NEW YORK SUPREME COURT APPELLATE DIVISION
SECOND DEPARTMENT

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RINAT DRAY,

Plaintiff-Appellant,

-against-

STATEN ISLAND UNIVERSITY HOSPITAL and JAMES J. DUCEY

Defendants-Respondents

-and-

LEONID GORELIK, and METROPOLITAN OB-GYN ASSOCIATES, P.C.,

Defendants-Respondents.

----------X

Docket No.: 2019-12617

NOTICE OF MOTION

Oral Argument Not Requested

NOTICE OF MOTION OF NATIONAL ADVOCATES FOR PREGNANT WOMEN TO FILE AN *AMICUS CURIAE* BRIEF

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Sarah Burns, dated October 30, 2020, together with the Exhibit annexed thereto, the undersigned will move this Court, located at 45 Monroe Place, Brooklyn, New York, 11201 on the 16th day of November 2020 at 9:30 a.m. of that day or as soon as counsel can be heard, for an order granting National Advocates for Pregnant Women leave to file an *amicus curiae* brief. A copy of the proposed brief is annexed hereto as Exhibit A.

Pursuant to CPLR 2214(b), answering affidavits, if any, are required to be served upon the undersigned at least 7 days before the return date of this motion.

Respectfully submitted,

National Advocates for Pregnant Women

Dated: New York, NY
October 30, 2020

Sarah E. Burns

By: Sarah E. Burns
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NEW YORK SUPREME COURT APPELLATE DIVISION
SECOND DEPARTMENT

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RINAT DRAY, Docket No.: 2019-12617

Plaintiff-Appellant,

-against- **AFFIRMATION OF** SARAH BURNS

STATEN ISLAND UNIVERSITY HOSPITAL and JAMES J. DUCEY

Defendants-Respondents

-and-

LEONID GORELIK, and METROPOLITAN OB-GYN ASSOCIATES, P.C.,

Defendants-Respondents.

----------X

Sarah Burns, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I make this affirmation on behalf of National Advocates for Pregnant Women (NAPW) in their application to file a brief *amicus curiae* in this case. I am authorized by the proposed *amici* to bring this motion and to submit the proposed brief attached to this motion as Exhibit A.
2. Plaintiff-Appellant, Rinat Dray moved this court to reverse the lower court's dismissal of her amended complaint. Ms. Dray sought to add important consumer protection and discrimination claims to her initial complaint based on information that only came to light after her initial filing. The lower court's improper dismissal of the Second Amended Complaint prevents the

court from considering Plaintiff's contentions that health care providers deceiving pregnant women in order to obtain and keep them as patients violates New York laws of fair dealing and discriminates on the basis of pregnancy. These claims should be aired.

3. National Advocates for Pregnant Women has followed this case from its inception and is deeply concerned that decisions thus far invite all New York obstetric health care providers to withhold vital information from their pregnant patients, to treat them as if they are excluded from the protection of well-established legal frameworks and to subject them to medical interventions without the permission of the pregnant patient. NAPW is a non-profit organization founded in 2001, and dedicated to ensuring that women do not lose their constitutional and human rights as a result of pregnancy. NAPW has unparalleled expertise in the civil and constitutional rights of pregnant women, including and especially the rights called into issue by this case. NAPW seeks to assist the Court with relevant authority and information that was not considered by the Court below and which has not been raised by the parties.

WHEREFORE, National Advocates for Pregnant Women respectfully request that this Court grant their motion to file an *amicus curiae* brief.

Respectfully submitted,

National Advocates for Pregnant Women

Sarah E. Burns

Dated: New York, NY
October 30, 2020

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EXHIBIT A

To be Submitted by:
SARAH BURNS

New York Supreme Court
Appellate Division – Second Department

Appellate Case No.: 2019-12617

RINAT DRAY,

Plaintiff-Appellant,

– against –

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

Defendants-Respondents.

BRIEF FOR *AMICUS CURIAE* NATIONAL ADVOCATES FOR PREGNANT WOMEN

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Kings County Clerk's Index No. 500510/14

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Amicus Curiae Statement of Interest

Amicus curiae National Advocates for Pregnant Women (NAPW) is a national not-for-profit organized under the laws of the State of New York. NAPW works to ensure that people do not lose their constitutional and human rights as a result of pregnancy or capacity for pregnancy. NAPW brings expertise to this matter essential to the resolution of this appeal. See, for example, Brief for Nat'l Advocates for Pregnant Women et al., Amicus Curiae Supporting Defendant-Appellant, *People v. Jorgensen*, No. 2012-05826 (2d Dept. 2015); Brief for Nat'l Advocates for Pregnant Women et al., Amicus Curiae Supporting Petitioner-Appellant, *S A McK v. S B M*, No. V-0968/13 (1st Dept. 2013); Brief for Nat'l Advocates for Pregnant Women et al., Amicus Curiae Supporting Defendant, *People v. Gilligan*, No. 2003-1192 (Supreme Court 2004). The depth and breadth of NAPW's knowledge on issues regarding rights abuses based on pregnancy is reflected in New York Times Editorial Board, "A Woman's Rights," New York Times, December 28, 2018.

Summary of Argument

The lower court improperly dismissed Ms. Dray's Second Amended Complaint. Based on Defendants' Answer and responses in discovery, Ms. Dray learned that her good faith efforts to avoid unnecessary surgery had been defeated by Defendants' deception and discrimination. Since 2008, Defendant Staten Island

University Hospital (SIUH) had an undisclosed "Managing Maternal Refusals of Treatment Beneficial for the Fetus" policy (maternal override policy) identifying circumstances in which its affiliated physicians were authorized to override a pregnant patient's refusal of treatment without court order. A-190. Defendants relied on that policy to perform unconsented cesarean surgery on Ms. Dray. Ms. Dray amended her complaint to add causes of action challenging Defendants' transactional deception and pregnancy discrimination based on that previously undisclosed policy. Those claims should be aired.

Contract, fraud, consumer protection, anti-discrimination, and informed consent law all provide rules for managing risk and distributing harm. Each of these protects the smooth, efficient and fair functioning of society during processes that cannot necessarily be predicted or controlled. Each is a way of managing divergent interests when values, goals and reasonable minds disagree. One essential requirement of all transactional laws is the disclosure of material information. Existence of the undisclosed maternal override policy was material to Defendants' dealings with Ms. Dray.

Defendants pretend medical certainty where there is none, and characterize their betrayal of Ms. Dray as heroic and life-saving. This false narrative should not distract from the core issue in this matter – that Defendants obtained Ms. Dray's business by not disclosing their maternal override policy, which they then applied

to her during her labor. Ms. Dray's amended complaint's causes of action appropriately address Defendants' health care business deception and related public accommodation discrimination. This Court should restore those claims.

Argument

On May 18, 2018[1], Ms. Dray moved to amend her complaint to add seven causes of action to her pending malpractice claim: breach of contract, fraud, deceptive acts, false advertising, denial of equal protection under New York civil rights law, and violations of the New York human rights law and New York City human rights law. A-166-189. These claims arose from the original malpractice claim facts supplemented with information about SIUH's maternal override policy. *See* A-167 ¶ 11, A-177-180 ¶ 67-70, 72, 76, 77, 84-85, 87, 97. This policy had been kept secret from Ms. Dray throughout her transactions with Defendants and only through pleadings in the case did she learn this policy is what Arthur Fried, Senior Vice President and General Counsel of SIUH, relied on to authorize the forced surgery on Ms. Dray. A-176-179 ¶ 71-88; Aff. in Opp., *Dray v. Staten*

[1] The original complaint for medical malpractice was filed January 22, 2014. Summons and Complaint, *Dray v. Staten Island Univ. Hosp.*, No. 500510/14, (Supreme Court, January 22, 2014). The lower court issued rulings in the matter on May 12, 2015 and October 29, 2015. Order, *Dray v. Staten Island Univ. Hosp.*, No. 500510/14, (Supreme Court, May 12, 2015) (posted to eFile October 21, 2015); Order, *Dray v. Staten Island Univ. Hosp.,* No. 500510/14, (Supreme Court, October 29, 2015) (posted to eFile December 1, 2015). Plaintiff timely appealed those rulings. Dray Notice of Appeals, Dray v. Staten Island Univ. Hosp., No. 500510/14, (Supreme Court, December 7, 2015). This Court ruled on the appeal of the lower court's orders on April 4, 2018, and remanded this case for trial on the claim of malpractice. Decision & Order, *Dray v. Staten Island Univ. Hosp.*, No. 500510/14, (Supreme Court, April 4, 2018) (posted to eFile April 16, 2018).

Island Univ. Hosp., No. 500510/14, ¶ 81 at 25 (Supreme Court, December 1, 2014); Aff. of Arthur Fried in Opp., *Dray v. Staten Island Univ. Hosp.*, No. 500510/14, (Supreme Court, December 1, 2014).

The lower court initially granted Ms. Dray's amendments. Then Defendants, proffering cesarean surgery as a risk-free cure-all for labor, persuaded that court to reverse itself and dismiss the amended complaint. In doing so, the lower court improperly accepted Defendants' overstatement of fetal risk and their minimization of risk to Ms. Dray. Cesarean surgery is risky major surgery. The Lancet Series, *Optimising caesarean section use,* October 12, 2018 (henceforth *Lancet Series*). Also it is overused. The preeminent medical journal in the world, *The Lancet*, has labeled the unprecedented rise in cesarean surgery an "epidemic," contributing to the call by leading medical organizations and experts to reduce unnecessary cesareans. Editorial, *Stemming the global caesarean section epidemic,* 392 The Lancet 10155 October 13, 2018; American College of Obstetricians and Gynecologists and Society for Maternal-Fetal Medicine, *Safe prevention of the primary cesarean delivery*. Obstetric Care Consensus, March (1) 2014 (reaffirmed 2016) (henceforth *Obstetric Care Consensus*) (overuse is a concern where there is an increase in surgery without a concomitant reduction in poor outcomes).

The cesarean surgery rate went from 4% in 1965 when it was first measured to a peak of 32.9% in 2009. Childbirth Connection, *Why is the U.S. Cesarean*

Section Rate So High? August 2016 (henceforth *Childbirth Connection)*; World Health Organization, *WHO recommendations non-clinical interventions to reduce unnecessary caesarean sections* 12-13 (2018) (noting that since the late 1980s, the international community considered the ideal rate to be between 10% and 15% and those in excess of that rate were recognized as not medically indicated or unnecessary). All three of Ms. Dray's births took place during this peak in unnecessary cesarean surgeries. The increase in cesarean surgery is associated with short and long-term problems, including a five-fold increase in the risk of maternal mortality, lending urgency to the national consensus to reduce cesareans. *Obstetric Care Consensus; Childbirth Connection; Lancet Series*. *See also* Mamta Gupta and Vandana Saini, *Cesarean Section: Mortality and Morbidity*, 12 J. Clinical & Diagnostic Res. 9 (2018).

The risks of cesarean are compounded with each successive surgery; by the third surgery, the chance of a major surgical complication is 1 in 13. Rebecca Dekker, The Evidence on VBAC, Evidence Based Birth (Jan. 28, 2020), available at https://evidencebasedbirth.com/ebb-113-the-evidence-on-vbac/. This was the context for Ms. Dray's negotiations with Metropolitan and her experience at SIUH seeking to avoid an unnecessary surgery.

I. Breach of contract, fraud, and General Business Law §§ 349 & 350 claims should be restored because Defendants violated a foundational requirement of our legal system by failing to disclose material information while engaged in negotiations to provide healthcare.

The lower court entirely ignored the context of the parties' negotiations when dismissing the Second Amended Complaint. Lack of consent has intentional tort, business law and malpractice dimensions. Honest disclosure of material information is essential to the formation of contracts and consumer protection, and is also the standard of care owed to a patient. This Court can and should address lack of consent here relating to basic transactional and consumer legal grounds.[2]

Ms. Dray entered into her relationships with Defendants with the clearly stated goal of pursuing vaginal birth if at all possible. She had undergone cesarean surgery with her two prior births, knew its impacts, and sought health care providers who would make sure another surgery not be "foisted" upon her for the doctor's convenience and no legitimate medical reason. Dray Aff. at 2. Defendants obtained her business knowing this was her goal. A-177-179 ¶ 67-88.

In dismissing the Second Amended Complaint, the court below ignored the pleadings and improperly drew factual conclusions. The documents appended to Ms. Dray's amended complaint should have been read in the context of her

[2] Amicus NAPW acknowledges informed consent as related to a time-barred claim for battery will not be presented at trial. Decision & Order, *Dray v. Staten Island Univ. Hosp.*, Nos. 2015-12064, 2015-12068, 4 (2d Dept. 2018).

negotiation with Defendants which led Ms. Dray to believe that Defendants honored consent in both business and medical transactions. A-194-198.

The lower court failed to do this, refusing to recognize that the undisclosed and key document, SIUH's maternal override policy, A-190, established that the Defendants had not negotiated in good faith with Ms. Dray. SIUH's policy carved maternal health decisions out of the transactional principles of consent. This policy was clearly at odds with the hospital's explicit and public forms and Metropolitan's negotiations. At no relevant time did Defendants inform Ms. Dray of this material fact.

A. Defendants engaged in a deception because none of them ever informed Ms. Dray that SIUH had a maternal override policy.

Ms. Dray's good faith efforts to avoid unnecessary surgery were repeatedly answered with deceptive action by the Defendants. On June 30th, twenty-six days before her baby was born, a note was made in Ms. Dray's chart: "advised recommendation is for rpt [repeat] c/s, pt wants tol [trial of labor] will sign consent outlining refusal of c/s at this point, will present for pts signature next week." Met OB Gyn office notes A-387. Notes indicating Ms. Dray's intention to have a trial of labor after cesarean (TOLAC) and decline an elective repeat cesarean surgery appear on July 7, 12 and 19th. *Id.*

Metropolitan also prepared a release dated July 7th signaling adherence to consent as both a standard of care and foundation of business transactions. It sought to limit their liability if a uterine rupture occurred by explicitly acknowledging Ms. Dray's informed refusal of surgery. A-386. Ms. Dray did not sign Metropolitan's release because it failed to include information about the risks of surgery. Instead, she provided her own letter to her doctors on July 19th. A-336. At no time did these providers advise Ms. Dray that this back and forth was pointless since they could ignore her refusal of surgery if she presented for labor at SIUH.

When she arrived at SIUH on July 26th, Dr. Gorelik recommended Ms. Dray proceed to a cesarean surgery. Dray Aff. at 3; Defendant Mot. to Dismiss at 2. She explained, again, that she had done research and knew cesarean surgery "also had risks." Dray Aff. 3. Upon admission she was given two "Permission for Operative and/or Diagnostic Procedure and/or Treatment" forms, one with "Vaginal Delivery" and the other with "Repeat Cesarean Section" filled in, and the "Patient Notification Record of Advance Directives" which includes receipt of the Patient Bill of Rights. These documents used words such as "consent," "agreement," "permission," "understand," "authorize," "refuse," "acknowledge," "confirm," "notify," "reaffirm," all indicating a process that would respect patient decision-making. No one disclosed the SIUH policy for overriding maternal refusals. While

the forms limit expectations regarding outcomes of medical care, stating, "no guarantees or assurances have been made…," no corollary limit was stated regarding the decision-making process. Neither Dr. Gorelik, nor anyone else, advised Ms. Dray that they could force her to undergo surgery.

That they presented consent documents and sought signatures prior to treatment would signal to any patient that the doctors and hospital were reconfirming the informed consent process as the standard of care *and* a foundation of their business transactions. Presenting Ms. Dray with the booklet "Your Rights as a Hospital Patient in New York State" had the same effect. Together, these documents did promise a specific *process* in which the patient decides whether or not to accept medical interventions. The maternal override policy, Defendants' failure to disclose it, and their ultimate application of it to Ms. Dray, contradicted that promise.

The Patient's Bill of Rights is given to every hospital patient in New York as required by 10 NYCRR 405.7. Affirming a patient's common law and constitutional rights to receive information necessary to consent to or refuse treatment, including surgery, it communicates informed consent's centrality to transactions in medicine and confirms the duty of hospitals to help patients "understand *and exercise* these rights." *Id.* (emphasis added). The New York State Department of Health (DOH) can reprimand facilities that fail to follow

these requirements. In May 2018, DOH found that SIUH violated 10 NYCRR 405.7 during Ms. Dray's care and ordered correction. A-373. In response, SIUH created a new policy which purports to defer to the pregnant patient's medical decisions.[3]

Yet, in its October 4, 2019 Order, ignoring the secret policy, the lower court dismissed Ms. Dray's added claims concluding that she had no viable claims because there was no promise *not* to do surgery, Ct. Order at 8, despite the fact that Ms. Dray had refused to sign the "repeat cesarean section" form. This reasoning is contrary to the statutory and common law which establishes that no medical interventions will be performed unless explicit information necessary for a decision is provided and patient consent is given. This principle, enumerated throughout New York law, applies to all patients including those who are pregnant.

New York State explicitly identifies who gets to consent for what and when, and recognizes that people need accurate information to make decisions regarding their health. Moreover explicit laws about reproductive health care establish that

[3] While SIUH argued in their Plan of Correction that their action "was not a violation as a matter of law," they created a new policy that says simply "If the woman continues to refuse, the woman's decision should be followed." A-375. Despite SIUH's insistence in this case that overriding maternal refusal was necessary and absence of "such a policy," "would deprive those viable, unborn fetuses of their right to live," Brief for Defendants-Respondents at 57, SIUH made no such claim in its Plan of Correction to DOH. This omission seems odd, possibly even misdirection, since Defendant SIUH invoked the "state's interest" in saving the fetus to justify its secret policy used against Ms. Dray.

pregnant patients, like all other patients, are protected by the rules and norms of information disclosure and consent.[4] For example, Article 24 of Chapter 45 of the Consolidated Public Health Laws requires public information about things such as Dioxin exposure and hysterectomies; Article 25 on maternal and child health establishes who can give consent for care, explicitly listing pregnant people as the ones who can consent to prenatal care, and prohibiting pelvic examinations on unconscious patients without explicit notice and consent at §2504, and §2505-a specifies breastfeeding rights; Article 25-a centers the consent of the pregnant patient by legalizing abortion; Article 28 requires hospitals to disclose information on childbirth procedures including cesarean section at § 2803(j), and informed consent at § 2805-d[5]. On the few rare occasions that deprive patients or their delegated decision-makers of the right to consent, New York law is explicit. For example, where specific informed consent for HIV testing was required, NY

[4] New York State takes a firm stance with regard to disclosure of information and consent, even where other States may not. For example, 32 states mandate that specific information —often including biased, false, or misleading information — be given to pregnant women who are seeking abortion services but New York does not require prospective abortion patients receive misleading information. Guttmacher Institute, *Counseling and Waiting Periods for Abortion*. Available at: https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion#, last visited by counsel for Amici on October 6, 2020. Some States explicitly exclude pregnant patients' refusals from Advance Directive coverage but New York does not. 10 NY ADC 400.21.

[5] SIUH tried to use this informed consent law, NY Pub Health § 2805(d)(4), as an affirmative defense. Staten Island Univ. Hosp. Answer, *Dray v. Staten Island Univ. Hosp.*, No. 500510/14, P 21 (Supreme Court, May 22, 2014). This law only applies to malpractice and does not constrain Ms. Dray's other claims.

included §2500-f permitting HIV testing of newborns without parental consent. *See* NYCRR 69-1.3(n)(2).

The New York State legislature did not exclude pregnant patients from patient decision-making laws.[6] Other states specifically excluded the directive to refuse life-sustaining treatment for a pregnant patient *in extremis*.[7] In New York in the absence of due process, there is no exception to the principle that the patient's decision-making determines the medical course of action.[8] These explicit laws about reproductive health care establish that pregnant patients, like all other patients, are protected by the rules and norms of information disclosure and

[6] The New York Legislature enacted three significant patient-decision making laws between 1972 and 1990 and did not exclude pregnancy from the principle of patient decision-making in any of them. The 1972 law, in the Maternal and Child Health section of the NY Public Health Law, clarified that adults may consent to their care and the care of their children except in an emergency. NY Pub. Health §2504. It was amended in 1984 to make it explicit that juvenile pregnant people could consent to prenatal care. Bill jacket L.1984, c. 976. In 1987 the law for do not resuscitate orders was established in Article 29-B of the Public Health Law, and in 1990 the law for health care agents and proxies was established in Article 29-C, with rules for Advance Directives following at 10 NYCRR 400.21 in 1991. During this same time period cases dealing with the health care decision-making of pregnant people in New York were before the courts, see *Fosmire v. Nicoleau*, 75 N.Y.2d 218 (N.Y. 1990), and *Matter of Jamaica Hospital*, 128 Misc.2d 1006 (Sup. Ct. Queens County 1985), and yet at no time has the legislature created unique rules to ignore or override pregnant people's health care decision-making.

[7] *See* Timothy Burch, *Incubator or Individual?: The Legal and Policy Deficiencies of Pregnant Clauses in Living Will and Advance Health Care Directive Statutes,* 54 Maryland L. Rev. 533 (1995); Charles P. Sabatino, *Death in the Legislature: Inventing Legal Tools for Autonomy,* 19 N.Y.U. Rev. L. & Soc. Change 309, 333 (1992).

[8] NY Pub. Health Ch. 45 Art. 29-C and Art. 29-CC and 10 NYCRR 400.21 are all silent with regard to pregnant patients, thereby affording them the same rights to information and consent as all patients.

consent.[9] That patient informed consent is ubiquitous in New York law confirms Defendants' deceptiveness in failing to disclose their maternal override policy.

Reliance on accurate information as the basis of agreements is also foundational to business and contracts. *See Miller v. Schloss*, 218 N.Y. 400 (N.Y. 1916) ("A contract cannot be implied in fact where … there is an express contract covering the subject-matter involved, or against the intention or understanding of the parties."). *Cf. In re First Central Financial Corp.*, 377 F.3d 209 (2nd. Cir. 2004) (building on *Schloss* to clarify the difference between fraud-rectifying and intent-enforcing constructive trusts in the context of explicit agreements). Information, honesty and fair-dealing are core principles of fiduciary duty. *See* Elizabeth Kukura, *Obstetric violence through a fiduciary lens* in Childbirth, Vulnerability and Law: Exploring Issues of Violence and Control (Camilla Pickles & Jonathan Herring, eds., 2019) (arguing that certain maternity care practices constitute a breach of fiduciary duty).

The qualifying language on line 3 of the "vaginal delivery" consent form cannot undo this or immunize Defendants for their failure to provide explicit notice

[9] New York State takes a firm stance with regard to disclosure of information and consent, even where other States may not. For example, 32 states mandate that specific information —often including biased, false, or misleading information — be given to pregnant women who are seeking abortion services but New York does not require prospective abortion patients receive misleading information. Guttmacher Institute, *Counseling and Waiting Periods for Abortion*. Available at: https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion#, last visited by counsel for Amici on October 6, 2020. Some States explicitly exclude pregnant patients from Advance Directive coverage but New York does not. 10 NY ADC 400.21.

to Ms. Dray. *See generally Fosmire v. Nicoleau*, 75 N.Y.2d 218 (1990) (recognizing that the explicit refusal of a life-saving procedure, known upon admission to the hospital, could not be overridden by the hospital even when there were competing State interests). Ms. Dray's goals were clearly communicated to the Defendants, Metropolitan's negotiations acknowledged them and her position as decision-maker, and SIUH's forms did too. A-194-198, A-386-387. Defendants were free to make their exceptional conditions explicit, and they deceitfully failed to do so.

B. Implementing SIUH's maternal override policy was a classic bait and switch.

One of the many deliberate actions Ms. Dray took to guard against unnecessary surgery was checking SIUH's cesarean surgery rate before she decided to labor there. Dray Aff. at 4. The public presentation of a hospitals' cesarean surgery rate is required by Public Health Law § 2803(j) and was material to her decision-making.

At 7 a.m. on July 26th Ms. Dray presented for care, exactly in accordance with what had been anticipated and discussed: She had two prior cesarean surgeries and she wanted to avoid a third by remaining in labor and having a vaginal birth, if at all possible. In this moment, Dr. Gorelik changed the terms of their engagement unilaterally by giving Ms. Dray one option disguised as two. His options for her were to receive an epidural followed by a cesarean surgery or sign

out against medical advice "seeking care elsewhere." RA-453. At the onset of labor, "seek[ing] care elsewhere" was not a genuine alternative. Where there is only one option, there can be no consent. This was a bullying tactic, not a discussion about the best course of care.[10] That "Dr. Gorelik was resistant to her proceeding by way of vaginal delivery from the first time he saw her at the hospital", Ct. Order at 10, could not cure Defendants' persistent and ongoing deception. Ms. Dray properly understood Dr. Gorelik had a duty to provide his risk assessment; she could not have understood his advising cesarean meant he would force a cesarean. Defendants kept that material fact from her.

This experience is referred to as a "bait and switch." A-181; BB Ibrahim, Pregnancy After Cesarean: A Mixed Methods Exploration of Women's Experiences in a Diverse U.S. Sample, 13 (2020) (Ph.D. dissertation, Yale University School of Nursing) (on file with NAPW). Misleading information prior to onset of labor baits consumers into hiring the provider who then switches the expected service (support during a trial of labor) for a different, less desirable one (surgery). Here, as in a classic consumer "bait and switch," the less desirable option for Ms. Dray was also the one with a greater profit margin for the

[10] Ms. Dray recalls Dr. Gorelik saying "Ok, go home and rupture your uterus at home," in this moment, Dray Aff. at 4, underscoring that the conversation was not about clinical risks and benefits but powerplay and negotiating tactics.

Defendants. Emily Oster and W. Spencer McClelland, "*Why the C-Section Rate is So High*," The Atlantic, October 17, 2019.

C. This Court should reinstate Plaintiff's Second Amended Complaint because it alleges facts sufficient to maintain her causes of action under breach of contract, fraud and General Business Law §§349 & 350.

New York State law subjects the delivery of health care to basic transactional law and to the same consumer law fair dealing protections as with all businesses. *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282 (N.Y. Ct. App. 1999); Ct. Order at 10. These laws are premised on fair and honest dealing:[11]"In order to ensure an honest marketplace, the General Business Law prohibits all deceptive practices, including false advertising, 'in the conduct of any business, trade or commerce or in the furnishing of any service in this state'." *Karlin,* 93 N.Y.2d at 287.

Honest dealing is exactly where Defendants failed in their transactions with Ms. Dray. Their contractual breach is not about the clinical conditions which none of them could control, but the decision-making process, which they could. They performed the steps of informed consent, until they unilaterally changed the terms:

[11] Contract and fraud, in common law and statutory form, have always required honest representation regarding the material aspects of the deal. Consumer law was developed as an added protection against dishonest dealing in asymmetric transactional contexts, where one party was expected to have far less familiarity with or knowledge about the product or service being bargained for in the transaction. *See* John F. Kennedy, Spec. message to Cong. On protecting consumer interest, 15, March 1962.

that was the breach. On July 26th Dr. Ducey admitted this breach by writing in direct opposition to all those steps and forms, "The woman has decisional capacity. I have decided to override her refusal to have a c-section." Progress Note, July 26, 2011 at 2:30 pm.

Before that, they induced her to their businesses through negotiations based on a false premise that the Defendants were in fact negotiating. As Ms. Dray pled, "If [I] had been aware of the secret policy (Ex.A) [I] would have chosen a different hospital or chosen to deliver [my] baby at home." A-179 ¶ 87. Woodhull Hospital where Ms. Dray had been receiving prenatal care was not a facility that negotiated; Woodhull had an express ban on VBAC which they communicated to her. This was why Ms. Dray switched to Metropolitan. Dray Aff. at 2. Woodhull's express policy led Ms. Dray to find a provider with whom she could negotiate. That Defendants would unilaterally end negotiations and displace her as decision-maker was a material fact to Ms. Dray. Withholding this information was certainly fraud on the part of SIUH and probably fraud by SIUH's affiliated physicians. It also represented a deceptive act and practice declared unlawful under General Business Law § 349(a). Finally, Defendant's failure to disclose their maternal override

policy while still using standard forms, contracts and legally-mandated disclosures was false advertising, violating General Business Law § 350. [12]

This Court should reinstate Ms. Dray's added claims and reject the lower court's three failures to follow procedural law— granting reargument where Defendants had failed to show any fact or law had been overlooked or misapprehended; not reading the allegations of the complaint most favorably to the plaintiff; and reaching factual conclusions favoring defendants, which is forbidden at the complaint-amendment stage.[13] As this Court has many times said, "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

[12] Ongoing representation of patient-as-decision-maker through standard consent documents and announcing without qualification "[w]e also care for mothers who wish to deliver vaginally after having had a previous cesarean delivery (VBAC)," https://siuh.northwell.edu/obgyn/maternity-services last visited by counsel for amicus NAPW on October 25, 2020, while insisting on the necessity of their maternal override policy in these proceedings is false representation to all potential SIUH pregnant consumers.

[13] Nothing had been previously overlooked in granting the amendment and the Defendants' CPLR § 3211 (a)(1) claim could not be disposed wholly on the documents as required. *See* CPLR § 2221(d)(2) (a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion"); CPLR § 3211 (a)(1) (dismissal of a claim is permitted where "a defense founded upon documentary evidence" wholly disposes of the claim); *Porat v. Rybina*, 177 A.D.3d 632, 111 N.Y.S.3d 625 (Nov. 6, 2019) (claim could not be disposed wholly on the documents as required under CPLR § 3211 (a)(1)); *Phillips v Taco Bell Corp.*, 152 A.D.3d 806, 806 (2d Dept. 2017) (lower court properly denied defendants 3211(a)(1) motion because affidavits are not documents under the rule).

986, 987 (2d Dept. 2015) (Citations and internal quotations omitted). The lower court did the exact opposite. This Court should reverse and remand.

II. Defendants' maternal override policy and related conduct is unlawful pregnancy discrimination and should be remedied as such.

New York State's and City's policies against discrimination are strong and should be given full effect. The lower court conceded that Defendants' conduct was based on her pregnancy, Ct. Order at 13, but then dismissed the discrimination claim by framing the essence of pregnancy as not solely pregnancy-based. *Id. 13-24.* Making inferences in favor of the Defendants, the lower court concluded that Ms. Dray's "conduct" threatened injury to another, i.e., the fetus. The "conduct" at issue was Ms. Dray being in labor, which was based on her pregnancy. The lower court then accepted as facts that the fetus was in serious danger and that surgery posed no serious risk to Ms. Dray. *Id.*

A. Defendants' should bear the burden of proving that they did not discriminate against Ms. Dray based on pregnancy

Defendant SIUH's maternal override policy carve-out of medical decision-making by pregnant patients is facially based on pregnancy. No inference need be made to find discrimination; the policy singles out patients because they are pregnant; a fetus cannot exist without pregnancy.

The appropriate approach to assessing discrimination is to determine whether the facts support the claim that the offending actions were taken because

of the protected category – pregnancy. That fact is explicit here and thereby established. Where facial discrimination is involved, the burden shifts to the defendants not just to articulate an explanation or excuse, but also to satisfy stringent proof of non-discrimination.

The New York Court of Appeals confirmed this in *Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.,* 81 N.Y.2d 211; 613 N.E.2d 523; 597 N.Y.S.2d 617 (1993). In that case, on behalf of herself and others similarly situated, Elaine W. sued Joint Diseases North General Hospital (North General) for pregnancy discrimination under the New York Human Rights Law (§296). North General, which did not have obstetrical treatment facilities, had a policy of categorically excluding pregnant addicts like Elaine W. from its drug treatment program. On review, acknowledging its precedents holding pregnancy discrimination to be sex discrimination under Section 296, the Court of Appeals maintained Elaine W's cause of action for discrimination.

The Court of Appeals reasoned "A hospital policy which singles out pregnant women for treatment different from treatment afforded those with other medical or physical impairments is …suspect. Unquestionably, North General's policy discriminates against pregnant women by treating them differently from others solely because they are pregnant and thus it constitutes facial sexual discrimination." *Id.* at 216. The Court continued "The mere proffering of a

medical explanation, when disputed by other evidence, does not validate the hospital's exclusionary policy. North General must establish at trial that its blanket exclusion of pregnant women is medically warranted." *Id.* at 216-17.[14]

Under the *Elaine W.* reasoning, having a facial policy singling out pregnancy confirms that Defendants are engaged in unlawful sex discrimination. Defendants therefore bear the burden of proving medical necessity—that they cannot deliver appropriate medical care to pregnant patients without having a special undisclosed policy for overriding such patients' decision-making.[15] In defending their facial pregnancy discrimination, it is not enough for the Defendants to state "there is a fetus/unborn child," which the lower court has allowed them to do here. That simple assertion is another way of saying "because this is pregnancy" which amounts then to an admission of discrimination.

In other words, the Defendants discriminated against Ms. Dray on the basis of her pregnancy and they have reasons but no legal defense for doing so. In fact, their discrimination was threefold. First was having the pregnant-person-specific secret policy allowing SIUH and its affiliated physicians to override maternal

[14] The *Elaine W.* court cautioned that "[m]any discriminatory practices develop improperly because of a paternalistic sense of what is 'best' for those who are discriminated against. If there is no medical basis for the discrimination, the fact that it was undertaken with good intentions is irrelevant." *Id.* at 217-18. This strategy of placing the burden of proving that there is genuinely important objective which virtually no alternative to the discriminatory practice can achieve fulfills the anti-discrimination law's goals to identify and stop categorical discrimination.
[15] Defendants cannot succeed in this and maintain their now revised policy that purportedly accepts the refusals of laboring patients. *Supra* n. 4.

refusal. That discriminatory conduct began May 2008 when the policy was established and affected Ms. Dray from the outset of her negotiations with SIUH and its physician affiliates. Second was Defendants' ongoing deception in obtaining and keeping Ms. Dray's business by not disclosing to her that they had a pregnancy-based policy authorizing override of her medical decisions contrary to New York law and to her stated goals.[16] Third was forcing the cesarean surgery on Ms. Dray despite her refusal and without due process. It should be noted that, while SIUH created the secret policy, Metropolitan doctors participated in the second and third acts of discrimination. All three were harmful to possibly other pregnant persons, and certainly to Ms. Dray, demoting her to the status of non-person because of her pregnancy.[17] No sufficient rationale exists to excuse Defendants' acts.[18]

Even in the abortion context, at all points in pregnancy the woman's life is the strongest interest – both of the individual woman and of the state. *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992). Thus, while a state interest in potential life has been deemed compelling enough to prohibit some (although not all) post-viability abortions, that interest and its reach are specific to the abortion

[16] *See Fosmire v.Nicoleau*; Ct. Order at 13.
[17] All other legal persons have decision-making authority either directly or as delegated, and when they do not, their liberty interests are nonetheless protected by due process; Ms. Dray got less than all other legal persons.

context (not birth) and requires recognition of the woman's life and health as the paramount interest. Moreover, a state interest does not authorize self-appointed citizens to enforce it. The state also has an interest in the life and health of car drivers, their passengers and others on the road. This interest does not, however, allow the choice of car to be purchased to be dictated by the seller if the seller purports that the potential buyer's choice is not as safe, even if the potential buyer-driver is pregnant.

A state interest in the life or health of a fetus does not shield Defendants from the common or statutory law consequences of their private negligent, deceptive and discriminatory conduct. If Defendants wanted to cloak themselves in the alleged "state interest," they were required to obtain a court order to operate on Ms. Dray without her consent. Defendants did not do that. The lower court erred when it dismissed the discrimination causes of action by adopting as fact and law Defendants' claim that they were required to force surgery.

B. This Court should reject the Defendants' false framing that the presence of a fetus exempts them from fundamental legal requirements.

To accept the Defendants' argument that they must be allowed to override a laboring person's refusal lest they "deprive … viable, unborn fetuses of their right to live," Brief for Defendants-Respondents in *Dray v. Staten Island Univ. Hosp*., No. 2019-12617, 57 (2d Dept. 2019), is to radically reframe childbirth as assault.

Against leading medical judgment[19] this position proffers medical force as a necessary solution to birth. The Defendants' intervention deprived Ms. Dray of her chance to prove them wrong as women have in other cases where physicians predicted harm as the outcome of a vaginal birth and turned out to be wrong.[20] Data about relative risk is not medical certainty and should not be used to justify the Defendants' unlawful forced surgery. By adopting Defendants' claim that the existence of a fetus, or in other words that pregnancy, absolves all their conduct, the lower court abandoned neutrality and improperly assumed the Defendants' infallibility.

The problem at issue is a differing assessment of risk. Everyone wanted the best for the fetus but patient and provider had different perspectives about how that

[19] "American College of Obstetricians and Gynecologists Committee on Ethics, Committee Opinion 664, Refusal of Medically Recommended Treatment During Pregnancy (2016) (: "Pregnancy is not an exception to the principle that a decisionally capable patient has the right to refuse treatment, even treatment needed to maintain life…"). American Medical Association, Policy Statement - H-420.969, Legal Interventions During Pregnancy (2016) ("Judicial intervention is inappropriate when a woman has made an informed refusal of a medical treatment designed to benefit her fetus… [T]he fundamental principle against compelled medical procedures should control in all cases which do not present … exceptional circumstances.") The facts of this case do not meet the AMA-defined "exceptional circumstances" and `Defendants failed to seek judicial intervention, thereby avoiding any neutral scrutiny of the validity of their claims of exceptionality.

[20] In prior briefing, NAPW described cases in which a judge considered a health provider's petition for forced cesarean surgery and yet the vaginal birth was fully successful. Brief for Nat'l Advocates for Pregnant Women et al., Amicus Curiae Supporting Petitioner, *Dray v. Staten Island Univ. Hosp.*, No. 500510/14, 9-10, 13-15 (Supreme Court, December 1, 2014). Notably Defendants' much-cited Georgia case, *Jefferson v. Griffin Spalding County Hosp. Auth.,* 274 S.E.2d 457 (Georgia 1981), resolved with a successful vaginal birth. *Id. See also* Jamie R. Abrams, *Distorted and Diminished Tort Claims for Women*, 34 Cardozo L. Rev. 1955, 1959 (2013).

could be achieved and different interests with regard to the process of birth. The physical exertion of labor ties the pregnant patient to the process and gives them direct feedback about how labor is progressing. The provider, on the other hand, is removed from that direct feedback. Moreover, supporting, rather than interrupting, labor requires providers to stand by, not take action. Research suggests that "standing by" makes providers feel legally vulnerable based on perceptions that they are more likely to be sued for actions they did not take than for actions they did.[21] Ms. Dray felt labor progressing which reassured her: "my contractions began growing stronger and closer together, and I could see that labor was picking up." Dray Aff. at 4. But Dr. Gorelik, perceived things differently and found surgery, which could expeditiously resolve his risk, more reassuring.[22]

No option guaranteed Ms. Dray ready relief. She, the patient, was stuck with lifelong physical and emotional consequences in every possible outcome (vaginal birth, birth by cesarean surgery, stillbirth). This is why the patient must be the ultimate decision-maker.

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[21] Sabrina Safrin, *The C-Section Epidemic: What's Tort Reform Got to Do With It,* 2018 Univ. Ill. L. Rev. 747, 751 (citing several sources on physician justifications for overuse of cesarean surgery), and Elizabeth Kukura, *Obstetric Violence,* 106 Georgetown L. J. 721, 773 n. 339 (2018) (citing James M. Shwayder, *Liability in High-Risk Obstetrics*, 34 Obstetrics & Gynecology Clinics of N. AM. 617, 619 (2007) (reporting that six of the nine most common reasons for obstetric malpractice suits allege failure to perform a cesarean delivery or failure to perform a timely cesarean delivery). *See also id.* at 765-78 (discussing systemic pressures on doctors which encourage surgical intervention).

[22] His perception was supported by fetal heart tracings from the Electronic Fetal Monitor, which has been proven to be "junk science." Thomas P. Sartwelle et al., *Perpetuating Myths, Fables, Fairy Tales: A Half Century of Electronic Fetal Monitoring,* 1 The Surgery Journal 1 (2015).

Cesarean section is a risky surgical intervention, not the cure-all that Defendants advocated, and the lower court assumed, it to be. Its popularity with providers over the "needs of women or babies" contributes to the excessive cesarean rate. National Partnership for Women and Families, *Maternity Care in the U.S. – We Can and Must Do Better*, 4 February 2020. Unnecessary surgery exposes people to harm and denies them beneficial interventions. *Id.* This was as true in 2011 when Ms. Dray was pressured to accept surgery with no clear benefit and possible harm, over vaginal birth's known benefits. The process of labor was a compelling choice for Ms. Dray, not an assault against her fetus. Ignoring this fact to dismiss Ms. Dray's legitimate claims of discrimination was an error that must be reversed, especially considering Ms. Dray's goal to give birth to many children, profoundly central to her role in her community.

Conclusion

This Court should not reward Defendants for denying pregnant persons protection of "the long held public policy of this state, [that] 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." Ct. Order at 12 (citing *Fosmire v. Nicoleau*, 75 N.Y.2d 218, 661 N.Y.S.2d 876 (1990); *Matter of Storar*, 52 N.Y.2d 363, 438 N.Y.S. 2d 266 (1981)). That she is bringing life into being is a reason to affirm, not deny,

that the pregnant patient's informed consent is the controlling decisional process for her birthing health care. Far more than a health care provider, the pregnant patient knows the totality of potential effects that the birthing process will have on her and her potential newborn. Defendants' approach of ignoring the pregnant patient's decisional rights upends established transactional law and is unlawful discrimination. Reinstating Ms. Dray's seven added causes of action will appropriately hold Defendants accountable for deceiving her and other pregnant patients.

Dated: New York, NY
October 30, 2020

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Printing Specifications Statement
Pursuant to 22 NYCRR § 1250.8(f) and (j)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules and regulations, etc. is 6920 words.

NOTICE OF APPEAL AND ORDER APPEALED FROM

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.,

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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

Michael M. Bast, P.C.
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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.

----------X

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.

----------X

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

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

Rinat Dray,

Plaintiff

- against -

Staten Island University Hospital, Leonid Gorelik, Metropolitan OB-Gyn Associates PC and James J. Ducey,
Defendants

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ Action Commenced under CPLR 214-g
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☒ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	☐ Commercial	☐ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☒ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: Kings
Dated: 10/30/2019	Entered: October 4,2019
Judge (name in full): Genine D. Edwards	Index No.:500510/2014
Stage: ■ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ☐ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

In this personal injury action plaintiff moved to amend her complaint to add addititional causes of action. The court granted the motion. Defendants moved to reargue, and upon reargument, the court vacated its previous order and denied the motion to amend the complaint. This is an appeal from the second order.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Plaintiff contends the lower court impermissibly decided issues of fact, and held the plaintiff's complaint to a higher standard of proof than is necessary on a motion to amend the complaint. Plaintiff appeals from each and every part of the order from which she is aggrieved.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Rinat Dray	Plaintiff	Appellant
2	Staten Island University Hospital	Defendant	Respondent
3	Leonid Gorelik	Defendant	Respondent
4	Metropolitan OB-Gyn Associates PC	Defendant	Respondent
5	James J. Ducey	Defendant	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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E-mail Address:michael@michaelbastlaw.com				
Attorney Type: ■ Retained	☐ Assigned	☐ Government	☐ Pro Se	☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):1				
Attorney/Firm Name: Gerspach Sikoscow LLP				
Address:40 Fulton Street				
City:New York	State:NY	Zip:10038	Telephone No:212-422-0700	
E-mail Address:sikoscow@gerspachlaw.com				
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Party or Parties Represented (set forth party number(s) from table above):2 and 5				
Attorney/Firm Name: Belair & Evans LLP				
Address: 90 Broad Street 14th floor				
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E-mail Address:escheffiein@belairevans.com				
Attorney Type: ■ Retained	☐ Assigned	☐ Government	☐ Pro Se	☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above): 3 and 4				
Attorney/Firm Name:				
Address:				
City:	State:	Zip:	Telephone No:	
E-mail Address:				
Attorney Type: ☐ Retained	☐ Assigned	☐ Government	☐ Pro Se	☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):				
Attorney/Firm Name:				
Address:				
City:	State:	Zip:	Telephone No:	
E-mail Address:				
Attorney Type: ☐ Retained	☐ Assigned	☐ Government	☐ Pro Se	☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):				
Attorney/Firm Name:				
Address:				
City:	State:	Zip:	Telephone No:	
E-mail Address:				
Attorney Type: ☐ Retained	☐ Assigned	☐ Government	☐ Pro Se	☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):				

AFFIDAVIT OF SERVICE BY E-FILE and MAIL

State of New York }
}ss:
County of Kings }

Frances B. Bast, being duly sworn, deposes and says: I am over the age of 18 years, reside at Brooklyn, NY and am not a party to this action; that on October 31, 2019 deponent served within **Notice of Appeal** upon:

Gerspach & Sikoscow LLP
Attorneys for Staten Island University Hospital and James J. Ducey
40 Fulton Street
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(212) 422-0700

Belair & Evans LLP
Attorneys for Leonid Gorelik and
Metropolitan OB-GYN Associates, PC
90 Broad Street 14th floor
New York, NY 10004
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The address designed by said attorney(s) for that purpose by depositing a true copy of same enclosed in E-File and a post-paid, properly addressed wrapper, in a post office/official depository under the exclusive care and custody of the E-Filing and the United States Postal Service with the State of New York.

Frances B Bast
Frances B. Bast

Sworn to before me this
October 31, 2019

Notary Public

MICHAEL M. BAST
NOTARY PUBLIC, STATE OF NEW YORK
No. 02BA4780186
Qualified in Kings County
Commission Expires 5.31.23

Index #: 500510/14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

RINAT DRAY

Plaintiff,

-against-

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

Defendants

NOTICE OF APPEAL

MICHAEL M. BAST, P.C.
Attorney at Law
26 Court Street – Suite 1811
Brooklyn, New York 11242
(718) 852-2902

By: _____
Michael M. Bast, P.C.

Service of a copy of the within
is hereby admitted.

Dated: Brooklyn, New York

STATE OF NEW YORK)

COUNTY OF NEW YORK)

Filed
☒ Court Portal

Loree Chow, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at the address 7 West 36th Street, 10th floor, New York, New York 10018, that on the 2nd day of November, 2020, deponent personally served via email the

Motion for Leave to File Amicus Brief

upon the attorneys who represent the indicated parties in this action, and at the email addresses below stated, which are those that have been designated by said attorneys for that purpose.

Names of attorneys served, together within the names of the clients represented and the attorney's designated email addresses.

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and James J. Ducey
sikoscow@gerspachlaw.com

Sworn to before me this
2nd day of November, 2020.
E-Notarization Authorized by
N.Y.S Executive Order 202.7

SONJIA R. RICHARDS
Notary Public, State of New York
No. 03-4998375
Qualified in Bronx County
Commission Expires June 29, 2022

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