

Cataldi v Bertelle

2009 NY Slip Op 32074(U)

September 8, 2009

Supreme Court, Kings County

Docket Number: 3558/06

Judge: Gerard H. Rosenberg

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of September, 2009.

P R E S E N T:

HON. GERARD H. ROSENBERG,
Justice.

-----X
JESSICA CATALDI, AS ADMINISTRATRIX OF THE
ESTATE OF JOSEPH CATALDI, deceased and JESSICA
CATALDI, individually,

Plaintiff(s),

- against -

Index No. 3558/06

ANTHONY BERTELLE, M.D., et al.,

Defendant(s).

-----X

The following papers numbered 1 to 23 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 11
Opposing Affidavits (Affirmations) _____	12 - 17
Reply Affidavits (Affirmations) _____	18 - 20
Sur Reply Affidavit (Affirmation) _____	21 - 23
Other Papers _____	_____

Upon the foregoing papers, and upon oral argument, defendants Alan Berlly, M.D. (Berlly), and H.I.A. Bensonhurst Imaging Associates, LLP (HIA) (Motion Sequence No. 006); defendants Anthony Bertelle, M.D., and Anthony Bertelle, M.D., P.C. (Bertelle P.C.) (Motion Sequence No. 007); and defendant Fred A. Notarnicola, M.D. (Motion Sequence

No. 008), move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of Jessica Cataldi, as Administratrix of the Estate of Joseph Cataldi, and Jessica Cataldi, individually, and all cross claims against them.

Procedural Background

On February 3, 2006, plaintiff commenced an action against Drs. Bertelle and Notarnicola seeking to recover damages premised upon causes of action sounding in medical malpractice, wrongful death and loss of consortium (Index. No. 3558/06). Both physicians specialize in internal medicine; Dr Notarnicola worked in the office of Bertelle P.C. By amended summons and complaint dated May 31, 2007, Bertelle P.C. was added as an additional defendant. On August 20, 2007, plaintiff commenced a second action against Dr. Berlly and HIA, alleging the same causes of action (Index. No. 30988/07). Dr. Berlly specializes in diagnostic radiology.

By order dated November 28, 2007, the two actions were consolidated. By order dated September 3, 2008, the Honorable Randolph Jackson dismissed the medical malpractice and loss of consortium claims against Dr. Berlly and HIA on the ground that they were barred by the Statute of Limitations, leaving only the claim for wrongful death.

Facts

It is not disputed that on December 13, 2003, Mr. Cataldi (also referred to herein as decedent) presented at Bertelle P.C., where he saw Dr. Notarnicola for complaints of an intermittent fever and general malaise. A physical examination was within normal limits;

blood tests revealed high cholesterol and triglycerides. Dr. Notarnicola diagnosed Mr. Cataldi as suffering from influenza; he was given prescriptions and told to rest in bed, to increase his hydration and to return to the office within one week. On December 17, 2003, Mr. Cataldi returned for additional blood work and on December 22, 2003, he was examined by Dr. Notarnicola; the findings were normal and blood tests revealed some elevated levels. On December 29, 2003, decedent again presented at Bertelle P.C. with complaints of lower quadrant pain and tenderness and was again examined by Dr. Notarnicola; blood tests were completed and most values were normal. To rule out appendicitis, Dr. Notarnicola ordered an abdominal and pelvic CT scan; the prescription for the scan was written on a script indicating that it was ordered by "A. Bertelle."

The scans were taken on December 30, 2003 at HIA and interpreted by Dr. Berlly. In a report addressed to Dr. Bertelle, Dr. Berlly stated that the scans showed a normal non-contrast enhanced CT examination, but he noted a 1.5 by 1.5 cm area of nodularity at the base of the left lung. As is relevant to the instant dispute, the report stated that:

"Parenchymal opacities are incidentally seen at the left base including a single area of nodularity as well as minor pleural reaction at the left base. While this may simply be a result of inflammatory process, close follow-up is suggested. Specifically, this should be correlated with plain radiographs and possibly with follow-up formal evaluation of the chest."

Later on December 30, 2003, Mr. Cataldi was seen by Dr. Notarnicola, who received the radiological report, discussed the findings with him and recommended a follow-up CT scan of the chest in three months. On March 17, 2004, Mr. Cataldi returned to the office of

Bertelle P.C. for blood work. On June 25, 2004, he returned for a routine physical examination and was again seen by Dr. Notarnicola; the results were normal.

On July 18, 2004, Mr. Cataldi was admitted to Maimonides Medical Center (Maimonides) with complaints of shortness of breath and left flank pain. A CT scan of the chest was done on July 19, 2004, which revealed an area of abnormality that was suspicious for metastatic disease. On July 23, 2004, Mr. Cataldi underwent a whole-body bone scan, which was suggestive of bone metastasis. A subsequent bone marrow biopsy revealed metastatic adenocarcinoma. Mr. Cataldi then underwent a thoracotomy and multiple wedge resections of his lung at St. Vincent's Medical Center (St. Vincent's), followed by multiple rounds of chemotherapy between July 2004 and April 2005. In April 2005, he was admitted to St. Vincent's, where a work-up revealed metastasis to his brain. Shortly after his discharge, he was admitted to Calvary Hospital, where he died on October 1, 2005.

Summary Judgment

“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 a departure was a proximate cause of the plaintiff's injury” (*Keevan v Rifkin*, 41 AD3d 661, 662 [2007]; *see also DiGiario v Agrawal*, 41 AD3d 764,767 [2007]). “““On a motion for summary judgment in a medical malpractice action, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby””” (*Swezey v Montague Rehab & Pain Mgt.*, 59 AD3d

431 [2009], quoting *Germaine v Yu*, 49 AD3d 685, 686 [2008], quoting *Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 801 [2008]; accord *Keevan*, 41 AD3d at 662, quoting *Williams v Sahay*, 12 AD3d 366, 368 [2004]; *DiGiario*, 41AD3d at 767). Defendant must make this showing through medical records and competent expert affidavits (*Jones v Ricciardelli*, 40 AD3d 935, 935 [2007]). “Once the defendant has made a prima facie showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue of fact” (*DiGiario*, 41 AD3d at 767, quoting *Chance v Felder*, 33 AD3d 645, 645-646 [2006]).

“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” (*Keevan*, 41 AD3d at 662, quoting *Thompson v Orner*, 36 AD3d 791, 792 [2007]). “General allegations of medical . . . malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical . . . malpractice, are insufficient to defeat defendant physician’s . . . summary judgment motion” (*Starr v Rogers*, 44 AD3d 646, 648 [2007], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; see also *Keevan*, 41 AD3d at 662).

It must be recognized, however, that “[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury” (*Bengston v Wang*, 41 AD3d 625, 626

[2007], quoting *Feinberg v Feit*, 23 AD3d 517, 519 [2005]). Thus, a motion for summary judgment must be denied where issues of credibility are raised (*see e.g. Darwick v Paternoster*, 56 AD3d 714, 715 [2008]; *Monsels v Sinclair*, 52 AD3d 487, 487-488 [2008]; *Bengston*, 41 AD3d at 626; *Feinberg*, 23 AD3d at 519; *Shields v Baktidy*, 11 AD3d 671, 672 [2004]).

Similarly, to establish a prima facie entitlement to judgment as a matter of law dismissing a wrongful death cause of action, a movant must provide evidence establishing that there was no significant causal connection between the alleged negligence and decedent's injuries (*see e.g. Bickford v St. Francis Hosp.*, 19 AD3d 344, 346 [2005], *lv denied, motion dismissed* 5 NY3d 710 [2005], citing *Fuller v Preis*, 35 NY2d 425, 429 [1974]).

Dr. Berlly and HIA

Plaintiff's Claims against Dr. Berlly and HIA

In her bill of particulars, plaintiff alleges that Dr. Berlly and HIA failed to properly interpret the CT scan taken on December 30, 2003, failed to report the existence of likelihood of metastatic disease and failed to notify the primary referring physician of the results of the reading. In a subsequent bill of particulars, plaintiff added allegations that Dr. Berlly and HIA failed to diagnose metastatic disease, failed to express any concern of malignant findings to the prescribing physician by call or report, and failed to appreciate bone loss density and a lytic lesion in the right hip. Plaintiff concludes that the delay in diagnosis

resulted in Mr. Cataldi's death.

Dr. Berlly's and HIA's Contentions in Support of Their Motion

In support of their request for summary judgment, Dr. Berlly and HIA reply upon an affirmation from Dr. Scott S. Coyne, a radiologist, to argue that movants did not deviate from accepted standards of medical care. More specifically, Dr. Coyne avers that in his report, Dr. Berlly noted a suspicious nodule in the left lower lobe of Mr. Cataldi's lung, suggested close follow-up and communicated his findings to Dr. Notarnicola. Dr. Coyne is also of the opinion that as a radiologist, Dr. Berlly was not required to direct further clinical testing or care for the patient, since that is the exclusive responsibility of the attending physician. Dr. Coyne further opines that the lesion in the right hip that plaintiff claims was a metastatic focus that was present on the scan was very small and had a benign appearance. Hence, Dr. Berlly's failure to document this incidental finding in his report similarly does not depart from accepted standards of radiological care, especially since the CT scan of the abdomen and pelvis was taken because decedent was suffering from fever, nausea, right lower abdominal pain and the possibility of appendicitis.

Dr. Coyne also avers that when the lesion in the hip was discovered to be a metastatic focus on the July 19, 2004 CT scan taken at Maimonides, it had grown substantially and destroyed a portion of the bone. He is therefore of the opinion that the finding that the lesion on the right hip was a metastatic focus in the July 2004 CT scan indicates metastasis to the bone had already occurred on December 30, 2003. Thus, Dr. Berlly's alleged failure to note

what appeared to be a benign lesion did not cause any damage to decedent, since earlier detection would not have allowed for treatment that would prevent metastasis. Hence, succinctly stated, movants conclude that plaintiff is unable to prove any alleged deviation from accepted standards of medical care, and assuming that such a deviation occurred, it was not the proximate cause of plaintiff's injuries.

Dr. Berlly and HIA also argue that plaintiff fails to demonstrate that any economic losses were sustained by the estate. In this regard, movants allege that Mr. and Mrs. Cataldi paid no housing or utility expenses before he died, since they had moved in with Mrs. Cataldi's mother, who paid the mortgage and other bills. Further, Mr. Cataldi was a high school graduate with no prospects for further education. Mrs. Cataldi's employment ended at the birth of the parties' first child, she had not returned to work since and she receives survivor benefits; the payments from Social Security to the wife and child equal or exceed decedent's income. Lastly, at the time of his diagnosis, Mr. Cataldi was receiving Worker's Compensation payments as the result of a back injury sustained at work in April 2004.

Plaintiff's Opposition to Dr. Berlly's and HIA's Motion

Plaintiff asserts that although she commenced an action against Dr. Berlly and HIA alleging that the doctor missed the finding of metastatic bone cancer, she has since decided that the claim is not tenable and she has accordingly discontinued the action as against these defendants by stipulation

Dr. Notarnicola's Opposition to the Motion

Dr. Notarnicola opposes the motion for summary judgment by Dr. Berlly and HIA in reliance upon an affirmation from his expert radiologist,¹ who alleges that Dr. Berlly's failure to report all abnormalities, including an 8 mm lytic lesion in decedent's right hip that was visible in the December 30, 2003 CT scan, was a departure from accepted medical standards of care, particularly since it was unreasonable to assume that the lesion was a cyst because of its location. Similarly, Dr. Berlly's failure to mention that the lung nodularity could be malignant deviated from accepted standards of medical care, as did his failure to correlate the two lesions and to recommend an immediate lung biopsy and bone scan. In addition, Dr. Berlly failed to communicate with Dr. Notarnicola to make it clear that there was a possibility of malignancy in the lung and bone loss in the hip, and instead had his office forward a copy of the report. The expert accordingly concludes that Dr. Berlly's departure from the accepted standard of medical care proximately caused a delay in diagnosing decedent's cancer.

Claim of Estoppel

In opposition to the motion by Dr. Berlly and HIA, Dr. Notarnicola, Dr. Bertelle and Bertelle P.C. also argue that plaintiff should be estopped from arguing that there was no evidence of metastatic disease in the December 30, 2003 CT scan, since this position is contradictory to the position that she has maintained up to this point in the litigation. More

¹ The name of the expert has been redacted from the papers served upon the parties; the original was made available to the court.

specifically, they contend that when plaintiff commenced the instant action, she argued that Dr. Notarnicola, Dr. Bertelle and Bertelle P.C. failed to timely heed carcinomous signs and symptoms in decedent's left lung, as revealed in the December 30, 2003 CT scan, and failed to follow the recommendations of the radiologist to follow-up and to prevent metastasis. When she commenced a second action against Dr. Berlly and HIA, plaintiff alleged that those defendants were negligent in the testing and interpreting of the CT scan.

In opposition to the motions for summary judgment, however, plaintiff relies upon the affirmation from Jack Baldasar, M.D., a radiologist, in which he opines that based upon his review of the films taken on December 30, 2003, although a nodularity was present in Mr. Cataldi's lung, there was no evidence of a lytic lesion or metastasis. Dr. Baldasar further avers that follow-up studies should have been conducted immediately to determine the nature of the suspicious mass, as recommended by Dr. Berlly, but he opines that the studies would have identified treatable non-metastatic cancer, so that Mr. Cataldi's chance of survival would have increased. Dr. Baldasar accordingly concludes that the failure of Drs. Bertelle and Notarnicola to obtain follow-up studies directly led to the spread and metastasis and significantly contributed to Mr. Cataldi's death. In apparent reliance upon this opinion, plaintiff discontinued her action against Dr. Berlly and HIA. Co-defendants thus conclude that plaintiff should not now be permitted to change her position.

Dr. Berlly's and HIA's Reply

In reply, Dr. Berlly and HIA argue that since plaintiff has discontinued her action

against them and because Dr. Notarnicola did not interpose any cross claims against them, their motion for summary judgment must be granted, in that an order denying the motion would permit Dr. Notarnicola to file a cross claim at this stage of the proceeding in violation of CPLR 205(a) and 3019. Moreover, Dr. Notarnicola's claim that he is unfairly prejudiced by plaintiff's voluntarily discontinuance of the claims against them is without merit, since plaintiff's claims against Dr. Notarnicola have remained constant throughout the action.

Turning to the merits, movants argue that the expert affirmation annexed to Dr. Notarnicola's opposition papers should be disregarded in that it is in direct conflict with Dr. Coyne's opinion. They further contend that the action for Dr. Berlly's alleged failure to diagnosis metastatic cancer in his review of the December 30, 2003 CT scan is inconsistent with Dr. Notarnicola's claim that the action should be dismissed as against him because decedent was already suffering from metastatic disease at the time that the scan was taken. In addition, Dr. Berlly and HIA argue that Dr. Notarnicola's expert's opinion is based on hindsight, since Dr. Berlly did not have the benefit of the results of the July 2004 scan taken at Maimonides when he read the December 30, 2003 scan, upon which the expert relies in opining that a small benign area appearing in one bony window of the scan of the abdomen evidenced metastatic disease. Dr. Berlly further avers that he never testified to observing an abnormality on the CT scan and he never indicted that additional scans were to be completed immediately.

Plaintiff's Reply

In reply, plaintiff argues that judicial estoppel is inapplicable herein, since her position has always been consistent.

Dr. Notarnicola's Sur-Reply

In a sur-reply, Dr. Notarnicola denies each allegation raised by Dr. Berlly and HIA.²

Estoppel

“Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding” (*Nestor v Britt*, 270 AD2d 192, 193 [2000], quoting *Maas v Cornell Univ.*, 253 AD2d 1, 5 [1999], *affd* 94 NY2d 87 [1999]). In applying the doctrine in a case in which a doctor obtained a judicial declaration that plaintiffs were not entitled to terminate the subject contract, he was thereafter estopped from seeking to unilaterally terminate the contract, the court explained that:

“It is a well-settled principle of law in this State that a party who assumes a certain position in a legal proceeding may not thereafter, simply because his interests have changed, assume a contrary position. (See *Matter of Martin v C.A. Prods. Co.*, 8 NY2d 226, 231; *Houghton v Thomas*, 220 AppDiv 415, 423, *affd* 248 NY 523.) Invocation of the doctrine of estoppel is required in such circumstances lest a mockery be made of the search for truth.’ (*Karasik v Bird*, 104 AD2d 758). Indeed, having charted their own course, the plaintiffs cannot now be heard to complain of the result (*cf.*, *Orens v Secofsky*, 60 AD2d

² The court agrees to consider this affirmation because it addresses arguments that are already before the court or that were raised by Dr. Berlly and HIA for the first time in their reply affirmation, without raising any other issues.

866, 867).”

(*Neumann v Metropolitan Med. Group*, 153 AD2d 888, 889 [1989]). Accordingly, “[t]he doctrine is invoked to estop parties from adopting such contrary positions because the judicial system “cannot tolerate this ‘playing fast and loose with the courts’”” (*Prudential Home Mort. v Neildan Constr.*, 209 AD2d 394, 395 [1994], quoting *Kimco v Devon*, 163 AD2d 573, 575 [1990], quoting *Environmental Concern v Larchwood Constr.*, 101 AD2d 591, 594 [1984]; see generally *Honeyman Point Beach Assn. v Schiff*, ___ AD3d ___, 2009 NY Slip Op 5946, 2 [2009] [since plaintiffs interchangeably referred to the right to use the subject beach as both a covenant and easement before the lower court, and relied upon the language in the declaration that they sought to disavow on appeal, they were estopped from raising the new claim, which was inconsistent with the position taken before the trial court]; *Matter of Sbuttoni*, 16 AD3d 693, 694 [2005] [appellant was estopped from advancing new arguments on appeal invoking shorter periods of limitations, since the positions were inconsistent with the stance he assumed before the trial court]; *Levy v Carol Mgmt.*, 260 AD2d 27, 32 [1999] [plaintiff’s deposition testimony, her own direct participation in the voluminous pleadings and motion practice, over the course of which she held herself out as having interests derived from a sublease, was a compelling basis to judicially estop her from arguing to the contrary later in the proceedings]; *Maas*, 253 AD2d at 5 [the doctrine of judicial estoppel, or estoppel against inconsistent positions, precluded plaintiff from seeking to convert an action into an article 78 proceeding, since plaintiff strenuously opposed such

conversion when a request was made by defendant in the context of its CPLR 3211 motion to dismiss]; *Public Admin. v Frota Oceanica Brasileira*, 222 AD2d 332, 334 [1995] [under circumstances where plaintiff had not pleaded that foreign law applied to the matter, and had maintained the action under the Jones Act, DOHSA and general maritime law for 19 years, it was estopped from taking the contrary position that the matter should be tried under foreign law]; *In re Town of Southampton*, 220 AD2d 752 [1995] [where appellant adopted the position prior to trial, in affidavits and in testimony, that he was the owner of an interest in the subject property so as to induce the Town to make an advance payment to him as though he was a condemnee, he was thereafter equitably estopped from adopting an inconsistent position and from denying his status as a condemnee to the detriment of the Town]; *Kohilakis v Smithtown*, 167 AD2d 513, 514 [1990] [having asserted in a prior motion to enlarge their time to perfect their appeal that they did not object to the discovery of certain documents, defendants were thereafter judicially estopped from opposing disclosure]; *Karasik*, 104 AD2d 758 [the surviving husband was estopped from adding a new claim when he was awarded a new trial on appeal, i.e., that defendant psychiatrist and her employee failed to diagnose his wife as suffering from alcoholism, since during the trial, he denied that his wife was even a moderate drinker, so that the new claim was totally at odds with his position at all prior stages of the eight year litigation and was highly prejudicial to defendants]).

Herein, as argued by Dr. Notarnicola, Dr. Bertelle and Bertelle P.C., throughout this action plaintiff has maintained that Dr. Berly and HIA improperly failed to identify and

failed to report the existence of metastatic disease when the December 30, 2003 CT scan was read. After discovery was complete, and in opposition to the motions for summary judgment, plaintiff changed her position in reliance upon the affirmation from Dr. Baldasar, in which he opines that based upon his review, the films taken on December 30, 2003 do not reveal any evidence of metastatic cancer. In addressing the issues raised herein, the court agrees that plaintiff's position as against Dr. Notarnicola, Dr. Bertelle and Bertelle P.C. has remained constant since the commencement of the instant action, i.e., they failed to follow-up on the findings of the December 30, 2003 CT scan and to prevent metastatic disease and hence death. The court further agrees with defendants, however, and finds that in submitting the affirmation from Dr. Baldasar and signing a stipulation discontinuing her action against Dr. Berlly and HIA, plaintiff is now seeking to hold only Dr. Notarnicola, Dr. Bertelle and Bertelle P.C. liable for the injuries allegedly sustained, without attributing any fault to Dr. Berlly or HIA. This position, which contradicts the position that plaintiff has previously taken in this action, works to prejudice the other defendants, since the new position would hinder the remaining co-defendants from seeking to establish negligence on the part of Dr. Berlly and HIA.

The above discussed principles of law thus compel the conclusion that plaintiff is estopped from seeking to establish that there was no evidence of metastatic disease in the December 30, 2003 CT scan and in relying upon expert testimony in so arguing. From this it follows that the affirmation of Dr. Baldasar, which is premised upon his opinion that the

December 30, 2003 CT scan did not indicate the presence of metastatic disease, is stricken in its entirety.³

Plaintiff's Discontinuance of the Action as against Dr. Berlly and HIA

An action or special proceeding can be discontinued as a matter of right by the party asserting a claim at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier (CPLR 3217[a][1]). In discussing the issue of when a party may voluntarily discontinue an action thereafter, the court has explained that:

“CPLR 3217(a)(2) requires, for a discontinuation by stipulation, a writing signed by the attorneys of record for all parties (*see Barker v Barker*, 295 AD2d 151 [2002]; *Bove v Cherney*, 252 AD2d 512 [1998]). . . . The requirement for the signature of the attorneys for all parties is mandatory, without which the discontinuance can be sought on motion (*see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3217:9*).”

(*Brown, Inc. v HCE*, 8 AD3d 520, 521-522 [2004]). Hence, a stipulation of discontinuance that is not signed by a defendant in an action is a nullity (*id.*).

It is also well established, however, that “[w]hile the authority of a court to grant or to deny an application made to it pursuant to CPLR 3217 (subd [b]) by a party seeking voluntarily to discontinue litigation is within its sound discretion, ordinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted”

³ Having held that Dr. Baldasar's affirmation is stricken, the court shall not refer to plaintiff's reliance thereon in opposing the motions by Dr. Bertelle, Bertelle P.C. or Dr. Notarnicola, nor will defendants' opposition to said affirmation be addressed.

(*Tucker v Tucker*, 55 NY2d 378, 384 [1982], citing 4 Weinstein-Korn-Miller, NY Civ Prac, par 3217.06]; accord *Parraguirre v 27th St. Holding*, 37 AD3d 793 [2007]; *Mathias v Daily News*, 301 AD2d 503 [2003]).

Herein, applying the above principles of law, the court exercises its discretion and grants plaintiff the right to discontinue her action as against Dr. Berlly and HIA (*see e.g. Tereshchenko v Lynn*, 36 AD3d 684 [2007]).⁴

Dr. Berlly's and HIA's Request for Summary Judgment

Turning to the merits of the motion, the court finds that the affirmation submitted by Dr. Coyne makes a prima facie showing that Dr. Berlly and HIA properly read the CT scan performed on Mr. Cataldi on December 30, 2003; that he properly suggested close follow-up with x-rays and a CT scan of the chest for an abnormality seen in the left lung; that he did not deviate from standards of proper care in not reporting a lesion in the right hip; that he properly conveyed his findings to Dr. Notarnicola, as Mr. Cataldi's treating physician; and that as a radiologist, Dr. Berlly had no duty to order further testing or to provide a plan of care.

In opposition, however, Dr. Notarnicola's expert opines that Dr. Berlly and his practice deviated from accepted standards of medical care when Dr. Berlly did not appreciate and/or report an 8 mm lytic lesion in Mr. Cataldi's right hip, since even if Dr. Berlly believed

⁴ Although none of the defendants make a motion to vacate the stipulation of discontinuance and plaintiff does not move for a court order permitting discontinuance, the court shall treat the papers as seeking this relief inasmuch as the issues were fully argued and all parties were afforded adequate opportunity to advance his or her arguments.

that this abnormality was benign, he still should have included the finding in his report; when he failed to report that the abnormality seen in decedent's left lung could indicate the presence of a malignant nodule; when he failed to correlate the appearance of a possible malignancy in the left lung and the bone density loss in the right hip; and when he failed to report these findings to the treating physician. Hence, the expert's opinion is not based upon the findings of the July 19, 2004 CT scan taken at Maimonides.

In view of the experts' conflicting opinions, issues of credibility that cannot be resolved upon the papers are presented. From this it follows that Dr. Berlly's and HIA's motion for summary judgment must be denied (*see generally Boston v Weissbart*, 62 AD3d 517 [2009]; *Darwick v Paternoster*, 56 AD3d 714, 715 [2008]; *Monsels v Sinclair*, 52 AD3d 487, 487-488 [2008]; *Cruz v St. Barnabas Hosp.*, 50 AD3d 382 [2008]; *Bengston*, 41 AD3d at 626; *Schaub v Cooper*, 34 AD3d 268 [2006]; *Feinberg*, 23 AD3d at 519; *Shields*, 11 AD3d at 672). In so holding, the court rejects the assertion by Dr. Berlly and HIA that the affirmations from Dr. Coyne and Dr. Notarnicola's expert are inconsistent. In this regard, in his affirmation Dr. Coyne addresses the issue of proximate cause, assuming that there was a deviation from accepted standards of medical care for purposes of the motion. Dr. Notarnicola's expert opines that Dr. Berlly deviated from accepted standards of medical care in interpreting and reporting the findings of the December 30, 2003 CT scan in the first instance.

The court also denies movants' request for summary judgment on the ground that the

estate did not sustain any damages. In this regard, the court finds that their conclusory assertions, unsupported by any evidence or documents, are insufficient to entitle them to dismissal of the action. To the extent that movants rely upon plaintiff's deposition testimony, the court similarly finds that the testimony is lacking in evidentiary and documentary basis.

***Dr. Bertelle's, Bertelle P.C.'s and
Dr. Notarnicola's Request for Summary Judgment***

Plaintiff's Claims against Dr. Bertelle, Bertelle P.C. and Dr. Notarnicola

In her bill of particulars, plaintiff alleges that Dr. Bertelle, Bertelle P.C. and Dr. Notarnicola failed to take heed of decedent's presenting symptoms; failed to timely identify and treat his left lung carcinoma; failed to follow up for recommended monitoring and follow-up studies; and failed to prevent metastasis of Mr. Cataldi's cancer.

Dr. Bertelle's and HIA's Contentions in Support of Their Motion

In support of their motion, in reliance upon the deposition testimony of Drs. Bertelle and Notarnicola and the records of the P.C., Dr. Bertelle alleges that he never saw or treated Mr. Cataldi. In this regard, Dr. Bertelle further contends that as a shareholder of the P.C., he bears no vicarious liability for any alleged malpractice. Dr. Bertelle further relies upon his deposition testimony to establish that he did not see the December 30, 2003 report from the radiologist, nor did he discuss the findings with Dr. Notarnicola until after the instant action was commenced.

Dr. Bertelle and Bertelle P.C. also argue that even if they could be held liable for the alleged malpractice of Dr. Notarnicola, which they do not concede, the affirmations of their

experts, Dr. Coyne and Dr. Reed Phillips, an oncologist, establish that there were no departures from good and accepted practice by Dr. Notarnicola that proximately caused Mr. Catladi's death. More specifically, in his affirmation, Dr. Coyne alleges that assuming arguendo, for the purposes of this motion only, that defendants departed from the standard of good and accepted medical care in their treatment of decedent by failing to appropriately follow-up on the findings of the December 30, 2003 CT scan, any such departure was not the proximate cause of the decedent's death, nor did it have an impact upon decedent's life expectancy or overall treatment outcome.

More specifically, Dr. Coyne avers that it is his opinion, with a reasonable degree of medical certainty, that decedent's cancer was metastatic to the bone at the time that he presented for the abdominal/pelvic CT scan on December 30, 2003, since his review of these films demonstrate a bone abnormality in the right hip that represented metastatic disease, which was not reported in the radiology report and appears to have been incidental to a more obvious finding of an area of the lung which was reported. Furthermore, his review of the CT scans taken at Maimonides on July 19, 2004 and the right hip bone biopsy taken on July 20, 2004 demonstrate exponential growth of the lesion in the right hip compatible with bone destruction and another lesion in the left hip. Dr. Coyne thus concludes that the dramatic growth and the accompanying severe bone destruction reflected evidence of a highly aggressive metastatic cancer. Moreover, based on the size of this metastatic deposit in July 2004, and the fact that it was visible on the December 2003 CT scan, Dr. Coyne further

opines that there were other micro-metastases throughout decedent's body as of December 2003 and concludes that decedent's lung cancer had already metastasized to the right hip, and most likely to other parts of his body by December 30, 2003. Given the presence of metastasis as of December 30, 2003, Dr. Coyne concludes that the claimed injuries were not proximately caused by an eight month delay in diagnosis.

In his affirmation, Dr. Phillips reaches the same conclusion. He further opines that as of December 30, 2003, decedent had Stage IV cancer. Dr. Phillips also opines that the presence of even one bone metastasis always indicates involvement by metastatic cancer of other bones and probably other organs, even if they have not become large enough to be detected elsewhere. Given the above, it is his opinion that assuming a delay of eight months in diagnosis for the purpose of this motion only, such delay had no impact upon the decedent's life expectancy or treatment outcome.

Dr. Phillips is also of the opinion that even had the diagnosis of cancer been made on or about December 30, 2003, decedent's course of treatment would have been virtually the same. As is evidenced by the metastasis to decedent's brain less than one year from the time of diagnosis and subsequent to multiple rounds of chemotherapy treatment, treatment was ineffective and would have been ineffective even had it been instituted some seven months prior. Dr. Phillips further opines that the alleged delay in diagnosis had no adverse impact upon decedent's condition or outcome because Mr. Cataldi did not suffer any complications as, for example, a broken hip, as a result of the failure to diagnose the disease; there is no

evidence that he suffered intense pain during the period of the alleged delay; and he did not respond favorably to treatment. Dr. Phillips thus concludes that given the size of the tumor and the extensive metastasis at the time of diagnosis, decedent's likelihood of surviving three years was almost non-existent, even had the cancer been diagnosed in December 2003. Rather, in all likelihood, decedent would have expired no later, and perhaps may have expired earlier had the diagnosis been made in December 2003 due to the toxic effect of the ineffective treatment on decedent's body, combined with the progression of the disease compared with the progression of the disease only.

Dr. Notarnicola's Contentions

In support of his motion, Dr. Notarnicola submits copies of the affirmations submitted by Drs. Phillips and Coyne and makes the same arguments as do Dr. Bertelle and Bertelle P.C.

Plaintiff's Opposition

In opposition to that branch of the motion seeking to dismiss the action as against Dr. Bertelle and Bertelle P.C., plaintiff argues that Mr. Cataldi presented to "Anthony Bertelle, M.D., P.C.," where he was treated by Dr. Notarnicola; Dr. Bertelle is the president and sole shareholder of the P.C. Plaintiff thus argues that since decedent was seen by Dr. Notarnicola under the auspices of Dr. Bertelle's care, Dr. Bertelle and the P.C. are vicariously liable for the care rendered by Dr. Notarnicola. Moreover, although Dr. Bertelle denies writing it, the referral for the December 30, 2003 CT scan is signed by him and the final report was

addressed to him. Neither Dr. Bertelle nor Dr. Notarnicola ever ordered the suggested follow-up studies. Hence, a question of fact is raised with regard to whether Dr. Bertelle ordered the CT scan, whether he reviewed the test results and whether he should have recommended a follow-up study, so that summary judgment should not be granted to either Dr. Bertelle or to the P.C.

In opposition to the argument that Dr. Bertelle, Bertelle P.C. and Dr. Notarnicola did not proximately cause any damages, plaintiff annexes an affirmation from Richard Hirschman, M.D., who is certified in internal medicine, hematology and oncology, in which he alleges that these defendants departed from good and accepted medical practice by failing to obtain follow-up studies of the lung after the CT scan performed on Mr. Cataldi on December 30, 2003, in accordance with the recommendation of Dr. Berlly, which resulted in a delay in diagnosing Mr. Catladi's lung cancer. In addition, the appearance of a suspicious area in the chest warranted follow-up studies to rule out lung cancer. Dr. Hirschman also avers that the failure to do so constitutes a departure from good and accepted standards of medical care and that the resulting seven month delay in diagnosing decedent's cancer eliminated any chance for a cure for him and contributed to his death.⁵

In opposition to Dr. Notarnicola's motion, plaintiff also argues that defendants' experts fail to point out that no physician who treated Mr. Cataldi ever identified metastatic

⁵ As was held above, the affirmation from Dr. Baldasar which was submitted in opposition to the motions, in which he opines that no metastatic disease was present in the December 30, 2003 CT scan, is stricken and will not be considered by this court.

disease in the December 30, 2003 films. More specifically, plaintiff alleges that Dr. Berlly testified at his deposition that he did not see any signs of bone metastasis at the time that the films were originally read, nor did he see metastasis when he reviewed the films at the time of his deposition. Hence, plaintiff argues that Dr. Berlly's testimony creates an issue of fact with regard to the absence of metastatic disease in December 30, 2003, so that Drs. Bertelle's and Notarnicola's failure to diagnose the disease directly contributed to Mr. Cataldi's death.

Dr. Berlly's and HIA's Opposition to Dr. Notarnicola's Motion

In opposition to Dr. Notarnicola's motion, in addition to the arguments discussed above in addressing Dr. Berlly's and HIA's motion, Dr. Berlly and HIA argue that Dr. Berlly had no obligation to order any follow-up testing of decedent, as that was the responsibility of Dr. Notarnicola, as Mr. Cataldi's primary physician. Dr. Berlly and HIA also assert that Dr. Notarnicola mischaracterizes Dr. Berlly's deposition testimony in that Dr. Berlly never testified that he observed "some abnormality" on the December 2003 CT scan, as Dr. Berlly instead testified that he would not deem the December 2003 scan to be abnormal until it was compared to the July 2004 scan.⁶

Dr. Notarnicola's Reply

In reply, Dr. Notarnicola argues that plaintiff's expert fails to establish that he is not entitled to summary judgment. More particularly, he contends that plaintiff's expert offers

⁶ The court rejects movants' assertion that Dr. Notarnicola's opposition papers should be disregarded because they were not served seven days before the return date as is required pursuant to CPLR 2214, since all parties were afforded an adequate opportunity to submit papers addressing all issues that are now before the court.

nothing more than general allegations of medical malpractice, conclusory in nature and unsupported by any competent evidence. Dr. Notarnicola further avers that Dr. Hirschman does not deny the opinions of Dr. Phillips and Dr. Coyne that Mr. Cataldi had Stage IV cancer when the December 30, 2003 CT scan was taken. Moreover, Dr. Berly's report does not state when follow-up studies should have been performed. Finally, Dr. Hirschman fails to mention the size or location of the hip lesion or how the hip lesion appears on the July 2004 CT scan, fails to compare the two scans, fails to discuss bone destruction, fails to address the issue of how what was initially believed to be a benign cancer turned out to be evidence of metastatic cancer and fails to discuss what impact the delay in treatment had on decedent.

Dr. Bertelle's and HIA's Reply

In reply, Dr. Bertelle and Bertelle P.C. argue that plaintiff's expert affirmation fails to raise a question of fact with regard to whether they departed from the standard of good and accepted medical care. Dr. Bertelle also argues that although the prescription for the December 30, 2003 CT scan was written on his prescription pad and the report was therefore sent to him, the deposition testimony establishes that the prescription was written by a clerical employee in the office and that Dr. Notarnicola ordered the CT scan, reviewed the results and discussed them with Mr. Cataldi. In addition, the records of Bertelle P.C. unequivocally reflect that Dr. Bertelle never consulted on, treated or examined decedent. Hence, Dr. Bertelle cannot be held vicariously liable for the alleged malpractice of another.

Dr. Bertelle's Request for Summary Judgment

In discussing the liability of a co-employee in a medical malpractice action, it has been held that:

“In general, an employee of a professional corporation will not be held vicariously liable for acts performed solely by a coemployee (*see, Engelbart v Schachter*, 235 AD2d 387; *Hylton v Flushing Hosp. & Med. Ctr.*, 218 AD2d 604). A shareholder, employee, or officer of a professional corporation is liable only for negligent or wrongful acts ‘committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation’ (Business Corporation Law § 1505[a]; *see also, Ecker v Zwaik & Bernstein*, 240 AD2d 360, 361; *Somer & Wand v Rotondi*, 219 AD2d 340, 343).

(*Moller v Taliuaga*, 255 AD2d 563, 564-565 [1998]).

Here, the deposition testimony of Dr. Bertelle and Dr. Notarnicola, along with the records of the P.C., establish that decedent was treated only by Dr. Notarnicola. That Dr. Notarnicola, and not Dr. Bertelle, treated Mr. Cataldi is also supported by the deposition testimony of plaintiff. Accordingly, other than the unsubstantiated allegations of the plaintiff’s attorney, plaintiff fails to present any proof that Dr. Bertelle committed any negligent or wrongful acts in the treatment of decedent.

Therefore, that branch of the motion seeking dismissal of plaintiff’s action as against Dr. Bertelle, in his individual capacity, is granted (*see generally Williams v Howe*, 297 AD2d 671, 672 [2002] [a doctor could be held vicariously liable for treatment rendered by another physician where the doctor seeking summary judgment failed to establish that plaintiff was

informed of the intended takeover of his practice or that co-defendant was an employee of the entity taking over the practice, rather than a physician in practice with him]).

Vicarious Liability of Bertelle P.C.

In addressing the issue of vicarious liability for medical malpractice, it has been held that:

“Generally, vicarious liability for medical malpractice rests on ‘agency or control in fact’ (see *Hill v St. Clare’s Hosp.*, 67 NY2d 72, 79 [1986]). However, in *Hannon v Siegel-Cooper Co.* (167 NY 244 [1901]), the Court of Appeals ‘recognized as a predicate for malpractice liability apparent or ostensible agency (or, as it is sometimes called, agency by estoppel . . .)’ (*Hill*, 67 NY2d at 79). Liability based on agency by estoppel requires a showing that the treater was ‘provided’ by the defendant or was otherwise acting on the defendant’s behalf, and that the plaintiff reasonably believed that the treater was acting at the defendant’s ‘behest’ (see *Sarivola v Brookdale Hosp. & Med. Ctr.*, 204 AD2d 245, 245-246, *lv denied* 85 NY2d 805 [1995]; *Soltis v State of New York*, 172 AD2d 919 [1991]).”

(*Warden v Orlandi*, 4 AD3d 239, 241-242 [2004]).

In discussing the liability of an employer, the court has explained that:

“Under well-settled principles of respondeat superior, it is fundamental that in order for an employer to be held vicariously liable for the torts of an employee, a viable cause of action must lie against that employee for his or her individual negligence (see *Karaduman v Newsday, Inc.*, 51 NY2d 531, 545-546 [1980]; *Sanderson v Bellevue Maternity Hosp.*, 259 AD2d 888, 891-892 [1999]; see also *Lopez v Master*, 58 AD3d 425 [2009]; *Magriz v St. Barnabas Hosp.*, 43 AD3d 331, 332-333 [2007], *lv denied* 10 NY3d 790 [2008]). Thus, where the employee commits negligence, a cause of action lies against both the employee and the employer, and the employer has the right to seek indemnification (see *McDermott v City of New*

York, 50 NY2d 211, 218, n 4 [1980]; *Ditingo v Dreyfuss*, 27 AD3d 1024, 1026-1027 [2006]; *see also Macari v Parsons Hosp.*, 26 AD2d 584, 584 [1966]).”

(*Hytko v Hennessey*, 62 AD3d 1081, 1084 [2009]). It is also well settled that “[a] plaintiff cannot rely on conjecture and inference to establish agency, either actual or ostensible” (*Hylton*, 218 AD2d at 606). Further, “[r]ank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment” (*Tungsupong v Bronx-Lebanon Hosp. Ctr.*, 213 AD2d 236, 238 [1995]).

Herein, it is not disputed that Mr. Cataldi presented to Bertelle P.C., where he was treated by Dr. Notarnicola. It is also not disputed that Dr. Notarnicola was employed by the P.C. Accordingly, as made clear by the above discussed case law, if Dr. Notarnicola is found liable to plaintiff, Bertelle P.C., as his employer, can be held vicariously liable.

Dr. Notarnicola’s and Bertelle’s P.C. Motion for Summary Judgment

In disposing of these branches of the motions on the merits, it must be recognized that “an expert’s affidavit . . . must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent’s favor” (*Romano v Stanley*, 90 NY2d 444, 451-452 [1997]). “Opinion evidence must be based on facts in the record or personally known to the witness” (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]). “Speculation is not a substitute for competent evidence even in an action for wrongful death” (*Waters v Mount Sinai School*

of Medicine-Mount Sinai Hosp., 38 AD3d 257 [2007], citing *Agius v State of New York*, 50 AD2d 1049, 1050 [1975]). “Where the expert’s ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force” (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002], citing *Romano*, 90 NY2d at 451-452; *Amatulli v Delhi Constr.*, 77 NY2d 525, 533-534, n 2 [1991]; accord *Moore v New York Med. Group, P.C.*, 44 AD3d 393 [2007], *lv dismissed* 10 NY3d 740 [2008] [where the factual premise upon which plaintiff’s expert’s opinion is based is unsupported by the evidence, his conclusions are without probative value]). Further, an expert may not properly rely upon information which could not have been known to plaintiff’s doctors during the time that he or she was treated (*see e.g. Lederman v Lawrence Hosp.*, 202 AD2d 198, 199-200 [1994]; accord *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [2006]).

Herein, Drs. Coyne and Phillips state that they are of the opinion that decedent was already suffering from Stage IV cancer at the time that the December 30, 2003 CT scan was taken and since he was already terminally ill at that time, any alleged failure to follow-up was not the proximate cause of plaintiff’s damages. A careful review of their respective affirmations reveals, however, that their opinions are purely speculative and are not based upon any factual or evidentiary basis. Most significantly, although both allege that Mr. Cataldi was already suffering from Stage IV cancer that had metastasized throughout his body, this conclusion is not supported by any test results, such as x-rays, CT scans, biopsies

or bone scans. Similarly, their conclusions that Mr. Cataldi's prognosis would have been the same if he had been diagnosed with cancer based upon the December 30, 2003 CT scan is also offered without any evidentiary basis. In this regard, the court notes that although the experts allege that treatment would have been unsuccessful based upon the fact that treatment was unsuccessful when it began after diagnosis in July 2004, this opinion is based upon facts that were not known to decedent's treating physicians in December 2003, i.e., that decedent did not react favorably to treatment (*see generally Lederman*, 202 AD2d at 199-200; *Rodriguez*, 28 AD3d 357). No other basis is offered for the experts' conclusions that if treatment had been started in December 2003, decedent's condition, and hence his prognosis, would not have improved.

Accordingly, for these reasons, the opinions offered by Drs. Coyne and Phillips are found to be without probative value and insufficient to entitle them to summary judgment as a matter of law (*see generally Shister v City of New York*, 63 AD3d 1032, 1035 [2009] [the opinion of plaintiff's expert that defendant's failure to order a gynecological examination earlier delayed discovery of her cancer, reducing decedent's life expectancy, was based upon mere speculation]; *Berlinger v Kraft*, 60 AD3d 489 [2009] [since plaintiff offered no evidence that the subject mycobacterial infection was progressing or was even present during earlier treatment, it would be pure speculation to find that an earlier referral would have prevented the allegedly unnecessary surgery]; *Brown v Bauman*, 42 AD3d 390, 392 [2007] [plaintiffs failed to submit any evidence to show the existence of an issue of fact as to

causation where the opinion of their expert came down to the assertion that had defendant doctor properly examined plaintiff, she should have then been referred to a qualified colorectal surgeon so that the appropriate repair could then be attempted, which conclusion was entirely speculative, specious and rested upon a number of unsupported assumptions]; *Feliz v Beth Israel Med. Ctr.*, 38 AD3d 396 [2007] [while plaintiff's expert opined that the infant's neurologic conditions were the result of complications arising during his birth and were consistent with an intrauterine injury, he did so in conclusory fashion without specific analysis, which was insufficient to raise any issue of fact]; *Bullard v St. Barnabas Hosp.*, 27 AD3d 206 [2006] [defendants were entitled to summary judgment where plaintiff's opposition to their prima facie showing of entitlement to summary judgment offered only conclusory assertions and speculation that an earlier diagnosis and treatment of the heel decubitus would have avoided the eventual bilateral amputation]; *Lederman*, 202 AD2d at 200 [plaintiff's expert's contention that time was not of the essence in treating decedent was mere hindsight and was based completely on facts which were still unknown on the night in question, at which time defendant had every reason to believe that an emergency existed]).

Since defendants fail to make a prima facie showing of entitlement to summary judgment, defendants' motions must be denied, without regard to the sufficiency of the opposing papers (*see e.g. Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Chance*, 33 AD3d 645; *Drago v King*, 283 AD2d 603, 603 [2001]). Accordingly, the court finds that Dr. Notarnicola's motion for summary judgment

must be denied. From this it follows that that branch of the motion for summary judgment by Bertelle P.C. must also be denied, since the P.C. can be held vicariously liable for any deviation from standards of care on the part of Dr. Notarnicola.

Conclusion

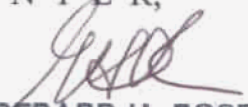
The complaint is severed, and the action and all cross claims asserted against Dr. Bertelle, in his individual capacity, are dismissed. Dr. Bertelle, in his individual capacity, may enter judgment accordingly.

Plaintiff is estopped from arguing that the December 30, 2003 CT scan did not evidence metastatic disease and she is precluded from offering the opinion of Dr. Baldasar, or any other expert, seeking to offer that opinion. Plaintiff is granted leave to discontinue the action against Dr. Berlly and HIA and the stipulation providing for the discontinuance of the action against Dr. Berlly and HIA is so ordered.

The motions for summary judgment made by Dr. Notarnicola and Bertelle P.C. are denied. All other relief requested is denied.

The foregoing constitutes the order and decision of this court.

E N T E R,


HON. GERARD H. ROSENBERG
J. S. C.