SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER PART 6
Justice

JOSE RODRIGUEZ and RITA DISLA RODRIGUEZ,

Plaintiffs,

- against-

NEW YORK DIALYSIS CENTER, INC., DR. ANIP BANSAL, NEW YORK PRESBYTERIAN HOSPITAL and ROMAN NOWYGROD, M.D.

Defendants.

INDEX NO. 805192/2014

MOTION DATE
MOTION SEQ. NO. 4, 5, 6, 7
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for/to

	NUMBERED	**PAPERS**
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...		
Answer — Affidavits — Exhibits _____		
Replying Affidavits		

Cross-Motion: Yes X No

HON. EILEEN A. RAKOWER, J.S.C.

Under Motion Sequence #4, Defendant New York Dialysis Services, Inc. d/b/a Harlem Dialysis Center s/h/a "New York Dialysis Center, Inc." ("HDC") moves pursuant to CPLR §3212, granting summary judgment in its favor. Plaintiffs Jose Rodriguez ("Mr. Rodriguez") and Rita Disla Rodriguez (collectively, "Plaintiffs") oppose the motion.

Under Motion Sequence #5, Defendant Dr. Anip Bansal ("Dr. Bansal") moves for an Order pursuant to CPLR §3212, granting summary judgment in his favor. Plaintiffs' opposition papers do not address the opinions of Dr. Bansal's expert regarding the care and treatment provided by Dr. Bansal to Mr. Rodriguez.

Under Motions Sequence #6 and 7, Defendants The New York and Presbyterian Hospital s/h/a New York Presbyterian Hospital ("NYPH") and Roman Nowygrod, M.D. ("Dr. Nowygrod") move pursuant to CPLR §3212, granting summary judgment in their favor. Plaintiffs oppose the motions.

Factual Background

In May 2012, Mr. Rodriguez underwent the implantation of a left forearm arteriovenous fistula ("AVF") at NYPH for access for hemodialysis once the AVF matured. At that time, Mr. Rodriguez was 55 years old and suffered from end stage renal disease.

In July 2012, Mr. Rodriguez was readmitted to NYPH. Mr. Rodriguez initially presented with right "back/shoulder pain." During that admission, Mr. Rodriguez had a stroke. (NYSCEF Doc. No. 99, p. 2/90). Diagnostic tests were performed. Toward the end of the admission in early August 2012, Mr. Rodriguez began receiving hemodialysis. Mr. Rodriguez was discharged from NYPH on August 5, 2012 with instructions to continue his dialysis at HDC three times a week. (NYSCEF Doc. No. 228, p. 7/15).

Mr. Rodriguez began his outpatient dialysis sessions at HDC on August 9, 2012. Dr. Bansal was his attending nephrologist. Dr. Bansal was not employed by HDC but had privileges to see and treat patients at HDC.

Mr. Rodriguez continued to receive his regular dialysis sessions at HDC through and including the summer of 2013. Mr. Rodriguez complained to Dr. Bansal and the nurses at HDC of arm pain, and Mr. Rodriguez reported that Dr. Bansal prescribed him pain medication.

On August 21, 2013, Mr. Rodriguez presented to the Emergency Department ("ED") of the Allen Pavilion campus of NYPH with complaints of left shoulder pain for six weeks that had worsened in the last ten days. (NYSCEF Doc. No. 100, p. 64/142). Diagnostic tests were performed that revealed "a catheter *fragment* overlying the left hemithorax." (NYSCEF Doc. No. 100, p. 51/142) (emphasis added). An ultrasound showed a "2.4 x 0.3 cm tubular structure in the proximal aspect of the left cephalic vein which may represent a *fragment* of the catheter." (*Id.*) (emphasis added). Dr. Bernard Chang documented, "I am also working up this ? (sic) foreign body. It appears in the shape of almost a needle. I will obtain a vascular ultrasound to see if it is an intraluminal object." (NYSCEF Doc. No. 226). The "General Surgery Consult Note," dated August 21, 2013, states, "RFC? *broken* catheter with FB on xray and L shoulder pain." (emphasis added) (NYSCEF Doc. No. 205, p. 137/160).

In the ED, Dr. Christine Hsieh, a then third year surgical resident, and Dr. Hester Shieh, a then second year surgical resident, performed a surgical

consultation with Mr. Rodriguez. Dr. Hsieh documented that Mr. Rodriguez "has an Xray of the shoulder from 2012 that did not show this object, and since that xray he has not been hospitalized, denies any lines, IVs, procedures, and only has been at HD center where his fistula was accessed." Dr. Hsieh documented:

> Xray showing foreign body, possibly IV catheter tip? lateral to clavicle ultrasound with tubular structure in proximal cephalic [.]
>
> Given that patient has not had any procedures or line placements (except for intermittent fistula access at dialysis center), and his last hospitalization was at the time of his stroke in 2012, it is possible that the foreign body has been present since then. The time course of his pain suggests that the pain is not related to presence of foreign body.
>
> It is likely that the object has fibrosed into the wall of the cephalic vein and may be difficult to retrieve with endovascular techniques. Other option is to do a cutdown/venotomy to retrieve object. However, if patient's pain is due to joint issue and not related to this object, then a procedure to remove it may not be necessary.

Dr. Hsieh further documented that she had "[d]iscussed with Dr. Nowygrod, Vascular attg on call" and that Mr. Rodriguez was to see "Dr. Nowygrod in his office tomorrow at 1pm." Dr. Hsieh further noted, "Would also discuss L shoulder pain with ortho? likely as outpatient." (NYSCEF Doc. No. 226).

Dr. Thomas Nickolas ("Dr. Nickolas"), a nephrologist, consulted with Mr. Rodriguez at NYPH. Dr. Nickolas documented under "[h]istory" that "[o]n evaluation he [Mr. Rodriguez] was noted to have an abnormality in the left cephalic vein that resembled a retained piece of catheter." Dr. Nickolas further documented, "Vascular was consulted and determined that this likely occurred within the previous 9 months, and that it was likely to have already been incorporated into the vascular wall. They determined that it is safe to use his left AVF as it is likely not mobile." (NYSCEF Doc. No. 100, p. 59/142). Under "Plan," Dr. Nickolas documented that Mr. Rodriguez could receive dialysis "via his left AV fistula as per vascular surgery (sic)," and that Mr. Rodriguez has "an outpt follow up vascular

appointment at 1 pm" that would need to be rescheduled if Mr. Rodriguez could not make it. (*Id.* at 61/142).

On August 22, 2013, Mr. Rodriguez was discharged from NYPH. The "NYPH Discharge Summary Note" documented (NYSCEF Doc. No. 225):

> Appearance of foreign body in axillary vein- appeared to be an incidental finding and not related to his shoulder pain, though suspicious as patient denied ever having any procedures such as a TDC placement. Foreign body did not appear to be infected, he was afebrile, and he did not have elevated WBC.
>
> - please refer patient to Vascular Surgery for follow-up (patient's insurance was not accepted by Columbia/Presbyterian Vascular Surgery Office)

Mr. Rodriguez returned to HDC on August 23, 2013 for treatment.

On September 3, 2013, Mr. Rodriguez saw his primary physician Dr. Acosta. Dr. Acosta referred Mr. Rodriguez to the Mount Sinai Hospital Vascular Surgery Clinic ("Mount Sinai"). Mr. Rodriguez was given an appointment on October 7, 2013.

Dr. Bansal testified at his deposition that on September 11, 2013, Mr. Rodriguez informed him of his visit to NYPH and that "a needle" had been discovered in his shoulder. On that date, Mr. Rodriguez did not report feeling pain in his shoulder to Dr. Bansal. Dr. Bansal asked Mr. Rodriguez to bring him the report from NYPH for him to review and advised Mr. Rodriguez to discuss treatment options with Dr. Acosta. (Bansal dep., 1/28/2016, 36-38 [NYSCEF Doc. No. 105]).

On September 16, 2013, Dr. Bansal saw Mr. Rodriguez. Dr. Bansal again asked Mr. Rodriguez to bring the records from NYPH for him to review. (Bansal dep, 47-48). On the same date, HDC Nurse Vashti Calderon referred Mr. Rodriguez to America Access Care for a fistulagram to be performed on September 17, 2013 because of Mr. Rodriguez's complaints of pain in his left shoulder. (Bansal dep. 49-51).

On September 17, 2013, Mr. Rodriguez underwent fistulagram and angioplasty of the midbody of the fistula and the cephalic arch by Dr. Noam Spinowitz ("Dr. Spinowitz") at American Access Care. Dr. Spinowitz subsequently added the following "Addendum" to his medical record of his September 17, 2013 procedure:

> Addendum 11/6/2013- After being asked to evaluate for a foreign body in the central circulation dating back to august 2013, the images from this study on 9/17/2013 were looked at. There is no obvious foreign body seen in the subclavian, brachiocephalic veins or superior vena cava. There is no sign of foreign body in the heart or pulmonary arteries.

(NYSCEF Doc. No. 279).

On October 7, 2013, Mr. Rodriguez was seen at Mount Sinai Vascular Surgery Clinic. On October 16, 2013, Mr. Rodriguez returned to the clinic with the discharge summary form from NYPH. The Clinic recommended that Mr. Rodriguez be admitted to Mount Sinai Hospital for endovascular retrieval of the foreign body from the cephalic vein.

On November 5, 2013, Mr. Rodriguez presented to Mount Sinai Medical Center for "removal of foreign body (which is thought to be a dialysis access needle) which was initially in his left cephalic vein but subsequently migrated into his right ventricle." The medical records note that the "[a]ttempted endovascular retrieval was unsuccessful." (NYSCEF Doc. No. 229).

A CT performed on November 7, 2013 "showed a 3 cm metallic foreign body in the right heart." On November 12, 2013, Mr. Rodriguez underwent a "[m]edian sternotomy removal of foreign body from Right ventricle" (NYSCEF Doc. No. 229-230). According to the surgical pathology report, "PART A labeled 'RIGHT VENTRICLE FOREIGN BODY' received without fixative and consists of a 4.2 cm in length and 0.2 cm in diameter portion of silver metallic material with a hollow point end." (NYSCEF Doc. No. 231).

Summary Judgment Standard

Mr. Rodriguez alleges a cause of action of malpractice against the defendants in the medical care they provided to him. Plaintiff Rita Disla Rodriguez is Mr. Rodriguez's spouse. Ms. Rodriguez alleges a claim for loss of society, services, companionship and consortium.

CPLR §3212 provides in relevant part, that a motion for summary judgment:

> shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party… [t]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

A defendant moving for summary judgment in a medical malpractice case has the burden of making a prima facie showing of entitlement to judgment as a matter of law by showing that "there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged" by introducing expert testimony that is supported by the facts in the record. *Rogues v. Nobel*, 73 AD3d 204, 206 [1st Dept 2010].

Once the defendant has made this showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]. Specifically, a plaintiff "must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact." *Alvarez*, 68 NY2d at 324.

A plaintiff "must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." *Rogues*, 73 AD3d at 207. "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." *Alvarez*, 68 NY2d at 325. An affidavit from an expert which sets "forth

general conclusions, misstatements of evidence and unsupported assertions, is insufficient to demonstrate a defendant's failure to comport with accepted medical practice, or that any such failure was the proximate cause of plaintiff's injuries." *Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008].

A hospital is vicariously liable for the acts of negligence of its physicians and medical staff pursuant to *Hill v. St. Clare's Hospital*, 67 NY2d 72 (1986) and *Mduba v. Benedictine Hospital*, 52 AD2d 450 (3d Dept 1976) and under a theory of respondeat superior.

Motion Sequence 4 – HDC's Motion

In Plaintiffs' Bill of Particulars as to HDC, Plaintiffs allege *inter alia* that HDC and its employees departed from good and accepted medical practices in:

> failing to properly administer hemodialysis through a arteriovenous fistula; negligently causing a dialysis needle to break off in plaintiff's vein; failing to recognize that a dialysis needle had broken off; failing to refer patient for extraction of the dialysis needle; failing to inform plaintiff that a dialysis needle had broken off; failing to advise plaintiff of the urgent need to remove the broken off needle; failing to document the breaking off of a dialysis needle; failing to properly attach dialysis equipment from plaintiff's arteriovenous fistula; failing to properly remove dialysis equipment from plaintiff (sic) arteriovenous fistula; failing to report to the supervising physician that a dialysis needle had broken off in plaintiff's arm; failing to follow up and investigate plaintiff's complaints of arm and shoulder pain; failing to prepare an incident report relating to the break off of a dialysis needle during a hemodialysis session.

Plaintiffs allege that as a result of HDC's negligence, Mr. Rodriguez sustained the following injuries:

> [f]oreign object dialysis needle in left cephalic vein; [m]igration of needle into the right ventricle embedded in

> sub valvular apparatus of tricuspid valve; [u]nsuccessful attempt at endovascular retrieval of needle …, with procedure aborted due to risk of cardiac injury; [n]eed for selective catheterization of the superior vena cava at right atrium …; [n]eed for open heart surgery/median sternotomy … ; [n]eed for post operative mechanical ventilation following open heart surgery; [p]ost operative chest pain and incisional pain; [p]ost operative hematoma at site of chest incision; [n]eed for drainage of hematoma …; [s]urgical scarring; [l]eft upper extremity pain; [l]eft shoulder pain; [n]eed for cardiac physical therapy …; [n]eed for pain management; [n]eed for home exercise program; and [n]eed for visiting nurses service at home.

Expert Affidavits

HDC submits the expert affidavit of Glenn Faust, M.D. ("Dr. Faust"). Dr. Faust is a physician licensed to practice medicine in the State of New York and is Board Certified in General Surgery and Vascular Surgery.

Plaintiffs submit the expert affirmation of a physician licensed to practice in the State of New York and currently board certified in general surgeon. Plaintiffs also submit the affidavit of Susan Cary, MN, RN, ANP-BC, CNN ("Nurse Cary"). Nurse Cary is a nephrology nurse duly licensed by the State of Louisiana. She is a certified nephrology nurse, an advanced practice registered nurse, and a board certified adult nurse practitioner.

Dr. Faust states that he has reviewed the pleadings, Bills of Particulars, deposition testimony, and the medical records and diagnostic reports. Dr. Faust contends, "At the forefront, Plaintiffs cannot prove that the foreign object that was retrieved from Mr. Rodriguez's heart was a dialysis needle placed by any staff member at Harlem Dialysis." Dr. Faust contends that Plaintiffs do "not offer any proof whatsoever to establish the specific date(s) of negligence, the specific act or omission related to needle placement or removal which caused or contributed to a retained foreign body, or the identity of any Harlem Dialysis nurse or patient care technician who was involved in placing or removing the needle into plaintiff's left arteriovenous ('AV') fistula when the needle allegedly broke off." Dr. Faust contends, "Plaintiffs also cannot prove the manufacturer of the needle, size, serial

number or any other markings to identify the needle as having been placed during a hemodialysis session at Harlem Dialysis."

Dr. Faust opines that "the medical care and treatment provided to Mr. Rodriguez at Harlem Dialysis, including the use of industry standard retracting safety needles, was in all respects in accordance with good and accepted standards of medical care and practice, and no alleged acts or omissions by the defendant was a substantial factor in causing or contributing to any injuries suffered by Mr. Rodriguez."

Dr. Faust opines that "[t]he nurses and patient care technicians at Harlem Dialysis utilized proper needle technique and care when providing dialysis to Mr. Rodriguez." Dr. Faust states that "[t]here were no complaints of pain to the forearm or shoulder area, or any other indicia of a unique occurrence, such as loss of a needle during decannulation" and "the dialysis staff properly monitored Mr. Rodriguez's AV fistula access site to ensure that there is no clotting or narrowing of the fistula." Dr. Faust explains that based on the records, "there were never issues of decreased thrill or bruit, which one might expect if a foreign body was present in the vasculature and blocking or diverting blood flow."

Dr. Faust further opines that there is no support for the claim "that the dialysis needle retrieved from Mr. Rodriguez at Mt. Sinai was a dialysis needle placed at Harlem Dialysis." Dr. Faust explains that there is no evidence that the needle that was retrieved was a dialysis needle used during Mr. Rodriguez' treatment at HDC. Dr. Faust states, "Harlem Dialysis was not the only facility where Mr. Rodriguez received dialysis" and as "[p]er the medical records, Mr. Rodriguez received dialysis prior to becoming a patient at NYDS [HDC]." Dr. Faust opines "a dialysis needle could have been lost in plaintiff's vasculature before Mr. Rodriguez became a patient at Harlem Dialysis."

Further, Dr. Faust states that he has reviewed the photos that were produced during discovery and states that "[t]here are no identifying features on the needle that can confirm that it was a dialysis needle used at Harlem Dialysis" and he has "no reason to disagree with Dr. Wei's testimony indicating that the needle appeared somewhat larger than the needles that the Harlem Dialysis chart refers to as being used during Mr. Rodriguez's treatment." Dr. Faust states, "Moreover, the records from NYPH indicate that the needle had likely embedded in Mr. Rodriguez's arm, that his complaints of pain were unrelated to a foreign body, and that the foreign body had likely occurred several months prior to his presentation."

Dr. Faust further states, "Even assuming, arguendo, that the needle that was retrieved from Mr. Rodriguez's right ventricle at Mt. Sinai on November 12, 2013 was a dialysis needle used at Harlem Dialysis, it is my opinion that the staff at Harlem Dialysis did not cause the needle to break off." Dr. Faust explains that his "review of the records indicates that the staff at Harlem Dialysis always practiced proper needle technique, prior to beginning treatment, during treatment, and decannulating the fistula."

Dr. Faust further opines that "that there were no tell-tale signs during Mr. Rodriguez's treatment, such as complaints of pain, that would have led the at HDC to suspect that a dialysis needle broke off in Mr. Rodriguez's vein while he was a patient at Harlem Dialysis" and "[t]he logical explanation for Mr. Rodriguez's left arm and shoulder pain was a chronic stenosis and/or arthritis, not migration of dialysis needle."

Dr. Faust states that "even if a dialysis needle migrated during treatment at Harlem Dialysis, the migration of the needle was not the result of anything the staff at Harlem Dialysis did or did not do" as "[t]he foreign body was discovered at NYPH on August 21, 2013, at which time Mr. Rodriguez was being followed by appropriate specialists, including nephrology, and was timely referred for a vascular surgery consultation."

Concerning Mr. Rodriguez's alleged injuries, Dr. Faust states, "Mr. Rodriguez suffered from several serious and pre-existing comorbidities prior to the claims in this matter including congestive heart failure, stroke, diabetes, hypertension, kidney failure, and mental health issues, depression and anxiety. "

Plaintiffs' surgical expert states that he has reviewed medical records, radiographic images, photographs of a 14 gauge JMS Wingeater AVF dialysis access needle, and deposition testimony.

Plaintiffs' surgical expert opines "within a reasonable degree of medical certainty, that the needle which was removed from Mr. Rodriguez' right heart at Mount Sinai Hospital was a dialysis access needle that had broken off from a dialysis session at HDC at some point between 6/27/13 and 8/21/13." Plaintiffs' surgical expert explains:

> The New York Presbyterian Hospital surgical consult notes of Dr. Shieh and Dr. Hsieh of 8/21/13 both state that a tubular shaped foreign body had been seen on

> imaging that day in the left proximal cephalic vein, but that imaging from a year earlier in 10/12 failed to show any foreign body in that area. The notes go on to say that since 10/12, Mr. Rodriguez had had no medical treatment, no hospitalizations, no surgeries, no procedures, no IV procedures, no IV drug use, and the only treatment that he had been receiving in the interim was his dialysis treatments. Mr. Rodriguez had an x-ray of his left shoulder taken at Washington Heights Imaging on 6/27/13, and those images do not show any foreign body in the left upper extremity or shoulder.

Plaintiffs' surgical expert concludes that "[i]t is therefore reasonable to believe that the foreign body seen in the 8/21/13 New York Presbyterian Hospital imaging came from some procedure on this patient between 6/27/13 to 8/21/13 during which time the only medical treatment he received was his 3 times a week dialysis sessions at HDC."

Plaintiffs' surgical expert opines "that during a dialysis session at HDC between 6/27/13 and 8/21/13, one of the dialysis access needles broke off from its plastic housing, and at the end of the dialysis session remained in Mr. Rodriguez' body, but that this went undetected by the HDC dialysis staff." Plaintiffs' surgical expert explains:

> At the conclusion of a dialysis session via an AVF, the dialysis access needles are removed by the dialysis staff either a dialysis nurse or technician, and good practice requires that the dialysis staff confirm that the dialysis apparatus that has been removed is intact, before it is discarded. In my opinion the dialysis staff failed to recognize that an access needle that had broken off from Mr. Rodriguez during a dialysis session between 6/27/13 and 8/21/13, and the failure to recognize this was a departure from good practice. Had it been recognized by the staff at the time, it would have been reported either to the nursing supervisor of the medical director at HDC, which in all medical probability would have led to a referral to a vascular surgeon for what would likely have been minimally invasive endovascular removal of the object from Mr. Rodriguez' blood vessel.

Plaintiffs' surgical expert opines that HDC staff's failures led to the migration of the needle into Mr. Rodriguez's heart and necessitated the later open heart surgery and the multiple complications experienced.

Plaintiffs also submit the expert affidavit of Nurse Cary. Nurse Cary states that she has reviewed deposition testimony medical records, and photographs, including: "FDA Form 35000 dated 12/9/13 identifying the needle removed (sic) a JMS Wingeater dialysis access needle used at Harlem Dialysis Center…; [a] 14 gauge JMS Wingeater dialysis access needle; [p]hotographs of a 14 gauge JMS Wingeater dialysis access needle; [and] [p]hotographs of the needle removed from Mr. Rodriguez' right heart at Mount Sinai Hospital."

Nurse Cary states that she is "familiar with the JMS Wingeater AVF dialysis access needle." Nurse Cary states, "While it is true that the portion of the needle that goes into the dialysis patient's fistula is approximately 1 inch long, the needle is encased in a plastic housing." Nurse Cary states that she "obtained a 14 gauge JMS Wingeater AVF dialysis access needle, and removed the needle from the plastic housing, and the needle measures 4.2 cm long and .2cm in diameter, exactly the dimensions of the needle described in the Mount Sinai pathology report as having been removed from Mr. Rodriguez' right heart." Nurse Cary states, "At her deposition, Dr. Wei testified that she believed JMS was the only manufacturer of dialysis access needles used by HDC." Nurse Cary states, "In comparing the photographs of the needle extracted from Mr. Rodriguez' heart with the 14 gauge JMS Wingeater AVF dialysis access needle that I obtained, the needles are virtually identical."

Nurse Cary opines:

> It is my professional opinion within a reasonable degree of certainty that the needle that was removed from Mr. Rodriguez's ventricle came from a dialysis treatment performed at HDC. It is my opinion that the needle separated from its plastic housing and that the HDC staff should have but did not detect that the needle was missing upon removal at the end of dialysis treatment. The absence of the needle should have been detected by the staff and reported immediately to the nursing supervisor which would have likely resulted in an immediate vascular surgeon referral for removal of the needle.

Nurse Cary further states:

> The HDC dialysis flow sheet records do not document the absence of a needle from its hub, but it is my opinion with a reasonable degree of certainty that a dialysis access needle separated from its housing during an HDC dialysis session between 6/27/13 and 8/21/13, and that this went unnoticed by the HDC staff … It is therefore a reasonable belief that the needle separated from its housing and remained in the patient's body between 6/27/13 and 8/21/l3, during which period the only medical care and treatment Mr. Rodriguez received was 3 times a week dialysis via his left AVF at HDC. In my opinion, not recognizing that the needle was missing at the conclusion of a dialysis session and not reporting this to the nursing supervisor was a failure to follow safe nursing practice by the HDC staff, depriving Mr. Rodriguez the opportunity to be referred to a vascular surgeon for treatment/removal of the needle before it migrated.

Discussion

HDC has made a prima facie showing of entitlement to summary judgment on Mr. Rodriguez's medical malpractice claim. *Alvarez*, 68 NY2d at 324. Dr. Faust, on behalf of HDC, opines that the medical care and treatment HDC rendered to Mr. Rodriguez conformed to the standard of care. Dr. Faust opines that the HDC staff utilized appropriate needle technique and properly performed routine inspections of Mr. Rodriguez's forearm during dialysis sessions. Dr. Faust explains that there was never any indication that a dialysis needle entered Mr. Rodriguez's vasculature during or upon completion of dialysis or that there was an issue that needed to be escalated to Dr. Bansal before September 16, 2013. Dr. Faust also contends there is no evidence that the dialysis needle removed during surgery at Mount Sinai on November 5, 2013 was initially placed at HDC.

The burden now shifts to Plaintiffs to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Lindsay-Thompson*, 147 AD3d at 639.

Plaintiffs' surgical expert affirmation and the expert affidavit of Nurse Cary show "material issues of fact which require a trial of the action" regarding Mr. Rodriguez's medical malpractice claim against HDC. *Alvarez,* 68 NY2d at 324. While Dr. Faust opines that HDC's treatment of Mr. Rodriguez conformed to the standard of care, Plaintiffs' surgical expert and Nurse Cary opine that HDC's treatment departed from good and accepted practices and caused Mr. Rodriguez to sustain injuries. They opine that the dialysis access needle that was removed from Mr. Rodriguez's heart at Mount Sinai on November 13, 2013 was a JMS Wingeater dialysis access needle that had broken off and separated from its housing at the end of a dialysis treatment session at HDC between June 27, 2013 and August 21, 2013. They opine that HDC staff failed to detect this occurrence and to report it to the appropriate HDC supervisor, which resulted in a delay in the diagnosis and treatment of the needle and its migration to the heart and the need for invasive surgery.

The affirmation of Plaintiffs' surgical expert and the affidavit of Nurse Cary establish sufficient factual disputes to defeat HDC's summary judgment motion. "The weight to be accorded to the conflicting testimony of experts is "a matter 'peculiarly within the province of the jury.'" *Torricelli v Pisacano*, 9 AD3d 291, 293 [1st Dept 2004].

Motion Sequence 5 – Dr. Bansal's Motion

In Plaintiffs' Bill of Particulars as to Dr. Bansal, Plaintiffs allege that Dr. Bansal departed from good and accepted medical malpractice in his treatment of Mr. Rodriguez. Plaintiffs allege that Dr. Bansal was negligent in:

> failing to properly administer hemodialysis through a arteriovenous fistula; failing to properly supervise staff personnel at defendant New York Dialysis Center in the rendering of hemodialysis to plaintiff; failing to heed and investigate plaintiff's complaints of severe arm and shoulder pain; failing to send plaintiff for appropriate imaging studies to investigate complaints of severe arm and shoulder pain following dialysis treatment; failing to timely refer plaintiff to a vascular surgeon; failing to prepare an incident report relating to the breaking off of a dialysis needle in plaintiff's body; failing to advise plaintiff of the urgent need to remove the broken off

> needle; failing to refer patient for extraction of the dialysis needle fragment; failing to inform plaintiff that a dialysis needle had broken off; [and] failing to document the breaking off of a dialysis needle.

Plaintiffs do not claim that Dr. Bansal "is vicariously responsible for the acts and/or omissions of others."

Plaintiffs allege that as a result of Dr. Bansal's negligence, Mr. Rodriguez sustained the following injuries:

> [f]oreign object dialysis needle in left cephalic vein; [m]igration of needle into the right ventricle…; [u]nsuccessful attempt at endovascular retrieval of needle …; [n]eed for selective catheterization of the superior vena cava…; [n]eed for open heart surgery/median sternotomy…; [n]eed for post operative mechanical ventilation following open heart surgery; [p]ost operative chest pain and incisional pain; [p]ost operative hematoma at site of chest incision; [n]eed for drainage of hematoma …; [s]urgical scarring; [l]eft upper extremity pain; [l]eft shoulder pain; [n]eed for cardiac physical therapy …; [n]eed for pain management; [n]eed for home exercise program; [and the] [n]eed for visiting nurses service at home.

Dr. Bansal submits the expert affidavit of Eric Brown, M.D. Dr. Brown is a physician licensed to practice medicine in the State of Connecticut and is board certified in nephrology and internal medicine. Dr. Brown states that he has reviewed the pleadings, Bills of Particulars, deposition testimony, and Mr. Rodriguez's medical records.

Dr. Brown opines "to a reasonable degree of medical certainty, that the treatment provided to plaintiff by Dr. Bansal was within the standards of good and accepted medical practice, and any alleged departure was not the proximate cause of plaintiff's injuries." Dr. Brown explains that Dr. Bansal's role "as plaintiff's treating nephrologist, was to monitor plaintiff's condition with respect to lab values, check his blood pressure, weight, and monitor how the plaintiff's treatments were going, as well as any specific complaints secondary to dialysis treatment." Dr. Brown explains that "[t]he nephrologist is not responsible to ensure that the dialysis

treatment itself is properly furnished, as that is the role of the dialysis technicians." Dr. Brown further explains, "Dr. Bansal is not responsible to supervise the dialysis personnel who remove the needle at the end of the treatment."

Dr. Brown opines that Dr. Bansal appropriately responded when Mr. Rodriguez first advised him on September 11, 2013 "that he had significant pain in his left upper extremity and had been seen at an emergency room and was told that he had a foreign body on x-ray." Dr. Brown states that Dr. Bansal "responded appropriately by requesting those records and then was told by plaintiff that he was following up with his primary care physician and vascular surgeon." Dr. Brown states the "[s]tandard of care did not require Dr. Bansal to follow this foreign body or to refer plaintiff to a specialist as Dr. Bansal's role was to monitor the plaintiff's hemodialysis, and manage medications."

Dr. Brown further opines that the "[s]tandard of care did not require that Dr. Bansal refer the plaintiff for further imaging" and the "[s]tandard of care did not require Dr. Bansal to advise AAC that the plaintiff had reported a foreign body in his shoulder at the time the plaintiff was referred for a follow up fistulogram." Dr. Brown opines that "any alleged omission or deviation in care provided by Dr. Bansal to the plaintiff was not the proximate cause of the plaintiff's injuries" because "Dr. Bansal was not responsible for nor did he ever insert or remove any needles during the plaintiff's hemodialysis treatments." Dr. Brown explains "[b]y the time he was made aware of the foreign body in the plaintiff's shoulder the plaintiff had already been evaluated by NYPH, which referred him for vascular surgery follow up with his primary care physician." Dr. Brown further explains, "Moreover, the plaintiff had already seen his primary care physician, who had also referred him for vascular follow up by the time Dr. Bansal was made aware of the foreign body."

Plaintiffs' opposition papers do not address the expert opinions of Dr. Brown regarding the care and treatment provided by Dr. Bansal to Mr. Rodriguez. Most importantly, Plaintiffs do not provide an affidavit from a nephrology expert to support the allegations of negligence in Dr. Bansal's treatment of Mr. Rodriguez.

Accordingly, Dr. Bansal has met his burden in showing that his treatment of Mr. Rodriguez met the standard of care and none of his treatment caused Mr. Rodriguez's alleged injuries. Plaintiffs have failed to provide an expert affidavit in opposition to the motion to rebutted Dr. Bansal's showing, and failed to raise an issue of fact. Accordingly, Dr. Bansal's motion to dismiss Plaintiffs' claims as against him only is granted in its entirety. Failure of Mr. Rodriguez's substantive

medical malpractice claim against Dr. Bansal "is fatal to his wife's derivative claim for loss of consortium." *Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009].

Motion Sequence 6 and 7 – NYPH and Dr. Nowygrod's Motions

Under Motion Sequence 6 and 7, NYPH and Dr. Nowygrod move for summary judgment. Under Motion Sequence #6, NYPH and Dr. Nowygrod submitted the motion by Order to Show Cause. Motion Sequence #7 duplicates #6, and was processed through regular motion practice.

In Plaintiffs' Bills of Particulars as against NYPH and Dr. Nowygrod, Plaintiffs allege that NYPH and Dr. Nowygrod:

> failed to appreciate the presence of a foreign body in the left cephalic vein as being a matter of medical urgency, requiring prompt removal/retrieval due to the risk of migration of the foreign body into the heart, where damage to cardiac structures could occur, and where removal/retrieval would require open heart surgery, a far more extensive, invasive and potentially dangerous procedure than procedure required to remove/retrieve the foreign body while it was still located in the left cephalic vein.

Plaintiffs further allege that NYPH and Dr. Nowygrod "should have accepted plaintiff Jose Rodriguez as a surgical patient and should have arranged or prompt removal/retrieval of the foreign body seen on imaging studies to be in plaintiff s left cephalic vein."

Plaintiffs allege that as a result of NYPH and Dr. Nowygrod's negligence, Mr. Rodriguez sustained the following injuries:

> [m]igration of foreign body dialysis assess needle into the right ventricle of the heart where it became embedded in the sub valvular apparatus of the tricuspid valve; [u]nsuccessful attempt at endovascular retrieval…, [n]eed for selective catheterization of the superior vena cava at the right atrium…; [n]eed for open heart surgery/median sternotomy…; [n]eed for post operative mechanical

> ventilation following open heart surgery; [p]ost operative chest pain and incisional pain; [p]ost operative hematoma at site of chest incision; [n]eed for drainage of hematoma…; surgical scarring; [l]eft upper extremity pain; [l]eft shoulder pain; [n]eed for cardiac physical therapy…; [n]eed for pain management; [n]eed for home exercise program; [n]eed for visiting nurse services at home; [p]ericardial effusion in December 2013…; [c]ardiac tamponade with associated organ ischemia, shock liver, right atrium diastolic collapse, right and left sided heart compromise, impaired right heart filling atrial fibrillation; [n]eed for emergency December 13, 2013 pericardiocentesis…; [r]eaccumulation of pericardial fluid with need for January 2014 readmission to Mount Hospital; [r]eaccumulation of pericardial fluid with need for April 1-9, 2014 admission to New York Presbyterian Hospital.

In support of their motion for summary judgment, NYPH and Dr. Nowygrod submit the affidavit of Larry Scher, M.D. ("Dr. Scher"). Dr. Scher is licensed to practice in New York and is board certified in vascular surgery. Dr. Scher states that he has reviewed the Bills of Particulars, pleadings, depositions, and medical records. Dr. Scher states that all of his opinions "are stated with a reasonable degree of medical certainty."

Dr. Scher opines that NYPH and Dr. Nowygrod's medical care and treatment of Mr. Rodriguez "was, at all times, in accordance with good and accepted medical, hospital, emergency and surgical practices" and nothing that they "did, or allegedly failed to do, proximately caused any of the alleged injuries or damages as itemized in plaintiff's bills of particulars and supplemental bills of particulars."

Dr. Scher opines that Mr. Rodriguez "was properly evaluated in the Emergency Department (hereinafter 'ED') of the Allen Pavilion of NYPH on August 21, 2013 for a six week complaint of left shoulder pain, in a patient who was known to have left shoulder pain in the past."

Dr. Scher explains that the ED staff properly evaluated Dr. Rodriguez's complaints of pain "including eliciting a history and performing range of motion testing, while also eliciting information about when the pain existed in relationship to range of motion testing, as per the standard of care." Dr. Scher opines that the ED

physicians concluded "the pain was localized in a position at the shoulder capsule, and not in the area of the cephalic vein, where the foreign object was then known to exist," and "as per the standard of care, there was justifiably no reason to suspect that the retained foreign object and the patient's complaints of pain were related."

Dr. Scher further opines that the NYPH residents and staff "reasonably, and within the standards of medical care, concluded that there was no medical emergency." Dr. Scher explains:

> Shoulder pain of this kind, whether caused by the retained foreign object or not, does not need to be treated in an emergent fashion. The surgical residents who consulted in the ED appropriately recognized that there was no life threatening situation, as it pertained to the retained foreign object, that required immediate admission or immediate performance of a procedure. In fact, Mr. Rodriguez did not go on to have more significant or intolerable pain. Nor did he experience any life-threatening emergency concerning his shoulder or having to do with the foreign object over the next several weeks.
>
> Moreover, sufficient imaging was performed which confirmed the existence of the foreign object, the location of the foreign object and the nature of the foreign object being a catheter or needle. Additional studies were not necessary, would have provided no additional significant information, and would not have changed the course of, or recommendations for, treatment at NYPH.

Dr. Scher opines that "the staff appropriately advised Dr. Nowygrod of the fact that there was a foreign object located in the area of the cephalic vein near the plaintiff's left shoulder and that there was, in fact, no acute, emergency need for intervention." Dr. Scher references the notes of the two surgical residents that the foreign object "was 'likely' incorporated into the vein, and that it only 'may' not need to be removed." Dr. Scher states that "[t]he residents appropriately did not make any final determinations as they wanted the input of a more experienced Vascular Surgery Attending," and "[t]he plan to follow with a Vascular Surgery Attending either at NYPH or, later upon discharge, on referral from his private primary care physician, as documented in the record, was appropriate and consistent with the standard of care."

Dr. Scher opines that Mr. Rodriguez was appropriately referred for an appointment with Dr. Nowygrod at the Vascular Surgery clinic of the Columbia Presbyterian campus of NYPH the following afternoon for an "evaluation as to whether the foreign object was embedded into the wall of the cephalic vein, and whether it required removal, again because there was no medical emergency as of August 21, 2013 through the time of discharge on August 22, 2013." Dr. Scher states "there was no medical emergency that required Dr. Nowygrod, who was seeing patients at another location, miles away, or another Vascular Surgeon, to be emergently called in to see the patient at the Allen Pavilion."

Dr. Scher opines that it was appropriate and within the standard of care for NYPH to keep Mr. Rodriguez overnight to receive dialysis under the circumstances.

As for Dr. Nowygrod's involvement, "Because the Vascular Surgical Attending on call, Dr. Nowygrod, was not in the hospital at the time (he was at another hospital campus three miles away), and given the lack of a medical emergency, it was appropriate for Dr. Nowygrod, who was contacted by telephone by one of the residents, to agree to see the patient the following day in the Vascular Surgical clinic, to review the imaging, determine what other testing, if any, needed to be done, and make a decision as to how to best treat the patient." Dr. Scher points to Dr. Shieh's testimony that Mr. Rodriguez was "stable, without the need for acute intervention, and the patient would be seen by Dr. Nowygrod the following day to make the final decision as to whether the foreign object needed to be removed or not."

Dr. Scher states that "Dr. Nowygrod did not see or treat the plaintiff, did not review the imaging, and did not make any decisions regarding the patient's care and treatment other than to agree to see plaintiff in the Vascular Surgery clinic the following day to then make a determination and recommendation about the patient's care and treatment."

Dr. Scher notes that by the time that Mr. Rodriguez was discharged from NYPH, his appointment with the Vascular Surgery clinic had already passed. Dr. Scher states that he was thereafter "properly given discharge instructions to follow up with his primary care doctor with the instructions specifically recommending that Mr. Rodriguez be referred to a Vascular Surgeon for follow up on the retained foreign object." Dr. Scher explains that the discharge instructions were faxed both to Mr. Rodriguez's primary care physician Dr. Acosta and Dr. Bansal. Dr. Scher notes that Dr. Acosta referred him to the Vascular Surgery clinic at Mount Sinai Hospital where

"Vascular Surgery physicians … also agreed that there was no medical emergency, even after review of the relevant imaging and/or radiology reports from NYPH, and eventually scheduled a removal which was to take place a month after the initial visit to Mount Sinai Hospital." Dr. Scher also states, "Even after the foreign body was found to be in the plaintiff's right ventricle and it could not be retrieved via an endovascular approach, the doctors at Mount Sinai Hospital waited still another six days before removing it via an open sternotomy."

Dr. Scher notes, "Plaintiff was never denied medical care at NYPH, and plaintiff did not seek out treatment at the Vascular Surgery clinic." Dr. Scher states "there is nothing to support that Mr. Rodriguez would have elected to see Dr. Nowygrod or another Vascular Surgeon at NYPH even if referred to them given his health insurance coverage."

Dr. Scher states, "While plaintiff may argue that the foreign object could have been removed at NYPH when Mr. Rodriguez was at the Allen Pavilion of NYPH in August, 2013, that does not mean that it was a departure from accepted standards of practices not to immediately remove it."

Dr. Scher further notes that Mr. Rodriguez continued to report pain in his shoulder after the dialysis treatment he received at NYPD at his visit "as documented by Dr. Acosta in a subsequent visit on September 3, 2013 or by Dr. Bansal on September 11, 2013, when Dr. Bansal referred plaintiff for a fistulogram to determine if there was a vein blockage or stenosis, or some other condition, causing the ongoing shoulder pain." Dr. Scher concludes, "Thus, if plaintiff's expert claims that the shoulder pain when Mr. Rodriguez presented to NYPH was, in fact, a result of the retained foreign object, then the foreign object had not migrated any appreciable amount by the time Mr. Rodriguez was seen by Dr. Bansal by September 11, 2013, despite receiving dialysis at NYPH, and despite subsequent dialysis treatments."

Plaintiffs' surgical expert opines that the medical staff at NYPH "departed from good practice in several significant respects during the 8/21-8/22/2013 hospitalization for complaints of left shoulder pain." Plaintiffs' surgical expert opines that "it was the obligation of the medical staff at NYPH, once it discovered the foreign body in the patient's left proximal cephalic vein on imaging, to find out what the object was, and therefore decide what needed to be done" including "[a]dditional intravascular imaging … which would have identified the object as a sharp metallic needle." Plaintiffs' surgical expert states that the staff at NYPH "did nothing to ascertain what the foreign body was, and made the assumption that the object was probably a plastic catheter fragment even though the emergency room physician Dr.

Chang wrote that object resembled a needle" and "this was a departure from good and accepted medical practice which led to the substantial delay in the removal of the needle."

Plaintiffs' surgical expert opines, "In addition, to ascertaining the nature of the foreign body discovered on imaging, the medical and surgical staff at NYPH needed to decide what to do with the foreign body, and in particular, whether or not to remove it." Plaintiffs' expert opines that NYPH surgeons Dr. Shieh, Dr. Hsieh, and Dr. Nowygrod "departed from accepted medical practice in several respects" in (1) failing "to recommend follow up imaging studies that would have determined that the foreign body, which they believed to be a plastic catheter fragment, was in fact a metallic needle;" (2) reaching "the faulty conclusion that the foreign body had been in the patient's body for a prolonged period of time, and therefore had fibrosed into the wall of the blood vessel making it unlikely to migrate;" and (3) making "the incorrect assumption that the left shoulder pain, which was the reason Mr. Rodriguez presented to the emergency room, was unrelated to the x-ray finding of the foreign body in a blood vessel in the area of the left shoulder." Plaintiffs' surgical expert states that the NYPH surgeons "therefore incorrectly assumed that there was no need to remove the forgiven body urgently, and possibly no need to remove it all."

Plaintiffs' surgical expert opines that NYPH staff made the following improper assumptions that were "a departure from good and medical practice which contributed to a substantial delay in treatment" based on the facts: (1) the assumption that Mr. Rodriguez' "left shoulder pain was unrelated to the foreign body in the proximal cephalic vein in the left shoulder;" (2) the "[a]ssumption that the foreign body had been present for a prolonged period, and therefore had probably fibrosed into the vascular wall, so that there was little if any risk that it would migrate;" and (3) the "[a]ssumption that the foreign body seen on imaging studies was a plastic catheter fragment (despite the note of ER attending Dr. Chang that the object looked like a needle) with less potential for injury than a needle." Plaintiffs' surgical expert opines that these assumptions "allowed for the needle (which as of its 8/21/13 discovery had already moved from the left forearm AVF to the left cephalic vein in the left shoulder) to subsequently migrate from the proximal cephalic vein to the right ventricle of the heart, necessitating high risk open heart surgery to remove it."

Plaintiffs' surgical expert further opines that "it was a departure from good medical practice for the New York Presbyterian vascular surgery office to refuse treatment because it would not accept Mr. Rodriguez' insurance." Plaintiffs' surgical expert further opines "this was a further departure from good practice because the

discovery of this intravascular foreign body constituted a condition necessitating urgent treatment in order to minimize the potential of injury from the foreign body."

At the conclusion of his affirmation, Plaintiffs' surgical expert sums up his opinion:

> As to New York Presbyterian Hospital, it is my opinion that the surgical staff there departed from good practice by failing to identify that the foreign body seen on imaging was a dialysis access needle, by making faulty and incorrect assumptions as outlined above, and by failing to remove the needle, by minimally invasive endovascular technique, within the next several days of discovery, and by refusing treatment due to insurance considerations. These departures contributed to a significant delay in diagnosis and treatment, allowing for the needle to migrate from the proximal cephalic vein in the shoulder to the right heart, so that open heart surgery that was needed to remove the needle.

Discussion

Defendants NYPH and Dr. Nowygrod have made a prima facie showing of entitlement to summary judgment on Mr. Rodriguez's medical malpractice claim. *Alvarez*, 68 NY2d at 324. Dr. Scher, on behalf of NYPH and Dr. Nowygrod, opines that the medical care and treatment they rendered to Mr. Rodriguez during his admission met the standard of care.

The burden now shifts to Plaintiffs to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Lindsay-Thompson*, 147 AD3d at 639.

"[B]are conjecture" by an expert is "insufficient to defeat Defendants' entitlement to summary judgment." *Manuel H. v. Landsberger*, 138 AD3d 490, 491 [1st Dept 2016].

Further, "[h]indsight reasoning is insufficient to defeat summary judgment." *Brown v Bauman*, 42 AD3d 390, 392 [1st Dept 2007]. "The physician's acts must be based on the facts that existed at the time of the claimed malpractice not aided or

enlightened by those which subsequently take place (i.e., hindsight)." § 1:59 Comment, New York Medical Malpractice § 1:59. *See e.g., Henry v Bronx Lebanon Med. Ctr.,* 53 AD2d 476, 480 [1st Dept 1976] ("It seems to us unfair to fasten liability on these physicians based largely, if not entirely, on Dr. Nathanson's hindsight judgments as to what should have been done. The defendants are to be judged on the facts as they existed [at the time of the claimed negligence] and not in retrospect in light of subsequent events.").

Dr. Nowygrod consulted with the surgical residents treating Mr. Rodriguez and relied on the facts that they provided to him. NYPH made an appointment for Mr. Rodriguez to see Dr. Nowygrod on the following day for an evaluation at 1 pm. Mr. Rodriguez, however, needed to finish his dialysis, and missed that appointment.

Plaintiffs' surgical expert fails to rebut Dr. Scher's opinion that Dr. Nowygrod acted appropriately and within the standard of care in this case. The record shows that Dr. Nowygrod's involvement in Mr. Rodriguez's case was limited – he was the Vascular Attending on call when Mr. Rodriguez was admitted in August 2013. Dr. Nowygrod consulted with the surgical residents treating Mr. Rodriguez and relied on the facts that they provided with him, and an appointment was made for Mr. Rodriguez to see him on the following day for an evaluation at 1 pm. Mr. Rodriguez, however, was discharged after that appointment. There is nothing in the record that shows that Dr. Nowygrod had anything to do with the timing of Mr. Rodriguez's discharge or that he refused to treat him at any point. Plaintiffs' surgical expert fails to raise any issues of fact concerning Dr. Nowygrod's care which was limited in scope and met the standard of care.

Plaintiffs' surgical expert fails to raise any issues of fact concerning Dr. Nowygrod's care. Dr. Nowygrod was not at the hospital, had not seen the imaging already done, and agreed to see Mr. Rodriguez the next day. Plaintiffs' surgical expert does not state what tests the standard of care required Dr. Nowygrod to order at the time of the consultation, or what facts demonstrated the urgency for emergent care at the time he was consulted.

Similarly, Plaintiffs' expert fails to rebut Dr. Scher's opinion that the residents and staff at NYPH acted appropriately and within the standards of care. Plaintiffs fail to show what these defendants did or failed to do in the light of the facts presenting at the time of Mr. Rodriguez's admission which fell below the standard of care.

A plaintiff "must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." *Rogues*, 73 AD3d at 207. "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." *Alvarez*, 68 NY2d at 325. An affidavit from an expert which sets "forth general conclusions, misstatements of evidence and unsupported assertions, is insufficient to demonstrate a defendant's failure to comport with accepted medical practice, or that any such failure was the proximate cause of plaintiff's injuries." *Coronel*, 47 AD3d at 457.

"Liability is not supported by an expert offering only conclusory assertions and mere speculation that the condition could have been discovered and successfully treated had the doctors not deviated from the accepted standard of medical practice." *Curry v Dr. Elena Vezza Physician, P.C.*, 106 AD3d 413, 413 [1st Dept 2013].

Further, "[h]indsight reasoning is insufficient to defeat summary judgment." *Brown*, 42 AD3d at 392. "The physician's acts must be based on the facts that existed at the time of the claimed malpractice not aided or enlightened by those which subsequently take place (i.e., hindsight)." § 1:59 Comment, New York Medical Malpractice § 1:59. *See e.g.*, *Henry v Bronx Lebanon Med. Ctr.,* 53 AD2d 476, 480 [1st Dept 1976].

Thus, this Court must consider the facts as they existed at the time that Mr. Rodriguez presented to the ED at NYPH and was discharged from NYPH. Specifically, the Court must consider what facts known at the time demonstrated that the standard of care required emergency intervention and removal of the foreign object, then in the cephalic vein.

On August 21, 2013, Mr. Rodriguez presented by ambulance to the ED of the Allen Pavilion campus of NYPH with complaints of left shoulder pain. Mr. Rodriguez testified at his deposition that he called the ambulance because he "couldn't stand the pain anymore." (Mr. Rodriguez's dep., p. 68-69 [NYSCEF Doc. No. 198]). Upon admission to NYPH, Mr. Rodriguez described "aching 5/10 L arm/shoulder pain." (NYSCEF Doc. No. 269).

At NYPH, imaging studies showed the foreign body to be a tubular structure in the proximal cephalic vein. Mr. Rodriguez was seen by surgical residents who

noted that an x-ray of the shoulder from October 2012[1] did not show the foreign object, and that Mr. Rodriguez had not been hospitalized or had any lines, IVs or procedures since then with the exception of his hemodialysis through his left forearm AVF. The surgical residents documented their belief that the foreign object had likely been present for a prolonged period of time and had fibrosed into the wall of the blood vessel. They documented their belief that the object was therefore unlikely to move, was probably unrelated to the presenting complaints of shoulder pain, and might not require removal at all.

Nevertheless, upon finding the foreign body, NYPH appropriately sought out a vascular consult. The notes document that the case was discussed with the attending on call vascular surgeon Dr. Nowygrod who agreed with their evaluation and an appointment was scheduled for Mr. Rodriguez to be seen by him in his office the following day, 8/22/13 at 1pm. (NYSCEF Doc. No. 268).

Here, Plaintiffs' surgical expert contends that the "the assumption" of NYPH surgical residents "should have been that the foreign body was related to dialysis treatments, and was in all probability of recent origin, so that it was unlikely that the foreign body had fibrosed or incorporated into the blood vessel." Plaintiffs' surgical expert contends that the NYPH surgical residents "failed to appreciate that there was a very real and significant risk that the foreign body would migrate to the heart, since the foreign body which should have been assumed to be related to recent dialysis treatment involving needles and tubing in an AVF in the forearm, had now migrated from the forearm to the proximal cephalic vein in the left shoulder area."

Plaintiffs' surgical expert, however, does not identify facts at the time of the surgical residents' August 22, 2013 evaluation and findings that standards of care would have demanded Mr. Rodriguez be treated urgently. Plaintiffs' surgical expert does identify any indicators that present during Mr. Rodriguez's admission to suggest that the foreign object was mobile, and therefore in danger of imminent migration. Again, hindsight is not applicable.

[1] Mr. Rodriguez's primary care physician, Dr. Acosta, had ordered an x ray of Mr. Rodriguez's left shoulder in June of 2013 due to his complaints of shoulder pain. That x ray was done at Washington Heights Imaging. The x ray of June 23, 2013 did not show a foreign object in the cephalic vein. The images and report from Washington Heights Imaging were not in the NYPH record, were not known to the surgical residents at the time of the August 21, 2013 admission, and could not inform the residents regarding how long the foreign object had been present. The experts who opine for the purposes of this motion had the benefit of the Washington Heights Imaging films and report, and in hindsight, could narrow the window during which this foreign object was introduced.

Plaintiffs' surgical expert does NOT identify any indicators that present during Mr. Rodriguez's admission to suggest that the foreign object was mobile, and therefore in danger of imminent migration. Again, hindsight is not applicable.

NYPH records from the August 21, 2013 admission report:

> "TTP lateral portion inferior to L clavicle, no erythema/swelling, L AVF with palpable thrill, palpable L brachial/radial/ulnar pulses, motor/sensation intact." . . . "The pain is present at night and worse with movement. He has never had this pain before. He thinks he gets some relief from tylenol."… "left shoulder + tenderness to palpation of the humeral head, + pain elicited to elevation >90 degrees, no pain on internal external rotation of the arm."…"presenting w 6 weeks of constant L shoulder pain that is worse in the last 10 days. His exam is suggestive of supraspinatous (sic) tendinitous (sic) or arthritis."…"Appearance of foreign body in axillary vein- appeared to be an incidental finding and not related to his shoulder pain, though suspicious as patient denied ever having any procedures such as a TDC placement. Foreign body did not appear to be infected, he was afebrile, and he did not have elevated WBC."…"8/21/21 (sic) Xray Chest: IMPRESSION: There is a catheter fragment overlying the left hemithorax. Otherwise clear lungs. 8/21/13 US Vascular Vein LUE: IMPRESSION: No evidence of deep venous thrombosis. Tubular structure in proximal cephalic vein. 8/21/13 Xray Left Shoulder: IMPRESSION: No acute bony abnormality. Mild DJD. Tubular radio opaque density in soft tissues."

Plaintiffs' surgical expert points to nothing in the record which was suggestive of the need for immediate surgery.

Accordingly, NYPH and Dr. Nowygrod's motion for summary judgment is granted and Plaintiffs' claims against them are dismissed. Failure of Mr. Rodriguez's substantive medical malpractice claim "is fatal to his wife's derivative claim for loss of consortium." *Kaisman*, 61 AD3d at 566.

Wherefore it is hereby

ORDERED that Defendant New York Dialysis Services, Inc. d/b/a Harlem Dialysis Center s/h/a New York Dialysis Center, Inc.'s motion for summary

judgment is denied (Motion Sequence 4); and it is further

ORDERED that Defendant Dr. Anip Bansal's motion for summary judgment is granted and Plaintiffs Jose Rodriguez and Rita Disla Rodriguez's claims are dismissed as against Dr. Anip Bansal and the Clerk is directed to enter judgment accordingly (Motion Sequence 5); and it is further

ORDERED that Defendants The New York and Presbyterian Hospital s/h/a New York Presbyterian Hospital and Roman Nowygrod, M.D.'s motion for summary judgment is granted and Plaintiffs Jose Rodriguez and Rita Disla Rodriguez's claims are dismissed as against Defendants The New York and Presbyterian Hospital s/h/a New York Presbyterian Hospital and Roman Nowygrod, M.D., and the Clerk is directed to enter judgment accordingly (Motion Sequence 6); and it is further

ORDERED that Motion Sequence 7 is denied as duplicative of Motion Sequence 6; and it is further

ORDERED that the remaining parties shall appear for pretrial conference in Part 6 on September 29, 2020 at 10:00 AM.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JUNE 17, 2020

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION