Hill v Albany Med. Ctr. Hosp.
2016 NY Slip Op 32800(U)
April 11, 2016
Supreme Court, Albany County
Docket Number: A17-10
Judge: Kimberly A. O'Connor
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JOSEPH HILL and MARLENE HILL,

Plaintiffs,

-against-

DECISION AND ORDER
Index No.: A17-10
RJI No.: 01-11-103281

ALBANY MEDICAL CENTER HOSPITAL, ALBANY MEDICAL COLLEGE, ALBANY MEDICAL CENTER, YU-HUNG KUO, M.D., FARHAD BAHRASSA, M.D., TYLER KENNING, M.D., MICHAEL GRUENTHAL, M.D., GARY BERNARDINI, M.D.[1], DZINTRA CELMINS, M.D., EARL ZIMMERMAN, M.D., JAMES THOMAS, M.D., and COMMUNITY CARE PHYSICIANS, P.C.,

ALB CO CLRK APR15'16AM10:15

Defendants.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

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(Justin W. Gray, Esq., of Counsel)
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[1] By stipulation dated March 15, 2013, plaintiffs discontinued their action against Gary Bernardini, M.D., without prejudice.

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O'CONNOR, J.:

In this medical malpractice action, defendants Albany Medical Center Hospital ("AMCH"), Albany Medical College ("AMC"), Albany Medical Center ("Albany Med"), Yu-Hung Kuo, M.D. ("Dr. Kuo"), Farhad Bahrassa, M.D. ("Dr. Bahrassa"), Tyler Kenning, M.D. ("Dr. Kenning"), Michael Gruenthal, M.D. ("Dr. Gruenthal"), Dzintra Celmins, M.D. ("Dr. Celmins"), Earl Zimmerman, M.D. ("Dr. Zimmerman") (collectively "AMCH defendants"), James Thomas, M.D. ("Dr. Thomas"), and Community Care Physicians, P.C. ("CCP") move, by three separate applications, for various relief based upon plaintiffs Joseph Hill ("plaintiff") and Marlene Hill's (collectively "plaintiffs") alleged failure to comply with certain discovery rules. Plaintiffs separately oppose the motions, and have cross-moved for protective orders.

Trial courts have broad discretion in supervising the discovery process, controlling disclosure, and determining compliance with discovery demands (*see Hameroff & Sons, LLC v. Plank, LLC*, 108 A.D.3d 908, 909 [3d Dep't 2013]; *Premo v. Rosa*, 93 A.D.3d 919, 920 [3d Dep't 2012]); *Cochran v. Cayuga Med. Ctr. at Ithaca,* 90 A.D.3d 1227, 1227 [3d Dep't 2011]; *Mary Imogene Bassett Hosp. v. Cannon Design, Inc.*, 66 A.D.3d 1286, 1286 [3d Dep't 2009]; *Graves v. County of Albany*, 278 A.D.2d 578, 578 [3d Dep't 2000]; *see also Andon ex rel. Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 745 [2000]). If a party "fails to respond to or comply with any

[discovery] request, notice, interrogatory, demand, question, or order," the party seeking disclosure may seek court intervention "to compel compliance or a response" (CPLR 3124). Furthermore, a court may preclude a party from "supporting or opposing designated claims or defenses, from producing evidence[,] designated things[,] or items of testimony, or . . . from using certain witnesses" if such party "willfully fails to disclose information which the court finds ought to have been disclosed" (CPLR § 3126[2]).

Notably, "'[t]he purpose of a bill of particulars is to amplify the pleadings, limit proof and prevent surprise at trial'" (*Niessel v. Rensselaer Polytechnic Inst.*, 30 A.D.3d 881, 881-882 [3d Dep't 2006], quoting *Twiddy v. Standard Mar. Transp. Servs., Inc.*, 162 A.D.2d 264, 265 [1st Dep't 1990]; *accord Graves v. County of Albany*, 278 A.D.2d at 578; *Felock v. Albany Med. Ctr. Hosp.*, 258 A.D.2d 772, 773 [3d Dep't 1999]; *Hayes v. Kearney*, 237 A.D.2d 769, 769 [3d Dep't 1997]). While "responses to a demand for a bill [of particulars] must clearly detail the specific acts of negligence attributed to each defendant" (*Hayes v. Kearney*, 237 A.D.2d at 769 [internal quotation marks and citation omitted]), "[t]hey need not . . . provide evidentiary material or information to be gleaned from expert testimony" (*Felock v. Albany Med. Ctr. Hosp.*, 258 A.D.2d at 773; *see Graves v. County of Albany*, *supra* at 578). Moreover, "in a medical malpractice action, as in any action for personal injuries, the bill of particulars requires only a [g]eneral statement of the acts or omissions constituting the negligence claimed" (*Felock v. Albany Med. Ctr. Hosp.*, *supra* at 773 [internal quotation marks and citation omitted]; *see* CPLR 3043[a][3]; *Da Biere v. Craig*, 268 A.D.2d 875, 876 [3d Dep't 2000]; *Rockefeller v. Hwang*, 106 A.D.2d 817, 818 [3d Dep't 1984]).

CPLR 3101(d)(1)(i) obligates a party to:

> [i]dentify each person whom the party expects to call as an expert witness at trial and . . . disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for

each expert's opinion (*see also Mary Imogene Bassett Hosp. v. Cannon Design, Inc.*, 97 A.D.3d 1030, 1031-1032 [3d Dep't 2012]).

"The expert disclosure requirements are 'intended to provide timely disclosure of expert witness information between parties for the purpose of adequate and thorough trial preparation'" (*McColgan v. Brewer*, 84 A.D.3d 1573, 1576 [3d Dep't 2011], quoting *Silverberg v. Community Gen. Hosp. of Sullivan County*, 290 A.D.2d 788, 788 [3d Dep't 2002]). "'[V]irtually all information regarding expert witnesses and their anticipated information is discoverable under CPLR 3101(d)(1)(i), unless the request is so detailed that disclosure would have the net effect of disclosing the experts' identities'" (*Mead v. Dr. Rajadhyax' Dental Group*, 34 A.D.3d 1139, 1140 [3d Dep't 2008], quoting *Morris v. Clements*, 228 A.D.2d 990, 991 [3d Dep't 1996] and *Pizzi v. Muccia*, 127 A.D.2d 338, 340 [3d Dep't 1987]). Where a party fails to comply with a request for expert disclosure, preclusion may be appropriate provided there is a showing of prejudice and evidence of a willful failure to disclose (*see McColgan v. Brewer*, 84 A.D.3d at 1576; *Mead v. Dr. Rajadhyax' Dental Group*, 34 A.D.3d at 1140; *Silverberg v. Community Gen. Hosp. of Sullivan County*, 290 A.D.2d at 788-789).

AMCH Defendants' Motion

The AMCH defendants seek an order: (1) precluding plaintiffs' medical experts from testifying at trial unless they amend/supplement their expert disclosure to conform to the requirements of CPLR 3101(d); (2) striking certain portions of plaintiffs' amended supplemental expert disclosure; and (3) striking certain portions of plaintiffs' second supplemental amended bill of particulars, and precluding them from offering evidence on those issues at trial.

Plaintiffs' Amended Supplemental Expert Disclosure

The AMCH defendants argue that plaintiffs' amended supplemental expert disclosure fails to satisfy the requirements of CPLR 3101(d)(1)(i) in that it does not adequately distinguish the deviations from the standard of care being alleged against each defendant, and does not adequately

disclose the substance of their experts' proposed testimony on causation and injury. According to the AMCH defendants, plaintiffs' amended supplemental expert disclosure is impermissibly vague as it does not disclose when plaintiffs' experts will claim that plaintiff's empyema should have been diagnosed or by whom, and how the alleged deviations of each individual defendant caused or contributed to plaintiff's alleged injuries.

The AMCH defendants further assert that plaintiffs' amended supplemental expert disclosure is vague and conclusory on matters of liability and damages, and contains a completely new theory of liability against AMCH, AMC, and Albany Med with respect to the alleged departures of Dr. Thomas and CCP, "notwithstanding the fact that they have been provided a copy of the contract between [CCP] and [AMCH] which clearly delineates that [CCP] is an independent contractor."

In addition, the AMCH defendants submit that plaintiffs' amended supplemental expert disclosure improperly alleges that AMCH, AMC, and Albany Med violated 10 NYCRR § 405.7 and § 405.9, since they did not assert any violation of any law, statute, ordinance, rule or regulation in their verified bills of particulars, supplemental verified bills of particulars, and 2nd supplemental amended verified bills of particulars, and have provided no disclosure on how these defendants allegedly violated such regulations. Moreover, the AMCH defendants claim that the plaintiffs' disclosure of their medical experts' qualifications fails to satisfy the requirements of CPLR 3101(d)(1)(i).

The Court has reviewed plaintiffs' amended supplemental expert disclosure and finds, "under the particular circumstances of this case," that it "sufficiently disclose[s] the subject matter on which the experts intend to testify, the substance of the facts and opinions on which they are expected to testify and a summary of the grounds of their opinion" (*Mary Imogene Bassett Hosp. v. Cannon Design, Inc.*, 97 A.D.3d at 1031-1032; *cf. Brossoit v. O'Brien*, 169 A.D.2d 1019, 1020-1021

[3d Dep't 1991]). Plaintiffs were not obligated to set forth the specific facts and opinions upon which their experts are expected to testify, but rather only the substance of those facts and opinions (*see Mary Imogene Bassett Hosp. v. Cannon Design, Inc.*, *supra* at 1032; *see Barrowman v. Niagara Mohawk Power Corp.*, 252 A.D.3d 946, 946-947 [4th Dep't 1998]; *Foley v. Am. Ind. Paper Mills Supply Co.*, 222 A.D.2d 401, 402 [2d Dep't 1995]; *Krygier v. Airweld, Inc.*, 176 A.D.2d 700, 700-701 [2d Dep't 1991]). Since plaintiffs' amended supplemental expert disclosure sets forth more than "a mere statement of the ultimate conclusion reached" (*Brossoit v. O'Brien*, 169 A.D.2d at 1020-1021), it satisfies the requirements of CPLR 3101(d)(1)(i) and preclusion is not warranted.

The Court declines to strike those parts of plaintiffs' amended supplemental expert disclosure purportedly asserting new theories of liability against AMCH, AMC, and Albany Med for the alleged departures of Dr. Thomas and CCP, and for violations of 10 NYCRR § 405.7 and § 405.9. Plaintiffs' claims against AMCH, AMC, and Albany Med for the alleged departures of Dr. Thomas and CCP are "readily discernible from the allegations set forth in the bills of particulars" (*Campos v. Beth Israel Med. Ctr.*, 80 A.D.3d 642, 642 [2d Dep't 2011]; *see Navarette v. Alexiades*, 50 A.D.3d 869, 870 [2d Dep't 2008]; *Durant v. Shuren*, 33 A.D.3d 843, 844 [2d Dep't 2006]), and are not "a completely new theory of liability" as the AMCH defendants contend. Furthermore, plaintiffs submit that the contract between CCP and AMCH is not necessarily determinative of whether AMCH, AMC, and Albany Med are vicariously liable for the alleged errors of Dr. Thomas and CCP. The Court agrees. Where, as here, "a patient seeks treatment from [a] hospital and not from a particular physician of the patient's choosing, the hospital may be vicariously liable for the malpractice of a physician who is an independent contractor" (*Syracuse v. Diao*, 272 A.D.2d 881, 881 [4th Dep't 2000]; *see Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 79-81 [1986]; *Litwak v. Our Lady of Victory Hosp. of Lackawanna*, 238 A.D.2d 881, 881-882 [4th Dep't 1997]). Moreover, the issue

of AMCH, AMC, and Albany Med's vicarious liability for the negligence of the Dr. Thomas and CCP is a question of law, not a matter of expert testimony.

Contrary to the AMCH defendants' assertion, plaintiff's failure to allege a violation of a law, statute, ordinance, rule or regulation in response to Demand 13 in their various bills of particulars does not bar them from claiming a violation of 10 NYCRR § 405.7 and § 405.9 now. In their bills of particulars, supplemental bills of particulars, and 2nd supplemental amended bills of particulars, plaintiffs stated that they "will rely upon expert testimony to set forth this information." The Court finds that such response was sufficient to preserve plaintiffs' claim of a regulatory violation. In addition, the Court is satisfied that plaintiffs' reference to the specific subsections of 10 NYCRR § 405.7 and § 405.9 that are alleged to have been violated, when read together with the entirety of plaintiffs' amended supplemental expert disclosure, sufficiently places AMCH, AMC, and Albany Med on notice of the substance of plaintiffs' expert testimony on this issue to enable them to adequately prepare for trial.

Finally, the Court rejects the AMCH defendants' assertion that the plaintiffs' disclosure of their medical experts' qualifications fails to satisfy the requirements of CPLR 3101(d)(1)(i). "Pursuant to CPLR 3101(d)(1)(i) . . . , a party responding to a request for information about expert witnesses in the context of a medical malpractice action, may omit the names of medical . . . experts[,] but shall be required to disclose all other information concerning such experts, including his or her professional qualifications" (*Morris v. Clements*, 228 A.D.2d at 991 [internal quotation marks and citation omitted]). Notably, to avoid an order directing such disclosure, a party must move for a protective order and show that the information sought is immune from disclosure (*see Morris v. Clements*, *supra*). A court may "strike a request for qualifications when it is demonstrated that the expert's identity would thereby be revealed" (*Pizzi v. Muccia*, 127 A.D.2d at 343). The

Court has reviewed plaintiffs' *in camera* submissions, and finds that they have sufficiently demonstrated that the disclosure of the demanded additional qualifications information, i.e., the medical school attended, graduation year, jurisdiction of licensure, location of affiliated hospitals, and/or the location of any internship or residency program attended, would result in the disclosure of the identity of their two medical experts (*see Thomas v. Swiantek*, 291 A.D.2d 884, 885 (4th Dep't 2002]; *Allen v. Hendrickson*, 39 Misc.3d 1229(A), *1 [Sup Ct., Albany County 2013]; *cf. Morris v. Clements*, *supra*; *Pizzi v. Muccia*, *supra*). Therefore, plaintiffs are entitled to a protective order.

Plaintiffs' 2nd Supplemental Amended Verified Bills of Particulars

The AMCH defendants contend that the "[p]laintiffs have made the same vague, and virtually identical, undifferentiated allegations of negligence against Drs. Bahrassa, Gruenthal, Kuo, Kenning and Celmins" in their 2nd supplemental amended verified bills of particulars, making it unduly burdensome for them to prepare a defense and failing to prevent surprise at trial. The AMCH defendants further assert that other allegations of negligence are impermissibly vague, insofar as the plaintiffs have failed to adequately particularize:

> (1) how each defendant failed to "properly, accurately and adequately interpret and document the findings of plaintiff, Joseph Hill's, brain images of October 3, 2008; October 7, 2008; October 11, 2008 and October 12, 2008" (collectively "images");
>
> (2) how each defendant failed to "correctly, accurately and adequately interpret and document the presence of an abscess as demonstrated on" the images;
>
> (3) what "accurate information" did each defendant fail to communicate with respect to the images, and when did the alleged failure to communicate occur;
>
> (4) what "significant medical findings" did each defendant fail to communicate with respect to the images, and when did the alleged failure to communicate occur;
>
> (5) what "misleading information" did each defendant communicate with respect to Mr. Hill, and when did the communication occur;
>
> (6) what additional imaging studies or diagnostic tests of Mr. Hill's subdural empyema and fluid collection should have been done based upon the images, and

when should they have been done;

(7) how each defendant failed to interpret and document the findings of the images in comparison to the August 4, 2008 and October 3, 2008 brain images;

(8) what was Mr. Hill's so-called "true status" (i.e., what condition(s) is being alleged to have not been properly assessed by each defendant);

(9) what "radiological findings" are the plaintiffs referring to in relation to their allegation of a failure to properly and timely treat Mr. Hill;

(10) what treatment do plaintiffs allege should have been done based upon the aforementioned "radiological findings";

(11) what symptoms are the plaintiffs alleging that Mr. Hill was exhibiting and expressing, and how did each defendant allegedly fail to timely, properly, carefully and thoroughly evaluate, diagnose, understand and appreciate them; and

(12) what "consultations" should have been called for, by whom and when should they have been requested.

In addition, the AMCH defendants maintain that the plaintiffs failed to particularize the amount of damages claimed in response to Demands 22-24, 26-30, and 32-38. According to the AMCH defendants, the vast majority of the service dates are years old, and plaintiffs have not offered a reason as to why the amounts billed are listed as "presently unknown" and/or "amount unknown." They also contend that there is a question as to whether the care provided to plaintiff Joseph Hill by some of the listed service providers is causally related to any of the damages he claims to have suffered, and that plaintiffs' latest expert disclosure contains no proposed testimony on the issue of any other special damages.

Lastly, the AMCH defendants submit that the 2nd supplemental amended verified bills of particulars contains new factual allegations with respect to liability and damages. Specifically, the AMCH defendants object to the addition of claims that they acted negligently with respect to the October 11, 2008 and October 12, 2008 brain images, and the assertion of damage claims (ee) through (iii) in response to Demand 17. The AMCH defendants argue that the plaintiffs were

required to seek leave to assert these new theories of liability and claims for damages, and that because discovery is closed, such claims should be stricken from the 2nd supplemental amended verified bills of particulars as prejudicial and plaintiffs should be precluded from offering any evidence on these issues at trial.

The Court has reviewed plaintiffs' 2nd supplemental amended verified bills of particulars and is satisfied that the plaintiffs have sufficiently particularized their claims of negligence against Drs. Kuo, Bahrassa, Gruenthal, Kenning, and Celmins to prevent surprise at trial and to permit a reasonable defense (*see* CPLR 3043[a][3]; *Felock v. Albany Med. Ctr. Hosp.*, 258 A.D.2d at 773). Notably, CPLR 3043 does not preclude the assertion of identical allegations of negligence against multiple defendants. In a case such as this, in which plaintiffs have alleged a failure to timely treat and diagnose where there was continuing care over a certain period of time involving multiple providers, some of the allegations of negligence will be identical. Nor does CPLR 3043 require plaintiffs "to provide meaningful differentiation of the allegations of negligence against each defendant." Here, plaintiffs served a 2nd supplemental amended bill of particulars on each defendant, setting forth their alleged acts of negligence on the date or dates they provided care and treatment to the plaintiff. No further detail is necessary or required.

The Court also finds that the twelve (12) "How" and "What" questions the AMCH defendants contend must be more adequately particularized as to each defendant "seek more than generalized allegations of negligence, sufficient to narrow the issues for . . . trial" (*see Stidham v. Clerk*, 57 A.D.3d 1369, 1370 [4th Dep't 2008], quoting *Khoury v. Choucani*, 27 A.D.3d 1071, 1072 [4th Dep't 2006]). Indeed, responding to such questions would require plaintiffs to provide material that is evidentiary in nature and/or information which is more appropriately the subject of expert proof (*see Heyward v. Elleville Community Hosp.*, 215 A.D.2d 967, 968 [3d Dep't 1995]; *Morris*

v. Fein, 177 A.D.2d 915, 916 [3d Dep't 1991]; *McKenzie v. St. Elizabeth Hosp.*, 81 A.D.2d 1003, 1004 [4th Dep't 1981]). As such, they are beyond the scope of the bill of particulars and need not be responded to by the plaintiffs.

Next, the Court finds plaintiffs' responses to Demands 22-24, 26-30, and 32-38 to be adequate. That there might be a question as to whether the care provided to the plaintiff by some of the listed providers is causally related to any of the alleged damages he claims to have suffered does not render plaintiffs' responses to these demands insufficient. Additionally, plaintiffs have indicated that the amounts of certain bills are "presently unknown" because they do not have the bills, do not know the amounts, and have been unsuccessful, to date, in obtaining the information. Since plaintiffs have represented that they are continuing to try to obtain the information and will disclose the information if it becomes available to them, their responses with respect to such information will not be stricken (*see Felock v. Albany Med. Ctr. Hosp.*, *supra* at 774; *Hayes v. Kearney*, 237 A.D.2d at 770; *Miccarelli v. Fleiss*, 219 A.D.2d 469, 470 [1st Dep't 1995]).

Moreover, plaintiffs' contention that they will rely on expert testimony to support their claim for special damages is a sufficient response to the AMCH defendants' demands on that issue. The fact that plaintiffs' latest expert disclosure does not contain proposed testimony on the issue of special damages is not a basis upon which to strike those parts of their 2nd supplemental amended bills of particulars claiming special damages, or preclude them from offering any evidence on such issue at trial.

The Court declines to strike that part of plaintiffs' 2nd supplemental amended bills of particulars, containing allegations of negligence in connection with the October 11, 2008 and October 12, 2008 brain images, and additional claims of damage set forth in (ee) through (iiii) of plaintiffs' response to Demand 17. The AMCH defendants submit that the plaintiffs impermissibly

amended their bills of particulars to assert "new factual allegations on both liability and damages," without seeking leave. The Court disagrees. CPLR 3042(b) permits a "party [to] amend the bill of particulars once as of course prior to the filing of a note of issue." Here, the record indicates that the plaintiffs served supplemental verified bills of particulars, containing the new factual allegations, the same day they filed their note of issue, and subsequently served the 2nd supplemental amended verified bills of particulars, containing the same "new factual allegations on liability," but only claims for damages (ee) through (lll)."[2] In the absence of any proof in the record showing that the note of issue was, in fact, filed prior to the service of the supplemental verified bills of particulars, the Court is not persuaded that plaintiffs could not avail themselves of CPLR 3042(b). As such, their amendment to the original bills of particulars without court leave was permissible.

The Court rejects the AMCH defendants' assertion that they are "highly" prejudiced by the inclusion of allegations of negligence related to the October 11, 2008 and October 12, 2008 brain images and the additional damage claims in response to Demand 17 because discovery is closed. Given that the trial of this matter is scheduled for September 12, 2016, the AMCH defendants would have sufficient time to conduct discovery on these issues to prepare for trial. Therefore, the Court grants the AMCH defendants leave, if they so choose, to conduct discovery with respect to the allegations of negligence related to the October 11, 2008 and October 12, 2008 brain images and additional damage claims in response to Demand 17. Such discovery shall be completed on or before June 3, 2016.

Based upon the foregoing, the Court denies the AMCH defendants' motion in its entirety, and grants plaintiffs' motion for a protective order, striking the AMCH defendants' expert disclosure

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[2] In their 2nd supplemental amended bills of particulars, plaintiffs struck damage claims (mmm) through (iiii) in their response to Demand 17.

demands to the extent that they request disclosure of the substance, facts and opinions, and qualifications of plaintiffs' medical experts beyond that which have already been disclosed, and deeming plaintiffs' expert disclosures and bills of particulars served to date to be sufficient and in compliance with CPLR 3101(d).

Dr. Thomas' Motion

Dr. Thomas moves to preclude plaintiffs' medical experts from testifying at trial unless the plaintiffs amend and supplement their expert response within thirty (30) days. Dr. Thomas maintains that plaintiffs' amended supplemental expert disclosure fails to satisfy the requirements of CPLR 3101(d)(1)(i) in that it does not provide reasonable detail regarding the substance of the facts and opinions of the anticipated trial testimony of the plaintiffs' experts. Specifically, Dr. Thomas submits that plaintiffs' expert disclosure does not adequately particularize the opinions of their experts with respect to causation and the timing of the alleged injury. Dr. Thomas further asserts that plaintiffs' disclosure of the qualifications of their medical experts fails to provide the "reasonable detail" required by CPLR 3101(d)(1)(i), which prejudices the defendants in their preparation for trial.

After reviewing the plaintiffs' amended supplemental expert disclosure, the Court is not persuaded that it is "so general and nonspecific that [Dr. Thomas] has not been enlightened to any appreciable degree about the content of the expert[s'] anticipated testimony" (*Chapman v. State of New York*, 189 A.D.2d 1075, 1075 [3d Dep't 1993]). Instead, the Court finds that plaintiffs' expert response reasonably details the substance of the facts and opinions upon which their experts are expected to testify as required by CPLR 3101(d)(1)(i), and that additional disclosure is neither necessary nor required. As such, the sanction of preclusion is unwarranted. Moreover, plaintiffs were not required to provide separate expert disclosure as to each defendant because the defendants treated the plaintiff on different days, notwithstanding Dr. Thomas' assertion to the contrary.

The Court further finds, upon review of plaintiffs' *in camera* submissions, that disclosure of the demanded additional qualifications information, i.e., the medical school attended, graduation year, jurisdiction of licensure, location of affiliated hospitals, and/or the location of any internship or residency program attended, would result in the disclosure of the identity of their two medical experts (*see Thomas v. Swiantek*, 291 A.D.2d at 885; *Allen v. Hendrickson*, 39 Misc.3d 1229(A) at *1; *cf. Morris v. Clements*, *supra*; *Pizzi v. Muccia*, *supra*). As such, plaintiffs are entitled to a protective order. The Court rejects Dr. Thomas' contention that a redacted version of plaintiffs' counsel's affirmation, submitted for *in camera* inspection, should have been provided to his counsel, and denies his request that the Court disregard the *in camera* affirmation or direct plaintiffs to serve counsel a redacted version of the affirmation and allow Dr. Thomas a reasonable time thereafter to respond. Dr. Thomas cites no authority requiring plaintiffs to provide him with a redacted version of their counsel's affirmation. In any event, providing Dr. Thomas' counsel with a redacted version of the affirmation would be of no practical effect because the plaintiffs would be providing nothing more than that which has already been provided in their expert responses.

For these reasons, the Court denies Dr. Thomas' motion in its entirety, and grants plaintiffs' motion for a protective order, striking Dr. Thomas' expert disclosure demands to the extent that they request disclosure of the substance, facts and opinions, and qualifications of plaintiffs' medical experts beyond that which have already been disclosed, and deeming plaintiffs' expert disclosures served to date to be sufficient and in compliance with CPLR 3101(d).

CCP's Motion

CCP seeks an order precluding plaintiffs' expert witnesses from testifying at trial based upon plaintiffs' failure to comply with CPLR 3101. In the alternative, CCP seeks an order requiring

plaintiffs to serve a proper expert disclosure within thirty (30) days. CCP argues that plaintiffs' expert disclosure is impermissibly vague and conclusory because it fails to provide the required specificity and detail as to the substance of the facts and opinions of the anticipated testimony of their experts on the issues of causation and the timing of the alleged injury. In addition, CCP joins in the portion of defendant Dr. Thomas' motion objecting to the insufficient qualifications information provided for plaintiffs' medical experts, and requests that a supplemental response be provided setting forth the experts' qualifications in compliance with CPLR 3101(d)(1)(i).

For the same reasons discussed above in the determination of Dr. Thomas' motion, the Court denies CCP's motion in its entirety, and grants plaintiffs' motion for a protective order, striking CCP's expert disclosure demands to the extent that they request disclosure of the substance, facts and opinions, and qualifications of plaintiffs' medical experts beyond that which have already been disclosed, and deeming plaintiffs' expert disclosures served to date to be sufficient and in compliance with CPLR 3101(d).

Any remaining arguments have been considered and found to be without merit, or need not be reached in light of the foregoing. As a final note, the Court is sealing, by separate order, all documents submitted by plaintiffs for an *in camera* review.

Accordingly, it is hereby

ORDERED, that defendants Albany Medical Center Hospital, Albany Medical College, Albany Medical Center, Yu-Hung Kuo, M.D., Farhad Bahrassa, M.D., Tyler Kenning, M.D., Michael Gruenthal, M.D., Dzintra Celmins, M.D., and Earl Zimmerman, M.D.'s motion is denied in its entirety for the reasons stated herein; and it is further

ORDERED, that defendant James Thomas, M.D.'s motion is denied in its entirety as stated

herein; and it is further

ORDERED, that defendant Community Care Physicians, P.C.'s motion is denied in its entirety as stated herein; and it is further

ORDERED, that plaintiffs three separate motions for protective orders are granted, striking defendants' expert disclosure demands to the extent that they request disclosure of the substance, facts and opinions, and qualifications of plaintiffs' medical experts beyond that which have already been disclosed, and deeming plaintiffs' expert disclosures and bills of particulars served to date to be sufficient and in compliance with CPLR 3101(d); and it is further

ORDERED, that the AMCH defendants are granted leave, if they so choose, to conduct discovery with respect to the plaintiffs' allegations of negligence related to the October 11, 2008 and October 12, 2008 brain images and their additional damage claims in response to Demand 17. Such discovery shall be completed on or before June 3, 2016; and it is further

ORDERED, that the AMCH defendants shall be permitted to supplement their motion for summary judgment following the additional discovery. Such supplement shall be submitted no later than June 17, 2016.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to the attorneys for the plaintiffs. A copy of the Decision and Order together with all other papers are being forwarded to the Albany County Clerk for filing. The signing of this Decision and Order and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: April 11, 2016
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

4/15/16

Papers Considered:

1. Notice of Motion, dated July 14, 2015; Attorney Affirmation (Justin W. Gray, Esq.), dated July 14, 2015; Exhibits A-G;
2. Notice of Cross-Motion to Albany Medical Center Hospital Defendants, dated July 24, 2015; Affirmation in Opposition to Motion of the Albany Medical Center Hospital Defendants and in Support of Plaintiffs' Cross-Motion (John K. Powers, Esq.), dated July 24, 2015;
3. Attorney Reply Affirmation (Justin W. Gray, Esq.), dated July 29, 2015;
4. Notice of Motion, dated July 10, 2015; Affidavit (Jonathan E. Hansen, Esq.), sworn to July 10, 2015; Exhibits A-H;
5. Notice of Cross-Motion to Defendant, James Thomas, M.D., dated July 24, 2015; Affirmation in Opposition to Motion of Defendant, James Thomas, M.D. and in Support of Plaintiffs' Cross-Motion (John K. Powers, Esq.), dated July 24, 2015;
6. Reply Affidavit (Jonathan E. Hansen, Esq.), sworn to July 30, 2015;
7. Notice of Motion, dated July 10, 2015; Attorney Affidavit (Erin Mead, Esq.), sworn to July 10, 2015; Exhibits A-G; Memorandum of Law, dated July 10, 2015;
8. Notice of Cross-Motion to Defendant, Community Care Physicians, P.C., dated July 24, 2015; Affirmation in Opposition to Motion of Defendant, Community Care Physicians, P.C. and in Support of Plaintiffs' Cross-Motion (John K. Powers, Esq.), dated July 24, 2015;
9. Attorney Reply Affidavit (Erin Mead, Esq.), sworn to July 30, 2015;
10. *In Camera* Affirmation in Support of Cross-Motion to Albany Medical Center Hospital Defendants (Adam P. Powers, Esq.), dated July 24, 2015, with Exhibits A-D annexed;
11. *In Camera* Affirmation in Support of Cross-Motion to James Thomas, M.D. (Adam P. Powers, Esq.), dated July 24, 2015, with Exhibits A-D annexed;
12. *In Camera* Affirmation in Support of Cross-Motion to Community Care Physicians, P.C. (Adam P. Powers, Esq.), dated July 24, 2015, with Exhibits A-D annexed; *and*
13. Memorandum of Law on Behalf of Plaintiff in Opposition to the Motions of All Defendants and in Support of Plaintiffs' Cross-Motions, dated July 24, 2015, with unmarked exhibits annexed.