

**Dendariarena v Mount Sinai Hospital**

2012 NY Slip Op 31262(U)

May 9, 2012

Sup Ct, New York County

Docket Number: 111256/07

Judge: Joan B. Lobis

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

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis  
Justice

PART 6

Dinora Denorriana Q

INDEX NO. 11256/07

MOTION DATE 2/21/12

MOTION SEQ. NO. 7

MOTION CAL. NO. \_\_\_\_\_

- v -

MOUNT SINAI HOSPITAL/EAH

The following papers, numbered 1 to 23 were read on this motion to/for dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-12

13-16

17-23

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion decided in accordance  
with accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAY 14 2012

Dated: 5/9/12

Joan B. Lobis  
NEW YORK COUNTY CLERK'S OFFICE  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
DINORA DENDARIARENA,

Plaintiff,

Index No. 111256/07

-against-

**Decision and Order**

MOUNT SINAI HOSPITAL, HORIZON MEDICAL  
GROUP, LLP, GEORGE LOWEN, M.D., ANNE  
FITZPATRICK, D.C., MATERNAL FETAL MEDICINE  
ASSOCIATES, SAMUEL BENDER, M.D., ANDREI  
REBARBER, M.D., and DANIEL SALTZMAN, M.D.

**FILED**

**MAY 14 2012**

Defendants.

-----X  
**JOAN B. LOBIS, J.S.C.:**

NEW YORK  
COUNTY CLERK'S OFFICE

In Motion Sequence Number 007, defendant The Mount Sinai Hospital s/h/a Mount Sinai Hospital ("Mt. Sinai") moves, by order to show cause, for an order, pursuant to C.P.L.R. Rule 3212, granting it summary judgment on the grounds that a hospital and its employees are not liable for the acts of private attending physicians. In Motion Sequence Numbers 008 and 009, defendant Anne Fitzpatrick, D.C., and defendants Maternal Fetal Medicine Associates ("MFM"), Samuel Bender, M.D., Andrei Rebarber, M.D., and Daniel Saltzman, M.D., respectively, also seek summary judgment by way of orders to show cause.

Plaintiff's action arises out of events that occurred during the birth of her second child. She had been seeing Dr. Saltzman for a high-risk pregnancy due to a history of miscarriages. On March 28, 2006, plaintiff was admitted to Mt. Sinai for induction of labor and delivery under the private care of MFM and Drs. Bender, Rebarber, and Saltzman. Plaintiff testified that during the delivery or shortly thereafter, she began experiencing a stiff pain in her neck that worsened upon movement; during her pregnancy, she had no complaints of neck or back pain. The records from Mt.

Sinai reflect that plaintiff was given a warm compress and Tylenol, and later morphine. At approximately noon on March 29, 2006, plaintiff delivered her son, Brandon. Dr. Saltzman performed the delivery. Plaintiff testified at her deposition that she had a normal vaginal delivery with epidural analgesia. After the birth, she was given Percocet for her neck pain at Dr. Saltzman's direction. Mt. Sinai's records reflect that by 6:30 p.m. on March 30, 2006, plaintiff was still complaining of neck pain, though she had been given Percocet at 8:30 a.m., 1:35 p.m., and 5:40 p.m. Dr. Rebarber was informed and was asked whether he wanted plaintiff to see a physical therapist. The notes reflect that a warm pack was applied to plaintiff's neck, as suggested by Dr. Rebarber.

Mt. Sinai's records reflect that by 1:00 a.m. on March 31, 2006, plaintiff was still complaining of neck pain and soreness. The notes reflect that she was medicated with Percocet and a warm compress was applied "as per MD Rebarber's orders." She was instructed to relax and take deep breaths, and she was given Ambien for sleeping at her request. At 2:15 a.m., Physician's Assistant ("P.A.") Lana Logoza (now known as Lana Marks) was called to evaluate plaintiff's neck pain. Her note reflects that plaintiff complained of neck pain not relieved by Percocet or a warm compress. She documented that she examined plaintiff and found tenderness over the cervical spinous process without erythema or ecchymosis. P.A. Logoza's note also reflects that she spoke with Dr. Saltzman and, thereafter, ordered morphine. Later that day, plaintiff was seen by Dr. Belin, an anesthesiologist. Dr. Belin apparently examined plaintiff and noted an impression that the etiology of the pain could be musculoskeletal or neurological. Dr. Belin's notes state: "will inform Dr. Bender & suggest further consult." At 6:00 p.m., plaintiff was seen by Dr. Bender, who noted that plaintiff reported that she felt much better after taking 600 milligrams of Motrin. He recommended that plaintiff remain at the hospital for an additional day to monitor her pain. Dr.

Bender further noted that if plaintiff's pain increased, he would order a neurology consult. The orders report in Mt. Sinai's chart indicates that on March 31, 2006, Dr. Bender's discharge instructions were that plaintiff was to be instructed to use Tylenol and Motrin as needed for pain. At 7:15 p.m., the progress notes reflect that plaintiff's pain was a 7-9 on a scale of 1-10; her pain medication was continued. On April 1, 2006, Dr. Saltzman issued orders to discharge plaintiff.

Plaintiff's testimony was that the pain was so severe that at one point she dropped her nurse call-bell and tried to get out of bed to retrieve it, but she fell to the floor; she testified that she could not move her upper body. She testified that she informed a nurse about the severity of her pain and the nurse had to help her get up from the floor back into bed. She testified that she had trouble attending to her newborn baby and that her nineteen-year old daughter, Jasmine, had to help her with dressing the baby. Plaintiff testified that no one at Mt. Sinai ever gave her a definitive answer as to why she was experiencing neck pain and that she was released without instructions as to what to do. She testified that on the day she was released, her pain was a "9" on a scale of 1-10. She testified that she was not given instructions upon discharge except as related to follow-up care for Brandon.

Plaintiff testified that once she was released, her neck pain interfered with her ability to care for Brandon and she had to call on family members and friends to help her. During the evening of April 1—the day that plaintiff was released from Mt. Sinai—the pain grew so intense that she called an ambulance to take her to Saint Vincent's Hospital Staten Island ("St. Vincent's"). She testified that was given medication or an injection that was supposed to treat a muscle spasm and was sent home.

Plaintiff testified that the next medical professional she saw after St. Vincent's was George Lowen, M.D., her primary care physician, on April 6, 2006. At that point, she was still taking the medication prescribed to her by St. Vincent's. She testified that she told Dr. Lowen about the history of her neck pain and that the pain was currently a "9" on a scale of 1-10. Plaintiff testified that Dr. Lowen also thought she had a muscle spasm and prescribed her the same medication that St. Vincent's had prescribed. His notes from that visit are sparse and reflect only that plaintiff had full range of motion with pain at her neck and that his plan was for her to take Percocet and non-steroidal anti-inflammatory drugs ("NSAIDs"). She testified that she told him that the medication was not working, but that he encouraged her to give it time to work. She testified that she asked him whether he was going to send her for an x-ray, and that his response was "no" and that the medication should work.

Plaintiff testified that after a few days, she telephoned Dr. Lowen and told him that the medication still was not alleviating her pain. She testified that when he encouraged her to give the medication time to work, she grew angry with him demanded that he refer her to a chiropractor. She testified that once Dr. Lowen gave her the referral, she immediately went to Dr. Fitzpatrick's office. On Wednesday, April 12, 2006, plaintiff was seen at Dr. Fitzpatrick's practice by her associate, Kristy Finimore, D.C. Plaintiff testified that she told Dr. Finimore about the history of her pain since delivering her child. Dr. Finimore had plaintiff attempt a few upper body movements, which plaintiff testified were so painful that she was yelling and screaming. Dr. Finimore took x-rays that day. Plaintiff testified that Dr. Finimore saw something suspicious on her neck and asked plaintiff to return for another appointment on Friday, April 14, 2006.<sup>1</sup> Dr. Fitzpatrick testified that

---

<sup>1</sup> Dr. Fitzpatrick testified that her office is closed on Thursdays.

prior to plaintiff's appointment on Friday, she and Dr. Finimore reviewed plaintiff's x-rays and were concerned that there was a break in the "George's line"<sup>2</sup> and evidence of a lytic lesion. When plaintiff was seen by Dr. Fitzpatrick on Friday, she reported that she was in intense pain. Plaintiff testified that Dr. Fitzpatrick informed her that she saw something abnormal on the x-rays and wanted plaintiff to have a magnetic resonance imaging ("MRI") examination. Plaintiff was present while Dr. Fitzpatrick haggled with plaintiff's insurance carrier to get approval for the MRI; once she finally obtained approval, it was difficult scheduling an MRI that day because it was Good Friday. Dr. Fitzpatrick testified that she telephoned every MRI facility on Staten Island, but due to the holiday weekend, the earliest an appointment could be scheduled was Monday, April 17, 2006. Dr. Fitzpatrick testified that she conveyed to plaintiff that she had a serious radiological finding and that suggested that plaintiff go to the emergency room, but that plaintiff refused because she had an infant at home and no baby-sitter. Plaintiff testified that she wanted the MRI immediately but that Dr. Fitzpatrick's associate asked her if she could wait until Monday for the MRI, and she agreed.

On the evening of Monday, April 17, 2006, plaintiff had an MRI. She testified that a couple of days or a week later, Dr. Fitzpatrick discussed the MRI results with her, explained that the results showed an abnormality, and referred her to Andrew M. Casden, M.D., an orthopedist at Beth Israel Medical Center ("BIMC"). Dr. Fitzpatrick told her to pick up her MRI films and bring them to her appointment with Dr. Casden. Plaintiff testified that either Dr. Fitzpatrick or Dr. Lowen actually set up her appointment with Dr. Casden. Plaintiff saw Dr. Casden on April 25, 2006.

---

<sup>2</sup> Dr. Fitzpatrick testified that the George's line is the posterior vertebral line, which is supposed to be symmetrical going down the spine. She testified that an interruption in the George's line is "usually a hallmark of something serious."

Plaintiff testified that once she saw Dr. Casden, he told her that she could not return home, that she had an infection between the bones of her neck, and that she had to see an infectious disease doctor. Dr. Casden's notes from that day reflect that plaintiff had what appeared to be C5-C6 osteomyelitis (bone infection) with discitis. She was admitted to BIMC that day. She testified that during this admission, she was administered intravenous antibiotics, although BIMC's records do not reflect that she was given antibiotics. Plaintiff was seen by an infectious disease specialist, Dr. Perlman; plaintiff testified that Dr. Perlman explained to her that she would require surgery to remove the infection. She was discharged from BIMC on April 28, 2006, and readmitted on May 8, 2006, for the surgery by Dr. Casden. Dr. Casden performed an anterior cervical discectomy, debridement, and corpectomy, and anterior cervical fusion with a bone graft and instrumentation, at C5-C6. Accordingly to the BIMC surgical pathology report, the bone and tissue removed was "Disc C5-6: Bone and cartilaginous tissue with new bone formation and fibrosis." No infectious organisms were ever identified. Gram staining performed on tissue specimens failed to reveal any organisms, and cultures of the specimens failed to produce any growth during a 3-day incubation period. A fungal culture of the C5-C6 disc tissue failed to yield any fungi over the course of a 4-week incubation. No acid fast bacilli were found on a direct examination of the tissue collected, and a culture failed to isolate any acid fast bacilli over the course of an 8-week incubation period.

On August 16, 2007, plaintiff commenced this action against Mt. Sinai, Horizon Medical Group, LLP, Dr. Lowen, and Dr. Fitzpatrick by the filing of a summons and verified complaint. On or about September 29, 2008, plaintiff commenced a second action against MFM, Dr. Bender, Dr. Rebarber, and Dr. Saltzman. Plaintiff was separately deposed in each action. The cases were consolidated on November 30, 2011. In her bills of particulars, plaintiff alleges that

defendants departed from proper and accepted medical practice in failing to diagnose plaintiff's cervical osteomyelitis; failing to order and/or perform necessary diagnostic tests, studies, and procedures; and failing to perform and interpret x-rays, CT scans, and/or MRI scans. The allegations against the defendants presently moving for summary judgment are essentially identical. Plaintiff alleges that as a result of defendants' negligence, she sustained personal injuries, including: osteomyelitis requiring surgical intervention; post-surgical scarring and accompanying injuries to surrounding nerves, muscles, ligaments, tendons, blood vessels, and soft tissues; persistent pain; and marked restriction and limitation of the full, free, and normal use and function of the area of the cervical spine.

The moving defendants now seek summary judgment. Summary judgment is a drastic remedy, "which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Gibson v. American Export Isbrandsten Lines, Inc., 125 A.D.2d 65, 74 (1st Dep't 1987) (internal citations omitted). As established by the Court of Appeals in Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) and Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and as has recently been reiterated by the First Department, it is "a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that [he or she] is entitled to judgment as a matter of law." Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep't 2012), citing Winegrad, 64 N.Y.2d at 853. In a malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Lowhar v. Eva Stern 500, LLC, 70 A.D.3d 654, 654-55 (2d Dep't 2010). The failure to

meet this burden mandates the denial of the application, “regardless of the sufficiency of the opposing papers.” Winegrad, N.Y.2d at 853. However, once a movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostrov, 91 A.D.3d at 152, citing Alvarez, 68 N.Y.2d at 324. In medical malpractice actions, expert medical testimony is the sine qua non for demonstrating either the absence or presence of material issues of fact pertaining to departure from accepted medical practice or proximate cause.

Mt. Sinai moves for summary judgment on the grounds that a hospital and its employees are not liable for the acts of private physicians. Mt. Sinai avers that there is no dispute that at all times during her admission to Mt. Sinai, plaintiff was the private patient of Drs. Bender, Saltzman, and Rebarber, who were not employed by Mt. Sinai. Mt. Sinai further asserts that plaintiff does not maintain any separate and distinct claims against it or its employees. Mt. Sinai submits that its staff treated plaintiff solely at the direction and under the control of Drs. Bender, Saltzman, and Rebarber. In support of its motion, Mt. Sinai submits an affidavit from Gary L. Mucciolo, M.D., who states that he is a physician board certified in obstetrics and gynecology. Having reviewed plaintiff’s medical records, pleadings, and expert disclosure, and the parties’ deposition testimony, Dr. Mucciolo opines, within a reasonable degree of medical certainty, that the treatment rendered by Mt. Sinai was indicated, was appropriately performed and documented, and complied with the standards of care; that Mt. Sinai did not deviate from good and accepted practice; and that nothing that Mt. Sinai did or did not do proximately caused plaintiff’s injuries. Dr. Mucciolo opines that the staff at Mt. Sinai timely and properly reported their findings to plaintiff’s private physicians, who were responsible for deciding what treatment should be rendered to plaintiff. He further sets forth

that it was Dr. Saltzman who made the decision to discharge plaintiff, and that in his opinion, it was proper for Dr. Saltzman to do so.

In opposition to Mt. Sinai's motion, plaintiff asserts that Mt. Sinai failed to annex the entire deposition transcripts and failed to submit the signature pages of the deposition transcripts. Plaintiff maintains that due to the above defects, the excerpted depositions transcripts are not in admissible form and should not be considered by the court. Plaintiff also maintains that because Mt. Sinai failed to attach to its motion papers copies of the verified answers of all of the co-defendants, the motion is defective and must be denied. In substantive opposition to Mt. Sinai's summary judgment motion, plaintiff argues that Mt. Sinai failed to address certain claims in the bill of particulars, namely, claims that Mt. Sinai "negligently failed to order and/or perform necessary diagnostic tests and procedures," "failed to properly and adequately monitor the patient's vital signs," and "failed to perform and interpret sonograms, X-rays, CT scans and/or MRI scans." Plaintiff submits her own affidavit in which she states, in pertinent part, that while she was admitted to Mt. Sinai, staff members told her that she should be seen by a physical therapist and a neurologist. Plaintiff states that these consultations did not occur.

In support of her opposition papers, plaintiff submits an affidavit from a physician (name redacted) who sets forth that s/he is a physician board certified in emergency medicine and medical management. Plaintiff's expert opines that Mt. Sinai's records show that the type, frequency, and amount of pain medication administered to plaintiff indicated that her pain was very severe and greater than what would be considered normal following the delivery of a baby. Plaintiff's expert opines that the pain medication was masking plaintiff's symptoms and not

providing any curative effect. Plaintiff's expert opines that it should have been apparent to Mt. Sinai's staff that some other process was going on and that immediate imaging of the spinal canal and cord and laboratory studies such as blood cultures, complete blood count ("CBC"), and sedimentation rate were warranted. The expert asserts that none of these steps were taken. Plaintiff's expert opines that the failure of Mt. Sinai's staff to order these studies constituted negligence independent from that of plaintiff's private physicians and a departure from accepted practice, and was a substantial factor in bringing about plaintiff's injuries. Plaintiff's expert further opines that plaintiff's private physicians' orders—pain medication and warm compresses—were clearly contraindicated in light of the severity of plaintiff's complaints of pain, and that Mt. Sinai's staff should have inquired further as to the correctness of those orders. Plaintiff's expert opines that the severity of plaintiff's infection could have been reduced and the need for surgery lessened or avoided if Mt. Sinai's staff had recognized the signs of an infection.

In reply, Mt. Sinai sets forth various arguments as to why their moving papers were not procedurally deficient. Mt. Sinai also points out that plaintiff's current argument in opposition to the motion—that her private physicians' orders were clearly contraindicated in light of the severity of her complaints—is a new theory of liability not previously asserted, because plaintiff's verified bill of particulars as to Mt. Sinai states, in response to Mt. Sinai's question, that "administration of contraindicated medicines, treatment, tests and/or surgery is not applicable."

Initially, the court rejects plaintiff's argument that Mt. Sinai's motion is deficient because only excerpts of the transcripts were provided. First, Mt. Sinai's motion does not depend on the deposition testimony. Second, complete copies of the transcripts are included in the other

parties' motion papers, and thus a complete record has been presented to the court. Additionally, the court rejects plaintiff's argument that Mt. Sinai's motion is deficient because the deposition transcripts are unsigned. On a summary judgment motion, the First Department has determined that the court may consider an unsigned deposition transcript as admissible evidence as long as it is certified by the court reporter as accurate. See, e.g., Martin v. City of N.Y., 82 A.D.3d 653, 654 (1st Dep't 2011); White Knight Ltd. v. Shea, 10 A.D.3d 567, 567-68 (1st Dep't 2004); Morchik v. Trinity Sch., 257 A.D.2d 534, 536 (1st Dep't 1999); Zabari v. City of N.Y., 242 A.D.2d 15, 17 (1st Dep't 1998). A review of the summary judgment papers in toto shows that all of the transcripts were either signed by the deponent or at least certified by the court reporter. Additionally, no one has come forward refuting the contents of the deposition transcripts. Thus, under these circumstances, the court will not reject Mt. Sinai's motion due to purportedly deficient transcripts. Finally, with respect to plaintiff's complaint that Mt. Sinai failed to attach all the of the co-defendants' pleadings to its papers, even if this were a defect, the pleadings of the co-defendants can be found annexed to their moving papers, so the court has been provided with a full set of the pleadings.

It is well established in New York that

[a] hospital may not be held concurrently liable for injuries suffered by a patient who is under the care of a private attending physician chosen by the patient where the resident physicians and nurses employed by the hospital merely carry out the orders of the private attending physician, unless the hospital staff commits 'independent acts of negligence or the attending physician's orders are contraindicated by normal practice.'

Suits v. Wyckoff Heights Med. Ctr., 84 A.D.3d 487, 488 (1st Dep't 2011), quoting Cerny v. Williams, 32 A.D.3d 881, 883 (2d Dep't 2006). In a plaintiff's bills of particulars, s/he must specify any independent acts of negligence by a hospital's staff. Suits, 84 A.D.3d at 489. It is undisputed

that plaintiff was admitted to Mt. Sinai as the private patient of MFM and its physicians Drs. Bender, Saltzman, and Rebarber, who were not employed by Mt. Sinai. Plaintiffs cite no evidence or even argue that Mt. Sinai should be held vicariously liable for Drs. Bender, Saltzman, or Rebarber. As to whether LHH is directly liable for any alleged malpractice, a review of plaintiff's bills of particulars against Mt. Sinai shows that plaintiff never identified any member of Mt. Sinai's staff as having been negligent. Amongst the numerous departures alleged against Mt. Sinai, there are only two that are distinct from those alleged against MFM and Drs. Bender, Saltzman, and Rebarber: failing to timely note changes in heart rate and/or function, and failing to timely provide necessary and indicated surgery. Plaintiff's expert opines on neither of these allegations in his/her affidavit in opposition to Mt. Sinai's motion. In essence, plaintiff has not asserted any direct claims against Mt. Sinai's staff. Importantly, plaintiff has not disputed Mt. Sinai's assertion that plaintiff's care at Mt. Sinai was undertaken entirely at the direction and behest of plaintiff's private physicians. Plaintiff's expert asserts that her private attending physicians' orders were contraindicated, but never opines that plaintiff's alleged injuries—i.e., the spread of osteomyelitis ultimately requiring surgical intervention—were caused by Mt. Sinai's staff carrying out the purportedly contraindicated orders. Moreover, plaintiff asserted in her bill of particulars that the administration or negligent administration of contraindicated treatment is not applicable to this matter. Thus, her current allegation that her private attending physicians' orders were contraindicated appears to be an impermissible attempt to add a new theory of liability. Accordingly, Mt. Sinai is entitled to summary judgment on the cause of action asserted against it sounding in medical malpractice. Additionally, though neither Mt. Sinai nor plaintiff addresses plaintiff's lack of informed consent claim against Mt. Sinai as asserted in the complaint, the facts as asserted in plaintiff's pleadings do not support a cause of action for lack of informed consent against Mt. Sinai. Given that plaintiff did not raise the

issue of lack of informed consent in her opposition papers, the cause of action should be deemed abandoned. Accordingly, as against Mt. Sinai, the cause of action for lack of informed consent is dismissed.

Dr. Fitzpatrick also seeks summary judgment, and in support of such, she provides an affidavit from Joseph Pfeifer, D.C., a chiropractor licensed to practice in New York. Dr. Pfeifer states that his affidavit is based on his review of the pertinent medical records and films, portions of the deposition testimony, and the bills of particulars. Dr. Pfeifer goes through plaintiff's treatment on April 12, 2006, with Dr. Finimore, and on April 14, 2006, with Dr. Fitzpatrick. He opines that the x-rays that Dr. Finimore took on April 12 were appropriate and that on April 14, having reviewed plaintiff's x-rays, Dr. Fitzpatrick properly and promptly referred plaintiff for an MRI. He further opines that Dr. Fitzpatrick's ordering of a cervical MRI without contrast was appropriate. Dr. Pfeifer opines that, upon learning of the MRI results, Dr. Fitzpatrick appropriately referred plaintiff to Dr. Casden. Dr. Pfeifer opines that Dr. Fitzpatrick's care and treatment in obtaining a prompt MRI and timely referring plaintiff to a specialist met the standard of good and accepted chiropractic care. He states that he compared the x-rays taken by Dr. Finimore on April 12, 2006, to x-rays taken on April 25 and May 2, 2006, respectively, and he opines that the studies all look substantially the same, with no significant interval change in the radiographic appearance of plaintiff's condition during that time frame. Dr. Pfeifer notes that the radiology report from the May 2 indicates degenerative disc disease with no mention of bony destruction, discitis, or osteomyelitis. In light of the above, Dr. Pfeifer opines that Dr. Fitzpatrick obtained a proper and adequate history; performed an appropriate examination; conducted the appropriate tests; obtained the appropriate radiological studies; administered the appropriate care and treatment; and timely and appropriately referred plaintiff to

an orthopedic surgeon. He states that it is generally beyond the purview of a chiropractor to diagnose osteomyelitis or administer antibiotics, though he notes that antibiotics were not administered during the April BIMC admission, and that the post-operative pathology report did not identify osteomyelitis in its final diagnosis. Dr. Pfeifer summarizes that it is his opinion, to a reasonable degree of chiropractic certainty, that Dr. Fitzpatrick's care comported with the accepted standard of chiropractic care and did not cause any of the injuries that plaintiff alleges.

In opposition to Dr. Fitzpatrick's motion, plaintiff maintains that Dr. Pfeifer failed to address plaintiff's allegation in her bill of particulars that Dr. Fitzpatrick negligently failed to order and/or perform necessary diagnostic tests and procedures, and failed to address Dr. Fitzpatrick's failure to order laboratory studies such as blood cultures, CBC, and sedimentation rate. In support of her opposition to Dr. Fitzpatrick's motion, plaintiff offers a second affidavit from her expert. The expert points out that although Dr. Finimore took x-rays on April 12, 2006, which showed a break in the George's line and a possible lytic lesion, Dr. Fitzpatrick testified that it was her route to review patient x-rays on Fridays. The expert disputes Dr. Fitzpatrick's testimony that she telephoned every MRI facility on Staten Island, but due to the holiday weekend, the earliest emergency appointment would be Monday, April 17, 2006. The expert maintains that any fully accredited hospital would be equipped with MRI and CT scan capabilities. The expert contends that Dr. Fitzpatrick's office had no protocol in place for an associate to bring an x-ray finding of infection to Dr. Fitzpatrick's attention other than at the Friday reviews. Plaintiff's expert opines that Dr. Fitzpatrick departed from accepted standards of medical and chiropractic practice by failing to consider that plaintiff's sudden onset of acute neck pain was a manifestation of a more serious pathology, such as infection or osteomyelitis. The expert maintains that infectious causes of neck

pain must be considered in the differential diagnosis because any delay in diagnosis or treatment may threaten the spinal cord by compression and result in potentially disastrous complications, and that osteomyelitis is an infection that, when undiagnosed, can result in permanent neurological dysfunction or death. Plaintiff's expert states that it is apparent that neither Dr. Fitzpatrick nor her staff engaged in the process of a differential diagnosis, and that plaintiff's symptoms and presentation revealed many clinical indications warranting a consideration of an infectious cause of her pain. The expert maintains that immediate imaging of the spinal canal and cord was imperative, and that blood culture, CBC, and sedimentation rate tests were warranted. The expert opines that Dr. Fitzpatrick's failure to order these studies was a departure from accepted medical and chiropractic practice and "an additional substantial factor in bringing about plaintiff's injuries." The expert further opines that the severity of plaintiff's infection could have been significantly reduced and the need for surgery lessened if not avoided completely, had Dr. Fitzpatrick recognized the signs of an infection. Plaintiff's expert asserts that Dr. Fitzpatrick's negligence caused plaintiff to go an additional five days without treatment, resulting in the continued presence of the infection, surgery, and permanent damage to plaintiff.

Plaintiff also submits her own affidavit. In pertinent part, plaintiff states that she was prepared to go for an MRI on April 14, 2006, when she saw Dr. Fitzpatrick, but she was told that one could not be arranged until Monday. She states that she was not referred to any of the three fully accredited hospitals on Staten Island which would have been equipped with MRI and CT scan capabilities.

In reply, Dr. Fitzpatrick objects to plaintiff's submission of an affidavit from a medical doctor. She maintains that plaintiff's expert's affidavit is not probative as to the chiropractic standard of care and should not be considered. This argument is rejected on a summary judgment motion, since at this juncture, the court does not have the full opportunity to explore the expert's level of expertise. See DaRonco v. White Plains Hosp. Ctr., 215 A.D.2d 339, 340 (1st Dep't 1995). Dr. Fitzpatrick further argues that plaintiff failed to raise a material issue of fact, and that plaintiff's allegation that she failed to perform blood culture, CBC, or sedimentation rate tests were improperly asserted for the first time in opposition to her motion for summary judgment.

Dr. Fitzpatrick demonstrates her prima facie entitlement to summary judgment by offering expert evidence from a chiropractor, who sets forth, in a nonconclusory manner, that Dr. Fitzpatrick's care comported with good and accepted chiropractic practice and did not proximately cause plaintiff's alleged injury. In opposition, plaintiff's expert fails to demonstrate the existence of a material issue of fact. Plaintiff's expert's opinion that Dr. Fitzpatrick failed to consider that plaintiff's sudden onset of acute neck pain was a manifestation of a more serious pathology, such as infection or osteomyelitis, is belied by both Dr. Fitzpatrick's medical records—which show that she did consider the possibility of infection—and plaintiff's and Dr. Fitzpatrick's deposition testimony that plaintiff was informed of the seriousness of the findings on the April 12, 2006 x-ray. Importantly, even if the court accepts plaintiff's expert's opinion that Dr. Fitzpatrick departed from the standard of care in failing to order blood culture, CBC, and sedimentation rate tests, the expert's opinion that the severity of plaintiff's infection could have been significantly reduced and the need for surgery lessened or avoided had Dr. Fitzpatrick recognized plaintiff's infection is speculative, conclusory, and fails to refute Dr. Pfeifer's opinion that plaintiff's condition was unchanged between

April 14 and the surgery on May 8. Plaintiff's expert also fails to explain his/her theory of proximate cause in light of the fact that plaintiff's records from BIMC between April 25 and April 28, 2006, show that she was not administered antibiotics; that the radiology report from the x-rays taken on May 2 indicates degenerative disc disease with no mention of signs of infection; and that the post-operative pathology report did not identify osteomyelitis in its final diagnosis. Plaintiff failed to rebut Dr. Fitzpatrick's showing that nothing she did or did not do proximately caused plaintiff's alleged injury, the spread of osteomyelitis ultimately requiring surgical intervention. Accordingly, Dr. Fitzpatrick is entitled to summary judgment and dismissal of the complaint against her. Additionally, though neither Dr. Fitzpatrick nor plaintiff address plaintiff's lack of informed consent claim against Dr. Fitzpatrick as asserted in the complaint, the facts as asserted in plaintiff's pleadings do not support a cause of action for lack of informed consent against Dr. Fitzpatrick. Dr. Fitzpatrick did not administer any treatment, procedure, or surgery to plaintiff, nor did she administer a diagnostic procedure that involved invasion or disruption of the integrity of the body. See Pub. Health L. § 2805-d(2). Moreover, plaintiff did not raise an outstanding claim for lack of informed consent against Dr. Fitzpatrick in her opposition papers, indicating that she has abandoned this claim. Accordingly, as against Dr. Fitzpatrick, the cause of action for lack of informed consent is also dismissed.

Drs. Bender, Rebarber, and Saltzman, and MFM, also seek summary judgment. In support of their motion, they submit two expert affirmations, one from Vincent M. D'Amico, M.D., a physician licensed in New York and board certified in obstetrics and gynecology, and the other from Daniel W. Wilen, M.D., a physician licensed in New York and board certified in orthopedic surgery. Both physicians set forth that they reviewed the pertinent records, deposition testimony,

and pleadings in this action. Dr. D'Amico goes through the treatment that the three physicians provided to plaintiff. With respect to Dr. Saltzman, Dr. D'Amico opines that his care was in accord with the standards of good and accepted medical practice and that none of his care caused or contributed to plaintiff's alleged injuries. He opines that Dr. Saltzman appropriately and properly ordered morphine for plaintiff in response to her complaint of neck pain during labor, and again in response to P.A. Logoza when she contacted him at 2:15 a.m. on March 31, 2006. Dr. D'Amico further opines that once plaintiff reported significant improvement of her neck pain, Dr. Saltzman appropriately discharged her, consistent with the standards of good and accepted medical practice. With respect to Dr. Rebarber, Dr. D'Amico opines that when contacted by a nurse on March 30, 2006, regarding plaintiff's complaint of neck pain, Dr. Rebarber appropriately and properly ordered conservative management in the form of pain medication and warm compress, consistent with the standards of good and accepted medical practice. With respect to the care and treatment rendered by Dr. Bender, Dr. D'Amico opines that it was entirely appropriate and proper for Dr. Bender to hold plaintiff's discharge for one day in order to continue to monitor plaintiff's neck pain or a neurology follow-up if her pain increased. In Dr. D'Amico's opinion, the care and treatment rendered by these three physicians was consistent with good and accepted medical practice and did not cause or contribute to plaintiff's alleged injuries. Dr. D'Amico opines that MFM's and Mt. Sinai's charts show that a complete history of plaintiff was obtained; that the hospital records and deposition testimony show that these defendants were appropriately and properly following plaintiff throughout her hospitalization; that the hospital records show that these defendants noted her complaints of neck pain and appropriately and properly responded to same by ordering medication and warm compresses with resulting pain relief; and that the medical records show that plaintiff was examined multiple times with respect to her neck pain and the results of these examinations are in the progress notes.

Dr. D'Amico further opines that plaintiff's claim that these defendants failed to obtain necessary and indicated consultations is baseless, because no consultations were indicated; plaintiff's complaints of neck pain were alleviated with 600 mg of ibuprofen, an NSAID, which Dr. D'Amico sets forth is consistent with neck spasm. Dr. D'Amico opines that no consultations were necessary once plaintiff reported improvement of her neck pain on April 1, 2006. He further contends that neither a cervical CT scan nor an MRI was indicated because plaintiff's pain improved with ibuprofen. Dr. D'Amico sets forth that the hospital chart reflects that plaintiff's vital signs were monitored throughout her labor and delivery admission; that they remained within the appropriate range throughout her admission; and that at no time did plaintiff's vital signs warrant any intervention. He contends that plaintiff was not negligently or prematurely discharged because by April 1, 2006, her condition had improved, and as such, Dr. Saltzman appropriately and properly discharged her. Dr. D'Amico opines that plaintiff's claim that these defendants failed to diagnose and treat cervical osteomyelitis is unfounded. He avers that the disease is a very rare condition wholly unrelated to pregnancy or childbirth and is diagnosed through CT scan/MRI and bone culture. Dr. D'Amico opines that it is not the standard of care to order a CT scan, MRI, or bone culture for a three-day history of neck pain alleviated by ibuprofen.

Dr. Wilen goes through plaintiff's course of treatment from her admission to Mt. Sinai on March 28, 2006 through her neck surgery on May 8, 2006, including the fact that cultures from the tissue samples removed on May 8 revealed no infection. Dr. Wilen opines that plaintiff's claim that Drs. Bender, Rebarber, and Saltzman failed to diagnose cervical osteomyelitis is without merit because plaintiff's records do not support a diagnosis of cervical osteomyelitis, as no infectious organism was ever identified through any of the numerous cultures tested at BMC. Dr. Wilen

opines that plaintiff's cervical complaints resulted from a longstanding chronic inflammatory process that eroded the cervical vertebrae long before she first complained of neck pain. He further opines that had the inflammatory process been diagnosed on March 29, 2006, the treatment and outcome would have been unchanged, as she still would have had to undergo the same procedures that were eventually performed on May 8, 2006, by Dr. Casten. Dr. Wilen maintains that plaintiff's ultimate outcome would have been unchanged, even with a diagnosis as early as plaintiff's first reported pain on March 29. Moreover, he opines, even if plaintiff's vertebrae erosion had been caused by osteomyelitis, as alleged, she would have had to undergo the same surgical procedures to treat the condition and her ultimate outcome would have been unchanged. He sets forth that osteomyelitis is a condition that occurs over a long period of time and would have been ongoing long before plaintiff first complained of pain; therefore, Dr. Wilen opines, any alleged delay in diagnosis over a period of 3.5 weeks would not have resulted in any change in the nature of treatment required or her overall outcome. Dr. Wilen also opines that plaintiff's claim that Drs. Bender, Rebarber, and Saltzman failed to administer appropriate antibiotics to treat osteomyelitis is unfounded, because even when she was admitted by Dr. Casten to BIMC on April 25, 2006, she was not administered antibiotics, and she was only administered antibiotics on May 8 as a surgical prophylaxis. As no infectious organism was ever identified, Dr. Wilen opines that there was no indication for plaintiff to have been treated with antibiotics between March 28 and April 1, 2006.

In opposition, plaintiff again submits an affidavit from the same expert used to oppose the other summary judgment motions; the affidavit is nearly identical to that which was submitted in opposition to Mt. Sinai's motion, with one additional opinion that Drs. Bender, Rebarber, and Saltzman failed to consider Dr. Belin's recommendation that a neurological consultation be ordered.

She also submits her own affidavit, again, largely identical to that submitted in opposition to Mt. Sinai's motion; in pertinent part, she maintains that while the pain medication administered to her did alleviate her pain for periods of time, the pain always returned unabated and she would renew her complaints. She maintains that at times, the relief from the pain medication lasted barely an hour, and after a day or so, she found that she was unable to move her neck without feeling pain.

In reply, MFM and Drs. Bender, Rebarber, and Saltzman argue that plaintiff's expert affirmation is silent as to the issue of proximate cause and is otherwise wholly conclusory. They also dispute the expert's contention that they failed to consider Dr. Belin's recommendation that a neurological consultation be ordered, maintaining that at no time did the anesthesiologist recommend a neurological consult during plaintiff's admission to Mt. Sinai. Regardless, these defendants argue that plaintiff failed to show how her condition or outcome would have changed if a neurology consult had been performed.

MFM and Drs. Bender, Rebarber, and Saltzman demonstrated their entitlement to summary judgment on both the issues of departure and proximate cause. In opposition, plaintiff did not offer any expert testimony to dispute the showing that there was no medical evidence that plaintiff had an infection or osteomyelitis at the C5-C6 level on her cervical spine, an opinion that has support in BIMC's records. Further, when faced with two detailed expert affirmations, in which defendants' experts opine that even had plaintiff's alleged condition been diagnosed as early as her admission to Mt. Sinai, her course of treatment and outcome would have been unchanged, plaintiff submitted only a vague, speculative, and conclusory opinion from her expert that the severity of

plaintiff's infection could have been reduced and the need for surgery lessened or avoided had Drs. Bender, Rebarber, and Saltzman recognized the signs of an infection. While there may exist disputes about the facts of the case, defendants firmly established, through expert opinion, the absence of proximate cause. Even assuming, arguendo, that plaintiff demonstrated the existence of a material issue of fact regarding her alleged departures, her opposition papers fail to rebut defendants' showing on the issue of proximate cause. Accordingly, Drs. Bender, Rebarber, and Saltzman, and therefore MFM, are entitled to summary judgment on the causes of action against them sounding in medical malpractice.

Additionally, MFM and Drs. Bender, Rebarber, and Saltzman seek summary judgment as to the lack of informed consent cause of action asserted against them on the grounds that none of them performed any non-emergency treatment, procedure, or surgery which involved invasion or disruption of the integrity of the body. As plaintiff has not opposed this branch of these defendants' motion, it appears that she has abandoned her cause of action for lack of informed consent against these defendants, and as such, the claim for lack of informed consent is hereby dismissed as against MFM and Drs. Bender, Rebarber, and Saltzman.

Accordingly, it is hereby

ORDERED that Motion Sequence Numbers 007, 008, and 009, by which defendants respectively move for summary judgment on behalf of The Mount Sinai Hospital s/h/a Mount Sinai Hospital, Anne Fitzpatrick, DC, Maternal Fetal Medicine Associates, Samuel Bender, M.D., Andrei

Rebarber, M.D., and Daniel Saltzman, M.D., are granted in their entirety, the complaint is dismissed as against these defendants, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining parties shall appear for a previously scheduled pre-trial conference on July 10, 2012, at 9:30 a.m.

Dated: May 9, 2012

ENTER:

MAY 14 2012

  
NEW YORK  
COUNTY CLERK'S OFFICE  
JOAN B. LOBIS, J.S.C.

**FILED**