SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 5
NASSAU COUNTY

WAYNE RASMUSSEN as the Administrator of the Estate of CHRIS RASMUSSEN, deceased,

Plaintiff(s),

-against-

WINTHROP HOSPITAL, SCOTT L. SCHUBACH, M.D., EDWARD ROBERT KOFSKY, M.D., SALVATORE SCOMA, M.D., and WILLIAM C. SCOT, M.D.,

Defendant(s).

ORIGINAL RETURN DATE:07/31/08
SUBMISSION DATE: 09/30/08
INDEX No.: 16917/04

MOTION SEQUENCE #4

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2,3,4,5
Reply.....	6
Sur-Reply	7

This motion by defendant Winthrop Hospital for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it is granted.

This is an action to recover damages for medical malpractice and lack of informed consent. Plaintiff Wayne Rasmussen alleges that when decedent Chris Rasmussen, who suffered from AIDS, diabetes and other illnesses, underwent cardiac bypass surgery at Winthrop Hospital on November 23, 2001, her private attending cardiovascular surgeon defendant Scott L. Schubach, M.D. accidentally cut a lymphatic duct in her sternum which caused her to leak chyle or lymph. Plaintiff alleges that as a result, decedent had to undergo several procedures to find and stop the leak, which, plaintiff alleges, caused a fungal infection, specifically, a sternal wound infection which required debridement and osteomyelitis in the spine, which traveled to her lumbar spine and caused her to be immobile until she passed away in June 2007 from other causes. On December 1, 2001, Mrs. Rasmussen returned to Winthrop with a lymph leak and on December 3, 2001, defendant Salvatore Scoma, M.D., a private attending infectious disease physician, was

brought in to consult on the case. Dr. Scoma managed all of the patient's issues relating to infection from that time on. On December 10, 2001, Dr. Schubach tried to locate and fix the leak with a thoracotomy procedure through the patient's back, and it appeared to be successful. However, on January 2, 2002, the lymphatic leak had not fully resolved, and Dr. Schubach performed another exploratory surgery, this time through the decedent's chest looking for its source. The source of the leak was then evident, and it was carefully sewn over. The leak was then successfully repaired. The decedent slowly improved and was transferred to Southside Hospital for rehabilitation on February 12, 2002, with a normal white blood cell count and no fever.

Defendant Winthrop Hospital seeks summary judgment dismissing the complaint against it. Winthrop Hospital maintains that the decedent's private attending doctors directed and provided the care and treatment the decedent received and that there are no grounds for imposing liability on it.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent 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." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

"To establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach of the standard was the proximate cause of injury." Sampson v Contillo___ AD2d ___, 2008 WL 4491469 (2d Dept. 2008), citing Nichols v Stamer, 49 AD3d 832 (2d Dept. 2008), quoting Berger v Becker, 272 AD2d 565, 565 (2d Dept. 2000). "To establish proximate cause, the plaintiff must present 'sufficient evidence from which a reasonable person might conclude that it was more probable than not that' the defendant's deviation was a substantial factor in causing the injury." Alice v Liguori, 54 AD2d 784 (2d Dept. 2008), quoting Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 (2d Dept. 2005); see also, Zak v Brookhaven Mem'l Hosp. Med. Ctr., 54 AD2d 852 (2d Dept. 2008), citing Lyons v McCauley, 252 AD2d 516 (2d Dept. 1998). As for damages, a plaintiff must submit evidence "from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [her] injury." Flaherty v Fromberg, 46 AD2d 743, 745 (2d Dept. 2007), citing Barbuto v Winthrop Univ. Hosp., 305 AD2d 623, 624 (2d Dept.

2003); Wong v Tang, 2 AD3d 840, 840-841 (2d Dept. 2003); Jump v Facelle, 275 AD2d 345, 346 (2d Dept. 2000), lv dism. 95 NY2d 931 (2000), lv to app den., 98 NY2d 612 (2002).

"In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician [and/or hospital] were negligent." Taylor v Nyack Hosp., 18 AD3d 537 (2d Dept. 2005) citing Alvarez v Prospect Hosp., supra. Thus, a moving defendant doctor or hospital has "the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the plaintiff was injured thereby." Chance v Felder, 33 AD3d 645 (2d Dept. 2006) quoting Williams v Sahay, 12 AD3d 366, 368 (2d Dept. 2004), citing Alvarez v Prospect Hosp., supra; Johnson v Queens-Long Island Med. Group, P.C., 23 AD3d 525, 526 (2d Dept. 2005); Taylor v Nyack Hosp., supra; see also, Thompson v Orner, supra.

If the moving party meets his burden, "in opposition, 'a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury.' " Domaradzki v Glen Cove Ob/Gyn Assocs., 242 AD2d 282 (2d Dept. 1997); see also, Mosezhnik v Berenstein, 33 AD3d 895 (2d Dept. 2006). The plaintiff's expert must not only differentiate between each defendant's specific acts but must also address the operative facts relied on by the defendants' experts. See, Kaplan v Hamilton Med. Assoc., P.C., 262 AD2d 609, 610 (2d Dept. 1999); see also, Rebozo v Williams, 41 AD3d 457, 459 (2d Dept. 2007); Slone v Salzer, 7 AD3d 609 (2d Dept. 2004); Ventura v Beth Israel Med. Ctr., 297 AD2d 801, 803 (2d Dept. 2002), lv den., 99 NY2d 510 (2003); Fhima v Maimonides Med. Ctr., 269 AD2d 559, 560 (2d Dept. 2000).

"Generally, a hospital cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee (quotations omitted)." Sampson v Contillo, supra, citing Quezada v O'Reilly-Green, 24 AD3d 744, 746 (2d Dept. 2005), lv to app den. 7 NY3d 703 (2006); see Dragotta v Southampton Hosp., 39 AD3d 744, 746; Salvatore v Winthrop Univ. Med. Ctr., 36 AD3d 887, 888 (2d Dept. 2007); Christopherson v Queens-Long Is. Med. Group, P.C., 17 AD3d 393, 394 (2d Dept. 2005); Orgovan v Bloom, 7 AD3d 770, 770 (2d Dept. 2004); see also, Martinez v LaPorta, 50 AD3d 976 (2d Dept. 2008). "Affiliation of a doctor with a hospital or other medical facility, not amounting to employment, is insufficient to impute the doctor's negligent conduct to the hospital or the medical facility." Keitel v Kurtz, 54 AD3d 387 (2d Dept. 2008) citing Hill v St. Claire Hosp., 67 NY2d 72 (1986); Bertini v Columbia Presbyt. Med. Ctr., 279 AD2d 492 (2d Dept. 2001). A hospital "may not be held concurrently liable [for the malpractice of a private attending physician] unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of the same." Toth v Broshinsky, 39 AD3d 848, 849 (2d Dept. 2007) citing Cerny v Williams, 32 AD3d 881 (2d Dept. 2006); Cook v Reisner, 295 AD2d 466 (2d Dept. 2002); Woodard v LaGuardia Hosp., 282 AD2d 529 (2d Dept. 2001); see also, Martinez v LaPorta, supra. And, "[w]here a private physician attends his

or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent." Salandy v Burke, 55 AD2d 137 (2d Dept. 2008) citing Cirella v Central Gen. Hosp., 217 AD2d 680, 681 (2d Dept. 1995); Public Health Law § 2805-d(1).

Contrary to plaintiff's position, Winthrop Hospital need not submit an expert's affidavit or affirmation to obtain summary judgment. A defendant may establish its entitlement to summary judgment via an attorney's affirmation, the patient's medical record and the pertinent deposition testimony. See, Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of its motion, Winthrop Hospital has established that decedent's doctors were not its employees and that the care and treatment provided decedent at its hospital was entirely under their control, thereby relieving it of liability. Winthrop Hospital has established its entitlement to summary judgment. See, Sampson v Contillo, supra; see also, Dragotta v Southampton Hosp., supra, at 699. The burden accordingly shifts to plaintiff to establish the existence of a material issue of fact.

In opposition, plaintiff alleges that two of Winthrop Hospital's employees departed from good and accepted standards of care and that those departures were a substantial factor in the causation of the decedent's injuries. Via an affirmation of expert Ira Mehlman, M.D., who is Board Certified in Internal Medicine, Emergency Medicine and Endocrinology and Metabolism, plaintiff explains and opines as follows:

Cecile LeMaresquier, a Nurse Practitioner and employee of Winthrop Hospital, examined decedent on November 26, 2001, the day before her planned discharge, and found her "lungs diminished bibasilar" and ordered an x-ray. Dr. Mehlman notes that Cecile LeMaresquier never followed up on the x-ray which was performed on November 27, 2001, which revealed a "new onset of pleural effusions bilaterally" and that decedent's "Progress Notes Discharge Assessment" dated November 27, 2001, verifies that that chest x-ray had been done but does not note the results. Dr. Mehlman then notes that Steven Bello, a Physician Assistant and employee of Winthrop Hospital, nevertheless discharged decedent. Dr. Mehlman opines to "a reasonable degree of medical certainty that Cecile LeMaresquier and Steven Bello departed from good and accepted medical standards in their care and treatment of Ms. Rasmussen's chest x-ray results taken on November 27, 2001, prior to her discharge." He explains that in decedent's case, her chest x-ray taken on the day of her discharge revealed "atelectasis at both lung bases with bilateral pleural effusions" and that "the pleural effusions are new from prior examination." It is Dr. Mehlman's opinion to a reasonable degree of medical certainty that accepted medical standards of care called for decedent's continued hospitalization for further testing and treatment in light of the x-ray's results. Dr. Mehlman further opines to a reasonable degree of medical certainty that these departures from accepted medical standards of care were substantial factors in causing Ms. Rasmussen's injuries. He explains that the development of a chylothorax after a median sternotomy and heart surgery is a well-known complication. He explains that the lymphatics, particularly the thoracic duct, are microscopic in size and are variably present within the region

of the posterior and middle mediastinum and that a chylous leak occurs when one of these lymphatics is torn but does not spontaneously close. He further explains that the chylous fluid is a solution with a high fat content and its leakage from the body leads to a decrease in nutritional parameters. He declares that in a patient with HIV like Ms. Rasmussen, a delay in the diagnosis of a chylous leak can significantly impact her immune function. He further opines that "in light of [decedent's] chest x-ray results on November 27, 2001, and the findings made immediately prior to her discharge, a diagnostic work-up, such as thoracentesis, would have revealed Ms. Rasmussen's chylous leak." Dr. Mehlman also opines that the delay in diagnosing and treating decedent's chylous leak exacerbated her injuries. He explains that "the chylous fluid in the thorax can be a medium for bacteria to grow in, so the sternal wound infection was predictable in such a case. The accumulating fluid in the chest adversely affected her physical ability to breath, and her depressed immune status led to further respiratory problems. The renal failure was a consequence of the use of Amphotericin, which was necessary to treat the Candida infection, but which is known to have renal failure as a possible complication."

Winthrop Hospital's request that this court reject plaintiff's opposition to its motion on the ground that it relies on a new theory of liability is denied. "The purpose of a bill of particulars is to amplify pleadings, limit proof, and prevent surprise at trial, not to provide evidentiary material. Toth v Bloshinsky, supra, citing Moran v Hurst, 32 AD3d 909 (2d Dept. 2006); Grcic v Peninsula Hosp. Ctr., 110 AD2d 625 (2d Dept. 1985); Cirelli v Victory Mem. Hosp., 45 AD2d 856 (2d Dept. 1974). "It must provide a general statement of the acts or omissions constituting the alleged negligence." Toth v Bloshinsky, supra, citing Kaplan v Rosiello, 16 AD3d 626 (2d Dept. 2005). While a new theory of liability which has not been set forth in the complaint or the bills of particulars must be rejected (Golubov v Wolfson, 22 AD3d 635 [2d Dept. 2005]; see also, Abalola v Flower Hosp., 44 AD3d 522 [1st Dept. 2007]; Winters v St. Vincent's Med. Ctr. of Richmond, 273 AD2d 465 [2d Dept. 2000]), the plaintiff's Bill of Particulars here alleges that Winthrop Hospital departed from good and accepted standards of medical care "in carelessly, negligently and improperly discharging the [decedent] from the hospital on November 27, 2001 while her condition was such that additional hospital and medical care and attention was urgently required." Thus, the theory relied on by plaintiff in opposition to this motion was adequately advanced.

Nevertheless, plaintiff's position is simply not supported by the record. See, Martinez v LaPorta, supra. While Cecile LeMaresquier ordered the x-ray on November 26, 2001, she had no contact with decedent on November 27, 2001, when the x-ray was performed, the results were obtained and decedent was discharged, in light of which Cecile LeMaresquier simply may not be held responsible for decedent's alleged untimely discharge. Similarly, Dr. Schubach, decedent's attending doctor, clearly testified at his examination before trial, as did other witnesses, that although he was aware of the results of the decedent's x-ray, he approved the decedent's discharge. Steven Bello's ministerial act of recording the discharge does not provide an adequate ground for liability. And, conspicuously absent from plaintiff's opposition is any allegation that Dr. Schubach's care and treatment of decedent fell to a level where Winthrop Hospital's staff was obliged to intervene.

Plaintiff, accordingly, has failed to establish the existence of a material issue of fact. Defendant Winthrop Hospital's motion for summary judgment is granted.

Accordingly, the caption of this action is amended to read as follows:

"WAYNE RASMUSSEN as the Administrator of the
Estate of CHRIS RASMUSSEN, deceased,

Plaintiff,

-against-

SCOTT L. SCHUBACH, M.D., EDWARD
ROBERT KOFSKY, M.D., SALVATORE
SCOMA, M.D., and WILLIAM C. SCOT, M.D.,

Defendants."

This decision constitutes the order of the court.

Dated: 10-31-08

HON THOMAS P. PHELAN

J.S.C.

Napoli, Bern, Ripka, Esqs.
Attorneys for Plaintiff
115 Broadway
New York, NY 10006

Bower, Sanger & Lawrence, P.C.
Attn: Jennine A. Gerrard, Esq.
Attorneys for Defendant Winthrop University Hospital
261 Madison Avenue, 12th Floor
New York, NY 10016

Kelly, Rode & Kelly
Attorneys for Defendants Drs. Schubach & Kofsky
330 Old Country Road
Mineola, NY 11501

Ivone, Devine & Jensen, LLP
Attorneys for Defendant Dr. Salvatore Scoma
2001 Marcus Avenue
Lake Success, NY 11042