

Soares v Greenblatt
2013 NY Slip Op 33130(U)
December 6, 2013
Supreme Court, Suffolk County
Docket Number: 06-15565
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX No. 06-15565
CAL No. 13-00030MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 1-2-13 (#003)
MOTION DATE 2-27-13 (#004)
MOTION DATE 5-8-13 (#005)
MOTION DATE 5-20-13 (#006)
MOTION DATE 7-10-13 (#007)
ADJ. DATE 11-20-13
Mot. Seq. # 003 - MD # 006 - MG
004 - MG # 007 - MG; CASEDISP
005 - MG

MARGO SOARES and STEVE SOARES,

Plaintiffs,

- against -

LOUIS GREENBLATT, D.O., LOUIS
GREENBLATT, D.O., P.C., DONNA LESSER,
M.D., DONNA LESSER, M.D., P.C., MORTON
WEINBERG, M.D., MORTON WEINBERG,
M.D., P.C., ST. CATHERINE OF SIENA
MEDICAL CENTER & SOUTHSIDE
HOSPITAL,

Defendants.

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Upon the following papers numbered 1 to 98 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1-13; (004) 14-15; (005) 16-30; (006) 31-49; (007) 50-69; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 70-15; 76-78; 82-83; 84-85- 86-91; Replying Affidavits and supporting papers 79-81;92-93; 94-95; 96-98: Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that motion (003) by defendant, Donna Lesser, D.O. s/h/a Donna Lesser, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against her has been rendered academic by service of the amended notice of motion (004), and is denied as moot; and it is further

ORDERED that motion (004) by amended notice of motion by defendant, Donna Lesser, D.O. s/h/a Donna Lesser, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against her is granted; and it is further

ORDERED that motion (005) by defendant, Southside Hospital, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against it is granted; and it is further

ORDERED that motion (006) by defendants, Morton Weinberg, M.D. and Morton Weinberg, M.D., P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against them is granted; and it is further

ORDERED that motion (007) by defendants, Louis Greenblatt, D.O. and St. Catherine of Siena Medical Center, pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against them is granted.

In this medical malpractice action, the plaintiff, Margo Soares, seeks damages for personal injuries allegedly caused by the defendants' negligent departures from the good and accepted standards of care during their care and treatment of a skin condition on or about June 4, 2005 through July 13, 2005. It is alleged that as a result of the lesions and the negligent treatment that the plaintiff suffered, inter alia, hyper and hypo-pigmentation and scarring. It is further asserted by the plaintiff that she suffered an allergic reaction to DynaCirc or an antibiotic which worsened her condition. Causes of action premised upon defendants' alleged negligence, and a derivative cause of action on behalf of the plaintiff's spouse, Steve Soares, have been asserted.

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*). 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, 427 NYS2d 595 [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, 435 NYS2d 340 [2d Dept 1981]).

In support of motions (003) and (004), defendant Lesser has submitted, inter alia, an attorney's affirmation; the affirmation of Irwin Ingwer, M.D.; copies of the summons and complaint, Lesser's answer, plaintiffs' verified bill of particulars; the unsigned but certified transcript of the examination before trial of Louis Greenblatt, D.O. dated August 14, 2008 which is not objected to (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); the unsigned but certified copy of the transcript of the examination before trial of Donna Lesser, M.D. dated December 3, 2009 which is adopted as accurate (*see Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); the certified record from St. Catherine of Siena; and other uncertified medical records which are not in admissible form pursuant to CPLR 3212 and 4518 (*Friends of Animals v Associated Fur Mfrs.*, *supra*). Expert testimony is limited to facts in evidence (*see also Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), and the uncertified records are not admissible.

In support of motion (005), defendant Southside Hospital has submitted, inter alia, an attorney's affirmation; the affirmation of Gregory Mazarin, M.D.; copies of the summons and complaints, it verified answer; copy of the order dated July 31, 2007 (Cohalan, P.) consolidating two actions; plaintiffs' verified and supplemental, and amended bill of particulars; signed and certified copy of the transcript of the examination before trial of Louis Greenblatt, D.O. dated August 14, 2008; uncertified copies of medical records which are not in admissible form; and the certified copy of the Southside Hospital emergency department record.

In support of motion (006), the Weinberg defendants have submitted, inter alia, an attorney's affirmation; expert affirmation of Irwin Ingwer, M.D.; affidavit of Robert P. Feinstein, M.D.; copies of the summons and complaint, their answer and demands, and plaintiffs' verified bill of particulars, and amended bill of particulars; the unsigned, double-sided transcript of the examination before trial of Margo Soares dated February 19, 2008 which is not in admissible form pursuant to 22 NYCRR 202.5; the transcripts of the examinations before trial of Louis Greenblatt, D.O. dated August 14, 2008 and Donna Lesser, D.O. dated December 3, 2008, and Morton Weinberg dated July 14, 2008, which are considered (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); uncertified medical records which are not in admissible form pursuant to CPLR 3212 and 4518; and certified record from St. Catherine of Siena.

In support of motion (007) defendants Greenblatt and St. Catherine of Siena have submitted, inter alia, an attorney's affirmation; the affirmations of Richard Blum, M.D., Irwin Ingwer, M.D.; copies of the summons and complaint, their answers and demands, and plaintiffs' verified and amended verified bill of particulars; the double-sided transcript of the examination before trial of Margo Soares which is not bound on the side, and is not in admissible form pursuant to 22 NYCRR 202.5; the signed and certified transcript of the examination before trial of Louis Greenblatt, D.O. dated August 14, 2008; an unsigned and uncertified copy of the transcript of the examination before trial of Donna Lesser, D.O. (*see Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]) but is considered in motion (004); the unsigned but certified copy of the transcript of the examination before trial of Morton Weinberg, M.D.; uncertified medical records which fail to comport with CPLR 3212 and 4518; and a certified copy of the St. Catherine of Siena Hospital Medical Center record.

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, 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 Derdiarian 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]).

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]).

"The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

Dr. Louis Greenblatt, M.D. testified to the extent that he is a physician licensed to practice in New York State since 1983, having received a doctorate of osteopathic medicine. He is board certified in family medicine with an additional board certification in geriatric medicine, and is board eligible for certification in anti-aging medicine. He is engaged in his own practice. Margo Soares was a patient at his office from October 29, 1996. He saw her on June 4, 2005 when she presented with complaints of insect bites which she had for one week. They appeared as raised red, itchy lesions on both lower legs. He prescribed Reflex 500 mg, three times a day, and administered an injection of Lincocin, both antibiotics. She had a history of being allergic to Penicillin and Ceclor. He also gave her a prescription for DynaCirc for her diabetes, and advised her to lose weight. On June 5, 2005, she was seen in the emergency room at Southside Hospital, and discharged, after being advised to continue the treatment she had been using. On June 7, 2005, the plaintiff called Greenblatt's office with complaints of swelling of her legs, and oozing sores, but she had no fever. She was advised to use cool compresses and elevate her legs. Gluophage XR was prescribed for her diabetes and she was instructed to continue the Reflex and to monitor her blood sugar levels. She presented to Dr. Greenblatt again on June 7, 2005, at which time he noted that she had infected, ulcerated insect bites which were getting worse, and for which he advised hospital admission. However, the plaintiff refused admission secondary to child care concerns. He changed her antibiotic to Levaquin 750 mg daily, and gave her samples. She was to check her blood sugar four times a day and take her blood pressure medication, eat a low sodium diet, and eat no sweets. She returned to the office on or June 8, 2005, with worsening of the lesions on her lower legs, and an elevating temperature, and was admitted by Dr. Greenblatt to St. Catherine of Siena.

Dr. Greenblatt continued that he spoke with Donna Lesser, M.D. a specialist in infectious disease, and asked her to see the plaintiff on consultation. He suggested intravenous antibiotics, a wound culture, and whirlpool therapy to plaintiff's bilateral lower extremities. The plaintiff's admitting diagnosis was diabetic foot/leg infection, cellulitis. Dr. Lesser recommended an intravenous antibiotic, Invanz. The plaintiff's blood sugars became uncontrolled, so she was started on Humulin insulin. By June 12, 2005, she developed desicckle blisters, fluid filled lesions, higher up. Her diagnosis was that of bacterial infection of the skin, possible varicella (chicken pox) blisters for which a titre was drawn on June 11, 2005. The wound culture revealed Staphylococcus Sciuri, for which she was receiving good antibiotic coverage. Dr. Greenblatt called Dr. Weinberg for a dermatology consultation and a biopsy of the lesions. He also called Dr. Khan, for a vascular consultation. Dr. Kahn indicated that the plaintiff had some boils and pimples on her legs, but mostly ulcerations with full thickness necrosis. Bactroban antibiotic ointment and Accuzyme to debride the lesions were ordered. He did not consider a drug eruption in his differential. The plaintiff was discharged home on June 13, 2005, and was to continue treatment with Dr. Weinberg until her condition resolved. However, she returned to Dr. Greenblatt's office on June 15, 2005. Her Varicella IGM titre indicated a prior, but not current, infection with chickenpox. He ordered Famvir, an antiviral, for one week, as there was no downside to her taking it. On June 17, 2005, she had a biopsy performed by Dr. Weinberg. The plaintiff called Dr. Greenblatt's office on June 20, 2005, indicating that blisters were less, she had no fever, and was taking an antibiotic, Cefadroxil, ordered by Dr. Weinberg. Her glucose was elevated to 154, and her feet were swollen and painful.

Dr. Greenblatt continued that the plaintiff returned to his office on June 21, 2005, and he admitted her to Stony Brook University Hospital as he believed her condition had worsened as she had bullous (blister) lesions on her legs. She was seen there by a dermatologist, Dr. Kalish, who was not sure what she had, so another biopsy was obtained, resulting in a diagnosis of bullous impetigo caused by a staphylococcus infection. DynaCirc, which she was taking for her diabetes, was stopped, due to a possible allergic reaction, however, he did not feel the skin condition looked like an allergic reaction. She was discharged July 1, 2005, improved. He saw her thereafter in his office on July 6, 2005, with the assessment of bulbous impetigo. On July 6, 2005, she complained that her legs were painful, she had pararesthesia (pins and needles), and he noted scabbing all over the legs, improving. He ordered Dawkins Solution and Bactroban ointment. She was to follow up with Dr. Weinberg and Dr. Berger, a hematologist/oncologist. When he next saw her on July 16, 2005, her legs sores were drying up. He gave her pain medication. On July 22, 2005, he discussed the patient's condition with Dr. Weinberg. On August 17, 2005, her legs were improved when she returned to his office. On November 26, 2005, she complained of depression. He noted areas of hypo and hyper pigmentation of her legs. His impression was that she had infected insect bites with bullous impetigo.

Donna Lesser, M.D. testified to the extent that she received a doctor of osteopathy, is licensed to practice medicine in New York State and North Carolina, and is board certified in internal medicine. Her records indicated that she was contacted by Dr. Greenblatt to see Margo Soares on consultation, and did so on June 9, 2005. She noted that the plaintiff was a 47 year old female with diabetes with open sores and redness, swelling of both legs for one week from insect bites, which developed papules which became itchy and progressed. At the time, she was taking Tylenol, Benadryl and Ambien. Her glucose was mildly elevated. Dr. Lesser felt the presentation for an impetigo staph-like infection was variable, as there were honey crusted lesions, lesions with central necrosis, lesions with papules with a necrotic base, and neck biosis which is rare and can be seen in diabetic patients. She considered a fungal infection as well because

the lesions looked scaly. She ordered Intraconazole for fungus, Invanz for bacterial infection, a culture, deep swab C&S for fungal infection, a dermatological consultation, and a vascular consultation with Dr. Khan who treats diabetic leg lesions. Dr. Lesser continued that she saw the plaintiff's lesions on June 10, 2005 after the bandages were removed, and noted they were located bilaterally about the ankle with central necrosis around the margin. She felt that they looked fungal. There were also new lesions noted. Papules with vesicles were noted under the plaintiff's arms, on June 11, 2005, so she expanded her differential diagnosis to Rocky Mountain Spotted Fever, Varicella, viral illnesses and added Doxycycline as an additional antibiotic. She ordered a Rocky Mountain Spotted Fever IGG/IGM test, and Varicella titre, and ordered Varicella precautions. Dr. Greenblatt ordered a Cocksackie virus panel. She noted that the Invanz was not helping much. Dr. Lesser stated that when she saw the plaintiff on June 13, 2005, none of the cultures and sensitivities had been received. The plaintiff was discharged on June 14, 2005. She had no further contact with the plaintiff thereafter. Dr. Lesser stated that she considered a medication reaction in her differential, but no specific medication was considered.

Dr. Weinberg testified to the extent that he is a physician licensed to practice medicine in New York and is board certified in dermatology since 1965. He stated, that according to his notes, on June 10, 2005, he received a call from Dr. Greenblatt to see Margo Soares at St. Catherine of Siena on consultation. He saw the plaintiff on June 13, 2005. His note indicated that the plaintiff developed intense itching after working out of doors. She stated that she had contact with material which had the odor of cat feces and urine. Blisters on her arms and legs were noted to have increased since admission. He observe bulbous vesicular blisters and ulcerations in the ankle and legs. His differential diagnoses were, insect bites, contact dermatitis, bulbous eruption, bulbous pemphigoid, viral, and rule out varicella, which he stated, the clinical picture did not support. He discontinued the Doxycycline she had been receiving for five days, along with intravenous Invanz, as it was no longer needed. Bactroban was being used for secondary infection. He did not know that she was being discharged. He did consider impetigo, which he described as an infection caused by bacteria, often staphylococci, which causes crusting and blisters, and can produce purulence. If the impetigo is localized, Bactroban is very useful without any oral antibiotic. Dr. Weinberg testified that he attributed the ulcers to plaintiff's diabetes for which she was taking Glucophage. He did not take cultures of fluid from the blisters as cultures had been taken, and the medication she was taking covered staphylococcus infection.

Dr. Weinberg testified that he saw the plaintiff on June 16, 2005, at his office and performed a biopsy of a bullous lesion on her left arm. He obtained the results the following day, and placed her on an appropriate antibiotic, Duricef, which she started on June 17, 2005. She told him she started running a fever, so the antiviral drug was stopped, and Bactroban and the enzyme cream were continued. He felt her condition was greatly improved, but she complained of skin discoloration. He testified that she had African skin, and although it was healing wonderfully, it becomes hypopigmented and further pigmented with residual darkness at the sites due to inflammation. He advised her that he was going out of town on June 24, 2005, and made arrangements for her to be seen by Dr. Kalish, the head of the dermatology department at Stony Brook University Hospital. He also spoke with Dr. Greenblatt on June 22 or 23, 2005 to advise him of the plaintiff's condition. Dr. Kalish admitted the plaintiff to Stony Brook on June 21, 2005, and obtained a biopsy which revealed a diagnosis of bullous impetigo made by pathologist Dr. McCain. Dr. Weinberg stated that the bulbous impetigo would have been addressed by the Duricef which he had prescribed on June 17, 2005. Dr. Weinberg stated that he saw the plaintiff again on July 30, 2005, at which time he noted residual pigmentary changes on her legs which were pretty much healed, and also at the sites of the bulla on her arms. She expressed concern to him that her skin condition had been caused by the drug

DynaCirc, but Dr. Weinberg stated that there was only a one percent chance of that drug being the cause. He received a letter dated July 22, 2005, from Dr. Berger, an oncologist/hematologist, who advised that the plaintiff told him someone told her that the DynaCirc caused her problem. Dr. Weinberg stated that he never saw the plaintiff as a patient after July 30, 2005.

In motion (004), defendant Donna Lesser, M.D. submitted the affirmation of her expert, Irwin Ingwer, M.D., a physician licensed to practice medicine in New York State who is board certified in internal medicine and infectious disease. Dr. Ingwer did not either provide a copy of his curriculum vitae or information about his training and work experience to qualify his expertise in this matter. However, his affirmation is considered.

Dr. Ingwer stated that Margo Soares is a 46 year old woman, originally from Barbados, who, on Memorial Day weekend, 2005, noted intense itching after working in her garden. She was admitted to St. Catherine of Siena Medical Center on June 8, 2005, by her family practitioner, Louis Greenblatt, M.D., who had been treating her on an outpatient basis with oral antibiotics, an intramuscular injection of Lincocin on June 4, 2005, and Levaquin as of June 7, 2005, for ulcers which developed on her legs. When Dr. Greenblatt advised the plaintiff of her need to be admitted to the hospital on June 7, 2005, she declined. At the time of her admission on June 8, 2005, the lesions had spread to her upper extremities, and she was started on intravenous antibiotics. She was seen by defendant Donna Lesser, for an infectious disease consultation on June 10, 2005. Dr. Ingwer continued that Dr. Lesser found multiple bilateral lesions on the anterior and posterior tibial (lower leg) surfaces with crusting, necrosis, and a surrounding rim of erythema with a few papules with necrotic base. It was her impression that the plaintiff probably had a staph/impetigo infection, and possibly a fungal infection or necrobiosis-a necrotizing skin infection which occurs in diabetics. The plaintiff was a diabetic.

Dr. Ingwer continued that cultures were taken of the right lower leg on June 8, 2005, which grew staphylococcus sciuri, sensitive to Invanz, inter alia, which the plaintiff was receiving. Two additional cultures were taken on June 10, 2005, one from each leg, which showed no growth. Thus, opined Dr. Ingwer, Dr. Lesser prescribed the correct antibiotics, and there was no basis to biopsy the lesions at the time while the plaintiff was hospitalized. On June 25, 2005, when a biopsy was later performed, the diagnosis of bulbous impetigo was made, for which Dr. Lesser was already treating the plaintiff. Dr. Ingwer continued that Dr. Lesser also ordered other appropriate testing to rule out other possible causes of the skin lesions, including Varicella and Rocky Mountain Spotted Fever, and prophylactically, ordered an anti-fungal. Whirlpool cleansing treatments of the legs were performed at St. Catherine's and continued by Dr. Lesser to cleanse and debride the wounds. When necrosis was noted on June 9, 2005, a consult was done by Dr. Khan on June 10, 2005. Dr. Weinberg performed a dermatological consult while the plaintiff was at St. Catherine of Siena. When the plaintiff was discharged from the hospital on June 13, 2005, Dr. Lesser no longer participated in her care and treatment. Dr. Ingwer opined that the significance of the plaintiff having necrosis in the lesions is that she was destined to have scarring from the dead tissue, despite proper antibiotic treatment. He concluded that there is nothing that Dr. Lesser did or failed to do which caused or contributed to her injuries.

Based upon the foregoing, it is determined that defendant Donna Lesser, M.D., P.C. has established prima facie entitlement to summary judgment dismissing the complaint.

In opposing Dr. Lesser's motion, the plaintiff has submitted the redacted and unsigned affirmation of her expert physician, and has failed to provide an unredacted copy of her expert's affirmation to this court as required pursuant to *Marano v Mercy Hospital*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]. A redacted version of an expert affidavit lacks evidentiary value. A party may successfully oppose a summary judgment motion without disclosing the names of the party's expert witnesses (*see Marano v Mercy Hospital*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]). In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an unredacted original is provided to the court for its in camera inspection (*Marano v Mercy Hospital*, *supra*). This procedure preserves the confidentiality of the name of plaintiff's medical expert while also preserving plaintiff's obligation in opposing defendant's motion, in that by submitting a redacted affirmation and by offering the original to the court for in camera inspection, plaintiff has opposed the motion by evidence in admissible form (*Rubenstein v Columbia Presbyterian Medical Center*, 139 Misc.2d 349, 527 NYS2d 680 [NY County 1988]). Because an unredacted copy of the affidavit with the expert's name and signature has not been provided to this court under separate cover, the plaintiff's expert affidavit is not in admissible form and is insufficient to raise a triable issue of fact as to the defendant's alleged malpractice (*Rose v Horton Medical Center*, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]). In addition, plaintiff's expert has not provided his or her work experience as a basis for his or her expertise in this matter, nor has he set forth the materials and records which were reviewed in formulating said opinions.

It is determined, however, that even considering the affidavit of plaintiff's expert, the expert has failed to raise a triable issue of fact and has set forth conclusory and unsupported opinions.

The plaintiff's expert opined that Dr. Lesser departed from good and accepted standards of medical practice in failing to consider whether plaintiff was having an allergic reaction to DynaCirc, because it is his/her opinion that the plaintiff presented with an allergic reaction to DynaCirc, and that Dr. Lesser caused a continued reaction and secondary infection by continuing the plaintiff on the medication. However, plaintiff's expert's opinion is conclusory and unsupported by any evidentiary submissions, such as blood tests or other diagnostic testing which support this opinion. Plaintiff's expert fails to set forth plaintiff's symptoms to distinguish between an infection and allergic reaction in the plaintiff, and how DynaCirc caused a secondary infection. Nor does he set forth the standard of care which should have been followed.

Plaintiff's expert opined that Dr. Lesser treated the plaintiff with intravenous Invanz despite her being allergic to Penicillin, which he stated is a Penicillin-type drug. However, he does not state that Invanz is contraindicated in patients with Penicillin allergy, and this court cannot infer the same. Plaintiff's expert continued that the use of Invanz caused a worsening of the plaintiff's condition, but he does not support this conclusory statement with any evidentiary proof or distinguish the symptoms of the initial infection with those of an allergic reaction to support his opinion.

Plaintiff's expert offers unsupported, conclusory opinions with regard to Dr. Lesser having subjected the plaintiff to additional medications, including Intracozazole, Doxycycline, and Famivir, without a diagnosis, exacerbating plaintiff's allergic reaction. However, he does not indicate how and what exacerbations were caused by those drugs, as distinguished from his opinion that the Invanz caused a worsening of her condition, and provides no basis for such opinion. He does not support his conclusory opinion with evidentiary proof such as blood tests or other laboratory studies, or establish proximate cause between the use of these medications and the damages claimed by the plaintiff.

The plaintiff's expert further opined that Dr. Lesser utilized a shotgun approach in her treatment of the plaintiff and failed to obtain a skin biopsy instead of a skin swab which is unreliable. The plaintiff's expert continued that a skin biopsy should have been sent for culture, special stains for bacteria, AFB, and fungi to determine if an infection was present. However, plaintiff's expert, although indicating that the culture obtained by Dr. Lesser revealed staphylococcus scuri, stated that it is of minimal pathological significance, but he does not rule out that it was not a causative organism and does not opine what the causative organism was to establish that treatment was incorrect. Also, plaintiff's expert does not opine with regard to the biopsy obtained by Dr. Weinberg of June 16, 2005, or the biopsy by Dr. Kalish at Stony Brook University Hospital, in which Dr. McClain diagnosed bullous impetigo. The plaintiff's expert does not opine that the medications that the plaintiff was treating with were not effective against such findings revealed by those tests, and does not set forth the causative organism for plaintiff's bullous impetigo, and whether or not the antibiotics prescribed by Dr. Lesser were effective against such causative organism.

Based upon the foregoing, the plaintiff's expert has failed to raise a genuine factual issue supported by evidentiary proof, standards of care, and bases for his conclusory opinions.

Accordingly, motion (004) is granted and the complaint as asserted against defendant Lesser is dismissed.

It is noted that Southside Hospital submitted an attorney's affidavit, but has not submitted an expert affirmation, in support of its partial opposition to Dr. Lesser's motion for summary judgment, which is the functional equivalent to a trial. Southside Hospital claims it is entitled to the benefits conferred by GOL § 15-108, and Article 16. However, in that the complaint has been dismissed herein against Southside Hospital, its reply has been rendered academic as to Dr. Lesser and Article 16 as a matter of law.

Accordingly, motion (004) by defendants Donna Lesser, M.D. and Donna Lesser, M.D., P.C. for summary judgment dismissing the complaint is granted, even if the plaintiff's expert's unredacted affirmation had been provided to this court for review.

In motion (005), defendant Southside Hospital has submitted the affirmation of its expert, Gregory Mazarin, M.D., a physician licensed to practice medicine in New York State, who is board certified in emergency medicine, and who stated he is familiar with treating patients with bullous impetigo and bug bites, as well as the standard of care applicable to presentation to an emergency room in 2005 for the same. It is Dr. Mazarin's opinion within a reasonable degree of medical certainty that the care and treatment rendered to the plaintiff at Southside Hospital on June 5, 2005 was not the proximate cause of the plaintiff's injuries, and that the staff at Southside Hospital comported with the standard of care in the treatment of the plaintiff.

Dr. Mazarin stated that on June 5, 2005, when the plaintiff presented to Southside Hospital emergency room, she complained of insect bites to both lower extremities for one and a half weeks, and that the bites became infected. She had seen Dr. Greenblatt, her private doctor, and was prescribed Keflex and was given an injection of Lincocin. At Southside Hospital, the plaintiff was diagnosed with cellulitis and was given instructions for the care of the bites, including Benadryl, Tylenol or Advil, and Bacitracin antibiotic ointment, and was told to follow up with her primary care doctor or return to the emergency room if the condition worsened. Dr. Mazarin stated that, considering it was June, and that the plaintiff presented with what looked like bug bites, the diagnosis of bug bites was reasonable, and further consultation was not

warranted. A skin biopsy with gram stain, wound culture, and blood work were not the standard of care for a presentation with insect bites.

Dr. Mazarin continued that bullous impetigo skin infection is caused by staphylococcus aureus, a less common form of impetigo usually seen in children. Keflex, as prescribed by Dr. Greenblatt, is a proper treatment for bullous impetigo. Having been on the medication from only the day before, there was insufficient time for the medication to work by the time she presented to the emergency room. Bacitracin antibiotic ointment, for further antibiotic benefit, was added to the Keflex regimen at Southside Hospital. Dr. Mazarin continued that the treatment received by the plaintiff at Southside Hospital was within the standard of care for treatment of bullous impetigo. Dr. Mazarin concluded that Southside Hospital staff did not depart from the standard of care in treating the plaintiff, and did not proximately cause or contribute to the plaintiff's claimed injuries.

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

The plaintiff has not submitted an expert affirmation in opposition to the motion by Southside Hospital, to raise a triable issue of fact to preclude summary judgment.

Accordingly, motion (005) by Southside Hospital for summary judgment dismissing the complaint as asserted against it is granted.

In motion (006), the Morton Weinberg, M.D. defendants have submitted the affidavit of their expert, Robert P. Feinstein, M.D., a physician licensed to practice medicine in New York who is board certified in dermatology and internal medicine. He has not set forth his education and training. He opined within a reasonable degree of medical certainty, from the perspective of a dermatologist, that the care and treatment rendered by Morton Weinberg, M.D. and Morton Weinberg, M.D., P.C. at all times comported with the good and accepted medical practices, and in no manner, was that care proximately related to any injuries claimed by the plaintiff.

Dr. Feinstein stated that the plaintiff presented with a history of insect bites which occurred while she was doing yard work, and was seen by Dr. Greenblatt. He set forth Dr. Greenblatt's care and treatment, noting that the plaintiff had a history of diabetes and hypertension, including her admission to St. Catherine of Siena Medical Center by Dr. Greenblatt, who requested consults with Dr. Lesser, Dr. Khan, and Dr. Weinberg. Dr. Weinberg saw the plaintiff on June 13, 2005, for a dermatological consultation. Invanz was continued and Calamine lotion for itching, and Bactroban, an antibiotic, were to be continued with the Invanz. Dr. Weinberg agreed with the treatment plan formulated by Dr. Greenblatt, Dr. Khan, and Dr. Lesser. Later that day, the plaintiff was discharged from the hospital, and she followed up on June 16, 2005, with Dr. Weinberg, who recommended a biopsy for some residual lesions, and performed such biopsy of a bullous lesion on the left arm. Dr. Weinberg prescribed Duricef, an antibiotic similar to Keflex, and referred her to Dr. Kalish, head of the dermatology department at Stony Brook University Hospital, because he was going to be away for a couple weeks. However, on June 17, 2005, the plaintiff called him and advised that she had developed a fever overnight, so he discontinued Famvir and ordered Duricef 500 mg. twice a day. Thereafter, Dr. Greenblatt had the plaintiff admitted to Stony Brook University Hospital.

Dr. Feinstein continued that Dr. Richard Kalish saw the plaintiff on June 22, 2005, and elicited the history that the plaintiff had been started on DynaCirc on May 21, 2005 and had extensive sun exposure. He found multiple tense blisters in a widespread distribution upon examination, and noted no oral or mucosa lesions. Some of the bullae were purulent. Dr. Kalish's impression was that of a possible phototoxic reaction to medication, so he ordered a shaved biopsy and immunofluorescent studies. Dr. Steven McClain interpreted these studies as bulbous impetigo. The initial biopsy by Dr. Weinberg did not reveal a definite diagnosis. Gram stain confirmed the presence of gram positive cocci and neutrophils in the superficial blister, which was not surprising under these circumstance, Dr. Feinstein stated.

Dr. Feinstein stated that when Dr. Weinberg last saw the plaintiff on July 30, 2005, the plaintiff advised him that she was doing well, the ulcerations had healed, and she was applying Vaseline to her legs. It was noted that the eruptions may have been the result of blood pressure medication prescribed by Dr. Greenblatt and taken for several weeks. The medication was discontinued and residual pigmentary changes were noted on the legs and sites of bullae on the arms. She was advised to apply Bactroban to any ulcerations and to return to the office if necessary.

Dr. Feinstein continued that the course of antibiotics that the plaintiff had been previously receiving were broad spectrum antibiotics which treated both gram negative and gram positive bacterial infection, and were appropriate to treat the plaintiff's condition. Dr. Feinstein continued that any claim by the plaintiff that a skin biopsy with a gram stain was necessary in treating the plaintiff is completely misplaced and was not a departure by Dr. Weinberg from good and accepted medical practice. As of June 29, 2005, Dr. Kalish's note indicted that there were no new bullae lesions and that the existing lesions were healing. Dr. Feinstein continued that Dr. Weinberg saw the plaintiff on three occasions, and that his dermatological management of the plaintiff was entirely appropriate and conformed to good and accepted standards of care and treatment. Despite the use of antibiotics, the lesions became secondarily infected and the eruptions evolved into bullous impetigo which was adequately treated with oral, intravenous, and topical antibiotics, and whirlpool treatment. Wound cultures had been appropriately obtained on June 8 and June 10, 2005, and no other wound cultures were necessary as the plaintiff was already on a course of antibiotics. The antibiotics received by the plaintiff were appropriate and within the class of antibiotics to which the organism was susceptible.

Dr. Feinstein opined that the concern of a possible allergic reaction to intravenous Invanz has no merit as she would have developed symptoms of an anaphylactic drug reaction: a swollen throat, face, and legs, as well as difficulty breathing. There is no evidence that the plaintiff ever had any such symptoms. Additionally, he stated, drug reactions do not present as local skin eruptions on one place of the body. Dr. Feinstein stated that the plaintiff's clinical presentation was consistent with her stated history of insect bites to the legs and/or exposure to cat feces, and was not consistent with a systemic drug reaction. It is Dr. Feinstein's opinion that the localized leg lesions were not the result of an allergic reaction to medication, more specifically, Invanz or DynaCirc, and that the failure to discontinue those medications, or other antibiotics, was not a departure from good and accepted medical practices that caused any of the plaintiff's alleged injuries. Dr. Feinstein opined that there is no medical or scientific basis for any physician to state within a reasonable degree of medical certainty that an allergic reaction to DynaCirc caused the leg lesions the plaintiff complained of at the time of her admission to St. Catherine of Siena Medical Center when she was first seen by Dr. Weinberg. He continued that the leg lesions depicted in the photograph of June 9, 2005, cannot be identified as lesions caused by an allergic reaction to any medication as opposed to leg ulcers caused by insect bites, exposure to cat feces, or exposure to other environmental allergens.

Dr. Feinstein opined that there is no sound medical or scientific basis that the antibiotic coverage prescribed to the plaintiff either caused or exacerbated an allergic drug reaction, and he explained why. Invanz, Aztreonam, and Reflex have similar risk and sensitivity in patients with true Penicillin allergies, and Invanz was the correct antibiotic for the treatment of bullous impetigo. With regard to the use of whirlpool therapy, Dr. Feinstein opined that it is used to cleanse and debride wounds, and was agreed to by Dr. Greenblatt, Dr. Lesser, and Dr. Khan. The wound culture obtained at St. Catherine of Siena was diagnostic of the infecting organism, and confirmed on June 22, 2005 by skin biopsy which demonstrated bullous impetigo, for which the plaintiff was already receiving the proper antibiotic coverage. All appropriate tests and studies to rule out other possible causes for the lesions were ordered. When Dr. Weinberg saw the plaintiff for the first time on June 13, 2005, she already had skin necrosis, which meant that she was destined to have scarring from the dead tissue, notwithstanding proper treatment by Dr. Weinberg. The plaintiff was subsequently treated by Dr. Daley with Hydroquinone, a bleaching agent, and those areas of hyperpigmentation were noted to be lightening significantly. He concluded that there is nothing that Dr. Weinberg did or failed to do which caused this condition, and there was nothing to do to change the course of the eruptions.

Based upon the foregoing, it is determined that defendants Morton Weinberg, M.D., and Morton Weinberg, M.D., P.C. have established prima facie entitlement to summary judgment dismissing the complaint as asserted against them.

The plaintiff has not submitted an expert affirmation in opposition to the motion for summary judgment by the Weinberg defendants to raise a factual issue to preclude summary judgment from being granted to them.

Accordingly, motion (006) by defendants Morton Weinberg, M.D., and Morton Weinberg, M.D., P.C. for summary judgment dismissing the complaint as asserted against them is granted.

In motion (007), Dr. Greenblatt and St. Catherine of Siena Medical Center submitted the affirmation of their expert, Richard Blum, M.D. who affirmed that he is licensed to practice medicine in New York State and is board certified in clinical pharmacology. Dr. Blum stated that on June 4, 2005, Dr. Greenblatt saw the plaintiff for "insect bites ? infected," and prescribed antibiotics. He also noted that the plaintiff had been noncompliant in taking her blood pressure medication, DynaCirc, and he wrote her a prescription for the same. He continued that Dr. Greenblatt testified that he would never have written the prescription if the plaintiff was having a problem with the medication. Dr. Blum continued to set forth the care and treatment provided by Dr. Greenblatt, including her admission to St. Catherine of Siena, where she was seen by Dr. Lesser, Dr. Weinberg, and Dr. Khan, and then her subsequent treatment with Dr. Weinberg and Dr. Kalish at Stony Brook Hospital.

It is Dr. Blum's opinion within a reasonable degree of medical certainty that at no time did Dr. Greenblatt, or the professional medical and/or nursing staff at St. Catherine of Siena, depart or deviate from the accepted standards of medical practice in their care and treatment of the plaintiff. He continued that Dr. Greenblatt obtained appropriate consultations during the plaintiff's admission at St. Catherine of Siena, considered multiple diagnoses, and administered appropriate advice and therapy during that hospitalization, which was delayed at the plaintiff's request. As for the apparent concern that the patient's skin condition was caused by a photosensitive reaction, or reaction to the sun, due to the plaintiff's hypertensive medications, DynaCirc and Toprol, there is no basis for such claim. By plaintiff's own testimony, he

continued, she was wearing sweat pants while gardening, and her legs were covered, so she was not exposed to sunlight while she was gardening over Memorial Day weekend. Dr. Blum continued that photosensitive drug reactions can only occur on the skin surfaces exposed to the sun, and the areas in question never had sun exposure. The skin reactions claimed by the plaintiff to be due to sun exposure have never been reported as an adverse drug reaction to this form of calcium channel blocker. It also appeared that the plaintiff had not been taking DynaCirc, according to Dr. Greenblatt's testimony, and that there was no reason for him to consider DynaCirc as a drug reaction. After being seen by numerous physicians and consultants at two different hospitals, no diagnosis of adverse drug reaction to a calcium channel blocker was ever made. Dr. Blum continued that as for the concern of a possible allergic reaction to the intravenous Invanz, there is no evidence to suggest that the plaintiff had such a reaction. She did not develop a swollen throat, face, and legs, as well as difficulty breathing, the symptoms of an anaphylactic drug reaction.

Dr. Greenblatt and St. Catherine of Siena have also provided a copy of the affirmation of Dr. Ingwer, which was submitted in support of Dr. Lesser's motion. The plaintiff has also opposed this motion with, *inter alia*, a redacted expert affirmation in opposition to Dr. Greenblatt's and St. Catherine of Siena Medical Center's motion for summary judgment, but has failed to provide a signed copy to this court for review. Having considered plaintiff's expert affirmation, it is determined that the plaintiff has failed to raise a factual issue to preclude summary judgment from being granted to Dr. Greenblatt and St. Catherine of Siena Medical Center.

The plaintiff's expert has not set forth the basis for his/or her work experience upon which to he bases his expert opinions. He set forth the materials and records which he reviewed, and opined within a reasonable degree of medical certainty that Dr. Greenblatt's and St. Catherine of Siena Medical Center departed from good and accepted medical practice, causing the plaintiff's scarring and lesions.

The plaintiff's expert stated that on June 8, 2005, at St. Catherine of Siena Medical Center, Dr. Greenblatt departed from good and accepted medical practice by prescribing Invanz, a penicillin-type drug which should not be given to people with penicillin allergy. He then went on to say that the plaintiff was having an allergic reaction to Invanz and DynaCirc, however, he has set forth no basis for this conclusory and unsupported opinion that the plaintiff was having an allergic reaction to either medication. He does not state upon what evidentiary proof such opinion was based. The plaintiff's expert further opined that Dr. Greenblatt further departed from the standard of care by not ordering an immediate dermatology consult on June 10, 2005. The plaintiff was not seen until June 13, 2005 by the dermatologist. However, he does not indicate that this delay was caused by Dr. Greenblatt, or how, if in any way, such delay caused a worsening of the plaintiff's condition, or that she would not have had such scarring or hypo or hyper pigmentation had the dermatologist seen the plaintiff the same day. He does not state what the dermatologist would have done differently, or what care and treatment would have been provided to make a difference.

The plaintiff's expert continued that St. Catherine of Siena departed from good and accepted medical practice through the action of its staff physician, Donna Lesser, M.D. who did not discontinue DynaCirc and who prescribed Invanz. He stated that Dr. Lesser should have prescribed an antibiotic without Penicillin which would have covered MRSA. However, he does not discuss the culture and sensitivities to establish whether or not correct or incorrect medications were prescribed. The plaintiff's expert opined that the plaintiff suffered a secondary bacterial infection, a bulbous eruption (bulbous impetigo), facilitated by the damage to her skin from the original allergic reaction. He does not indicate the

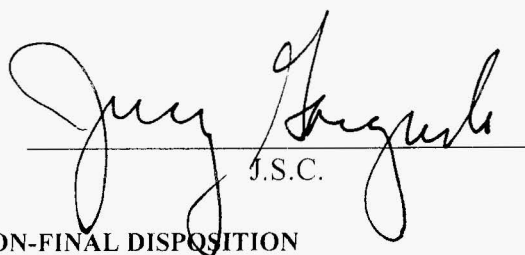
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source of such infection and does not distinguish between any scarring caused from the primary infection and the alleged secondary infection. Plaintiff's opinions are conclusory and lack evidentiary support. Additionally, it has not been established that Dr. Lesser was an employee of defendant St. Catherine of Siena, and that it is vicariously liable for Dr. Lesser's care and treatment.

Based upon the foregoing, it is determined that Dr. Greenblatt and St. Catherine of Siena Medical Center have established prima facie entitlement to summary judgment dismissing the complaint as asserted against them.

Accordingly, motion (007) by defendants Dr. Greenblatt and St. Catherine of Siena Medical Center for summary judgment dismissing the complaint is granted with prejudice.

Dated: 12/6/13


J.S.C.

X FINAL DISPOSITION NON-FINAL DISPOSITION