

**Stero v Laakso**

2007 NY Slip Op 34514(U)

October 21, 2007

Supreme Court, New York County

Docket Number: 111583/06

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey  
Justice

PART 40 D

PAUL STERO,

Plaintiff,

Index No.: 111583/06

MOTION DATE \_\_\_\_\_

MOTION SEC. NO. \_\_\_\_\_

MOTION FILE NO. \_\_\_\_\_

-v-

ULLA KRISTIINA LAAKSO, M.D., LOUIS  
JOSEPH MORLEDGE, M.D., CONTINUUM  
HEALTH PARTNERS INC., MADISON  
MEDICAL GROUP, STEVEN SCHNEIDER,  
M.D. and ROBERT MARBACH,

Defendants.

RECEIVED  
OCT 24 2008  
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OCT 30 2008  
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NEW YORK

The following papers, 1 - 67, were read on this motion by defendants Steven Schneider M.D. and Robert Marbach for summary judgment, dismissing the complaint, as asserted against them; cross-motion by defendants Ulla Kristina Laakso M.D. and Continuum Health Partners Inc. for summary judgment, dismissing the complaint, as asserted against them; cross-motion by defendants Louis Joseph Morledge, M.D. and Madison Medical Group for summary judgment, dismissing the complaint, as asserted against them; and cross-motion by plaintiff for partial summary judgment against Ulla Kristina Laakso M.D. with respect to the informed consent cause of action, and to preclude various items of evidence at trial.

Steven Schneider M.D. and Robert Marbach's Notice of Motion, affirmation, accompanying exhibits  
Ulla Kristina Laakso M.D. and Continuum Health Partners Inc.'s Notice of Cross-Motion, affirmation, accompanying exhibits  
Louis Joseph Morledge, M.D. and Madison Medical Group's Notice of Cross-Motion, affirmation, accompanying exhibits  
Notice of Cross-Motion, affirmation /opposition to motion and cross-motions, accompanying exhibits  
Steven Schneider M.D. and Robert Marbach's Reply affirmation/ opposition to cross-motion, accompanying exhibits  
Ulla Kristina Laakso M.D. and Continuum Health Partners Inc.'s Reply affirmation/opposition to cross-motion, accompanying exhibits  
Louis Joseph Morledge, M.D. and Madison Medical Group's Reply affirmation/opposition to cross-motion, accompanying exhibits  
Plaintiff's Reply affirmation

Papers Numbered

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*Handwritten signature/initials*

Cross-Motion:  Yes  No

Plaintiff, Paul Stero, initially commenced the instant medical malpractice action seeking to recover damages against defendants Ulla Kristiina Laakso, M.D., Louis Joseph Morledge, M.D., Continuum Health Partners, Inc. and Madison Medical Group by the filing of a summons and complaint on or about August 18, 2006. The crux of the plaintiff's complaint is that defendants were negligent in the manner in which they administered and monitored plaintiff's lithium treatment, causing lithium toxicity and resulting injuries. The complaint also contains a cause of action for lack of informed consent as against Dr. Laakso, alleging that she failed to inform plaintiff of the risk of lithium toxicity, and the available alternatives to lithium treatment.

Thereafter on October 13, 2006, plaintiff filed an amended complaint adding Steven Schneider, M.D., and Robert Marbach as defendants. According to plaintiff he presented to the office of Dr. Schneider, where he was examined by physician's assistant Marbach (hereinafter P.A. Marbach). Plaintiff alleges that despite the fact that he had serious neurological defects at the time of that visit, P.A. Marbach failed to consult with Dr. Schneider regarding his condition, failed to arrange for plaintiff to be admitted into the hospital in a timely manner, and failed to make a timely diagnosis. By order of this Court, dated April 12, 2007, plaintiff was granted, *inter alia*, leave to supplement the summons and complaint, *nunc pro tunc*, so as to add Dr. Schneider and P.A. Marbach as defendants.

Discovery in this action has now been completed, a note of issue/certificate of readiness has been filed, and this case is ready to proceed to trial. Defendants Dr. Schneider and P.A. Marbach presently move for summary judgment, dismissing the complaint, as asserted against them. Defendants Dr. Laakso and Continuum Health Partners Inc. cross-move for summary judgment, dismissing the complaint, as asserted against them. Defendants Dr. Morledge and Madison Medical Group have also cross-moved for such relief. Plaintiff presently cross-moves for partial summary judgment against Dr. Laakso with respect to the informed consent cause of action, and to preclude various items of evidence at trial.

In or about October of 2003, plaintiff presented to defendant Dr. Morledge, an internist, seeking a referral to a psychiatrist. Plaintiff had previously been diagnosed with bipolar disorder and depression. Dr. Morledge referred plaintiff to Dr. Laakso, a psychiatrist, for treatment. Plaintiff first visited Dr. Laakso in November of 2003, and at that time she placed plaintiff on Depakote to treat his bipolar disorder. Thereafter, between December of 2003 and April of 2004, plaintiff treated with Dr. Laakso approximately five times, and during this period Dr. Laakso changed plaintiff's dose of Depakote and started him on Seroquel and Risperdal, which were also used to treat his bipolar disorder, and Zonegran, which was an anti-seizure medication. Then on May 21, 2004, plaintiff returned to Dr. Laakso's office with complaints that he was depressed, anxious, had racing thoughts and a suspicious mood. At that time, Dr. Laakso placed him on a half a tablet (225 mg.) of lithium, with the intention of slowly increasing the dosage.

Upon prescribing lithium to plaintiff, Dr. Laakso informed him that suicide is a risk of taking lithium. Additionally, Dr. Laakso informed plaintiff that there were certain side effects associated with lithium use, such as hand tremors. Plaintiff was also informed of the need to have periodical

blood tests to check his lithium levels. In addition to this information, Dr. Laakso provided plaintiff with a handout containing information relating to lithium use. Plaintiff received an additional handout from Duane Reade pharmacy when filling his prescription. The handout provided by Dr. Laakso states, among other things, that lithium should be taken as prescribed. If too much is taken it may result in an overdose, or if too little is taken, relapse into depression may occur. This handout does advise that blood tests are needed to ensure that a patient is taking a proper dose of lithium. The handout provided by Duane Reade also states the need for frequent laboratory tests, and informs that there are side effects associated with lithium use, such as hand tremors, mild thirst or nausea, increased urination and general discomfort. The Duane Reade handout further states that a patient should "[s]top taking this medicine and contact your doctor right away if you develop diarrhea, vomiting, drowsiness, muscle weakness, or lack of coordination."

After initially being prescribed lithium in May of 2004, plaintiff returned to Dr. Laakso's office on June 11, 2004, at which time she increased plaintiff's lithium dosage to one and one half tablets per day (675 mgs.). It appears that on July 20, 2004, plaintiff went to Dr. Morledge's office at the request of Dr. Laakso to have blood work done, to test, among other things, plaintiff's lithium levels. It is noted that plaintiff testified at his deposition that he did not know specifically what the blood was being tested for, but assumed the blood work was regarding his liver. Plaintiff's blood lithium levels at that time were low. Dr. Laakso again increased plaintiff's lithium dosage in October of 2004, to two and one half pills a day (1125 mgs.). Plaintiff next visited Dr. Laakso on November 2, 2004, at which time Dr. Laakso directed plaintiff to get blood work done, including a check of his lithium levels. It appears that plaintiff did not comply and did not get blood work done in November of 2004. On January 13, 2005, plaintiff visited Dr. Laakso, and she again directed plaintiff to get blood work done, including a check of his lithium levels. On February 18, 2005, plaintiff had blood work performed by Dr. Morledge. However, Dr. Moreledge did not test plaintiff's lithium levels. The February 2005 blood test revealed abnormal liver function values. As a result, plaintiff was instructed by Dr. Morledge to return for a further blood test on April 1, 2005.

Dr. Morledge performed a blood test on plaintiff on April 1, 2005, however, he, again, did not test plaintiff's blood lithium levels. Dr. Morledge advised plaintiff that the results of such test, other than slightly elevated liver function tests, were normal. According to defendants, on April 27, 2005, plaintiff informed Dr. Laakso that the results of his recent blood test were normal. Dr. Laakso credited this information, and made a notation that plaintiff's blood work had been completed, but was not yet faxed to her by Dr. Morledge. Notwithstanding defendants contention, plaintiff testified that he simply informed Dr. Laakso that he had gone to Dr. Morledge with her prescription and blood was taken. When Dr. Laakso informed plaintiff that she had not yet received the test results, he told her "well, I did as I was told." During the April 27, 2005 visit, Dr. Laakso increased plaintiff's lithium dosage to 3 tablets per day (1350 mgs.). Plaintiff next visited Dr. Laakso on May 27, 2005. During this visit plaintiff made complaints of severe lethargy and an inability to stay awake during the day. Plaintiff was given another lithium prescription during this visit, which was his last visit to Dr. Laakso.

On June 11, 2005, plaintiff began to feel weak and lightheaded. Additionally, he had noticed that food did not taste right. These symptoms worsened over the next day, and he began having difficulty walking and felt unsteady on his feet. He considered calling Dr. Morledge, but did not because he did not believe that Dr. Morledge would be readily available. On June 12, 2005,

plaintiff was given the name of Dr. Schneider by a friend, after telling his friend about his symptoms. Plaintiff called Dr. Schneider's office on June 13, 2005, and was told that he could be seen by Dr. Schneider's physician's assistant, P.A. Marbach, the next day, June 14, 2005.

On June 14, 2005, plaintiff presented to Dr. Schneider's office and was examined by P.A. Marbach. According to plaintiff, at the time he was examined by P.A. Marbach he was disoriented, unable to gather his words, unsteady on his feet, and his hands were shaking. Plaintiff initially went to the wrong office. He testified that he was so weak and disoriented he had to sit for a few minutes before heading to the correct office. He further testified that he was unable to complete the forms given to him at Dr. Schneider's office. He also mistakenly gave a credit card to the staff at Dr. Schneider's office, rather than providing them with his insurance card. Additionally, plaintiff was unable to express to P.A. Marbach a complete and accurate medical history, unable to provide P.A. Marbach information relating to all of the medication he was taking. Plaintiff advised P.A. Marbach that he was taking Depakote and Risperdal, but did not mention that he was on other medications at the time, including lithium. Plaintiff did, however, advise P.A. Marbach that he was cutting back on the Depakote and Risperdal, without medical direction, because he was experiencing weight gain. Based upon this information, P.A. Marbach concluded that plaintiff was suffering from adverse effects from cutting back his medication. P.A. Marbach recommended that plaintiff go see Dr. Laakso to get under proper medication control, or if he could not get in touch with Dr. Laakso, to go to the emergency room. P.A. Marbach discussed plaintiff's case with Dr. Schneider later in the day, and it appears that Dr. Schneider agreed with P.A. Marbach's assessment. After his visit with P.A. Marbach plaintiff did not contact Dr. Laakso, nor did he go to the emergency room.

Plaintiff's symptoms worsened over the next few days. According to plaintiff's testimony, he spent June 15 and 16, 2005, lying on the floor of his apartment sleeping or lying with his eyes closed. On June 17, 2005, a friend of plaintiff who visited him at his apartment called 911 to bring plaintiff to the hospital. An ambulance arrived at plaintiff's apartment. It was noted in the ambulance call report that multiple empty alcohol bottles were observed in plaintiff's apartment. According to plaintiff, the empty bottles around the apartment were iced tea bottles. Plaintiff was brought to Bellevue hospital, where he was diagnosed with lithium toxicity, and treated for same until he was discharged from Bellevue on September 20, 2005. Plaintiff alleges that as a result of the lithium toxicity he has suffered a brain injury causing ataxia (a loss of ability to coordinate muscular movement) and speech impairment. He claims that he has lost his balance and now requires a wheelchair to ambulate.

The defendants herein allege that between June 10 and June 17, 2005, plaintiff was taking lithium in a manner that was not prescribed. According to defendants, on June 2, 2005, plaintiff re-filled a lithium prescription he originally filled on April 25, 2005, in the name of his dog, Mowgly; and on June 2, 2005 received 75 lithium tablets.<sup>1</sup> Defendants contend that on the very next day,

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<sup>1</sup> Defendants also allege that plaintiff never filled the lithium prescriptions issued by Dr. Laakso on January 13, 2005, April 27, 2005 and May 27, 2005. According to defendants the Duane Reade records indicate that the plaintiff never filled the January 13, 2005 prescription and plaintiff is in possession of the original prescriptions issued on April 27, 2005 and May 27, 2005, evidencing the fact that these were not filled.

June 3, 2005, filled a prescription for another 75 lithium tablets. Defendants point out that although the pharmacy information relating to this prescription indicates that it was written by Dr. Laakso on June 3, 2005, plaintiff did not see Dr. Laakso on June 3, 2005. Defendants submit that it is not coincidence that plaintiff received 150 lithium tablets on June 2 and 3, 2005, and then was diagnosed with lithium toxicity on June 17, 2005. They contend that plaintiff either intentionally overdosed on lithium, or accidentally took so much lithium he became toxic.

Steven Schneider M.D. and P.A. Robert Marbach

Defendants Dr. Schneider and physician's assistant Marbach presently move for summary judgment, dismissing the complaint, as asserted against them. "[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]. Initially, "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 demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]. A failure by the movant in demonstrating *prima facie* its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers. See Alvarez v. Prospect, *supra*; Winegrad v. New York Univ. Med. Center, *supra*. Where a prima facie showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*.

Dr. Schneider and P.A. Marbach argue that neither of them departed from the accepted standards of medical care in their treatment of plaintiff. According to these defendants, after examining plaintiff, P.A. Marbach appropriately referred plaintiff to see his treating and prescribing physician, Dr. Laakso, or, if he could not get in touch with Dr. Laakso, to go to the emergency room. In support of their motion Dr. Schneider and P.A. Marbach submit, *inter alia*, the expert affidavit of a physician, who is board certified in internal medicine and licensed to practice in New York. According to Dr. Schneider and P.A. Marbach's expert the treatment plan created by P.A. Marbach complied with the standard of care and if plaintiff followed P.A. Marbach's instructions it would have helped him. The expert states that "[n]either P.A. Marbach's nor Dr. Schneider's actions or inactions were a cause of Mr. Stero's injuries." The expert for Dr. Schneider and P.A. Marbach points out that plaintiff advised P.A. Marbach that he was taking Depakote and Risperdal and had, without medical direction, been cutting back on the dosage. It is noted in the affidavit, that plaintiff did not advise P.A. Marbach that he was also on lithium. Therefore, neither P.A. Marbach nor Dr. Schneider, who reviewed the chart after the examination was conducted by P.A. Marbach, could have made a diagnosis of lithium toxicity.

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Notwithstanding the foregoing, defendants contend that plaintiff filled, or re-filled, lithium prescriptions on March 1, 2005, March 25, 2005, April 25, 2005 and June 2, 2005, in his dog's name. According to defendants this is indicative of plaintiff's misuse of lithium.

Dr. Schneider and P.A. Marbach's expert further states that P.A. Marbach did not deviate from standard and proper medical practice in examining plaintiff without consulting with Dr. Schneider, or another physician. The expert explains that a licensed physician's assistant, such as P.A. Marbach, is permitted to treat and evaluate patients without the need to consult with a physician, at the time of treatment. It was adequate to have Dr. Schneider review the charts of patients examined by P.A. Marbach at the end of each day. This according to the expert, is the usual practice. With respect to the adequacy of the neurological examination that was performed by P.A. Marbach, the expert opines that there was no indication that a more extensive neurological examination was needed, as "[p]laintiff's presenting symptoms of dizziness, hesitancy of thought and speech and slight trembling of hands were consistent with bipolar disorder, anxiety, and adverse effects from improper dosing of Depakote and Risperdal - the only two medications that plaintiff informed P.A. Marbach that he was taking." Dr. Schneider and P.A. Marbach's expert also states that even if further neurological testing was performed by P.A. Marbach, it would not have led to a diagnosis of lithium toxicity because plaintiff did not advise P.A. Marbach that he was taking lithium. The expert again states that P.A. Marbach appropriately referred plaintiff to see his treating and prescribing physician, Dr. Laakso, or, if he could not get in touch with Dr. Laakso, to go to the emergency room.

With respect to any alleged failure on the part of these defendants to order blood tests, the expert opines that Dr. Laakso, as plaintiff's treating and prescribing physician, was in a better position to determine if blood tests were needed. Moreover, they could not have been expected to order a blood lithium test, because they were not made aware by plaintiff that he was taking lithium. Therefore, according to the expert, "neither P.A. Marbach nor Dr. Schneider departed from the standard of medical care by not ordering a blood test for lithium levels." The affidavit of Dr. Schneider and P.A. Marbach's expert further sets forth that the standard of care did not require P.A. Marbach or Dr. Schneider to personally consult with Dr. Laakso with respect to the plaintiff's condition, or to personally arrange for the hospitalization of plaintiff. He opines that it was sufficient to refer plaintiff to see Dr. Laakso, or to instruct him that if he could not get in touch with Dr. Laakso, to go to the emergency room. The expert concludes by stating that:

"it is my opinion with a reasonable degree of medical certainty that P.A. Marbach and Dr. Schneider did not deviate in any way from the standards of accepted medical practice in the care of Paul Stero. It is further my opinion with a reasonable degree of medical certainty that any alleged deviations by P.A. Marbach and Dr. Schneider were not a cause of injury to plaintiff."

The aforementioned affidavit of P.A. Marbach or Dr. Schneider's expert is sufficient to make a prima facie showing of entitlement to judgment as a matter of law, demonstrating the absence of any material issues of fact with respect to the adequacy of the medical treatment provided by P.A. Marbach and Dr. Schneider to plaintiff. See Suib v. Keller, 6 AD3d 805 [3rd Dept. 2004]; Juba v. Bachman, 255 AD2d 492 [2d Dept. 1998]; see also Alvarez v. Prospect Hospital, supra. The burden, therefore, shifts to plaintiff to come forward with evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, supra; Zuckerman v. City of New York, supra.

In opposition to this motion, plaintiff submits, *inter alia*, the expert affidavit of a board certified psychiatrist, who is licensed to practice medicine in New York. Plaintiff's expert sets forth that because P.A. Marbach was aware that plaintiff had bi-polar disorder and was impaired with regard to his thought processes, memory and speech, he should have specifically asked plaintiff whether he was taking lithium, which is commonly prescribed to treat bi-polar disorder. According to the expert "[t]he failure to specifically elicit this information was a deviation from the standard of care. Had Marbach asked the question in a direct and pointed way he would have got the responses which would have led to a diagnosis of lithium toxicity." The expert further opines that based upon plaintiff's presenting symptoms, it was clear that he was suffering from a serious neurological problem, which required neurological testing. Notwithstanding, P.A. Marbach did not test plaintiff's reflexes, muscle strength, or coordination. This failure to conduct adequate neurological testing, according to plaintiff's expert, "was a serious deviation from the standard of care."

Plaintiff's expert sets forth in his affidavit that even if P.A. Marbach did not appreciate that plaintiff was suffering from lithium toxicity, "he should have appreciated that Stero was suffering from a severe and acute neurological disorder which required immediate hospitalization." He states that it was not sufficient to merely refer plaintiff to Dr. Laakso, because P.A. Marbach had undertaken the care of plaintiff, and was obligated to admit plaintiff to the hospital. The expert points out that given P.A. Marbach's finding of mental impairment it could not be expected that plaintiff would follow his instructions to see Dr. Laakso or go to an emergency room. It is the opinion of plaintiff's expert that P.A. Marbach's failure to admit plaintiff into the hospital was a deviation of the standard of care.

Furthermore, plaintiff's expert notes that Dr. Schneider did not recall discussing plaintiff's examination with P.A. Marbach and that such a consultation between P.A. Marbach was not noted in plaintiff's chart. In the opinion of plaintiff's expert, if no such consultation took place it was a deviation from the accepted standards of care on the part of P.A. Marbach. According to this expert, where a physician's assistant is unable to diagnose a patient and where the assessment and treatment of a patient is beyond the expertise of a physician's assistant, the physician's assistant has a duty to consult with a physician. The expert opines that P.A. Marbach was not capable of formulating a definitive diagnosis with respect to plaintiff's condition, and a consultation was needed. The expert further opines that if P.A. Marbach did, in fact, consult Dr. Schneider with respect to his examination of plaintiff, then Dr. Schneider deviated from the standard of care in failing to admit plaintiff to the hospital. Plaintiff's expert also states in his affidavit that Dr. Schneider is ultimately responsible for the conduct of P.A. Marbach, as he was Dr. Schneider's physician assistant.

With respect to causation, plaintiff's expert states that the deviations from standards of care by P.A. Marbach and Dr. Schneider were substantial factors in causing plaintiff's injuries. In his opinion, based upon the symptoms exhibited by plaintiff at the time he presented to P.A. Marbach, plaintiff had not yet suffered irreversible damage to the cerebellum, and had plaintiff been immediately admitted to the hospital and properly treated, permanent injury could have been avoided.

Based upon the conflicting expert affidavits submitted by the parties, it appears that issues of fact and credibility exist in connection with whether the treatment provided by P.A. Marbach and Dr. Schneider (directly and vicariously through the acts and omissions of his employee, P.A. Marbach) deviated from good and accepted medical practice. Such issues cannot be resolved on this motion for summary judgment. See Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v. Lenox Hill Hosp., 232 AD2d 184 [1996]. Accordingly, defendants Dr. Schneider and P.A. Marbach's motion for summary judgment dismissing the complaint as asserted against them is denied.

Ulla Kristina Laakso M.D. and Continuum Health Partners Inc.

Defendant Ulla Kristina Laakso M.D. and Continuum Health Partners, Inc. (hereinafter "Continuum") presently cross-move for summary judgment, dismissing the action as asserted against them. Dr. Laakso seeks summary judgment arguing that she did not depart from good and accepted medical and psychiatric practice in her treatment of plaintiff. She further argues that plaintiff filed illegitimate prescriptions and back-to-back prescriptions, and that such wrongdoing on his part warrants summary judgment. In opposition, plaintiff argues that Dr. Laakso had several deviations from the standard of good and accepted medical care in connection with his medical treatment. Plaintiff further argues that Dr. Laakso's allegations relating to his misuse of lithium in June of 2005 is false, and not supported by the credible evidence.

Continuum seeks summary judgment, arguing that its only role with respect to the plaintiff's medical treatment was to facilitate Dr. Laakso's billing. It is argued that since Continuum provided only administrative services in connection with plaintiff's care, and did not provide any medical treatment to plaintiff, it may not be held liable for the acts of Laakso.<sup>2</sup> Plaintiff does not oppose this portion of Ulla Kristina Laakso M.D. and Continuum's cross-motion. As it appears that Continuum provided only administrative services in connection with plaintiff's care, dismissal of the complaint, as asserted against it, is warranted. Accordingly, the unopposed portion of Ulla Kristina Laakso M.D. and Continuum's cross-motion for summary judgment, seeking dismissal of the complaint as asserted against defendant Continuum, is granted.

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<sup>2</sup> It is noted that Continuum previously moved for dismissal on the ground that it played no role in plaintiff's medical treatment. In support of this motion it submitted, *inter alia*, the affidavit of Continuum's General Counsel, wherein she set forth that its purpose is to provide administrative services to various area hospitals. Also stated in this affidavit is that Dr. Laakso is not employed by Continuum or any of its affiliated healthcare institutions. This Court, by order, dated April 12, 2007, denied that motion, holding that dismissal of the complaint at that time was premature as discovery relating to the relationship that existed between Continuum and Dr. Laakso had not yet been conducted. Continuum was granted leave to renew that motion, as a motion for summary judgment pursuant to CPLR §3212, upon completion of discovery on the issue of the relationship that existed between Continuum and Dr. Laakso at the time of the subject incident.

With respect to that portion of Dr. Laakso and Continuum's cross-motion for summary judgment, seeking dismissal of the complaint as asserted against defendant Dr. Laakso, Dr. Laakso submits, *inter alia*, the expert affidavit of a physician, who is board certified in psychiatry and forensic psychiatry and licensed to practice medicine in New York, New Jersey and California. With respect to plaintiff's allegations that Dr. Laakso failed to properly inform plaintiff about lithium, Dr. Laakso's expert opines that plaintiff "was appropriately advised about lithium, the risks and side effects and how it needed to be monitored with blood tests." According to this expert, Dr. Laakso provided plaintiff with an informational handout when she first prescribed lithium to plaintiff, which expressly stated the need for blood tests to insure proper dosage. Additionally, as the expert points out, plaintiff admits to having received another handout relating to lithium use from the Duane Reade pharmacy when filling his prescription for lithium. Dr. Laakso's expert states in his affidavit that plaintiff "admitted that Dr. Laakso told him to get his blood work checked at Dr. Morledge's office" and that plaintiff "concedes that he was aware and assumed that the reason Dr. Laakso was directing him to get blood work was to monitor the medications she prescribed, including lithium." Based upon these facts, Dr. Laakso's expert finds that she met the standard of care with respect to providing plaintiff with sufficient information about lithium use.

Dr. Laakso's expert further opines that Dr. Laakso met the standard of care with respect to "monitoring Stero's blood work for the lithium levels in April of 2005, and at all times before and after, especially since he did not exhibit any side effects suggestive of impending lithium toxicity." The expert sets forth that plaintiff, who was prescribed lithium in May of 2004, was directed by Dr. Laakso to have blood work performed, including the testing of blood lithium levels, on November 2, 2004, January 13, 2005 and again on April 27, 2005. In April of 2005, Dr. Morledge performed a blood test on plaintiff, however, blood lithium levels were not tested at that time. The results of this blood test in other respects were normal, and this was conveyed to plaintiff by Dr. Morledge. Thereafter, plaintiff informed Dr. Laakso that his April 2005 blood test was normal. Dr. Laakso credited plaintiff's representation that his April 2005 blood work was normal, and, according to this expert, "[i]t is not a departure from accepted medical standards to credit a statement made by a patient, including a psychiatric patient, if that physician finds the patient coherent enough to report the information, which Stero was."

With respect to any alleged failure on the part of Dr. Laakso to order a blood test for plaintiff in May of 2005, Dr. Laakso's expert opines that it is not the standard of care to order a blood test one month after a blood test was performed. The expert states that "[h]aving been told that the April 2005 blood test was normal, Dr. Laakso met the standard of care for lithium monitoring and she did not need to order another blood test in May, 2005." According to the expert, plaintiff was not exhibiting signs of possible lithium toxicity, such as tremors, in May of 2005, which would have warranted another blood test one month after a blood test had been performed.

Dr. Laakso's expert addresses causation in his affidavit, opining that "nothing Dr. Laakso did or did not do was a proximate cause of lithium toxicity and the resulting claimed injuries." He states that based upon the facts of this case, in his opinion, "somewhere between June 10 and June 17, 2005, Mr. Stero took lithium in a manner that was not prescribed which resulted in lithium toxicity and/or lithium overdose."

In opposition, plaintiff relies on the affidavit of his expert psychiatrist, wherein he states that "[i]t would be a departure from standard of care to prescribe lithium without the patient being made fully aware of the risk of brain injury. It is undisputed in this case that Dr. Laakso [ ] failed to inform Stero of this risk prior to prescribing this medication." According to plaintiff's expert, plaintiff was neither warned verbally by Dr. Laakso, nor by the handouts received by Dr. Laakso and Duane Reade that brain injury is a risk associated with lithium use. As a result, plaintiff did not give his informed consent to be treated with lithium.

Plaintiff's expert further opines that Dr. Laakso deviated from the standard of care by relying on what plaintiff, her patient, said were the results of his April 2005 blood test. As noted by plaintiff's expert, plaintiff was unaware that Dr. Morledge did not test his lithium levels, and correctly reported to Dr. Laakso that Dr. Morledge informed him that other than slightly elevated enzyme levels, the results were normal. According to the expert, Dr. Laakso should have spoke directly to Dr. Morledge about the test results and should have asked Dr. Morledge to send her a copy of the results; and in not doing so deviated from the standard of care. Dr. Laakso's failure to follow up with Dr. Morledge to make sure the blood test she wanted performed in April of 2005 was properly done, and her failure to review the results of that test, was a deviation from the standard of care. Plaintiff's expert adds that other than the test results relating to the July 20, 2004 blood test, Dr. Laakso never received any further blood work results, and never followed up with Dr. Morledge to confirm that other blood tests were performed to test plaintiff's lithium levels, despite the fact Dr. Laakso repeatedly increased plaintiff's lithium dosage after July of 2004. The increasing of plaintiff's lithium dosage without obtaining further blood lithium levels, according to plaintiff's expert, is also deviation from the standard of care.

Additionally, plaintiff's expert opines that as of May 27, 2005, plaintiff began to exhibit signs of lithium toxicity and that Dr. Laakso's failure to obtain an immediate blood test to measure plaintiff's blood lithium levels, kidney function and thyroid function was a deviation from accepted standards of medical care. In his opinion, "[h]ad a blood test been done, it would have with a reasonable degree of medical probability shown elevated lithium levels, which would have resulted in discontinuance of lithium, and the patient would not have suffered brain injury." According to plaintiff's expert, "[Dr.] Laakso's failure to obtain Stero's informed consent before placing him on lithium, and her failure to do appropriate blood tests in a timely manner caused plaintiff to suffer lithium toxicity, resulting in renal failure, and brain injury."

Based upon these conflicting expert affidavits, it appears that issues of fact and credibility exist in connection with whether the treatment provided by Dr. Laakso deviated from good and accepted medical practice in her treatment of plaintiff, and whether she provided sufficient information to plaintiff with respect to lithium use. Although Dr. Laakso's expert opines that plaintiff "was appropriately advised about lithium, the risks and side effects and how it needed to be monitored with blood tests," plaintiff's expert sets forth that "[i]t would be a departure from standard of care to prescribe lithium without the patient being made fully aware of the risk of brain injury." These issues cannot be resolved on this motion for summary judgment. These are questions of fact to be resolved by a jury, as are the issues raised by the conflicting expert opinions relating to whether or not her treatment of plaintiff with respect to testing his blood lithium levels was within the standard of good and acceptable medical care.

With respect to Dr. Laakso's contention that summary judgment is warranted because of plaintiff's own wrongdoing in filing illegitimate prescriptions and back-to-back prescriptions. This court does not find that defendants have established, as a matter of law, that plaintiff was filing illegitimate prescriptions and back-to-back prescriptions. Plaintiff has submitted sufficient evidence in opposition to defendants' motion to raise triable issues of fact with respect to whether plaintiff filled illegitimate prescriptions and/or filled back-to-back prescriptions at the Duane Reade pharmacy. In opposition to the Dr. Laakso's motion, plaintiff submits his own testimony where he explains that in 2000 his dog Mowgly became ill, and he was given a prescription for Phenobarbital, which he had filled at the Duane Reade pharmacy. At that time Duane Reade created an account under the name of Paul Mowgly Stero. Plaintiff further submits the affidavit of the Duane Reade's Director of Pharmacy Operations, Gary Melnick. In his affidavit Mr. Melnick confirms that plaintiff has two accounts with Duane Reade; one account for Paul Stero, and another for Paul Mowgly Stero. According to Mr. Melnick, on June 2, 2005 a request was made for a lithium refill, which was never filled and not picked up by plaintiff. Thereafter, on June 3, 2005, a new prescription was filled. He states that "[a]pparently the new prescription was filled using the same bottle that had been designated for the refill, which was not done." Therefore, according to Mr. Melnick, the Duane Reade records demonstrate that plaintiff received only one bottle of lithium in June of 2005, which contained 75 tablets.<sup>3</sup> Accordingly, defendant Laakso's cross-motion for summary judgment dismissing the complaint as asserted against her is denied.

Louis Joseph Morledge, M.D. and Madison Medical Group

Defendants Dr. Morledge and Madison Medical Group presently cross-move for summary judgment dismissing the complaint as asserted against them. These defendants argue that the evidence demonstrates that Dr. Morledge did not depart from good and accepted medical care in connection with his treatment of plaintiff, and, thus, he is entitled to summary judgment. Dr. Morledge and Madison Medical Group also argue that since plaintiff's claims against Madison Medical Group are solely for vicarious liability for the alleged negligence of Dr. Morledge, they too are entitled to summary judgment.

In support of their cross-motion Dr. Morledge and Madison Medical Group submit the expert affidavit of a board certified internist, who is licensed to practice in the New York. According to this expert, "the treatment rendered by Dr. Morledge was at all times in accordance with the accepted standards of medical practice, and the medical treatment rendered by Dr. Morledge to the plaintiff did not cause or contribute to any alleged injuries claimed by plaintiff." Specifically, this expert states that:

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<sup>3</sup> Defendants argue that based upon the deposition testimony of Gary Melnick, which was conducted after his affidavit was submitted to the Court, there exists inconsistencies between the two; and the affidavit should not be considered in deciding the instant motion. Despite defendants' contention to the contrary, the Court does not find any significant inconsistencies between Gary Melnick's deposition testimony and his affidavit that would warrant the rejection of Mr. Melnick's affidavit.

"since Dr. Morledge did not prescribe any of the psychotropic medications to the plaintiff between 2003 and 2005, good and acceptable medical practice did not require him to test the plaintiff's blood levels with regard to the efficacy of the psychotropic medications. Further, good and acceptable practice did not require Dr. Morledge to discuss or warn the plaintiff of the potential risks and benefits of a medication that was prescribed by another medical doctor."

Dr. Morledge and Madison Medical Group's expert ultimately sets forth that "Dr. Morledge cannot be liable for failing to test, warn or monitor a medication that was prescribed by another physician."

In opposition to this cross-motion, plaintiff also relies upon the affidavit of their expert psychiatrist. With respect to the treatment rendered to plaintiff by Dr. Morledge, plaintiff's expert opines that there were several deviations from accepted standards of medical care, and that such deviations were substantial factors in causing plaintiff's injuries. According to plaintiff's expert psychiatrist, Dr. Morledge deviated from the standard of care "in failing to perform the blood test for lithium levels as requested by Dr. Laakso in April 2005, in failing to coordinate his patient's care with Dr. Laakso, [and] in failing to consult with Dr. Laakso with regard to the need for further blood work with respect to his lithium intake. . ." Plaintiff's expert further opined that Dr. Morledge deviated from the standard of care "in failing to inform Stero as to the need and importance of repeat blood work." The expert states that:

"[e]ven though [Dr. Morledge] did not prescribe the lithium, as Stero's primary care doctor, who agreed to participate with Laakso in Stero's care to test lithium levels, he had an obligation to inform Stero that such levels must be done on a regular basis, and whenever there is an increase in dosage, and what signs and symptoms of lithium toxicity are so he may be alerted to them."

With respect to causation, plaintiff's expert psychiatrist sets forth that Dr. Morledge's aforementioned deviations from the standard of care were substantial factors in causing plaintiff's injuries. In his opinion, plaintiff would have avoided injury if Dr. Morledge tested plaintiff's blood for lithium in April of 2005, or had he made plaintiff aware of the need for regular blood lithium tests or the signs of lithium toxicity.

Based upon these conflicting expert affidavits, it appears that issues of fact and credibility exist in connection with whether the treatment provided by Dr. Morledge deviated from good and accepted medical practice. As previously stated, such issues cannot be resolved on this motion for summary judgment. Accordingly, defendants Dr. Morledge and Madison Medical Group's cross-motion for summary judgment dismissing the complaint as asserted against them is denied.

#### Plaintiff

Plaintiff presently cross-moves for partial summary judgment against Dr. Laakso with respect to plaintiff's informed consent cause of action. In his cross-motion, plaintiff also seeks to preclude the following items of evidence at the time of trial: (i) the statement of the Emergency Medical Technician (hereinafter EMT) that he saw open alcohol bottles in plaintiff's home; (ii)

evidence that plaintiff was convicted of driving under the influence of alcohol (hereinafter "DUI") in 1999 and that he previously overdosed on Vioxx in 2000; and (iii) defendant's expert testimony that plaintiff is a malingerer, dishonest and motivated by secondary gain.

With respect to plaintiff's cross-motion for partial summary judgment against Dr. Laakso with respect to the informed consent cause of action, as set forth above, based upon the conflicting expert affidavits, issues of fact and credibility exist in connection with whether Dr. Laakso provided sufficient information to plaintiff with respect to lithium use. Although plaintiff's expert sets forth that "[i]t would be a departure from standard of care to prescribe lithium without the patient being made fully aware of the risk of brain injury," Dr. Laakso's expert opines that plaintiff "was appropriately advised about lithium, the risks and side effects and how it needed to be monitored with blood tests." These issues cannot be resolved on this motion for summary judgment. These are questions of fact to be resolved by a jury.

In addition to seeking partial summary judgment as against Dr. Laakso with respect to the informed consent cause of action, plaintiff also seeks to preclude the following items of evidence at the time of trial: (i) the statement of the Emergency Medical Technician (hereinafter EMT) that he saw open alcohol bottles in plaintiff's home; (ii) evidence that plaintiff was convicted of driving under the influence of alcohol (hereinafter "DUI") in 1999 and that he previously overdosed on Vioxx in 2000; and (iii) defendant's expert testimony that plaintiff is a malingerer, dishonest and motivated by secondary gain.

Plaintiff first seeks to preclude defendants from introducing any evidence at the time of trial relating to the reference in the ambulance call report that an EMT observed empty alcohol bottles in plaintiff's apartment on June 17, 2005. The ambulance call report, and the information contained therein, are hearsay and are precluded at the time of trial. See Sanchez v. City of New York, 299 AD2d 475 [2d Dept. 2002]. If defendants sought to call the EMT who responded to the scene at plaintiff's apartment on June 17, 2005 as a witness, providing plaintiff's counsel with an opportunity to cross-examine the EMT with respect to his observations on that day, the Court would have no grounds to preclude such testimony. However, the ambulance call report and the statements contained therein are precluded at the time of trial.

Plaintiff further seeks to preclude any evidence during the trial of this action relating to plaintiff's 1999 DUI conviction and any evidence that he previously overdosed on Vioxx in 2000, when taken by plaintiff with other medications and an undetermined amount of alcohol. With respect to plaintiff's 1999 DUI conviction, this Court, in its discretion, finds that this conviction, which occurred approximately six years prior to the subject incident and approximately nine years prior to the trial of this action is too remote in time to have any significant probative value with respect to plaintiff's credibility. With respect to precluding any evidence that plaintiff previously overdosed on Vioxx in 2000, this Court finds that defendants cannot establish that plaintiff's misuse of prescription medication was done with the requisite regularity and deliberateness to permit such evidence to demonstrate that he habitually misused prescription drugs. To justify the introduction of evidence to demonstrate that plaintiff habitually misused prescription drugs, defendants herein must be able to show a sufficient number of instances where plaintiff acted in such a manner. See Halloran v. Virginia Chem., 41 NY2d 386 [1977]; Richardson on Evidence, 11th Ed., sec. 4-602, p. 198. Based upon the evidence presently before this Court, it appears that defendants are unable to show any occasion, other than plaintiff's Vioxx overdose in 2000, where

he had misused prescription drugs. Such a showing is insufficient. See Halloran v. Virginia Chem., supra. Therefore, this Court finds that evidence that plaintiff misused prescription pills in 2000, either intentionally or accidentally, may not be used in any way to demonstrate that plaintiff misused lithium in June of 2005. Accordingly, defendants are precluded from admitting any evidence that plaintiff previously overdosed on Vioxx in 2000.

Defendants argue in opposition to plaintiff's cross-motion to preclude the aforementioned evidence, that such evidence, *i.e.*, the ambulance call report, the DUI conviction and the Vioxx overdose, should be admitted as circumstantial evidence to demonstrate that plaintiff was a chronic alcohol abuser, and that his injuries are a result of alcohol abuse, and not lithium toxicity. Notwithstanding defendants' argument, these three occurrences, even when considered with plaintiff's treatment for alcohol withdrawal subsequent to the subject incident, do not show a pattern of chronic alcohol abuse, and cannot be admitted for the purpose of demonstrating that plaintiff was a chronic alcohol abuser.

Lastly, plaintiff seeks to preclude defendants' expert testimony that plaintiff is a malingerer, dishonest and motivated by secondary gain. While defendants' experts certainly may offer opinion testimony calling into question the severity of plaintiff's injuries, they cannot directly offer an opinion relating to plaintiff's credibility. See Kravitz v. Long Island Jewish Hillside Medical Center, 113 AD2d 577 [2d Dept. 1985]. An expert may only testify to the credibility of a party where "the methodology applied by the expert [in making his or her determination] is so reliable that he or she can testify that the results are conclusive and not merely accurate within a reasonable degree of medical certainty." See Id. Defendants have not demonstrated that their experts have conclusively established that plaintiff is a malingerer, dishonest and motivated by secondary gain, and, thus, may not offer opinions stating so. Notwithstanding, as set forth above, these experts are not precluded from offering opinion testimony calling into question the severity of plaintiff's injuries.

Based upon the foregoing it is:

**ORDERED** that defendants Steven Schneider M.D. and Robert Marbach motion for summary judgment, dismissing the complaint, as asserted against them is denied; and it is further

**ORDERED** that that portion of the cross-motion by defendants Ulla Kristina Laakso M.D. and Continuum Health Partners Inc. for summary judgment, dismissing the complaint, as asserted against Ulla Kristina Laakso M.D. is denied; and it is further

**ORDERED** that that portion of the cross-motion by defendants Ulla Kristina Laakso M.D. and Continuum Health Partners Inc. for summary judgment, dismissing the complaint, as asserted against Continuum Health Partners Inc. is granted; and it is further

**ORDERED** that the cross-motion by defendants Louis Joseph Morledge, M.D. and Madison Medical Group for summary judgment, dismissing the complaint, as asserted against them, is denied; and it is further.

ORDERED that that portion of plaintiff's cross-motion for summary judgment against Ulla Kristina Laakso M.D. with respect to the informed consent cause of action is denied; and it is further

ORDERED that that portion of plaintiff's cross-motion to preclude (i) the statement of the Emergency Medical Technician that he saw open alcohol bottles in plaintiff's home; (ii) evidence that plaintiff was convicted of driving under the influence of alcohol in 1999 and that he previously overdosed on Vioxx in 2000; and (iii) defendant's expert testimony that plaintiff is a malingerer, dishonest and motivated by secondary gain is granted.

Dated: 10/21/2007

*Joan F. [Signature]*  
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J.S.C.

Check one:  FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

NON- FINAL DISPOSITION  
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**FILED**  
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NEW YORK