

McCarroll v Rosen

2015 NY Slip Op 30049(U)

January 15, 2015

Supreme Court, Suffolk County

Docket Number: 10-26834

Judge: W. Gerard Asher

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-28-14 (#004)
MOTION DATE 5-12-14 (#005)
ADJ. DATE 6-17-14
Mot. Seq. # 004 - MG
005 - MG; CASEDISP

-----X
JOAN MARIE MCCARROLL and KEVIN
MCCARROLL,

Plaintiffs,

- against -

BONNIE S. ROSEN, M.D., STEVEN WEST,
D.O., SOUTH SHORE NEUROLOGIC
ASSOCIATES, P.C., BROOKHAVEN MRI and
BROOKHAVEN MAGNETIC RESONANCE
IMAGING,

Defendants.
-----X

SHAYNE, DACHS, CORKER, SAUER &
DACHS, LLP
Attorney for Plaintiffs
114 Old Country Road, Suite 410
Mineola, New York 11501

MITCHELL J. ANGEL, PLLC
Attorney for Defendant Rosen, M.D.
170 Old Country Road
Mineola, New York 11501

KRAL, CLERKIN, REDMOND, RYAN, PERRY
& VAN ETTEN, LLP
Attorney for Defendant West, D.O.
538 Broadhollow Road, Suite 200
Melville, New York 11747

GABRIELE & MARANO, LLP
Attorney for Defendant South Shore Neurologic
and Brookhaven MRI
100 Quentin Roosevelt Boulevard
P.O. Box 8022
Garden City, New York 11530

Upon the following papers numbered 1 to 68 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004)1-16; (005) 17-33; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 34-46; 47-59; Replying Affidavits and supporting papers 60-62; 63-64; Other 65-66; 67-68; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by defendant South Shore Neurological Associates, P.C. d/b/a Brookhaven MRI, pursuant to CPLR 214-a, 3211 (a) (5) and 3212 for partial summary judgment dismissing the complaint as asserted against it on the basis it cannot be held liable for an alleged misreading of the

McCarroll v Rosen
Index No. 10-26834
Page No. 2

April 28, 2006 MRI by independent contractor Steven West and on the basis of the statute of limitation, is granted; for partial summary judgment dismissing that part of the complaint premised upon its alleged negligence between 2007 and April 13, 2010, dates within the applicable statute of limitations, on the issue of liability, is granted; and for summary judgment for any alleged negligence which occurred prior to January 27, 2008 as barred by the applicable statute of limitations is granted; and it is further

ORDERED that motion (005) by defendant Steven West, D.O., pursuant to CPLR 214-a, 3211(a) (5) and 3212 for summary judgment dismissing the complaint as asserted against him as barred by the applicable statute of limitations, is granted.

In this medical malpractice action, Joan Marie McCarroll and her husband Kevin McCarroll seek damages personally and derivatively for injuries allegedly suffered by plaintiff due to the negligent departure from good and accepted standards of medical care by the defendants, who undertook follow-up care, evaluation, and monitoring, secondary to her diagnosis of Arnold Chiari malformation and cervical spine disc pathology, beginning in 2001. It is alleged, inter alia, that the brain MRI of April 28, 2006, was incorrectly read and misinterpreted in that there was a failure to diagnose the presence of an abnormality or mass epicentered at the skull base, and that the defendants failed to follow-up with, or provide proper diagnostic study and treatment of the condition. These failures, plaintiff alleges, caused and permitted a left endolymphatic sac tumor to increase and extend to involve the left petrous bone with involvement of adjacent mastoid air cells, and to project to the lateral aspect of the jugular foramen, resulting in a worsening of her symptoms and emerging clinical presentations of occipital pressure, intermittent hearing loss, dizziness and/or disequilibrium and eventual visual disturbances, and the inability to completely resect and remove the mass at the time of the surgical intervention in September 2010, placing her at a higher risk of recurrence and additional complications.

In support of motion (003), South Shore Neurological Associates, P.C. submitted, inter alia, copies of the summons and complaint, its answer, plaintiffs' verified bill of particulars; signed copies of the examinations before trial of Jean Marie McCarroll (and continued) and Kevin McCarroll, Steven West, D.O., and Charles Burke; unsigned and uncertified transcript of the examination before trial of Bonnie S. Rosen, M.D. to which there is no objection; certified copy of the South Shore Neurological Associates, P.C. record; and the affirmation of David Myland Kaufman, M.D.

In support of motion (005), Steven West, D.O. submitted, inter alia, an attorney's affirmation; the affirmation of David Myland Kaufman, M.D.; memorandum of law; copy of the supplemental summons and amended complaint, his answer and an answer to the amended complaint, answer served by co-defendants Rosen, Brookhaven MRI, and South Shore Neurological Associates, and plaintiff's verified bill of particulars; notice to admit; signed copies of the examinations before trial of Jean Marie McCarroll and Kevin McCarroll, and defendant West; unsigned and uncertified transcript of defendant Rosen to which there is no objection; unsigned but certified transcript of Charles Burke which is considered as signed copy was submitted with motion (004); and a certified copy of the South Shore Neurological Associates, P.C. record.

Joan Marie McCarroll testified to the extent that in about 1999, she first experienced occipital pressure and excruciating pain, lasting about ten seconds at the back of her head, associated with excessive laughing, coughing, straining, or bending over. She first mentioned this to Drs. Walsh and Toriello in about

2000. Dr. Walsh sent her for an MRI in about June 2000, advised her it was normal, and referred her to a neurologist. She then followed-up with Dr. David Besser at South Shore Neurological Associates in about 2000-2001, and obtained another MRI at Brookhaven MRI in 2001. She was advised the MRI was normal, but later testified that Dr. Besser advised her that she had Arnold Chiari Syndrome and herniated cervical discs. In 2001 or 2002, Dr. Besser referred her to Dr. Rosiello at Stony Brook, who recommended decompression Arnold Chiari surgery, and cervical spine fusion for the multiple herniated cervical discs which were impinging on the spinal cord. She then went for a second opinion with neurosurgeon, Steven Schneider, M.D., and was advised that the Arnold Chiari Syndrome was causing her symptoms, that the herniated cervical discs looked “scarry” as they were compressing the spinal cord, and that she should watch and wait.

The plaintiff testified that in 2002 or 2003, she went to Dr. Bolognese at the Chiari Institute, in Manhasset. She had multiple tests and studies, including MRIs of the brain, and cervical, thoracic, and lumbar spine, MRA, and a 3-D test at North Shore University Hospital and at the Chiari Institute. Dr. Bolognese confirmed the diagnosis of Arnold Chiari Syndrome and herniated cervical discs, advised her that her symptoms were explained by the Arnold Chiari Syndrome, and recommended that she see a neurologist, follow-up with him in one year, and consider having surgery for the discs as that was more pressing than the Arnold Chiari Syndrome. She indicated care and treatment, including an EMG related to her snoring and mild sleep apnea, and Holter monitor and cardiology work-up with Dr. Choudry, and an ENT consult in October 2004 with Dr. Campbell and Dr. Bonafede for sinusitis. She stated she was reluctant to have the surgery for the herniated discs, that Dr. Firouztale, at South Shore Neurological Associates advised her to have yearly MRI studies as the impingement looked as though it was progressing at C5 and C6. The Arnold Chiari Syndrome also progressed from 4 mm to 6 mm. She experienced more frequent occipital pressure and pain at the back of her head, associated with excessive laughing, coughing, straining, or bending over. She advised Drs. Walsh, Toriello, Besser, Schneider, and Bolognese of her complaints with symptoms progressing to about four times a week.

The plaintiff testified that on January 17, 2005, she had surgery on her neck at North Shore University Hospital, which provided her with more mobility in her neck. She had a post-operative visit with Dr. Bolognese and followed-up for neurology with Dr. Firouztale at South Shore Neurological Associates in April 2006. Dr. Firouztale ordered an MRI, which was done at Brookhaven MRI, and advised her it was normal. She complained to Dr. Firouztale of intermittent hearing loss, and some deterioration in her eyesight, and was sent her to see ENT doctors, Drs. Campbell and Bonafede. In 2007, she was seen by Dr. Spencer, her primary care physician, for a three-day episode of fogginess, balance issues, nausea, and vomiting. Dr. Spencer, after consulting with South Shore Neurology Associates, referred her to the emergency room at Good Samaritan Hospital, where she had a CT scan, MRI, and EKG, which were normal. However, her blood pressure was elevated. She followed-up with Dr. Spencer and Dr. Firouztale at South Shore Neurology Associates, and advised Dr. Firouztale that she had a couple episodes of burning pain on the left side of her head. He ordered a carotid Doppler, which she had at Brookhaven MRI, and which she was told was normal. She followed-up with South Shore Neurological Associates in 2008 or 2009. Her symptoms were still the same, except she began to experience continuous coughing episodes and intermittent hearing loss, and a fullness in her ears when she bent her head back, for which she saw Dr. Campbell or Dr. Bonafede who performed a scope procedure to her throat.

For the first time, stated the plaintiff, she experienced pulsating in her left ear over a three day period while she was in Florida in February 2007. She continued that she did not see anyone at the Chiari Institute in 2008 because her symptoms were not getting any worse. She went to Dr. Campbell's group twice in 2009 due to daily coughing episodes, which exacerbated the pressure in the back of her head. She was advised to stop the Lisinopril for her blood pressure and take a different blood pressure medication. In February or March 2010, she saw Dr. Spencer for her blood pressure, and was advised to see her neurologist. She saw Dr. Firouztale in March 2010 for complaints of fogginess, balance issues, nausea, and vomiting, change in hearing, identical to the episode she experienced in 2007. Dr. Firouztale ordered a brain MRI, vestibular testing, a BAER, and EEG. A 24 hour EEG was then ordered due to sharp waves in the EEG. The vestibular testing was abnormal. Dr. Firouztale advised her that the lesion was bigger than it was in 2006, and she asked him "What lesion?" He advised her that it was at her brain stem, at the base of her brain, that tumors in that area are generally benign and slow growing, and that he wanted her to have a CAT scan of the brain. After the CAT scan, he advised her she had a cholesterol granuloma and referred her for an ENT specialist for evaluation. She made an appointment with Dr. Campbell or Bonefede, who then referred her to Dr. Schessel, a neurotologist at Stony Brook, where she had a CAT scan of the internal auditory canal. Dr. Schessel advised her that he did not believe it was a cholesterol granuloma, but rather, an endolymphatic sac tumor, associated with Hippel-Lindau syndrome, for which she had been tested in 2004 due to jaundice and elevated liver function blood tests. She was not diagnosed with Hippel-Lindau, however. Dr. Schessel advised her the lesion was present in the 2006 MRI study of the brain, and had become bigger. He recommended surgery which he said could have been done in 2006, however, he did not say whether the surgery would have been any different if performed in 2006. She also obtained consults with Dr. Davis and Dr. Fiorello at Stonybrook, and Dr. Bolognese. In September 2010, she had the surgery performed at the National Institute of Health in Bethesda, Maryland for removal of the endolymphatic sac tumor .

Dr. Rosen testified that she is on the faculty at Stony Brook University Hospital and worked part time at Brookhaven MRI in 1994, and upon completion of her fellowship, became employed full time by Brookhaven MRI. She believed South Shore Neurological Associates was doing business as Brookhaven MRI, and had offices in the same building. South Shore Neurological Associates also has additional offices. She was not aware of a business known as Brookhaven Magnetic Resonance Imaging, Inc. As a neuroradiologist, she is generally a diagnostic radiologist. She testified that an endolymphatic sac tumor is a pathologic diagnosis, and that she was not aware of ever having diagnosed a lesion radiographically. Dr. Rosen testified that she trained with Steven West, D.O. at Stony Brook. When she was on vacation, or on days off, the Stony Brook faculty read those images taken at Brookhaven MRI for her. In 2006, Dr. West was part of the Stony Brook faculty practice and interpreted images. From 2006 through 2010, she was the only neuroradiologist on site at Brookhaven MRI. In 2006, when an imaging study was taken, it was stored in the computer, and the report was generated by dictaphone after the film was reviewed. When Dr. West reviewed the film, a report was generated on Brookhaven MRI letterhead. Stony Brook had a contract with Brookhaven MRI, and Dr. West was paid a fee for reading the study. She testified that Dr. West was not an employee of Brookhaven MRI in 2006. When Dr. West reviewed a film, her name would also be placed on the report, although she did not re-review any of the imaging studies. Dr. Rosen testified that Dr. West reviewed the plaintiff's MRI study of April 28, 2006.

Dr. Rosen continued that she reviewed plaintiff's MRI brain study of April 13, 2010, and compared it to the prior study of April 28, 2006 which was reviewed by Dr. West. She noted that "[i]n comparison to the previous examination, there is an interval increase in the size of the left-sided mass, which is epicentered

at the skull base in the region of the left hypoglossal canal or the jugular foramen.” Dr. Rosen described a mass as having discrete borders, was focal and well-defined, measuring 1.8 mm by 1.3 mm. She recommended a CT scan. She spoke with Dr. Firouztale and made arrangements at Brookhaven Hospital for the CT. She testified that ended her involvement with the plaintiff. Dr. Firouztale advised her that an interim study had been done at Good Samaritan in 2007. She had no opinion concerning whether Dr. West should have mentioned the mass in his April 28, 2006 report.

Steven West, D.O. testified to the extent that upon completion of his neuroradiology fellowship in May 2005, he worked as an attending physician at Stony Brook for two months, then, in July 2005, he joined S&D Medical, a private practice radiology group. In 2008, he went back to Stony Brook University Hospital as an attending physician in neuroradiology and became board certified in diagnostic radiology in 2010. On April 28, 2006, he was employed by S&D Medical, whose principal was Kenneth Schwartz. During his employ with S&D Medical, it provided occasional coverage for Brookhaven MRI when Dr. Rosen was not available. During his employment with S&D Medical, he worked the majority of the time at Brookhaven Memorial Hospital, and sometimes rotated through other hospitals that had contracts with S&D Medical. He first started cross-covering for Dr. Rosen in 2005 and went to Brookhaven MRI on Mondays to review about 40 to 60 imaging studies a day. Dr. West testified that he was compensated for reading the April 28, 2006 MRI study by S&D Medical.

Dr. West testified that he reviewed the plaintiff’s MRI study of April 28, 2006, which consisted of a scanogram, a T-1 sagittal, a T-2 sagittal, and a flair. He had no input on the protocol for taking the films and merely reviewed the images. Prior to his deposition, when he re-reviewed the April 28, 2006 study, he noted that there was an abnormal signal on the flair sequences, proximal location of the petrous portion of the temporal bone. He saw no abnormalities in T1 or T2. Had he thought the abnormal signal on the flair sequence was anything other than artifactual (apparent finding that is not a true finding that can be caused by patient motion or flow related artifacts, or other artifacts which obscure or mimic findings), he would have reported it and ordered either a CT of the temporal bones or MRI of the internal auditory canals. His only recollection of reading the study in 2006, was his report. Dr. West testified that in reviewing the study for his testimony, given the history provided, it is still likely that he could have interpreted it as artifactual. To differentiate between artifact and a real lesion in the area of the petrous bone or jugular foramen, a more dedicated study of the location, and MRI of the internal auditory canals with contrast could determine whether or not it would be more likely to rule in or rule out artifact at that location. The large part is the history provided. He described the Chiari malformation of the brain demonstrated in the 2006 MRI study, but saw no hydrocephalus. When he reviewed the April 28, 2006 MRI study, he also reviewed the prior 2001 study and did not see any change from the prior study. In reviewing images 4 and 5 of the April 28, 2006 MRI, he stated that they are the areas he may have called artifact, as it is not an uncommon area for artifact because of the foramen. Dr. West testified that physicians can misinterpret a finding, or fail to observe a positive finding. If he felt something was artifactual, he would not report it.

Charles Burke testified to the extent that he received an associates degree in x-ray technology, a bachelor of sciences, and then a masters in healthcare administration. He described his various employment until he became director of operations at South Shore Neurologic Associates in 2009, and then chief operating officer. He was unaware of the relationship between South Shore Neurologic Associates and Brookhaven MRI in 2006. It is his understanding that Brookhaven MRI is a d/b/a for South Shore Neurologic Associates, which are both located in the same office building in Patchogue. He has no

knowledge of any relationship with Brookhaven Magnetic Resonance Imaging, Inc. Burke testified that the founding partner of South Shore Neurologic Associates was Dr. Norman Chernick, and the chief operating officer was Anne Dunne. He testified that Dr. Steven West was paid by South Shore Neurologic Associates when he filled in for Dr. Rosen, but insurance was billed out under Brookhaven MRI. Patients of South Shore Neurologic Associates are billed under South Shore Neurologic Associates to the insurance companies. Brookhaven MRI has a separate banking account.

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 [1999]). 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 Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 224 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], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

"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, 690 NYS2d 762 [3d Dept 1999]).

Turning to motions (004) and (005), it is noted that both South Shore Neurologic Associates and Dr. West have submitted the same expert affirmation of David Myland Kaufman, M.D. Dr Kaufman affirmed that he is a physician licensed to practice medicine in New York and is board certified in internal medicine since 1972, and psychiatry and neurology since 1976. He set forth his education and training and the records and materials which he reviewed.

Dr. Kaufman stated that the plaintiff presented to South Shore Neurologic Associates on July 19, 2001, where she was followed by Dr. Besser. She advised him that her MRI of June 12, 2000 was normal. Dr. Kaufman indicated that the plaintiff had MRI brain studies on about September 18, 2001 with a MRA and cervical spine study. At a November 8, 2001 visit with Dr. Besser, the plaintiff advised Dr. Besser that she had seen Dr. Rosiello who recommended surgery for Arnold Chiari malformation diagnosed in her brain. She was also found to have cervical disc herniations. She was seen on June 20, 2002 by Dr. Campbell, on otolaryngology consult for evaluation of Arnold Chiari and sleep apnea. The plaintiff returned to South Shore Neurologic Associates on July 15, 2004, at which time she was seen by Dr. Firouztale and advised him that she had been seen by Dr. Bolognese at the Chiari Institute, and that cervical spine surgery for the disc herniations was recommended. On January 17, 2005, the plaintiff underwent cervical surgery by Dr. Bolognese at North Shore University Hospital, consisting of fusion at C5 and C6 and placement of a plate and screw. On March 23, 2006 the plaintiff was seen by Dr. Firouztale at South Shore Neurologic

Associates who, after examining the plaintiff and taking further history, recommended that she have another MRI of her brain to follow the progression of the Arnold Chiari.

On April 28, 2006, stated Dr. Kaufman, the brain MRI was conducted at Brookhaven MRI, and interpreted by Dr. West who opined that there was no interval change from the previous study, and that his impression was mild cerebellar tonsillar ectopia consistent with Chiari-I malformation with no evidence of hydrocephalus. Thereafter, on May 14, 2007, the plaintiff underwent MRI and CAT scan of the brain at Good Samaritan Hospital. The CAT scan was interpreted as normal. The MRI showed protrusion of the cerebellar tonsils for a distance of approximately 8 mm inferior to the foramen magnum, suggestive of underlying Chiari-II malformation. Dr. Kaufman continued that the plaintiff returned to Dr. Firouztale August 23, 2007 and advised him that in May 2007, she experienced a sensation of disequilibrium, vomiting, and encephalopathy, and that she was seen by Dr. Spencer, her primary care physician, who found she had severely elevated blood pressure, placed her on medication, and referred her to a cardiologist, Dr. Choudrey. The plaintiff also advised Dr. Firouztale that she had lower left skull pain intermittently for three months. After a neurological examination, Dr. Firouztale recommended a transcranial Doppler study. His impression was Arnold Chiari syndrome with status post cervical disc herniation with cord compression with resolution of symptoms after surgery. The transcranial Doppler was read by Dr. Rosen as normal.

Dr. Kaufman continued that the plaintiff saw Dr. Firouztale on October 18, 2007, for complaints of excruciating pain in the occipital area for ten seconds duration, experienced only with laughing. Dr. Kaufman described Dr. Firouztale's neurological examination and findings, and stated the plaintiff was advised to follow up in three to four months. The plaintiff returned on February 18, 2008 with complaints of eyelid twitching, left greater than right, occipital pressure with straining, lethargy, falling asleep very quickly, with no new episodes of confusion, for which he recommended sleep study and follow-up in six months. The plaintiff, however, did not return to South Shore Neurologic Associates and Dr. Firouztale until March 16, 2010. In the interim, she had been seen by Dr. Campbell, her otolaryngologist, for complaints of loss of hearing and continuous coughing. Dr. Kaufman stated that when the plaintiff saw Dr. Firouztale on March 16, 2010, she presented with new and recent complaints of disequilibrium, being off balance, feeling as if she were in a fog, and a feeling of fullness and pulsation her left ear. She felt improved when treated with antibiotics by her primary physician, however, the sense of fog continued. Dr. Firouztale's impression was to rule out vertebrobasilar insufficiency or vestibular dysfunction, cerebellopontine angle mass or tumor, and progression of Arnold-Chiari Syndrome, so he ordered an MRI of the brain and internal acoustic canals with gadolinium to rule out a mass, MRA of the head and neck to rule out aneurysm, a vestibular function test, EEG to rule out seizure activity, encephalopathy blood work, Antivert, and follow-up in eight weeks.

Dr. Kaufman indicated that the March 23, 2010 brainstem auditory evoked potential study revealed normal brain stem evoked response. The April 13, 2010 brain MRI, interpreted by Dr. Rosen, noted an interval increase in the size of the left-sided mass, epicentered at the skull base in the region of the left hypoglossal canal or jugular foramen, approximately 1.8 by 1.3. The April 15, 2010 follow-up brain CT scan revealed a left petrous bone cholesterol granuloma extending to the jugular foramen. The plaintiff was advised of the results and advised to follow-up with her ENT physician, Dr. Campbell. On September 29, 2010, the plaintiff underwent resection of the tumor at the National Institute of Health. Surgical pathology was consistent with endolymphatic sac tumor approximately 2 cm, with visualization through the osseous labyrinth into the semicircular canals at several sites.

Dr. Kaufman opined that the care rendered by South Shore Neurologic Associates between 2007 and April 13, 2010, comported with the standard of care on each visit as a complete and full examination, including cranial nerve and cerebellar evaluations were done. He stated that the plaintiff does not allege that South Shore Neurologic Associates misread or misinterpreted any radiological studies performed between 2007 and April 13, 2010. Dr. Kaufman opined that in August 2007, there was no indication for a brain CT or MRI as the brain CAT, and the MRI performed in May 2007, at Good Samaritan Hospital, yielded negative results. The neurology results did not indicate the need for repeating those studies, and Dr. Firouztale relied upon those results. Dr. Kaufman continued to set forth the dates the plaintiff was seen at South Shore Neurologic Associates by Dr. Firouztale, the examinations performed, findings, and reliance upon the earlier brain MRI and CAT scan. In February 2008, when the plaintiff was advised to return to South Shore Neurologic Associates in six months, the plaintiff did not return until March 2010, as she was treating with her ENT/otolaryngology physician, Dr. Campbell.

When the plaintiff presented to Dr. Firouztale on March 16, 2010, the plaintiff presented new complaints of fullness and pulsation in her left ear, and a recent sensation of being off balance and having disequilibrium, for which Dr. Firouztale's concern was for possible cerebellopontine angle mass or tumor. He also ordered further testing including MRI of the head and neck, MRI of the brain and internal acoustic canals with haolinium vestibular function test, EEG and blood work. Dr. Kaufman stated that it was based upon those tests ordered by Dr. Firouztale that the diagnosis of endolymphatic sac tumor was diagnosed. As such, South Shore Neurologic Associates and Dr. Firouztale acted within the standard of care in their care and treatment of the plaintiff in March and April 2010 when the plaintiff was treated by them.

Dr. Kaufman set forth that an endolymphatic sac tumor is a rare otolaryngological condition which appears in the otolaryngology literature, and not in the neurology literature. Thus, stated Dr. Kaufman, this condition would be within the purview of an ENT physician, and not a neurologist. The fact that even plaintiff's ENT physician, Dr. Campbell, did not diagnose this tumor indicates this was a difficult tumor to diagnose, and that it was not a deviation from the standard of care for South Shore Neurologic Associates physicians not to diagnose the same. Dr. Kaufman opined that it was not a departure from the standard of care for Dr. Firouztale not to include an endolymphatic sac tumor within his differential in 2007 and 2008 because the plaintiff had a brain MRI and CAT scan at Good Samaritan Hospital in May 2007 that showed no evidence of a mass, and that Dr. Firouztale properly and correctly relied upon the findings of Good Samaritan Hospital in not suspecting an endolymphatic sac tumor between 2007 and 2008.

Dr. Kaufman stated that in a patient with an endolymphatic sac tumor, one would not expect a normal result of an auditory evoked potential study. When the plaintiff underwent this study on March 23, 2010, she had normal conduction through the auditory pathways of the brainstem. This, stated Dr. Kaufman, confirms that the plaintiff's hearing loss did not parallel the normal presentation of an endolymphatic sac tumor. He continued, that as per the plaintiff's testimony, her vision loss was a congenital problem which she had since childhood.

Dr. Kaufman opined, in addition to stating that South Shore Neurologic Associates and Dr. Firouztale acted within the standard of care in the care and treatment of the plaintiff from the 2007 through the 2010 visits, that there were no acts or omissions by South Shore Neurologic Associates and Dr. Firouztale which proximately caused any injury to the plaintiff.

Based upon the foregoing, it is determined that defendant South Shore Neurologic Associates and Steven West, D.O. established prima facie entitlement to summary dismissal of the complaint as asserted against them.

In opposing motion (004) and (005), the plaintiff has submitted affidavits, inter alia, and asserts she raised a factual issue to preclude summary judgment because she paid a \$15.00 co-pay to Brookhaven MRI for her April 28, 2006 MRI, and that her insurance, GHI, paid Brookhaven MRI \$510 for the MRI study. Therefore, plaintiff concluded, Steven West was an employee of South Shore Neurologic Associates, and summary judgment should be precluded to South Shore Neurologic Associates and Dr. West on that basis.

In motion (005), defendant West seeks summary dismissal of the complaint as barred by the applicable statute of limitations. Dr. West testified that during his employ with S&D Medical, whose principal was Kenneth Schwartz of Stony Brook faculty, S&D Medical provided occasional coverage for Brookhaven MRI to read studies when Dr. Rosen was not available. West testified that he was compensated for reading the April 28, 2006 MRI study by S&D Medical. Dr. Rosen testified that Stony Brook had a contract with Brookhaven MRI, and Dr. West was paid a fee for reading the study, but West was not an employee of Brookhaven MRI in 2006. Charles Burke testified that in 2009, Dr. Steven West was paid by South Shore Neurologic Associates when he filled in for Dr. Rosen when Rosen was off or on vacation, but insurance was billed out under Brookhaven MRI. Burke testified, that he was unaware of the relationship between South Shore Neurologic Associates and Brookhaven MRI in 2006. He continued that a patient seen at Brookhaven MRI is billed under Brookhaven MRI due to insurance contracts. Burke added that patients of South Shore Neurologic Associates are billed under South Shore Neurologic Associates to the insurance companies. Here, it is determined that the billing and reimbursement practices do not raise factual issues concerning by whom Dr. West was employed. The adduced testimonies establish that Dr. West was employed by S&D Medical of Stony Brook faculty, and, pursuant to an agreement between Stony Brook and South Shore Neurologic Associates, West was assigned to Brookhaven MRI on Mondays to review MRI studies because Dr. Rosen, an employee of South Shore Neurological Associates, was off on Mondays. Thus, it is determined that South Shore Neurological Associates bears no liability for the alleged misread by Dr. West on April 28, 2006 of the plaintiff's MRI of the brain, on the basis that he was an independent contractor at the time, and an employee of S& D Associates.

Accordingly, that part of motion (004) by South Shore Neurological Associates for summary dismissal of that part of the complaint premised on its alleged liability for the alleged misreading of the April 28, 2006 MRI by independent contractor Steven West, is granted.

Pursuant to CPLR 214-a, the statute of limitations in a medical malpractice action is two and one half years. It is alleged that defendant West misread the plaintiff's MRI of her brain on April 28, 2006. West contends that was the only time that he provided radiologic services to the plaintiff. No factual issue has been raised to dispute this claim. The instant action was commenced on July 27, 2010, well beyond the two and one half year statute of limitations within which to commence the action, which should have been commenced against defendant West by October 28, 2008, as there was no continuous treatment rendered by him. In the context of a statute of limitations, in general, the continuous treatment doctrine does not apply to a diagnostician, such as a radiologist, who renders discrete, intermittent medical services, unless the diagnostician has a continuing or other relevant relationship with the patient or acts as an agent for the physician or otherwise acts in relevant association with the physician (*see Cole v Karanfilian, M.D., P.C.*,

McCarroll v Rosen
Index No. 10-26834
Page No. 10

117 AD3d 670, 985 NYS2d 141 [2d Dept 2014]; *Sosnoff v Jackman*, 45 AD3d 568, 845 NYS2d 391 [2d Dept 2007]), and the same has not been demonstrated herein.

Additionally, the CAT and MRI performed in May 2007, at Good Samaritan Hospital, yielded negative results two years after Dr. West's alleged "misread" of the April 28, 2006 MRI, and neurology results did not indicate the need for repeating those studies when the plaintiff was seen by Dr. Firouztale in 2010. A negligence cause of action must fail absent a showing of proximate cause (*Mosezhnik v Bernstein*, 33 AD3d 895, 823 NYS2d 459 [2d Dept 2006]; *Dellacona v Dorf*, 5 AD3d 625, 774 NYS2d 776 [2d Dept 2004]). Here, the plaintiff has failed to oppose defendant West's motion with an expert affirmation relating proximate cause of any injuries to the alleged delay in treatment resulting from defendant West's alleged misread of the April 28, 2006 MRI of the brain, or that defendant West negligently misread the April 28, 2006 MRI.

In view of the foregoing, motion (005) by defendant West for summary dismissal of the complaint as asserted against him as barred by the applicable statute of limitations is granted.

In opposing defendants' motions, plaintiff has not submitted an expert affirmation or expert affidavit to raise factual issue on the basis that South Shore Neurological Associates departed from good and accepted standard of medical practice, or that it proximately caused the plaintiff's alleged injuries (*see Mosezhnik v Bernstein, supra*).

Dr. Kaufman's opinions established prima facie entitlement to summary judgment on behalf of defendant South Shore Neurological Associates, P.C. d/b/a Brookhaven MRI on the basis that the care and treatment provided by South Shore Neurological Associates comported with the standard of care, and that it did not proximately cause the injuries claimed by the plaintiff. Dr. Kaufman set forth the bases for his opinions. Dr. Kaufman opined that it was not a departure from the standard of care for Dr. Firouztale not to include an endolymphatic sac tumor within his differential in 2007 and 2008 because the plaintiff had a brain MRI and CAT scan at Good Samaritan Hospital in May 2007 that showed no evidence of a mass, and that Dr. Firouztale properly and correctly relied upon the findings of Good Samaritan Hospital in not suspecting an endolymphatic sac tumor between 2007 and 2008. The plaintiff was under his care for treatment and monitoring of Arnold Chiari syndrome, as evidenced by the records and imaging studies. On February 14, 2008, when the plaintiff was advised by Dr. Firouztale to return to South Shore Neurologic Associates in six months, the plaintiff did not return until March 2010, two years and one month later, as she was treating with her ENT/otolaryngology physician, Dr. Campbell. At the March 16, 2010 visit, Dr. Firouztale ordered a battery of tests, including an MRI of the brain and internal acoustic canals with gadolinium to rule out a mass. The MRI was taken and read on April 13, 2010 by defendant Rosen, who compared the study to the prior study taken April 27, 2006 and interpreted April 28, 2006 by defendant West. Defendant Rosen then notified Dr. Firouztale on April 13, 2010 of her findings of interval increase in size of a mixed signal intensity lesion epicentered at the left skull base either in the region of the hypoglossal canal or the left jugular foramen.

Dr. West testified that the basis for his impression, in the reading he conducted on April 28, 2006 of plaintiff's brain MRI, was that he believed the area was representative of artifact, and if he felt it was otherwise, he would have ordered further testing. Dr. Kaufman stated that the plaintiff's brain MRI and CAT scan at Good Samaritan Hospital in May 2007 showed no evidence of a mass. Thus, whether this

alleged misreading was a misinterpretation of the study based upon Dr. West's judgment and impression of what he saw on the April 27, 2006 brain MRI, or whether it was a departure from the standard of care, is of no moment because proximate cause has not been demonstrated between any alleged misread of the MRI on April 28, 2006 MRI and the injuries claimed by plaintiff. Dr. Firouztale relied upon the Good Samaritan Hospital reports from May 2007 until April 13, 2010 when defendant Rosen reported the findings on the MRI ordered by Dr. Firouztale on March 16, 2010. Five months later, in September 2010, the plaintiff had surgery at the National Institute of Health in Bethesda, Maryland for removal of the endolymphatic sac tumor .

It is noted that Dr. Kaufman set forth that an endolymphatic sac tumor is a rare otolaryngological condition which appears in the otolaryngology literature, and not in the neurology literature. He continued that such a condition would be within the purview of an ENT physician, and not a neurologist. The fact that even plaintiff's ENT physician, Dr. Campbell, did not diagnose this tumor indicates this was a difficult tumor to diagnose, and that it was not a deviation from the standard of care for South Shore Neurologic Associates physicians not to diagnose the same. Here, it is determined that the plaintiff sought ongoing care and treatment from South Shore Neurologic Associates for the Arnold Chiari brain malformation. The examinations performed by South Shore Neurologic on the plaintiff prior to the detection or diagnosis of the endolymphatic sac tumor were specifically part of her ongoing care for this preexistent Chiari condition.

South Shore Neurologic Associates, Brookhaven MRI and Bonnie Rosen, M.D., as employee of Brookhaven MRI, demonstrated they did not depart from the accepted standard of medical care and practice in treating the plaintiff, and that they did not proximately cause the injuries complained of.

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]). Thus, plaintiff was obligated to provide an expert affirmation to raise factual issues to preclude summary judgment on the issues of whether or not the defendants departed from the standard of care, and proximate cause of plaintiff's claimed injuries related to such departure. Plaintiff has failed to do so.

Accordingly, defendant South Shore Neurologic Associates d/b/a Brookhaven MRI, and Bonnie Rosen, as employee of Brookhaven MRI, are granted summary judgment dismissing those parts of the complaint premised upon the alleged negligence for all dates between 2007 and April 13, 2010; for any alleged negligence which occurred prior to January 27, 2008 as barred by the applicable statute of limitations; and for all allegations of negligence stemming from the April 28, 2006 alleged misread of the MRI as barred by the applicable statute of limitations.

In searching the record, it is noted that plaintiff set forth that a supplemental summons and amended complaint was filed naming Brookhaven Magnetic Resonance Imaging, Inc. as a defendant. However, plaintiff does not indicate that said defendant was served process, no answer from Brookhaven Magnetic Resonance Imaging, Inc. has been provided, testimony by Dr. Rosen establishes that she is unaware of an

McCarroll v Rosen
Index No. 10-26834
Page No. 12

entity known as Brookhaven Magnetic Resonance Imaging, Inc., and defendants West and Rosen denied being employed by Brookhaven Magnetic Resonance Imaging, Inc., as alleged in the complaint.

Accordingly, the complaint is also dismissed as against Brookhaven Magnetic Resonance Imaging, Inc.

Dated: Jan, 15, 2015

W. Gerard Ashe
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION