Eastwood v Buono
2013 NY Slip Op 33322(U)
November 8, 2013
Sup Ct, Suffolk County
Docket Number: 08-28840
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX No. 08-28840
CAL No. 13-00565MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-28-13 (002 & 003)
MOTION DATE 6-17-13 (004)
MOTION DATE 7-25-13 (005)
ADJ. DATE 10-3-13
Mot. Seq. # 002 - MG # 004 - MG
003 - MD # 005 - MotD

LISA EASTWOOD as the Executrix of the Estate of LEWIS EASTWOOD and LISA EASTWOOD, Individually,

Plaintiff,

- against -

LUIGI BUONO, D.O., FRANK P. LOMBARDO, M.D., MARTIN J. VAN DYNE, M.D., DAVID M. KIRSHY, M.D., ANTHONY E. MITAROTONDO, M.D., NORTH FORK RADIOLOGY and NORTH FORK FAMILY PRACTICE,

Defendants.

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Attorney for Defendants Kirshy, M.D., Mitarotondo, M.D. and North Fork Radiology
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Upon the following papers numbered 1 to 73 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-17; (003) 18-31; (004) 32-42; (005) 43-55; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 56-61; 62-63; 64-65; Replying Affidavits and supporting papers 66-67; 68-71; 72-73 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendant, Frank P. Lombardo, M.D., pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted against him is granted with prejudice; and it is further

ORDERED that motion (003) by defendant Martin J. Van Dyne, M.D., pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted against him is denied; and it is further

ORDERED that motion (004) by defendants, David M. Kirshy, M.D., Anthony E. Mitarotondo, M.D., and North Fork Radiology, P.C., regarding any vicarious liability it may have for Dr. Mitarotondo and Dr. Kirshy, for an Order, pursuant to CPLR 3217, So-Ordering the stipulations of discontinuance with prejudice dated April 16, 2012, and dismissing the complaint asserted against them is granted as to these defendants. The remaining co-defendants, who have not opposed this application, are precluded from asserting the benefits conferred by Article 16 at the time of trial as to Frank Lombardo, M.D., David M. Kirshy, M.D., Anthony E. Mitarotondo, M.D., and North Fork Radiology relative to any vicarious liability it may have for Dr. Lombardo, Dr. Mitarotondo and Dr. Kirshy; and it is further

ORDERED that motion (005) by defendant, North Fork Radiology, P.C., pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted against it is granted to the extent that the complaint asserts North Fork Radiology's vicarious liability for defendants Frank P. Lombardo, M.D., David M. Kirshy, M.D. and Anthony E. Mitarotondo, M.D., is granted; and is denied as to that part of the complaint which asserts North Fork Radiology, P.C. is vicariously liable for defendant Martin J. Van Dyne, M.D.

In this medical malpractice action, the plaintiff, Lisa Eastwood as Executrix of the Estate of decedent Lewis Eastwood, asserts causes of action premised upon the negligence of the defendants; lack of informed consent; wrongful death; a derivative claim on behalf of Lisa Eastwood and her three infant children; and negligent hiring by defendant North Fork Radiology, P.C. It is alleged that the defendants negligently departed from the good and accepted standards of medical care and treatment in failing to timely and properly diagnose and treat the decedent's lung cancer, resulting in his death.

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 order to be admissible, medical records are required to be certified 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]). Uncertified medical records are not admissible evidence.

In support of motion (002), defendant Frank Lombardo, M.D. has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, his answer and demands, and plaintiff's verified and supplemental verified bills of particular as for defendant Luigi Buono, D.O., witness disclosure and amended witness disclosure; uncertified medical records; signed transcripts of the examinations before trial of David M. Kirshy dated July 25, 2012, Frank P. Lombardo, M.D. dated April 16, 2012, and Martin Van Dyne dated May 29, 2012; unsigned transcript of the examination before trial of Luigi Buono, M.D. with proof of service pursuant to CPLR 3116; and the expert affirmation of Victor Scarmato, M.D.

In support of motion (003), defendant Martin J. Van Dyne, M.D. has submitted, *inter alia*, an attorney's affirmation; summons and complaint, amended summons and complaint, defendants' answers to the complaint and amended complaint, defendants' demand for a bill of particulars, plaintiff's verified bill of particulars; expert witness response; transcript of the unsigned and uncertified examination before trial of Lisa Eastwood dated May 24, 2010 and November 4, 2010, which is not in admissible form (*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]); uncertified copy of Dr. Buono's office records; uncertified copy of the North Fork Radiology records; unsigned but certified transcript of the examination before trial of Luigi Buono, D.O. dated October 27, 2011, which is considered, there being no objection (*see* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); signed transcripts of the examinations before trial of Frank P. Lombardo, M.D. dated April 16, 2012 and Martin J. Van Dyne, M.D. dated May 29, 2012; and the physician's affirmation by Evan R. Mair, M.D.

In support of motion (004), David M. Kirshy, M.D. and Anthony E. Mitarotondo, M.D., and North Fork Radiology have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint and amended complaint, their answers to the complaint and amended complaint, answers served by defendants Buono and North Fork Family Medical Practice, and Frank P. Lombardo, M.D. as to the complaint and amended complaint; a copy of a stipulation of discontinuance with prejudice dated April 16, 2012 on behalf of David M. Kirshy, M.D. and Anthony E. Mitarotondo, M.D. signed by their counsel and plaintiff's counsel, but not signed by co-defendants; a copy of a stipulation of discontinuance dated April 16, 2012 on behalf of North Fork Radiology signed by its counsel and plaintiff's counsel, but not signed by co-defendants.

In support of motion (005), defendant North Fork Radiology, P.C. has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, amended complaint, its answers to the complaint and amended complaint, plaintiff's verified bill of particulars for North Fork Radiology, Dr. Van Dyne, Dr. Lombardo, Dr. Buono; copies of the stipulations of discontinuances dated April 16, 2012; certified records from North Fork Radiology; expert affirmations of Victor Scarmato, M.D. and Evan R. Mair, M.D.; signed and certified transcript of the examinations before trial of Frank P. Lombardo dated April 16, 2012; and unsigned but certified transcript of the examination before trial of Martin J. Van Dyne dated May 29, 2012, which is not objected to by any party.

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]).

LUIGI BUONO, M.D.

Luigi Buono, M.D. testified to the extent that he is licensed to practice medicine in New York State and is board certified in family practice. He was associated with North Fork Family Practice through 2008, after which there was a change in the corporation and it became Prime Care Medical of Long Island, P.C. He was associated with Dr. Cappello in the practice. He has admitting privileges at Peconic Bay Medical Center. He had somewhat of a recollection of Lewis Eastwood who became his patient on April 10, 1995. A chest x-ray on June 10, 1996 was negative. He testified concerning the decedent's visits of December 31, 1996, and on July 16, 1998 when there was discussion concerning the decedent's use of tobacco, and an additional visit on August 4, 1998. The physician's assistant at his office saw the decedent on August 12, 1998 for a syncopal episode for which a CT of the brain was ordered and which revealed a negative finding. He was seen on March 12, 1999 and referred to an orthopedist for leg problems, and on February 15, 2000, the decedent requested to be tested for diabetes. Upon examination, his lungs were clear to ascultation. He was seen on February 15 and 18, 2000 for blood work. October 8, 2001 and October 12, 2001 notes concerned orthopedic complaints. Dr. Buono stated his note of December 14, 2001 concerned referral of the decedent to Dr. Davisa, a neurosurgeon, due to findings concerning his lumbar spine.

Dr. Buono continued that his notes showed an entry concerning a chest x-ray from January 3, 2002, taken at Central Suffolk Hospital. The films were compared to a chest x-rays of October 6, 2002 and October 24, 2001, and showed a right fifth rib with a questionable lesion. A CT of the chest was recommended and the decedent obtained the same. Dr. Buono received the CT report dated November 2, 2001, signed by Dr. Savino of North Fork Radiology. His note of January 15, 2002 concerning that CT of the chest indicated the test revealed bilateral lung nodules three to seven millimeters, mild hilar adenopathy, for which a CT recheck was recommended in three months. He then received a copy of the CT report from January 15, 2002, read by Dr. Mitarotondo, and noted that it showed, among other things, a poorly defined nodule, approximately 1 cm in size

in the subpleural location in the left lung. He stated that this meant to him that it was an undefined lesion in the lung tissue. He stated the report also indicated there were additional nodules in the left lung for which a six month study was recommended. Dr. Buono stated his differential was that of nodules of unknown significance, potentially vessels sometimes on end, scarring, potential malignancies, and foreign bodies. On January 16, 2002, he spoke with the decedent who denied shortness of breath, cough, weight loss, decreased appetite, but positive tobacco use. Dr. Buono testified that he called Dr. Davis, a neurosurgeon, to discuss the case and see if he felt the patient could have a lumbar soft tissue mass tumor. Because the decedent was to have surgery with Dr. Davis, Davis wanted clearance from a pulmonologist regarding the CT findings. Dr. Buono referred the decedent to Dr. Walser, a pulmonologist, who read the CT films himself and felt the nodules depicted on the CAT scan were not amenable to biopsy. Dr. Walser's differential was possible cancerous lung. Pulmonary function testing was consistent with obstructive airway disease.

On July 22, 2002, the decedent was noted to have right neck tenderness which Dr. Buono felt was questionable carotidynia or inflammation of the muscles of the neck. The September 17, 2002 note indicated the nodules are stable without size increase. A repeat CT in four to five months was recommended. Dr. Buono stated he had received two different reports for the CT scan of August 21, 2002 from Dr. Savino and Dr. Gross. Dr. Savino compared the CT study to the January 15, 2002 CT study and noted that the nodules appeared unchanged, and that the majority of the subpleural nodules were present previously and appeared unchanged. Dr. Buono testified that he felt the nodules in the left lung, except the two new nodules, were stable based upon Dr. Savino's report. He stated that Dr. Gross didn't do a comparison of films. Dr. Buono did not change his differential based upon Dr. Savino's report. The decedent and his wife were notified of Dr. Savino's findings set forth in the report. Dr. Buono continued that a CT scan was repeated on April 10, 2003. He received the report by Dr. Mitarotondo who indicated that the largest of the nodules, the one beneath the left lateral chest wall, had increased in size in the left lung, but the other nodules were unchanged. Dr. Mitarotondo had compared this CT scan with the CT scan of January 15, 2002. Dr. Buono indicated in his note of April 18, 2003, that the CT of the chest was "overall okay," and there may be a slight increase in one nodule, but that could be from the way the nodule was filmed. Dr. Buono also wrote in his note that he felt a one year followup was appropriate, given the decedent's clinical picture. Dr. Buono testified that he formulated his own followup although Dr. Mitarotondo recommended a followup in six months. He stated that he put in parenthesis "fax copy to pulmo, Dr. Walser."

Dr. Buono testified that he saw the decedent on July 28, 2003 for a growth on the right side on the top of his head. When he saw the decedent on November 10, 2003, he complained that he had swelling in his right groin. A CT was pending. Dr. Buono spoke with the decedent's wife. On April 1, 2004, Dr. Buono gave the decedent a script for a CT scan of the chest without contrast. His note indicated the pulmonary nodules were stable. He stated that the decedent had a CT of the chest on May 19, 2004, and the report from Dr. Kirshy indicated the study was compared with the prior study of April 10, 2003. Dr. Kirshy's impression was that there was a stable 12 mm subpleural nodule in the left upper lung and a stable 2 mm right lower lung nodule. Dr. Buono stated that Dr. Kirshy made no recommendation for followup. Dr. Buono wrote a note on May 23, 2004 which indicated that the CT of the chest was stable with no increased size or shape of the nodules, but some changes in the lungs consistent with history of tobacco use. He recommended pulmonary function tests for emphysema. Dr. Buono testified that he did not change his differential and stated that depending on the clinical presentation in future visits and other factors, he would have considered what the followup would be. He did not recall if he recommended to the decedent or his wife that a followup CT scan be done. Dr. Buono stated he received a report dated June 11, 2004 from pulmonologist Dr. Sampson who had seen the decedent. Dr. Buono stated that Dr. Sampson did not comment upon the CT scans of the chest.

Dr. Buono testified that when he saw the decedent on September 12, 2005, he had sores in his mouth which were treated in the emergency room. He stated he received a phone call from the decedent's wife on March 21, 2006 and that he saw the decedent on March 22, 2006 for swelling in his right arm (subjectively), and for which he ordered a CT scan of the chest, with and without contrast, for mass obstruction. He stated that the swelling could have been due to newer lesions and not necessarily from the original lesions. Dr. Buono testified that he received a report from Dr. Lombardo concerning the decedent's CT scan of March 28, 2006, in which Dr. Lombardo referenced a subpleural lateral left upper lobe nodule measuring 1.6 cm which may represent a slow growing left upper lobe tumor which cannot be excluded. Dr. Buono state he also received an addendum dated April 4, 2006 stating that Dr. Lombardo compared the CT scan with those performed in May 2004 and April 2003. A PET scan was recommended to see if the nodules are active, and if it was time for a biopsy, as the left lobe nodule was slightly increased in size. Dr. Buono stated he spoke with the decedent's wife. The PET scan was performed on May 18, 2006. It was interpreted by Dr. Van Dyne whose conclusion was that it was unremarkable, but he recommended close interval CT and followup of the chest to assure continued stability of the previously described nodule.

Dr. Buono testified that he saw the decedent on May 17, 2006 at which time the decedent complained of nausea for a week, swelling on and off in the right upper chest and right axilla, tingling of the feet for a few weeks, increased urination with occasional incontinence, and anxiousness. The decedent was next seen on April 17, 2007, with complaints of occasional left chest discomfort. Dr. Buono stated that he did not order a CT scan on that date, or at the next visit of June 20, 2007, as he felt the decedent was asymptomatic and that a CT was not indicated based upon the decedent's clinical presentation. On October 18, 2007, the decedent was seen by the physician's assistant for swelling in his right arm for two days, for which a doppler of the extremity was ordered and axilla adenopathy was considered. When he saw the decedent on October 24, 2007, he did not order a CT scan of the chest. On February 21, 2008, the decedent called his office complaining of a painless six-inch long football-shaped lump in the stomach area. He felt the patient could wait a week for an appointment as he had no pain. The decedent then saw the physician's assistant on March 17, 2008 who assessed him as having a ventral hernia, abnormal skin lesions, left scalp mass, and questionable cyst. He was referred for surgical and dermatologic consults. Dr. Buono stated that he saw the decedent on March 25, 2008, and noted a cyst on his head. He spoke with him the following day concerning tendon pain and inability to sleep at night, and referred the decedent for an orthopedic consult.

Dr. Buono stated that on April 3, 2008, the decedent called to have a CT scan of his head at North Fork Radiology instead of Peconic Bay Medical Center. The physician's assistant had recommended the CT scan, but Dr. Buono wanted the decedent seen by a surgeon first. The decedent saw Dr. Kelly, who wanted to perform an excisional biopsy of the left parietal scalp mass. The decedent's spouse called on May 1, 2008 and advised him that her husband saw another physician who ordered a CT and referred him to a neurosurgeon. She also told Dr. Buono that her husband was looking for a new doctor. On May 2, 2008, Dr. Buono stated that he wrote a note concerning an x-ray of the thoracic and cervical spine, and CT on April 29, 2008. The CT of the brain with contrast, interpreted by Dr. Savino, revealed an osseous destructive lesion within the left parietal lobe with a large associated soft tissue mass with both intra and extracranial components, representing an aggressive, likely malignant process for which biopsy was recommended. On May 2, 2008, the decedent's wife advised that her husband had an appointment with Dr. Ouzonian for a back mass biopsy, and an appointment with Dr. Davis for neurological evaluation. Dr. Buono testified that he was not aware of the report for the CT scan of the chest, abdomen, and pelvis. He was advised on May 12, 2008 by the decedent's spouse that the biopsy of the back mass was positive for squamous cell carcinoma and that he was being seen at Sloan Kettering. He had no further contact with the decedent or decedent's spouse after that date.

MOTION (002)

In motion (002), Frank Lombardo, M.D. seeks summary judgment dismissing the complaint as asserted against him, and has submitted, *inter alia*, the affirmation of his expert physician, Victor Scarmato.

Frank P. Lombardo, M.D. testified to the extent that he is a physician licensed to practice medicine in New York State, New Jersey, Pennsylvania, Connecticut, and Florida. In March 2006, he had been employed full time by North Fork Radiology, P.C. since 2004. His only involvement with Lewis Eastwood concerned interpreting a CT scan performed on the decedent on March 28, 2006 by technicians at the facility who follow protocols with respect to positioning patients. A prescription dated March 22, 2006 requested CT scan of the chest with and without contrast, and indicated that the decedent has right arm swelling and a history of pulmonary nodules. A CT with contrast was performed wherein an iodinated compound was injected prior to obtaining the images to show better detail of vasculature and other structures in the chest. The CT scan produces images which are then read and interpreted. With respect to the images produced on March 28, 2006 during the CT scan of the decedent's chest, Dr. Lombardo testified that the decedent had prior CT scans of his chest on May 19, 2004 and April 10, 2003, which images and reports he reviewed and mentioned in his report generated with respect to the March 28, 2006 CT scan. He did not recall if the CT images from January 15, 2002 and August 21, 2002 were available to him at the time. Dr. Lombardo testified that he uses the current film as a baseline, then looks back to note for changes in prior studies since there was a known history.

Dr. Lombardo testified that he generated a two page report, reviewed it and signed it. The report dated March 29, 2006, contained an addendum dated April 4, 2006. Upon viewing the images, he saw nodules, which he described as usually rounded or ovoid lesions that are not normally present in a person's lung and are something which is not physiologic. He measured the nodule he observed in the decedent's left upper lobe on the March 28, 2006 CT scan with a digital ruler in the program. He determined the nodule to be 16 mm or 1.6 cm, which Dr. Lombardo stated he reported as similar when compared to the prior exam.

Dr. Lombardo testified that he reviewed the images from the 2004 study, but he did not recall if he personally measured the nodule in the left lung present on the image. Dr. Kirshy had interpreted the May, 2004 CT scan and reported the lesion as being 12 mm. Dr. Lombardo accounted the difference in measurement to be due to the "slight difference in measuring technique." He believed Dr. Kirshy measured the nodule off the film itself using a different method than he used. At the time the previous study was done, films were not available on the monitor for review to permit use of the digital ruler which he used. He was not sure, however, if the nodule was exactly the same size in comparing the 2004 and 2006 images, or if there had been any growth of the nodule. He testified that position of the slices could have been different from the prior study, creating a different image. Therefore, he recommended to Dr. Buono in his report that the CT scan should be followed up with a PET scan to determine the malignant potential of the nodule. Dr. Lombardo testified that it was his feeling that this nodule could represent a malignancy. He reported to Dr. Buono that the possibility that this may represent a slow-growing left upper lobe tumor which could not be excluded.

Dr. Lombardo testified that, in his March 29, 2006 report, he included his review of the April 10, 2003 prior CT scan of the chest and added it to the addendum dated April 4, 2006. He did not know if he was aware at any time prior to dictating his addendum that there had been two CT scans done in 2002, or reports by Dr. Gross concerning the January 15, 2002 or August 21, 2002 CT scans. He continued that if a lesion had been stable over the course of several years, going back even further doesn't necessarily add value to the interpretation. He stated he relied on the reports which showed relative stability.

Victor Scarmato, M.D. affirmed that he is a physician licensed to practice medicine in New York State and is board certified in radiology. He set forth his education and training, and his medical experience to qualify as an expert in this matter. He set forth a vague recitation of the materials and records which he reviewed. He opined within a reasonable degree of medical certainty that Frank Lombardo, M.D. conformed to the standard of care with respect to his radiological interpretations, description and recommendations, and that Dr. Lombardo did not proximately cause any of the plaintiff's claimed damages.

Dr. Scarmato set forth the chronology of the radiological studies conducted at North Fork Radiology on the plaintiff's decedent, commencing with the chest x-rays of October 6, 2001, October 24, 2001, and November 2, 2001. On January 15, 2002, the decedent had a CT scan of the chest with contrast. CT scans of the chest were also performed on August 21, 2002, April 10, 2003, May 19, 2004, and March 28, 2006. A whole body PET scan was obtained on May 18, 2006, and a CT scan of the brain was performed on April 29, 2006. A CT scan of the chest/abdomen/pelvis was conducted on May 8, 2008, and a PET scan on May 13, 2008. He set forth the interpretations by the various radiologists and concluded that the PET scan of May 13, 2008 demonstrated that there were malignant tumor cells in the left lung, neck and skull, but the images did not indicate the primary tumor site. Dr. Lombardo interpreted the PET scan images from March 28, 2006.

Dr. Scarmato opined that Frank Lombardo, M.D. at all times conformed to the standard of care with respect to his radiologic interpretations, descriptions, and reporting of the findings of the March 28, 2006 CT scan of the chest with contrast, and correctly reported that it demonstrated a 1.6 cm lateral left upper lobe spiculated nodule. Dr. Scarmato, upon review of the CT scan, opined that Dr. Lombardo reasonably and correctly described the location, size, and appearance of the left upper lung nodule. He continued that Dr. Lombardo appropriately compared the March 28, 2006 CT scan of the chest to the May 19, 2004 and April 10, 2004 CT scans, and that it is appropriate for a radiologist to compare the approximate last two years of imaging studies when evaluating/comparing a CT scan of the chest. He stated that it is not necessary for the radiologist to compare every CT scan of the chest that has been performed on a patient. He continued that Dr. Lombardo, upon comparing the studies, appropriately reported that the 1.6 cm left upper lobe nodule was similar (not identical) to the prior exam, accounting for slight differences in measuring techniques, which differences Dr. Lombardo reported may be due to either a difference in measuring technique, or a difference in slice positioning, or both. Dr. Scarmato stated that Dr. Lombardo testified that there was a change in the radiology equipment being used at North Fork Radiology between 2004 and 2006, such that when Dr. Kirshy measured the nodule in 2004, he used a handheld ruler. When Dr. Lombardo measured the nodule in 2006, he used a digital ruler.

Dr. Scarmato stated that it was reasonable for Dr. Lombardo to consider the possibility that the 4 mm difference in the appearance of the nodule was due to patient or slice positioning as a CT scan uses radiation to create images of structures within the body. Each rotation of the scanner produces an image of a thin slice of the organ, and the thickness or thinness of the image depends upon the slice being used. As such, changes in a patient's positioning can result in up to a 5 mm difference in the size of the nodule, either larger or smaller. Even the patient's breathing can produce a different image. Dr. Scarmato opined that even though Dr. Lombardo considered that the change in appearance of the nodule was due to differences in measuring techniques and/or slice differential, he appropriately communicated to Dr. Buono that further testing be performed because "the possibility that this may represent slow growing left upper lobe tumor cannot be excluded" and "it may be time for the patient to have biopsy." Thus, stated Dr. Scarmato, not only did Dr. Lombardo not fail to diagnose or suspect cancer, and not fail to appreciate the significance of the potential increase in size of the left lung nodule, he also recommended a PET scan followup for more definitive evaluation.

Dr. Scarmato stated that since cancer cells take up and metabolize glucose, and the PET scan evaluates how the cells in the body take up the glucose, the PET scan was appropriately recommended by Dr. Lombardi for the diagnosis of cancer, evaluation of the stage of a tumor, spread of the cancer, or if it is responding to treatment. Thus, stated Dr. Scarmato, this was the standard of care, and Dr. Lombardo comported with the standard of care. Dr. Scarmato stated that not only was this recommendation properly communicated, but it was received by Dr. Buono who reviewed and considered the report, as supported by Dr. Buono's record. Dr. Scarmato stated that it is generally up to the clinician to order a biopsy based upon his/her clinical judgment and consideration of the patient's clinical information. He added that because Dr. Lombardo made the recommendation for further evaluation of the left lobe nodule, he could not have proximately caused any delay in the diagnosis and treatment of the decedent's cancer, and did not proximately cause any of the plaintiff's claimed damages.

Based upon the foregoing, Dr. Lombardo has demonstrated *prima facie* entitlement to summary judgment dismissing the complaint as asserted against him.

Counsel for the plaintiff has submitted an attorney's affirmation in opposition to Dr. Lombardo's motion and argues that Dr. Lombardo's expert, Dr. Scarmato, has set forth opinions which are conclusory and unsupported by the record. However, the plaintiff has failed to submit a affirmation or affidavit from an expert physician raising a triable issue of fact to preclude summary judgment from being granted to Dr. Lombardo.

Accordingly, motion (002) is granted and the complaint is dismissed as asserted against Dr. Frank Lombardo.

MOTION (003)

Martin Van Dyne, M.D. testified to the extent that he has been licensed to practice medicine in New York State since 1972 and is board certified in radiology. He was affiliated with North Fork Radiology for 38 years, and in 2008 was a shareholder in the P.C. Dr. Van Dyne stated that he never met the decedent, but reviewed a sonogram of the right arm and PET scans done May 18, 2006 and May 13, 2008, which were taken by technicians. Prior to interpreting the PET scan of May 18, 2006, he was provided with a history revealing a left upper lobe pulmonary nodule. He reviewed a report from Dr. Lombardo and the images concerning a CT scan from March 28, 2006, probably before and after interpreting the PET scan images. He explained what a PET scan consists of and its significance in helping to determine if a nodule was FDG active or had any increased glucose activity. Dr. Van Dyne stated the PET scan was a full body scan. When he compared the PET scan images of May 18, 2006 with the CT scan images of March 28, 2006, he observed that the left upper lobe pulmonary nodule did not show any FDG activity or any abnormal FDG activity in the rest of the scan. Dr. Van Dyne stated that the PET scan did not rule out malignancy. He did not review any other CT scans taken prior to March 28, 2006. He agreed with Dr. Lombardo's determination that there was a left upper lobe pulmonary nodule. He did not remember if he measured the nodule or whether he had any discussion with Dr. Lombardo or Dr. Buono. Dr. Van Dyne included in his report of May 18, 2006 a recommendation for a close interval CT followup of the chest to assure continued stability of the nodule. This was so because a negative PET scan does not exclude the presence of a malignancy, and he wanted to assure that the nodule did not increase in size. Stability can be assured if there is no change in size of the nodule when the CT scan is done three months later. He considers three months to be close interval. However, he stated, the CT scan was not repeated until May 8, 2008, two years later.

Dr. Van Dyne testified that he also interpreted the PET scan of May 13, 2008. Available to him at the time of that interpretation was a CT scan from May 8, 2008, plus information that the technologist obtained prior to the PET scan. The CT scan from May 8, 2008 revealed a 2.5 cm nodule in the left upper lung, indicative of growth of the nodule. He concurred with the previous reading when he reviewed the images. Dr. Van Dyne testified that a PET scan cannot help make a determination as to whether the uptake is either metastatic or primary. In interpreting the PET scan of May 13, 2008, he compared it to the prior PET scan of May 18, 2006. He noted that the May 13, 2008 PET scan showed multiple areas of active FDG activity which were not present on the prior PET scan, indicative that it was most likely metastatic cancer. His interpretation of the May 13, 2008 PET scan also included an uptake in the left parietal portion of the skull, in the posterior cervical region, and the right supra clavicular area. His findings indicated a destructive lesion in the left parietal portion of the skull, a lesion in the superficial posterior cervical region, and a third lesion in the right supraclavicular area. He noted a SUV intensity measurement of 4.2, and stated that a reading over 2 would be suspicious for an abnormal lesion. A fourth positive uptake was found in the left mid lung portion also. At the time, the decedent had already been diagnosed with cancer ascertained with a biopsy on a tumor on his back the week before. Dr. Van Dyne continued that the decedent had also had a positive CT of the brain which described a destructive lesion, which the PET scan confirmed was avid.

In support of motion (003), defendant Martin Van Dyne has submitted the affirmation of Evan R. Mair, M.D. who affirms that he is licensed to practice medicine in New York State and is board certified in radiology since 2004. Dr. Mair set forth his training and experience to qualify as an expert. He set forth the records and materials which he reviewed and opined within a reasonable degree of medical certainty that Martin Van Dyne at no time departed from the accepted standards of medical/radiological care and practice, and that there is nothing that he did or did not do which is proximately related to the injuries claimed on behalf of the plaintiff-decedent or his death.

Dr. Mair noted that Dr. Van Dyne interpreted three radiological studies performed upon the plaintiff's decedent at North Fork Radiology: venous sonogram of decedent's right arm on March 11, 2006; whole body PET scan performed on May 18, 2006; and whole body PET scan performed on May 13, 2008. Dr. Mair stated that he reviewed the images, films, and paperwork generated in connection with each of the studies as well as Dr. Van Dyne's accompanying reports. Dr. Mair stated that the bill of particulars does not reference the venous sonogram of March 11, 2006, interpreted by Dr. Van Dyne, and that his interpretation was wholly appropriate and within the standard of care in that Dr. Van Dyne determined that the venous sonogram showed the decedent's right upper extremity had normal venous flow without evidence of thrombosis.

Dr. Mair stated that Dr. Van Dyne interpreted the whole body PET scan performed at North Fork Radiology on May 18, 2006. Dr. Mair stated that the PET scan had been ordered as Dr. Lombardo previously interpreted a CT scan at North Fork Radiology which had been performed on March 28, 2006, wherein he noted the presence of a subpleural lateral left upper lobe nodule measuring approximately 1.6 cm, found to be similar when compared to prior exams of April 10, 2003 and May 19, 2004, accounting for slight differences in measuring techniques. Dr. Mair stated that Dr. Lombardo recommended to Dr. Buono, the decedent's primary physician, that the decedent have a PET scan to determine underlying malignancy, and for more definitive evaluation as he could not exclude the possibility of a slow growing left upper lobe tumor. Thus, the decedent had the PET scan as recommended by Dr. Lombardi on May 18, 2006,.

Dr. Mair described what a PET scan is and how it works by showing areas of increased glucose/sugar/FDG activity to determine if the nodule is FDG reactive and whether a malignant lesion is suspected. Dr. Mair stated that Dr. Van Dyne conducted a review of Dr. Lombardi's report as well as the images

from the March 28, 2006 study, which enabled him to identify the nodule visualized by Dr. Lombardi, and permitted him to focus on the area, and correlate the CT scan study with the interpretation of the PET scan. Dr. Mair stated that Dr. Van Dyne was under no duty or obligation to review any prior CT scans for comparative purposes. He added that Dr. Van Dyne considered the decedent's history as provided by Dr. Buono. Dr. Mair opined that upon his own review of the PET scan images from May 18, 2006, that Dr. Van Dyne's determination that the PET scan did not demonstrate abnormal FDG activity within the neck, chest, abdomen, or pelvis was correct and within accepted standards of medical/radiologic care.

Dr. Mair continued that Dr. Van Dyne's recommendation for close interval chest CT followup in three months to ensure stability of the previously described nodule referenced in Dr. Lombardo's report was proper and adhered to accepted standards of care in the field of radiology. He continued that any ultimate determination on the next step of care was within the purview of the ordering/treating physician, in this case, Dr. Buono. Given that the PET scan was negative, Dr. Van Dyne was under no duty to verbally communicate the results of the study with Dr. Buono, and the report was forwarded to Dr. Buono. Dr. Mair continued that Dr. Van Dyne was not negligent in not recommending that a biopsy be done as this determination is within the purview of the ordering/treating physician/clinician. There is no duty to recommend a biopsy in light of the unremarkable PET scan. Dr. Mair stated that Dr. Buono elected to disregard Dr. Van Dyne's recommendation for close followup because the decedent was "asymptomatic."

Dr. Mair continued that Dr. Van Dyne interpreted a second whole body PET scan on May 13, 2008 at North Fork Radiology. He made a comparison of the films to the recent CT scan of the chest/abdomen/pelvis performed at North Fork Radiology on May 8, 2008, which had been interpreted by Dr. David Gross as including the presence of a 2.5 cm. subpleural nodule within the left upper lung, several small nodules seen within the left upper lung, and several small nodules seen within the right mid lung zone, which were all felt to be consistent with metastatic disease. Dr. Van Dyne found the PET scan was positive as there was activity within the left mid lung laterally corresponding to the pulmonary nodule seen on the recent CT as well as FDG lesions in the left parietal portion of the skull, superficial posterior cervical region and right supraclavicular area. Dr. Van Dyne did not make any recommendations. It is Dr. Mair's opinion that Dr. Van Dyne properly interpreted the May 13, 2008 PET scan, and that he was not required to provide any recommendation. The plaintiff' decedent's condition of metastatic cancer had already been diagnosed at the time of this PET scan study, and the study served to confirm this and to help plan for treatment. Dr. Mair concluded that there was nothing that Dr. Van Dyne should have done in connection with his interpretations and recommendations concerning the three studies which he reviewed that would have resulted in any different outcome for the decedent.

Based upon the foregoing, it is determined that Dr. Van Dyne has established *prima facie* entitlement to summary judgment dismissing the complaint as asserted against him.

In opposing Dr. Van Dyne's motion for summary judgment, the plaintiff has submitted the unredacted affirmation of her expert who is licensed to practice medicine in New York and is board certified in diagnostic radiology. Plaintiff's expert has set forth his education and training, and his work experience upon which he bases his expertise. He set forth the records and materials which he reviewed, including the radiology films from decedent's CT scans of the chest from April 10, 2003, May 19, 2004, and March 28, 2006, and the PET scan of May 18, 2004. He also reviewed defendant's expert affirmation by Dr. Mair. Plaintiff's expert set forth that this his affirmation is limited to his opinions concerning the care and treatment, or lack thereof, by defendant Martin J. Van Dyne, M.D., and purposely omits any opinions concerning any other defendants or clinicians involved in the decedent's care and treatment.

Plaintiff's expert set forth the decedent's medical history while under the care of defendant Luigi Buono, D.O. from 1995 until 2008. On January 15, 2002, the decedent underwent a CT scan of the chest at North Fork Radiology to evaluate a potential lesion identified on a chest x-ray. The CT scan found multiple lung nodules which are generally considered to be lesions within the lung parenchyma less than 3 cm, are quite common, and appear as discrete space occupying structures on chest x-ray. Followup CT scans were obtained at North Fork Radiology on August 21, 2002, April 10, 2003, and May 19, 2004. Plaintiff's expert set forth some of Dr. Lombardo's testimony concerning his interpretation of a CT scan of March 28, 2006, noting that Dr. Lombardo found the lesion measured 1.6 cm. This was Dr. Lombardo's only involvement with the decedent. As a result of Dr. Lombardo's recommendation, Dr. Buono ordered a PET scan which was performed on May 18, 2006.

Dr. Van Dyne, a shareholder of North Fork Radiology, interpreted the PET scan as "unremarkable." Plaintiff's expert stated that Dr. Van Dyne looked at Dr. Lombardo's report and CT scan, and compared it to the images obtained on the PET scan, and noted that the negative PET scan does not exclude the presence of a malignancy, and to assure that this nodule did not increase in size, Dr. Van Dyne recommended a short followup for another CT of the chest. Plaintiff's expert stated that the decedent continued under the care of Dr. Buono, who noted on March 17, 2008, that the decedent had a left scalp mass. When the decedent was seen by a general surgeon, a CT of the head was ordered and performed at North Fork Radiology on April 29, 2008, and revealed an intra and extracranial mass. The decedent then presented to Dr. Zuhoski who ordered further diagnostic testing. In May, 2008, the decedent underwent chemotherapy at Sloan Kettering for primary pulmonary carcinoma, and died on September 17, 2008.

The plaintiff's expert opined that Dr. Van Dyne departed from good and accepted medical practice by failing to properly report the findings of the PET scan from May 18, 2006, as he did not set forth in the report that the negative PET scan did not rule out cancer. The plaintiff's expert opined that it was a further departure from the standard of care by Dr. Van Dyne failing to recommend further testing beyond just a short interval followup. The plaintiff's expert opined that these failures were a substantial factor in the failure to timely followup and diagnose the decedent's lung cancer. Had the significance of the lung nodule been appreciated and reported, the plaintiff would have warranted further diagnostic testing, even in the face of a negative PET scan.

The plaintiff's expert stated that lung nodules are very commonly detected on CT scans of the chest, and the clinical importance of small nodules differs substantially from that of larger nodules detected on those scans. The positive relationship between the size of the lesion and the likelihood of malignancy is clearly understood. Approximately 50% of incidentally detected nodules greater than 8 mm are malignant. Malignancy should be suspected in a patient with a prior history of cancer or in any case in which a nodule is increasing in size, has speculated margins, or mixed solid/ground glass attenuation. Approximately 40% of solitary pulmonary nodules are found to be malignant, and prognosis for patients found with such a malignancy is dependant upon the staging at diagnosis. Spiculated and upper lobe nodules are more likely to be cancerous. He continued that a radiologist evaluating a pulmonary nodule must carefully review and report all relevant findings, and compare prior radiologic studies that are available to determine any potential change in size or characteristic of a nodule. The plaintiff's expert stated that a radiologist is actively employed in the detection, diagnosis, and staging of lung cancer. He continued that Dr. Van Dyne did not adequately report that the PET scan performed on May 18, 2006 did not rule out cancer as it demonstrated a significant left upper lobe nodule, for which Dr. Van Dyne should have recommended per cutaneous needle aspiration biopsy (PNAB), or video-assisted thoracic surgery (VATS). The failure to do so, stated plaintiff's expert, was a departure from good and accepted medical practice. Because the decedent was only 48 years of age, without significant health problems, and a history of smoking which increased the risk of development of lung cancer, PNAB or VATS was indicated even with a

negative PET scan. The plaintiff's expert concluded that the radiologic findings are consistent with a slow growing metabolically inactive cancer which was amenable to per cutaneous biopsy or VATS procedure.

The plaintiff's expert set forth that he disagreed with the expert opinion by Dr. Mair that Dr. Van Dyne's role was a targeted one solely to interpret what was seen on the PET scan, and that such statement misstates the role of a radiologist who is to give the referring physician an understanding of the significance of the findings of the study, and to make recommendations based upon what was seen and not seen on the radiologic exam. The plaintiff's expert stated that the ordering physician makes the ultimate determination regarding the next steps of care, but the radiologist is responsible to provide all relevant information to that clinician. He continued that Dr. Buono's note that he would consider a biopsy if the nodule was active indicated to him that as a physician, Dr. Buono did not understand that a negative PET scan did not rule out cancer, which is the very reason why Dr. Van Dyne should have reported that to Dr. Buono.

Based upon the foregoing, it is determined that the plaintiff has raised multiple factual issues which preclude summary judgment from being granted to Dr. Van Dyne, especially with regard to whether or not Dr. Van Dyne should have specifically stated in his report that the PET scan does not rule out cancer, although he did recommend a short interval followup for a CT of the chest. The conflicting opinions set forth in the expert affirmations require that summary judgment be denied.

Accordingly, motion (003) by defendant Martin J. Van Dyne, M.D. for summary judgment dismissing the complaint as asserted against him is denied.

MOTION (004)

In motion (004), defendants David M. Kirshy, M.D., Anthony E. Mitarotondo, M.D., and North Fork Radiology relative to vicarious liability for any treatment rendered by Dr. Mitarotondo and Dr. Kirshy, pursuant to CPLR 3117, seek to have the stipulations of discontinuance with prejudice dated April 16, 2012, So-Ordered, discontinuing the action as asserted against them.

Counsel for the plaintiff, in opposing motion (005), affirms that the case against North Fork Radiology, P.C. is based on defendant's vicarious liability for co-defendants Van Dyne and Lombardo, and that North Fork Radiology does not dispute the claim for vicarious liability as to these defendants who are both admittedly employees of North Fork Radiology, P.C. Plaintiff does not offer opposition to motion (004) and has signed the stipulations of discontinuance with prejudice as to defendants Kirshy, Mitarotondo, and North Fork Radiology with respect to any vicarious liability it may have for Kirshy and Mitarotondo.

Co-defendants Buono, Lombardo, Van Dyne, and North Fork Family Practice have submitted no opposition to this motion, and have submitted no expert affirmations or affidavits asserting that these moving defendants bear liability in this action. Without having submitted expert testimony in opposition to this motion, the provisions of CPLR Article 16 are waived (***Cover et al v Cohen et al***, 113 AD2d 502, 497 NYS2d 382 [2d Dept 1985]; *see* ***Dembitzer v Broadwall Management Corp***, 2005 NY Slip Op 50303U, 6 Misc 3d 1035A, 800 NYS2d 345, 2005NY Misc LEXIS 420; citing ***Hanna v Ford Motor Co.***, 252 AD2d 478, 479, 675 NYS2d 125 [2d Dept [1998]). It is additionally noted that none of the defendants have asserted cross-claims against the moving defendants and have not moved to amend their answers to assert cross-claims.

Accordingly, motion (004) is granted. The stipulations of discontinuance with prejudice dated April 16, 2012 are deemed So-Ordered as to defendants David M. Kirshy, M.D., Anthony E. Mitarotondo, M.D., and North Fork Radiology relative to any vicarious liability it may have for Dr. Mitarotondo and Dr. Kirshy, and the complaint is dismissed with prejudice as to these defendants. The remaining co-defendants are precluded from asserting the benefits conferred by Article 16 at the time of trial as to David M. Kirshy, M.D., Anthony E. Mitarotondo, M.D., and North Fork Radiology relative to any vicarious liability it may have for Dr. Mitarotondo and Dr. Kirshy. In light of the dismissal of the complaint as asserted against defendant Frank Lombardo, co-defendants are also precluded from asserting the benefits conferred by Article 16 at the time of trial as to Frank Lombardo, M.D.

MOTION (005)

In motion (005), North Fork Radiology, P.C. seeks summary judgment dismissing the complaint as asserted against it.

A shareholder, employee, or officer of a professional corporation is liable only for negligent or wrongful acts committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation (***Oviedo v Weinstein***, 102 AD3d 844, 958 NYS2d 467 [2d Dept 2013]; ***Moller v Taliuaga***, 255 AD2d 563, 681 NYS2d 90 [2d Dept 1998]).

The complaint has been dismissed as against Dr. Mitarotondo and Dr. Kirshy, and North Fork Radiology relative to any vicarious liability North Fork Radiology may have for Drs. Mitarotondo and Kirshy. The complaint has also been dismissed as asserted against defendant Frank Lombardo, M.D., thus North Fork Radiology bears no vicarious liability as to Dr. Lombardo. However, the motion by Dr. Van Dyne has been denied.

Dr. Van Dyne was a shareholder and employee of North Fork Radiology, P.C. at the time he interpreted the aforementioned studies and issued reports and recommendations. In that he was rendering professional services on behalf of North Fork Radiology, P.C., and in that there are factual issues concerning any departures from the standard of care by Dr. Van Dyne, summary judgment is denied to North Fork Radiology, P.C. for any vicarious liability it may have for Dr. Van Dyne.

Accordingly, that part of motion (005) by North Fork Radiology for summary judgment dismissing the complaint asserted against it for vicarious liability for defendants Frank Lombardo, M.D., Anthony Mitarotondo, M.F., and David Kirshy, M.D. is granted, but is denied with respect to that part of the application for dismissal of the complaint for vicarious liability as to Martin Van Dyne, M.D.

Dated: November 8, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**