

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 25-00120

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

HEATHER J. AND ANTONIO T., AS PARENTS AND
NATURAL GUARDIANS OF CHASE T., A MINOR,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ROCHESTER REGIONAL HEALTH, UNITY HOSPITAL AND
GENEA I. HASKIN, R.N., DEFENDANTS-APPELLANTS.

BROWN, GRUTTADARO & PRATO, PLLC., ROCHESTER (HALI S. BUCKLEY OF
COUNSEL), FOR DEFENDANTS-APPELLANTS ROCHESTER REGIONAL HEALTH AND
UNITY HOSPITAL.

REBAR KELLY LLC, NEW YORK CITY (JAYNE L. BRAYER OF COUNSEL), FOR
DEFENDANT-APPELLANT GENEA I. HASKIN, R.N.

JANET, JANET & SUGGS, LLC, BALTIMORE, MARYLAND (ANDREW JANET OF
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered August 5, 2024, in a medical malpractice action. The order denied the motion of defendant Genea I. Haskin, R.N., for summary judgment and denied in part the motion of defendants Rochester Regional Health and Unity Hospital for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendants Rochester Regional Health and Unity Hospital and striking the allegations against those defendants of lack of informed consent from plaintiffs' amended bill of particulars and by dismissing the claims of medical malpractice against those defendants to the extent that they are not based on the alleged medical malpractice of defendant Genea I. Haskin, R.N., and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by their son during his birth as a result of the alleged medical malpractice of defendants Rochester Regional Health and Unity Hospital (collectively, Hospital defendants) and Genea I. Haskin, R.N., in failing to timely diagnose, respond to, and treat a uterine rupture. Following discovery, the Hospital defendants and Haskin separately moved for summary judgment dismissing the complaint against them. Supreme Court denied the Hospital defendants' motion in part and denied Haskin's motion in its entirety.

The Hospital defendants and Haskin separately appeal.

We agree with the Hospital defendants that the court erred in denying that part of their motion seeking, in effect, to strike the allegations of lack of informed consent from plaintiffs' amended bill of particulars to the Hospital defendants, and we modify the order accordingly. "[A] bill of particulars is intended to amplify the pleadings, limit the proof, and prevent surprise at trial . . . Whatever the pleading pleads, the bill must particularize since the bill is intended to [afford] the adverse party a more detailed picture of the claim . . . being particularized . . . A bill of particulars may not be used to allege a new theory not originally asserted in the complaint" (*Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011] [internal quotation marks omitted]; see *Sebring v Wheatfield Props. Co.*, 255 AD2d 927, 928 [4th Dept 1998]). For those purposes, "[l]ack of informed consent is a distinct theory of medical malpractice liability rooted in a specific professional duty to reasonably inform and obtain consent from the patient," and claims for traditional medical malpractice and lack of informed consent " 'comprise[] different elements' " (*SanMiguel v Grimaldi*, — NY3d —, —, 2025 NY Slip Op 05780, *3 [2025]; see *Raymond v Ryken*, 98 AD3d 1265, 1266 [4th Dept 2012]). Here, we conclude that "[t]he complaint is based solely on [traditional] medical malpractice and does not contain a separate cause of action for lack of informed consent" (*Connelly v Warner*, 248 AD2d 941, 942 [4th Dept 1998]) and that a review of the allegations in the complaint does not support the conclusion that the distinct theory of lack of informed consent was " 'sufficiently pleaded to avoid surprise and prejudice to [the Hospital] defendants' " (*Clark v Cucinotta*, 229 AD3d 1106, 1107 [4th Dept 2024]; see *Connelly*, 248 AD2d at 942-943). Inasmuch as plaintiffs' complaint does not presently plead a cause of action for lack of informed consent, the allegations in plaintiffs' amended bill of particulars relating to lack of informed consent must be stricken (see *Connelly*, 248 AD2d at 942-943).

Contrary to Haskin's contention, we conclude that the court properly denied her motion for summary judgment. Haskin met her initial burden of establishing her entitlement to judgment as a matter of law on deviation from the accepted standard of care through the submission of an expert affidavit that was "detailed, specific and factual in nature[,] . . . addressed each negligence claim raised in [plaintiffs' amended] bill of particulars" relating to her (*Kristie M. v Mercy Hosp. of Buffalo*, 240 AD3d 1228, 1229 [4th Dept 2025] [internal quotation marks omitted]), and opined that Haskin did not deviate from good and accepted medical practice (see *Nesterenko v Hall*, 239 AD3d 1314, 1315 [4th Dept 2025]; *Wicks v Virk*, 198 AD3d 1315, 1315 [4th Dept 2021]; *Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]). The burden then shifted to plaintiffs "to raise triable issues of fact by submitting an expert's affidavit . . . attesting to a departure from the accepted standard of care" (*Nesterenko*, 239 AD3d at 1315 [internal quotation marks omitted]; see *Ziemendorf v Chi*, 207 AD3d 1157, 1157-1158 [4th Dept 2022]). In opposition, plaintiffs submitted an expert affidavit of an obstetrician/gynecologist opining that Haskin deviated from the accepted standard of care by, inter

alia, failing to properly monitor the fetal heart rate, with the result that the attending obstetrician received untimely notice of the uterine rupture, which " 'squarely opposes' " the affidavit of Haskin's expert and results in " 'a classic battle of the experts that is properly left to a jury for resolution' " (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

Contrary to the Hospital defendants' contention, plaintiffs' assertion that Haskin was acting as their agent is not raised for the first time on appeal. We further agree with plaintiffs that the Hospital defendants failed to meet their initial burden of establishing as a matter of law that, because Haskin was a traveling nurse contracted to work at Unity Hospital and not an employee, Unity Hospital did not " 'maintain[] control over the manner and means of [her] work' " and plaintiffs did not " 'reasonably believe[] that [she was] provided by the hospital or acted on the hospital's behalf' " (*Pasek v Catholic Health Sys., Inc.*, 195 AD3d 1381, 1382 [4th Dept 2021]; see *Torns v Samaritan Hosp.*, 305 AD2d 965, 966-967 [3d Dept 2003]). Thus, inasmuch as the court properly found triable issues of fact with respect to the malpractice claim against Haskin, summary judgment dismissing the related vicarious liability claim against the Hospital defendants based upon the alleged malpractice of Haskin was properly denied (see *Pezulich v Grecco*, 206 AD3d 827, 829 [2d Dept 2022]; *Wilk v James*, 107 AD3d 1480, 1484-1485 [4th Dept 2013]).

However, we agree with the Hospital defendants that the court erred in not dismissing the remaining claims against them. The Hospital defendants met their initial burden of establishing their entitlement to judgment as a matter of law on deviation, with respect to plaintiffs' claims of direct liability against the Hospital defendants and vicarious liability of the Hospital defendants for the alleged malpractice of three of their employees, through the submission of an expert affidavit that was "detailed, specific and factual in nature[,] . . . addressed each negligence claim raised in [plaintiffs' amended] bill of particulars" relating to them (*Kristie M.*, 240 AD3d at 1229), and opined that the Hospital defendants and the three employees did not deviate from good and accepted medical practice (see *Nesterenko*, 239 AD3d at 1315; *Wicks*, 198 AD3d at 1315; *Webb*, 133 AD3d at 1386). The burden then shifted to plaintiffs (see *Nesterenko*, 239 AD3d at 1315; *Ziemendorf*, 207 AD3d at 1157-1158). The affidavit of plaintiffs' expert obstetrician/gynecologist addressed the Hospital defendants' conduct only with respect to the claim arising from Haskin's alleged failure to properly monitor the fetal heart rate. By not submitting the requisite expert medical response in opposition to the motion on the claims of direct liability against the Hospital defendants and their vicarious liability regarding the actions or omissions of the three employees, plaintiff failed to raise a triable issue of fact as to those claims (see *Nesterenko*, 239 AD3d at 1315; *Webb*, 133 AD3d at 1387). The court thus erred in denying the Hospital defendants' motion insofar as it sought to dismiss plaintiffs' claims for medical malpractice against them to the extent that they are not based on the alleged medical malpractice of Haskin,

and we further modify the order accordingly.

In light of our determination, we do not reach the remaining contentions of the Hospital defendants.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court