

Weber v Brackman
2012 NY Slip Op 30477(U)
February 10, 2012
Sup Ct, Suffolk County
Docket Number: 07-23265
Judge: Joseph C. Pastorella
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SHORT FORM ORDER

INDEX No. 07-23265
CAL No. 10-00231MMSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH C. PASTORESSA
Supreme Court

COPY

Mot. Seq. # 001 MotD

CYNTHIA WEBER, Individually and as the ,
Executrix of the Estate of DENNIS WEBER,
Deceased,

Plaintiffs,

- against -

MATTHEW RICHARD BRACKMAN, M.D.,
COLLIN EVERTON-MONTGOMERY
BRATHWAITE, M.D.,
COLLIN E.M. BRATHWAITE, M.D., PLLC,
BRATHWAITE SURGICAL, PLLC, and
ST. CATHERINE OF SIENA MEDICAL CENTER,
Defendants.: DUFFY & DUFFY, ESQS.
: Attorney for Plaintiffs
: 1370 Rex Corp. Plaza
: Uniondale, New York 11556
:
: BOWER MONTE & GREENE, P.C.
: Attorney for St. Catherine of Siena
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: New York, New York 11042
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: GALLAGHER, WALKER, BIANCO & PLASTARAS
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: 98 Willis Avenue
: Mineola, New York 11501
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: IVONE, DEVINE & JENSEN, LLP
: Attorneys for Defendant Brackman, M.D.
: 2001 Marcus Avenue, Suite N100
: Lake Success, New York 11042-1024

Upon the following papers numbered 1 to 23 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 -14; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 15 - 20; Replying Affidavits and supporting papers 21 - 23; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by defendant St. Catherine of Siena Medical Center for an order granting summary judgment dismissing plaintiff's complaint as asserted against it is granted only to the extent that it is determined that defendant Collin Brathwaite M.D., and defendant Matthew Brackman, M.D., were private attending physicians and not employees of St. Catherine of Siena Medical Center, and thus, it is not vicariously liable for their alleged malpractice and acts of negligence; the application is denied insofar as it applies to allegations of negligence or malpractice by the employees of St. Catherine of Siena Medical Center.

This medical malpractice action brought by Cynthia Weber is premised upon allegations of negligence, lack of informed consent, and wrongful death of the plaintiff's decedent Dennis Weber, and the negligent hiring of various employees by the defendant St. Catherine of Siena Medical Center, as well as a derivative claim on behalf of Cynthia Weber, relating to the care and treatment rendered to the plaintiff's decedent involving a small bowel obstruction. It is claimed that the defendants departed from accepted

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standards of care in failing to timely and properly diagnose and treat a small bowel obstruction, resulting in the plaintiff's decedent having to undergo multiple subsequent surgeries, and suffer infections, sepsis, cardiac arrest and premature death.

The defendant St. Catherine of Siena Medical Center seeks summary judgment dismissing the complaint on the bases that its employees did not depart from the good and accepted standards of medical practice in its treatment of the plaintiff's decedent, and that it is not vicariously liable for any actions of the plaintiff's private attending surgeons Dr. Brackman and/or Dr. Brathwaite.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2d Dept 1981]).

In support of motion (004), St. Catherine of Siena Medical Center has submitted, inter alia, an attorney's affidavit, copies of the summons and complaint, its answer and the plaintiff's verified bill of particulars as to St. Catherine and the co-defendants; a certified copy of the plaintiff's decedent's medical records; a copy of the St. Catherine of Siena Medical Center emergency department roster dated March 2006; the affidavit of Ronni Sollazzo, M.D.; and the unsigned transcripts of the examinations before trial of Cynthia Weber dated September 12, 2008, and Matthew Brackman, M.D. dated October 2, 2009. The unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (see, Martinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2d Dept 2008]; McDonald v Maus, 38 AD3d 727 [2d Dept 2007]; Pina v Flik Intl. Corp., 25 AD3d 772 [2d Dept 2006]), however, they are accompanied by proof of service of the transcripts pursuant to CPLR 3116, and are therefore considered on this motion.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2d Dept 1998], *app denied* 92 NY2d 818). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (see, Derdiarian v Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see, Fiore v Galang, 64 NY2d 999 [1985]; Lyons v McCauley, 252 AD2d 516 [2d Dept 1998], *app denied* 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [2d Dept 1994]).

CYNTHIA WEBER

Cynthia Weber testified to the extent that her deceased husband, Dennis Weber, was born on January 5, 1940. In November of 2005, he had a colonoscopy and was advised by Dr. Alpern that he “was not emptying out.” On March 7, 2006, he contacted his internist, Dr. Gold, and was seen at Dr. Gold’s office by the physician’s assistant on March 8, 2006. He was sent for x-rays which he was told did not reveal any findings. She stated that on March 10, 2006, her husband called Dr. Gold’s office again and advised the physician’s assistant that he wished to speak to Dr. Gold. Dr. Gold did not call back, so they went to the emergency department at St. Catherine of Siena as her husband was having excruciating abdominal pain and diarrhea of two days duration. At St. Catherine of Siena, a CT scan was performed and they were subsequently advised that her husband might have a blockage. She and her daughter were told to go home, but after arriving home, she received a telephone call advising that her husband would need immediate surgery. Therefore, on March 11, 2006, at about 3:30 a.m., her husband underwent surgery for a blockage which she was told was caused by scar tissue. Dr. Brathwaite advised her after completion of the surgery that everything went well. She first met Dr. Brackman at St. Catherine of Siena Medical Center on March 10, 2006, but did not remember what they spoke about.

Ms. Weber testified that her husband remained hospitalized at St. Catherine of Siena through March 19, 2006, and was discharged to home on a liquid diet. After arriving home, he complained that his stomach was bothering him and he began retching. She called Dr. Brackman who returned her call at about 9:00 p.m., and advised her husband to come into the office the following day at about 1:00 p.m. on March 20, 2006. When they arrived, he was having severe stomach pains, so Dr. Brackman sent him to the emergency room at St. Catherine of Siena. She was told that the CT scan subsequently performed revealed that he had adhesions which would have to be scraped away. She believed that Dr. Brathwaite and Dr. Brackman performed the surgery the next day on March 21, 2006. Shortly thereafter, he began running a fever and developed sepsis as there was E. Coli contamination from feces. She called Dr. Brathwaite late at night and told him she was not happy with the way Dr. Brackman was handling the case, but he advised her that he and Dr. Brackman concurred on everything. Her husband decided to continue with Dr. Brackman.

Ms. Weber testified that her husband was taken to surgery again on March 23, 2005 to “clean him out.” After that surgery, he had to have additional surgery to “close him up.” She was advised that if they could not close the wound, they would have to leave it open. Subsequently, Dr. Brathwaite advised her that he could not close the wound as her husband’s abdomen was too distended, so he just cleaned him out. On March 29, 2006, Dr. Brackman performed surgery again to clean out the wound and put in mesh, however, the wound was still left open after this procedure. Her husband remained hospitalized until April 28, 2006, at which time he was discharged with the wound still open. She was instructed as to how to change the dressings. He had follow-up visits with Dr. Gold and Dr. Brackman. Dr. Brackman changed his dressing and asked him if he had returned to work, which they thought was kind of odd. Mrs. Weber testified that since surgery, her husband had been experiencing swelling in his left leg, so he was seen by Dr. Hormozi on a Friday. That night, he began feeling unwell and complained of abdominal pain. He began feeling progressively worse and asked her to call an ambulance. He was taken to St. Catherine of Siena emergency department where a nasogastric tube was inserted. It was felt that he might have another blockage and he was admitted to the hospital. On the morning of May 29, 2006, her husband was advised that he would need another surgery for “blackened intestines” and that a section of his colon would have to be removed and a colostomy performed. She placed a call to Dr. Marion in the city who spoke to Dr. Brackman. Because they couldn’t “get a crew,” or enough staff for the surgery, it was not until hours later that Mr. Weber was taken to

surgery. Dennis Weber died on the operating room table on May 29, 2006. Mrs. Weber stated that Dr. Brackman told her it was because his heart stopped.

MATTHEW BRACKMAN, M.D.

Matthew Brackman testified that he is licensed to practice medicine in New York State and Florida and became board certified in general surgery in 2005. From June 2005 to June 2006, he was employed by Collin Brathwaite, M.D. as a general surgeon. His employment was terminated in June 2006 by Dr. Brathwaite when Dr. Brathwaite took a position as an employee at Winthrop University Hospital. Dr. Brackman stated he remembered Dennis Weber. He knew that the immediate cause of his death was cardiac arrest, but he could not figure out what the other causes were, and he did not remember the possible causes he considered at the time. He discussed it with Dr. Brathwaite when Dr. Brathwaite was reviewing the decedent's chart, but could not remember the specifics of their conversation. He testified that Dr. Brathwaite asked him if he contacted Mr. Weber's primary physician, and he told him he did not. He thought it was one of the reasons he cited for terminating him as Dr. Brathwaite didn't think he called Mr. Weber's primary care physician. Dr. Brackman testified that he was the admitting surgeon for each of Mr. Weber's admissions, but was an employee of Dr. Brathwaite. If Dr. Brathwaite ever stated to him what he wanted done, as his employee, he would say ok, if he did not have an objection from a medical point of view. They co-managed Mr. Weber's care and treatment. There were times that he asked Dr. Brathwaite's opinion concerning the care of Mr. Weber, however, he did not state what opinions he sought.

Dr. Brackman continued that during the March 10, 2006 hospitalization, Mr. Weber was diagnosed with a high-grade distal small bowel obstruction for which urgent surgery was needed and performed by him, as assisted by Dr. Seguerra, an independent physician. As there was massive distention of the proximal small intestine, he had to spend some time considering how to decompress the loops without causing injury to the intestine. He stated that the massive distention of Mr. Weber's intestine occurred because Mr. Weber waited an excessive amount of time, several days, before he presented to the emergency room. He also stated that he accomplished what he had hoped to by doing the surgery, relieving the obstruction, and closing his abdomen, with him surviving. He opined that Mr. Weber's massive obesity adversely affected his outcome and stated why. He also felt that Mr. Weber's generally poor medical condition, his age and the serious nature of his illness also affected his risk of surviving. Dr. Brackman continued that there was no type of ischemia or compromised blood flow to Mr. Weber's intestine at the time of that surgery, and that he did not cause any damage to the small bowel during the March 11, 2006 procedure.

On March 13, 2006, the decedent's abdomen was noted to be very distended. As of March 14th, Dr. Brackman stated Mr. Weber was doing pretty well. However, it was noted in the nursing note that Mr. Weber was nauseous and having dry heaves and that Dr. Brackman ordered that the nasogastric tube be reinserted and that he be medicated. Dr. Brackman then testified that he thought Mr. Weber had an ileus or an obstruction. On March 15, Mr. Weber was having bilious drainage from his nasogastric tube, suggesting an obstruction of the stomach, indicating either an ileus or an obstruction somewhere distal to the stomach. Because the abdomen was distended, it was suggestive of an ileus. There were no bowel sounds, however, bowel sounds were noted on March 16th, indicating the ileus was resolving. Dr. Brackman testified that he considered the possibility of an obstruction, but he did not do anything to rule out an obstruction. However, on March 14th, Dr. Brathwaite had ordered an abdominal flat and upright x-ray, which was performed on March 14th or 15th, but Dr. Brackman testified that he did not know if he ever became aware of the findings

upon the reading of that x-ray. On March 17th, he stated, there was less abdominal distention, bowel sounds were present, flatus was being passed, and Mr. Weber was trying to drink. On March 18th, liquid bowel movements appeared and bowel sounds were active. He discharged Mr. Weber home on March 19th. It was Dr. Brackman's judgment that Mr. Weber did not have an ileus or an obstruction at that time.

However, the following day, on March 20, 2006, Dr. Brackman saw Mr. Weber at his office and sent him to the emergency room for a CT scan of the abdomen and pelvis to evaluate him for an obstruction. When Dr. Brackman was shown the CAT scan films from March 20, 2006, he stated that Mr. Weber's abdomen was more distended than on the May 11th film, there were inflammatory changes in the right lower quadrant consistent with the recently operated area, the colon had more contents, there was more air, and the small bowel was massively distended with fluid. Dr. Brackman stated that it was difficult to state whether or not there was an obstruction. Dr. Brathwaite saw Mr. Weber in the emergency room on March 20th and admitted him to St. Catherine of Siena as Mr. Weber's colon was collapsed. An exploratory laparoscopy was performed by Dr. Brackman, assisted by Dr. Brathwaite, for a small bowel obstruction and lysis of "post operative" adhesions, at the distal jejunum, which Dr. Brackman testified was at a site higher up or more towards the mouth than the previous obstruction. He noted in his operative note that there was a small serosal tear of the distal jejunum, which he thought was caused by the massive dilation of the bowel which caused the serosa of the jejunum to rupture. He also testified that it could have torn when they manipulated the intestine during surgery. On March 22, 2006, Mr. Weber's abdomen was distended, which Dr. Brackman thought was from an ileus. He had a fever of 104.4, and was leaking some bloody fluid from the incision, which Dr. Brackman felt was not of any significance. On March 23, 2006, Mr. Weber was still febrile, had labored respirations, his abdomen was distended, and fluid was expressed from the midline incision. His white count was 30,000. Dr. Brackman felt he was septic so Mr. Weber was intubated, and broad antibiotics were started.

Dr. Brackman testified that Mr. Weber was in a dire condition on his last admission. He remembered having a discussion with the family; they wanted to discharge him as Mr. Weber's physician, because they were concerned that he had not recovered. Dr. Brackman thought the family may have thought he was too young. He saw Mr. Weber on the morning of his last admission after being advised by Dr. Brathwaite that he had been admitted by Dr. Vitolo, an independent physician covering for Dr. Brathwaite and Dr. Brackman. Dr. Brathwaite advised him that the CAT scan had been read by a radiologist and interpreted to show pneumatosis intestinalis, or free fluid in the abdominal cavity with a high-grade (near complete) bowel obstruction of the small intestine. Dr. Brackman testified that Mr. Weber whined from pain when he pressed on his abdomen, his white blood cell count was elevated to 20,000, and he was in renal failure. When all things were considered, he determined that there was an emergent need to perform surgery on Mr. Weber, consisting of an exploratory laparotomy and other possible surgeries, depending upon what he found upon exploration. He set forth the possibilities and the danger of a tear occurring in the intestine during surgery. Dr. Brackman stated a potential complication of a tear was peritonitis, or an inflammation of the bowel, or infection which can lead to death. He continued that it could also cause renal failure, sepsis, organ failure, heart attacks, and wound infections, among other things. Dr. Brackman further stated that the family wanted him to contact a doctor in the city before Mr. Weber consented to the surgery. He did not remember the physician's name, but he stated that he did speak to the physician and advised him what he thought needed to be done. Dr. Brackman stated the physician agreed with him, that he advised the family of the same, and they consented to surgery.

Dr. Brackman continued that he explained to Dr. Brathwaite that he had a very difficult time emotionally dealing with Mr. Weber's expiration. Dr. Brackman stated that when Mr. Weber died, he

advised the family that the surgery seemed to go very well, that he had almost completed closing the abdominal incision, when Mr. Weber developed an arrhythmia for which CPR and advanced life saving protocols were initiated. They were not able to reverse the arrhythmia, and Mr. Weber died. Dr. Brackman testified that anyone is at risk for an arrhythmia, but Mr. Weber was slightly more at risk due to his age, his general poor medical condition, including obesity, history of heart disease, and the intestinal obstruction. He continued that during bowel surgery, there can be a large shift in fluid and electrolytes which can often be the mode of death for people with bowel obstruction as the heart cannot compensate and it fails. When asked if he had an opinion with a reasonable degree of medical certainty as to whether the changes in fluids and electrolytes on May 29, 2006 had anything to do with the arrhythmia Mr. Weber developed, he stated he did not have an opinion.

RONNI SOLLAZZO, M.D.

Ronni Sollazzo, M.D. avers that he/she is a physician licensed to practice in New York State, but does not indicate whether he/she is board certified in any area of medicine. A copy of a curriculum vitae containing such information was not provided. Dr. Sollazzo states that in March 2006, he/she was employed by St. Catherine of Siena Medical Center to provide emergency medicine services in the emergency department of the hospital. Dr. Sollazzo admits to having no independent recollection of the plaintiff's decedent, but states that the emergency department medical record of March 10, 2006 was reviewed and that certain events transpired while treating the plaintiff's decedent. Dr. Sollazzo states he/she reviewed the nursing triage note and learned that Dr. Gold, a private attending physician at St. Catherine of Siena, was the medical internist for Mr. Weber, and that Dr. Gold had seen Mr. Weber that Tuesday. Dr. Sollazzo states he/she completed the medical record and documented the clinical findings of the physical examination. Initial orders by Dr. Sollazzo included initiation of intravenous fluids, lab work, abdominal flat and upright x-rays and an abdominal sonogram. Dr. Sollazzo's impression was that of small bowel obstruction and he/she made a plan to obtain a surgical consultation and a CT scan of the abdomen with contrast.

Dr. Sollazzo states that he/she called Dr. Gold's service that night and was unsure who returned the call at 10:40 p.m., either Dr. Harvey Lerner or Dr. Anna Lerner. In any event, Dr. Sollazzo states they discussed the case and the plan was for a surgical consultation. Dr. Sollazzo was advised by Dr. Lerner to contract Dr. Colin Brathwaite, a private attending surgeon. Dr. Brackman responded to that call at 10:53 p.m. Dr. Sollazzo discussed the plan and the need for a surgical consult with the family members present. Dr. Sollazzo further set forth that when a patient does not have a primary care physician and needs a surgical consultation, that he/she directs the emergency department staff to telephone the surgeon on call for the emergency department.

Here, St Catherine of Siena has failed to establish its prima facie entitlement to summary judgment dismissing the complaint. The affidavit of Dr. Sollazzo has not set forth Mr. Weber's complaints upon presentation to the emergency department, the standard of care for treating Mr. Weber in the emergency room, and whether there was compliance with such standard of care and treatment. Neither has Dr. Sollazzo set forth the findings upon examination, the results of the various tests ordered in the emergency department, whether Mr. Weber's condition was properly diagnosed, the differential diagnoses made, if any, and any treatment employed. Accordingly, Dr. Sollazzo failed to establish that he/she and employees of St. Catherine of Siena were not negligent, that they did not depart from the standard of care, and did not proximately cause any of the injuries of the plaintiff's decedent. Dr. Sollazzo has not established that he/she is board certified or whether he/she qualifies to offer any expert opinion, and, in fact, has not offered any opinions. Additionally, Dr. Sollazzo has not commented on the care and treatment rendered to the plaintiff's decedent during his

multiple admissions to St. Catherine of Siena Medical Center. Neither has St. Catherine of Siena established the appropriate standards for care and treatment by its employees during the plaintiff's decedent's multiple admissions. Accordingly, movant has not established prima facie that its employees did not depart from good and accepted standards of medical practice in its treatment of the plaintiff's decedent.

A hospital or other medical facility is liable for the negligence or malpractice of its employees, however, that rule does not apply when the treatment is provided by an independent physician, as when the physician is retained by the patient himself, unless the hospital knows that the patient is unaware of the dangers and novelty of the medical procedure proposed to be performed (Birdell Hill v St. Clare's Hospital, 67 NY2d 72 [1986]). A hospital generally cannot be held liable, other than derivatively, for another's malpractice. Thus, where there is no vicarious liability, the plaintiff must establish that the hospital, through its own agents, was guilty of malpractice or other tort concurring in causing the harm (Fiortino v Wenger, 19 NY2d 401 [1967]; Belak-Redi v Bollengier, 74 AD3d 1110 [2nd Dept 2010]; Welch v Scheinfeld, 21 AD3d 802 [1st Dept 2005]). Here, St. Catherine has established through the testimony by Dr. Brackman that he and Dr. Brathwaite were not employees of St. Catherine. Thus, St. Catherine of Siena Medical Center has demonstrated entitlement to summary judgment dismissing the complaint on the limited basis that it is not vicariously liable for any actions of Dr. Brackman and/or Dr. Brathwaite, who were independent practitioners and not employees of St. Catherine of Siena Medical Center. In opposition, the plaintiff has not raised a factual issue to preclude summary judgment on the issue that St. Catherine of Siena Medical Center is not vicariously liable for the actions of Dr. Brackman and Dr. Brathwaite.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see*, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div., 7 AD3d 759 [2d Dept 2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [2d Dept 1997]). "Summary 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 [2d Dept 2007]). While the defendant St. Catherine of Siena has not established prima facie entitlement to summary judgment dismissing the complaint against it and its employees, the plaintiff has submitted medical expert opinions which would preclude summary judgment on that issue.

The plaintiff's expert has set forth his/her qualifications as an expert in the affirmation which has been reviewed by this court. The plaintiff's expert has set forth the records and materials reviewed and has opined with a reasonable degree of medical certainty that St. Catherine of Siena Medical Center, Dr. Matthew Brackman and Dr. Collin Brathwaite departed from accepted standards of care with regard to the care and treatment rendered to the decedent Dennis Weber, which departures were substantial contributing factors in the development of recurrent adhesions, sepsis, cardiac arrest and death. The plaintiff's expert further sets forth the bases for such opinions and also points out that Dr. Sollazzo does not discuss the standard of care applicable in this case.

The plaintiff's expert opines that when a bowel obstruction is suspected, whether it be an unresolved or a new obstruction following a repair procedure, that it was a deviation from good and accepted standards of care not to conclusively rule out the presence of that suspected small bowel obstruction. The plaintiff's expert opines that the multiple surgeries that Mr. Weber underwent following the initial surgery of March 11, 2006 were necessitated by the fact that the obstruction(s) that continued to appear were never properly addressed.

The failure to properly rule out the obstruction seen on diagnostic studies on March 11, 2006 was a departure by the defendants and was a substantial contributing factor in the injuries subsequently suffered by the plaintiff's decedent. The plaintiff's expert further opines that it was a departure from the accepted standard of care to discharge the plaintiff's decedent on March 19, 2006 prior to ruling out the presence of an obstruction following the March 11, 2006 procedure. The x-ray of March 14, 2006 demonstrated the obstruction which was present when Mr. Weber presented to the emergency room on March 20, 2006, and was present at his discharge on March 19, 2006. The plaintiff's expert states that a CT scan should have been ordered to confirm whether or not the obstruction resolved prior to discharging Mr. Weber, and the failure to do so was a departure from the standard of care.

The plaintiff's expert also opines that it was a departure on the part of the nursing staff of St. Catherine of Siena Medical Center to fail to follow physician's orders to make Dr. Brackman aware of the results of the March 14, 2006 x-rays to enable Dr. Brackman to properly address the obstruction.

The plaintiff's expert also opines that it was a departure from the accepted standard of care to discharge Mr. Weber on April 28, 2006 prior to ordering and performing a CT study to confirm that the obstruction had resolved, as the obstruction which the plaintiff's decedent presented with on May 28, 2006, was the obstruction demonstrated on the diagnostic studies taken during the prior admission and which was present on April 28, 2006. The plaintiff's expert opines that it was a further departure from the accepted standard of care to fail to obtain a second opinion from a more experienced surgeon once it became obvious that the attempts at various repairs were failing so that the decedent's condition could be properly addressed.

The plaintiff's expert opines that each of these departures was causally related to, and caused and/or contributed to the death of Mr. Weber. If appropriate standards of care had been met by the defendants, his small bowel obstruction would have been properly treated, thereby avoiding the ensuing multiple surgeries, infection, sepsis, and the stress on his body, which resulted in his cardiac arrest and death. Proper management and treatment of the plaintiff's decedent during the several hospitalizations would have resolved the obstruction without the need for the subsequent surgeries. The departures permitted the decedent's condition to progress to the point where he suffered from the infection, sepsis and ultimately, cardiac arrest and premature death.

Based upon the foregoing, it is determined that the plaintiff has raised factual issues which preclude summary judgment on the issues of liability and proximate cause as it relates to all the defendants. However, the plaintiff has raised no factual issue as it relates to St. Catherine of Siena's vicarious liability for any acts of negligence by the defendants Dr. Brackman and Dr. Brathwaite. It has been demonstrated that Dr. Brackman and Dr. Brathwaite are independent, attending physicians who were not employees of St. Catherine of Siena Medical Center. Thus, movant is not vicariously liable for any departures relating to the care and treatment rendered by these defendant attending physicians to the plaintiff's decedent.

The arguments set forth in the defendant's reply are without merit. The defendant is merely speculating that the plaintiff's expert's affirmation is improperly notarized as an out of state affidavit and has demonstrated no basis for such claim. This court has reviewed the unredacted expert affirmation provided to this court for in camera inspection, and, except for the redacted sections, finds the affirmation to be identical to the affirmation provided to the defendants. Such unredacted copy of the expert's affirmation has been returned to counsel for the plaintiff.

Further, the improper submission of the expert physician's affirmation in defendant's reply is not

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considered by this court. On a motion for summary judgment, such failure to submit the affidavits or affirmations with the moving papers renders the application insufficient, and such affidavits are to be given no consideration by the court entertaining the motion for summary judgment, when received in a reply (Canter v East Nassau Medical Group, 270 AD2d 381[2d Dept 2000]; Sherrer v. Time Equities, Inc. and Emilia Grocery, Inc. v. Time Equities, Inc., 218 A.D.2d 116 [1st Dept 1995]). The function of a reply paper is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion (In the Matter of the Application of Veronica Montgomery-Costa v The City of New York, 2009 NY Slip Op 29461, 2009 Misc Lexis 3116 [Sup Ct, New York County 2009]). Nor does it avail defendant to shift to the plaintiff, by way of a reply affidavit, the burden to demonstrate a material issue of fact at a time when the plaintiff has neither the obligation nor the opportunity to respond absent express leave of court (Winegrad v City of New York, supra; Azzopardi v American Blower Corporation, 192 AD2d 453 [1st Dept 1992]).

In view of the foregoing, the motion by St. Catherine of Siena Medical Center for an order granting summary judgment dismissing plaintiff's complaint as asserted against it is granted only to the extent that it is determined that Dr. Brathwaite and Dr. Brackman, were private attending physicians and not employees of St. Catherine of Siena Medical Center, and thus, it is not vicariously liable for their alleged malpractice and acts of negligence; the application is denied insofar as it applies to allegations of negligence or malpractice by the employees of St. Catherine of Siena Medical Center.

Dated: February 10, 2012



HON. JOSEPH C. PASTORELLA

FINAL DISPOSITION X NON-FINAL DISPOSITION