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SHORT FORM ORDER

INDEX No. 09-7349

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 2-28-13 (#007)
MOTION DATE 4-10-13 (#008)
ADJ. DATE 4-17-13
Mot. Seq. # 007 - MD
008 - MD

EILEEN BERGIN, as Administratrix of the Estate of LAWRENCE BERGIN, deceased, and EILEEN BERGIN, individually,

Plaintiffs,

- against -

DAVID JACKSON, R.P.A., KAREN EYNON, M.D., CARL GOODMAN, M.D., CHRISTINE KAM, M.D., U.S. RADIOLOGY ON-CALL, RANDOLPH PHILLIPS, M.D., PATRICIA PICCIANO, R.N., BROOKHAVEN MEMORIAL HOSPITAL, DENISE ABSELET, D.O., PORT JEFFERSON INTERNAL MEDICINE ASSOCIATES, P.C., ALEXANDER WEINGARTEN, M.D., PHILLIP FYMAN, M.D., ALEXANDER WEINGARTEN, M.D., P.C., LOUIS MALESARDI, PA-C, PHILLIP N. FYMAN, M.D., COMPREHENSIVE PAIN MANAGEMENT ASSOCIATES, RICHARD D. HINDES, M.D., RICHARD D. HINDES, M.D., P.C., ORTHOPEDIC ASSOCIATES OF LONG ISLAND, LLP and RICHARD BALTER, M.D.,

Defendants.

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Upon the following papers numbered 1 to 39 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (007) 1- 14; (008) 15 - 20; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 16-25; 26-36 ; Replying Affidavits and supporting papers 37-39; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (007) by the defendant, Louis Malesardi, PA-C, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him, is denied; and it is further

ORDERED that motion (008) by the defendants, Phillip Fyman and Alexander Weingarten, M.D., P.C. s/h/a Phillip Fyman, M.D., Alexander Weingarten, M.D., P.C., d/b/a Comprehensive Pain Management Associates, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them on the basis that they are not vicariously liable for defendant, Louis Malesardi, PA-C, is denied.

In this action, the plaintiff, as the Administratrix of the Estate of Lawrence Bergin, seeks damages on behalf of the estate and derivatively for personal injuries allegedly sustained by the decedent, Lawrence Bergin. It is alleged that the decedent was caused to suffer an infection in his right hip caused by Methicillin Resistant Staphylococcus Aureus (MRSA), allegedly as a result of a superficial greater trochanteric injection administered by defendant Louis Malesardi, PA-C on November 7, 2006, for pain in the decedent's right hip and lower extremity. Louis Malesardi was a physician's assistant employed at the office of Comprehensive Pain Management Associates where plaintiff's decedent was administered various interventional techniques to manage his pain, including trigger point injections to his neck and lower back in 2004 and 2005, and hip injections, lumbar interlaminar epidural steroid injections, and prescription medication. Such interventions were administered by Malesardi or by medical doctors at the facility. On October 8, 2006, the plaintiff's decedent had presented to Brookhaven Memorial Hospital emergency room with complaints of right thigh pain since Thursday, October 5, 2006. Examination at that time revealed, inter alia, a urine culture positive for MRSA, for which an oral antibiotic, to which the organism was sensitive, was prescribed. When defendant Malesardi saw the decedent on November 7, 2006, he complained of low back pain radiating down his left lower extremity, and right hip pain for which the subject injection of DepoMedrol and bupivicaine was administered by Malesardi via right superficial greater trochanteric injection. The complaint asserts causes of negligence premised upon the alleged negligent departures from the good and accepted standard of care by the defendants, and for lack of informed consent.

In motion (007), the moving defendant Malesardi seeks summary judgment dismissing the complaint asserted against him on the basis that the right superficial greater trochanteric injection did not proximately cause the infection in the decedent's right hip and was not the source of the infection; that Maldesardi did not depart from the standard of care in administering the injection; that the injection was not administered into the hip joint; and that the injection was not contraindicated. In motion (008), the defendants Phillip Fyman and Alexander Weingarten, M.D., P.C. d/b/a Comprehensive Pain Management seek summary judgment dismissing the complaint asserted against them as there is no basis for liability as to defendant Malesardi upon which vicarious liability can be predicated.

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 [1981]).

In support of motion (007) defendant Malesardi has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and plaintiff's amended verified bill of particulars; the unsigned and uncertified copies of the transcripts of the examination of Eileen Bergin dated November 11, 2010, and Louis Malesardi dated May 30, 2012; uncertified medical records and pharmacy records; and a copy of the Order dated August 3, 2012 (Pastoressa, J.); unsigned and uncertified deposition transcripts of plaintiffs, without an affidavit or proof of service pursuant to CPLR 3116, are inadmissible and not considered on this motion (see, Martinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; McDonald v Maus, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; Pina v Flik Intl. Corp., 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]). While the deposition transcript of defendant Malesardi is unsigned and uncertified, it is considered by this court as adopted as accurate by the moving defendant (*see*, Ashif v Won Ok Lee, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]), however, it fails to comport with CPLR 2101 (a) with regard to font size. The uncertified medical records are not in admissible form pursuant to CPLR 3212 and 4518. Expert testimony is limited to facts in evidence. (see, Allen v Uh, 82 AD3d 1025 [2nd Dept 2011]; Marzuillo v Isom, 277 AD2d 362 [2nd Dept 2000]; Stringile v Rothman, 142 AD2d 637 [2nd Dept 1988]; O'Shea v Sarro, 106 AD2d 435, 482 NYS2d 529 [2nd Dept 1984]; Hornbrook v Peak Resorts, Inc. 194 Misc2d 273 [Sup Ct, Tomkins County 2002]), and the uncertified records are not in evidence.

In support of motion (008) the moving defendants have submitted, inter alia, an attorney's affirmation and copies of the pleadings, and rely on defendant Malesardi's evidentiary submissions to demonstrate that Malesardi bears no liability in this action, and, thus, there is no basis upon which to premise vicarious liability as to them.

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 [2nd 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 [3d Dept 1985]; Lyons v McCauley, 252 AD2d 516 [2d Dept 1998], app denied 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [2nd Dept 1994]).

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 [2nd Dept 2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [2nd 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 [2rd Dept 2007]).

It is determined that even if the evidentiary proof submitted in support of motions (007) and (008) was in admissible form to be considered on these motions for summary judgment, the moving papers raise factual issues, and the parties have submitted conflicting medical expert opinions which preclude summary judgment.

Defendants' expert, Christopher Gharibo, M.D., affirms that he is licensed to practice medicine in New York State and is board certified in anesthesiology with a subspecialty certification in pain medicine. He set forth the records and materials which he reviewed and opined within a reasonable degree of medical certainty that the superficial greater trochanteric injection administered by Mr. Malesardi on November 7, 2006, was not the source of the MRSA infection in Mr. Bergin's right hip diagnosed during his hospitalization at Mather Memorial Hospital from November 23 through December 8, 2006. He continued that sterile technique was utilized during the injection procedure; there is no evidence that multi-dose vials were used; and as stated by Dr. Jaffe who saw Mr. Bergin on March 28, 2007, the source of the hip and urinary bladder MRSA infections was the patient's "severe carious teeth involving the entire maxilla with erosion of the teeth back to the gingiva, with severe carious teeth...also noted on the mandible." Dr. Gharibo added that there is a very high probability of persistent systemic bacetermia in patients with poor oral hygiene which can seed the hip or any other part of the body.

Dr. Gharibo continued that the injection was a superficial greater trochanteric injection, and the skin entry point was the upper lateral thigh, which makes it virtually impossible to enter the hip joint capsule which is entered anteriorly. To be able to enter the hip joint, the injection would have to be done at the groin with a longer and larger needle than the 27 gauge, 1 1/4 inch needle used by Mr. Malesardi. Therefore, concludes Dr. Gharibo, the injection could not have entered the hip joint and could not have been the cause of any contamination to the hip joint. He added that there were no contraindications to Mr. Malesardi administering the injection as even neuraxial nerve blocks are permitted in systemically infected patients as long as the patient has been initiated on antibiotics and has responded to antibiotic treatment. He continued that Mr. Bergin had completed antibiotic treatment and had been off his antibiotics without any evidence of return of his (urinary tract) infection, and that the injection administered by Mr. Malesardi was superficial, not a neuraxial nerve block, and not an intra-articular hip injection.

Dr. Gharibo stated that proof that the superficial injection could not, with reasonable medical certainty have caused or aggravated a deep seated hip joint infection is that at no time between November 7 and November 23, 2006, did Mr. Bergin present to any health care provider with a superficial infection, or any signs of infection at the injection site as would be evidenced by localized swelling, erythema, warmth, fluctuance, crepitus, or drainage of pus. In the absence of signs of infection at the skin injection site, such as visible, local soft tissue, adipose, muscle, bursal sac and skin infection at the needle site, the superficial injection given through the skin by Mr. Malesardi could not have caused or exacerbated an infection within the joint. Dr. Gharibo additionally stated that there was no communication between the area of injection and the hip joint space as well, demonstrating no scientific medical basis for the claim that the injection caused or exacerbated an infection in the hip joint.

Based upon the foregoing, the defendants have established prima facie entitlement to summary judgment on the issue that there is no proximate cause relating to administration of the superficial greater trochanteric injection and causation of the MRSA infection found in the plaintiff's decedent's right hip. However, the standard of care has not been set forth concerning the diagnosing of the decedent's onset of severe right hip pain for a period of weeks prior to the administration of the injection, and whether the plaintiff's decedent's condition should have, or could have, been diagnosed and treater earlier, affecting progression of the infection

and deterioration of the hip and vascular necrosis with progression to sepsis. In addition, the plaintiff's expert as set forth below, raises factual issues and presents conflicting opinions which preclude summary judgment.

The plaintiff's expert[1] has affirmed to being a physician licensed to practice medicine in New York State, being certified in neurology, and experienced in treating patients with acute and chronic pain syndromes. He set forth the materials and records reviewed and opined within a reasonable degree of medical certainty that the defendants departed from accepted standards of care in failing to know and/or consider the decedent's chronic steroid use given for his asthmatic condition, and the effects of the same, including the risk of the development of vascular necrosis of the hip joint and the increased risk of infection. He continued that the defendants failed to monitor the decedent for the same, and failed to properly diagnose the plaintiff's decedent's condition when he presented with severe groin/hip pain. He continued that the defendants also performed a contraindicated intratrochanteric injection when they knew, or should have known, of the decedent's infection with MRSA, without confirming that such infection had been successfully treated. The plaintiff's expert stated that the vascular necrosis from steroid use is most common at the head of the femur. The steroids also depress the resistance to infection. Pain in the affected joint is the most common presenting symptom, exacerbated by weight bearing, which was how the plaintiff presented to the defendant on October 3, 2006. The plaintiff's expert opined that the plaintiff's decedent developed septic, or an infection or osteomyelitis, of the right hip with MRSA, due to the lack of blood supply to the hip.

The plaintiff's expert continued that the defendants saw Mr. Bergin on an average of once a month, and occasionally twice a month throughout a three year period for complaints of back pain with radiation to the left leg and right hip pain treated with epidural injections and various analgesics and narcotic pain medication. He set forth the various presentations and care and treatment. He stated that in 2006, the plaintiff's decedent could not bear weight due to the disabling right groin pain. Mr. Malesardi saw the plaintiff on October 3, 2006 for severe right groin pain and discussed his use of Oxycontin with him. The plaintiff's expert opined that this was a new and significant change in the decedent's condition which warranted a full and comprehensive evaluation. Despite the administration of the subject injection on November 7, 2006, the decedent returned to see Malesardi on November 10, 2006 due to complaints of pain for which he was referred for physical therapy to the right hip. When the decedent presented for physical therapy on November 14, 2006, he was ambulating with two crutches due the pain and inability to bear weight. When the decedent saw defendant Weingarten the following day, the record does not indicate this severely disabled condition, and there was no indication the decedent was using crutches. However, he was administered an epidural injection.

The plaintiff's expert continued that on November 23, 2006, the decedent was admitted to Mather Memorial Hospital with severe right leg pain and swelling at the right hip region, with restricted range of motion, and inability to flex the hip more than five degrees, and abduction or adduction of only a few degrees, without excoriating pain. This pain, opined the plaintiff's expert, was due to the infection in the right hip which now had pus and fluid therein, so advanced that the decedent developed Disseminated Intravascular Coagulopathy (DIC) with anemia, requiring intensive care. An aspiration of the fluid cultured MRSA. On October 8, 2008, incision and drainage of the decedent's right hip was performed, and the surgeon found that the hip had degenerative arthritis, vascular necrosis, osteomyelitis of the proximal femur and acetabulum, and a

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[1]A signed copy of plaintiff's expert affirmation has been submitted to this court for in camera inspection (Marano v Mercy Hospital, 241 A.D.2d 48 [2nd Dept 1998]; McCarty v Community Hosp. of Glen Cove, 203 A.D.2d 432 [2nd Dept 1994], and is returned to counsel for the plaintiff.

pathological fracture of the femoral head due to intrinsic bone destructive process caused by the insufficiently treated MRSA osteomyelitis.

The plaintiff's expert disagrees that the cause of the MRSA infection in the right hip was due to the decedent's poor dental condition as MRSA is not an organism which lives in the oral cavity. He continued that there was a failure by the defendants to timely diagnose and treat the decedent's condition, and the administration of contraindicated steroid injections of the decedent's infected and necrotic right hip. He continued that the treating physicians were obligated to timely and carefully evaluate the decedent's condition throughout the three years of treatment and failed to do so, and more egregiously when the decedent presented with new and severe right hip pain with painful weight bearing. He stated that the defendants failed to obtain the emergency department record of October 8, 2006 from Brookhaven Memorial Hospital, and failed to make a differential diagnosis including vascular necrosis, immune compromise, and increased fracture susceptibility due to the history of prolonged steroid use. He stated that confirmation of the successful treatment of the MRSA urinary tract infection should have been ascertained, especially in light of the fact that the plaintiff was treated with oral, rather than intravenous, antibiotics.

The plaintiff's expert opined that Malesardi's scope of practice is regulated by New York statutes, including 10 NYCRR § 94.2, permitting him to perform medical services only under the supervision of a physician. Defendant Fyman wrote the prescriptions for Malesardi and countersigned his notes. Defendant Weingarten also supervised Malesardi. The standard of care for Malesardi is the same as that of the physician treating patients with chronic pain and the conditions and co-morbidities associated therewith, and requires proper monitoring with comprehensive and problem oriented evaluations, with updated and accurate differential diagnosis. The plaintiff's expert set forth the departures from the standard of care by Malesardi, as well as the departures by Weingarten in the care provided to the decedent and in his supervision of Malesardi.

The plaintiff's expert noted that Malesardi denied that he entered the hip joint in injecting the plaintiff. He continued that the entire point of a greater trochanteric injection is to deliver the steroid and anesthetic medications to this region, including the femoral head and surrounding area. Thus, the argument that the injection was not directly into the joint itself does not recognize the rationale for the injection and its technique. It would be a contraindication to go forward with the injection without knowing of the urinary tract infection and obtaining information, and without consulting with defendant Weingarten. The plaintiff's expert stated that Malesardi testified he would not have given the greater trochanteric injection had he been aware of the MRSA infection diagnosed at Brookhaven Hospital on October 8, 2006. He opines that the defendants' expert does not address the significance of the decedent's new groin/hip pain with inability to walk without limping or using crutches, and that he disagrees that the MRSA urinary tract infection was successfully treated with oral antibiotics when it was not and there was no follow up culture done. Nor does the defendants' expert address the effects of long-term steroid use or the failure of Malesardi to have documented the technique used in performing the greater trochanteric injection or the site where the end of the needle was noted. The plaintiff's expert concluded that Malesardi deviated from the accepted standards of care in his treatment of the plaintiff's decedent, and that such deviations were the proximate cause of the decedent's injuries.

Based upon the foregoing, it is determined that plaintiff's expert raises factual issues which preclude summary judgment from being granted to any of the moving defendants.

Dated: April 30, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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