, which applies to discrimination in public accommodations, because that statute pertains only to discrimination against "any person on account of race, creed, color or national origin" and does not extend to gender discrimination or discrimination based on a plaintiff's pregnancy. *See DeCrow v. Hotel Syracuse Corp.*, 59 Misc. 2d 383, 298 N.Y.S.2d 859 (Sup Ct, Onondaga County 1969); *Seidenberg v. McSorleys' Old Aile House, Inc.*, 317 F. Supp. 593 (SDNY 1970).

On the other hand, the State and City Human Rights Laws bar discriminatory practices in places of public accommodations because of sex or gender and extend to distinctions based solely on a woman's pregnant condition. *See Elaine W. v Joint Diseases N.Gen. Hosp.*, 81 N.Y.2d 211, 597 N.Y.S.2d 617 (1993); *see also Chauca v. Abraham*, 30 N.Y.3d 325, 67 N.Y.S.2d 85 (2017); Executive Law § 296 (2) (a); Administrative Code of the City of NY § 8–107 (4). In the proposed pleading, plaintiff's causes of action based on the City and State Human Rights Laws are based solely on a claim that SIU Hospital's Maternal

Refusal Policy facially violates these provisions. The determination of whether the Maternal Refusal policy is one that makes distinctions based solely on a woman's pregnant condition turns on a patient's rights in refusing treatment.

Under the long held public policy of this state, a hospital cannot override the right of a competent adult patient to determine the course of his or her medical care and to refuse treatment even when the treatment may be necessary to preserve the patient's life. *See Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 551 N.Y.S.2d 876 (1990); *Matter of Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266 (1981). The Court of Appeals, however, noted that when an "individual's conduct threatens injury to others, the State's interest is manifest and the State can generally be expected to intervene." *See Matter Fosmire*, 75 N.Y.2d 218, 551 N.Y.S.2d 876. While a fetus is not a legally recognized person until there is a live birth, Penal Law § 125.05 (1); *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 335 N.Y.S.2d 390 (1972), the State recognizes an interest in the protection of viable fetal life after the first 24 weeks of the pregnancy, *see Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) (state has compelling interest in protecting fetal life at the point of viability),[2] by holding a mother liable for neglect for drug use during a pregnancy, *Matter of Stefanal Tyesah C.*, 157

[2] In this respect, the Court notes that, until January 22, 2019, the Penal Law criminalized abortions and self abortions that took place after 24 weeks of gestation where the life of the mother was not at risk. *See* former Penal Law §§ 125.05 (3), 125.40, 125.45, 125.50, 125.55 and 125.60, repealed by L. 2019, ch. 1, § 5-10. Although these amendments decriminalized abortion, they specifically allow an abortion to be performed only if the fetus is not viable, if the mother's health is at risk, or if it is within 24 weeks of the commencement of the pregnancy. *See* Public Health Law § 2500-bb; L. 2019, ch. 1, § 2.

A.D.2d 322, 556 N.Y.S.2d 280 (1st Dept. 1990), and by allowing an infant born alive to sue for injuries suffered in utero. *See Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); *Ward v. Safejou*, 145 A.D.2d 836, 43 N.Y.S.3d 447 (2d Dept. 2016).

New York trial courts have found that this interest in the well being of a viable fetus is sufficient to override a mother's objection to medical treatment, at least where the intervention itself presented no serious risk to the mother's well being. *See Matter of Jamaica Hosp.*, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (Sup Ct, Queens County 1985); *Matter of Crouse-Irving Mem. Hosp. v. Paddock*, 127 Misc. 2d 101, 485 N.Y.S.2d 443 (Sup Ct, Onondaga County 1985), and the Appellate Division, Second Department, has also so found, albeit in dicta. *Matter of Fosmire v. Nicoleau*, 144 A.D.2d 8, 536 N.Y.S.2d 492 (2d Dept. 1989), *affd.* 75 N.Y.2d 218, 551 N.Y.S.2d 876 (1990).

In view of this legal background, and regardless of whether it is ultimately determined that a mother may refuse consent to medical procedures regardless of the risk the procedure may present to the fetus, SIU Hospital's Maternal Refusal Policy clearly presents an attempt to comply with the law relating to the refusal to consent to procedures where the rights of a viable fetus are at stake. As such, while the Maternal Refusal Policy only affects pregnant woman, the policy's interference in a pregnant woman's refusal decision only applies under circumstances such that the distinctions it makes are not solely based on a woman's pregnant condition, but rather, take into account concern for the fetus, and thus, the policy does not constitute discrimination based solely on sex or gender under the City and State Human

Rights Laws.

CONCLUSION

In conclusion, this Court grants reargument, vacates it's January 7, 2019 decision and order to the extent that the Court found that plaintiff's proposed causes of action sufficient to state causes of action, and denies plaintiff's motion to amend her complaint.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. GENINE D. EDWARDS

AFFIDAVIT OF SERVICE

DRAY V. SIUH, ET AL.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, BETH SAMACH, being duly sworn, deposes and says:

I am not a party to this action, am over 18 years of age and reside in New York, New York.

On October 16, 2019, I served the within ORDER WITH NOTICE OF ENTRY by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:

TO: MICHAEL M. BAST, P.C.
Attorneys for Plaintiff
26 Court Street, Suite 1811
Brooklyn, New York 11242
(718) 852-2902

BELAIR & EVANS, LLP
Attorneys for Defendants
LEONID GORELIK, M.D. and
METROPOLITAN OB/GYN ASSOCIATES, P.C.
90 Broad Street, 14th Floor
New York, New York 10004
(212) 344-3900

BETH SAMACH

Sworn to before me this
16th day of October, 2019

Notary Public

ROBERT W.F. BECKMANN
Notary Public, State of New York
No. 02BE6367948
Qualified in Westchester County
Commission Expires 12/04/2021

EXHIBIT D

NEW YORK STATE OF OPPORTUNITY. | Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

April 20, 2018

Donna Proske, R.N.
Executive Director
Staten Island University Hospital-North
475 Seaview Avenue
Staten Island, NY 10305

Agency: Staten Island University Hospital-North
PFI: 1740
Type of Survey: Article 28 (Complaint # NY00215467)
Event ID #: S6HB11
Survey Completion Date: 4/6/2018

Dear Ms. Proske:

Staff from the New York State Department of Health completed an onsite Article 28 complaint investigation at Staten Island University Hospital-North on 4/6/2018. The purpose of this surveillance activity was to assess compliance with Article 28 Title 10 New York Codes, Rules and Regulations (10NYCRR) governing Hospitals.

Enclosed is the Statement of Deficiencies (STATE FORM) detailing the survey findings.

An acceptable Plan of Correction is due to this office within ten (10) calendar days of the date of this letter or no later than April 30, 2018.

An acceptable Plan of Correction must relate to the care of all patients and prevent such occurrences in the future. It must contain the following elements:

1. The plan for correcting each specific deficiency cited;
2. The plan for improving the processes that led to the deficiency cited;
3. The procedure for implementing the acceptable plan of correction for each deficiency cited;
4. The title of the person responsible for implementing the acceptable plan of correction; and
5. The process for how the facility has incorporated the improvement action into its Quality Assessment and Performance Improvement (QAPI) program, including monitoring and tracking procedures to ensure the plan of correction is effective, and that specific deficiencies cited remain corrected.

As you prepare a specific Plan of Correction on the Statement of Deficiencies (STATE FORM) enclosed with this letter, please ensure the following:

1. Corrective actions and the title of the party responsible for each corrective action are entered in the column labeled "Provider's Plan of Correction,"
2. Completion date for each action plan is entered in the (X5) column, and

3. The first page of the Plan of Correction is signed by a duly authorized representative of your facility in the (X6) section.

If you require additional space, you may note "See attachment" on the form and attach sheets, which clearly identify, by tag number, the citation being addressed.

Sincerely,

Kathleen C. Gaine

Kathleen Gaine, MPA
Regional Program Director
Bureau of Hospitals and Diagnostic and Treatment Centers, MARO

(2567- Enclosure)

Staten Island University Hospital
Northwell Health℠

North Shore-LIJ Health System is now **Northwell Health**

April 27, 2018

Kathleen Gaine, MPA
Regional Program Director
Bureau of Hospitals and Diagnostic and Treatment Centers
New York State Department of Health
Metropolitan Area Regional Office
90 Church Street, 15th Floor
New York, NY 10007

Agency: Staten Island University Hospital – North
PFI: 1740
Type of Survey: Article 28 (Complaint # NY00215467)
Event ID #: S6HB11
Survey Completion Date: 4/6/2018

Dear Ms. Gaine,

Please accept this Plan of Correction on behalf of Staten Island University Hospital in reference to the above captioned matter.

Additionally included are the Court decisions regarding the lawsuit.

If you have any questions, please feel free to contact me at 718-226-9514.

Sincerely,

Karen Lefkovic, R.N.
Associate Executive Director
Quality/Risk Management

Cc: Dina Wong, Deputy Executive Director
Frank Besignano, Chairman, SI Regional Executive Council

Enclosures

New York State Department of Health

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION	(X1) PROVIDER/SUPPLIER/CLIA IDENTIFICATION NUMBER:	(X2) MULTIPLE CONSTRUCTION	(X3) DATE SURVEY COMPLETED
	330160	A. BUILDING: _____ B. WING _____	04/06/2018

NAME OF PROVIDER OR SUPPLIER	STREET ADDRESS, CITY, STATE, ZIP CODE
STATEN ISLAND UNIVERSITY HOSPITAL	475 SEAVIEW AVENUE STATEN ISLAND, NY 10305

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY MUST BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY)	(X5) COMPLETE DATE
S 000	INITIAL COMMENTS State Facility ID: 1740 Operating Certificate Number: 7004003H Note: The New York Official Compilation of Codes, Rules and Regulations (10NYCRR) deficiencies below are cited as a result of complaint #NY00215467. The plan of correction, however, must relate to the care of all patients and prevent such occurrences in the future. Intended completion dates and the mechanism(s) established to assure ongoing compliance must be included.	S 000		
S 454	405.7 (b) (10) Patients' Rights. Hospital responsibilities. The hospital shall afford to each patient the right to: (10) refuse treatment to the extent permitted by law and to be informed of the reasonably foreseeable consequences of such refusal. This Regulation is not met as evidenced by: Based on medical record review, document review, and interview, in one (1) of five (5) medical records reviewed, the facility failed to afford a pregnant woman the right to refuse treatment. Specifically, the facility did not implement a pregnant woman's decision not to have a Cesarean -Section (Surgical procedure used for the delivery of offspring). Findings Include: Review of medical record for Patient #1 identified a 32- year-old female who presented to the facility on 7/26/11 at 6:25 AM in active labor. The patient's past medical history was significant for two prior C-sections.	S 454	The patient at the center of the Department's inquiry (record 1 of 5), and the presumptive catalyst for the inquiry, is currently suing Staten Island University Hospital. In the lawsuit, the patient alleged violation of her right to refuse treatment. She argued that her right to refuse a cesarean section was and is absolute as a matter of law. She moved for summary judgment on this issue. The trial Court denied her motion holding: "[t]his court thus rejects plaintiff's assertion that she had an absolute right to reject medical care necessary to protect her viable fetus. As such, the above noted factual issues relating to the risk of the fetus are relevant to defendants' liability here." The plaintiff then appealed to the Appellate Department, Second Department. On April 4, 2018, the Appellate Division affirmed the trial court's denial of the patient's motion. Accordingly, in response to the Department's inquiry regarding whether the patient's right to refuse treatment "to the extent permissible by law" as codified in 10 NYCRR 405.7 was violated, it has been decided by the Courts that the patient's right to refuse treatment is not absolute and therefore there was not a violation as a matter of law.	

New York State Department of Health

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION	(X1) PROVIDER/SUPPLIER/CLIA IDENTIFICATION NUMBER:	(X2) MULTIPLE CONSTRUCTION	(X3) DATE SURVEY COMPLETED
	330160	A. BUILDING: _____ B. WING _____	04/06/2018

NAME OF PROVIDER OR SUPPLIER	STREET ADDRESS, CITY, STATE, ZIP CODE
STATEN ISLAND UNIVERSITY HOSPITAL	475 SEAVIEW AVENUE STATEN ISLAND, NY 10305

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY MUST BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY)	(X5) COMPLETE DATE
S 454	Continued From page 1 On 7/26/11 at 10:14 AM, Staff F, Attending Physician noted that the patient wishes to have a vaginal delivery and refused a C-section even after the risks of vaginal delivery were explained to the patient. The patient signed a consent form for vaginal delivery dated 7/26/11 (not timed). The patient was given a trial of labor, and after five (5) hours, cervical opening did not progress beyond four centimeters (4cm). Also, a decreased fetal heart rate was noted. On 07/26/11 at 2:11 PM, a Registered Nurse (RN), documented that the patient is in labor and she is refusing C-section. Staff A, Director of Maternal Fetal Medicine on 07/26/11 at 2:30 PM noted that "the woman has decisional capacity." The patient underwent an emergency C-section and delivered a live baby on 7/26/11 at 3:15 PM. There was no documented evidence in the medical record that the patient signed a consent for the C-section procedure. Review of facility's Administrative Policies and Procedures Manual titled "Managing Maternal Refusals of Treatment Beneficial for the Fetus" (effective May 2008) states "In some circumstances, the significance of the potential benefits to the fetus of medically indicated treatment may justify using the means necessary to override a maternal refusal of the treatment."	S 454	Notwithstanding the findings of the Courts, the Hospital has developed a policy regarding Maternal Refusal of Medically Recommended Treatment during Pregnancy which addresses a pregnant woman's right to refuse treatment. The policy states "If a patient with capacity, or her legal surrogate, continues to refuse the treatment, the patient should be fully informed of any change in clinical condition and any indication that her health or that of the fetus is at risk. If the woman continues to refuse, the woman's decision should be followed." The policy is before the Hospital's Medical Executive Committee for final adoption. The Chairman of OBGYN is responsible for the Plan of Correction. 100% of the OBGYN Physicians, Maternal Child Health Nurses and Anesthesiologists will be educated on the policy. Any staff on a leave of absence will be educated upon their return. A random monthly review of 20 medical records of patients with cesarean sections, vaginal deliveries or VBAC will be completed for four (4) months. The review will validate that the consent for treatment documented by the patient or her surrogate with decisional capacity is aligned with care rendered. The numerator will be the number of documented consents aligned with treatment rendered. The denominator will be the number of charts reviewed. 100% compliance is expected. Results will be presented to Hospitalwide Performance Improvement Coordinating Group and up to Medical Executive Committee. In addition, the Hospital maintains and follows a Patient Rights and Responsibilities policy which also outlines the rights of all patients.	May 7, 2018 May 31, 2018 October 31, 2018 November 5, 2018

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION	(X1) PROVIDER/SUPPLIER/CLIA IDENTIFICATION NUMBER:	(X2) MULTIPLE CONSTRUCTION	(X3) DATE SURVEY COMPLETED
	330160	A. BUILDING: _____ B. WING _____	04/06/2018

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S 454	Continued From page 2 [redacted] The facility's determination to override the patient's decision not to have a C-section was confirmed during interview on 04/05/18 with Staff B, Chief of Maternal Fetal Medicine and Staff C, Associated Executive Director of Quality and Risk Management at 12:10 PM and 2:00 PM respectively.	S 454		

New York State Department of Health

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S 000	INITIAL COMMENTS State Facility ID: 1740 Operating Certificate Number: 7004003H Note: The New York Official Compilation of Codes, Rules and Regulations (10NYCRR) deficiencies below are cited as a result of complaint #NY00215467. The plan of correction, however, must relate to the care of all patients and prevent such occurrences in the future. Intended completion dates and the mechanism(s) established to assure ongoing compliance must be included.	S 000		
S 454	405.7 (b) (10) Patients' Rights. Hospital responsibilities. The hospital shall afford to each patient the right to: (10) refuse treatment to the extent permitted by law and to be informed of the reasonably foreseeable consequences of such refusal. This Regulation is not met as evidenced by: Based on medical record review, document review, and interview, in one (1) of five (5) medical records reviewed, the facility failed to afford a pregnant woman the right to refuse treatment. Specifically, the facility did not implement a pregnant woman's decision not to have a Cesarean -Section (Surgical procedure used for the delivery of offspring). Findings Include: Review of medical record for Patient #1 identified a 32- year-old female who presented to the facility on 7/26/11 at 6:25 AM in active labor. The patient's past medical history was significant for two prior C-sections.	S 454		

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