

Schmitt v Medford Kidney Center

2013 NY Slip Op 30581(U)

March 18, 2013

Sup Ct, Suffolk County

Docket Number: 07-27347

Judge: Daniel Martin

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 9-7-11 (#006)
MOTION DATE 1-3-12 (#007)
MOTION DATE 3-6-12 (#008 & #009)
ADJ. DATE 3-06-12
Mot. Seq. # 006 - MD # 008 - MG
007 - MD # 009 - MD

-----X
JOYCEANN SCHMITT and RONALD
SCHMITT,

Plaintiffs,

MCANDREW, CONBOY & PRISCO, LLP
Attorney for Plaintiffs
1860 Walt Whitman Road - Suite 800
Melville, New York 11747

- against -

MARTIN, CLEARWATER & BELL LLP
Attorney for Defendants Huntington Artificial
Kidney Center d/b/a Medford Kidney Center and
Davita, Inc.
90 Merrick Avenue, 6th Floor
East Meadow, New York 11554

MEDFORD KIDNEY CENTER,
HUNTINGTON ARTIFICIAL KIDNEY
CENTER, LTD., DAVITA, INC., SUFFOLK
NEPHROLOGY CONSULTANTS, P.C., ANNE
L. REINHART, APRN, BC, MARK A. FINGER,
M.D., and EKAMBARAM ILAMATHI, M.D.,

Defendants.

SHAUB, AHMUTY, CITRIN & SPRATT, LLP
Attorney for Defendants Suffolk Nephrology
Consultants
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Lake Success, New York 11042

CATALANO GALLARDO & PETROPOULOS
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Upon the following papers numbered 1 to 75 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (006) 1-28; Notice of Cross Motion and supporting papers (007) 29-40; (008) 41-49; (009) 50-73; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 74-75; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that motion (006) by the defendant Anne L. Reinhart, APRN, BC pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied., and it is further

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ORDERED that motion (007) by the plaintiffs Joyceann Schmitt and Ronald Schmitt pursuant to CPLR 3212 for summary judgment against defendant Medford Kidney Center, Huntington Artificial Kidney Center, LTD, and Davita, Inc. is denied; and it is further

ORDERED that motion (008) by defendant Ekambaram Ilamathi, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted, and the complaint as asserted against him is dismissed with prejudice; and it is further

ORDERED that motion (009) by defendant Huntington Artificial Kidney Center, LTD d/b/a Medford Kidney Center and Davita, Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

In this medical malpractice action, the plaintiff, Joyceann Schmitt, seeks damages for personal injuries resulting from the alleged negligent departures from good and accepted standards of care by the defendants. A cause of action for lack of informed consent, and a derivative claim asserted on behalf of plaintiff's spouse, Ronald Schmitt, have also been asserted. Joyceann Schmitt had a history of hypertension and kidney disease and received hemodialysis at the Medford Kidney Center. It is alleged that she was under the care and treatment of the defendants from about October 19, 2006 through November 16, 2006. She was sixty three years of age at the time. When she went for dialysis at the Medford Kidney Center on November 11, 2006, hemodialysis was effectuated through a Perma Cath because there were unsuccessful attempts with multiple needle punctures to gain access for hemodialysis in her right upper arm AV fistula (fistula, AV shunt). After the attempts at cannulation (needle puncture) into the AV fistula, the plaintiff bled tremendously due to an alleged vascular injury to the brachial artery in her right arm. She was thereafter seen on an emergency basis at St. Catherine of Siena Hospital emergency room by Dr. Rashid Khan for compartment syndrome in her right arm, which caused that arm to become cyanotic and pulseless, and to lose motor and sensory function. Dr. Khan performed emergency surgery, consisting of a fasciotomy, fasciectomy, and repair of an AV fistula. During surgery plaintiff required four units of packed red blood cells due to severe intra-operative bleeding. It is alleged that the defendants were negligent in their care and treatment of her by performing hemodialysis through an immature fistula without first taking a fistulogram to determine that the fistula was mature; in making repeated punctures and negligently avulsing (lacerating) the brachial artery; and in negligently administering Heparin to her. As a result of the alleged departures, the plaintiff asserts, inter alia, that she has an extensive longitudinal incision from the axilla to the wrist of her right arm; weakness and decreased function and dysesthesia of the right extremity; contractures in her right hand; need for peritoneal dialysis; hypertension; fracture and mild displacement of the proximal left humerus with open reduction and internal fixation, and decreased range of motion of the left shoulder.

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, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [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*).

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, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions as such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]; *see, also, Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624, 760 NYS2d 199 [2d Dept 2003]; *Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650, 724 NYS2d 432 [2d Dept 2001]).

In support of motion (006), defendant Reinhart has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint and the answers served by defendants Reinhart with a cross claim asserted against Medford Kidney Center, LTD, Davita Inc., Mark A. Finger, M.D. and Ekambaram Ilamathi, M.D. for contractual and common law indemnification; the answer of Huntington Artificial Kidney Center, LTD and Suffolk Nephrology Consultants, P.C., Mark A. Finger, M.D., and Ekambaram Ilamathi, M.D., and plaintiffs' verified bill of particulars; uncertified copies of plaintiff's medical records; the transcripts of the examinations before trial of Joyceann Schmitt, Ronald Schmitt, Ekambaram Ilamathi, M.D., Carmichael Angeles, M.D., non-party witnesses Nicolae Caraiani, M.D., Brooke Moore, M.D., Theresa Olmer, Lynn Murphy, Jose Vergara, and moving defendant Anne Reinhart; and the expert affidavits of Jacqueline Javier-Burns, R.N., B.S.N. and John K. Edoga, M.D.

In support of motion (007), the plaintiffs have submitted inter alia, an attorney's affirmation; the affirmation of their expert Joseph J. Lieber, M.D.; photographs; and uncertified and incomplete medical records of the plaintiff.

In support of motion (008), defendant Ilamathi has submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiffs' verified bill of particulars; the transcript of his examination before trial; and the affirmation of his expert physician, John Douglas Wagner, M.D.

In support of motion (009), the defendants Huntington Artificial Kidney Center, LTD d/b/a Medford Kidney Center and Davita, Inc. have submitted, inter alia, an attorney's affirmation; a CD labeled "exhibits to Medford Cross Motion and Opposition to Plaintiff's motion"; the affirmation of Gary Giangola, M.D.; copies of the summons and complaint, defendants' answer, and plaintiffs' verified bill of particulars; an uncertified and unauthenticated copy of the records of the Huntington Artificial Kidney Center; the affidavit of Roland Delgado Santos; an uncertified copy of the Mather Memorial Hospital record and additional medical records; unsigned and uncertified partial transcripts of the examinations before trial of Jose Vergara, Theresa Olmer, Anne Reinhart, Carmichael Angeles, M.D., and Ekambaram Ilamathi, M.D.; and the expert affidavit of John K. Edoga, M.D.

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*

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Sprain Brook Manor Nursing Home, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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, Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [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, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

MOTION 006

In motion (006), Anne L. Reinhart, APRN, BC seeks summary judgment dismissing the complaint as asserted against her on the basis that she was an employee at Suffolk Nephrology Consultants, and on November 7, 2006, she and Dr. Carmichael Angeles, one of the partners at Suffolk Nephrology Consultants, evaluated the plaintiff's fistula and determined that it was appropriately developed, so she wrote an order to cannulate it and to use it for dialysis. She asserts that she appropriately conformed with good and accepted nursing practice in assessing that the plaintiff's right arm fistula was mature, and that she properly issued an order to cannulate it. She further asserts that the injuries claimed by the plaintiff were not caused by anything that she did or did not do.

Jacqueline Javier-Burns, R.N., B.S.N. has set forth in her expert affidavit submitted in support of defendant Anne Reinhart's application for dismissal of the complaint, that she is a registered nurse licensed to practice in New York State and is a certified nephrology nurse. She set forth her experience and training, and the records and materials which she reviewed. She set forth her opinions within a reasonable degree of medical certainty. It is her opinion that nurse Reinhart was working collaboratively with the physicians of Suffolk Nephrology, that she did not depart from the accepted standard of care, and that she did not cause any of the injuries claimed by the plaintiff.

Javier-Burns continued that whether a fistula is mature is a determination made on a case by case basis, and the true maturity of a fistula is determined by physical assessment. Patency is assessed by auscultating for a bruit, and palpating for a thrill. The size and pliability of the vein is assessed by applying a tourniquet above the site of anastomosis and palpating for firmness and size. The fact that nurse Reinhart and Dr. Angeles agreed that the fistula appeared mature on November 7, 2006, as it was hardened, as compared to it being soft on October 24, 2006, and the fact that it was successfully cannulated on November 9, 2006, was proof that it was mature enough to be cannulated with a small needle on November 11, 2006. On November 9, 2006, the fistula was cannulated with a #17 gauge needle, the smallest used in a dialysis setting. She continued that a fistulagram was not necessary as it is a diagnostic test to determine blood flow. Often times, cannulating a fistula may aid in its maturation, even in an older fistula. If after cannulating the fistula, an insufficient blood flow or low arterial pressure is found, a fistulagram may be indicated.

Javier-Burns continued that nurse Reinhart was entitled to rely upon the medical records compiled at the facility where she was seeing patients, and that she had no obligation or responsibility to be present during every, nor any, of the plaintiff's dialysis sessions at Medford Kidney Center, as the plaintiff was an established patient at a dialysis clinic at the time this event occurred. While nurse Reinhart could answer any questions concerning risks and alternatives to dialysis with the plaintiff, it was not her obligation to do so, and instead, it was the obligation of the patient's nephrologist to advise the plaintiff. Additionally, stated Javier-Burns, nurse Reinhart appropriately documented her findings which clearly described the fistula's appearance and function, and included her examination. The standard of care and routine to order Heparin administration at the time of dialysis is to avoid clotting issues which could affect progress of the dialysis session. Thus, she stated, the order dated October 17, 2006, which directs the administration of Heparin, was within standard practice. It is up to the discretion of the administering registered nurse to determine if Heparin administration is not warranted due to safety reasons.

John K. Edoga, M.D. set forth in his expert affidavit, submitted in support of defendant Reinhart's application, that he is licensed to practice medicine in New Jersey, his area of practice is vascular surgery, and that he is board certified in surgery and surgical critical care. He set forth his training stating that he has extensive experience in the area of hemodialysis vascular access creation and maintenance and is one of the inventors of the Circuport Vascular Access system. He set forth the records and materials which he reviewed, and opined with a reasonable degree of medical certainty that all care rendered to the plaintiff by nurse Reinhart was appropriate, that she did not depart from the accepted standard of care, and did not cause or contribute to any of the injuries claimed. He also opined that nurse Reinhart conducted an appropriate examination and assessment of the fistula with Dr. Angeles. He further concluded that the plaintiff's right arm fistula was mature on November 7, 2006, as was supported by nurse Reinhart's testimony that it hardened in comparison with her assessment on October 24, 2006, when it was soft.

Dr. Edoga opined that there was no reason for nurse Reinhart to order a fistulagram prior to November 11, 2006, as such diagnostic test is done to assess problems with blood flow. He continued that an attempt to cannulate the fistula must be made prior to ordering a fistulagram, as the true maturity of the fistula can only be determined once the fistula is actually punctured. If, after cannulating the fistula, there is insufficient blood flow or systolic pressure, then a fistulagram may be indicated. Dr. Edoga stated that although several of the plaintiff's other medical providers had knowledge there were issues with cannulating the right arm fistula prior to the plaintiff receiving dialysis at Medford, none of the medical records he reviewed indicated that nurse Reinhart had knowledge of what transpired during the plaintiff's hospitalization at Mather Hospital in October 2006. He added that it was not nurse Reinhart's obligation to ensure that all of the plaintiff's relevant medical records were included in her chart when the plaintiff was seen at the Medford Kidney Center in October 2006.

Dr. Edoga further opined that the cause of the plaintiff's internal bleeding in her right arm on November 11, 2006 was the result of the anastomosis being punctured during repeated attempts to cannulate it at the Medford Kidney Center. Nurse Reinhart was not present when that occurred, nor did she have an obligation to be there for the procedure. Dr. Edoga opined that had the plaintiff been properly cannulated pursuant to nurse Reinhart's order, the plaintiff would not have sustained any internal bleeding or any of the related injuries. He added that the plaintiff's injuries were significantly worsened by the plaintiff's refusal to go to the hospital as soon as she was advised to do so. Dr. Edoga opined that the

fracture of the plaintiff's left humerus occurred a month later after an episode of uncontrolled hypertension which was in no way related to the administration of dialysis or the care rendered or failed to be rendered by nurse Reinhart. Dr. Edoga concluded that there is no evidence that nurse Reinhart departed from good and accepted standards of care or that she caused or contributed to the plaintiff's injuries.

Based upon the foregoing, it is determined that nurse Reinhart has established prima facie entitlement to summary judgment dismissing the complaint as asserted against her.

In opposing this motion, the plaintiffs have provided the affirmation of their expert, Joseph J. Lieber, M.D., who has affirmed that he is licensed to practice medicine in New York and that he is a diplomate of the American Board of nephrology and internal medicine. He set forth the records and materials which he reviewed and opined with a reasonable degree of medical certainty that nurse practitioner Anne Reinhart departed from good and accepted practice in the care and treatment of the plaintiff. Dr. Lieber stated that when nurse Reinhart ordered the fistula to be cannulated, such order was a deviation from good and accepted practice and a proximate cause of the plaintiff's injuries. He continued that nurse Reinhart failed to familiarize herself with the "rule of sixes" to see if the fistula is mature.

Dr. Lieber stated that because nurse practitioner Reinhart failed to order a fistulagram after determining the fistula was not mature on October 26, 2006, she departed from the standard of care. He continued that she should have known that four prior attempts to cannulate the fistula at Mather Hospital during the October 13, 2006 admission were unsuccessful, and that the vascular surgeon, Dr. Bhatti, wrote in the record that a work-up and fistulogram was required due to a malfunction of the fistula prior to any further attempts of cannulation, and the need for revision of the fistula.

Dr. Lieber also set forth that the KDOQI guidelines recommend that a questionable fistula is initially cannulated on a non-scheduled dialysis day so that the dialysis can be run for a limited period of time at a reduced volume to check its maturity, and without the use of Heparin to avoid excessive bleeding when there are numerous attempts to cannulate. He opined that nurse Reinhart's failure to order such cannulation as recommended was a departure from the standard of care. He states that it is his opinion with a reasonable degree of medical certainty that as a result of the defendant's deviations from good and accepted practice, the plaintiff was caused to sustain a massive bleed into the right arm and right chest cavity. As a result of the initial injury, plaintiff sustained damage to the nerves, muscles and tissues in the right arm which was confirmed by subsequent testing to be permanent in nature.

Based upon the foregoing, the plaintiffs' expert has raised factual issues which preclude summary judgment as to defendant Anne Reinhart. Accordingly, motion (006) by Anne Reinhart is denied.

MOTION (008)

In motion (008), defendant Ekambaram Ilamathi, M.D. seeks summary judgment dismissing the complaint as asserted against him on the bases that at no time was he involved in making a decision as to the fistula's maturity and suitability for access; he was not involved in dialysis treatment or cannulation of the fistula; and that there was nothing which he did that proximately caused the plaintiff's alleged injuries.

Dr. Ilamathi's expert physician, John Douglas Wagner, M.D. affirms that he is a physician licensed to practice medicine in New York and is board certified in nephrology and internal medicine. He indicated the records and materials reviewed and set forth his opinions within a reasonable degree of medical certainty. It is Dr. Wagner's opinion that Dr. Ilamathi at all times acted within the accepted standards of care for a nephrologist. His recommendation for an AV fistula was proper. When the AV fistula in the left arm failed, he had no responsibility as he did not create it. When the right AV fistula was created, Dr. Ilamathi had no responsibility and took no part in the dialysis treatment, or the determination that the fistula was mature. He did not cannulate the fistula at any time, and properly deferred to appropriate medical professionals for all these activities. Dr. Ilamathi did not personally see the plaintiff after November 1, 2005 prior to the occurrence on November 11, 2006. Dr. Wagner stated that on November 11, 2006, Dr. Ilamathi appropriately referred the plaintiff emergently to St. Catherine's of Siena Medical Center, and he was not involved with her care during that November 11, 2006 admission.

Based upon the foregoing, Dr. Ilamathi has demonstrated prima facie entitlement to summary judgment dismissing the complaint. The plaintiffs do not oppose Dr. Ilamathi's motion for summary judgment, and thus have not raised factual issues to preclude summary judgment.

Accordingly, motion (008) is granted and the complaint as asserted against Dr. Ilamathi is dismissed with prejudice.

MOTIONS (007) and (009)

In motion (007), the plaintiffs seek summary judgment against Medford Kidney Center, Huntington Artificial Kidney Center, LTD, and Davita, Inc. Plaintiffs assert that when Joyceann Schmitt was admitted to Mather Memorial Hospital on October 17, 2006, the vascular surgeon indicated a further work up was required on an out-patient basis to determine the cause of the malfunction of the fistula which had been placed over a year prior to her visit to Medford Kidney Center on November 11, 2006. Plaintiffs contend that her discharge summary from Mather Memorial Hospital indicated that there was a failed venous access site repair, and further noted that upon discussion with Dr. Cariani of Suffolk Nephrology, a revision of the fistula was needed. She alleges that despite no work-up having been performed, including a fistulagram, on November 11, 2006, four attempts were made at Medford Kidney Center to cannulate the fistula with a needle, lacerating the plaintiff's brachial artery. Thus, plaintiffs argue that summary judgment should be granted to them against Medford Kidney Center, Huntington Artificial Kidney Center, LTD, and Davita, Inc.

Huntington Artificial Kidney Center LTD d/b/a Medford Kidney Center and Davita Inc., oppose plaintiffs' motion (007) and in motion (009) seek summary judgment dismissing the complaint as asserted against them. They assert that pursuant to an order by defendant Reinhart on October 17, 2006, the plaintiff underwent her first dialysis at Medford on October 19, 2006 through a central venous catheter (CVC). On November 7, 2006, N.P. Reinhart examined the plaintiff with Dr. Carmichael Angeles, a Suffolk Nephrology Affiliate, and after determining the fistula was ready to be cannulated, she then wrote an order on the Huntington Artificial Kidney Center LTD. physician's order form for cannulation of the right upper arm fistula to begin with one small needle on November 9, 2006, and to advance as tolerated. That fistula was cannulated successfully on November 9, 2006 for dialysis. On November 11, 2006, three attempts were

made to cannulate the fistula, but the blood flow from the fistula was insufficient to maintain dialysis, so dialysis was achieved through the CVC. It was after that the plaintiff began to complain of symptoms in her right arm. Dr. Ilamathi was notified, and the plaintiff was transported to Mather Hospital emergency room.

In support of the plaintiffs' application for summary judgment against Medford Kidney Center, Huntington Artificial Kidney Center, LTD, and Davita, Inc., the plaintiffs' expert, Joseph J. Lieber, M.D., set forth that avulsion of the brachial artery at the site of the anastomosis is not a known complication of cannulation. Dr. Lieber continued that Anne Reinhardt testified that in order to prevent avulsion of the artery, it is not to be cannulated at the anastomosis, and to do so would be a departure from the standard of care. Dr. Lieber opines that the cause of the plaintiff's internal bleeding in her right arm on November 11, 2006 was the result of the anastomosis being punctured during repeated attempts to cannulate the fistula at the Medford Kidney Center, and that the plaintiff would not have sustained any internal bleeding or any of the related injuries had the fistula been properly cannulated. Both the technician Jose Vegara, and nurse Murphy, of defendant's staff, attempted to cannulate the fistula.

Dr. Lieber set forth that when nurse Murphy felt the fistula and found it was small and immature, she could have used just the Perma Cath on November 11, 2006 to dialyze the plaintiff, and avoided using the fistula. Dr. Lieber does not set forth the standard of care for nurse Murphy when an order has been made by the nurse practitioner, co-signed by Dr. Caraianni, to commence cannulating the fistula.

Huntington Artificial Kidney Center LTD d/b/a Medford Kidney Center and Davita Inc. (Medford Kidney Center), have submitted the affirmation of their expert, Gary Giangola, M.D. in support of their application for summary judgment. Dr. Giangola affirmed that he is licensed to practice medicine in New York and is board certified in vascular surgery. He set forth his education and training and experience with arteriovenous fistulas. He set forth the materials and records which he reviewed and opined with a reasonable degree of medical certainty that Medford Kidney Center has not departed from good and accepted standards of medical care and treatment. He set forth the plaintiff's care and treatment in November 2006, and the events leading to the plaintiff's admission to St. Catherine of Siena Medical Center on November 11, 2006. Dr. Giangola stated that in his operative report, Dr. Khan noted multiple skin puncture marks, all of which he attributed to needle marks of the attempted dialysis cannulation. He additionally noted that one of the branch arteries had avulsed, which he attributed to a needle puncture. He very specifically noted in his operative report that the fistula had not been cannulated.

Dr. Giangola continued that as a preliminary matter, injury to the brachial artery is a known complication of dialysis cannulation and is documented in medical literature. Dr. Giangola stated additionally, laceration of the artery can occur even when proper cannulation technique is utilized. He continued, even assuming nurse Murphy or the technician Vegara avulsed the brachial artery, it is a known risk and therefore not a deviation from the standard of care. Dr. Gaingola opined that both nurse Murphy and technician Vegara took appropriate measures to cannulate the plaintiff's right arm fistula on November 11, 2006. He set forth the standard of care for inserting the needle to cannulate the fistula and how they both complied with such standard of care. Moreover, he opined, it is not indicative of poor cannulation technique that the patient's fistula was not patent on the 11th, even though it was used for dialysis on the 9th, as it is possible for a mature fistula to fail at any time. He continued that the plaintiff's internal bleeding was not the result of the anastomosis being punctured during the cannulation attempts as there is nothing in Dr.

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Khan's operative report that even suggests that the avulsion occurred at the anastomosis. Dr. Giangola continued that even Dr. Moore, who was in the operating room, does not recall that the brachial artery was avulsed.

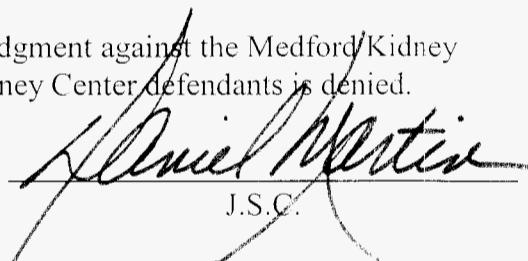
Dr. Giangola also opined that a branch artery cannot be palpated or visualized, nor can thrill or bruit be identified in the branch due to the branch's small size. Thus, one may inadvertently come into contact with the branch artery during a cannulation attempt because its location is unknown. He continued that it is possible that nurse Murphy or technician Vegara avulsed the branch artery without knowing that they had done so. It is possible that the needle avulsed the branch artery because the needle is larger than the branch, particularly in this patient who was known to have small vessels. Thus, there would be no flashback and neither would have suspected that there was contact with the branch artery. Since the location of the branch artery cannot be known in the setting of a dialysis center, it follows that it is not a deviation of the standard of care to inadvertently avulse a branch during a cannulation attempt.

Dr. Giangola also opined that it was proper for the defendants to follow nurse Reinhart's order and utilize the AV fistula since it had been successfully cannulated on November 9th. He added that there is no specific standard of care relative to the number of attempts at cannulation of an AV fistula other than the local standards created by the individual dialysis center. Dr. Giangola concluded that because nurse Murphy and technician Vegara comported with the applicable standards of care there is no proximate cause between their care and the injuries sustained by the plaintiff.

Based upon the foregoing, it cannot be determined that the Medford Kidney Center defendants have demonstrated entitlement to summary judgment dismissing the complaint. Nor can it be determined that plaintiffs are entitled to summary judgment. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions as such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]; see, also, *Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624, 760 NYS2d 199 [2d Dept 2003]; *Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650, 724 NYS2d 432 [2d Dept 2001]).

Accordingly, motion (007) by the plaintiffs for summary judgment against the Medford Kidney Center defendants is denied, and motion (009) by the Medford Kidney Center defendants is denied.

Dated: MARCH 18, 2013.


 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION