

Browning v Sorgen

2013 NY Slip Op 34035(U)

August 1, 2013

Supreme Court, Westchester County

Docket Number: 22575/09

Judge: Joan B. Lefkowitz

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To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

JAYDEN RUSSELL BROWNING, An Infant by
CANDICE BROWNING His Parent and Natural
Guardian and CANDICE BROWNING, Individually,

Plaintiffs,

-against-

CARL D. SORGEN, ADOLFO GRIEG, HERSCHEL
LESSIN, NHAN TUE TAI, THE CHILDREN'S MEDICAL
GROUP, PLLC, VASSAR BROTHERS HOSPITAL,
HUDSON VALLEY NEWBORN PHYSICIAN
SERVICES, PLLC and VASSAR BROTHERS CARE
CENTER,

Defendants.

LEFKOWITZ, J.

The following papers numbered 1-38 were read on (1) motion by defendants Adolfo Grieg, Nhan Tue Tai and Hudson Valley Newborn Physician Services, PLLC (hereinafter "HVNPS") for an order dismissing the action based upon plaintiffs' willful refusal to provide a proper bill of particulars in contravention of court orders, or precluding evidence as to the items insufficiently set forth in response to defendants' demand for a bill of particulars, or conditionally dismissing the action and/or precluding evidence unless plaintiffs provide a properly responsive bill of particulars within 10 days of the court's order; and (2) motion by defendants Vassar Brothers Hospital and Vassar Brothers Care Center (hereinafter "Vassar defendants") for an order compelling plaintiffs to provide a further supplemental bill of particulars and other further relief as the court may deem just and proper.

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Upon the foregoing papers and the proceedings held on June 3, 2013, the motion is decided as follows:

FILED
AND
ENTERED
ON 8-2 2013
WESTCHESTER
COUNTY CLERK

FILED
AUG - 2 2013
TIMOTHY C. IDOMI
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION & ORDER

Index No. 22575/09
Motion Date: June 3, 2013

Seq. no. 3 & 4

O.K.


Factual and Procedural Background

In the present medical malpractice action, plaintiffs generally allege in their verified complaint that as the result of the improper medical care and treatment or lack thereof of plaintiffs by defendants, infant plaintiff Jayden Russell Browning sustained severe, serious and permanent personal injuries. Plaintiffs further allege, inter alia, that infant plaintiff sustained his injuries due to carelessness, negligence and departures from accepted and proper medical, obstetrical and other good practices by defendants and their agents and/or employees. Plaintiffs also allege a cause of action for lack of informed consent.

Movants served answers and demands for a bill of particulars on or about October 19, 2009 and October 22, 2009. The Vassar defendants demand sought, inter alia, to have plaintiffs identify each and every individual for whom plaintiff claimed the Vassar defendants were vicariously liable.

Plaintiffs served Verified Bills of Particulars dated May 18, 2010 on each movant. With respect to the movants, plaintiffs alleged in the bills of particulars, inter alia: defendants failed to timely and properly diagnose and treat infant plaintiff's truncus arteriosus, interrupted aortic arch/ventricular septal defects and arial septal defect during the ante natal period and perionatal period; negligently and carelessly caused and allowed infant plaintiff's cardiac arrest, cyanotic state, brain damage, and sepsis; negligently and carelessly causing infant plaintiff's cardiovascular collapse; negligently and carelessly failed to admit infant plaintiff to the hospital and appreciate and diagnose infant plaintiff's diminished pulses; negligently and carelessly failed to order radiological and diagnostic studies on infant plaintiff, including examinations of the heart and timely ultrasounds, CT scans, x-rays, echocardiography and electrocardiography; negligently and carelessly failing to order proper consults and perform timely surgical procedures; and ignoring infant plaintiff's signs and symptoms, including diminished pulse, gray-bluish coloration, cool skin, congested breathing and heart murmurs. As to the Vassar defendants' demand with respect to the identity of individuals for whom plaintiff claimed they were vicariously liable, plaintiffs responded that the Vassar defendants were vicariously liable for the negligence of "... their agents, servants, and employees whose names and identities are unknown to the Plaintiff at the present time."

By letter dated June 21, 2010, the Vassar defendants objected to the response as insufficient and demanded plaintiffs strike the allegations from the bill of particulars or provide clarification. Therein, the Vassar defendants also requested additional information regarding plaintiffs' alleged special damages.

Defendants Grieg, Tai and HVNPS objected to plaintiffs' bills of particular by letter dated July 16, 2010. Specifically, these defendants objected to plaintiffs' responses to paragraphs 2, 3, 4 and 9 of the demands for a bill of particulars. With respect to paragraph 3, they requested specific responses as to, inter alia: (1) what radiological and diagnostic studies it is claimed were misread

or misinterpreted; (2) identification of the consultation which should have been performed; (3) identification of the medication which should have been prescribed; (4) identification of what surgical procedure should have been performed; (5) what manner it is claimed that infant plaintiff was abandoned; (6) what antenatal testing it is claimed Dr. Tai should have ordered; (7) what fetal abnormalities were not detected; and (8) what follow-up examinations, tests or procedures it is claimed should have been performed. As to paragraph 4, they requested the identify of the individuals for whom plaintiffs claim defendants are liable. As to paragraph 9, they requested the identification of the rules, regulations, law or ordinance which it is claimed were violated. Finally, they requested the specific dates of the alleged malpractice.

On April 28, 2011, the parties appeared for a compliance conference. By order dated April 29, 2011, this court directed plaintiffs to, inter alia, supplement paragraph 3 of the bills of particulars as to defendants Grieg and Tai on or before May 13, 2011. Therein, the court also directed plaintiffs to respond to the objection letter of the Vassar defendants on or before May 13, 2011.

Plaintiffs served a Supplemental Verified Bill of Particulars dated May 27, 2011 as to defendants Tai and Grieg. Therein, plaintiffs added time periods of the alleged malpractice as to the doctors, but did not otherwise supplement their response to paragraph 3.

By Compliance Conference Order dated June 7, 2011, this court directed, inter alia, plaintiffs to, on or before June 9, 2011, supplement paragraph 3 of the bill of particulars with respect to defendants Tai and Grieg and respond to the objection letter of the Vassar defendants.

Plaintiffs failed to serve an amended or supplemental bill of particulars with respect to the Vassar defendants despite letters from counsel for the Vassar defendants demanding an amended bill of particulars. In June, 2011¹, counsel for plaintiffs advised the Vassar defendants by letter that a supplemental bill of particulars would be provided after the completion of the depositions.

On or about November 11, 2011, plaintiffs served Second Supplemental Bills of Particulars as to defendants Grieg and Tai with respect to paragraph 3. As to defendants Grieg and Tai, plaintiffs identified the radiological and diagnostic studies which plaintiffs alleged they negligently and carelessly misread and misinterpreted as follows: x-ray radiographies, Computed Tomographies, Positron Emission Tomographies, Magnetic Resonance Images, ultrasounds, and echocardiographies.²

¹ By Verified Amended Complaint dated June 16, 2011, plaintiffs added Carl D. Sorgen as a defendant and deleted Aaron Blum as a defendant. Defendants served answers to the verified amended complaint.

² Contrary to defendants Greig, Tai and HVNPS, plaintiffs alleged in their Supplemental Verified Bill of Particular as to defendant Grieg and paragraph 3 that defendant Grieg negligently and carelessly failed to order immediate cardiothoracic surgery consultation and that defendant

By Compliance Conference Order dated December 2, 2011, this court directed plaintiffs to supplement the bill of particulars, to the extent applicable, within 45 days after completion of depositions. By Compliance Conference Order dated January 18, 2012, insofar as depositions were still outstanding, this court set deadlines for the outstanding depositions and again directed plaintiffs to supplement the bill of particulars, to the extent applicable, within 45 days of the completion of depositions.

By letter dated November 19, 2012, counsel for the Vassar defendants demanded a supplemental bill of particulars, including the identification of any individuals for whom plaintiffs claim the Vassar defendants are vicariously liable.

On February 1, 2013, the parties appeared for a compliance conference. By Compliance Conference Order of the same date, this court directed plaintiffs to, inter alia, serve a supplemental bill of particulars on or before February 22, 2013. By letter dated February 22, 2013, counsel for defendants Grieg, Tai and HVNPS demanded the further supplemental bill of particulars.

Plaintiffs served a Third Further Supplemental Verified Bills of Particulars as to defendant Grieg and Tai, and a Second Further Supplemental Verified Bill of Particulars as to HVNPS. As to Dr. Grieg, plaintiffs added, inter alia, the following as to the response to demand 3: (1) negligently and carelessly failed to perform a pulse oximetry reading on infant plaintiff's upper and lower extremities; (2) negligently and carelessly failed to refer infant plaintiff to the emergency room on December 26, 2008; (3) negligently and carelessly failed to directly evaluate infant plaintiff on December 26, 2008; (4) negligently and carelessly failed to provide appropriate instructions to defendant Vassar Brothers Hospital staff regarding the non-admitted infant in the Neonatal Intensive Care Unit; (5) negligently and carelessly failed to admit infant plaintiff to the hospital on December 26, 2008; (6) negligently and carelessly failing to properly evaluate and take infant plaintiff's blood pressure on December 26, 2008; (7) negligently and carelessly failing to properly provide appropriate instructions to defendant Vassar Brothers Hospital; and (8) failing to order a pediatric cardiology consultation. As to defendant Grieg plaintiffs added to the response to demand 4 that he was vicariously liable to his agents, servants and employees, including defendant Vassar Brothers Hospital nurse who took infant plaintiff's blood pressure values on December 26, 2008, Nurse Andrea Leggio and other unknown agents, servants and employees whose names are unknown.

The Third Further Supplemental Bill of Particulars as to defendant Tai added the following to the response to demand 3: (1) negligently and carelessly failed to order a fetal echocardiogram; (2) negligently and carelessly failed to arrange for follow-up maternal fetal medicine consults; and

Grieg was negligently and carelessly caused infant plaintiff's cardiovascular collapse. These allegations, therefore, were not added for the first time in plaintiffs Second Supplemental Verified Bill of Particulars as to defendant Greig as contended by defendants Greig, Tai and HVNPS.

(3) negligently and carelessly failed to properly communicate plaintiff Candice Browning's medical history and condition with maternal fetal specialist Dr. Auth.

In the Second Further Supplemental Verified Bill of Particulars as to HVNPS plaintiffs supplemented the response to demand 4 by alleging that HVNPS was vicariously liable for its agents, servants and employees, but only identified defendant Grieg as the only individual known by plaintiffs for whom HVNPS is vicariously liable.

Plaintiffs also served a Further Verified Supplemental Bill of Particulars as to the Vassar defendants dated February 22, 2013. Therein, plaintiffs alleged that the Vassar defendants "are vicariously liable for the negligence of their agents, servants, and employees including, CARL SORGEN, ADOLFO GRIEG, all Hospital nurses and Hospital staff involved in infant-plaintiff's December 26, 2008 presentation, the Hospital nurse who took infant-plaintiff's blood pressure values on December 26, 2008, Nurse Andrea Leggio and Defendant HOSPITAL and CENTER's agents, servants and employees whose names and identities are unknown to Plaintiff[s] at the present time."

By letter dated March 4, 2013, the Vassar defendants objected to the Further Verified Supplemental Bill of Particulars on the ground that it does not adequately advise defendants as to whom plaintiffs claim defendants are vicariously liable. The Vassar defendants demanded that plaintiffs provide them with the names of the individuals, as well as the acts and/or omissions attributable to each individual. Additionally, the Vassar defendants demanded, inter alia, the first and last date on which it is claimed that defendants treated or advised plaintiffs, detailed allegations and additional special damages.

Plaintiffs served a Further Supplemental Verified Bill of Particulars dated April 18, 2013 with respect to the Vassar defendants. Therein, plaintiffs supplemented their responses to demands 5 and 26 as to the individuals whom plaintiffs claim the Vassar defendants are vicariously liable by stating "... Defendants, Hospital and Center are vicariously liable for the negligence of their employees and/or agents, ..." and identified 20 individuals in addition to defendant Carl D. Sorgen, defendant Grieg and the Hospital nurse who took infant-plaintiff's blood pressure values on December 26, 2008. Plaintiffs also reserved the right to further supplement the responses upon obtaining further information from the Vassar defendants.

Motion of the Vassar Defendants

The Vassar defendants now seek an order compelling plaintiffs to provide a further supplemental bill of particulars. Specifically, the Vassar defendants contend that plaintiffs should be directed to strike the words "employees and/or agents" in their response to demand 4 in their further supplemental bill of particulars dated April 18, 2013, regarding the individuals who plaintiffs claim the Vassar defendants are vicariously liable. The Vassar defendants assert that this language makes it unclear whether plaintiffs are referring to the individuals named thereafter or whether plaintiffs are referring to additional unnamed individuals. The Vassar defendants rely

upon case law which holds that plaintiffs must identify nonparties prior to the close of discovery and identify those individuals whom plaintiffs claim defendant is vicariously liable (*Gannotta v Long Is. College Hosp.*, 92 AD2d 930 [2d Dept 1983]; see *Batson v LaGuardia Hosp.*, 194 AD2d 705 [2d Dept 1993]; *Brusco v St. Clare's Hosp.*, 128 AD2d 390 [1st Dept 1987]).

The Vassar defendants also seek an updated figure with respect to plaintiffs' special damages, which was not provided in the supplemental bill of particulars. Although the Vassar defendants recognize that pursuant to CPLR 3043 (b), plaintiffs may supplement their bill of particular with respect to continuing special damages and disabilities up until 30 days prior to trial, the Vassar defendants also assert that plaintiffs have a duty to promptly supplement the bill of particulars pursuant to CPLR 3101 (h) when the information previously provided is no longer correct. The Vassar defendants contend that since it has been almost three years since plaintiffs provided the initial figures regarding special damages in the original bill of particulars, plaintiffs should be in a position to update the information.

Plaintiffs oppose the motion and contend that it should be denied as frivolous insofar as plaintiffs have complied with the court orders regarding the supplementation of the bills of particulars. Plaintiffs contend that, as conceded by the Vassar defendants, plaintiffs have a right to supplement a special damages claim up until 30 days before trial, and the Vassar defendants fail to present any reason why plaintiffs should be required to supplement special damages at this point. At oral argument, plaintiffs further contended that they had provided authorizations to defendants to obtain information as to continuing special damages. As to the Vassar defendants request that plaintiffs remove the words "employee and/or agent" from the response regarding the identity of individuals for whom the Vassar defendants are vicariously liable, plaintiffs contend that the request is not supported by any legal precedent, harassing and without merit.

The Vassar defendants correctly contend that the use of the words "employees and/or agents" in plaintiffs' bills of particulars in response to demand 4 regarding the individuals who plaintiffs claim the Vassar defendants are vicariously liable is vague and fails to apprise defendants as to specifically whom it is claimed defendants are vicariously liable (*Gannotta v Long Is. College Hosp.*, 92 AD2d 930; *Crispino v Anderson*, 33 Misc3d 1204(A) [Sup Ct, Nassau County 2011]). Accordingly, the Vassar defendants' motion is granted to the extent that plaintiffs shall serve further supplemental bill of particulars as to demand 4 of the Vassar defendants' Demand for a Verified Bill of Particulars and shall omit the words "employees and/or agents" from their response.

The motion is also granted to the extent that plaintiffs are precluded from claiming at trial that the Vassar defendants are vicariously liable for any individual other than the individuals named in the further supplemental bill of particulars dated April 18, 2013 and the nurse who took infant plaintiff's blood pressure values, unless plaintiffs, with leave of the court, name additional individuals in an amended bill of particulars prior to trial.

As to special damages, although CPLR 3043 (b) provides that a party may serve a supplemental bill of particulars with respect to claims of continuing special damages and

disabilities without leave of court “at any time, but not less than 30 days prior to trial”, CPLR 3043 (c) grants the court discretion to grant further or other particulars not set forth in the statute. In the present case, in light of the serious nature of the injuries alleged and the fact that almost three years has elapsed since plaintiffs served the original bill of particulars, a supplemental bill of particulars updating the costs of the special damages is warranted. Accordingly, that branch of the Vassar defendants motion which seeks a supplemental bill of particulars as to special damages is also granted and plaintiffs shall provide the Vassar defendants with a supplemental response to demand 15 setting forth the total amount of special damages as to the categories of special damages set forth in demand 15.

Motion of Defendants Tai, Grieg and HVNPS

Defendants Tai, Grieg and HVNPS (hereinafter “moving defendants”) seek an order dismissing the action based upon plaintiffs’ willful refusal to provide a proper bill of particulars in contravention of court orders, or precluding evidence as to the items insufficiently set forth in response to moving defendants’ demand for a bill of particulars, or conditionally dismissing the action and/or precluding evidence unless plaintiffs provide a properly responsive bill of particulars within 10 days of the court’s order.

Initially, the court finds that moving defendants have failed to demonstrate entitlement to an order dismissing or precluding plaintiffs, or that plaintiffs’ conduct warrants such a remedy. CPLR 3126 provides that if any party “willfully fails to disclose information which the court finds ought to have been disclosed,” the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. “The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). “Willful and contumacious conduct can be inferred from repeated noncompliance with court orders, inter alia, directing depositions, coupled with no excuses or inadequate excuses” (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]). Here, it cannot be said that plaintiffs have willfully failed to comply with court orders. Rather, plaintiffs, in compliance with court orders, have provided multiple supplemental bills of particulars in an attempt to comply with the court orders.

The court will now address that branch of moving defendants’ motion seeking an order compelling plaintiffs to serve further supplemental bills of particulars and for conditional preclusion. The moving defendants specifically challenge plaintiffs’ responses to demands 2-6, 9, 10, 13, 14 and 16 of moving defendants’ demands for a bill of particulars. The moving defendants allege the foregoing responses are insufficient or improper. Moving defendants’ contentions as to the specific responses, plaintiffs’ opposition and the courts findings are set forth below:

Demands 2 and 9

As to demands 2 and 9, which request that if plaintiffs claim defendants violated any manuals, laws, rules, codes, regulations, or contracts, that they set forth the details of the claims, moving defendants assert that plaintiffs' original bill of particulars stated that the responses would be supplemented after depositions. Moving defendants further assert that although depositions have been completed, plaintiffs have not provided particulars as to these claims.

Plaintiffs allege that no further supplementation is needed since a defendant physician is charged with knowing the acceptable standards of medicine and no claim is asserted in the complaint that defendants violated "any manuals, ordinances, statutes, etc."

Although plaintiffs assert they are not alleging a claim for the violation of any manual, statute, rule, ordinance, regulation, law, code or contracts, plaintiffs are required to affirmatively state the foregoing in an amended bill of particulars in response to demands 2 and 9. That branch of the motion seeking an order directing plaintiffs to supplement their response as to those demands is therefore granted.

Demand 3

As to demand 3, which seeks particulars as to moving defendants' negligence, moving defendants contend that although the responses contain some specific alleged negligent acts and omissions, the responses still include numerous improper "overly broad and factually vague statements." Moving defendants specifically object to the use of the term "including" since it allows plaintiffs to make other claims at trial which are not specifically delineated in the bill of particulars. Moving defendants also object to, inter alia, the use of the words "properly" and "appropriate" as constituting generalizations and conclusory boilerplate. Accordingly, moving defendants seek preclusion or a supplemental bill of particulars removing these general and inclusive allegations.

Plaintiffs assert that in the bills of particulars they have provided a "general statement" of the acts or omissions constituting the negligence claims, as required by case law. Plaintiffs further note that, as to the moving defendants they have provided three supplemental bills of particular. Plaintiffs assert that no further delineation can be provided and note that counsel for the moving defendants admits in her affirmation in support of the defendants' motion that plaintiffs' Third Supplemental Bills of Particulars "contain some specific alleged acts and omissions." Plaintiffs further contend that there is no prohibition against plaintiff alleging general failures as long as plaintiff also provides specifics to amplify the pleading.

CPLR 3043 (a)(3) provides that in an action to recover for personal injuries, including a medical malpractice action, the bill of particulars must provide "[a] general statement of the acts or omissions constituting the negligence claimed." The purpose of a bill of particulars is to amplify

pleadings, limit the proof and prevent surprise at trial, not provide evidentiary material (*Jurado v Kalache*, 93 AD2d 759 [2d Dept 2012]; *Toth v Bloschinsky*, 39 AD3d 848, 849 [2d Dept 2007]). As a whole, plaintiffs' bills of particulars sufficiently set forth the acts and omissions which constituted moving defendants' alleged medical malpractice. In their bills of particulars, plaintiffs set forth with detailed specificity the particulars as to these acts and omissions, including claims that defendants: failed to timely and properly diagnose and treat infant plaintiff's truncus arteriosus, interrupted aortic arch/ventricular septal defects and aortic septal defect; failed to timely and properly perform; negligently caused and allowed infant plaintiff's cardiac arrest, cyanotic state, and severe brain damage; and negligently failed to appreciate and note diagnosis of infant plaintiff's heart murmurs. Contrary to moving defendants' contention, the use of the words "properly" and "appropriate" do not render the response vague or improper.

However, moving defendants correctly contend that the use of the word "including" in a bill of particulars has been held to be improper as it does not amplify the pleadings or limit the proof (*Alvarado v New York City Housing Auth.*, 302 AD2d 264 [1st Dept 2003]; *Crispino v Anderson*, 33 Misc3d 1204[A]). Accordingly, the use of the word "including", which is used once in plaintiffs' response to paragraph 3 in the Third Further Supplemental Verified Bills of Particulars as to Drs. Grieg and Tai and in the Second Further Supplemental Verified Bill of Particulars as to HVNPS, was improper. Plaintiffs, therefore, shall serve the moving defendants with further supplemental bills of particulars as to demand 3 with the word "including" stricken from their responses.

Demand 4

Moving defendants contend that plaintiffs' claim of vicarious liability as to defendant Grieg should be limited to the alleged acts of the Nurse Coordinator and Andrea Leggio, R.N., a Vassar Brothers Medical Center employee, since these are the only individuals identified in plaintiffs' response to demand 4, which sought the identities of the individuals for whom plaintiffs claim defendant Grieg is vicariously liable. Plaintiffs fail to address this contention.

As noted earlier, a plaintiff must identify or otherwise specify in the bill of particulars the individuals for whom they claim a defendant are vicariously liable (*Gannotta v Long Is. College Hosp.*, 92 AD2d 930 [2d Dept 1983]; see *Batson v LaGuardia Hosp.*, 194 AD2d 705 [2d Dept 1993]; *Brusco v St. Clare's Hosp.*, 128 AD2d 390 [1st Dept 1987]). Here, plaintiffs, in their Third Further Verified Bill of Particulars dated February 22, 2013 as to defendant Grieg, identified the following individuals for whom plaintiffs claim defendant Grieg is vicariously liable: "his agents, servants, and employees including the VASSAR BROTHERS HOSPITAL nurse who took infant-plaintiff's blood pressure values on December 26, 2008, Nurse Andrea Leggio and his agents, servants, and employees whose names and identities are unknown to the Plaintiff[s] at this time." As held earlier, the use of the words "employees and/or agents" is improperly vague and fails to apprise defendants as to specifically whom it is claimed defendants are vicariously liable (*Gannotta v Long Is. College Hosp.*, 92 AD2d 930; *Crispino v Anderson*, 33 Misc3d 1204(A)). Accordingly, insofar as depositions are now completed and demanded discovery exchanged,

plaintiffs shall serve defendant Grieg with a further supplemental bill of particulars as to demand 4 specifying the individuals for whom plaintiffs contend defendant Grieg is vicariously liable, and shall not use the phrase “agents, servants, and employees” or the word “including” in the supplemental response to demand 4.

Demand 5

As to demand 5 of the demands as to defendants Grieg and Dr. Tai³, which seeks the nature of the condition or conditions which it is claimed that defendants undertook to treat, plaintiffs objected to the demand as beyond the scope of a bill of particulars, but also responded “Defendant undertook to treat a symptomatic presentation.” Moving defendants contend that plaintiffs should be compelled to provide a general statement of what conditions defendants allegedly undertook to treat. Plaintiffs object to this branch of the motion and contend that the demand was improper since they are not required to provide evidentiary material or expert medical opinion in a bill of particulars.

Contrary to plaintiffs’ objection to demand 5, the courts have held that a plaintiff should set forth the condition or conditions which plaintiff alleges defendant failed to diagnose or improperly treated or failed to treat (*Mahr v Perry*, 74 AD3d 1030 [2d Dept 2010]; *Cady v Rivkin*, 109 AD2d 725 [2d Dept 1985]). Accordingly, that branch of moving defendants’ motion with respect to plaintiffs’ response to demand 5 as to defendants Grieg and Tai is granted and plaintiffs shall supplement their responses to demand 5 with respect to those defendants. Notably, in response to demand 3 of moving defendants’ demands for a bill of particulars, plaintiffs responded that defendants were negligent with respect to: infant plaintiff’s truncus arteriosus, interrupted aortic arch/ventricular septal defects and aortic septal defect; caused or allowed infant plaintiff’s cardiac arrest, sepsis, and severe brain damage; failed to appreciate infant plaintiff’s diminished pulse; and ignored infant plaintiff’s diminished pulses, gray-bluish coloration, cool skin, congested breathing and heart murmurs.

Demand 6

Demand 6 of the demands for a bill of particulars of defendants Grieg and Tai seek the date and approximate time of day of each of the alleged negligent or otherwise tortious acts and/or omissions.⁴ Moving defendants contend that although this demand is specifically authorized by CPLR 3043, plaintiffs have not provided a “cogent response.” In response to demand 6, plaintiffs objected to the demand as improper, evidentiary and beyond the scope of the bill of particulars, but also responded that negligent acts of defendants and their agents, servants, and/or employees

³ Paragraph 5 of the demand with respect to HVNPS seeks the location of the alleged negligence.

⁴ Paragraph 6 of the demand as to HVNPS does not seek information as to infant plaintiff’s alleged conditions.

occurred at various times during December, 2008, and are known by defendants since they are contained in defendants' records. Plaintiffs do not address this contention in their opposition to the motions.

CPLR 3043 (a)(1) provides that in actions to recover for personal injuries, particulars "may be required" as to "[t]he date and approximate time of day of the occurrence." However, where the negligent or otherwise tortious acts or omissions are ongoing, plaintiff may provide a range of dates in response to a demand for the date and time of day of the occurrence (*Harrell v County of Nassau*, 227 AD2d 590 [2d Dept 1996] [response that repeated assaults took place on a continual basis from May 1992 through August 7, 1992, proper]; *see generally Dickstein v Dogali*, 303 AD2d 443 [2d Dept 2003] [plaintiff entitled to amend bill of particulars to enlarge dates of hospital's alleged negligence]). Here, insofar as defendants Grieg and Tai continuously treated plaintiffs over a period of time, plaintiffs' response that those defendants' alleged negligent acts and omissions occurred in December, 2008 was sufficient to apprise the defendants of the allegations against them and allow them to prepare a defense.

Demand 10

Moving defendants contend that plaintiffs' response to demand 10, which seeks particulars as to lack of informed consent, is so vague and overbroad that it fails to apprise defendants of any alleged failure to obtain informed consent. Moving defendants further contend that there are no other allegations in the bill of particulars to suggest that there is a claim for lack of informed consent. Moving defendants note that the pleadings for a claim of lack of informed consent must establish that there is "an unconsented-to affirmative violation of the plaintiff's physical integrity."

Plaintiffs contend that the demand for particulars as to the claim of lack of informed consent is outside the scope of a bill of particulars. In any event, plaintiffs contend that they provided an adequate response. Plaintiffs responded that defendants failed to disclose the risks and benefits of the courses of treatment undertaken by defendants or alternative treatments and their risks and benefit. Plaintiffs further contend that any further supplementation would require expert testimony, which is evidentiary in nature and outside the scope of the bill of particulars.

The court disagrees with plaintiffs and finds plaintiffs' response to demand 10 to be vague and overbroad. Moving defendants are, therefore, entitled to a further amplification of the claim of lack of informed consent. Plaintiffs are directed to supplement their response to demand 10 such that they advise moving defendants of the specific treatment or treatments which they are alleging those defendants failed to inform them of the risks, benefits and alternatives.

Demands 13 and 14

Demands 13 and 14 of moving defendants' demands for a bill of particulars seek the following: (1) past, present and future hospitalizations claimed to have been caused by the malpractice or other tortious conduct of defendants, addresses of the hospitals, dates of confinement or treatment, and amount of hospital bill; and (2) names and addresses of all treating

and/or consulting physicians who are expected to render medical treatment to plaintiffs as a consequence of the alleged malpractice and total amount of their bills. Plaintiffs objected to those demands as beyond the scope the bill of particulars since they sought evidentiary material.

Moving defendants contend that CPLR 3043 by its own terms is not exhaustive and the court may grant further and different particulars than those set forth in CPLR 3043 (a). Moving defendants further contend that since CPLR 3043 (a)(9) permits the total amounts claimed as special damages for physician services and hospital expenses, it is reasonable for the court to compel plaintiffs to provide the names of the physicians and hospitals for which plaintiffs are claiming special damages.

To the extent that demands 13 and 14 seek the names and addresses of treating physicians and hospitals and the dates of confinement or treatment, the demands improperly seek evidentiary material. The purpose of the bill of particulars is to amplify the pleadings, not to seek evidentiary material (*Pardo v Boulevard Hosp.*, 92 AD2d 888 [2d Dept 1983]). Contrary to moving defendants' contention, the fact that CPLR 3043 (a)(9) sets forth that the total amounts claimed as special damages for, inter alia, physicians' services and hospital expenses may be required in a bill of particulars in a personal injury action, does not also warrant the disclosure in the bill of particulars of evidentiary material concerning physicians and hospital services. Accordingly, moving defendants properly objected to demands 13 and 14 as beyond the scope of the bill of particulars insofar as the demands seek evidentiary material regarding plaintiffs' hospitalizations and treating physicians.

To the extent, however, that demands 13 and 14 seek the total amount of the bills for plaintiffs' hospitalizations and treating physicians, the demands properly seek the total amount of special damages in those categories as authorized by CPLR 3043 (a)(9). Plaintiffs, therefore, shall provide further supplemental bills of particulars and supplement their responses to demands 13 and 14 by providing the total amounts claimed for hospital expenses and physicians' services. The remaining portions of demands 13 and 14 are stricken and plaintiffs need not supplement their responses to those portions of demands 13 and 14 which seek evidentiary material.

Demand 16 (a)-(g)

Demand 16 seeks past, present and future damages and the names and addresses of the payees with respect to nurses, psychologists, medical supplies, ambulance services, loss of earnings, and special educational, emotional or vocational training or schooling. Plaintiffs responded as follows regarding special damages: (1) nurses services was approximately \$4,000 and continuing (16[a]); (2) medical supplies approximately \$8,000 and continuing (16[c]); and (3) infant plaintiff will suffer a reduction in future earnings capacity in an amount to be determined, but will exceed \$1,000,000.00 (16[e]). Plaintiffs objected to the following subsections of the demand 16 as improper, evidentiary and beyond the scope of the bill of particulars: (1) psychologist or other mental health professionals (16[b]); (2) ambulance services (16[d]); (3) special education, emotional or vocational training or schooling (16[f]); and (4) other special damages other than the foregoing (16[g]).

With respect to demand 16, moving defendants assert that plaintiffs should be required to provide particulars regarding special damages as to: psychologists or other mental health providers; medical supplies and appliances; ambulance services; loss of earnings; special education, emotional or vocational training or schooling; and any other special damages claimed but not already set forth, even though these categories are not specifically listed in CPLR 3043 (a). Moving defendants assert that plaintiffs may not make claims at trial as to which defendants would be surprised, and must plead and particularize such claims on demand. Moving defendants note that CPLR 3043 (c) grants the court the discretion to direct further or different particulars. Moving defendants contend that plaintiffs have not updated their special damages since May 18, 2010, and plaintiffs should be directed to supplement the amount of special damages and provide the names of the payees to the present.

Plaintiffs contend that many of the items contained in demand 16 call for expert information, which plaintiffs will provide should they chose to present such claims at trial. Plaintiffs further assert that there is no reason presented to the court by moving defendants to expand the nature and purpose of the bill of particulars. Plaintiffs also again contend that CPLR 3043 (b) only requires a plaintiff to supplement the bill of particulars as to special damages no less than 30 days prior to trial.

Plaintiffs properly objected to demand 16 as beyond the scope of the bill of particulars insofar as it seeks the names and addresses of payees regarding special damages. As noted earlier, the sole purpose of the bill of particulars is to amplify the pleadings and is not to obtain evidentiary material (*Pardo v Boulevard Hosp.*, 92 AD2d at 888). Accordingly, that portion of demand 16 which seeks the names and addresses of payees is improper and must be stricken.

Demand 16, however, properly seeks the amount of special damages as to: psychologists or other mental health providers; ambulance services; special education, emotional or vocational training or schooling; and any other special damages claimed, except as already set forth. Although the foregoing categories are not included in the special damages listed in CPLR 3043 (a)(9), which requires the amounts of certain special damages be set forth in the bill of particulars, moving defendants in the present action are entitled to the amounts of all special damages which plaintiffs are claiming in light of the extensive injuries claimed. As noted by moving defendants, CPLR 3043 (c) grants the court the discretion to direct further and different particulars that are not specifically set forth in CPLR 3043 (a). The motion of the moving defendants is, therefore, granted to the extent that plaintiffs shall supplement their responses to demand 16 of the moving defendants and provide the total amount which plaintiffs are claiming as special damages for: psychologists or other mental health providers; ambulance services; special education, emotional or vocational training or schooling; and any other special damages claimed but not already set forth in the bills of particulars.

The branch of the motion seeking to compel plaintiffs to supplement their responses to demand 16 is denied with respect to the request for the amount of special damages as to medical supplies and appliances, as well as loss of earnings, since plaintiffs have already provided

sufficient responses to those demands. Notably, plaintiffs responded that special damages for medical supplies was approximately \$8,000 and continuing. Plaintiffs also responded that infant plaintiff will suffer a reduction in future earnings capacity in an amount to be determined, but will exceed \$1,000,000.00.

In view of the foregoing, it is

ORDERED that the motion of the Vassar defendants is granted only to the extent that:

(1) plaintiffs shall serve a further supplemental bill of particulars upon the Vassar defendants on or before August 19, 2013, if such a supplemental bill of particulars has not already been served, as follows: (1) supplementing their response to demand 4 by omitting the words "employees and/or agents" from their response; and (2) supplementing their response to demand 15 by updating the total amount of special damages as to the categories of special damages set forth in the demand; and

(2) plaintiffs are precluded from claiming at trial that the Vassar defendants are vicariously liable for any individual other than the individuals named in the further supplemental bill of particulars dated April 18, 2013 and the nurse who took infant plaintiff's blood pressure values, unless plaintiffs, with leave of the court, name additional individuals in an amended bill of particulars prior to trial; and it is further

ORDERED that the branch of the motion of defendants Grieg, Tai and HVNPS seeking to dismiss the complaint is denied; and it is further

ORDERED that the branch of the motion of defendants Grieg, Tai and HVNPS seeking to compel plaintiffs to provide supplemental responses to their demands for a bill of particulars are granted only to the extent that plaintiffs shall serve those defendants with further supplemental bills of particulars on or before August 19, 2013, with the following responses supplemented:

(1) Demands 2 and 9 as to defendants Grieg, Tai and HVNPS, which shall affirmatively state that plaintiffs are not claiming violations of any manuals, laws, rules, codes, regulations, or contracts;

(2) Demand 3 as to defendants Grieg, Tai and HVNPS with the word "including" stricken from their responses to the demand;

(3) Demand 4 as to defendant Grieg, which shall specify the individuals for whom plaintiffs contend defendant Grieg is vicariously liable with the phrase "his agents, servants and employees, including" stricken from the response;

(4) Demand 5 with respect to defendants Grieg and Tai, which shall set forth set forth the condition or conditions which plaintiff alleges defendants Grieg and Tai failed to diagnose or improperly treated or failed to treat;

(5) Demand 10 as to defendants Grieg, Dr. Tai and HVNPS, which shall set forth the specific treatment or treatments which they are alleging those defendants failed to inform them of the risks, benefits and alternatives;

(6) Demands 13 and 14 as to defendants Grieg, Tai and HVNPS by providing the total amounts claimed for hospital expenses and physicians' services to date; and

(7) Demand 16 as to defendants Grieg, Tai and HVNPS by providing the total amount which plaintiffs are claiming as special damages to date for: psychologists or other mental health providers; ambulance services; special education, emotional or vocational training or schooling; and any other special damages claimed but not already set forth in the bills of particulars; and it is further

ORDERED that the branch of the motion of defendants Grieg, Tai and HVNPS seeking to compel plaintiffs to provide supplemental responses to their demands for a bill of particulars is denied with respect to demand 6; and it is further

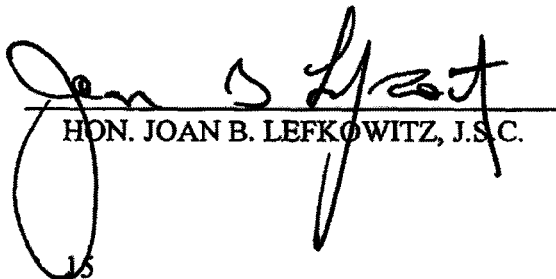
ORDERED that the branch of the motion of defendants Grieg, Tai and HVNPS which seek to compel plaintiffs to provide supplemental responses their demands for a bill of particulars is denied with respect to the following demands and those demands are stricken as improper: (1) the portions of demands 13 and 14 which seek evidentiary material as to physicians and hospital services, including the names and addresses of the service providers and dates of confinement or treatment; and (2) the portions of demand 16 which seeks the names and addresses of payees of special damages; and it is further

ORDERED that the motion is granted to the extent that plaintiffs shall be precluded from claiming at trial that defendant Grieg is vicariously liable for any individuals who plaintiffs do not identify or specify in the supplemental bill of particulars, unless plaintiffs, with leave of court, name additional individuals in an amended bill of particulars; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on August 20, 2013 at 9:30 AM, at which time it is contemplated that a Trial Readiness Order will be issued.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
August 1, 2013


HON. JOAN B. LEFKOWITZ, J.S.C.