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SHORT FORM ORDER

INDEX No. 05-2445

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 3-6-07
CAL. DATE 7-25-07
Mot. Seq. #003 - MD

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JOSEPHINE SCHACHERBAUER and MICHAEL SCHACHERBAUER,

Plaintiffs,

- against -

UNIVERSITY ASSOCIATES IN OBSTETRICS & GYNECOLOGY, P.C., MICHAEL LYDIC, M.D., RICHARD BRONSON, M.D. and BARBARA RAPISARDI,

Defendants.

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross-Motion and supporting papers__; Answering Affidavits and supporting papers 17-26; 27-28 ; Replying Affidavits and supporting papers 29-30 ; Other ___; and after hearing counsel in support and in opposition to the motion it is,

ORDERED that this motion (#003) by the defendants University Associates in Obstetrics & Gynecology, P.C., Michael Lydic, M.D., and Richard Bronson, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

This is an action premised upon the alleged medical malpractice by the defendant Barbara Rapisardi, a phlebotomist (hereinafter Rapisardi), whom the plaintiff, Josephine Schacherbauer, claims caused her to sustain injury when Rapisardi drew blood from her left arm. The complaint asserts causes of action for negligence and lack of informed consent on behalf of the plaintiff , and a third cause of action asserting a derivative claim on behalf of the plaintiff's spouse, Michael Schacherbauer. The plaintiff claims in her bill of particulars that as a result of the departures from accepted medical practice during vena puncture on January 25, 2003, Rapisardi caused the plaintiff to develop, *inter alia*, reflex sympathetic dystrophy, CRPS of the left upper extremity; brachial neuritis; left median neuropathy, median nerve neuropraxia, and bursitis of the left shoulder.

The defendants, University Associates in Obstetrics & Gynecology, P.C. (hereinafter University Associates), Michael Lydic, M.D. (hereinafter Dr. Lydic), and Richard Bronson, M.D. (hereinafter Dr. Bronson), seek an order granting summary judgment, arguing they have no actual or vicarious liability with regard to the plaintiff's injuries allegedly caused by the defendant

Rapisardi in that the defendant Rapisardi was an employee of New York State who was providing phlebotomy services to patients of University Associates at 6 Technology Drive, East Setauket, New York (hereinafter 6 Technology Drive). The moving defendants also assert Raspisardi was not an employee of University Associates, Dr. Lydic and/or Dr. Bronson, and that they did not hire, pay, supervise or instruct Rapisardi.

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 et al*, 253 AD2d 852, 678 NYS2d 503 [2nd Dept 1998]). 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 [2nd Dept 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 [3rd Dept 1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375, *app denied* 92 NY2d 814, 681 NYS2d 475 [2nd Dept 1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 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 [2nd Dept 1979]) and must assemble, lay bare and reveal its proof in order to establish that the matters set forth in its 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 [2nd Dept 1979]).

In support of this motion (#003) the moving defendants have submitted, *inter alia*, copies of the pleadings and answers; a copy of the bill of particulars; copies of the transcripts of the examinations before trial of Josephine Schacherbauer, Michael Lydic, M.D., Richard Bronson, M.D., Barbara Rapisardi, and Denise Ross; and the affirmation of J. Gerald Quirk, M.D.

Josephine Schacherbauer testified she first went to University Associates and saw Drs. Lydic and Bronson for problems with infertility. She complained of a history of premenstrual symptoms, headache and irritability, hot flashes, crying, depression and breast tenderness. She also testified she has a history of a thyroid condition and a herniation in her neck. She saw the doctors from University Associates at Stony Brook Hospital before they moved to 6 Technology Drive. She had blood work done at the laboratory at the hospital during that period of time before the group moved to their new location. On Saturday, January 25, 2003, without an appointment, she went to University Associates at 6 Technology Drive for blood work which was ordered by Dr. Lydic after she had a procedure for insemination performed the week before by Dr. Lydic. She was told that there would be full services at this new office. When she arrived, she was first seen by the receptionist, then the phlebotomist whom she described as a young female named Barbara. They had a discussion about her (the defendant Rapisardi) working with Dr. Lydic and Dr. Bronson because she needed the extra money. The plaintiff stated she did not know who the phlebotomist's employer was. When Rapisardi was drawing the plaintiff's blood from her arm, the plaintiff testified she did not feel anything as the needle was inserted, but when the phlebotomist pulled the needle out while holding the plaintiff's wrist, she felt a popping sensation from her elbow to her wrist, like a rubber band snapping inside. She pulled her arm back as she felt a sharp, burning pain from her elbow to her wrist. She testified she was crying as she left the office and that she drove herself home.

Denise Ross testified she had been employed part time Monday through Friday for the last four (4) years as a secretary by Research Foundation, located at 6 Technology Drive in the OB/GYN Department within the offices of Drs. Lydic and Bronson. On Saturdays she worked at the same office, but in Reproductive Endocrinology, and had a different desk across the hall. She had the same supervisor for all days, Monday through Saturday. Her job consisted of checking patients in and making further appointments for them as they were leaving the office, which she would then enter into the computer. In January, 2003, she also entered the orders for the blood work for any laboratory testing the patient would need, as ordered by Dr. Lydic or Dr. Bronson. The computer had a program called UHIS (University Hospital Information System) into which the information would be entered. The computer would then generate a requisition slip for the blood work which she would give to the patients upon arrival. University Associates had a phlebotomist in the office at 6 Technology Drive in a small office to the side of the reception area where the phlebotomist would draw blood. She stated the phlebotomist, Rapisardi, was there Saturdays, but she did not know if she was there Monday through Friday. She gave Rapisardi paperwork, but never gave her instructions as to what to do with the paperwork. She thought Rapisardi was responsible for drawing the blood, putting the requisition with the blood, and bringing it back to Stony Brook Hospital.

J. Gerald Quirk, M.D. (hereinafter Dr. Quirk) stated, in his affirmation, that he was the Chairman of the Department of Obstetrics and Gynecology and Reproductive Medicine at Stony Brook University Hospital and an officer of University Associates, a defendant in this action. Dr. Quirk stated, on January 25, 2003, University Associates did not employ any phlebotomists who drew blood at its offices. He believed these phlebotomists were employed by Stony Brook University Hospital.

Dr. Lydic testified at his examination before trial that he had worked at Stony Brook University Hospital since 1998 and was a full time faculty member as a clinical assistant professor in the Department of Obstetrics, Gynecology, and Reproductive Medicine. He was also the medical student courtship director. He stated he was part of a reproductive endocrinology and infertility practice called University Associates in Obstetrics and Gynecology, P.C., which is the obstetrics and gynecology practice of the university physicians who are full-time faculty, so he is an employee of the practice. The practice has several divisions consisting of a general obstetrics and gynecology group, and a reproductive endocrinology and infertility group. He was part of Reproductive Endocrinology with Dr. Bronson and had been an employee of the practice since 1998. Dr. Lydic also testified he received his paycheck from CPMP, a Practice Management Plan which ran the business aspects of University Associates and other departments. He received another paycheck from Stony Brook University. He said he was at 6 Technology Drive almost daily, and eighty percent of his working day was spent treating patients. Some of his day was spent teaching medical students and residents, and he also took part in some clinical research, and spent a few hours a week at Stony Brook University Hospital.

Dr. Lydic also testified that Dr. Bronson was the Division Director and was his superior, and was also the medical director within their practice. Dr. Bronson handled the business aspects of the practice. Dr. Lydic did not know if University Associates was a corporation, a partnership or something else. He did not know when it was formed or its business address nor did he know who the principals or officers of University Associates were. He did state that the general obstetrics and gynecology division, the maternal fetal medicine division of Reproductive Endocrinology and Infertility, and gynecologic oncology of the University Associates conducted its medical practice from of 6 Technology Drive and paid rent for that facility. He did not know if he or Dr. Bronson paid rent separately for their particular space as opposed to University Associates paying for both spaces of the practice. He did not hold any ownership interest in University Associates and he did not know if University Associates had any agreement with Stony Brook University to provide patient care to clinical patients.

Dr. Lydic further testified that University Associates had full time employees consisting of a receptionist and nurses. The plaintiff first came to the office on June 13, 2002 at its previous office in Stony Brook University Hospital. He testified that the plaintiff was being evaluated by him in conjunction with his work within University Associates, as opposed to Stony Brook University Hospital. After University Associates moved to 6 Technology Drive, he believed University Associates did not want them to have a phlebotomy service within their office. On occasion, the Laboratory Services Department of Stony Brook University Hospital would send one of its phlebotomists to their office, usually on a Saturday morning, and the phlebotomists would position themselves somewhere in the office. On Saturday, January 25, 2003, Rapisardi was the phlebotomist from Stony Brook University Hospital at their office. Dr. Lydic did not know if she was paid by University Associates for the time she worked at 6 Technology Drive or if it provided Rapisardi with any orientation or training. He did not know if anyone from University Associates reviewed her background before she began providing phlebotomy services at 6 Technology Drive. He believed Dr. Bronson was involved in the arrangements to have a

phlebotomist work at 6 Technology Drive, but did not know if there was a specific agreement concerning the phlebotomists on site. He did not know if University Associates paid Stony Brook University Hospital or Laboratory Services Department for having a phlebotomist perform services at 6 Technology Drive. When Dr. Lydic learned of the incident involving the plaintiff, he reported the incident to Rapisardi's supervisor at Stony Brook University Hospital about a week after speaking with the plaintiff on March 5, 2003. He also advised Dr. Bronson.

Dr. Bronson testified at his examination before trial that he was employed by Stony Brook University Hospital as Professor of Obstetrics and Gynecology and that he was also a member of the professional corporation of University Associates consisting of about twenty members. He was not sure if University Associates was a private medical practice. He stated Stony Brook University Hospital is a separate entity with a clinical practice plan that is the billing agent of all the professional corporations. He did not know if during the time that University Associates operated from the hospital, it paid rent to the hospital, but he testified Dr. Quirk would know. He stated University Associates does not own the premises at 6 Technology Drive, but he did not know who owned it. He did not know if it paid rent. University Associates' business address is 6 Technology Drive, but they also has other offices on the South Shore.

Dr. Bronson testified that when they moved from Stony Brook Hospital to 6 Technology Drive one of the arrangements made was that a patient in the new office would just walk down the hall to the phlebotomist's office to have blood drawn so that a patient did not have to drive back to the hospital for that purpose. The hospital was building a functional phlebotomy satellite office across the street from 6 Technology Drive, but it was not going to be available by the time they were ready to move. Therefore, the hospital agreed that there would be someone at 6 Technology Drive to draw blood until the new space was available. The phlebotomist used the nursing office at University Associates's to draw blood on Saturdays.

Dr. Bronson further testified that University Associates never provided training or supervision for the individuals who drew blood. He was not aware that University Associates paid the phlebotomists for drawing blood. He thought the phlebotomists came under the Department of Pathology at Stony Brook University Hospital. University Associates did not maintain a record of the phlebotomists who drew blood at its site. He did not know if University Associates paid the hospital for the services provided by the Hospital. University Associates did not bill patients for blood work. Dr. Bronson stated he never advised the plaintiff of the risks of drawing blood.

Dr. Bronson testified that he had intermittently been an officer of University Associates, and, if Dr. Quirk, the president and chairman of University Associates, was not there, he would attend the board meetings and then inform Dr. Quirk what occurred and that he would maybe cast a proxy vote at such meetings. He held a title with University Associates at one time but was unsure of his title. He was considered the director of Reproductive Endocrinology and he and Dr. Lydic were the only physicians in that division. He had been involved in the hiring of the employees of the practice. Administrative secretaries would post positions and make sure that the people interviewed by him were qualified, and he would decide if they would be hired. He believed University Associates was a separate entity from the Stony Brook University Medical Center, and that the plaintiff was being treated by University Associates.

No testimony has been submitted by the moving defendants on behalf of the defendant Rapisardi.

Based upon the foregoing, it is determined the moving defendants have failed to demonstrate prima facie entitlement to summary judgment on the issue that they have no actual or vicarious liability with regard to the plaintiff's injuries allegedly caused by Rapisardi. Indeed, there are factual issues concerning which entity or entities paid Rapisardi for the phlebotomy services she provided at University Associates on Saturday, January 25, 2003, whether it was University Associates, Research Foundation, Department of Obstetrics and Gynecology and Reproductive Medicine at Stony Brook University Hospital, Stony Brook University Hospital, or some other entity.

The moving defendants have not submitted any evidence to support their claim that Rapisardi was an employee of New York State when she was providing phlebotomy services to patients of University Associates at 6 Technology Drive. In fact, there has been no testimony or evidence submitted to demonstrate by whom Rapisardi was employed. Dr. Quirk merely stated he believed Rapisardi was employed by Stony Brook University Hospital. The defendants did not know what payment arrangements were made for the services provided by Rapisardi. The defendants have not presented any agreements or contracts concerning the circumstances by which Rapisardi was drawing blood in the office of University Associates, Reproductive Endocrinology, at 6 Technology Drive. Dr. Quirk has not explained the payment to the phlebotomists, or the terms and conditions for having phlebotomists draw blood or provide services in the offices of University Associates for patients of University Associates, nor has any evidence been submitted relative thereto by the moving defendants.

There has been no testimony or evidence submitted to demonstrate the legal relationship, or lack thereof, between University Associates and/or University Associates Reproductive Endocrinology and/or Stony Brook University Hospital and/or the Research Foundation. The legal relationship, if any, between University Associates, Research Foundation and Stony Brook University Hospital and/or the State, has not been denied as well.

There are further factual issues which preclude summary judgment concerning whether University Associates was holding itself out as a provider of laboratory services and whether the patient reasonably believed that phlebotomists were provided by or acted on behalf of University Associates, Dr. Lydic or Dr. Bronson (*Dragotta v Southampton Hospital,* 39 AD3d 697, 833 NYS2d 638 [2nd Dept 2007]). Thus, the issue of apparent or ostensible authority precludes summary judgment to the moving defendants.

Under the theory of apparent agency, a principal can be held liable for the acts of someone who is not an employee. Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to act on behalf of the principal; the third party must reasonably rely upon the appearance of authority based on some misleading conduct on the part of the principal, not the agent. The third party must also accept the services of the ostensible

agent in the reliance not upon that person's skill, but based on his or her relationship with the principal (*Searle v Cayuga Medical Center at Ithaca,* 28 AD3d 834, 813 NYS2d 552 [Third Dept 2006]). To create apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to appearance and belief that an agent possesses authority to act on behalf of the principal, and the third party must reasonably rely on the appearance of that authority, based on some misleading words or conduct by the principal, not the agent, and the third party must accept services of an agent in reliance upon a perceived relationship between the agent and principal, not in reliance on an agent's skill (*Dragotta v Southampton Hospital,* supra). After the plaintiff sustained her injury, she called Dr. Lydic to inform him of her injury and pain and to seek his recommendation as to what to do. Therefore, there is a factual issue as to whether or not the moving defendants held out the phlebotomist to be their employee, whether the plaintiff was obligated to use the services of the phlebotomist they provided, and whether she accepted these services based upon her relationship with the moving defendants (*see, Soltis v State of New York,* 172 AD2d 919, 568 NYS2d 470 [Third Dept 1991]; *Duncan v Mount St. Mary's Hospital of Niagara Falls,* 176 Misc2d 201, 672 NYS2d 657).

The issue of vicarious liability also precludes summary judgment in this matter. One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by the employer's servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them it by its servants (*Birdell Hill v St. Clare's Hospital,* 67 NY2d 72, 499 NYS2d 904 [1986]). As it is not known whether the moving defendants paid for the services provided by Rapisardi, it cannot be determined whether the defendants are vicariously liable for her alleged negligence.

Accordingly, motion (#003) by the defendants University Associates in Obstetrics & Gynecology, P.C., Michael Lydic, M.D., and Richard Bronson, M.D. for summary judgment dismissing the complaint is denied.

Dated: SEP 20 2007

Peter Lehner
J.S.C.