

Lakharam v Sokol

2015 NY Slip Op 32192(U)

October 15, 2015

Supreme Court, Queens County

Docket Number: 702492 2013

Judge: Peter J. O'Donoghue

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part MD
Justice

Bibi Lakharam as Administrator of the Estate of
Nicholas Lakharam, deceased and Bibi Lakharam
and Rajendra Lakharam, Individually,

Plaintiffs, x

Index
Number 702492 2013

-against-

Scott Sokol, et. al.

Motion
Date June 15 & June 17, 2015

Defendants

Motion
Cal. Numbers 14, 16, 17, 18, &
19

x

Motion Seq. Nos. 3, 5, 6, 7, & 8

The following papers numbered 1 to 35 read on this motion by defendants Jamaica Hospital Medical Center (Jamaica Hospital), Partha Chatterjee (Dr. Chatterjee), and Yogita Patel (Dr. Patel) for summary judgment dismissing the complaint against them; and on this motion by defendant David DiJohn (Dr. DiJohn) for similar relief; and on this motion by defendants Scott Sokol (Dr. Sokol), Queens Long Island Medical Group, P.C. (QLIMG), and Roy Harnett-Robinson (Dr. Harnett-Robinson) for similar relief; and on this motion by defendants Evora Newby, M.D. s/h/a Evora Newby (Dr. Newby) and Long Island Jewish Medical Center s/h/a North Shore LIJ Schneider Children's Hospital a/k/a Cohen Children's Medical Center (LIJ) for similar relief and for summary judgment dismissing all claims of vicarious liability against LIJ for the alleged acts or omissions of Dr. Harnett-Robinson; and on this motion by Robert Donadt (Dr. Donadt) for summary judgment dismissing the complaint insofar as asserted against him.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits	1 - 20
Answering Affidavits - Exhibits	21 - 23
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Upon the foregoing papers it is ordered that the motions are determined as follows:

This is an action to recover damages for medical malpractice and wrongful death arising from the alleged negligence of defendants in their failure to timely and properly diagnose and treat the infant plaintiff's Ewing's Sarcoma, resulting in his death on December 16, 2011. In each bill of particulars, plaintiff Bibi Lakharam, as administrator of the infant plaintiff's estate, and plaintiffs Bibi Lakharam and Rajendra Lakharam suing individually, allege, inter alia, that defendants misdiagnosed the infant plaintiff with osteomyelitis, failed to timely obtain a bone biopsy, bone scan, and PET scan, failed to timely refer the infant plaintiff to specialists, including an oncologist and pediatric surgeon, and failed to provide radiation, chemotherapy, and other anti-cancer therapies, thereby delaying diagnosis and treatment of the infant plaintiff's Ewing's Sarcoma, resulting in metastasis of his cancer and death.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage (*see Rebozo v Wilen*, 41 AD3d 457 [2007]; *Thompson v Orner*, 36 AD3d 791, 791-792 [2007]). Therefore, on a motion for summary judgment in a medical malpractice action, a defendant has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Rebozo*, 41 AD3d at 458; *Williams v Sahay*, 12 AD3d 366, 368 [2004]). 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 (*see Suib v Keller*, 6 AD3d 805 [2004]; *Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [2001]). In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice and that such departure was a competent producing cause of the injury (*see Anonymous v Wyckoff Hgts. Med. Ctr.*, 73 AD3d 1104 [2010]).

Initially, the court notes that, pursuant to a so ordered stipulation dated May 26, 2015, plaintiffs voluntarily discontinued the action against Dr. Sokol. As such, that branch of the motion by Dr. Sokol, QLIMG, and Dr. Harnett-Robinson for summary judgment dismissing the complaint insofar as asserted against Dr. Sokol has been rendered academic.

Furthermore, as a threshold matter, the court notes that, although the affirmations of plaintiffs' experts, whose names have been redacted, were signed and notarized outside New York and were not accompanied by certificates of conformity as required by CPLR 2309(c), they will be considered by the court because their absence is merely a defect in form (CPLR 2001; *see Smith v Allstate Ins. Co.*, 38 AD3d 522 [2007]).

Jamaica Hospital, Dr. Chatterjee, and Dr. Patel made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint against them by submitting the expert affirmation of Dr. Adam Levy, a board certified physician in pediatrics and pediatric hematology/oncology. In his affirmation, Dr. Levy opined that, during the infant plaintiff's admission at Jamaica Hospital from October 8, 2009 through October 20, 2009, Dr. Chatterjee, the attending pediatrician, and Dr. Patel, the attending radiologist, did not deviate from accepted standards of medical care in the treatment of the infant plaintiff and that there was no causal relationship between such care and treatment and the infant plaintiff's injuries. Dr. Levy stated that it was within good and accepted medical practice to include osteomyelitis and possible malignancy, among others, in Dr. Chatterjee's differential diagnosis and it was likewise within accepted standards of medical practice for malignancy to be low on the list of possible differentials given the prevalence of osteomyelitis and rarity of Ewing's Sarcoma or other cancers in a 10-year old boy with no past medical or family history and in conjunction with his clinical presentation, lab work, and imaging studies. Dr. Levy indicated that it was within good and accepted medical practice for Dr. Chatterjee to order a pediatric orthopedic consultation, which was performed on October 9, 2009 by Dr. Donadt, as well as a pediatric infectious disease consultation, which was performed on October 13, 2009 by Dr. DiJohn. Furthermore, Dr. Levy opined that, based on his review of the October 9, 2009 MRI of the right hip, upon which Dr. Chatterjee relied in treating the infant plaintiff, Dr. Patel accurately reported the findings which were consistent with a diagnosis of osteomyelitis and did not show any classic signs of a tumor or lesion and was non-specific for edema. Dr. Levy indicated that, since the infant plaintiff was improving clinically after the initial administration of antibiotics, it was within good and accepted standards of medical practice to continue antibiotics for osteomyelitis and, in fact, the infant plaintiff's ESR and CRP levels normalized, which was evidence that the antibiotics were working against the osteomyelitis and that there was no malignancy. Therefore, it is Dr. Levy's opinion that, based on the infant plaintiff's clinical presentation of sudden, localized and non-radiating right hip pain, slight fever, and negative blood cultures in conjunction with the negative bilateral hip x-ray and the MRI of the right hip, which did

not reveal signs of a tumor, including Ewing's Sarcoma, it was within good and accepted medical practice to diagnose and treat the infant plaintiff for osteomyelitis at the time of his care at Jamaica Hospital between October 9, 2009 and October 20, 2009. Dr. Levy also stated that, at the time, the standard of care did not require a diagnosis be confirmed via biopsy, bone scan, PET scan, and/or CT scan and that there was no indication of a malignancy which would require further treatment, consultations, procedures, tests, and imaging studies during the infant plaintiff's admission at Jamaica Hospital. Additionally, Dr. Levy noted that the infant plaintiff's condition remained the same until January 2010 and his symptoms continued not to be indicative of malignancy, thereby further indicating that the diagnosis and treatment of the infant plaintiff by Dr. Chatterjee at Jamaica Hospital was within accepted standards of medical care.

In opposition, plaintiffs' expert affirmations of a pediatrician and a radiologist established the existence of triable issues of fact as to whether Jamaica Hospital, Dr. Chatterjee, and Dr. Patel departed from accepted standards of medical care in their treatment of the infant plaintiff at Jamaica Hospital in October 2009 and if so, whether such departure(s) was (were) a proximate cause(s) of plaintiff/decedent's injuries/death which may require resolution at trial. Plaintiffs' expert pediatrician opined that the standard of care requires that, where as here, when a differential diagnosis includes life-threatening pathology, that pathology must be ruled out before moving on to other diagnoses, even when there is a working diagnosis that fits some of the patient's symptoms. Plaintiffs' expert pediatrician stated that Dr. Chatterjee departed from good and accepted standards of medical care by failing to rule out a malignancy, which is life-threatening, even though he testified that it was on his differential diagnosis. Plaintiffs' expert pediatrician further stated that the clinical signs and symptoms of Ewing's Sarcoma and osteomyelitis are similar and, thus, good and accepted standards of medical care mandate that a needle biopsy be done to confirm the presence of acute osteomyelitis and to rule out neoplasm, a life-threatening disease, which Dr. Chatterjee failed to do here. It is plaintiffs' expert pediatrician's opinion that these departures by Dr. Chatterjee were a proximate cause in delaying the diagnosis of the infant plaintiff's Ewing's Sarcoma, which metastasized in March or April 2010, and his eventual death. Furthermore, plaintiffs' expert radiologist opined that, while a review of the October 9, 2009 MRI of the right hip performed by Dr. Patel reveals that the pathology in the infant plaintiff's hip was suspicious for osteomyelitis, such a condition cannot be confirmed by radiological studies alone and the results were non-specific enough that the standard of care required a recommendation that other causes, including neoplasm, be considered because the bone marrow edema may indicate osteomyelitis or the early stages of neoplasm, which cannot be distinguished without a biopsy. Therefore, it is the plaintiffs' expert radiologist's opinion that it was insufficient for Dr. Patel to state in the MRI report that clinical correlation should be considered since early cancer may have similar appearances to osteomyelitis and, thus, Dr. Patel departed from good and accepted medical practice by failing to include and recommend neoplasm in her differential.

Dr. DiJohn met his initial burden of establishing entitlement to judgment as a matter of law dismissing the complaint against him through submission of the expert affirmation of Dr. Oya Levendoglu-Tugal, a physician board certified in pediatrics and pediatric hematology/oncology. Dr. Levendoglu-Tugal opined that Dr. DiJohn, the infectious disease specialist who saw the infant plaintiff at Jamaica Hospital on October 13, 2009, did not deviate from accepted standards of medical care in the treatment of the infant plaintiff and that such care was not the proximate cause of his injuries. Dr. Levendoglu-Tugal stated that, upon being called for consultation by Dr. Chatterjee, Dr. DiJohn properly documented the infant plaintiff's complaints and history, the results of the October 9, 2009 MRI of the right hip, which was consistent with osteomyelitis and did not show any signs of a tumor or lesion, and laboratory test results, which revealed a white blood count of 9.1 and ESR of 50. Dr. Levendoglu-Tugal also stated that Dr. DiJohn appropriately performed a physical examination of the infant plaintiff, noting that he had no complaints of pain, a slight limp, and "exquisite point tenderness of proximal right femur." It is Dr. Levendoglu-Tugal's opinion that, based on the infant plaintiff's history, his hospital course prior to the consultation, Dr. DiJohn's physical examination, and the infant plaintiff's clinical improvement on antibiotics, Dr. DiJohn's diagnosis of osteomyelitis was appropriate and that Dr. DiJohn's plan of treating the infant plaintiff with antibiotics was the appropriate medical course and was within the standard of care. Moreover, Dr. Levendoglu-Tugal opined that Dr. DiJohn did not deviate from the standard of care in declining to perform a biopsy or PET scan at that time because it was not indicated in light of the infant plaintiff's symptoms and clinical, laboratory, and radiological findings. Dr. Levendoglu-Tugal explained that a needle biopsy would be used to check for osteomyelitis, not for the purpose of diagnosing cancer, which was not a consideration at the time, and, given the attendant circumstances, an open bone biopsy would not have been conducted in this case. Dr. Levendoglu-Tugal also stated that, for the same reasons, it was not necessary for Dr. DiJohn to refer the infant plaintiff to any other specialists, including an oncologist and pediatric surgeon, and that radiation, chemotherapy, and anti-cancer therapies were not indicated at that time. Finally, it is Dr. Levendoglu-Tugal's opinion that Dr. DiJohn's treatment of the infant plaintiff for osteomyelitis during his admission at Jamaica Hospital in October 2009 was not a proximate cause of the infant plaintiff's metastatic cancer and death as Ewing's Sarcoma was not present in the infant plaintiff at that time and the infant plaintiff's condition remained the same until January 2010 and his symptoms continued not to be indicative of malignancy, confirming that Dr. DiJohn's diagnosis and treatment of the infant plaintiff for osteomyelitis in October 2009 was proper and within the standard of care.

The affirmation of plaintiffs' expert pediatrician raised a triable issue of fact as to whether Dr. DiJohn departed from accepted standards of medical practice in the treatment of the infant plaintiff and if so, whether such departure(s) was (were) a proximate cause(s) of plaintiff/decedent's injuries/death which may require resolution at trial. Plaintiffs' expert pediatrician opined that the applicable standard of care required

diagnosis of the infectious agent through a needle biopsy and culture, which Dr. DiJohn failed to recommend in this case. Plaintiffs' expert pediatrician also indicated that the infant plaintiff was receiving significant levels of NSAID, which are anti-inflammatories and painkillers and, therefore, it was a departure from the standard of care for Dr. DiJohn to rely on the infant plaintiff's report of decrease in pain without identifying the infectious agent and ruling out cancer by performing a needle biopsy before administering treatment.

QLIMG and Dr. Harnett-Robinson established, prima facie, their entitlement to judgment as a matter of law dismissing the complaint against them. In support of their motion, QLIMG and Dr. Harnett-Robinson offered the expert affirmation of Dr. Rosaria DiMarco, a pediatric hospitalist and physician board certified in pediatrics, who opined that Dr. Harnett-Robinson, the pediatric hospitalist who treated the infant plaintiff during his admission at LIJ from January 20, 2010 through January 27, 2010, rendered appropriate care and treatment of the infant plaintiff during that period of time and that no alleged act or omission by Dr. Harnett-Robinson was the proximate cause of the infant plaintiff's injuries. Dr. DiMarco stated that it was within good and accepted standards of medical practice for Dr. Harnett-Robinson, as a pediatric hospitalist, to rely on the findings and recommendations stated in the reports of the radiologists and specialists in treating the infant plaintiff and reaching a diagnosis of osteomyelitis. Dr. DiMarco stated that the MRI of the right hip performed on January 21, 2010 showed no evidence of a tumor, which confirmed the diagnosis of osteomyelitis. Dr. DiMarco further stated that, during the infant plaintiff's January 2010 admission to LIJ, Dr. Harnett-Robinson timely and appropriately referred the infant plaintiff for consultations with a pediatric infectious disease specialist, a pediatric orthopedist, and a pediatric rheumatology specialist, and Dr. Harnett-Robinson appropriately reviewed, documented, and relied on the findings and treatment recommendations of those consulting specialists. It is Dr. DiMarco's opinion that, based on the infant plaintiff's symptoms of recurring hip pain, leg pain, limp, fatigue, swelling, and fever, all of which are symptoms associated with osteomyelitis and consistent with the prior diagnosis of osteomyelitis in October 2009, combined with the results of the radiological studies and the infant plaintiff's response to clinical treatment of osteomyelitis, it was within accepted standards of medical care for Dr. Harnett-Robinson to treat the infant plaintiff for osteomyelitis. Furthermore, Dr. DiMarco explained that Dr. Harnett-Robinson, as a pediatric hospitalist, would not order or perform bone biopsies, which are generally done by an orthopedist after a tumor or lesion is identified, which was not the case here. Therefore, Dr. DiMarco opined that Dr. Harnett-Robinson did not deviate from accepted standards of medical care by relying on the recommendations of the specialists whose consultations he obtained regarding whether there was evidence of a tumor on a radiological study or other test and whether a bone biopsy was indicated. Likewise, Dr. DiMarco stated that, given the findings of the x-rays, MRI of the right hip, Indium Scan, clinical treatment by various physicians and consulting specialists, as well as documented response to antibiotic treatment for

osteomyelitis, there was no indication for Dr. Harnett-Robinson to refer the infant plaintiff to an oncologist or pediatric surgeon for radiation, chemotherapy, or other anti-cancer therapies as there was no evidence to suggest cancer, or, specifically, Ewing's Sarcoma. In addition, Dr. DiMarco indicated that Dr. Harnett-Robinson did not deviate from the standard of care by failing to order a PET scan because there was no recommendation by a radiologist and/or orthopedist to order that test.

The affirmations of plaintiffs' experts raised a triable issue of fact as to whether QLIMG and Dr. Harnett-Robinson departed from accepted standards of medical practice in the care and treatment of the infant plaintiff and if so, whether such departure(s) was (were) a proximate cause(s) of plaintiff/decedent's injuries/death which may require resolution at trial. Both plaintiffs' expert pediatrician and orthopedist opined that Dr. Harnett-Robinson departed from good and accepted standards of medical care by failing to order a bone biopsy to rule out cancer, despite the recommendation of two rheumatologists, Drs. Barillas-Arias and Yee, that chronic osteomyelitis was not likely and that a bone biopsy should be done. Plaintiffs' expert orthopedist, radiologist, and pediatrician explained that the January 2010 MRI of the right hip showed a sclerotic lesion, a pattern which is highly suspicious for cancer, but was misdiagnosed as incompletely treated osteomyelitis. Plaintiffs' experts indicated that the diagnosis of osteomyelitis was further cast into doubt by the January 2010 Indium Scan, which was negative for infection. At that point, plaintiffs' expert orthopedist, radiologist, and pediatrician opined that a neoplasm should have been immediately considered and ruled out with a bone biopsy, as recommended by the rheumatologists. Moreover, plaintiffs' expert pediatrician stated that Dr. Harnett-Robinson, as the attending pediatric hospitalist, had the authority to order a biopsy because he was responsible for the supervision of the overall care of the infant plaintiff and was required to coordinate and communicate among the several specialists and treating residents. Plaintiffs' experts opined that the infant plaintiff's cancer did not metastasize until March or April 2010 and, therefore, Dr. Harnett-Robinson's failure to order a bone biopsy to rule out cancer in January 2010, despite the recommendations of the rheumatologists and the findings of diagnostic studies, contributed to the delay in diagnosis and treatment of the infant plaintiff's Ewing's Sarcoma.

Dr. Newby and LIJ made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint against them. In support of their motion, Dr. Newby and LIJ submitted the expert affirmation of Dr. Levendoglu-Tugal, a physician board certified in pediatrics and pediatric hematology/oncology, who opined that Dr. Newby and LIJ, its agents, servants, and employees, did not deviate from accepted standards of medical care in the treatment of the infant plaintiff during his admission at LIJ from January 20, 2010 through January 27, 2010 and during his treatment by various physicians at LIJ in January 2010 and February 2010 and that such care was not the proximate cause of his injuries. Dr. Levendoglu-Tugal explained that Dr. Newby, as a

first-year pediatric resident during the infant plaintiff's January 2010 admission at LIJ, did not have the authority to act independently and her responsibilities were limited to carrying out the orders of the attending physician, who is ultimately responsible for ordering tests and requesting consults and treatments. Dr. Levendoglu-Tugal opined that, at all times, Dr. Newby timely and appropriately carried out the orders of the attending physician, Dr. Harnett-Robinson. Dr. Levendoglu-Tugal further stated that Dr. Newby did not deviate from the accepted standard of medical care by carrying out the order to discharge the infant plaintiff on January 27, 2010 with a diagnosis of osteomyelitis based on the infant plaintiff's documented clinical improvement and the results of the radiological studies and lab work in addition to the fact that appropriate follow-up appointments were scheduled on an outpatient basis. In addition, Dr. Levendoglu-Tugal opined that, at all times, there were no departures in the medical care and treatment rendered to the infant plaintiff by the physicians of LIJ. In particular, Dr. Levendoglu-Tugal stated that Dr. Lilliana Barillas-Arias, the pediatric rheumatology attending physician, and her fellow, Dr. Maria Yee, both of whom saw the infant plaintiff on January 27, 2010, acted within the accepted standard of medical care by making a recommendation for a bone biopsy. Dr. Levendoglu-Tugal stated that, as specialists, Drs. Barillas-Arias and Yee could only recommend such a procedure and the attending physician has the responsibility and authority to order any procedures recommended by the consultants after considering the recommendation and using his or her clinical judgment. Furthermore, Dr. Levendoglu-Tugal opined that Dr. Beth Gottlieb, the pediatric rheumatology attending physician, and her fellow, Dr. Julisa Patel, who saw the infant plaintiff at the LIJ pediatric rheumatology outpatient clinic on February 23, 2010, acted within the accepted standard of medical care by appropriately considering a different impression of reactive arthritis rather than osteomyelitis in light of the infant plaintiff's past medical history, the lack of any bone destruction or mass seen on the diagnostic studies, essentially normal lab results, and the infant plaintiff's clinical signs and symptoms. Dr. Levendoglu-Tugal also stated that it was an appropriate exercise of clinical judgment by Drs. Gottlieb and Patel not to order a needle biopsy, which is a significant invasive procedure, and not to suspect a malignancy or have the infant plaintiff worked-up for a malignancy, in consideration of the infant plaintiff's improved complaints of pain and lab results.

In opposition, with respect to Dr. Newby, plaintiffs failed to raise a triable issue of fact as to said defendant's liability because none of plaintiffs' experts adequately addressed the salient issues concerning Dr. Newby's alleged departures from accepted standards of medical practice and whether those alleged departures were a proximate cause of the infant plaintiff's injuries. As such, the branch of Dr. Newby and LIJ's motion for summary judgment dismissing the complaint insofar as asserted against Dr. Newby is granted.

However, as to the claims of vicarious liability against LIJ, the affirmations of

plaintiffs' expert pediatrician and orthopedist established the existence of triable issues of fact with respect to the issues of liability and causation. In their affirmations, plaintiffs' expert pediatrician and orthopedist opined that Drs. Barillas-Arias, Yee, Gottlieb, and Patel, all of whom are employees of LIJ, departed from good and accepted standards of medical practice by failing to order a biopsy to rule out cancer in light of the results of the January 2010 MRI of the right hip, which revealed a sclerotic lesion highly suspicious for cancer, and January 2010 Indium Scan, which was negative for infection and, thus, making osteomyelitis an unlikely diagnosis. In the opinions of plaintiffs' experts, the failure of Drs. Barillas-Arias, Yee, Gottlieb, and Patel to order a biopsy to resolve the diagnosis, despite their own recommendations to do so, was a departure from the accepted standard of medical care and contributed to the delay in the diagnosis and treatment of the infant plaintiff's Ewing's Sarcoma, thereby resulting in metastasis of his cancer and death.

Turning to that branch of the motion by Dr. Newby and LIJ for summary judgment dismissing the vicarious liability claims against LIJ for the alleged acts or omissions of Dr. Harnett-Robinson, movants established their entitlement to judgment as a matter of law. In opposition, plaintiffs failed to raise a triable issue of fact. It is well-settled that a hospital may not be held liable for the negligent acts of a private attending physician who is not a hospital employee (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 29 [1986]; *Brink v Muller*, 86 AD3d 894 [2011]). Here, the evidence in the record demonstrates that Dr. Harnett-Robinson acted as the infant plaintiff's private attending physician because, on January 19, 2010, the infant plaintiff was instructed by his private treating pediatrician from QLIMG to go to LIJ for a further work-up and, upon his admission at LIJ on January 20, 2010 through January 27, 2010, he was treated by Dr. Harnett-Robinson, a pediatrician employed by QLIMG with privileges at LIJ. Therefore, the branch of the motion by Dr. Newby and LIJ for summary judgment dismissing the claims of vicarious liability against LIJ in relation to the alleged malpractice of Dr. Harnett-Robinson is granted.

Dr. Donadt made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint against him by submitting the expert affirmation of Dr. Alfred Faust, an orthopedic surgeon. In his affirmation, Dr. Faust opined that Dr. Donadt, the attending orthopedist who saw the infant plaintiff during his admission at Jamaica Hospital on October 9, 2009, did not deviate from good and accepted orthopedic practice with respect to his treatment of the infant plaintiff and such care was not a proximate cause of the infant plaintiff's injuries. Dr. Faust stated that, in accordance with accepted standards of orthopedic practice, Dr. Donadt timely and appropriately rendered an orthopedic consultation, in which he obtained a proper and thorough history, reviewed pertinent laboratory and radiology test results, performed and documented a proper physical examination, impression, and recommendations. It is Dr. Faust's opinion that the negative bilateral hip x-rays and the October 9, 2009 MRI of the right hip, which was

suggestive of osteomyelitis, were not consistent with a primary bone tumor such as Ewing's Sarcoma. The findings of those radiological studies, coupled with the fact that the infant plaintiff's hip pain was of sudden and recent onset and elevated inflammatory markers in the infant plaintiff's blood work, were indicative of infection and not Ewing's Sarcoma. Thus, in Dr. Faust's opinion, it was within accepted standards of medical and orthopedic practice for Dr. Donadt to not have included any primary malignancy near the top of his differential diagnosis at the time of his evaluation of the infant plaintiff, and that osteomyelitis was a reasonable and appropriate diagnosis, which was properly treated with antibiotics. In addition, Dr. Faust stated that there were no indications which required Dr. Donadt to recommend further investigation such as a bone biopsy or PET scan or refer the infant plaintiff to specialists such as a pediatric surgeon or oncologist. Dr. Faust also stated that good and accepted standards of practice did not require Dr. Donadt to order or recommend a bone biopsy or aspiration of the hip at the time of his orthopedic consultation since the findings of the October 9, 2009 MRI of the right hip and bilateral hip x-rays did not reveal any specific area in which to perform a biopsy and Ewing's Sarcoma, which was non-existent at that time, would not have been detected if a biopsy had been performed. Dr. Faust further indicated that the infant plaintiff did not have any symptoms following his discharge from Jamaica Hospital on October 20, 2009 until his admission at LIJ in January 2010, which is further supportive of the lack of evidence of any malignancy during the time of treatment rendered by Dr. Donadt at Jamaica Hospital. Finally, Dr. Faust opined that Dr. Donadt's treatment of the infant plaintiff on October 9, 2009 was not a proximate cause of the progression of the infant plaintiff's cancer or death as there was no evidence clinically or radiographically to suggest malignancy or metastatic disease at that time.


In opposition, plaintiffs raised a triable issue of fact as to whether Dr. Donadt departed from the accepted standard of care in the treatment of the infant plaintiff and if so, whether such departure(s) was (were) a proximate cause(s) of plaintiff/decedent's injuries/death which may require resolution at trial. Notably, the affirmation of plaintiffs' expert orthopedist does not address the care and treatment of the infant plaintiff rendered by Dr. Donadt at Jamaica Hospital in October 2009. In any event, plaintiffs' expert pediatrician opined that Dr. Donadt departed from the accepted standard of care by failing to rule out a tumor from the differential diagnosis through a biopsy, which is the only way to either confirm a diagnosis of osteomyelitis or identify a different pathology, such as a tumor. It is the opinion of plaintiffs' expert pediatrician that such a departure contributed to the delay in diagnosis and treatment of Ewing's Sarcoma, resulting in the spread of the infant plaintiff's cancer and death.

Finally, with respect to the claims of vicarious liability against Jamaica Hospital, plaintiffs failed to make any allegations of negligence against Jamaica Hospital and its staff except in relation to the acts or omissions of Drs. Chatterjee, Patel, Donadt, DiJohn, Dakshayani Guttal, Roy Davidovitch, and Sashi Kona. It is noted that plaintiffs

voluntarily discontinued the action against Drs. Guttal, Davidovitch, and Kona. However, inasmuch as the court has found that there are issues of fact as to the alleged malpractice of Drs. Chatterjee, Patel, Donadt, and DiJohn, the vicarious liability claims against Jamaica Hospital pertaining to those defendants remain. Therefore, that branch of the motion by Jamaica Hospital, Dr. Chatterjee, and Dr. Patel for summary judgment dismissing the vicarious liability claims against Jamaica Hospital is granted only to the extent that said claims relate to the alleged malpractice of Drs. Guttal, Davidovitch, and Kona.

Accordingly, the separate motions by Jamaica Hospital, Dr. Chatterjee, and Dr. Patel, Dr. DiJohn, QLIMG, Dr. Sokol, and Dr. Harnett-Robinson, and Dr. Donadt for summary judgment dismissing the complaint against them are denied. That branch of the motion by Jamaica Hospital, Dr. Chatterjee, and Dr. Patel for summary judgment dismissing the vicarious liability claims against Jamaica Hospital is granted only to the extent that it is predicated on the alleged malpractice of Drs. Guttal, Davidovitch, and Kona. Those branches of the motion by Dr. Newby and LIJ for summary judgment dismissing the complaint insofar as asserted against Dr. Newby and for summary judgment dismissing the claims of vicarious liability against LIJ relating to the alleged malpractice of Dr. Harnett-Robinson are also granted. In all other respects, Dr. Newby and LIJ's summary judgment motion is denied.

Dated: October 15, 2015



J.S.C.

FILED
OCT 20 2015
COUNTY CLERK
QUEENS COUNTY