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SHORT FORM ORDER

INDEX No. 09-9272
CAL No. 12-11790MM

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

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 2-6-13
ADJ. DATE 4-23-13
Mot. Seq. # 001 - MD
002 - MotD

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SINDI SCARFUTTI,

Plaintiff,

- against -

EASTERN LONG ISLAND HOSPITAL and WILLIAM RENNIE, M.D.,

Defendants.

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Upon the following papers numbered 1 to 51 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 17 - 39 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 40 - 47 ; Replying Affidavits and supporting papers 48 - 49; 50 - 51 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendant William Rennie, M.D., and the motion (#002) by defendant Eastern Long Island Hospital hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant William Rennie, M.D., seeking summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that the motion by defendant Eastern Long Island Hospital seeking summary judgment dismissing plaintiff's complaint is determined as hereinafter stated.

Plaintiff Sindi Scarfutti commenced this action against defendants Eastern Long Island Hospital and William Rennie, M.D., to recover damages for injuries she allegedly sustained as a result of medical malpractice. By her complaint, plaintiff alleges, among other things, that Dr. Rennie failed to timely diagnose and properly treat her right foot infection and that, as a result of such failure, she was admitted into Peconic Bay Medical Center on September 21, 2006, and through bills of particular we learn she alleges such failures led her to suffer cellulitis, osteomyelitis of the right foot, neuritis of both feet, and right and left foot neuromas. Plaintiff also alleges, among other things, that the nursing staff of Eastern Long Island Hospital negligently performed a physical examination of her; negligently discharged her from its emergency room without conducting the proper diagnostic tests; failed to question the orders of Dr. Rennie; and failed to inform her to return to the hospital for a re-evaluation when she phoned the following day with complaints.

On September 19, 2006, at approximately 9:30 a.m., plaintiff presented to the emergency department of Eastern Long Island Hospital ("ELIH") with complaints of pain in her right foot and swelling on the dorsal aspect of her foot. Plaintiff informed the triage nurse that the pain in her right foot had begun the day before, that she had dropped a vacuum on her right foot approximately one week earlier, that she had sustained "chigger bites" to her shins and feet approximately one month beforehand, and that she suffers from high blood pressure for which she takes Diovan. She was initially evaluated by Cherie Fingerle, a triage nurse, who did not observe any signs of redness or bruising on the dorsal aspect of plaintiff's right foot, and noted that her temperature was 97.5 degrees. Following her evaluation by the triage nurse, she was examined by Dr. William Rennie, who noted that plaintiff presented with complaints of pain on the dorsum of her right foot, but did not have any discoloration, open wounds, lacerations or bruises on her right foot. Dr. Rennie's examination of plaintiff's right foot revealed that the pain across the dorsum increased upon plantar flexion and was consistent with tendonitis or bursitis. Thereafter, Dr. Rennie ordered an x-ray of plaintiff's right foot, which revealed slight soft tissue swelling at the dorsum of the right foot at the metatarsals. Plaintiff was discharged from the emergency department after Dr. Rennie diagnosed her as suffering from tendonitis and local bursitis, and applied a compression dressing. Dr. Rennie also provided plaintiff with special discharge instructions for management of her tendonitis and bursitis, which included returning to the emergency room if there were any signs of increased pain, swelling, discoloration; elevating and icing her right foot; continuing compression dressing; and following up with her medical doctor by the end of the week. The following afternoon, plaintiff phoned the hospital and spoke with a nurse, who allegedly informed her that, since she had a sprain, the pain would get worse before it became better, and that she should return to the hospital if her foot continued to bother her.

On September 21, 2006, plaintiff presented to the Peconic Bay Medical Center with complaints of chills and right foot swelling with redness, which had become worse the night prior to this presentation. After an examination of plaintiff's right foot, it was determined that she was suffering from dorsal tenderness, swelling and erythema, and blood work revealed an elevated white blood count. Thereafter, plaintiff was admitted to Peconic Bay Medical Center under the care of Dr. George Ruggerio with a diagnosis of acute cellulitis of the right foot, and intravenous ("IV") Clindamycin was begun. However, the swelling in plaintiff's right foot became worse, extending from the dorsum of her right foot to midway up her right leg. On September 23, 2006, plaintiff developed a foot abscess. Following the positive culture for staph aureus bacteria, she was placed on a course of Cipro that was administered via IV. The triple bone scan that was performed failed to rule out osteomyelitis secondary to pain, and, thereafter, an outpatient magnetic resonance imaging ("MRI") examination with contrast was ordered to rule out osteomyelitis, as well as to determine the length of treatment. On September 27, 2006, plaintiff was discharged from Peconic Bay Medical Center with a diagnosis of right foot abscess, right foot cellulitis, and a gait disorder secondary to right foot pain. Plaintiff was ordered to scheduled a follow up with Dr.

Ruggerio within four days from her discharge. On September 29, 2006, an outpatient MRI examination performed on plaintiff's right foot revealed an abnormal marrow signal consistent with osteomyelitis. A follow up MRI examination on November 2, 2006 indicated no evidence of osteomyelitis or infection at that time. Thereafter, plaintiff commenced this medical malpractice action.

Dr. Rennie now moves for summary judgment on the basis that he did not deviate for the acceptable standard of medical care when he treated plaintiff during her visit to the emergency room at ELIH on September 19, 2006, and that his treatment of her right foot did not proximately cause her alleged injuries. In support of the motion, Dr. Rennie submits copies of the pleadings, the parties' deposition transcripts, plaintiff's medical records relating to the injuries at issue, and the affirmation of his expert, Dr. Gregory Mazarin. Also, ELIH moves for summary judgment on the bases that the care and treatment rendered by its nursing staff did not deviate from good and accepted standards of medical and nursing care, and that the care rendered did not proximately cause plaintiff's alleged injuries. ELIH further asserts that it is not vicariously liable for the alleged negligent treatment rendered by Dr. Rennie and in any event Dr. Rennie di not commit malpractice. ELIH relies on the same evidence submitted by Dr. Rennie on his motion for summary judgment. ELIH also submits a certified copy of plaintiff's medical records, the affidavit of its expert, Dr. Anthony Mustalish, the affidavit of Patricia Pispisa, and the contract between ELIH and Paragon Emergency Medicine, P.C.

Plaintiff opposes Dr. Rennie's motion on the ground that there are material triable issues of fact as to whether he deviated from good and acceptable medical practice when he treated her on September 19, 2006, and whether such deviation was the proximate cause of her injuries. Plaintiff opposes ELIH's motion, arguing that there are material triable issues of fact as to whether it is vicariously liable for Dr. Rennie's alleged negligence during his treatment of her in its emergency department on September 19, 2006. In opposition to the motions, plaintiff submits copies of the pleadings, her own affidavit, the parties' deposition transcripts, certified copies of her medical records regarding her alleged injuries, and a redacted and unsigned copy of her expert's affidavit. In addition, plaintiff submits an unredacted copy of her expert's affidavit for in camera review.

On a motion for summary judgment in a medical malpractice action, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured by such departure (*see* ***Swezey v Montague Rehab & Pain Mgt., P.C.***, 59 AD3d 431, 872 NYS2d 199 [2d Dept 2009], *lv denied* 18 NY3d 880, 939 NYS2d 293 [2012]; ***Germaine v Yu***, 49 AD3d 685, 854 NYS2d 730 [2d Dept 2008]; ***Shahid v New York City Health & Hosps. Corp.***, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]). A physician may establish that he or she did not depart or deviate from accepted medical practice in his or her treatment of the patient, and that he or she was not the proximate cause of the plaintiff's injuries through the submission of medical records and competent expert affidavits (*see* ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***Deutsch v Chaglassian***, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; ***Plato v Guneratne***, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]). However, a doctor is not a guarantor of a correct diagnosis or a successful treatment, nor is a doctor liable for a mere error in judgment if he or she has considered the patient's best interest after careful evaluation (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Oelsner v State of New York***, 66 NY2d 636, 495 NYS2d 359 [1985]; ***Bernard v Block***, 176 AD2d 843, 575 NYS2d 506 [2d Dept 1991]). If the defendant doctor sustains this burden, in order to defeat summary judgment, "a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant doctor's omissions or departures were a competent producing cause of the injury" (***Domaradzki v Glen Cove Ob/Gyn Assoc.***, 242 AD2d 282, 282, 660 NYS2d 739 [2d Dept 1997]; *see* ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d

Dept 2011]; ***Arkin v Resnick***, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]; ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; ***Johnson v Queens-Long Is. Group***, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]; ***Dellacone v Dorf***, 5 AD3d 625, 774 NYS2d 776 [2d Dept 2005]). General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (*see* ***Dolan v Halpern***, 73 AD3d 1117, 902 NYS2d 585 [2d Dept 2010]; ***Arkin v Resnick***, *supra*; ***Holbrook v United Hosp. Med. Ctr.***, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

Based upon the adduced evidence, Dr. Rennie has established his entitlement to judgment as a matter of law on the issue of liability by proffering the parties' deposition testimonies, and by submitting the affidavit of Dr. Gregory Mazarin, in which that doctor opined that the care and treatment rendered to plaintiff did not deviate or depart from good and acceptable standards of medical care. (*see* ***Muniz v Mount Sinai Hosp. of Queens***, 91 AD3d 612 [2d Dept 2012]; ***Belak-Redl v Bollengier***, 74 AD3d 1110, 903 NYS2d 508 [2d Dept 2010]; ***Ellis v Eng***, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]; ***Adjetey v New York City Health & Hosps. Corp.***, 63 AD3d 865, 881 NYS2d 472 [2d Dept 2009]; ***Tuorto v Jadali***, 62 AD3d 784, 878 NYS2d 457 [2d Dept 2009]). Dr. Mazarin, who is board certified in emergency medicine, states that the treatment rendered to plaintiff by Dr. Rennie on September 19, 2006 was, at all times, well within good and acceptable standards of medical care. Dr. Mazarin explains that, in an emergency department, it is customary for a patient to first be triaged and then seen by the emergency department physician. Dr. Mazarin states that plaintiff, during the time of triage, was found to be afebrile, since her temperature was 97.5 degrees, and that her claim that this particular temperature was "on the high side for her" has no basis in medicine, because a temperature of 97.5 is considered to be "without fever." Moreover, Dr. Mazarin states that Dr. Rennie appropriately obtained plaintiff's past medical and surgical histories, information on her presenting complaints, and performed a physical examination of her feet, including a sensory and motor exam.

Dr. Mazarin further states that the assertion that blood work should have been ordered based upon plaintiff's presenting symptoms is without merit, because plaintiff was "afebrile on examination; her right foot was not red or erythematous; there were no inflammatory changes noted on her right foot; there was no evidence of streaking; and the chigger bites reported by plaintiff, on examination, were well healed; and plaintiff's skin temperature was not found to be abnormally warm upon examination by Dr. Rennie." Dr. Mazarin states that at the time of plaintiff's presentation to ELIH and Dr. Rennie's examination of her, there was no evidence of an infection. Additionally, Dr. Mazarin explains that, since there was no clinical evidence of an infection, there was no indication for blood tests, and that blood tests, in particular a white blood count, is not a reliable marker for cellulitis

In addition, Dr. Mazarin opines that Dr. Rennie's diagnosis of tendonitis and bursitis was, within a reasonable degree of medical certainty, the appropriate diagnosis based upon plaintiff's presenting complaints, her history and Dr. Rennie's examination. Dr. Mazarin states that the treatment of tendonitis and bursitis consists of protective wraps to the affected area and the application of ice, and that Dr. Rennie's application of a compression dressing and his discharge instructions were appropriate and medically indicated based upon plaintiff's history and examination. Dr. Mazarin opines that Dr. Rennie did not fail to make a differential diagnosis, nor did he negligently discharge plaintiff from the ELIH's emergency room, as is evidenced by the very specific discharge instructions that he gave to plaintiff prior to her discharge. Dr. Mazarin states that Dr. Rennie specifically instructed plaintiff to look for any signs of infection that might develop, including signs and symptoms for cellulitis.

On the issue of causation, Dr. Mazarin states that it is unclear as to whether plaintiff's subsequent left and right foot neuromas were causally related to the infection/cellulitis that she suffered, and that, although an earlier MRI study revealed she suffered from osteomyelitis, a repeat MRI study revealed that the osteomyelitis had resolved. Such opinions certainly do not emphatically demonstrate a failure to link the malpractice to the alleged injuries and in fact may suggest that there is some link. A statement that a particular injury (osteomylitis) had resolved over a period of time, however short, says nothing about causation. Further it would appear that the selection of the word unclear with regard to the plaintiff's foot neuromas does little to inform this court of a lack of cause and effect. Finally, Dr. Marazin concludes, within a reasonable degree of medical certainty, that the care and treatment provided to plaintiff by Dr. Rennie at ELIH on September 19, 2006 was within accepted medical standards of care, and that no action or inaction by Dr. Rennie proximately caused or contributed to plaintiff's subsequent injuries. The latter, on causation, seems to contradict his specific opinions and can be said to be nothing more than an unsupported generalization.

In opposition to Dr. Rennie's prima facie showing, at least on the issue of malpractice, plaintiff has raised a triable issue of fact as to whether Dr. Rennie departed from good and accepted medical practice. (*see* ***Barrett v Hudson Val. Cardiovascular Assoc., P.C.***, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; ***Upshur v Staten Is. Med. Group***, 88 AD3d 785, 930 NYS2d 649 [2d Dept 2011]; ***Rea v Gallagher***, 31 AD3d 731, 818 NYS2d 490 [2d Dept 2006]). Plaintiff primarily relies upon the affirmation of her expert, who is licensed to practice osteopathic medicine in the State of New York. In his affirmation, the expert states that, within a reasonable degree of medical certainty, the care and treatment rendered to plaintiff by Dr. Rennie on September 19, 2006 at ELIH was not within the confines of good and acceptable medical care, and that the departures proximately caused or contributed to plaintiff's injuries. The expert states that Dr. Rennie should have performed blood work on plaintiff during her September 19th visit, because he felt warmness in her right foot and plaintiff told him that she did not have any swelling or pain after dropping a vacuum cleaner on her foot. He further considered her representations that she did have redness approximately 3 inches in diameter when she saw Dr. Rennie. According to the expert, Dr. Rennie's "cross out" in plaintiff's emergency room records indicates that he was hesitant in stating whether her right foot was abnormally warm, a fact left unexplained by Dr. Rennie. In addition, the expert states that the significant number of the "well healed" chigger bites which were still itching should have put Dr. Rennie on notice that the swelling may have been caused by an infection, and that he should not have concluded that it was a sprain without performing a more in-depth differential diagnosis. Furthermore, the expert states that, if Dr. Rennie considered that plaintiff had an infection in his differential diagnosis, he should have ordered a blood test. Moreover, the expert states that any elevation above 10.8 in a person's white blood count is a determining factor of a possible infection,(unlike the characterization of Dr. Mazarin, and that if plaintiff's blood count was 12.5 two days after visiting the emergency room of ELIH, then any statement that plaintiff's white blood count would have been normal when she visited ELIH is speculation, and not based upon medical literature. However, the expert states that, "if Dr. Rennie ordered blood work and it revealed that plaintiff's white blood count was normal then Dr. Rennie's discharge instructions would have been proper as a precaution, because absent a fall or twisting of the foot, a sprain would not occur."

The affirmation of plaintiff's expert, which concludes that plaintiff's injuries were proximately caused by Dr. Rennie's failure to perform blood work, and to properly and timely diagnose her with an infection when she presented to ELIH's emergency department on September 19, 2006, may not be specific with regard to causation and may be too generalized to raise a triable issue of fact on the issue of causation. (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Forrest v Tierney***, 91 AD3d 707, 936 NYS2d 295 [2d Dept 2012]; ***Simmons v Brooklyn Hosp. Ctr.***, 74 AD3d 1174, 903 NYS2d 521 [2d

Dept 2010]: ***Cerny v Williams***, 32 AD3d 881, 822 NYS2d 548 [2d Dept 2006]) However, the need for such appropriate information is only required if the causation had been put into issue by Dr. Rennie. The 2nd Department has taken the position that "... to defeat summary judgment, the nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing."(see ***Stukis v. Streiter***, 83 A.D.3d 18, [2d Dept. 2011]) At issue then is whether Dr. Rennie has met his burden regarding causation by opining that some of the injuries may or may not have been caused by Dr. Rennie's malpractice and that some of the injuries alleged had resolved themselves. As the court has already suggested, it believes he did not. As that is the case, plaintiff need not submit evidence rebutting same and the court need not consider the adequacy of same.

It should be noted that in reply to the plaintiff's opposition, Dr. Rennie argues that plaintiff's expert suggested that if blood work were conducted by Dr. Rennie and the results were negative, his later actions with respect to discharge were appropriate. Dr. Rennie then argues that such a position is totally inconsistent with plaintiff's claim of causation. To quote Dr. Rennie's counsel in his affirmation at paragraph 8, "[w]ithout knowledge as to what the while (sic) blood count was on September 19, 2006 which is conceded by Dr. Ruggiero as unknown, then there can be no way that Dr. Ruggiero can provide an opinion to a reasonable degree of medical certainty that the failure by DR. RENNIE to order blood work was a proximate cause of plaintiff's injuries.". Although the statement in question may be subject to a different interpretation, it would appear that if it is interpreted as counsel does here, it would impose a very difficult burden for plaintiff in proof. However as Dr. Rennie has failed in his burden of placing the question of causation before the court, that issue must await trial.

In fact, in this failure to diagnose case wherein the failure led to a 2 day delay in treatment, it is difficult for the court to understand how so little is said about causation in all the parties' papers. These type of cases, usually involving the failure to diagnose cancer and sometimes involving the failure to conduct the proper test to determine same, present themselves to the court with the question on causation of "did the delay in diagnosis lead to a worse result?" In the normal course the delay is for some months or even years and a medical expert can say with a reasonable degree of medical certainty that such a delay, in those cancer cases, had the effect of lessening the patient's chances of survival. Here plaintiff leaves us with no information from her expert on that issue as to the impact of the delay on the alleged injuries but as stated above that matter will await trial.

Accordingly, Dr. Rennie's motion for summary judgment dismissing the complaint against him is denied.

ELIH also does not establish its entitlement to judgment as a matter of law dismissing plaintiff's complaint although with regard to certain theories of liability and damages it in fact does meet that burden. ELIH maintains that plaintiff suggests two theories of liability and cannot sustain either. It contends that plaintiff alleges that the hospital, through its employees, was negligent and also that ELIH is responsible for the acts of Dr. Rennie.

To the extent that plaintiff alleges that ELIH is liable, through its employees, for its own negligent acts, ELIH has established, prima facie, that its nursing staff did not depart from the applicable standards of medical and nursing care in rendering treatment to plaintiff during her September 19th visit to its emergency department and, in any event, that the emergency treatment received by plaintiff from its nursing staff was not a proximate cause of her alleged injuries (*see* ***Tartaglia v Northen Duchess Hosp.***, 84 AD3d 1061, 925 NYS2d 514 [2d Dept 2011]; ***Shahid v New York City Health & Hospitals Corp.***, 47 AD3d 800, 850

NYS2d 519 [2d Dept 2008]; ***Fernandez v Elemam***, 25 AD3d 752, 809 NYS2d 513 [2d Dept 2006]; ***Ericson v Palleschi***, 23 AD3d 608, 806 NYS2d 667 [2d Dept 2005]). It is fundamental that the primary duty of a hospital's nursing staff is to follow the physicians' orders, and that a hospital, generally, will be protected from tort liability if its staff follows the orders (***Toth v Community Hosp. at Glen Cove***, 22 NY2d 255, 265, 292 NYS2d 440 [1968]; *see* ***Sledziewski v Cioffi***, 137 AD2d 186, 538 NYS2d 913 [3d Dept 1988]). "Not every negligent act of a nurse [is] considered medical malpractice, but a negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice" (***Bleiler v Bodnar***, 65 NY2d 65, 72, 489 NYS2d 885 [1985]; *see* ***Spiegel v Goldfarb***, 66AD3d 873, 889 NYS2d 45[2d Dept 2009]). This conclusion is no different with respect to the emergency room nurse, functioning in that role as an integral part of the process of rendering treatment to a patient (***Bleiler v Bodnar***, *supra* at 72, 489 NYS2d 885).
ELIH's expert, Dr. Mustalish, who is board certified in emergency medicine, states in his affidavit that, within a reasonable degree of medical certainty, the care provided to plaintiff by ELIH's emergency department staff, and by Dr. Rennie, was in accordance with good and accepted standards of medical and nursing care. Dr. Mustalish further states that the care provided to plaintiff on September 19, 2006 did not proximately cause or contribute to the injuries she allegedly sustained. Dr. Mustalish opines that the nursing staff of ELIH timely and appropriately performed a triage assessment of plaintiff, including obtaining her vital signs, pertinent complaints, prior medical and surgical histories, and appropriately documented such information in the hospital chart. He states that the nursing staff appropriately followed Dr. Rennie's orders, and timely and appropriately arranged for an x-ray of plaintiff's right foot. Dr. Mustalish explains that nurses do not have the authority to order any diagnostic tests, such as blood tests, or antibiotics, nor do they have the authority to discharge a patient for which a physician's order is indicated. According to Dr. Mustalish, nurses do not have the authority or expertise to diagnose or tender an impression about a patient's medical condition or to decide whether specific treatment is indicated for a particular patient. He also states that nurses are not authorized or trained to supervise or instruct a physician's treatment and diagnosis except in the most egregious of circumstances, and that there is no evidence of egregious misconduct in this case. Therefore, Dr. Mustalish opines, there was no medical basis upon which the nursing staff at ELIH should have questioned Dr. Rennie regarding his care, treatment and diagnosis of plaintiff. Furthermore, Dr. Mustalish states that it was within good and accepted medical and nursing practice for the nurse, who answered plaintiff's call on September 20, 2006, based upon plaintiff informing the nurse that she had a sprain in her right foot, to inform her to continue to follow the discharge instructions, because plaintiff did not relay any new signs or symptoms, and did not complain about a fever or chills. In fact, plaintiff informed the nurse that her temperature was 98 degrees, which is considered normal and not indicative of an infection.

ELIH further demonstrated that its nursing staff followed the orders of Dr. Rennie, that Dr. Rennie's orders were not contraindicated by normal practice, and that its nursing staff did not commit any independent acts of negligence (see ***Bellafiore v Ricotta***, 83 AD3d 632, 920 NYS2d 373 [2d Dept 2011]; ***Schultz v Shreedhar***, 66 AD3d 666, 886 NYS2d 484 [2d Dept 2009]; ***Martinez v La Porta***, 50 AD3d 976, 857 NYS2d 194 [2d Dept 2008]; **Cook v Reisner**, 295 AD2d 466, 744 NYS2d 426 [2d Dept 2002]).

ELIH also argues that it is not responsible for the actions of Dr. Rennie and further that his treatment was appropriate and with the standard of care. It argues that there is no basis to hold ELIH vicariously liable for Dr. Rennie's alleged negligent acts unless its staff committed independent acts of negligence or the attending physician's order were contraindicated by normal practice (*see* ***Corletta v Fischer***, 101 AD3d 929, 956 NYS2d 163 [2d Dept 2012]; ***Sela v Katz***, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]).

"Affiliation of a doctor with a hospital or other medical facility, not amounting to employment, is insufficient to impute the doctor's negligent conduct to the hospital or the medical facility" (***Keitel v Kutz***, 54 AD3d 387, 390, 866 NYS2d 195 [2d Dept 2008], *citing* ***Hill v St. Clare's Hosp.***, 67 NY2d. 72, 79, 499 NYS2d 904 [1986]; *see also* ***Toth v Bloshinsky***, 39 AD3d 848, 850, 835 NYS2d 301 [2d Dept 2007]; ***Cerny v Williams***, 32 AD3d 881, 882 NYS2d 548 [2d Dept 2006]) ELIH has submitted a copy of its contract with Paragon Emergency Medicine, P.C. ("Paragon"), wherein said contract states:

> "Paragon is engaged as the exclusive provider of professional medical services in emergency medicine, consisting of the services of physicians, physician's assistants and nurse practitioners trained in emergency treatment of patients...Paragon shall provide medical services... required under this Agreement only through physicians, physician's assistants and nurse practitioners who are shareholders of, employed by or under contract with Paragon. Paragon and physicians, physician's assistants and nurse practitioners shall not be employees of ELIH, and Paragon shall prohibit physicians, physician's assistants and nurse practitioners from holding themselves out as employees of ELIH in any way."

The submission of the contract between ELIH and Paragon demonstrates that when Dr. Rennie treated plaintiff he was not an employee of ELIH. (*see* ***Sullivan v Sirop***, 74 AD3d 1326, 905 NYS2d 240 [2d Dept 2010]; ***King v Mitchell***, 31 AD3d 958, 819 NYS2d 169 [3d Dept 2006]). Additionally, the affidavit of Patricia Pispisa, Vice President of Patient Care Services at ELIH, who is familiar with the members of the medical staff at ELIH and the nature of each member's relationship to the hospital, states that Dr. Rennie was not an employee of ELIH on September 19, 2006 or at any other time. It states that Dr. Rennie is a member and employee of Paragon, and that Paragon was the exclusive provider of professional medical services in the emergency department. Pispisa asserts in her affidavit that ELIH did not control or direct the professional medical services rendered to plaintiff by Dr. Rennie on September 19, 2006 in the emergency department, nor did it assign Dr. Rennie to render such professional services. Pispisa explains that ELIH did not reimburse Dr. Rennie for his professional services, nor did it grant Dr. Rennie the right and privileges that have been established for employees of ELIH. Furthermore, she indicates that Dr. Rennie, according to ELIH's contract with Paragon, is a shareholder, employee or independent contractor with Paragon.

Additionally, Dr. Mustalish states that Dr. Rennie's treatment of plaintiff was within good and acceptable standards of medical care, that he ordered the appropriate tests, and that he properly discharged plaintiff from the emergency department of ELIH on September 19, 2006. Dr. Mustalish states that there was no indication from plaintiff's history, complaints, or physical examination of an infection in her right foot and, thus, there was no need to prescribe an antibiotic, obtain blood work or perform additional diagnostic testing of plaintiff. He explains that plaintiff, upon examination, did not exhibit any evidence of erythema (redness), streaking, fever, or increased heart rate, which are the typical signs and symptoms of cellulitis. Dr. Mustalish states that as plaintiff did not manifest any signs or symptoms of cellulitis when she presented to the emergency department at ELIH, it was appropriate for Dr. Rennie to discharge her from the emergency department, and that Dr. Rennie's discharge instructions were specific and in accordance with good and acceptable medical care. Dr. Mustalish further states that when plaintiff presented to Peconic Bay Medical Center's emergency department on September 21, 2006, her clinical condition had dramatically changed since her presentation at ELIH's emergency department on September 19, 2006. Moreover, Dr. Mustalish states that plaintiff's right foot cellulitis and osteomyelitis did not cause

her alleged neuritis or neuromas, since neuromas occur spontaneously and have no relation to plaintiff's claim that she favored one foot over the other.

In opposition to ELIH's prima facie showing on the issue of ELIH being negligent in its own right, plaintiff failed to raise a triable issue of fact. Indeed, plaintiff's expert's affirmation failed to allege any departure from the applicable medical standard of care by ELIH's nursing staff that would have proximately caused or contributed to any of plaintiff's alleged injuries (*see* ***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]). Plaintiff failed to present any proof to refute the opinion of ELIH's experts that its nursing staff did not commit any independent acts of negligence, or to identify an action or omission committed by any identified employee of ELIH which caused plaintiff's injury (*see* ***Gardner v Brookdale Hosp. Med. Ctr.***, 73 AD3d 1124, 901 NYS2d 680 [2d Dept 2010]; ***Rizzo v Staten Is. Univ. Hosp.***, 29 AD3d 668, 815 NYS2d 162 [2d Dept 2006]; ***Christopherson v Queens-Long Is. Med. Group, P.C.***, 17 AD3d 393, 792 NYS2d 608 [2d Dept 2005]).

However, with respect to the claim that ELIH may be vicariously liable for the actions of Dr. Rennie, plaintiff correctly points out that there is an exception to the general rule regarding independent contractors when a person is treated in an emergency room of a defendant hospital. Hospitals may be held vicariously liable for the acts of independent physicians where the patient entered the hospital through an emergency room and sought treatment from the hospital and not a particular physician (see ***Salvatore v Winthrop Univ. Med. Ctr***., 36 AD3d 887, 888 [2007];***Monostori v Murphy***, 34 AD3d 882, 883-884 [2006]; Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2005];***Torns v Samaritan Hosp***., supra at ***967;Citron v Northern Dutchess Hosp.***, 198 AD2d 618, 620 [1993],lv denied 83 NY2d 753 [1994];see also ***McDonald v Ambassador Constr. Co.***, 273 AD2d 108, 109 [2000];***Abraham v Dulit***, 255 AD2d 345 [1998];***Ryan v New York City Health & Hosps. Corp.***, 220 AD2d 734, 736 [1995]). . Although generally a hospital may not be held liable for the malpractice of a physician who is not an employee of the hospital (see, e.g., ***Sledziewski v Cioffi***, 137 AD2d 186, 188-189), a hospital may be held vicariously liable for the acts of independent physicians if the patient enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician(***Citron v Northern Dutchess Hosp***.198 A.D.2d 618, 603 N.Y.S.2d 639N.Y.A.D.,1993, citing ***Mduba v Benedictine Hosp***., 52 AD2d 450, 453; ***Noble v Porter***, 188 AD2d 1066; ***Agustin v Beth Israel Hosp***., 185 AD2d 203, 205-206; ***Soltis v State of New York***, 172 AD2d 919). In th[e] line of cases [dealing with emergency room settings] we have held that "a hospital may be held vicariously liable for the acts of independent physicians if the patient enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician" (***King v Mitchell*** 31 A.D.3d 958, 819 N.Y.S.2d 169NY,2006, citing ***Citron v Northern Dutchess Hosp***., 198 AD2d 618, 620 [1993],lv denied83 NY2d 753 [1994]). Here, plaintiff alleges that she entered the hospital through the emergency room seeking treatment from the hospital and not from Dr. Rennie and thus adequately raises an issue of fact in that regard.

With respect to the position of ELIH regarding the care and treatment rendered by Dr. Rennie to the plaintiff as it applied to the standard of care rendered, as stated previously, the court finds that the plaintiff has adequately opposed the motion and the statements made previously with regard to Dr. Rennie's motion on the issue of liability are adopted here.

However the court finds that, with respect to the issue of causation as it applies to the claim of neuritis and neuromas, the plaintiff has not adequately raised an issue of fact so as to defeat ELIH's assertion that such damages were not causally related to the alleged malpractice.

Accordingly, Eastern Long Island Hospital's motion for summary judgment dismissing plaintiff's complaint against it is granted to the extent that any claims regarding liability based on the actions of employees of ELIH are dismissed as are any claims for damages arising from neuritis or neuromas plaintiff is alleged to have sustained. It is otherwise denied.

So ordered.

Dated: September 30, 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION