

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

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C/

_____AD3d_____

Argued - October 7, 2025

HECTOR D. LASALLE, P.J.
FRANCESCA E. CONNOLLY
LOURDES M. VENTURA
ELENA GOLDBERG VELAZQUEZ, JJ.

2021-06314

DECISION & ORDER

Mary Hidalgo, et al., appellants-respondents, v
Borimir Darakchiev, etc., respondent-appellant,
Good Samaritan Hospital Medical Center,
respondent, et al., defendants.

(Index No. 618491/16)

Nelson, Robinson & El Ashmawy, PLLC, New York, NY (Daniel X. Robinson of counsel), for appellants-respondents.

Abrams Fensterman, LLP, Lake Success, NY (Jennifer Larkin-Higgins of counsel), for respondent-appellant.

Fumuso, Kelly, Swart, Farrell, Polin & Christesen, LLP, Hauppauge, NY (Michelle C. Acosta and Scott G. Christesen of counsel), for respondent.

In an action, inter alia, to recover damages for medical malpractice, etc., the plaintiffs appeal, and the defendant Borimir Darakchiev cross-appeals, from an order of the Supreme Court, Suffolk County (George M. Nolan, J.), dated August 9, 2021. The order, insofar as appealed from by the plaintiffs, granted that branch of the motion of the defendant Good Samaritan Hospital Medical Center which was for summary judgment dismissing the complaint insofar as asserted against it. The order, insofar as appealed from by the defendant Borimir Darakchiev, denied those branches of his motion which were for summary judgment dismissing the causes of action alleging medical malpractice and loss of consortium insofar as asserted against him.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting those branches of the motion of the defendant Good Samaritan Hospital Medical Center which were for summary judgment dismissing so much of the causes of action alleging medical

malpractice and loss of consortium insofar as asserted against it as were based on acts occurring after May 15, 2014, and substituting therefor a provision denying those branches of the motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, with one bill of costs payable by the defendant Borimir Darakchiev to the plaintiffs.

On April 10, 2013, the plaintiff Mary Hidalgo (hereinafter the injured plaintiff) was admitted to the defendant Good Samaritan Hospital Medical Center (hereinafter the hospital), where the defendant Borimir Darakchiev performed a lumbar decompressive laminectomy and intervertebral fusion. In the days following the surgery, the injured plaintiff had significant discharge from her surgical drain, and on April 16, 2013, Darakchiev performed an exploratory surgery on the injured plaintiff during which he discovered and repaired a dural defect. On April 18, 2013, the injured plaintiff was discharged from the hospital, and began following up with Darakchiev at his office. On May 19, 2013, Darakchiev admitted the injured plaintiff to the hospital after learning that she had a fever and that her incision appeared red and swollen. At the hospital, the injured plaintiff received an MRI, which showed diffuse disc desiccation and the presence of two separate dorsal fluid collections. Darakchiev performed another exploratory surgery during which he discovered and repaired a second dural defect. The injured plaintiff was discharged again on May 25, 2013. Beginning in July 2013, Darakchiev would send orders to the hospital for the injured plaintiff to receive outpatient radiological imaging prior to each of her in-office follow-ups. The MRIs were conducted at the hospital on July 14, 2013, July 29, 2013, August 16, 2013, November 19, 2013, and May 16, 2014. The MRIs indicated that the injured plaintiff had a fluid collection at the surgical site, which Darakchiev monitored until the injured plaintiff's final appointment with him on May 23, 2014.

On November 15, 2016, the injured plaintiff, and her husband suing derivatively, commenced this action against Darakchiev and the hospital, among others, inter alia, to recover damages for medical malpractice and negligent hiring arising from treatment rendered by Darakchiev and the hospital between April 10, 2013, and May 23, 2014. The hospital moved, among other things, for summary judgment dismissing the complaint insofar as asserted against it. Darakchiev moved, inter alia, for summary judgment dismissing the causes of action alleging medical malpractice and loss of consortium insofar as asserted against him. The plaintiffs opposed both motions. In an order dated August 9, 2021, the Supreme Court, among other things, granted that branch of the hospital's motion on statute of limitations grounds, and denied those branches of Darakchiev's motion. The plaintiffs appeal, and Darakchiev cross-appeals.

“A defendant seeking summary judgment in a medical malpractice action must make a prima facie showing either that he or she did not depart from the accepted standard of care or that any departure was not a proximate cause of the plaintiff's injuries” (*M.T. v Lim*, 203 AD3d 778, 778 [internal quotation marks omitted]; see *Rodriguez v Avshalumov*, 238 AD3d 1082, 1083). “In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars” (*Donohue v Grossman*, 233 AD3d 1003, 1005, quoting *Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 912). “The general rule is that [a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars” (*Rich v Donnenfeld*, 191 AD3d 909, 910, quoting *Larcy*

v Kamler, 185 AD3d 564, 566). “If the theory is discernable from the pleadings, it may be considered, especially if the theory is referred to in the depositions” (*id.*, quoting *Larcy v Kamler*, 185 AD3d at 566; see *Palagye v Loulmet*, 203 AD3d 729, 731). “Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions” (*Walker v Jamaica Hosp. Med. Ctr.*, 208 AD3d 714, 716 [internal quotation marks omitted], quoting *Palagye v Loulmet*, 203 AD3d at 730; see *Pirri-Logan v Pearl*, 192 AD3d 1149, 1150).

Here, Darakchiev established his prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as alleged medical malpractice insofar as asserted against him by submitting, inter alia, an affirmation of his expert, who opined that Darakchiev’s treatment of the injured plaintiff was within the appropriate standard of care, and that any alleged departure did not proximately cause the injured plaintiff’s alleged injuries (see *Walker v Jamaica Hosp. Med. Ctr.*, 208 AD3d at 716; *M.T. v Lim*, 203 AD3d at 779). However, in opposition, the plaintiffs raised a triable issue of fact by submitting, among other things, an affirmation of their expert, a board-certified radiologist, who opined that the injured plaintiff’s radiological imaging indicated that Darakchiev had misplaced pedicle screws in the initial fusion surgery. Additionally, the plaintiffs submitted an affirmation of a physician who was board certified in neurological surgery, who opined that the misplacement was a deviation from the standard of care, and that the injured plaintiff’s dural tears were iatrogenic injuries secondary to the initial fusion surgery. Although the plaintiffs’ theory that misplaced hardware caused the injured plaintiff’s dural tears was not specifically alleged in the complaint or the bill of particulars, the theories were referenced by the plaintiffs’ counsel during Darakchiev’s deposition, and thus, they were appropriately raised in opposition to Darakchiev’s motion (see *Valerio v Chaudhry*, 241 AD3d 593, 596; *Walker v Jamaica Hosp. Med. Ctr.*, 208 AD3d at 717; *M.T. v Lim*, 203 AD3d at 780). Accordingly, the Supreme Court properly denied those branches of Darakchiev’s motion which were for summary judgment dismissing the causes of action alleging medical malpractice and loss of consortium insofar as asserted against him (see *Walker v Jamaica Hosp. Med. Ctr.*, 208 AD3d at 717; *M.T. v Lim*, 203 AD3d at 780).

The hospital established its prima facie entitlement to judgment as a matter of law dismissing so much of the causes of action alleging medical malpractice and loss of consortium insofar as asserted against it as were based on allegations of medical malpractice occurring prior to May 16, 2014, by demonstrating that the action was commenced more than two years and six months after the alleged acts of malpractice occurred, with the exception of one outpatient radiology examination completed on May 16, 2014 (see *Rhodes v Van Valkenburg*, 236 AD3d 838, 839; *Cole v Richard G. Karanfilian, M.D., P.C.*, 117 AD3d 670, 671). In opposition, the plaintiffs failed to raise a triable issue of fact as to whether the statute of limitations was tolled by the application of the continuous treatment doctrine (see *Rhodes v Van Valkenburg*, 236 AD3d at 839; *Cole v Richard G. Karanfilian, M.D., P.C.*, 117 AD3d at 671). “In general, the continuous treatment doctrine does not apply to a diagnostician, such as a radiologist, who renders discrete, intermittent medical services, unless the diagnostician has a continuing or other relevant relationship with the patient or acts as an agent for the physician or otherwise acts in relevant association with the physician” (*Cole v Richard G. Karanfilian, M.D., P.C.*, 117 AD3d at 672, quoting *Kaufmann v Fulop*, 47 AD3d 682, 684; see *McDermott v Torre*, 56 NY2d 399, 408; *Elkin v Goodman*, 24 AD3d 717, 718).

Here, there is no indication that the injured plaintiff or the hospital anticipated that the hospital would provide the injured plaintiff with ongoing treatment. The injured plaintiff's outpatient imaging appointments were scheduled upon orders sent by Darakchiev prior to her follow-up appointments in his private practice. The record indicates that the interpreting radiologists did not make treatment recommendations, and Darakchiev's medical records indicate that he independently analyzed the imaging. Under these circumstances, the injured plaintiff's post-discharge outpatient imaging appointments were "discrete and complete" services, and did not constitute a continuous course of treatment (*Elkin v Goodman*, 24 AD3d at 718; see *Cole v Richard G. Karanfilian, M.D., P.C.*, 117 AD3d at 672; *Kaufmann v Fulop*, 47 AD3d at 684). Moreover, the record contains no evidence that there was a relevant association between Darakchiev and the hospital for purposes of the continuous treatment doctrine (see *Ruane v Niagara Falls Mem. Med. Ctr.*, 60 NY2d 908, 909; *McDermott v Torre*, 56 NY2d at 408; *Kaufmann v Fulop*, 47 AD3d at 684).

As to the care rendered by the hospital on May 16, 2014, the hospital argued in the Supreme Court, and contends as an alternative ground for affirmance (see *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), that the plaintiffs' allegation that a hospital radiologist negligently misinterpreted the injured plaintiff's radiological imaging taken on May 16, 2014, was improperly raised for the first time in opposition to the hospital's motion for summary judgment. However, the complaint, as amplified by the bill of particulars, alleged that the injured plaintiff underwent a continuous course of treatment at the hospital ending on or about May 23, 2014, and that the hospital's employees negligently failed "to properly assess . . . diagnostic . . . results," and that the negligent conduct occurred on "each and every date" the hospital's employees "evaluated" the injured plaintiff. The injured plaintiff's radiological imaging and interpretation thereof were the only services rendered to her on May 16, 2014.

“[A] defendant's expert's affidavit or affirmation that merely recount[s] the treatment rendered and opine[s] in a conclusory manner that such treatment did not represent a departure from good and accepted medical practice is insufficient to meet [the defendant's] burden” (*In v Maimonides Med. Ctr.*, 240 AD3d 764, 765, quoting *Buzeska v Crystal Run Healthcare Physicians, LLP*, 234 AD3d 656, 658). Here, the hospital failed to establish its prima facie entitlement to judgment as a matter of law dismissing so much of the causes of action alleging medical malpractice and loss of consortium insofar as asserted against it as were based on acts occurring after May 15, 2014. The hospital submitted, inter alia, an affirmation of an expert, whose opinion regarding the injured plaintiff's outpatient radiology appointments was conclusory (see *id.*; *Buzeska v Crystal Run Healthcare Physicians, LLP*, 234 AD3d at 658). Accordingly, the Supreme Court should have denied those branches of the hospital's motion, regardless of the sufficiency of the plaintiffs' opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *In v Maimonides Med. Ctr.*, 240 AD3d at 765).

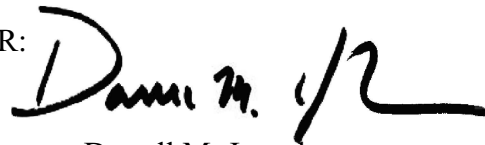
However, contrary to the plaintiffs' contention, the Supreme Court properly granted that branch of the hospital's motion which was for summary judgment dismissing the cause of action alleging negligent hiring. “Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training” (*Garcia v Hollander*, 241 AD3d 651, 654 [internal quotation marks omitted], quoting

Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation, 147 AD3d 739, 741-742; see *Talavera v Arbit*, 18 AD3d 738, 738). “[A]n exception exists to this general principle where . . . the injured plaintiff seeks punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee” (*S.W. v Catskill Regional Med. Ctr.*, 211 AD3d 890, 891, quoting *Talavera v Arbit*, 18 AD3d at 738-739). Here, the hospital demonstrated, prima facie, that its employees acted within the scope of their employment when they engaged in the acts that the plaintiffs allege deviated from the standard of care. In opposition, the plaintiffs failed to raise a triable issue of fact with respect to the applicability of the exception.

The parties’ remaining contentions either are without merit or need not be reached in light of our determination.

LASALLE, P.J., CONNOLLY, VENTURA and GOLDBERG VELAZQUEZ, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Darrell M. Joseph", followed by a long horizontal flourish.

Darrell M. Joseph
Clerk of the Court