

Bernstein v Wysoki

2010 NY Slip Op 30498(U)

March 8, 2010

Supreme Court, Nassau County

Docket Number: 20686/07

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

JORDAN BERNSTEIN, a minor under the age of 18 years of age by his Mother and Natural Guardian, MALKA BERNSTEIN, and MALKA BERNSTEIN, Individually,

Plaintiff(s),

-against-

RANDEE WYSOKI, M.D., JILL TSCHINKEL, R.N., DINA FARRELL, M.D., MICHAEL FARRELL, M.D., GREGORY SCAGNELLI, M.D., PATRICIA GRANT, R.N., WILLIAM KAZALSKI, R.N., JULIE HIGGINS, R.P.A., CAMP ISLAND LAKE, WILSON MEMORIAL REGIONAL MEDICAL CENTER, UNITED HEALTH SERVICES HOSPITAL, INC. and UNITED MEDICAL ASSOCIATES, P.C.,

Defendant(s).

ORIGINAL RETURN DATE:07/28/09
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MOTION SEQUENCE #9,11,12

The following papers read on this motion:

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All defendants move, in three separate motions, for summary judgment dismissing the complaint in this medical malpractice action. The motions are denied with respect to claims for malpractice/negligence by all of the defendant physicians, Nurse Tschinkel, Nurse Kazalski and Physician's Assistant Higgins as triable issues of fact are presented. The motion by Triage Nurse Grant for summary judgment dismissing the complaint against her is granted.

The motion by the Camp and the Hospital for summary judgment dismissing the fourth cause of action is denied to the extent that it alleges a claim for vicarious liability but is granted as a matter of law to the extent that it purports to allege a claim for negligent hiring or supervision. The Camp's further request for summary judgment dismissing the second cause of action for lack of informed consent is granted in the absence of opposition by plaintiffs.

Thirteen year-old Jordan Bernstein ("Jordan") was a camper at Camp Island Lake in August 2007. On August 8, 2007, after lunch and a period of mountain biking, Jordan put his bike away and returned to his room, where he went to the bathroom and then lay down. The pain was in his abdomen and groin, above the penis (Bernstein transcript, p. 56). According to plaintiff, the pain got worse, so he went to the Infirmary.

At the Infirmary the Camp nurse, Nurse Tschinkel, testified that Jordan complained of abdominal pain. She took his blood pressure and temperature, and called the Camp physician, Dr. Wysoki, to come to the Infirmary. While waiting for the doctor, Jordan vomited (Bernstein transcript, p.68).

Nurse Tschinkel testified that she usually looked at the area of the body complained of by the camper (Tschinkel transcript, p. 128). She did not look at Jordan's groin, penis or testicles (Tschinkel transcript, p. 128-129). She does not recall asking Jordan what he was doing prior to the onset of pain (Tschinkel transcript, p. 121). She was not aware that he had been mountain biking prior to arriving at the infirmary (Tschinkel transcript, p. 215).

Dr. Wysoki arrived and examined Jordan on an exam table at 3:15 PM. She pulled up his shirt and pulled his shorts down to the inguinal area (Wysoki transcript, p. 108). Jordan's penis was not exposed (Id.). Dr. Wysoki testified that Jordan pointed to his lower right quadrant at McBurney's point, when asked where it hurt the most (Wysoki transcript, p.109). She palpated the lower right quadrant of his abdomen and noted the point of tenderness at McBurney's point (Id.) She percussed his entire abdomen. Dr. Wysoki testified that she did not examine Jordan's groin, scrotum, penis or testicles (Wysoki transcript, p. 120), because she had no reason to do so (Wysoki transcript, p. 180). If she had known that Jordan had been mountain biking, she might have given him a different type of exam (Wysoki transcript, p. 93-34).

Dr. Wysoki decided to send Jordan to the Hospital in the Camp car, and called the emergency room at the defendant Hospital to let them know that a child with "r/o appendicitis" was coming (Wysoki transcript, pp.139-146). She prescribed percocet for pain and sent Jordan in the car with an IV (Wysoki transcript, p. 144 and 159). Nurse Tschinkel drove the Camp car to the hospital and stayed until Jordan's mother arrived.

At the Hospital Jordan was first seen by Triage Nurse Grant, who testified that Jordan complained of severe right lower abdominal pain (Grant transcript, pp. 67-68), as well as nausea and vomiting (Grant transcript p. 74). The intensity of the pain was a 10 on a scale of 10, according to what Jordan told Nurse Grant (Grant transcript, p. 77). She took down Jordan's name and birth date and pressed on his right lower quadrant (Grant transcript, p. 88). If a patient complained of a testicular problem, she would look for swelling and redness, palpate the area and ask about pain (Grant transcript, p. 57). Nurse Grant testified that her goal was to get Jordan to a room as quickly as possible where a nurse and physician could examine him (Grant transcript, pp. 100, 105). The triage took 10 minutes (Grant transcript, p. 99).

At the room for triage Level 2, Nurse Kazalski gave Jordan a head-to-toe assessment, although this assessment did not include a testicular examination (Kazalski transcript, p. 33). Kazalski testified that Jordan did not complain of testicular pain, just pain in the lower right quadrant (Kazalski transcript, p. 34). He was also assessed for nausea, vomiting and diarrhea (Kazalski transcript, p. 73).

Jordan was next seen by Physician's Assistant Julie Higgins, who testified that Jordan did not have testicular torsion while he was in her care (Higgins transcript, pp. 52, 93, 219), because his presentation in the emergency room was not that of a torsion (Higgins transcript, p. 105). She saw him walk into the room, and he had a normal gait (Higgins transcript, pp. 131, 220). According to Higgins, Jordan was holding his lower right abdomen when she walked into the room (Higgins transcript, p. 151). She did not ask him what camp activities he was involved in before the onset of pain, because she did not have a concern that the pain was trauma related (Higgins transcript, pp. 152-153), and when she obtained the history, there was no history of trauma (Higgins transcript, p. 166).

Higgins performed a "complaint-appropriate" head to toe exam and basically asked about different body systems (Higgins transcript, pp.166, 175). According to Higgins, Jordan admitted to nausea, vomiting and diarrhea, but denied testicular pain (Higgins transcript, pp. 167-168). She did not look at Jordan's penis or testicles (Higgins transcript, p. 168). His underwear was removed to allow her access to the femoral pulses and the inguinal lymph nodes in the groin (Higgins transcript, p. 257). She ordered a CT Scan and testing, and then asked Dr. Dina Farrell for her opinion (Higgins transcript, p. 200). Jordan's diagnosis continued to be "rule out appendicitis" (Higgins transcript, p. 230).

Dr. Dina Farrell, the Emergency Department physician, examined Jordan in order to try confirm Higgins' diagnosis and to schedule surgery for appendicitis (D. Farrell transcript, p. 155). She had Jordan pull down his underwear; according to her, Jordan said he had no pain in his private area (D. Farrell transcript, p. 155). She did not palpate the testicles; if Jordan had told her he had an undescended testicle, she would have palpated and manipulated his testicles (D. Farrell transcript, pp. 135-136,155). She palpated McBurney's point, and he vomited immediately afterward (D. Farrell transcript, p. 192). According to Dr. Dina Farrell, the testicular exam she did was appropriate for the presentation (D. Farrell transcript, p. 283). She called for a surgical consultation with Dr. Michael Farrell (Higgins transcript, p. 236).

Dr. Michael Farrell performed his surgical consultation in the Emergency Department. According to Dr. Michael Farrell, at the time of his examination, Jordan was resting comfortably on a stretcher with no obvious distress (M. Farrell transcript, p. 219). Dr. Michael Farrell took his own history and performed a physical examination of Jordan. He lifted up Jordan's hospital gown and his underpants to visualize Jordan's penis and testicles. (M. Farrell transcript, pp. 214-216). He palpated Jordan's inguinal regions bilaterally and observed Jordan jump up and down at the bedside (M. Farrell transcript, p. 216-218). He asked Jordan what he was doing when the pain started, and Jordan's response was that he had had a bowel movement and then the pain began (M. Farrell transcript, pp. 140, 239-240). The CT Scan was inconclusive (Exhibit BB, p. 112). Dr. Michael Farrell admitted Jordan to the Hospital, and ordered tests for the next morning.

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On the morning of August 9th, Dr. Michael Farrell again physically examined Jordan's right lower quadrant and ordered a CT scan of the abdomen and pelvis with contrast, which showed a worsening process in the pelvis affecting the ileum (M. Farrell transcript, pp. 256-260; Exhibit BB, p. 106). He agreed with Dr. Scagnelli that Jordan could be discharged to follow up with a specialist on Long Island. Dr. Michael Farrell opined that testicular torsion does not occur without testicular pain (M. Farrell transcript, pp. 293, 295).

Dr. Scagnelli, the Director of Pediatrics at the Hospital and a pediatric gastroenterologist, was called by Dr. Michael Farrell to evaluate Jordan and the diagnosis of "rule out appendicitis" (Scagnelli transcript, pp. 119-120). Dr. Scagnelli testified that in response to questioning about onset, Jordan told him that he went to the bathroom, had a bowel movement and felt pain in the right lower quadrant (Scagnelli transcript, pp. 149-150). Dr. Scagnelli testified that Jordan's pain came in waves, and for this reason testicular torsion was not in the differential diagnosis (Scagnelli transcript, p. 203). When he saw Jordan, Jordan was not in pain (Scagnelli transcript, p. 209).

Dr. Scagnelli's working diagnosis was Crohn's disease (Scagnelli transcript, p. 214). He called Dr. Michael Farrell and told him that Crohn's disease needed to be ruled out with a gastroscopy and a colonoscopy, and because his mother wanted Jordan back in Long Island, the best hospitals for him were Long Island Jewish or North Shore (Scagnelli transcript, pp. 230-231). According to Dr. Scagnelli, Jordan did not have surgical abdomen, so it was safe for him to travel (Scagnelli transcript, p. 232). Consequently, Dr. Scagnelli wrote the discharge order, including administration of pain medication for the car ride home, and then left the Hospital. However, Dr. Scagnelli received a phone call from the Hospital that Jordan was in severe pain, so he cancelled the discharge order and ordered tests for the morning.

Sometime after 9:00 PM on August 9, 2007, during a shower at the Hospital, Jordan felt a "stinging pain" when the water touched his right testicle. He also noticed that his right testicle was swollen to three times the normal size (Bernstein transcript, pp. 101-102). He had not noticed anything different about his testicle when he went to the bathroom with diarrhea a couple of times because he "was not looking down there" (Bernstein transcript, p. 103). A testicular ultrasound confirmed "acute right testicular torsion" (Exhibit BB, p. 107). Jordan's testicle was removed the next morning on August, 10, 2007.

Jordan and his mother seek damages from every person who examined, assessed or treated him from the time of the onset of his complaints to surgery, and they seek damages for vicarious liability from the Camp and the Hospital. At the time of his surgery, Jordan's left testicle was undescended, and he had had bilateral inguinal hernia repair at some point in the past.

Summary judgment is the procedural equivalent of a trial (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). It is a drastic remedy and should only be granted if there are no triable issues of fact (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept. 2009]; *Dykeman v Heht*, 52 AD3d 767, 769 [2d Dept. 2008]).

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once the movant makes its *prima facie* showing, the burden shifts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (Id.). It is not the court's function on summary judgment to assess credibility (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *S.J. Capelin Assoc.*).

The requisite elements of proof in a medical malpractice case are a departure from accepted community standards of practice and evidence that such departure was a proximate cause of plaintiff's injury (*Flanagan v Catskill Regional Medical Center*, 65 AD3d 563 [2d Dept. 2009]; *Tuorto v Jadali*, 62 AD3d 784 [2d Dept. 2009]; *DiGiario v Agrawal*, 41 AD3d 764 [2d Dept. 2007]). To establish proximate cause, a plaintiff "must demonstrate 'sufficient evidence from which a reasonable person might conclude that it was more probable than not that' the defendant's deviation was a substantial factor in causing the injury" (see *Alicia v Ligouri*, 54 AD3d 784, 785 [2d Dept. 2008], quoting *Johnson v Jamaica Hosp. Med. Center*, 21 AD3d 881, 883 [2d Dept. 2005]; *Flaherty v Fromberg*, 46 AD3d 743, 745 [2d Dept. 2007]).

Plaintiff's evidence is legally sufficient, even if his expert cannot quantify the extent to which defendant's act of omission decreased plaintiff's chance of a better outcome or increased his injury, as long as evidence is presented from which the jury may infer that defendant's conduct diminished plaintiff's chance of a better outcome or increased his injury (*Alicia* at 786; *Flaherty* at 745).

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions (*Roca v Perel*, 51 AD3d 757, 759 [2d Dept. 2008]; *Graham v Mitchell*, 37 AD3d 408, 409 [2d Dept. 2007]; *Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept. 2005]; *Shields v Baktidy*, 11 AD3d 671, 672 [2d Dept. 2004]). Such credibility issues can only be resolved by a jury (Id.).

Dr. Wysoki, Dr. Dina Farrell, Dr Michael Farrell, Dr. Gregory Scagnelli and Physician's Assistant Higgins seek summary judgment dismissing the malpractice claims against them in the complaint on the dual grounds that the care and treatment provided to Jordan between August 8, 2007, and August 9, 2007, was within good and accepted practice and that the medical care provided to Jordan at the Camp and the Hospital was not the proximate cause of any of the alleged injuries. In support of this motion they submit the expert affirmations of Dr. Anderson and Dr. Newman.

Dr. Anderson, who is board certified in pediatrics and anatomic pathology, opines that "testicular torsion results in unremitting testicular pain" and that she has never heard of a case of "testicular torsion without testicular pain." Her review of the color photographs of the slides containing the re-cuts of Jordan's testicle is the basis for her opinion that Jordan's testicle "was not torted for

greater than 4 to 8 hours, or until the evening of August 9, 2007.” Consequently, Dr. Anderson states that the care and treatment rendered to Jordan at the Camp’s Infirmary and at the Hospital was not in any way the proximate cause of any of the alleged injuries.

Dr. Leonard Newman, who is board certified in pediatrics and sub-certified in pediatric gastroenterology, echoes Dr. Anderson when he asserts that he “never heard of a patient having testicular torsion without complaints of testicular pain.” He opines that “given the lack of complaints of testicular pain throughout the course of treatment through the middle of the evening on August 9, 2009, along with the negative visual examinations, negative inguinal canal examinations and the infants’s ability to jump up and down at the bedside without complaint, . . . that the physical examinations conducted by the moving defendants through August 9, 2007, were within good and accepted practice.” Dr. Newman further avers that the care and treatment rendered to Jordan at the Camp’s Infirmary and at the Hospital between August 8, 2007, through August 9, 2007, was not a proximate cause of any of the injuries.

The Camp and Nurse Tschinkel also move for summary judgment dismissing the claims against them. They submit the affidavit of Advanced Practice Nurse Ficken who opines that in the absence of complaints or a history of testicular pain, “there was no basis for a Registered Nurse to perform any additional assessment of the infant plaintiff’s testicles.” She concludes that Nurse Tschinkel’s actions were within “good and accepted nursing practice,” and that Nurse Tschinkel’s actions did not cause or contribute to Jordan’s injuries.

Nurse Grant, Nurse Kazalski and the Hospital bring the third motion for summary judgment dismissing the claims against them, based upon their deposition transcripts, Jordan’s Emergency Department chart (part of the Hospital record) and the expert affidavit of Dr. Bartfield, who is board certified in the specialties of emergency medicine and internal medicine.

Dr. Bartfield opines that Nurse Grant “carried out her responsibilities as a triage nurse in exemplary fashion.” Dr. Bartfield stresses that the triage nurse is not responsible to make a diagnosis or treat a patient; her role is to “take only that information which is necessary to classify the level of care which seems likely to be needed for a particular patient.” As Nurse Grant set the acuity level for Jordan as Level 2, or “Emergent,” she performed her role in connection with Jordan “in a way that was entirely consistent with the applicable standard of nursing care.”

The record also contains a copy of the Hospital’s “Policy and Procedure” for Emergency Department Triage (Bartfield Aff., Ex. A), which sets forth the steps to be taken by the Triage Nurse in making triage decisions. A complaint of “severe pain/distress” qualifies as Level 2 status, and the procedure states: “When Level 2 condition is identified, the triage process stops, the patient is taken directly to a room and immediate physician intervention is requested.”

As to Nurse Kazalski, Dr. Bartfield testifies that the history taken by Kazalski was “completely appropriate” and “well within the applicable standard of care.” He also opines that Nurse Kazalski’s decision not to perform a physical examination of Jordan’s testicles was appropriate

because the “boy did not complain of scrotal, testicular, or genital pain.” Consequently, according to Dr. Bartfield, a decision to examine other areas of the body is a decision for the providers (physicians/physician’s assistant) not for the nurses.

On the basis of the deposition testimony presented, the pleadings and the expert testimony, the Court finds that defendants on all three motions have presented a *prima facie* case for dismissal of the claims against them. Under these circumstances the burden then shifts to plaintiffs to raise a triable issue of fact.

In opposition to the three motions, plaintiffs submit three expert opinions. The first consists of a redacted affirmation by a physician board certified in internal medicine and emergency medicine. This physician summarizes the conduct of Drs. Dina Farrell, Michael Farrell, Gregory Scagnelli and Physician’s Assistant Higgins and concludes, that “an appropriate physical examination of a patient presentation such as Jordan’s includes the manual palpation of the testes in order to rule out that body system as the cause of the patient’s illness.” This expert further concludes that the conduct of these defendants was “in deviation from the appropriate standard of medical care” and “a proximate cause of the delay in diagnosis of testicular torsion” and the removal of Jordan’s right testicle.

Plaintiff’s second expert, who is board certified in anatomical and surgical pathology and in forensic pathology, also submits a redacted affirmation. This expert focuses on the four pathology slides annexed to Dr. Anderson’s affirmation, and states that “the area of focal necrosis documented on one of the four pathology slides was approximately twenty-four (24) to thirty-six (36) hours old at the time Jordan’s testicle was removed.” Consequently, this expert opines that Jordan suffered an “acute injury,” occurring approximately 24-36 hours prior to the removal of the testicle, as well as testicular changes related to the testicular torsion that was diagnosed late on August 9, 2007. This expert states that “had Jordan undergone a testicular exam” at the Camp or at the Hospital “it would have been more likely than not that the infant plaintiff would have demonstrated symptoms of testicular tenderness and pain related to the area where the focal necrosis existed on the pathology slides.” The expert further opines that “had a timely examination of Jordan’s genital area been performed, such examination would have revealed Jordan’s testicular pathology and would have prompted adequate monitoring and treatment, and that such monitoring and treatment would have more likely than not prevented the ultimate injury and damages sustained by Jordan.”

Plaintiff’s third expert is Nurse Thomas Sharon, a registered nurse who practices in southern Florida. Nurse Sharon opines that Nurse Tschinkel failed to take a complete and accurate history form Jordan upon his arrival at the Infirmary and failed to perform a “full examination” of Jordan’s groin in order to assess its potential as the source of his symptoms.

As to Triage Nurse Grant, Nurse Sharon opines that it was a deviation for her not to obtain a history of Jordan’s activity at the time of onset of the pain, and that without such history Grant was unable to accurately prioritize the treatment that Jordan required.

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As to Nurse Kazalski, Nurse Sharon insists that in view of Jordan's age and Nurse Grant's notation of prior inguinal surgery, Kazalski was required to perform a physical examination, including palpation of Jordan's groin. Nurse Sharon concludes that the care and treatment rendered to Jordan by Nurse Grant, Nurse Kazalski and the Hospital was below the accepted standard of nursing care and was therefore negligent, and that such negligence was a substantial factor and a proximate cause of Jordan's injuries.

On this record, the Court is presented with a battle of the experts. Defendants argue that a testicular examination for Jordan was not appropriate in the absence of a complaint of testicular pain, and that testicular torsion is always accompanied by testicular pain. Dr. Anderson insists that Jordan's testicle was not torsed for more than 4 to 8 hours before the testicle was removed.

In contrast, plaintiffs argue that Jordan's symptoms and history cried out for a testicular examination even without express complaints of testicular pain, and that one of the pathology slides shows a focal necrosis that existed approximately 24 to 36 hours before Jordan's surgery. On this record, the Court is compelled to conclude that plaintiffs have raised triable issues of fact as to the malpractice of each of the physicians and Physician's Assistant Higgins, given the failure of each to give Jordan a testicular examination and further whether such failure was a substantial factor in, and therefor a proximate cause of, the removal of Jordan's right testicle on August 10, 2007.

Plaintiffs have further raised triable issues of fact as to whether Nurse Tschinkel was negligent in failing to elicit a thorough history from Jordan as to his activity immediately prior to the onset of the pain (see *Morrison v Altman*, 278 AD2d 135 [1st Dept. 2000]), whether Nurse Tschinkel and Nurse Kazalski were negligent in failing to examine Jordan's penis and testicles, and whether any of this alleged negligence was a substantial factor, or a proximate cause, of Jordan's injuries. These issues of fact additionally implicate the Camp and the Hospital, as these entities may have vicarious liability for the negligence of their employees, although there can be no claim against the Camp and the Hospital for negligent hiring or supervision (*Talavera v Arbit*, 18 AD3d 738 [2d Dept. 2005]).

However, plaintiffs failed to raise a triable issue of fact as to any alleged negligence by Triage Nurse Grant. According to the Hospital's Policy and Procedure for the Emergency Department, she properly identified Jordan's acuity level and thereby fulfilled her duty. Nurse Sharon's opinion is not supported by the record, as no party has claimed that Triage Nurse Grant's assessment of Level 2 status for Jordan was improper.

Based on the foregoing the motions by Dr. Wysoki, Dr. Dina Farrell, Dr. Michael Farrell, Dr. Scagnelli, Physician's Assistant Higgins, Nurse Tschinkel, the Camp, Nurse Kazalski and the Hospital for summary judgment dismissing the first cause of action for malpractice/negligence and the fourth cause of action for vicarious liability must be denied.

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The Camp and the Hospital are entitled to summary judgment dismissing the fourth cause of action to the limited extent that it purports to allege a claim for negligent hiring or supervision.

Triage Nurse Grant's motion for summary judgment dismissing all claims against her is granted. Jordan's mother's claims for derivative damages remain viable, as long as Jordan's direct claims survive. Consequently the motions for summary judgment dismissing the third cause of action on behalf of the mother must be denied as to all parties except Nurse Grant.

This leaves the second cause of action for lack of informed consent. The Camp seeks summary judgment dismissing this cause of action, as the Camp did not perform any procedures, but transferred Jordan to the Hospital. In the absence of any opposition by plaintiffs, the Camp's motion for summary judgment dismissing this second cause of action is granted.

The caption of this action is amended to read as follows:

"JORDAN BERNSTEIN, a minor under the age of 18 years of age by his Mother and Natural Guardian, MALKA BERNSTEIN, and MALKA BERNSTEIN, Individually,

Plaintiffs,

-against-

RANDY WYSOKI, M.D., JILL TSCHINKEL, R.N., DINA FARRELL, M.D., MICHAEL FARRELL, M.D., GREGORY SCAGNELLI, M.D., WILLIAM KAZALSKI, R.N., JULIE HIGGINS, R.P.A., CAMP ISLAND LAKE, WILSON MEMORIAL REGIONAL MEDICAL CENTER, UNITED HEALTH SERVICES HOSPITAL, INC. and UNITED MEDICAL ASSOCIATES, P.C.,

Defendants."

This decision constitutes the order of the court.

Dated:

3-3-10

ENTERED THOMAS P. PHELAN

MAR 08 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

J.S.C.

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