SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

CARMEN GRANCE and PABLO CRUZ as Administrator of the Estate of LOURDES GRANCE DEC'D,

Plaintiff(s),

- against -

JONATHAN ROSNER, MD, NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, NORTH SHORE UNIVERSITY HOSPITAL and GLEN COVE HOSPITAL,

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 12170/11

MOTION SEQUENCE NO. 1

MOTION SUBMISSION DATE: March 23, 2012

The following papers read on this motion:

Notice of Motion	X
Affidavit in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by plaintiff for an Order pursuant to CPLR 3025, granting plaintiffs leave to serve an amended complaint, in the form attached hereto, is determined as hereinafter provided:

The plaintiffs in the plaintiffs Verified Complaint set forth four causes of action sounding in conscious pain and suffering (*first cause of action*); lack of informed consent (*second cause of action*); wrongful death (*third cause of action*) and malpractice (*fourth cause of action*).

A review of the respective submissions establishes that the instant action arises out of a birth of a female child that occurred at the defendant Hospital on March 5, 2010 at approximately 2:40 am. The progress notes (*see Plaintiffs' reply Exhibit 1)* set forth that upon delivery multiple resuscitation efforts were commenced including intubation, CPR and IV administration in response to the child's condition "pale, limp, no detectable HR, no respirations". The child was pronounced dead at 3:06 am.

The plaintiffs' seek to add a Fifth Cause of Action. Said proposed cause of action sets forth:

'AS AND FOR A FIFTH CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

> Adult Plaintiff sustained severe and permanent and nonpermanent injuries as a result of the negligence and malpractice of Defendant(s) and agents, servants, and employees, including but not limited to, and emotional distress.
>
> The injuries and damages sustained by Adult Plaintiff were caused solely by the negligence and malpractice of Defendant(s) and agents, servants and employees without any negligence on the part of Adult Plaintiff contributing thereto.
>
> Adult Plaintiff sustained damages in excess of the jurisdictional limits of all lower courts, which might otherwise have jurisdiction."

To the extent that the plaintiffs seek to assert the proposed Fifth Cause as to the alleged emotional distress of the mother caused by the child's demise, the Court in **Broadnax v Gonzalez**, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 stated:

> In *Tebbutt v Virostek (65 NY2d 931 [1985])*, we held that a mother could not recover for emotional injuries when medical malpractice caused a still birth or miscarriage, absent a showing that she suffered a physical injury that was both distinct from that suffered by the fetus and not a normal incident of childbirth. Plaintiffs assert that *Tebbutt* is arbitrary and unfair, and should be overturned.
>
> *Tebbutt* reflected our longstanding reluctance to recognize causes of action for negligent infliction of emotional distress, especially in cases where the plaintiff suffered no independent physical or economic injury. Its holding was in keeping with our view that tort liability is not a panacea capable of redressing every substantial wrong. Although these concerns weigh heavily on us today, we are no longer able to defend *Tebbutt's* logic or reasoning.
>
> As its dissenters recognized, the rule articulated in *Tebbutt* fits uncomfortably into our tort jurisprudence. Infants who are injured in the womb and survive the pregnancy may maintain causes of action against tortfeasors responsible for their injuries (*see Woods v Lancet, 303 NY 349 [1951]).* Further, a pregnant mother may sue for any injury she suffers independently. A parent, however, cannot bring a cause of action for wrongful death when a pregnancy terminates in miscarriage or stillbirth (*see Endresz v Friedberg, 24 NY2d 478 [1969]).*
>
> Injected into this common-law framework, *Tebbutt* engendered a peculiar result' it exposed medical caregivers to malpractice liability for in utero injuries when the fetus survived, but immunized them against any liability when their malpractice caused a miscarriage or stillbirth. In categorically denying recovery to a narrow, but indisputably aggrieved, class of plaintiff, *Tebbutt* is at odds with the spirit and direction of our decisional law in this area. The Endresz court, for example, justified its holding - barring parents from suing in wrongful death on behalf of an unborn child - in part on the assumption that parents would have some legal recourse for a miscarriage or still birth resulting from negligent conduct (*id. at 486).*

> On its own terms, *Tebbutt*, may make formal sense, but it created a logical gap in which the fetus is consigned to a state of "juridical limbo" (*65 NY2d at 933 [Jason, J., dissenting]*). It is time to fill the gap. If the fetus cannot bring suit, "it must follow in the eyes of the law that any injury here was done to the mother" (*65 NY2d at 940 [Kaye, J., dissenting]*).
>
> Defendants maintain that *Tebbutt* states a sensible rule, one worth presenting, because the defendant physician in that case did not violate a duty to the expectant mother. We are not persuaded. In *Ferrara v Bernstein (81 NY2d 895 [1993])*, we permitted a plaintiff to recovery damages for emotional distress when she miscarried, following an unsuccessful abortion, on the ground that the treating physician violated a duty of care to his patient. Defendant would have us distinguish *Ferrara*, arguing that, in the cases before us, their alleged conduct injured only the fetuses, and, accordingly, they did not violate a duty to the expectant mothers. Defendants' reasoning is tortured. Although, in treating a pregnancy, medical professionals owe a duty of care to the developing fetus (as we impliedly recognized in *Woods v Lancet, 303 NY 349 [1951])*, they surely owe a duty of reasonable care to the expectant mother, who is, after all, the patient. Because the health of the mother and fetus are linked, we will not force them into legalistic pigeonholes.
>
> We therefore hold that, even in the absence of an independent injury, medical malpractice resulting in miscarriage or stillbirth should be construed as a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress."
>
> **see Broadnax v Gonzalez, supra at 153-155**

Thereafter the Court in **Sheppard-Mobley v King**, 4 NY3d 627, 797 NYS2d 403, 830 NE2d 301 set forth:

> "As we recognized in *Broadnax/Fahey,* our tort jurisprudence in this area created a "peculiar result" in that "it exposed medical caregivers to malpractice liability for in utero injuries when the fetus survived, but immunized them against any liability when their malpractice caused a miscarriage or stillbirth" (*2 NY3d at 154*). Moreover, we recognized the injustice created by aggrieved, class of plaintiffs" (*id.*). It was this particular injustice that we sought to rectify when we held that a mother caused a stillbirth or a miscarriage, even without a showing that she suffered an independent physical injury. In other words, our holding in *Broadnax/Fahey* is a narrow one, intended to permit a cause of action where otherwise none would be available to redress the wrongdoing that resulted in a miscarriage or stillbirth.
>
> In the case now before us, the Appellate Division improperly extended our decision in *Broadnax/Fahey* by reinstating Sheppard's sixth cause of action seeking damages for emotional harm based on the birth of a live infant with physical injuries. The rule pronounced in *Broadnax/Fahey* does not apply here, where infant plaintiff was injured in utero, but carried to term and born alive. After all, as we stated in *Wood v Lancet*, a child born alive may bring

> a medical malpractice action for physical injuries in the womb (*303 NY 349 [1951]*).
>
> **see Sheppard-Mobley v King, supra at 637**

Applying the foregoing to the facts as presented in the instant case, the female child born at 2:40 am was pronounced dead at 3:06 am. While Courts, philosophers, medical professions and theologians may offer various positions regarding the quality and viability of this 26 minute period, the progress notes supplied by the plaintiffs (*supra)* indicate that the female child was alive. As such, the Court of Appeals holding in **Sheppard-Mobley v King**, supra is applicable and to the extent that the plaintiffs seek to assert a cause of action for emotional distress of the plaintiff mother for the death of the female child, said cause of action is **denied** and cannot be asserted.

In relation to the foregoing, while the plaintiffs urge the Court to follow the holding of the Court in **Mendez v Bhattacharya**, 15 Misc3d 974, 838 NYS2d 378, as a Court of co-ordinate jurisdiction, the Court declines to follow said holding.

The Court observes that as to the proposed Fifth Cause of Action, the defendants through counsel set forth:

> "Defendants acknowledge that the adult plaintiff, Carmen Grance, is entitled to maintain a claim for emotional distress arising out of alleged malpractice resulting in her own alleged independent injury, in this case, aa ruptured uterus."

To the extent that the plaintiff seeks to assert the proposed Fifth Cause of Action in relation to the plaintiff Carmen Grance alleged independent injury, said application is **granted**.

Based upon all of the foregoing, the plaintiff's application for an Order pursuant to CPLR 3025, granting plaintiffs leave to serve an amended complaint, in the form attached hereto consisted with this Order, is **granted**. Plaintiffs shall serve said Amended Verified Complaint within 45 days of this Order.

SO ORDERED.

DATED: 5/29/2012

Ray S. Mahon
J.S.C.

ENTERED
JUN 04 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE