Schmahl v Wheeler
2019 NY Slip Op 33433(U)
November 19, 2019
Supreme Court, Suffolk County
Docket Number: 12-25362
Judge: David T. Reilly

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 12-25362
CAL. No. 16-00238MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 05-08-19
ADJ. DATE 06-05-19
Mot. Seq. # 012 - MotD
013 - MotD

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DAVID LEE SCHMAHL, as Executor of the Estate of RICHARD R. SCHMAHL, Deceased,

Plaintiff,

- against -

JEFFREY WHEELER, D.O., DAVID R. BERENZY, JR., P.A., STEVEN K. SAMUEL, D.O., "JOHN/JANE DOE", P.A., (First and Last Name being fictitious), FREDERICK B. GUTMAN, M.D., NEW YORK SPINE & BRAIN SURGERY UFPC, and ST. CHARLES HOSPITAL AND REHABILITATION CENTER,

Defendants.

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Upon the following papers numbered 1 to 51 read on these motions for summary judgment: Notice of Motion and supporting papers 1-24; 32-49 ; Answering Affidavits and supporting papers 25-28 ; Replying Affidavits and supporting papers 29-31; 50-51; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (#012) of defendant David Berenzy, P.A., and the motion (#013) of defendants Steven Samuel, D.O., and St. Charles Hospital and Rehabilitation Center are consolidated for purposes of this determination; and it is

ORDERED that the motion (#012) of defendant David Berenzy, P.A., for summary judgment dismissing the complaint against him is granted to the extent set forth below, and is otherwise denied; and it is further

ORDERED that the motion (#013) of defendants Steven Samuel, D.O., and St. Charles Hospital and Rehabilitation Center is granted to the extent set forth below, and is otherwise denied.

Plaintiff David Lee Schmahl, as Executor of the Estate of Richard Schmahl, commenced this action to recover damages for personal injuries and wrongful death allegedly caused by defendants' medical malpractice. The complaint also contains causes of action for lack of informed consent and negligent hiring by defendant St. Charles Hospital and Rehabilitation Center. The complaint alleges that plaintiff's decedent was treated by defendants on March 18, 2011, March 20, 2011, and March 22, 2011 through March 28, 2011. Plaintiff alleges that defendants committed malpractice by failing to properly test, diagnose, and treat decedent for an epidural abscess and staphylococcus aureus infection, resulting in sepsis, multi-organ failure and premature death.

Defendant David Berenzy, P.A., now moves for summary judgment dismissing the complaint against him on the grounds that his treatment of decedent did not depart from accepted medical practice and was not a proximate cause of his injuries and death. In support of the motion, Berenzy submits copies of the pleadings, the transcripts of the parties' deposition testimony, decedent's hospital records, and an expert affirmation by Dr. Gregory Mazarin. By the bill of particulars, plaintiff alleges that on March 18, 2011, Berenzy committed medical malpractice by failing to timely diagnose decedent with a spinal epidural abscess, in failing to perform various diagnostic tests, in failing to perform a differential diagnosis, and in failing to admit him to the hospital and, among other things, causing decedent personal injuries resulting in his premature death.

Dr. Wheeler testified that he is board certified in emergency medicine, and that he works at St. Charles Hospital and Rehabilitation Center (St. Charles) as an emergency medicine clinician and as the director of emergency services. He testified that in March 2011 he was employed by Port Emergency Medical Services, now named Island Medical Physicians, P.C., which provides emergency department personnel at various hospitals, including St. Charles. Dr. Wheeler testified that he does not have an independent recollection of decedent or the dates and events at issue, and testified to his custom and practice as an attending physician in the emergency department. He testified from the patient's chart which is maintained in the hospital records. He testified that when a patient presents to the emergency department he or she is initially triaged by the nursing staff, and is then seen by a physician assistant, and that it is his custom and practice to review the reports created by the ambulance providers, the nursing

triage, and the physician assistant. He testified that there is one attending physician in the emergency department on each shift, and that the two shifts are typically from 7:00 a.m. through 7:00 p.m. and 7:00 p.m. through 7:00 a.m.

Dr. Wheeler testified from the ambulance record which states that decedent was found on the couch with complaints of pain, that he described his pain as a 10 on a scale from 1 through 10, and that he was conscious, his skin was warm and dry and his ankles were cool. According to the ambulance record, decedent told the ambulance crew that he has not experienced back pain for over 20 years, and that he took a Vicodin at 8:30 a.m., and that he took one before he went to bed the previous night. The report indicates that the decedent's vital signs were obtained by the ambulance crew, and Dr. Wheeler testified that the triage notes indicate that decedent arrived at the emergency department on March 18, 2011, at 10:10 a.m. on a back board wearing a cervical collar. He testified that decedent was categorized by triage as a "stable urgent three" which is one of the four criteria used by the emergency department, one being emergency level and level four is non-urgent. Dr. Wheeler testified that decedent's chief complaint was lower back pain, and he was unable to stand up. He testified that decedent's vital signs were taken, and that his temperature was 98.3 which is normal, that his pulse was 108, his blood pressure was 141 over 98, saturation was 98 per cent, and his respirations were 18. He testified that decedent's pulse rate of 108 suggested early tachycardia, and that decedent was taking Vytorin and 81mg of aspirin daily.

Dr. Wheeler testified that decedent was given Toradol and Flexiril at 10:35 a.m., and that an x-ray examination of the lumbar spine was ordered. He testified that the emergency department notes indicate that Berenzy performed a physical examination and neurological examination on decedent at 10:25 a.m. and circled negative for the following constitutionals: fever, chills, weakness, irritability and weight loss. Berenzy's notes also indicate that decedent did not have altered vision, toothaches, throat pain, nosebleeds, earache or altered hearing. Dr. Wheeler testified that the notes further indicate that decedent was negative for symptoms in the pulmonary chest system, gastroenterological system, genitourinary system, and he read the specific areas in the various systems during his deposition. Berenzy's notes indicate that the neurological examination of decedent indicated no headaches, weakness, tremors, blurred vision, vertigo, diplopia or parasthesias. Additionally, Berenzy's notes indicate that decedent was alert, his cranial nerves 2 through 12 were intact, his reflexes and motor strength were normal, and his cerebellar neurological aspects were normal. Dr. Wheeler described the types of tests that were utilized to obtain those results.

With respect to the physical examination, Dr. Wheeler testified that Berenzy's notes indicate he circled a positive finding for tenderness in decedent's lower back area, and that the x-ray examination revealed extensive arthritis. Dr. Wheeler testified that Berenzy's diagnosis for decedent was lumbosacral radiculopathy, severe osteoarthritis of the lumbosacral spine, and muscle spasm, and that decedent was given Toradol and Flexeril at noon. He testified that the progress notes created by the triage nurses indicate that decedent felt much better, that he was able to move slowly, and that he was discharged with instructions and prescriptions for Vicodin and Naprosyn.

Dr. Wheeler testified that he agreed with Berenzy's plan and diagnosis, as well as the decision not to order blood work, and that an MRI and CT scan were not necessary, as decedent responded to the

emergency department's intervention and medications. Dr. Wheeler was asked of the significance of his signature on the emergency room record, and he testified that it indicates that he was the physician on duty during the time that decedent was in the emergency department, and that he countersigned with Berenzy. He testified that his signature indicates that he gave "oversight, awareness, guidance, structure and agreement, oversight and assessment of the interaction in the emergency department of this patient as representative of the ED PA, NP." He testified that it is the custom and practice to clear a patient for departure from the emergency department by both the physician assistant and the attending physician.

Berenzy testified that he became a licensed practical nurse in 1989, that he worked in the emergency department of South Central Hospital, which is currently Peconic Bay Medical Center, and that he also worked in jails until becoming a physician assistant in 2004. He testified that he worked in the emergency department at Peconic Bay Medical Center for three years while employed with Dr. Imam, and that he was responsible for assessing patients and writing orders. Berenzy testified that following such employment, he worked at urgent care facilities under Dr. Goldman for two to three years and in the emergency department at Peconic Bay Medical Center. He testified that he subsequently became employed with Port Emergency Medical Services, and worked for Dr. Ferrara. He testified that he worked at an urgent care facility and in the emergency department at St. Charles on a per diem basis.

Berenzy, who did not recall decedent, testified from his notes. He testified that decedent presented to the emergency department by ambulance on a backboard with a cervical collar and was triaged by a nurse. He explained that triage nurses record their assessments in the emergency department records, and that he reads the assessments before seeing the patients. He testified that the nurses categorize patients from one to four, and that decedent was assessed at number 3, indicating stable and urgent. He testified that the triage nurses take patients' vital signs, and that decedent's vitals were normal with slightly elevated blood pressure and heart rate. He testified further that he always reads the ambulance records regarding a patient, and that decedent's vital signs taken by the ambulance crew were consistent with the results obtained by the triage nurse. Berenzy testified that he generally does not take a patient's vital signs unless he finds an inconsistency.

Berenzy testified that he assessed decedent at 10:25 a.m., that his chief complaint was pain across his lower back, and that he performed a physical examination and a standard neurological examination, which consists or inquiries and testing reflexes with a reflex hammer. He testified that he also checks motor function through range of motion, and that he uses a paper clip or similar object to determine sensation. He testified that he records the results of the examination immediately, and that he circles positive and negative for various categories contained on the form. Berenzy testified that decedent experienced tenderness in his lower back which is typically associated with muscle spasms, so he ordered Flexeril for muscle relaxation and Toradol for inflammation, and that he ordered an x-ray examination which revealed extensive arthritis. He testified further that he diagnosed decedent with lumbosacral radiculopathy.

Berenzy testified that decedent was reassessed by the nursing staff at 12:00 p.m. The emergency department notes indicate that decedent felt better, was able to move, and did not have any other complaints, so he was discharged after discussing his plan with Dr. Wheeler. He testified that decedent was given discharge instructions which included, among other things, to contact his primary care

physician, Dr. Fishberger, the same day, and that he was advised to see Dr. Fishberger within three days if his symptoms did not improve.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

Medical malpractice occurs when plaintiff is injured as a result of medical treatment received by a health care provider that departs from accepted practice and is proven to be a proximate cause of plaintiff's injuries (*see* ***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***Gachette v Leak***, 172 AD3d 1327, 101 NYS3d 432 [2d Dept 2019]; ***Donnelly v Parikh***, 150 AD3d 820, 55 NYS3d 274 [2d Dept 2017]). It is the failure of a provider of medical services to exercise the degree of skill and learning commonly applied by an average member of the profession (***Pike v Hensinger***, 155 NY 201, 49 NE 760 [1898]), and the standard of care is one established by the profession itself (***Spensieri v Lasky***, 94 NY2d 231, 701 NYS2d 689 [1999], citing ***Toth v Community Hosp.***, 22 NY2d 255, 292 NYS2d 440 [1968]).

"A physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of the plaintiff's injuries" (***Anonymous v Gleason1***, 175 AD3d 614, 616, 106 NYS3d 353 [2d Dept 2019], quoting ***Schwartzberg v Huntington Hosp.***, 163 AD3d 736, 737, 81 NYS3d 118 [2d Dept 2018]). The burden is equally applicable to a physician assistant who is subject to liability in medical malpractice as well (*see* ***Bleiler v Bodnar***, 65 NY2d 65, 489 NYS2d 885 [1985]; ***Monzon v Chiaramonte***, 140 AD3d 1126, 35 NYS3d 371 [2d Dept 2016]; ***Scivoli v Levit***, 79 AD3d 1011, 913 NYS2d 323 [2d Dept 2010]). To prove that defendant did not deviate from accepted standards of medical care or was not a proximate cause of plaintiff's injuries, expert testimony is ordinarily necessary (*see* ***James v Wormuth***, 21 NY3d 540, 974 NYS2d 308 [2013]; ***Lampe v Neurological Surgery, P.C.***, 173 AD3d 996, 103 NYS3d 527 [2d Dept 2019]; ***Decker v State of New York***, 164 AD3d 650, 83 NYS3d 533 [2d Dept 2018]; ***Whitnum v Plastic & Reconstructive Surgery, P.C.***, 142 AD3d 495, 36 NYS3d 470 [2d Dept 2016]).

Once defendant establishes a prima facie case, "a plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing" (***Stukas v Streiter***, 83 AD3d 18, 186, 918 NYS2d 176 [2d Dept 2011], citing *Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923). Thus, a plaintiff is not required to address

those elements that the defendant did not establish in the motion in order to successfully defeat the motion (*see* ***Omane v Sambaziotis***, 150 AD3d 1126, 55 NYS3d 345 [2d Dept 2017]; ***Metcalf v O'Halleran***,137 AD3d 758, 25 NYS3d 679 [2d Dept 2016]; ***Guctas v Pessolano***, 132 AD3d 632, 17 NYS3d 749 [2d Dept 2015]; ***Hayden v Gordon***, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176).

The affirmation of Dr. Gregory Mazarin is submitted. In his affirmation, Dr. Mazarin states that he is a licensed physician in the State of New York, and he has worked as an emergency room physician since 1997. He states that he reviewed decedent's hospital records from St. Charles, the pleadings, bills of particulars, and the transcripts of the deposition testimony given in this matter. Dr. Mazarin opines, with a reasonable degree of medical certainty, that Berenzy's treatment and care of decedent did not depart from accepted medical practice and was not a cause of decedent's injuries or death.

Dr. Mazarin reiterates the factual history of decedent's presentation to the emergency department which comports with the testimony recited above, and opines that it was appropriate for decedent to be seen by a physician assistant. He opines that Berenzy properly recorded decedent's medical history, conducted an appropriate physical examination, and properly documented the results. He opines that Berenzy acted in accordance with accepted medical practice based upon the information provided to him, and that he properly formulated a proper differential diagnosis of lumbar/sacral radiculopathy, severe osteoarthritis of the lumbar/sacral spine, and muscle spasm.

Dr. Mazarin states that back pain is one of the most common conditions encountered in an emergency department, and that when decedent presented to the emergency department at St. Charles on March 18, 2011, there were no red flags to suggest that he was suffering from anything other than back pain. He states that decedent was afebrile, that he had no numbness or incontinence, and he did not complain of weakness on March 18, 2011. Dr. Mazarin opines that decedent's presentation with no symptoms other than back pain did not warrant blood work to be performed, and that in the absence of a fever or focal neurologic deficit, there was no indication to obtain any additional testing. He states that decedent improved with low doses of pain medication, and that his history, his improvement, and the results of the lumbar x-ray examination are consistent with the diagnose and his discharge.

Dr. Mazarin opines that decedent's presentation did not warrant a CT scan, MRI, blood cultures, urine cultures, and he enumerates other diagnostic tests which he opines were not required under the applicable standard of care. He opines that Berenzy acted within accepted practice by having Dr. Wheeler sign the patient's chart prior to his discharge, and that it was within the standard of care for patients who are assessed at level 3 or 4 not to be seen by a physician.

Here, Berenzy established, prima facie, his entitlement to summary judgment dismissing the medical malpractice cause of action by proffering, among other things, the affirmation of Dr. Mazarin, who opines that the treatment rendered to decedent at St. Charles on March 18, 2011 by Berenzy was in accordance with good and accepted medical practice, and was not a proximate cause of decedent's injuries or death (*see* ***Gray v Patel***, 171 AD3d 1141, 99 NYS3d 76 [2d Dept 2019]; ***Garcia v Richer***, 132 AD3d 809, 18 NYS3d 401 [2d Dept 2015]).

Berenzy also established, prima facie, his entitlement to summary judgment dismissing the second cause of action alleging lack of informed consent, as the alleged injuries are alleged to have occurred from the failure to diagnose. For the claim to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d [2]). An essential element of a cause of action for lack of informed consent is that there be an affirmative violation of a plaintiff's physical integrity (***Ellis v Eng***, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]). Lack of informed consent does not apply to injuries that allegedly result from a failure to undertake a procedure (***Bueno v Allam***, 170 AD3d 939, 96 NYS3d 623 [2d Dept 2019]; ***Ellis v Eng***, 70 AD3d 887, 895 NYS2d 462). As there are no allegations in the complaint or bill of particulars regarding an affirmative violation of decedent's physical integrity, the cause of action for lack of informed consent should be dismissed (*see* ***Galluccio v Grossman***, 161 AD3d 1049, 78 NYS3d 196 [2d Dept 2018]). Having established his entitlement to summary judgment, Berenzy shifted the burden to plaintiff to proffer competent evidence sufficient to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176).

In opposition, plaintiff submits an affirmation by an expert whose name has been redacted. However, an unredacted affidavit was provided to the court for *in camera* review. The Court notes that plaintiff's opposition to Berenzy's motion also includes its opposition to the motion by defendants Steven Samuel, D.O. and St. Charles, discussed below. Plaintiff's expert states that he is a licensed physician in the State of New York, and he is board certified in internal medicine and emergency medicine. He states that he has specialized in emergency medicine for over 35 years, and has worked as a director of emergency departments for 20 years. Plaintiff's expert states that he is familiar with the roles and requirements of attending physicians and physician assistants, as well as the duties and responsibilities required of them when treating patients such as decedent. He states that he has reviewed the pleadings, the medical records from St. Charles relating to decedent's presentation to the emergency department on March 18, 2011 and March 20, 2011, and the records pertaining to his hospital admission from March 22, 2011 through March 28, 2011. He states that he has also reviewed the affirmations submitted with defendants' motions and the transcripts of deposition testimony.

Plaintiff's expert states that PA Berenzy departed from accepted medical practice in his treatment and care of decedent and that such departure was a cause of decedent's injuries and premature death. He opines that when patients present to an emergency department with complaints of back pain, the standard of care is to conduct a proper "work up" and determine whether the patient's complaints are due to a potentially emergent condition requiring rapid evaluation and treatment. He states that the standard of care for emergency room clinicians who evaluate patients for lower back pain is to include a "red flag diagnoses," which includes "space occupying lesions, fracture, cuada equina syndrome, spinal cord compressions, vertebral malignancy, and spinal infection." He states that it is improper for a treating clinician to assume that back pain is benign, and that his or her only role is to alleviate the pain.

Plaintiff's expert opines that defendants departed from accepted standards of medical care by making such assumptions. He opines that x-ray examinations are generally inadequate to determine whether a potentially emergent condition exists, and that a CT scan or a magnetic resonance imaging test (MRI) are required under the accepted standard of care. He opines that the diagnosis provided on March

18 and March 20, 2011 was a "diagnosis of exclusion" without going through the process of exclusion which would have included an MRI test and blood tests at a bare minimum. He opines that decedent's undiagnosed condition progressed, and that the delay in treatment between March 18 and March 22, 2011, the date when the accurate diagnose was formed, led to decedent's organ failure and premature death, as he could have been treated with antibiotics which would have arrested the development of the infectious disease that caused his death.

Plaintiff's expert states that the defendants failed to conduct a thorough differential diagnosis which should have included a "space occupying lesion, such as an epidural abscess," and that such failure was a departure from the accepted standard of medical care. He opines that decedent's symptoms upon presentation to the emergency department on March 18, 2011 were indicative of a space occupying lesion, and that defendants departed from accepted medical practice by failing to perform an MRI or conduct lab studies which would have revealed abnormalities consistent with an infection, and that such infection could have been treated if timely diagnosed.

Plaintiff's expert affirmation raises triable issues of fact regarding Berenzy's treatment of decedent. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (***Feinberg v Feit***, 23 AD3d 517, 519, 806 NYS2d 661 [2d Dept 2005]; *see also* ***Hutchinson v New York City Health & Hosps. Corp.***, 172 AD3d 1037, 101 NYS3d 96 [2d Dept 2019]). Here, the conflicting affirmations of plaintiff's expert and Dr. Mazarin raise credibility issues properly determined by a trier of fact (***Macancela v Wyckoff Hgts. Med. Ctr.***, 109 AD3d 411, 2019 NY Slip Op 07244 [2019]; ***Stucchio v Bikvan***, 155 AD3d 666, 63 NYS3d 498 [2d Dept 2017]; ***Loaiza v Lam***, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2013]). Accordingly, the motion of Berenzy for summary judgment dismissing the complaint against him is denied with respect to the cause of action alleging medical malpractice. However, Berenzy is granted partial summary judgment with respect to the cause of action alleging lack of informed consent, as plaintiff has failed to oppose that branch of the motion or specifically address such cause of action (*see* ***Wright v Morning Star Ambulette Servs., Inc.***, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]; ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]).

Dr. Steven Samuel and St. Charles move for summary judgment dismissing the complaint against them. Dr. Samuels argues that he did not owe decedent a duty of care, as he did not form a physician-patient relationship with decedent in the emergency department on March 20, 2011. The bill of particulars alleges that Dr. Samuels was the attending physician in the emergency department at St. Charles on March 20, 2011, and that he was negligent in failing to diagnose decedent with a spinal epidural abscess, in failing to admit decedent to the hospital, in failing to conduct various diagnostic tests, and in failing to consult with specialists, among other things. In support of the motion, Dr. Samuel submits the transcripts of deposition testimony by Lisa Weider and Sandra Bel-Schmal, certified hospital records from St. Charles, and his own affidavit.

At his deposition, Dr. Samuel testified that he graduated from New York College of Osteopathic Medicine in 2002, and that he did a three-year residency in emergency medicine at St. Barnabas Hospital. He testified that he is a licensed physician in the State of New York, and that he is board certified in emergency medicine. He testified that he is employed by Island Medical Physician's, P.C.,

and that he worked in the emergency department of St. Charles for six years, including on March 20, 2011. He testified that he works twelve hour shifts at St. Charles, and is the attending physician in the emergency department. He testified that he works from 7:00 a.m. until 7:00 p.m., and that the emergency department has one attending physician per shift, and also has physician's assistant and nurses. He testified that he did not meet, examine or treat decedent on March 20, 2011, and that decedent was not assigned to him in the emergency department.

Dr. Samuel was shown a copy of decedent's emergency department records from March 20, 2011, and he concedes that his name appears on decedent's chart as the admitting physician and as the attending physician. He testified that his name only appears on the record as a result of being pre-populated and that it was inserted by default. He denies that he was the attending physician assigned to decedent, and he testified that he did not discuss or consult with any of the staff regarding decedent, and he did not review decedent's chart. He testified that decedent was treated by the nursing staff and by Maria Baciuska, P.A., in the emergency department on March 20, 2011, and that decedent's emergency department records were signed by Baciuska and that he co-signed the records.

Dr. Samuel was asked why he signed the emergency department records relating to decedent on March 20, 2011, and he testified that it was required by his employer Island Medical Physicians based upon its policy. His signature appears on page two of the emergency department record under patient's disposition. He was asked whether he reviewed decedent's chart, and he answered in the negative with the explanation that decedent was not assigned to him, and he did not meet him, so he would not have reviewed the records.

Dr. Samuel also submits his own affidavit which reiterates his testimony that he had "zero involvement" with decedent's treatment and care. He states that physician's assistants work independently, and at times they seek advice from the attending physician, but that he was not contacted by Bacuiska on March 20, 2011.

Here, Dr. Samuel failed to establish his prima facie entitlement to summary judgment dismissing the cause of action alleging medical malpractice, as he has failed to submit sufficient evidence to support his argument that he did not owe a duty of care to plaintiff. No affidavits have been submitted by any agent of Island Medical, nor have any documents been submitted to substantiate that the company's policy requires physicians to sign hospital records that they have not reviewed. Nor has any expert affidavit been submitted to explain the protocol and relationships of physicians and physician assistants. The testimony and affidavit of Dr. Samuel are insufficient to establish his prima facie entitlement to summary judgment, as "self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts" (***Quiroz v 176 N. Main, LLC***, 125 AD3d 628, 631, 3 NYS3d 103 [2d Dept 2015], quoting ***Sacher v Long Is. Jewish-Hillside Med. Ctr.***, 142 AD2d 567, 568, 530 NYS2d 232 [2d Dept 1988]).

Furthermore, it is evident from the conflicting testimony of Dr. Wheeler that triable issues of fact have not been eliminated to establish that Dr. Samuel did not owe decedent a duty of care. For the

reasons discussed in this decision regarding Berenzy's motion, Dr. Samuel is also granted partial summary judgment dismissing the cause of action alleging lack of informed consent.

As for the branch of the motion pertaining to St. Charles, the hospital moves for summary judgment dismissing the complaint on the grounds that the cause of action alleging negligent hiring, supervision and training cannot proceed against it where liability is imposed upon an employer under the doctrine of respondeat superior and the employees were acting within the scope of their employment. St. Charles argues further that its staff did not depart from good and accepted medical practice in their treatment of decedent; that it cannot be vicariously liable for the conduct of Dr. Wheeler, Dr. Samuel and Berenzy, and that it cannot be liable for lack of informed consent.

Hospitals are vicariously liable for the acts of their employees and may be vicariously liable for the malpractice of a physician, nurse, or other health care professional that it employs under the doctrine of respondeat superior (*see* ***Hill v St. Clare's Hosp.***, 67 NY2d 72, 499 NYS2d 904 [1986]; ***Bing v Thunig***, 2 NY2d 656, 163 NYS2d 3 [1957]; ***Seiden v Sonstein***, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]). Generally, a hospital is not vicariously liable for the malpractice of a physician who is not employed by the hospital. However, "an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing" (***Smolian v Port Auth. of N.Y. & N.J.***, 128 AD3d 796, 801, 9 NYS3d 329, 334 [2d Dept 2015]). Under a theory of apparent agency, the hospital may be held vicariously liable for the negligence of the treating physician or provider even if they are independent contractors (*see* ***Rivera v Wyckoff Hgts. Med. Ctr.***, 175 AD3d 522, 107 NYS3d 55 [2d Dept 2019]). A hospital also owes a duty of reasonable care to its patients in hiring and supervising its employees and generally complies with such duty where there is evidence that it conformed to the acceptable standard of care customarily used by general hospitals (*see* ***Salvia v St. Catherine of Sienna Med. Ctr.***, 84 AD3d 1053, 923 NYS2d 856 [2d Dept 2011]).

To establish a prima facie showing of entitlement to summary judgment, a defendant hospital must establish through medical records and competent expert affidavits that its employees, or as here, the emergency room staff, did not deviate or depart from accepted medical practice in their treatment of the patient or that any departure was not a proximate cause of plaintiff's injuries (***Tsitrin v New York Community Hosp.***, 154 AD3d 994, 62 NYS3d 506 [2d Dept 2017]; ***Lau v Wan***, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]).

Here, St. Charles failed to establish its prima facie entitlement to summary judgment dismissing the cause of action claiming it is vicariously liable for the conduct of its employees and agents, as no expert affidavit or other competent evidence is submitted establishing that its employees or agents did not depart from good and accepted medical practice in treating decedent. However, St. Charles has established its entitlement to summary judgment dismissing the causes of action alleging lack of informed consent and negligent hiring, supervision and training. "Where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training" (***Ouiroz v Zoftola***, 96 AD3d 1035, 1037, 948 NYS2d 77 [2d Dept 2012],

quoting ***Talavera v Arbit***, 18 AD3d 738, 795 NYS2d 708[2d Dept 2005]; *see also* ***Simpson v Edghill***, 169 AD3d 737, 93 NYS3d 399 [2d Dept 2019]; ***Henry v Sunrise Manor Ctr. for Nursing Rehabilitation***, 147 AD3d 739, 46 NYS3d 649 [2d Dept 2017]). While there is an exception that applies to a plaintiff seeking punitive damages for gross negligence, it is inapplicable here. As plaintiff seeks to hold it vicariously liable for the conduct of its agents and employees, and there is nothing to show that any of them were acting outside the scope of their employment, St. Charles established its prima facie case, and, therefore, shifted the burden to plaintiff to submit competent proof sufficient to raise a triable issue of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). Further, St. Charles has established, prima facie, that the treating doctors and other health care providers were qualified, as per their testimony regarding their experience and credentials.

In opposition, plaintiff submits the papers that were submitted on the motion by Berenzy. While plaintiff's expert addresses the cause of action alleging medical malpractice, it is devoid of any statements or opinions regarding the causes of action for lack of informed consent and negligent hiring. Having failed to oppose that branch of the motion or specifically address such causes of action, the hospital's motion is granted to the extent that partial summary judgment is granted dismissing the causes of action alleging lack of informed consent and negligent hiring (*see* ***Wright v Morning Star Ambulette Servs., Inc.***, 170 AD3d 1249, 96 NYS3d 678; ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121). However, with respect to the cause of action imposing vicarious liability on the hospital for the malpractice of its employees and agents, the motion is denied.

The unredacted affidavit of the plaintiff's expert is being mailed back to the plaintiff's counsel on this same date.

Dated: November 19 2019
Riverhead, NY

J.S.C.
HON. DAVID T. REILLY

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**