SHORT FORM ORDER

INDEX No. 04-673
CAL. No. 06-02183-MM

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 1-19-07 (003)
1-29-007 (004) (005)
ADJ. DATE 4-12-07
Mot. Seq. # 003 - MD
004 - MD
005 - MD

GREGG ALPER and MARIA ALPER, Plaintiffs, - against - JOSEPH ANTHONY DiMEO, M.D., JOSEPH A. DiGIOVANNA, D.O., MICHAEL DiGIOVANNA, D.O., GERI DiGIOVANNA, D.O., DiGIOVANNA FAMILY CARE CENTER, JOSEPH, MICHAEL & GERI DiGIOVANNA, D.O., P.C., JOSEPH DiGIOVANNA & MICHAEL DiGIOVANNA, D.O., P.C., JEROME M. WEINRAUB, M..D., ZWANGER & PESIRI RADIOLOGY GROUP, LLP, PORT INTERVENTIONAL RADIOLOGY, P.C., BROOKHAVEN IMAGING, P.C., STEVEN ROBBINS, M.D., NORTH NASSAU UROLOGICAL ASSOCIATES, P.C. and ISLAND MEDICAL ASSOCIATES, P.C., Defendants.	DUFFY, DUFFY & BURDO, ESQ. Attorneys for Plaintiffs 1370 Reckson Plaza Uniondale, New York 11556-1370 LEWIS JOHS AVALLONE, et al. Attys for Defts DiMeo & DiGiovanna 425 Broad Hollow Road, Suite 400 Melville, New York 11747 ROGAK & GIBBONS, LLP Attys for Defts Weinraub & Zwanger 90 Merrick Avenue East Meadow, New York 11554 VARDARO & HELWIG Attys for Defts Robbins & Nassau Urological 732 Smithtown Bypass, Suite 203 Smithtown, New York 11787

Upon the following papers numbered 1 to 69 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers 22-32; 33-45; Answering Affidavits and supporting papers 46-63; Replying Affidavits and supporting papers 64-65; 66-67; 68-69 Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (003) by defendants Joseph Anthony DiMeo, M.D., Michael DiGiovanna, D.O., Geri DiGiovanna, D.O., DiGiovanna Family Care Center, Joseph, Michael & Geri DiGiovanna, D.O., P.C., and Joseph DiGiovanna & Michael DiGiovanna, D.O.,P.C. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, opposed by plaintiffs, is

denied; and it is further

ORDERED that this motion (004) by defendants Steven Robbins, M.D., and North Nassau Urological Associates, P.C. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, opposed by plaintiffs, is denied; and it is further

ORDERED that this motion (005) by defendants Jerome M. Weintraub, M.D., and Zwanger & Pesiri Radiology Group, L.L.P. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, opposed by plaintiffs, is denied.

The complaint of this action sets forth causes of action sounding in medical malpractice and lack of informed consent on behalf of plaintiff Gregg Alper, with a derivative cause of action for loss of services asserted on behalf of Maria Alper. Plaintiff alleges defendants failed to timely and properly diagnose cancer, more specifically, a tumor in the Ewing's sarcoma family known as a Primitive Neuroectodermal Tumor (PNET). Plaintiff first presented for medical care in October, 2001, after noticing a lump in his right scrotum in late September, 2001. Plaintiff alleges that the tumor was misdiagnosed as a benign epididymal cyst and a small hydrocele, and that defendants failed to detect the presence of a solid mass and appropriately diagnose and treat it. Plaintiff alleges a delay in diagnosing and treating his condition, and claims his chances for a cancer-free survival have diminished, and his risk of recurrence has increased as a result of defendants' negligence. He also claims that as a result of defendants' alleged departures, he necessitated a right radical orchiectomy, and suffers from permanent and unsightly scarring, advancement and spread of the cancer, necessity for radiation therapy and adjuvent chemotherapy with resulting sequelae therefrom, cancer phobia, and emotional distress, depression and anxiety.

Defendants allege there were no departures from the appropriate medical/urological standards of care and that the tumor ultimately found in April, 2003 was a new, independent disease, which had not been previously present in 2001 and 2002, and they did not fail to diagnose and treat the condition. They also argue that plaintiff's treatment would have been the same in 2001 as it was in 2003 when the Ewing's Sarcoma was diagnosed. Thus the moving defendants seek an order granting summary judgment dismissing the complaint asserted against them.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503[1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see,* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674, 638 NYS2d 700 [1996]) Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see,* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [1994]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

Turning to motion (003), by defendants, Dr. DiMeo and the DiGiovanna Family Care Center, as evidenced by the deposition transcript of defendant DiMeo (defendants' exhibit C), defendants began treating plaintiff in August, 1999. Defendant DiMeo, an employee of the DiGiovanna Family Care Center first saw plaintiff on October 1, 2002 wherein plaintiff was complaining of a cough, and swelling and pain in his right testicle for one day. Defendant DiMeo performed an examination of plaintiff's genitalia and noted a firm and mobile nodule on the right testicular apex. He considered the diagnosis of epididymitis, prescribed antibiotics, and referred Mr. Alper for a scrotal sonogram. The ultrasound was performed on October 4, 2001 at Zwanger & Pesiri Radiology Group, LLP. There was a note dated October 4, 2001 in plaintiff's medical record, entered by a medical assistant and signed off by defendant DiMeo, concerning a verbal report from defendant Zwanger's office, wherein it is stated there was an "Asymmetric epididymis, right greater than left, small epididymal cyst, hydrocele". Thereafter, defendant Geri DiGiovanna noted, "Fluid surrounding the testicle on the right. Abnormally (sic) no treatment".

Defendant DiMeo testified he did not initially feel plaintiff had cancer, but stated any doctor that evaluates a patient with any mass is concerned about cancer. Thereafter, Mr. Alper was seen November 14, 2001 at the DiGiovanna facility. The note indicates right hydrocele, for which Ceftin was prescribed, and which antibiotic was then changed to Augmentin. Defendant DiMeo also stated he received a report from the urologist, Dr. Robbins, whose impression was that plaintiff had a benign spermatocele.

Plaintiff was seen by the group on December 26, 2001 for a sinusitis and exudative pharyngitis, but no scrotal examination was performed. Plaintiff did not keep his appointment of June, 2002, but was seen September 10, 2002, at which time, as indicated by defendant DiMeo's note, a genitourinary examination was performed with normal findings. On October 15, 2002, plaintiff had an employment physical exam by the nurse practitioner, Dorothy Ferraro, but there is no indication a genitourinary examination was performed.

Defendant DiMeo also testified that he reviewed a urological report of May, 2003 from Dr. Kohan who had seen Mr. Alper and stated he did not feel that what was contained in Dr. Kohan's report in 2003 was related to Mr. Alper's condition of October, 2001.

Defendants DiMeo and DiGiovanna Family Care Center have submitted, inter alia, various medical records, and their expert's report (defendants' exhibit R). Defendants' expert, Howard Kolodny, M.D. states he a physician duly licensed to practice medicine in the State of New York and is Board Certified in Internal Medicine. It is his opinion based upon a reasonable degree of medical certainty, that the care and treatment rendered by these defendants, staff, agents and employees from October 1, 2001 through February 20, 2003, were at all times in conformity with good and accepted medical practice, and that none of Gregg Alper's alleged injuries were proximately caused by any of the care and treatment rendered by these defendants. Defendants' expert states that after defendant DiMeo examined plaintiff and noted the presence of a firm and mobile nodule at the apex of the right testicle, he appropriately sent Mr. Alper for a scrotal ultrasound and placed him on antibiotics. After discussing the results of the ultrasound with Mr. Alper, Dr. DiMeo referred him to a urologist, Steven Robbins, M.D., who subsequently informed Dr. DiMeo that Mr. Alper had a benign spermatocele which required no further urological intervention. Defendants' expert opines that it was proper for a family practitioner to rely on the experience and expertise of Dr. Robbins, a specialist.

Defendants' expert also sets forth that on December 26, 2001, Mr. Alper made no complaints regarding his scrotum or testicle and therefore no examination of the scrotum or testicle was done at the DiGiovanna facility. On July 29, 2002, Mr. Alper saw the urologist, Dr. Robbins, and complained of increased pain in the right scrotum over the last three months. Surgery was recommended and scheduled for August 9, 2002, but was cancelled and rescheduled for October, 2002, then cancelled again by Mr. Alper.

Plaintiff was ultimately diagnosed with Ewing's sarcoma. Dr. Kolodny opined Ewing's Sarcoma is almost always a skeletal tumor and is usually found in children under the age of twenty, is extremely rare in the testicular region of the older adult male, and the failure of a family practitioner to diagnose such a rare bone tumor in an adult male is not a departure from the relevant standards of medical practice. The October 4, 2001 sonogram showed no abnormalities consistent with a neoplasm, but revealed three indistinguishable cysts, none of which appeared unusual or malignant. There was some asymmetry with the right epididymis, but no malignancy. Defendants' expert also opines that Ewing's Sarcoma is a quickly growing tumor, and if the mass palpated in October 2001 was actually Ewing's Sarcoma, the mass excised in April 2003 would likely have been much larger, and he would have experienced no relief from feelings of pain or discomfort from the onset. It was only after Mr. Alper's sudden onset of pain in February 2003 that the mass began displaying the appropriate clinical behavior for Ewing's Sarcoma. Therefore, opines defendants' expert, the mass palpated in October, 2001 was not the same mass ultimately diagnosed as Ewings Sarcoma in 2003. Defendants' expert also states that regardless when the tumor was diagnosed, the nature of the treatment would not have been any different as Ewing's Sarcoma comes only in two staging variants, Stage III (localized tumor with Ewing's pathology) and Stage IV (metastatic Ewing's Sarcoma), and in Mr. Alper's case, it never metastasized. He would have required a right orchiectomy and aggressive chemotherapy with either.

Based upon the foregoing opinions set forth in the affirmation of defendants' expert, defendants

DiMeo and DiGiovanna have demonstrated prima facie entitlement to an order granting summary judgment.

In motion (004), defendant Steven Robbins, M.D. and North Nassau Urological Associates, P.C. seek an order granting summary judgment.

Defendant Steven Robbins testified at his examination before trial (defendant DiMeo exhibit G) that he became a partner and shareholder in North Nassau Urological Associates in 1999. Mr. Alper first presented to his office on October 10, 2001, having been referred by Dr. DiMeo. Defendant Robbins had a copy of the ultrasound report of Zwanger & Pesiri of October 4, 2001 in his office record. Upon presentation to the office, Mr. Alper was described as a thirty year old male with complaints of a scrotal mass. History revealed he noticed a small mass in his right testicle one week prior with pain in the right hemiscrotum. Mr. Alger told Dr. Robbins the sonogram was normal, no cancer, and he was treated with antibiotics without significant change in the symptoms. He also described occasional pain radiating from his back to his right lower extremity. Upon examination, defendant Robbins noted the testicles were soft, nontender, with no masses intratesticularly palpable. There was one soft, round, mobile, nonadherent, nontender, fluctuant extrastesticular cyst (.5 millimeters) on the superior portion of his right testicle which he diagnosed as an epididymal cyst, also known as a spermatocele. An erythematous rash was also noted in his right groin which defendant Robbins diagnosed as a fungal infection. He ruled out the possibility of a cancerous process based upon the physical examination, interpretation of radiologic information, and differential diagnoses in relationship to history. Mr. Alper was advised by Dr. Robbins to continue his antibiotics although he did not concur that Mr. Alger had epididymitis. He was also advised to treat his fungal infection with over-the counter medications, follow up with his doctor if his right lower extremity pain continues, perform at least a monthly self-testicular examination, if things changed, to call him immediately, and if not, follow up in six months. Defendant Robbins further testified that in October, 2001, a biopsy, excision of the mass, and any other testing were not indicated to evaluate the mass.

Mr. Alper was rescheduled for an appointment with Dr. Robbins on March 6, 2002, but did not show up for the appointment. He was then seen in July, 2002 for complaints of increasing pain in the right testicle-right scrotum over the last three months prior to the visit. When Dr. Robbins examined Mr. Alper, he found an increase in the size of the cyst he previously palpated, and noted it was tender. Dr. Robbins testified there was no indication for performing another scrotal sonogram in July, 2002. Defendant Robbins recommended that Mr. Alger have his right spermatocele removed due to the pain. Elective surgery was scheduled for August 9, 2002, but was cancelled by plaintiff on August 6, 2002, then rescheduled for October 18, 2002, but cancelled again.

In support of defendant Robbins motion for summary judgment, defendant has also submitted, inter alia, the affirmation of his expert, Dr. David Beccia, M.D. (exhibit H), a board certified urologist licensed to practice medicine in the State of New York. Dr. Beccia opines with a degree of medical certainty that the care and treatment rendered to Gregg Alper by Dr. Robbins was at all times within good and accepted medical practice. Defendant's expert states that when Dr. Robbins saw Mr. Alper on October 10, 2001, he appropriately diagnosed a right epididymal cyst on the basis of Mr. Alper's history, physical examination and review of the scrotal sonogram report of October 4, 2001. He also stated Dr. Robbins appropriately recommended Mr. Alper have surgical excision of the epididymal cyst.

Defendant Robbins expert further sets forth that on February 20, 2003, Mr. Alper was seen by a subsequent treating urologist for the acute onset of right groin, scrotal and testicular pain of one day origin, thought to be epididymitis. On April 18, 2003, Mr. Alger was hospitalized at NSUH, Plainview where a right inguinal exploration, epididymal biopsy, evacuation of a hematocele, and right radical orchiectomy was performed. Tissue pathology revealed a primative neuroectodermal tumor/Ewing's Sarcoma.

Dr. Breccia also avers that Ewing' Sarcoma, primative neuroectodermal tumor, is a rare bone or connective tissue tumor which ordinarily occurs in childhood and is a fast growing heterogeneous, solid tumor, and occurrence in adult paratesticular tissue is incredibly rare. The expert concludes with a reasonable degree of medical certainty that the only pathology present within the plaintiff's right hemi-scrotum during the time within which Dr. Robbins rendered care or treatment to Mr. Alper was a right epididymal cyst because Mr. Alper would have had a different clinical history and different findings on physical examination, and different findings on scrotal sonogram. He therefore concludes that the clinical entity that brought Mr. Alper under the care and treatment of Dr. Robbins in October 2001 through October 2002 was a benign epididymal cyst not related to a primitive neuroectodermal tumor/Ewing's Sarcoma, which represented a new, independent disease which occurred subsequent to the care and treatment rendered by Dr. Robbins.

Based upon the foregoing, defendant Robbins and North Nassau Urological Associates, P.C. have demonstrated prima facie entitlement to an order granting summary judgment.

In motion (005), defendants Jerome M. Weinraub, M.D. and Zwanger & Pesiri Radiology Group, L.L.P. seek an order granting summary judgment dismissing the complaint as asserted against them. Counsel for defendants sets forth in her affirmation that it is the posture of Dr. Weintraub and Zwanger & Pesiri Radiology that plaintiff cannot make out a proximate cause argument against them. In support of this motion, defendants have submitted, inter alia, a copy of the deposition transcript of Dr. Weinraub (defendants exhibit H) and the "expert affidavit" of Howard Kolodny, M.D. (exhibit F) and the expert affirmation of David Beccia, M.D., previously submitted by defendants DiMeo, DiGiovanna, and Robbins in support of their opposing papers. Defendants Weinraub and Zwanger & Pesiri offer no expert testimony with regard to the claimed departures from the good and accepted standards of medical/radiological care by defendants as alleged by plaintiff, and therefore, the application for summary judgment and subsequent analysis is limited to the issue of proximate cause.

Dr. Kolodny and Dr. Beccia have both opined, as set forth above, on the issue of departures and on the issue of proximate cause, indicating that the Ewing's Sarcoma/PNET tumor was not present in October, 2001, and that the condition that plaintiff was treated for by defendants was different from the Ewing's Sarcoma/PNET tumor diagnosed at a later date.

Based upon the foregoing, it is determined defendants Jerome M. Weinraub, M.D. and Zwanger & Pesiri have demonstrated prima facie entitlement to an order granting summary judgment on the issue of proximate cause.

Plaintiff has opposed these three motions for summary judgment. To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the

existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see,* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.,*** 7 AD3d 759, 776 NYS2d 907 [2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.,*** 242 AD2d 282, 660 NYS2d 739 [1997]). In support of plaintiff's opposition, plaintiff has submitted, inter alia, the affirmations of three expert witnesses with their names redacted. Copies of these affirmations with the experts' names and signatures have been provided to this court under separate cover.[1]

Plaintiff's expert, who is licensed to practice medicine in the State of New York and who is board certified in urology, has rendered opinions as to the care rendered by Dr. DiMeo, the DiGiovanna defendants, Dr. Robbins and North Nassau Urological (exhibit A). Plaintiff's expert states Ewing Sarcomas are primitive tumors that can develop in any part of the body in bone or soft tissue. The soft tissue sarcomas in the Ewing's Sarcoma family of tumors are known as Primitive Neuroectodermal Tumors (PNETs). Ewing's Sarcomas are the second most common and most lethal malignant bone tumor, with forty percent found in the pelvis. The initial manifestation of a Ewing's Sarcoma is pain at the site of the tumor and often the mass will be palpable. Pain is the most important and earliest symptom, which may present on an intermittent basis. Eventually, most patients have a large, palpable mass, with tense and tender local swelling.

Plaintiff's urology expert opines the standard of care in 2001 and 2002 requires that the physician elicit a full, accurate and complete history, as well as a thorough physical exam and various laboratory and diagnostic studies to enable the physician to formulate a differential diagnosis by considering the entire constellation of a patient's signs, symptoms and complaints, and to consider any and all disease processes or conditions which may be causing the same. The physician must then rule out each possible condition or refer to an appropriate specialist.

Plaintiff's expert states that although other benign conditions may account for a patient's pain and detection of a lump, when a patient presents with complaints of localized scrotal pain and reports detecting a lump in the scrotum, and the physician palpates a solid mass, the physician must consider the possibility of malignancy, including Ewing Sarcoma/PNET. Given the potentially life-threatening nature of a malignant mass, such as Ewing Sarcoma/PNET, as opposed to the non-lethal nature of a spermatocele, when the physician is confronted with a scrotal mass, it is necessary to determine the nature of the mass, including whether the mass is solid or liquid, and to obtain a cancer marker study (blood test) to monitor and predict disease progression as elevated cancer markers indicate malignancy. Plaintiff's expert opines that on October 1, 2001, when Mr. Alper presented to Dr. DiMeo with complaints of swelling and pain in the right testicle, and a firm and mobile nodule was noted on the right of the testicular apex, Mr. Alper should have been sent for laboratory tests including cancer marker studies.

Plaintiff's urological expert also opines, with a reasonable degree of medical certainty, that Dr. DiMeo departed from accepted standards of care by failing to obtain appropriate and adequate imaging

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[1]The Court has conducted an in-camera inspection of the original unredacted affirmations and finds them to be identical in every way to the redacted affirmations in plaintiff's opposition papers with the exception of the redacted experts' names. In addition, the Court has returned the unredacted affirmations to the plaintiff's attorney.

studies of Mr. Alper's scrotum during the October 2, 2001 visit. In 2001 and 2002, the accepted standard of care required when a patient presents with complaints of scrotal pain and a reported mass, and the physician palpated a solid mass, is for the physician to order and/or perform a sonogram of the scrotum to assess whether the mass was solid or liquid filled. Plaintiff's urology expert also opines that had Dr. DiMeo obtained appropriate imaging studies, there would have been information indicative of a malignancy as early as October 1, 2001 and Mr. Alper's treatment would not have been delayed by 19 months until April 2003, and Mr. Alper's injuries would have been less.

It is also the opinion of plaintiff's urology expert that even though Dr. DiMeo did refer Mr. Alper for a sonogram, which was allegedly misinterpreted by the radiologist Dr. Weintraub, Dr. DiMeo failed to perform a transillumination of Mr. Alper's scrotum to determine if the light passes through to detect a solid mass. Then, the misinterpreted sonogram findings would have been of no moment as such inconsistency should have then led Dr. DiMeo to order further study, including a repeat sonogram or biopsy. It is plaintiff's expert's opinion with a reasonable degree of medical certainty that this departure, relying on the sonogram without further testing before making his diagnosis was a cause in the delay in the diagnosis of Mr. Alper's cancer. The determination of the nature of the mass would be part of the process of the differential diagnosis to rule out the most life-threatening conditions first. This failure to properly rule in or rule out a malignancy constituted a departure from accepted standards of care.

Plaintiff's urological expert further opined that under accepted standards of care in 2001 and 2002, when a physician determined on physical examination that a patient's previously identified mass had increased in size since the patient was previously examined several months before, the physician was obligated to perform additional, updated testing, including new imaging studies and new blood testing, and not rely on the previous test findings of several months prior as they do not account for the patient's then existing and changing condition. This was not done by defendants.

Plaintiff also submitted an expert report from a physician licensed to practice medicine in the State of California who is board certified in internal medicine and medical oncology (plaintiff's exhibit C). This report is submitted by plaintiff in opposition to all the defendants as set forth in the report.

Plaintiff's medical/oncology expert sets forth that Ewing Sarcomas are primitive tumors that can develop in any part of the body, in bone or soft tissue. Soft tissue sarcomas in the Ewing sarcoma family of tumors are known as Primitive Neuroectodermal Tumors (PNETs), classically described under small round blue cell tumors. Ewing sarcomas are the second most common and most lethal malignant bone tumor, and forty percent are found in the pelvis. They represent a biological spectrum of the same tumor and are treated the same way. The initial manifestation of a Ewing's Sarcoma /PNET is pain at the site of the tumor and often a palpable mass. Pain is the most important and earliest symptom, and may present initially on an intermittent basis. Eventually, most patients have a large palpable mass, with a tense and tender local swelling.

The overall survival rate is 41%, although survival of greater than 60% has been reported with multi modality therapy. The size and site of the tumor are important prognostic factors as patients with distal extremity primary tumors, and those with primary tumors arising in the clavicle and scapula, have a better prognosis than patients with proximal extremity, rib and pelvic/sacral tumors. As a tumor grows, the patient's chances for a cancer-free survival reduce. The larger the tumor size and the greater the

number of cancerous cells, the less likely that all of the cancerous cells will be eradicated and the more likely disease will recur. Failing to timely diagnose the tumor will allow the tumor to grow or to advance in stage. The American Joint Committee on Cancer's Cancer Staging Manual, sets forth that the advancement from stage I to stage II of soft tissue sarcomas like Ewing Sarcoma/PNET results in a reduction in a patient's chance for disease free survival from 86.13 percent to 71.68 percent and a reduction in a patient's chance for freedom from local recurrence from 88.04 percent to 81.97 percent. Overall survival chances are reduced from 90.00 percent to 80.89 percent.

It is also the opinion of plaintiff's medical/oncology expert, stated with a reasonable degree of medical certainty, that the delay in diagnosis of Mr. Alper's cancer caused a worsening of his prognosis and decreased his chances for a disease free survival. The size of the tumor increases the patient's risk for recurrence because the less likely that all of the cancerous cells will be eradicated and the more likely disease will recur. Plaintiff's expert further opined with a reasonable degree of medical certainty that Mr. Alper's chances for a cancer-free survival were greatly reduced by the failure to timely and properly diagnose his cancer during the 19 month period in which the tumor grew to 5 cm. It is his further opinion that the cancer was diagnosed at stage I when, with a reasonable degree of medical certainty, when Mr. Alper's cancer was actually a stage II, as according to the American Joint Committee on Cancer's Cancer Staging Manual, soft tissue sarcomas like Ewing's Sarcoma/PNET are staged as stage II when given a grade of 3 or higher. Grading of the tumor is a classification of the degree of malignancy or differentiation of tumor tissue. As Mr. Alper's tumor was poorly differentiated, it was given a grade of 3, and should have been staged as Stage II cancer.

Plaintiff's medical/oncology expert opines that when Mr. Alger presented to Dr. DiMeo on October 1, 2001, despite finding a firm and mobile nodule, he did not refer Mr. Alper for laboratory tests, including a cancer marker study.

Plaintiff's medical/oncology expert states that Mr. Alper presented to Dr. Robbins on October 10, 2001 after his October 4, 2001 sonogram, and in reporting to Dr. DiMeo, Dr. Robbins acknowledged that Mr. Alper had a questionable mass in his right testicle, but concluded that Mr. Alper was suffering from a "benign spermatocele for which he require[d] no further urologic intervention." Mr. Alper again presented to Dr. Robbins on July 29, 2002 with complaints of increased pain in his right testicle over the preceding three months, and after physical examination, Dr. Robbins determined that the mass he had detected in October 2001 had increased in size. Dr. Robbins, however, did not repeat Mr. Alper's scrotal sonogram or obtain any further imaging studies or order a cancer marker study.

Although Dr. Robbins scheduled plaintiff twice for surgery, the surgery was twice cancelled by plaintiff who was unaware he had cancer.

On February 19, 2003, almost seventeen months after Mr. Alger first presented to Dr. DiMeo, plaintiff's oncology expert states Mr. Alger experienced severe pain and swelling, presented to the emergency department of North Shore University Hospital, Syosett, where a Doppler sonogram was performed and interpreted as showing a heterogeneous extratesticular mass. The following day, a CT scan performed at Winthrop University Hospital emergency room showed a mass approximately 5 x 2 cm superior to the right epididymis. A scrotal sonogram performed March 20, 2003 revealed a 6 cm complex vascular mass within the right hemiscrotum in the region of the epididymis containing central complex

cystic material, with septated cystic material throughout the hemiscrotum-consider neoplastic process.

Plaintiff's medical/oncology expert further sets forth that on April 18, 2003, Mr. Alper under went surgery at North Shore University Hospital at Plainview for evacuation of a hematocele, epididymal biopsy, and right radical orchiectomy, for which pathology studies showed a tumor in the paratesticular tissue which was considered to be a PNET or Ewing's Sarcoma, a poorly differentiated grade 3, 5cm tumor. Adjuvent chemotherapy was thereafter administered.

It is plaintiff's medical/oncology expert's opinion, based upon a reasonable degree of medical certainty that the growth of the solid mass appearing on the October 4, 2001 sonogram from 1 x 1.3cm to 5 cm on April 18, 2003 is consistent with the growth of a Ewing sarcoma/PNET. Plaintiff's oncology expert states defendant's expert in internal medicine postulates that the mass palpated in October 2001 would have been much larger in April 2003 if it was an aggressive Ewing Sarcoma, however, opines plaintiff's oncology expert, this five fold increase in the tumor size over that time period constitutes aggressive growth and can be reasonably expected for a Ewing Sarcoma/PNET.

In review of the foregoing, it is determined by this Court that plaintiff's experts have raised material issues of fact in opposing defendants' motion. The factual issues raised concern, inter alia, the alleged departures from the standards of care in that defendant DiMeo and defendant Robbins relied solely on the sonogram in ruling out a cancerous condition, failed to obtain blood study cancer markers, failed to perform a transillumination of plaintiff's scrotum to help rule out a solid mass, and failed to properly make differential diagnoses and rule in and rule out all the possible diagnoses with appropriate testing and follow up. Further, when plaintiff presented to the DiGiovanna facility months after the October, 2001 visit, and also returned to see Dr. Robbins, the physicians were obligated to perform additional, updated testing, including new imaging studies and new blood testing, and not rely on the previous test findings of several months prior as they do not account for the patient's then existing and changing condition.

Based upon the foregoing, it is determined that plaintiff has demonstrated the existence of triable issues of fact attesting to departures from accepted practice by defendants DiMeo, DiGiovanna and Robbins, and that these departures were a competent producing cause of injuries to the plaintiff.

Accordingly, motion (003) by defendants DiMeo and DiGiovanna and motion (004) by defendant Robbins, and North Nassau Urological (as vicariously liable for defendant Robbins) for an order granting summary judgment is denied (***O'Regan v. Lundie,*** 299 AD2d 53, 751 NYS2d 274 [2002]).

In opposing motion (005) by defendants Weinraub and Zwanger & Pesiri Radiology, plaintiff has further submitted the affirmation of a physician board certified in Radiology who is licensed to practice in the state of New York. It is the opinion of plaintiff's radiology expert who reviewed the films from the October 4, 2001 sonogram and the report of the interpreting physician, Jerome M. Weinraub, based upon a reasonable degree of medical certainty that the study showed an approximately 1 x 1.3 cm solid nodule involving the right epididymis, and there were also a single small left and two small right epididymal cysts, but the study does not reflect the presence of a hydrocele which was reported by Dr. Weinraub. It is plaintiff's radiology expert's further opinion that Dr. Weinraub did not correctly interpret the October 4, 2001 scrotal sonogram in that he failed to identify the solid mass in the right epididymis which appeared

as an echogenic image on the study, and thus, departed from the accepted standards of care in 2001. He further opines that this misinterpretaion in turn caused or substantially contributed to the delay in diagnosing Mr. Alper's cancer since the mass which was discernible on the sonogram was not identified and therefore not acted upon.

Based upon the foregoing, it is determined that plaintiff has demonstrated the existence of material, triable issues of fact on the issue of proximate cause as to defendants Weinraub and Zwanger & Pesiri Radiology, that the departures alleged herein were a competent producing cause of injuries to the plaintiff. These factual issues preclude an order granting summary judgment to defendant Weintraub and to Zwanger & Pesiri as a medical facility can be held vicariously liable for the negligence and/or malpractice of its employees (***O'Regan v. Lundie,*** supra).

Accordingly, motion (005) by defendants Dr. Weinraub and Zwanger & Pesiri Radiology is denied.

Dated: 5/21/07

Emily Pines
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION,**