

**Alvarado v Beth Israel Med. Ctr.**

2009 NY Slip Op 32146(U)

September 11, 2009

Supreme Court, Kings County

Docket Number: 7552/02

Judge: Gerard H. Rosenberg

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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 11<sup>th</sup> day of September, 2009.

P R E S E N T:

HON. GERARD H. ROSENBERG,  
Justice.

-----X  
MARIA ALVARADO, ET ANO.,

Index No. 7552/02

Plaintiffs,

- against -

BETH ISRAEL MEDICAL CENTER, ET ANO.,

Defendants.

-----X

The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1, 2 _____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____ 3, 4 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, and upon oral argument, (1) defendants Beth Israel Medical Center (BIMC) and Andrew Lo, M.D. (Dr. Lo) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint (Motion Sequence No. 007), and (2) plaintiffs Maria Alvarado (Alvarado) and Luis Alvarado (collectively, the

Alvarados) cross-move for an order granting leave to serve an amended bill of particulars (Motion Sequence No. 008).

### ***BACKGROUND***

The above-captioned lawsuit alleging medical malpractice was commenced by plaintiffs against BIMC, Dr. Lo (a staff surgeon at BIMC), Dr. Yumiko Kanai and two other physicians who were never served (Dr. Rajeev Arora [Dr. Arora] and Dr. Kevin Tehrani [Dr. Tehrani]) by filing and service of a summons and verified complaint dated February 15, 2002. The lawsuit arises out of a surgical procedure performed to treat Alvarado's cholelithiasis (gallstones). In their Verified Complaint, plaintiffs alleged that defendants, on September 14, 1999, improperly performed a laparoscopic cholecystectomy (lap chole) on Alvarado and failed to timely diagnose and treat a perforation that had occurred during that specific procedure. By separate cause of action, Luis Alvarado derivatively alleged loss of service and consortium.

Issue was joined by defendants BIMC, Dr. Lo and Dr. Kanei by service of verified answers on or about April 18, 2002. A demand for a bill of particulars and various other discovery demands was served on May 7, 2002. Responsive bills of particulars were provided as to BIMC and Dr. Lo on or about November 22 and 23, 2004. Plaintiffs specifically alleged that: (1) defendants negligently perforated plaintiff Alvarado's duodenum during the September 14, 1999 lap chole, which then purportedly necessitated an emergency endoscopic retrograde choleangiopancreatography (ERCP) and laparotomy to repair that

perforation; and (2) defendants failed to convert the lap chole to an open procedure and failed to order a pre and/or intra-operative cholangiogram. They further withdrew their claim based upon lack of informed consent.

At depositions of then non-party Dr. Seth Cohen (Dr. Cohen), held on October 24, 2006, and Dr. Lo, held on January 30, 2007, testimony that the perforation of the duodenum actually occurred during the ERCP performed by Dr. Cohen on September 17, 1999 and not during the lap chole performed three days earlier by Dr. Lo, was introduced. Plaintiff then served a Second Amended Verified Complaint dated May 23, 2007, adding Dr. Cohen as a defendant, and alleging four causes of action. The first, asserted against Dr. Lo and BIMC, reiterating the allegations set forth in the original complaint, alleges that the September 14, 1999 laparoscopic procedure was negligently performed and that said defendants failed to timely diagnose and treat a perforation that occurred during that procedure. *The second cause of action, asserted against Dr. Cohen and BIMC, alleges that during the September 17, 1999 ERCP, Dr. Cohen perforated the plaintiff's duodenum* (emphasis provided). There is a third cause of action for lack of informed consent, and a fourth cause of action for loss of services. Issue was joined as to the Second Amended Verified Complaint on or about January 15, 2008.

In plaintiffs' new bill of particulars which was served on or about May 14, 2008, plaintiffs allege: (1) Dr. Lo perforated the duodenum during the lap chole on September 14, 1999; (2) BIMC failed to supervise now non-parties Dr. Arora and Dr. Tehrani, who

performed that procedure with Dr. Lo; (3) Dr. Lo and BIMC were negligent in failing to order pre and/or intraoperative choleangiogram, and failing to convert the lap chole to an open laparotomy; and (4) the hospital was vicariously liable for Dr. Cohen's negligence. Plaintiffs again withdrew their claim regarding lack of informed consent.

Dr. Cohen appeared in the action by interposing a motion to dismiss based upon the expiration of the statute of limitations. Plaintiffs cross-moved on the ground, inter alia, that the causes of action against Dr. Cohen related back to the original summons and complaint, thereby tolling the statute. By Order dated October 18, 2007, Justice Marsha Steinhardt granted Dr. Cohen's motion and denied plaintiffs' cross motion, holding, inter alia, that treatment provided by an independent non-employee physician (Dr. Cohen) cannot be imputed to a hospital merely because of the hospital affiliation.

Plaintiffs filed their note of issue on or about July 23, 2008.

### ***CONTENTIONS***

#### ***Defendants***

Defendants BIMC and Dr. Lo first contend that plaintiffs have failed to demonstrate that the lap chole performed on September 14, 1999 was a proximate cause of her alleged injuries, as alleged by plaintiffs in their bills of particulars. In support, defendants rely on the affirmation of Dr. George Ferzli (Dr. Ferzli), who states that he is a board-certified General Surgeon with a sub-certification in Critical Care. Based his examination of the deposition testimony and medical records, Dr. Ferzli opines that, within a reasonable degree

of medical certainty, the perforation of Alvarado's duodenum occurred during the ERCP performed by nonparty gastroenterology surgeon Dr. Cohen on September 17, 1999, three days after Dr. Lo performed the lap chole.

In his affirmation, Dr. Ferzli initially opines that based upon plaintiff's clinical symptomatology and the radiologic studies, she was appropriately referred for a lap chole to remove her gallbladder, and that although plaintiff had undergone an appendectomy in 1989, a lap chole was not contraindicated. In addition, plaintiff did not have any prior surgical adhesions or any other acute gallbladder disease, and there was nothing peculiar about her anatomical structure, as would have been revealed in the radiological studies, that would have risked complications of a laparoscopic procedure.

Dr. Ferzli further opines that Dr. Lo and the two residents under his supervision were qualified to perform the lap chole,<sup>1</sup> that based upon the documentary evidence and Dr. Lo's deposition testimony, no complications occurred during the surgery, the procedure went smoothly, and Alvarado was transferred to recovery in stable condition. He opines that an ~~intraoperative choleangiogram~~ was not indicated in this procedure, since there were no ~~intraoperative complications~~ and there were no medical indications to convert the laparoscopy to an open laparotomy procedure.

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<sup>1</sup> At his deposition, Dr. Lo testified that he had prior experience with Dr. Tehrani and was very familiar with Dr. Arora's involvement in prior surgical dissections with other attending physicians.

Dr. Ferzli further opines that the deposition testimony and documentary records conclusively establish that the perforation of Alvarado's duodenum occurred during the ERCP performed by Dr. Cohen on September 17, 1999. He notes that Dr. Cohen acknowledged, without qualification, that the perforation occurred during that procedure based on the intraoperative findings set forth in the operative report concerning the ensuing laparotomy performed by Dr. Lo, wherein a 2 cm perforation in the third portion of the duododenum, was noted where the endoscope had been inserted by Dr. Cohen. He states that the fact that progressive pneumoperitoneum (air in the abdominal cavity), consistent with a duodenal perforation, did not begin to develop until after the ERCP procedure had begun, further makes clear that a duodenal perforation had not yet occurred prior to the ERCP procedure. He refers to an ensuing operative report concerning the subsequent debridement procedures that Alvarado underwent on November 10, 1999, stating that the perforation occurred on September 17, 1999.

Finally, Dr. Ferzli opines that the duodenal perforation could not have occurred during the lap chole because the portion of the duodenum that was perforated was nowhere in the operative field of the lap chole, that all of plaintiff's sequela, including her stormy postoperative course and ensuing surgical procedures, have nothing to do with the lap chole and are directly attributable to sequelae from the duodenal perforation and/or her pre-existing gastroesophageal reflux disease (GERD), and that a duodenal perforation stemming from performance of an ERCP is a known complication and does not constitute medical

malpractice. Based upon his review of Dr. Cohen's deposition testimony, he opines that there is nothing in the record to indicate that the procedure was negligently performed even though a complication resulted, explaining that insertion of the endoscope must be done blindly and despite careful attention to avoid injury to the bowel, a perforation can still occur. He states that the perforation was immediately and timely diagnosed by Dr. Cohen, and an emergent laparotomy was immediately arranged and appropriately performed by Dr. Lo.

Defendants thus contend that they are entitled to summary judgment, since plaintiff's alleged injuries occurred during an ensuing ERCP procedure performed by Dr. Cohen, a private gastroenterology surgeon, three days later. As a second contention, defendants urge the court to apply the doctrine of the law of the case, and reject plaintiffs' attempt to convince the court that it should reconsider Justice Steinhardt's holding that the hospital is not united in interest with Dr. Cohen, and is thus not vicariously liable for his negligence.

***Plaintiffs' contentions in opposition and in support of their cross motion***

Plaintiffs contend that, despite the convoluted procedural history of this case, Alvarado's claims are now clear and have been addressed by defendants in their moving papers: (1) Dr. Lo, a staff surgeon employed by BIMC, and his residents, Drs. Arora and Tehrani, improperly performed a lap chole on plaintiff on September 14, 1999 by leaving a remnant of the gallbladder tissue behind, causing a bile leak; and (2) Dr. Lo failed to properly supervise Dr. Arora and Dr. Tehrani, and that Dr. Arora lacked the requisite knowledge, training and experience needed to perform the dissection aspect of the procedure.

This negligence led to plaintiffs' second claim against BIMC, which alleges that on September 17, 1999, Dr. Cohen, an attending physician at BIMC, improperly performed an ERCP on Alvarado when attempting to repair plaintiff's bile leak which occurred during the lap chole, creating a duodenal perforation, giving rise to plaintiffs' third claim against Dr. Lo, that in performing the emergency laparotomy to repair the perforation, he performed, inter alia, a bilateral truncal vagotomy (BTV) which was not the applicable standard of care in 1999. Plaintiffs reject any potential claim of surprise or prejudice, contending that Dr. Ferzli opined on all of the procedures performed. They thus contend that defendants have failed to meet the requisite standard for entitlement to summary judgment, and argue that they have raised issues of fact in opposition thereto.

Initially, referring to the operative reports and depositions, plaintiffs assert that despite the fact that Dr. Lo was one of only two staff surgeons at BIMC and instructed residents on how to perform a lap chole, there is no evidence that he had previously supervised Dr. Arora during the performance of a lap chole – rather, he relied on his recollection that Dr. Arora had told him that this was not the first time he had performed that procedure. They thus question Dr. Lo's basis of knowledge regarding Dr. Arora's qualifications. Referring to the Reports of Operation<sup>2</sup>, plaintiffs note that during the dissection of the cystic duct, Dr. Arora accidentally opened a wall of the gallbladder. The bile was aspirated and a wash given to control any contamination.

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<sup>2</sup> Two reports of operation were dictated by Dr. Arora.

Plaintiffs concede, as undisputed, that Dr. Cohen perforated the third portion of Alvarado's duodenum during the ERCP.

Plaintiffs further allege that the operative reports and testimony reveal that there were several procedures performed during the course of Dr. Lo's laparotomy on September 17, 1999. The perforation was identified and repaired. In addition, according to Dr. Tehrani's operative report, a bile leak distal to the cystic stump was identified. Dr. Lo testified that a hole was found in the area by the cystic duct and that a bile leak was observed. He acknowledged that it was possible for a surgeon to negligently make a hole in the cystic duct by "ripping" the gallbladder off during dissection. In plaintiffs' words, Dr. Lo "hypothesized" that the bile leak occurred when the surgical clips that were placed on the cystic duct during the lap chole dislodged because of pressure buildup. Plaintiff characterize this as conjecture, since Dr. Lo admitted that there were no diagnostic tests available to confirm his theory. They submit that Dr. Lo's statement, that while he may or may not have seen the area where the bile was leaking, he did not treat the area during the laparotomy because it had previously been treated by Dr. Cohen, belies what is written in the laparotomy operative report stating that the bile leak in the area where a remnant of the gallbladder remained was sutured, demonstrates that defendants' motion should be denied regardless of the sufficiency of plaintiffs' opposition papers.

Plaintiffs challenge, as conclusory, Dr. Ferzli's statement that the lap chole was properly performed, went smoothly and was free from complications, and was completed in

only two hours and twenty-five minutes, comparing the latter statement to Dr. Ferzli's own findings of a study in 1997 where, in a field of 147 lap choles, the average operating time was 37 minutes. Also challenged as conjectural is Dr. Ferzli's opinion that Dr. Arora had the requisite experience to participate in the lap chole under Dr. Lo's supervision, arguing that said statement is based on nothing more than hearsay. In this regard, plaintiffs assert that Dr. Ferzli's affirmation is silent as to plaintiffs' claim, set forth in the bill of particulars, that Dr. Lo failed to adequately and properly supervise Dr. Arora, thus precluding judgment as a matter of law.

Plaintiffs submit a redacted Affirmed Report of an undisclosed Expert Surgeon and contend that his opinions, stated within a reasonable degree of medical certainty, that (1) the decision by Dr. Lo and his residents to leave behind a remnant of Alvarado's gallbladder was a departure from good and accepted medical and surgical practice, as they knew or should have known that this action substantially increased the probability of a bile leak,<sup>3</sup> and (2) the addition of a BTV, which, in 1999 was not routinely part of a "pyloric exclusion", was also a departure from good and accepted surgical practice as it left Alvarado with prolonged complications, raise issues of fact.<sup>4</sup> They further submit the affirmation of another physician,

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<sup>3</sup> Based on his review of Alvarado's medical records, plaintiffs' Expert in General Surgery noted that during the procedure, the gallbladder was incised during its mobilization and, as a result, a small remnant of gallbladder tissue was left *in situ* as found during the laparotomy.

<sup>4</sup> Plaintiffs' expert in General Surgery opines that the decision by Dr. Lo to perform an emergency laparotomy to treat the duodenal perforation that occurred during the ERCP was appropriate and timely, and that his decision to perform a "pyloric exclusion", although questionable, was not a deviation from the standard of care.

board certified in the fields of Internal Medicine and Gastroenterology, which expresses agreement with the opinion of the expert surgeon insofar as (1) finding that Dr. Cohen negligently caused the perforation of Alvarado's duodenum, (2) opining that the decision to leave a "remnant" of the gallbladder behind substantially increased the risk of a bile leak and was a departure from good and accepted practice which required plaintiff to undergo the emergency ERCP in an attempt to treat same, and (3) opining that Dr. Lo's addition of a BTV to the procedure was a departure from good and accepted surgical practice where the correct approach would have been to treat the patient post-operatively with drugs.

Plaintiffs further assert that defendants have failed to tender sufficient evidence to demonstrate the absence of any material questions of fact related to the performance of the ERCP sufficient to satisfy their obligation. They assail Dr. Ferzili's affirmation as insufficient, as Dr. Ferzili's expertise is General Surgery as opposed to Gastroenterology, and reject his opinion that the perforation was immediately and timely diagnosed by Dr. Cohen. They aver that Dr. Lo's testimony raises an issue of fact as to whether a third portion duodenal perforation "pretty far away" from the gallbladder was caused by a negligently performed ERCP.

Finally, plaintiffs contend that Justice Steinhardt's decision misapprehended the law as to vicarious liability, and asks the court to reject BIMC's arguments on the issue of the applicability of the doctrine of law of the case. In her decision, Justice Steinhardt refused to permit the claim against Dr. Cohen to "relate back" to the date of the filing of the case

against BIMC for statute of limitations purposes, finding that plaintiffs had failed to establish the second prong of the three-prong test, that Dr. Cohen and BIMC were “united in interest” (*see Buran v Coupal*, 87 NY2d 173 [1995]). Noting that nowhere in her decision does Justice Steinhardt state that, as a matter of law, BIMC is not vicariously liable for the acts of Dr. Cohen, plaintiffs further argue that controlling authority permits this court, under the present circumstances, to disregard the doctrine of “law of the case” and find an issue of fact as to whether Dr. Lo, by his conduct, misled plaintiff into reasonably believing that Dr. Cohen was acting at the behest of the hospital in providing her care and treatment. In such a case, plaintiffs contend that hospital liability can be predicated on principles of apparent or ostensible agency, as an alternative to “control in fact.”

Further citing the opinions of their expert gastroenterologist that (1) Dr. Cohen negligently caused the duodenal perforation by use of excessive force in introducing the endoscope into the third portion of the duodenum; and (2) contrary to the position of Dr. Cohen, the progression of the pneumoperitoneum during the case should have immediately alerted any endoscopist of average skill as to the substantial likelihood of injury, calling for him to abort the ERCP and allowing Dr. Lo the opportunity to suture and clean the perforation rather than the performance of extensive surgical repair to control the life-threatening complication. They argue that although it was not raised as an issue by defendants, plaintiffs failure to timely commence against Dr. Cohen does not compel

dismissal of the vicarious liability claim against BIMC, as Dr. Cohen is not a necessary party to the action.

Finally, plaintiffs seek leave to amend their bill of particulars to add plaintiffs' claim that defendants were negligent, inter alia, in performing an unnecessary BTV during the laparotomy on September 17, 1999, based on the opinions of their experts that BTV was not the applicable standard of care in 1999. They deny that defendants will be prejudiced by such amendment, as it is not being requested on the eve of trial, and a reasonable excuse exists because plaintiffs' counsel became aware of this potential claim after consultation with said experts in response to the instant summary judgment motion. They assert that Dr. Ferzli has already opined that nothing in the treatment rendered by any of the staff members of BIMC and/or Dr. Lo was a proximate cause of Alvarado's injuries, and his statement that the emergent laparotomy was appropriately performed by Dr. Lo, shows that defendants' expert reviewed the laparotomy report and other relevant records in order to form his opinion, thus obviating prejudice.

***Defendants' reply and opposition to plaintiffs' cross motion***

In reply, defendants contend that primarily through Dr. Ferzli's affirmation, they have established, prima facie, their entitlement to judgment, and reiterate that because Justice Steinhardt previously held that BIMC was not vicariously liable for Dr. Cohen's negligence during the ERCP and for which Dr. Lo had no involvement, defendants further established that summary judgment dismissal was warranted as to any claims arising from the

performance of the ERCP under the law of the case. They further point out that plaintiffs now, for the first time, allege that: (1) Dr. Lo and the residents under his supervision improperly performed the lap chole by negligently leaving behind a remnant of the gallbladder; and (2) Dr. Lo negligently added a BTV as part of the life-saving exploratory laparotomy to repair the duodenal perforation sustained during the ERCP, which caused plaintiff to develop continued gastroparesis and gastritis-related complaints. In addition to urging the court to reject said claims as unpleaded and wrongfully asserted in opposition to a summary judgment motion, defendants, presenting supplementary affirmations of Dr. Ferzli and Dr. Tehrani, argue that these claims have no merit as they are factually unsupported by the record and are contradicted by the evidence. They contend that the record establishes that a gallbladder remnant was not left behind, and that a truncal vagotomy was, in fact, clearly indicated in this case. Finally, they argue that any claims related to the performance of the lap chole should be rejected, as the duodenal perforation during the ERCP constitutes a superceding, intervening cause which breaks any causal relation between the claims related to the lap chole and Alvarado's injuries.

Defendants contend that dismissal is mandated because plaintiffs' expert affirmations set forth two new departures not previously claimed in either the original or amended pleadings and bill of particulars: (1) as to Dr. Lo and BIMC, the decision to leave behind a remnant of the gallbladder, and (2) as to Dr. Lo, the inclusion of the BTV which led to the prolonged complications reported by plaintiff. They argue that Dr. Lo was not questioned

about these new theories during two deposition sessions, and that defendants were deprived of the opportunity to question plaintiffs at their respective depositions about the newly alleged injuries. They assert that the new injuries are now raised solely for the improper purpose of defeating defendants' summary judgment motion.

### *Supplementary affirmations*

In further support of its Reply Affirmation, defendants submit a Supplemental Affirmation of Dr. Ferzli, and an Affirmation of Dr. Tehrani who, as a fourth-year general surgical resident employed at BIMC, assisted Dr. Lo in the September 14, 1999 lap chole, and the ensuing September 17, 1999 laparotomy. Both opine that the treatment rendered to plaintiff in all ways comported with good and accepted practice, and no act or omission by BIMC and/or Dr. Lo was a proximate cause of Alvarado's injuries. Both further opine that plaintiffs' claim that Dr. Lo was initially negligent in performing the September 14, 1999 lap chole by leaving behind a portion of the gallbladder is not supported by the evidence. As previously noted, Dr. Tehrani, in the operative report of the September 17, 1999 laparotomy, had stated that "this area [where a small leak was identified] was believed to be a small remnant of the gallbladder that was removed." In the new affirmations, Dr. Ferzli and Dr. Tehrani point out that a pathology report from the procedure of September 14, 1999, states that the gallbladder was received by [the Department of] Pathology intact, thus precluding any possibility that a remnant was left behind. They further note that the pathology report concerning the ensuing laparotomy procedure is devoid of any reference to

a gallbladder remnant, and, as asserted by Dr. Tehrani, if a “remnant” had been surgically removed during the second procedure, it would have been the custom and practice to send same to Pathology for analysis. They concur with Dr. Lo’s deposition testimony that Dr. Tehrani’s reference was, in all likelihood, a reference to the cystic duct stump since the gallbladder had been removed, and, by way of explanation, Dr. Tehrani agrees that his reference to a “small remnant of the gallbladder that was removed” was an inartfully worded statement. Further, he now indicates that he meant to state that the physicians had identified a small leak in a area distal to the cystic stump, and that the area to which he referred in that sentence was believed to have been a small remnant of the gallbladder that had already been removed at the time of the lap chole, not that it was removed during the laparotomy. Defendants argue that based upon the foregoing documents, it is clear that no part of the gallbladder was left behind from the lap chole and that the area referred to by Dr. Tehrani in his operative report was the cystic duct stump.

Dr. Ferzli opines in his Supplementary Affirmation that leaving behind a gallbladder remnant, even if true, would not increase the risk of a postoperative bile leak, and indeed, by sealing off the area where such a leak might occur, might actually decrease said risk. He further states that plaintiffs’ claim concerning the purportedly negligent inclusion of the BTV during the laparotomy of September 17, 1999, ignores Alvarado’s preexisting history of chronic gastritis as reflected in prior treatment records of the BIMC Outpatient Clinic. He agrees with Dr. Lo’s position set forth at his deposition that the inclusion of a vagotomy was

indicated because it is the vagus nerve that controls acid production and by cutting the vagus nerve, acid production is decreased and symptoms of gastritis are minimized. He further opines that had that procedure not been performed, bleeding and ulcers might have resulted, and the fact that the vagotomy was ultimately unsuccessful in reducing plaintiff's gastritis attacks was not attributable to the performance of the vagotomy, but rather was simply a continuation of plaintiff's preexisting chronic conditions.

Also in reply, defendants reject, as remote and attenuated, plaintiffs' allegation that Dr. Lo's lap chole led to the perforation of plaintiff's duodenum three days later caused by Dr. Cohen. They further reject, as speculative, plaintiff's experts' opinion that Dr. Lo's alleged negligence in either knowing but ignoring, or failing to know, that his actions in performing the lap chole substantially increased the probability of a bile leak which required her to undergo the ERCP.

Defendants reiterate their contention that Justice Steinhardt ruled on the issue of vicarious liability, including the claim of apparent agency, and plaintiffs fully briefed said issues. They reject plaintiffs' argument that the staff at BIMC, including Dr. Lo, in any way misled Alvarado into believing that Dr. Cohen had authority to act on behalf of BIMC, and argue that plaintiff's claim that she did not request a specific doctor to perform the ERCP and had never met Dr. Cohen, is insufficient to raise an issue of fact.

### *Plaintiffs' reply*

In reply, plaintiffs reject defendants' claim that they seek to add two new theories of liability. While they admit that they seek, in their cross motion, leave to add a claim against Dr. Lo and BIMC for negligently performing a BTV, they maintain that from the outset of the case, plaintiffs have alleged that Dr. Lo improperly performed the lap chole. They further deny that they seek to add the negligent vagotomy theory in an effort to defeat defendants' motion, but rather, seek to clarify their position by requesting that the cross motion to add that new theory should only be considered by the court after the issues raised in the summary judgment motion are determined. They reiterate that they have demonstrated that defendants will not be prejudiced by amendment of the bill of particulars, and reject defendants claim that they were deprived of an opportunity to fully question about ensuing injuries as disingenuous.

Plaintiffs further reject the supplemental affirmation of Dr. Ferzli and the new affirmation of Dr. Tehrani as an attempt to provide the court with additional evidence not provided in their original moving papers. Additionally, they reject defendants' assertion that they would be prejudiced if the court were to permit amendment of the bill of particulars as unsupported and disingenuous. Specifically, they argue that their allegations concerning Dr. Lo's negligence in leaving a portion of the gallbladder behind cannot support a claim of surprise, since the general statement that the lap chole was negligently performed was included in the original complaint and in all subsequent bills of particulars.

Finally, plaintiffs aver that they have raised an issue of fact with regard to BIMC's vicarious liability for the negligent actions of Dr. Cohen. They argue that because the Appellate Division only stated that plaintiffs failed to satisfy the third-prong of the relation-back test, it implicitly found that the first and second prongs were satisfied. Noting that the second prong of the test requires a showing that "the new party [Dr. Cohen] is united in interest with the original defendants, and the "it is well-settled that parties are considered united in interest when one can be held vicariously liable for the other," plaintiffs assert that the holding of the Appellate Division is in direct conflict with that of Justice Steinhardt, who held that Dr. Cohen was not united in interest.

## ***DISCUSSION***

### ***Plaintiffs' cross motion***

As a threshold matter, the court first considers the plaintiffs' cross motion to allow service of an amended bill of particulars.

Ordinarily, in the absence of a showing of prejudice or surprise, leave to amend a bill of particulars is freely given (CPLR 3025 [b]; see *Ito v 324 E. 9<sup>th</sup> St. Corp.*, 49 AD3d 816, 817 [2008]). In the present matter, while plaintiffs' delay in presenting the new claims upon which amendment is based is irrefutable, they have come forward with a reasonable explanation, in that counsel became aware of the potential claim upon which the proposed amended bill of particulars is based after consultation with the expert witnesses in preparing

a response to the present summary judgment motion (*see Cherebin v Empress Ambulance Service, Inc.*, 43 AD3d 364 [2007]).

Defendants' conclusory assertions of prejudice are unavailing. Prejudice requires "some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*see Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 [1981]). With particular relevance here, prejudice has been found where newly advanced theories of liability could not be discerned from either the complaint or original bills of particulars (*see Navarette v Alexiades*, 50 AD3d 869, 879 [2008] [Supreme Court's denial of leave to amend bill of particulars to add new theories of liability held to be proper exercise of discretion because motion made on eve of trial]). In evaluating the merits of the present cross motion under such a standard, the court can discern no ensuing prejudice if such amendment were granted, particularly since the newly-advanced allegations are based upon the contents of operative reports maintained by BIMC (*see Cherebin*, 43 AD3d at 365).

Finally, a finding of such lack of prejudice undermines defendants' argument that permitting the additional theories of liability impermissibly defeats their entitlement to summary judgment (*see Araujo v Brooklyn Martial Arts Academy*, 304 AD2d 779 [2003]). In an analogous situation found in *Rogoff v San Juan Racing Ass'n, Inc.* (77 AD2d 831 [1981]), the defendant had the defense of the Statute of Frauds but failed to plead it. When the defendant then moved for summary judgment on the basis of that defense, the court held

for the defendant, rejecting the plaintiff's contention that the defense was waived. The court allowed the defendant to raise it on the motion, and took the further step of awarding the defendant summary judgment based on it, finding that a number of documents were submitted with the purpose of meeting the Statute of Frauds requirements, and there was ample opportunity to address the issue in plaintiff's examination before trial, and there was thus no surprise. Indeed, with particular relevance to the instant situation, Professor Siegel, in his Commentary, suggests that "[t]he defendant, as an alternative, could have moved for leave to amend the answer to assert the statute of frauds as a defense. CPLR 3025(b). In entertaining that motion, the court would apply essentially the same criterion: that of surprise and prejudice. . . Presumably. . . such an amendment would have been allowed." (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:11).

In accordance with the foregoing, the court grants plaintiffs' cross motion and permits amendment of the bill of particulars in the form proposed by plaintiffs.

#### ***Defendants' motion for summary judgment***

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible

form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [1989]; *see also Zuckerman*, 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted medical practice and evidence that such departure was a proximate cause of injury or damage” (*Graham v Mitchell*, 37 AD3d 408, 409 [2007]). As initially framed, defendants established their prima facie entitlement to judgment as a matter of law with respect to Dr. Lo’s liability by providing the testimony of Dr. Cohen as well as the expert affirmation of Dr. Ferzli, which demonstrated that the perforation of plaintiff’s duodenum occurred during the ERCP performed by Dr. Cohen on September 17, 1999, that they did not depart from good and accepted medical practice in their treatment of the plaintiff, and that, in any event, their treatment was not a proximate cause of the plaintiff’s injuries (*see Adjetey v New York City Health and Hospitals Corp.*, 63 AD3d 865 [2009]; *see also Howard v Kennedy*, 60 AD3d 905 [2009]). In opposition, plaintiffs rely on redacted affirmations provided by two expert witnesses which state, within a reasonable degree of medical certainty, their opinions that defendants departed from good and accepted practice.

As previously noted, defendants argue in reply that they are entitled to summary judgment on the two newly alleged claims even if amendment of the bill of particulars is

granted. However, contrary to defendants' arguments, the findings and opinions set forth in the Supplemental Affirmation of Dr. Ferzli, and the Affirmation of Dr. Tehrani are sharply disputed by plaintiffs' experts, and do not support a conclusive finding that the treatment rendered to Alvarez by Dr. Lo and BIMC was entirely within the accepted standards of medical and general surgical practices. Significantly, both experts for plaintiffs state that post-operative complaints by Alvarado led to testing which demonstrated the presence of the bile leak in what appeared to be the area of the cuff/remnant of gallbladder tissue. There is disagreement between plaintiffs' experts and Dr. Ferzli as to the cause of this condition: although plaintiffs' experts opine that Dr. Lo's decision to leave behind a remnant of the gallbladder substantially increased the probability of a bile leak, Dr. Ferzli, who, based upon his interpretation of the pathology report, opines that the gallbladder was removed intact, further opines that the "likely explanation" for the initial bile leak was a dislodging or loosening of the surgical clips that occurred postoperatively, "a known complication of laparoscopic cholecystectomy procedures in general, and was not the result of any negligence on the part of Dr. Lo. . ."

In this regard, it is well-settled that "[s]ummary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts . . . . When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution" (*Shields v Baktidy*, 11 AD3d 671, 672 [2004] [citations omitted]; *see also* *Feinberg v Feit*, 23 AD3d 517, 519 [2005]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623,

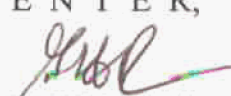
624 [2003]). In general, causation is a factual issue to be resolved on a case-by-case basis by the factfinder (*see Eiseman v State of New York*, 70 NY2d 175, 187 [1987]; *Brown v Bowman*, 42 AD3d 390 [2007]). Although Dr. Cohen's testimony demonstrates that he, and not Dr. Lo, was directly responsible for causing the injury to Alvarado's duodenum, plaintiffs have raised a question of fact as to whether Dr. Lo, a potential initial tortfeasor, is liable to plaintiff for any aggravation of her injuries (*see Cohen v New York City Health and Hospitals Corp.*, 293 AD2d 702 [2002]).

Finally, irrespective of Justice Steinhardt's prior ruling, there is no dispute as to the fact that Dr. Lo was employed by defendant BIMC at the time he treated Alvarado, thus raising a question of fact with respect to BIMC's vicarious liability. Accordingly, the court denies that portion of defendants' motion seeking dismissal of plaintiffs' claims regarding that issue (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]).

In view of the foregoing, the court denies defendants' motion in its entirety. However, in light of defendants' contention that they have not had an opportunity to conduct full discovery on the issues raised by the newly-amended bill of particulars, the court vacates plaintiffs' note of issue in order to permit defendants to have further discovery.

The parties are directed to appear in the Central Compliance Part, Room 469, at 9:30 a.m. on October 19, 2009.

The foregoing constitutes the decision and order of the court.

E N T E R,  
  
HON. GERARD H. ROSENBERG  
J. S. C.