

Anonymous v Wyckoff Heights Med. Ctr.

2008 NY Slip Op 32193(U)

July 31, 2008

Supreme Court, Suffolk County

Docket Number: 0008978/2001

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**

P R E S E N T :

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 3-20-08
ADJ. DATE 5-15-08
Mot. Seq. # 006 MG
Mot. Seq. # 007 MD
Mot. Seq. # 008 MD

-----X
ANONYMOUS and MRS. ANONYMOUS, :
 :
 :
 Plaintiffs, :
 :
 :
 -- against -- :
 :
 WYCKOFF HEIGHTS MEDICAL CENTER, :
 DR. NAGENDRA SAGAR KATARI, SOUTH :
 SHORE MEDICAL ASSOCIATES and DR. :
 CARY LEVINE, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 73 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 ; Notice of Cross Motion and supporting papers 24 - 30; 31 - 42 ; Answering Affidavits and supporting papers 44 - 55; 56 - 67 ; Replying Affidavits and supporting papers 68 - 69; 70 - 71; 72 - 73 ; Other _____; and after hearing counsel in support and opposed to the motion, it is,

ORDERED that the motion (#006) by defendant Nagendra Katari for summary judgment dismissing the complaint against him is granted; and it is further

ORDERED that the cross-motion (#007) by defendant Wyckoff Heights Medical Center and the cross-motion (#008) by defendants South Shore Medical Associates and Cary Levine for summary judgment dismissing the complaint are denied.

Plaintiff, a New York City police officer, allegedly contracted the human immunodeficiency virus (HIV) through human bite wounds that occurred while assisting another officer make an arrest on the evening of November 5, 1998. The wounds allegedly happened when plaintiff punched the arrestee in the mouth with his right fist and the arrestee's teeth penetrated plaintiff's skin in two locations on the top of his right hand. Hours after the alleged incident, plaintiff presented to the emergency department of defendant Wyckoff Heights Medical Center for treatment of the injuries on his hand. He was treated in

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the emergency department by defendant Nagendra Katari, who is employed by Wyckoff Heights Medical Center as an attending physician and is board-certified in internal medicine and emergency medicine. On Dr. Katari's orders, a nurse cleaned the wounds, applied a topical antibiotic, and administered a tetanus shot to plaintiff. An x-ray taken at the hospital revealed no fractures in plaintiff's right hand. Dr. Katari diagnosed plaintiff as suffering from a superficial laceration and a soft tissue injury on the right hand, and prescribed an oral antibiotic to prevent infection.

The next morning, plaintiff sought medical care from his internist, defendant Cary Levine, for inflammation in his right hand. Dr. Levine, a partner in defendant South Shore Medical Associates, P.C., diagnosed plaintiff as suffering from cellulitis, an infection of the dermis and subcutaneous tissue caused by bacteria, and prescribed a different oral antibiotic and a corticosteroid. He also instructed plaintiff to soak his right hand in warm water with Epsom salt. At a follow-up examination conducted three days later, Dr. Levine had a blood sample taken from plaintiff to test for HIV antibodies. This test did not detect the presence of HIV antibodies in plaintiff's blood. Plaintiff returned to Dr. Levine's office again on November 13, 1998, at which time the symptoms of the skin infection had improved. Shortly thereafter, on November 30, 1998, plaintiff sought treatment from Dr. Levine for viral symptoms and a rash. Based on the findings made during a physical examination and the results of a blood test, Dr. Levine diagnosed plaintiff as suffering from a viral infection. On June 3, 1999, plaintiff presented at Dr. Levine's office with a complaint of chest congestion. A sample of plaintiff's blood drawn during this appointment was sent to a laboratory to test again for HIV antibodies. The test was positive for HIV, and secondary tests to confirm the HIV infection also were positive.

Subsequently, plaintiff commenced this action against defendants to recover damages for medical malpractice, alleging that as a result of their negligent care he contracted HIV and suffered other physical and psychological conditions, including depression, anxiety and fear of developing Acquired Immune Deficiency Syndrome (AIDS). Plaintiff's wife sued derivatively for loss of services. The complaint alleges defendants were negligent in the care and treatment rendered to plaintiff, in failing to properly diagnose plaintiff's medical condition, and in failing to provide prophylactic-drug therapy. As amplified by the bills of particulars, plaintiff alleges, among other things, that defendants were negligent in "failing to properly assess and appreciate the risks to plaintiff as a result of his exposure to another's blood and/or bodily fluids"; "in failing to take adequate and necessary post-exposure steps so as to minimize the likelihood and/or severity of plaintiff contracting bloodborne infections"; "in failing to timely begin plaintiff on post exposure prophylaxis treatment"; "in failing to train the staff on proper steps to take when treating patients exposed to potential bloodborne infections"; and in failing to provide proper post exposure counseling, evaluation and treatment protocols."

Dr. Katari now moves for summary judgment dismissing the complaint against him, arguing the failure to initiate a post-exposure HIV prophylaxis regimen when plaintiff presented at the hospital's emergency department did not constitute medical malpractice. Further, Dr. Katari asserts plaintiff is unable to establish that the source of the HIV infection was the arrestee with whom he had the altercation in November 1998, or that prompt initiation of post-exposure prophylaxis would have prevented the HIV infection. Evidence submitted in support of the motion includes copies of the pleadings; an affirmation of Dr. Anthony Mustalish, who is board-certified in the specialty of emergency medicine; an affirmation of Dr. Katari; and transcripts of the deposition testimony of plaintiff, Dr. Katari, and Dr. Levine. Wyckoff

Heights Medical Center cross-moves for summary judgment dismissing the claims against it, arguing that judgment must be granted in its favor if the Court determines as a matter of law that Dr. Katari was not negligent. Dr. Levine and South Shore Medical Associates also cross-move for summary judgment in their favor, alleging the failure to recommend post-exposure prophylaxis for plaintiff did not constitute a departure from accepted standards of medical care. The Court notes neither the cross motion by Wyckoff Heights nor the cross motion by Dr. Levine and South Shore Medical Associates is supported by an expert's affidavit or affirmation. Rather, both cross motions incorporate by reference the arguments and exhibits submitted by Dr. Katari in support of his motion for summary judgment.

In opposition, plaintiffs argue Dr. Katari and Wyckoff Heights Medical Center had a duty to treat plaintiff the same as they would treat a health-care worker who had an occupational exposure to HIV, and that he breached such duty by failing to evaluate the likelihood of risk of transmission and to recommend prophylactic treatment. More particularly, they allege that plaintiff's job as a police officer entails the same occupational risk of contracting HIV from an infected individual as a health-care worker experiences in a health-care setting. Therefore, plaintiffs contend, defendants had a duty to assess the risk of HIV exposure when treating plaintiff's bite wounds the same way such risk is assessed when health care personnel sustain a needlestick injury while at work. Based on this premise, plaintiffs assert the affirmation of Dr. Mustalish is insufficient to meet Dr. Katari's burden of proof on the motion, because it does not demonstrate that Dr. Katari abided by public health service guidelines issued by the federal Centers for Disease Control and Prevention (CDC) for management of occupational exposure to HIV by health-care personnel. Plaintiffs also argue that even if the November 1998 altercation is considered a nonoccupational exposure to HIV, Dr. Katari should have considered antiretroviral drug therapy as there was a high risk of infection. Alternatively, plaintiffs argue the deposition testimony provided by Dr. John Vernaleo, the Infectious Disease Director at Wyckoff Heights Medical Center, and the affidavit and the affirmation of their experts demonstrate as a matter of law that Dr. Katari breached his duties to advise patients of the risk of HIV transmission, to perform a "baseline test," and to counsel about antiretroviral drug therapy. Plaintiffs further assert Wyckoff Heights Medical Center, in addition to being vicariously liable for Dr. Katari's actions, breached an obligation "to have in effect policies and procedures for those who sought care at its hospital for occupational and non-occupational exposure" to blood and other body fluids that may contain HIV. Plaintiffs assert the only triable issue with respect to Dr. Katari and Wyckoff Heights Medical Center is whether their negligence was a cause of plaintiff's HIV infection.

As to defendants Dr. Levine and South Shore Medical Associates, plaintiffs argue the affidavit of Dr. Mustalish is insufficient to meet their burden of proof on the cross motion, since the affidavit only addresses the issue of whether Dr. Katari was negligent in his treatment of plaintiff. Plaintiffs further argue their experts' affidavit and affirmation raise questions as to whether Dr. Levine departed from acceptable medical care by failing to evaluate plaintiff's risk of HIV exposure, failing to provide plaintiff with counseling on the risks of HIV transmission, and failing to prescribe an antiretroviral treatment regimen.

A physician owes a patient three basic duties of care: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the physician practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and

exercising his or her skill (*see Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Pike v Honsinger*, 155 NY 201, 49 NE 760 [1898]). Significantly, the rule requiring a physician to use his or her best judgment “does not hold him [or her] liable for a mere error in judgment, provided he [or she] does what he [or she] thinks is best after careful examination” (*Pike v Honsinger, supra*, at 210, 49 NE 760; *see Davis v Patel*, 287 AD2d 479, 731 NYS2d 204 [2d Dept 2001]). Thus, a physician may be liable for medical malpractice only if the physician’s treatment decisions “do not reflect his or her best judgment, or fall short of the generally accepted standard of care” (*Nestorowich v Ricotta, supra*, at 399, 740 NYS2d 668).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted standards of medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff’s injury or damage (*see Sheenan-Conrades v Winifred Masterson Burke Rehabilitation Hosp.*, 51 AD3d 769, 858 NYS2d 280 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; *Biggs v Mary Immaculate Hosp.*, 303 AD2d 702, 758 NYS2d 83 [2d Dept], *lv denied* 100 NY2d 506, 763 NYS2d 812 [2003]). On a motion for summary judgment dismissing a medical malpractice action, a defendant physician has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]; *Rebozo v Wilen, supra*; *Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]). If the defendant makes such a showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue of fact (*see DiGiario v Agrawal*, 41 AD3d 764, 839 NYS2d 212 [2d Dept 2007]; *Kaplan v Hamilton Med. Assoc.*, 262 AD2d 609, 692 NYS2d 674 [2d Dept 1999]; *Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician’s motion for summary judgment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Ramsay v Good Samaritan Hosp.*, 24 AD3d 645, 808 NYS2d 374 [2d Dept 2005]; *DiMitri v Monsouri*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]). Rather, to create a triable issue, a plaintiff must submit an affidavit or affirmation of a medical expert attesting to the defendant’s departure from accepted standards of medical care and opining that such deviation was a competent producing cause of the plaintiff’s injury (*see Bjorke v Rubenstein*, ___ AD3d ___, 2008 WL 2669686 [2d Dept, July 8, 2008]; *Shahid v New York City Health & Hosps. Corp., supra*; *Vera v Soohoo*, 41 AD3d 586, 838 NYS2d 154 [2d Dept 2007]; *Thompson v Orner, supra*; *Domaradzki v Glen Cove Ob/Gyn Assoc.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]; *see generally Alvarez v Prospect Hosp., supra*).

Dr. Katari established prima facie his entitlement to summary judgment through the parties’ deposition testimony and the affidavit of Dr. Mustalish, who concludes Dr. Katari’s emergency room treatment of plaintiff did not depart from the accepted standard of care and that no causal relationship can be established between his failure to recommend postexposure prophylaxis and plaintiff’s HIV infection (*see Bjorke v Rubenstein, supra*; *Worthy v Good Samaritan Hosp. Med. Ctr.*, 50 AD3d 1023, 857 NYS2d 178 [2d Dept 2008]; *Rosen v John J. Foley Skilled Nursing Facility*, 45 AD3d 558, 846 NYS2d

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208 [2d Dept 2007]; *Johnson v Queens-Long Is. Med. Group, P.C.*, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]). In particular, the affirmation of Dr. Mustalish states that in 1998 prophylaxis was offered only in limited circumstances to health care personnel exposed to HIV in a health-care setting, commonly referred to as an occupational exposure. Dr. Mustalish states that it was not standard medical practice at the time of plaintiff's altercation with the arrestee for an emergency physician to offer prophylaxis for non-occupational exposure to HIV, even if the patient had been exposed to blood or body fluids during a physical altercation, and that antiretroviral drug therapy never was administered at the request of a patient. He states there were no established policies or guidelines in November 1998 for non-occupational HIV exposures, and that HIV prophylaxis would be offered for non-occupational exposures only in circumstances where there was "a great likelihood of HIV transmission and exposure to a known HIV carrier." Dr. Mustalish further states that in November 1998 "the CDC did not recommend that antiretroviral agents be used in situations of non-occupational exposure, and recommended against antiretroviral agents for persons with HIV exposures that [had] a low risk of exposure." He opines that the information allegedly provided to Dr. Katari by plaintiff about the wounds to his right hand – i.e., that the cuts were caused by the teeth of a person who appeared thin, disheveled and dirty, and whose mouth came in contact with plaintiff's fist during an arrest– indicated that plaintiff had only a minimal risk of HIV transmission. He further opines that, under such circumstances, Dr. Katari's actions were consistent with the recommendations of the CDC at that time.

Contrary to the assertions by plaintiffs' counsel, both the affidavit and the affirmation of plaintiffs' experts submitted in opposition to Dr. Katri's motion fail to raise a triable issue of fact. The Court notes that no allegations have been made by plaintiffs' experts that Dr. Katari negligently treated the wounds on plaintiff's hand. The affidavit of plaintiffs' expert in infectious diseases states "there is no indication in the records or testimony of either Dr. Katari or Dr. Levine that they considered the risk of HIV infection to this police officer or that they took his concerns [of HIV transmission during the altercation] seriously." The expert, a physician licensed to practice medicine in Georgia, states in the affidavit that plaintiff's HIV infection "was a result of the incident of November 6, 1998" [sic], and that plaintiff would have been a candidate for treatment with AZT, an antiretroviral drug, had the risk of HIV transmission "been properly assessed." The expert further asserts plaintiff would have had "between 65 to 80% chance of clearing the [HIV] virus from his body" had he been given the drug AZT during the period of time between November 6 and November 9, 1998, and that during the following weeks "there was still a window of opportunity" during which antiretroviral therapy may have prevented the infection. This expert's affidavit, however, does not indicate the accepted medical standard that existed in November 1998 for managing so-called non-occupational exposures to HIV, particularly in circumstances involving the potential exchange of blood or body fluids between individuals whose HIV status is unknown (see *Harper v Findling*, 38 AD3d 601, 832 NYS2d 266 [2d Dept 2007]), or that Dr. Katari's treatment of plaintiff deviated from such standard of care (see *Rosen v John J. Foley Skilled Nursing Facility*, *supra*; *Pace v Jakus*, 291 AD2d 436, 737 NYS2d 123 [2d Dept 2002]; *Perrone v Grover*, 272 AD2d 312, 707 NYS2d 196 [2d Dept 2000]). It also does not address the allegations made by Dr. Mustalish that the information available to Dr. Katari at the time indicated that plaintiff had only a low risk of HIV transmission, and that postexposure prophylaxis was not recommended in such a situation. Further, in concluding that Dr. Katari failed to assess the plaintiff's risk of HIV transmission and that plaintiff would have been a candidate for antiretroviral drug therapy improperly, this expert improperly relied on information not known to Dr. Katari at the time he treated plaintiff, namely the HIV status of the arrestee (see *Rodriguez v*

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Montefiore Med. Ctr., 28 AD3d 357, 814 NYS2d 59 [1st Dept 2006]; *Lederman v Lawrence Hosp.*, 202 AD2d 198, 607 NYS2d 948 [1st Dept 1994]; see also *Holbrook v United Hosp. Med. Ctr.*, *supra*).

The affirmation of plaintiff's expert in internal medicine and emergency medicine states that plaintiff "had the same risk [of HIV transmission] as faced by a health care worker stuck by a needle" when his skin was cut by the teeth of "a person suspected to be at high risk for HIV infection." It states that Dr. Katari and Wyckoff Heights Medical Center deviated from accepted standards of medical care by "failing to take an adequate history" of the hand injury to determine plaintiff's risk of exposure to HIV, and by failing "to consider prophylaxis treatment." It states that "[o]nce the [plaintiff] expressed that he was exposed to a person who he was concerned was infected with HIV and with whom there was a mixing of body fluids, Dr. Katari had a duty to assess his risk [for HIV infection] and the best way to do so was already outlined" in the infection control manual prepared by Wyckoff Heights Medical for the management of occupational exposures to blood or body fluids. This expert opines that if a police officer advises a physician that he or she sustained lacerations during physical contact with a person who the officer is concerned may be infected with HIV, the physician has a duty to inquire about and document all details of that encounter in order to properly counsel the patient about the risk of exposure to HIV and other viral infections. The expert's affirmation further states Wyckoff Heights Medical Center was negligent in not having procedures in place for prophylactic treatment of non-employees who present to the hospital "with a history that would evidence a risk" of HIV exposure. The expert concludes that plaintiff's HIV infection was the result of the exchange of bodily fluids with the arrestee and that, had plaintiff "been given the proper evaluation, counseling and treatment with AZT at the time of his admission to Wyckoff, he would have had a significant chance of eliminating the virus and would not now be HIV positive."

As with the expert affidavit offered by plaintiff, the expert's affirmation is silent as to what constituted acceptable medical practice in 1998 when a patient presented for emergency treatment following a potential exposure to HIV, particularly if the HIV status of the source is unknown (see *Harper v Findling*, *supra*). Further, absent from the expert's affirmation is any factual support for the conclusion that Dr. Katari should have followed the protocol for occupational exposure to HIV when he treated plaintiff. In fact, the Court rejects plaintiffs' argument that the scope of the duty owed by an emergency physician to a patient presenting after a potential exposure to HIV increased to include evaluating the likelihood of HIV transmission and providing "supportive counseling" and information about postexposure prophylaxis if such patient was a police officer. A determination regarding the existence of a duty and the scope thereof involves scrutiny by a court of the wrongfulness of the alleged tortfeasor's action or inaction, and an examination of the injured party's reasonable expectation of the care owed to him by others (see *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584, 611 NYS2d 817 [1994]; *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49 [1986]). Here, plaintiffs failed to show that it would be reasonable for a police officer, like plaintiff, who expressed a concern about potential HIV exposure when presenting for emergency medical treatment, to expect that he or she would be assessed, evaluated and treated by an emergency physician in the same manner as a person working in a health-care setting whose actions with patients or blood or body fluids from patients lead to exposure to bloodborne infections.

Moreover, the expert's assertions in the affirmation that the arrestee "had a high risk of infection" and that plaintiff had the same risk of HIV transmission as a health care worker stuck by a needle are not

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supported by any facts or data. There also is no factual support for the assertion that postexposure prophylaxis would have provided plaintiff with a “significant chance of eliminating the virus.” The expert’s bare, conclusory assertions that plaintiff’s HIV infection was caused by an exchange of bodily fluids with the arrestee during the altercation in November 1998, and that plaintiff “would not now be HIV positive” if Dr. Katari had counseled him about HIV prophylaxis, therefore, lack probative value (*see Diaz v Downtown Hosp.*, 99 NY2d 542, 754 NYS2d 195 [2002]; *Shahid v New York City Health & Hosps. Corp.*, *supra*; *Furey v Kraft*, 27 AD3d 416, 812 NYS2d 590 [2d Dept], *lv denied* 7 NY3d 703, 819 NYS2d 869 [2006]; *Maldonado v Lee*, 278 AD2d 206, 717 NYS2d 258 [2d Dept 2000]; *see generally Romano v Stanley*, 90 NY2d 444, 661 NYS2d 589 [1997]; *Amatulli Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1991]). Thus, summary judgment dismissing the claims against Dr. Katari is granted, as the expert affidavit and the expert affirmation submitted by plaintiffs are insufficient to create triable issues as to the applicable standard of care in 1998 for non-occupational HIV exposure, whether Dr. Katari departed from such standard, and whether such departure caused plaintiff’s alleged injuries (*see Diaz v Downtown Hosp.*, *supra*; *Perro v Schappert*, 47 AD3d 694, 848 NYS2d 882 [2d Dept 2008]; *Furey v Kraft. supra*).

However, the cross motion by Wyckoff Heights Medical Center for summary judgment in its favor is denied. Although plaintiffs’ claim that Wyckoff Heights Medical Center was vicariously liable for the negligence of Dr. Katari must be dismissed in view of the determination to grant summary judgment dismissing the complaint against Dr. Katari, plaintiffs also have claimed that the hospital was negligent in failing to have an established procedure or protocol for the care of non-health care workers who present for medical treatment following exposure to blood or other bodily fluids infected with HIV. As indicated above, Wyckoff Heights Medical Center did not submit an affidavit from an expert attesting to the fact that the medical care provided to plaintiff by hospital staff in November 1998 conformed with accepted standards of medical care. Rather, the hospital relied on the affirmation of Dr. Katari’s expert to meet its burden on the motion. As the affirmation of Dr. Mustalish does not address the standard of care owed plaintiff by Wyckoff Heights Medical Center, its cross motion for summary judgment is denied (*see Vera v Soohoo*, *supra*; *Savage v Franco*, 35 AD3d 581, 827 NYS2d 210 [2d Dept 2006]).

Finally, the cross motion by Dr. Levine and South Shore Medical Associates is denied. CPLR 3212 (b) provides that if no date for making a summary judgment motion has been set by the court, such a motion “shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.” Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). The Court’s computerized records show that the note of issue was filed in this action on September 25, 2007. The cross motion by Dr. Levine and South Shore Medical Associates for summary judgment in their favor was made on February 21, 2008, the date which it was served (*see CPLR 2211*). As there is no explanation in the papers for the delay in making the application, the Court must deny the cross motion for summary judgment in favor of Dr. Levine and South Shore Medical Associates on the basis it was made more than 120 days after the filing of the note of issue (*see Miceli v State Farm Mut. Auto. Ins. Co.*, *supra*; *Soltes v 260 Waverly Owners, Inc.*, 42 AD3d 565, 840 NYS2d 412 [2d Dept 2007]). Even if the cross motion was timely, summary judgment in favor of Dr. Levine and South Shore Medical Associates would be

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denied, as they failed to submit an expert affidavit demonstrating prima facie that they were not negligent or that plaintiff's injuries were not caused by their negligence (*see Vera v Soohoo, supra; Savage v Franco, supra*).

Accordingly, having granted the motion for summary judgment dismissing the complaint against Dr. Katari, the claim against him is severed and the action is continued as to the remaining defendants. The unredacted affidavits and affirmations submitted by plaintiffs in opposition to the motions are being returned by mail to plaintiffs' counsel simultaneously with the issuance of this order.

Dated: 7/31/08

Emily Pines
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION

TO: LEWIS JOHS AVALLONE AVILES, LLP
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