McKay v Gulmatico
2020 NY Slip Op 33146(U)
September 24, 2020
Supreme Court, Kings County
Docket Number: 516614/2017
Judge: Marsha L. Steinhardt
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At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of September, 2020.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice.

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AUBU MCKAY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARGARET HOPE COWAN, DECEASED,

Plaintiff,

- against -

Index No. 516614/2017

Mot. Seq. Nos. 2-6

CONSTANTINO GULMATICO, JR., M.D., JOSE A. PENA, M.D., SAMIR FARHAT, M.D., ZACHARY BRENER M.D., NEW YORK COMMUNITY HOSPITAL, AND GULMATICO MEDICAL ASSOCIATES, P.C.,

Defendants.

- -X

The following e-filed papers read herein:

	NYSCEF Doc Nos.[1]
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Anne	72-73, 75-80 110-112 114-128 81-109 130-144 156-165
Opposing Affidavits (Affirmations)	145-154
Reply Affidavits (Affirmations)	170-172 167-168
Memorandum of Law	129

[1]New York State Courts Electronic Filing [NYSCEF] Document Numbers

Upon the foregoing papers, in this medical malpractice and wrongful death action by plaintiff Aubu McKay (plaintiff), individually and as the administrator of the estate of Margaret Hope Cowan, deceased (Ms. Cowan), against defendants Constantino Gulmatico, Jr., M.D. (Dr. Gulmatico), Jose A. Pena, M.D. (Dr. Pena), Samir Farhat, M.D. (Dr. Farhat), Zachary Brener, M.D. (Dr. Brener), New York Community Hospital, and Gulmatico Medical Associates, P.C. (Gulmatico Associates),[2] Dr. Pena moves, under motion sequence number two, for summary judgment dismissing plaintiff's complaint as against him, directing the clerk of the court to enter judgment in his favor, and deleting his name from the caption of this action.

Dr. Gulmatico and Gulmatico Associates move, under motion sequence number three, for: (1) summary judgment dismissing plaintiff's complaint as against them pursuant to CPLR 3212; and (2) partial summary judgment and a limitation of the triable issues pursuant to CPLR 3212 (e).

New York Community Hospital moves, under motion sequence number four, for summary judgment dismissing plaintiff's complaint as against it, directing the clerk of the court to enter judgment in its favor, and deleting its name from the caption of this action.

[2]By an order dated November 21, 2019, a motion to dismiss by defendants Yakoub Katri, M.D. and Diamond Medical Associates, P.C., pursuant to CPLR 3211 (a) (1), under motion sequence number one, was granted, and this action was dismissed as against them, without opposition, based upon a lack of a physician-patient relationship with Ms. Cowan, and the caption of this action was amended to reflect their dismissal.

Dr. Farhat moves, under motion sequence number five, for summary judgment dismissing plaintiff's complaint as against him, directing the clerk of the court to enter judgment in his favor, and deleting his name from the caption of this action.

Dr. Brener moves, under motion sequence number six, for summary judgment dismissing plaintiff's complaint as against him, directing the clerk of the court to enter judgment in his favor, and deleting his name from the caption of this action.

Facts and Procedural Background

At 12:46 a.m. on January 22, 2017, Ms. Cowan, who was then 61 years old, was brought, by ambulance, to New York Community Hospital's emergency room, with a chief complaint of a seizure lasting more than 10 minutes, associated with vomiting and abdominal pain. She had an arteriovenous fistula (AV) fistula present in her right arm for dialysis access. Ms. Cowan had a history of seizure disorder, brain cancer, chronic obstructive lung disease, coronary artery disease, high blood pressure, and end-stage renal disease, which was treated with dialysis three times per week via her right upper arm AV. Ms. Cowan's surgical history included multiple hospitalizations and procedures, including many relating to the failure, removal, and replacement of dialysis lines. Ms. Cowan's prior New York Community Hospital admission (from July 19, 2016 to July 29, 2016), pertained to dialysis. In the report for the creation of an AV graft performed on July 25, 2016 during that admission, Dr. Gary Gelbfish, a vascular surgeon, noted that Ms. Cowan underwent the "creation of an AV graft on the right side,"

and that she "had relatively poor veins because of her significant vascular access history and multiple catheters."

After being seen and evaluated in the emergency room on January 22, 2017 by Dr. Aleksandr Shesik (Dr. Shesik) at New York Community Hospital, Ms. Cowan was admitted to the general medical floor under the service of Steve Nozad, M.D. (Dr. Nozad), a cardiologist. Dr. Nozad documented that Ms. Cowan's nausea and vomiting were most likely the result of her missing her dialysis, and he requested a renal consult.

On January 23, 2017 at 3:02 p.m., Ms. Cowan was seen by Dr. Brener, a nephrologist, who noted that Ms. Cowan had end-stage renal disease, was on hemodialysis, and had a malfunctioning AV fistula. Dr. Brener requested a vascular surgery evaluation for dialysis access, and recommended hemodialysis three times a week and blood pressure control. His plan was to place a temporary femoral line for dialysis, pending placement of more permanent access. On the same day at 11:09 p.m., Dr. Ju Kim, a surgeon, placed a temporary right femoral vein triple lumen HD catheter under ultrasound guidance without difficulty. On January 24, 2017, this temporary dialysis catheter was used to give Ms. Cowan dialysis.

On January 25, 2017 at 11:21 a.m., Dr. Nozad noted that Ms. Cowan would require a permacath, which is a catheter placed in a large, central vein to be used for long-term dialysis. Dr. Gulmatico saw Ms. Cowan at 3:58 p.m. to evaluate for the permacath placement. Ms. Cowan initially refused to consent to this placement, but then agreed to it. Ms. Cowan was hemodynamically stable, and the surgery was scheduled for

January 26, 2017. On January 26, 2017, at 8:29 a.m., Ms. Cowan was seen by Dr. Nozad, was found to be in no acute distress, and cleared for the procedure.

On January 26, 2017, Dr. Gulmatico performed a surgical insertion of a left subclavian permacath dialysis catheter (permacath) under fluoroscopic and sonographic guidance. Dr. Pena, an anesthesiologist, provided the anesthesia via intravenous (IV) sedation. The operative report indicates that Dr. Gulmatico first attempted insertion of the permacath through Ms. Cowan's left internal jugular vein, but was unsuccessful as the guidewire met resistance. Dr. Gulmatico then proceeded with a left subclavian approach. After Dr. Gulmatico performed fluoroscopic confirmation of the proper placement of the permacath, Ms. Cowan was transferred to the recovery room at 12:10 p.m. A chest X ray was ordered by Dr. Gulmatico, which showed that Ms. Cowan had a slightly widened superior mediastinum and left-sided pneumothorax of the lung. Dr. Gulmatico ordered an emergency CT scan of Ms. Cowan's head and chest because after the procedure, Ms. Cowan was noted to have lost sensory and motor function in her left arm.

The chest CT scan showed a left pneumothorax comprising 40-50% of the lung and confirmed widening of the mediastinum. Dr. Gulmatico called for consults in thoracic surgery and neurology. At 2:00 p.m., Dr. Gulmatico brought Ms. Cowan back to the operating room where he placed a left chest tube to decompress the pneumothorax. Dr. Pena provided the IV sedation throughout this procedure. At 3:15 p.m., Ms. Cowan was brought to the recovery room in stable condition.

A chest X ray at 3:16 p.m. showed that Ms. Cowan's left pneumothorax had been successfully resolved by the chest tube with full left lung re-expansion, but that there was still a widening of the superior mediastinum consistent with previously demonstrated mediastinal fluid and gas bubbles and hemorrhage, which had not changed from the first chest X ray. It was specifically noted that the left subclavian double lumen catheter tip was overlying the carina, that it extended into the mediastinum, and that it was surrounded by fluid gas bubbles, likely representing some aspirated fluid and hemorrhage. The distal portion of the catheter was in the mediastinum and not in the vascular system.

While Ms. Cowan was in the recovery room, Dr. Farhat, a critical care specialist saw her, at the request of Dr. Gulmatico, to perform a critical care consultation in order to evaluate her for transfer to the intensive care unit (ICU). After examining Ms. Cowan and reviewing the X ray report, Dr. Farhat transferred Ms. Cowan to the ICU. Ms. Cowan went to the ICU at approximately 4:45 p.m.

A nurse's note entered at 4:45 p.m. indicated that Ms. Cowan was comfortable upon her arrival in the ICU with blood drainage from the chest tube. At 5:35 p.m., Ms. Cowan experienced labored breathing, diaphoresis (i.e., sweating), and a severe drop in oxygen saturation from normal down to 78%. Ms. Cowan then developed bradycardia (i.e., a slow heart rate), which progressed to the lack of a pulse, and she went into cardiac arrest. Ms. Cowan was resuscitated at 6:04 p.m. According to Dr. Gulmatico, the thoracic surgeon consult, Dr. Jamie Yun (Dr. Yun), did not see Ms. Cowan until about

6:00 p.m. At 7:23 p.m., Ms. Cowan went into cardiac arrest again and was resuscitated. At 8:00 p.m., Ms. Cowan went into cardiac arrest for a third time, but failed to respond to resuscitation efforts. Ms. Cowan was pronounced dead at 8:11 p.m. The cause of Ms. Cowan's death, as stated in an autopsy report, was "hemorrhagic complications due to left subclavian artery perforated during permacath placement."

Consequently, on August 25, 2018, plaintiff, who is Ms. Cowan's son and the administrator of her estate, filed the instant action alleging medical malpractice and wrongful death. The defendants interposed their respective answers, and all discovery, including the taking of depositions and the exchange of medical records, has been completed. On January 27, 2020, plaintiff filed his note of issue. On May 4, 2020, Dr. Pena filed his instant motion for summary judgment. On May 5, 2020, New York Community Hospital filed its instant motion for summary judgment. On May 6, 2020, Dr. Gulmatico and Dr. Gulmatico Associates filed their instant motion for summary judgment. On May 18, 2020, Dr. Farhat filed his instant motion for summary judgment. On July 9, 2020, Dr. Brener filed his instant motion for summary judgment.[3]

Discussion

[3]On March 20, 2020, in response to the COVID-19 public health crisis in New York State, Governor Andrew Cuomo issued Executive Order 202.8, which directed that "any specific time limit for the commencement, filing or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of this state, including but not limited to the criminal procedure law . . . is hereby tolled from the date of this Executive Order until April 19, 2020." Since the time that Executive Order 202.8 was originally signed in March, Governor Cuomo has issued an Executive Order approximately every 30 days extending the toll on time limits. Thus, while the moving defendants did not file their summary judgment motions within 60 days from the date that plaintiff's note of issue was filed, there was good cause for the delay (see CPLR 3212 [a]). The motions will, therefore, be addressed on their merits.

Applicable Standard

"The essential elements of a cause of action to recover damages for medical malpractice are a deviation or departure from accepted medical practice and evidence that such departure was a proximate cause of injury [or death]" (*Harris v St. Joseph's Med. Ctr.*, 128 AD3d 1010, 1012 [2d Dept 2015]; *see also Poter v Adams*, 104 AD3d 925, 926 [2d Dept 2013]; *Hayden v Gordon*, 91 AD3d 819, 820 [2d Dept 2012]; *Guzzi v Gewirtz*, 82 AD3d 838, 838 [2d Dept 2011]). "Proximate cause is established where the defendant's conduct was a 'substantial factor' in bringing about the injury [or death]" (*King v St. Barnabas Hosp.*, 87 AD3d 238, 245 [1st Dept 2011]; *see also Goldberg v Horowitz*, 73 AD3d 691, 694 [2d Dept 2010]).

In an action sounding in medical malpractice, a defendant moving for summary judgment has the initial burden of making "'a prima facie showing either that there was no departure from accepted medical practice [or the accepted standard of care], or that any departure was not a proximate cause of the patient's injuries [or death]'" (*Stucchio v Bikvan*, 155 AD3d 666, 667 [2d Dept 2017], quoting *Matos v Khan*, 119 AD3d 909, 910 [2d Dept 2014]; *see also Larcy v Kamler*, 185 AD3d 564, 564-565 [2d Dept 2020]; *Joyner v Middletown Med., P.C.*, 183 AD3d 593, 594 [2d Dept 2020]; *Neyman v Doshi Diagnostic Imaging Servs., P.C.*, 153 AD3d 538, 543 [2d Dept 2017]; *Elmes v Yelon*, 140 AD3d 1009, 1010 [2d Dept 2016]; *Wixted v Schoenwald*, 137 AD3d 1263, 1265 [2d Dept 2016]; *Nisanov v Khulpateea*, 137 AD3d 1091, 1093 [2d Dept 2016]; *Guctas v Pessolano*, 132 AD3d 632, 633 [2d Dept 2015]; *Poter*, 104 AD3d at 926; *Salvia v St.*

Catherine of Sienna Med. Ctr., 84 AD3d 1053, 1053-1054 [2d Dept 2011]; *Heller v Weinberg*, 77 AD3d 622, 622-623 [2d Dept 2010], *lv denied* 16 NY3d 707 [2011]). "The failure to make such [a] prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Stiso v Berlin*, 176 AD3d 888, 889 [2d Dept 2019]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the defendant has made such a prima facie showing, the burden shifts to the plaintiff to submit, in opposition, "evidentiary facts or materials to rebut the defendant's prima facie showing," and to establish the existence of triable issues of fact, "but only as to those elements on which the defendant met the prima facie burden" (*Neyman*, 153 AD3d at 543; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Keesler v Small*, 140 AD3d 1021, 1023 [2d Dept 2016]; *Elmes*, 140 AD3d at 1010; *Wixted*, 137 AD3d at 1265; *Nisanov*, 137 AD3d at 1093-1094; *Harris*, 128 AD3d at 1012; *Poter*, 104 AD3d at 926; *Stukas v Streiter*, 83 AD3d 18, 25-26 [2d Dept 2011]).

Dr. Pena's Motion for Summary Judgment (Motion Seq. No. 2)

As noted above, Dr. Pena was the anesthesiologist during Ms. Cowan's two surgeries on January 26, 2017. In support of his motion, Dr. Pena has submitted the expert affirmation of Martin Griffel, M.D. (Dr. Griffel), a physician duly licensed in the State of New York, who is board certified in anesthesiology and internal medicine, with a special qualification in critical care medicine. Dr. Griffel opines, within a reasonable degree of medical certainty, that the anesthesia care provided to Ms. Cowan by Dr. Pena was within accepted standards of medical practice. Dr. Griffel sets forth that during the

first surgery for the placement of the permacath, Dr. Pena appropriately administered IV sedation, and when Ms. Cowan expressed some vague chest pain, Dr. Pena properly administered Lidocaine to numb the area where the surgery was being performed. Dr. Griffel further sets forth that Ms. Cowan's vital signs were properly monitored and were stable throughout the surgery, and that there were no anesthetic complications during the surgery.

Dr. Griffel further opines, within a reasonable degree of medical certainty, that when Ms. Cowan was transferred to the recovery room at 12:10 p.m. following the first surgery, her vital signs remained stable and there was no indication for Dr. Pena to render any treatment to Ms. Cowan or order any testing or consultations during that time. Specifically, Dr. Griffel explains that there was no indication for Dr. Pena to order any testing or consults for Ms. Cowan while she was in the recovery room since the attending surgeon, Dr. Gulmatico, had already called for consultations with thoracic surgery and neurology and physician's assistant Shyam Shah (P.A. Shah) had followed up on his request.

Dr. Griffel also opines, within a reasonable degree of medical certainty, that during the second surgery for placement of a chest tube, Dr. Pena appropriately administered IV sedation and properly monitored Ms. Cowan. Dr. Griffel sets forth that Ms. Cowan's vital signs were stable, and that there were no complications associated with the anesthesia. He further sets forth that when Ms. Cowan was admitted to the recovery room, her vital signs were stable.

Dr. Griffel additionally opines, within a reasonable degree of medical certainty, that there was no indication for Dr. Pena to order any tests or additional consultations for Ms. Cowan while she was in the recovery room after the second surgery. Dr. Griffel asserts that while Ms. Cowan was in the recovery room, she remained in stable condition and her vital signs were within the normal range. Dr. Griffel notes that prior to being transferred from the recovery room to the ICU, Ms. Cowan was evaluated by Dr. Farhat, who cleared Ms. Cowan for transfer to the ICU. Dr. Griffel points out that after Ms. Cowan was discharged from the recovery room and transferred to the ICU, Dr. Pena was no longer involved in her care.

Based on the above, Dr. Griffel sets forth his opinion, within a reasonable degree of medical certainty, that the anesthesia care rendered by Dr. Pena to Ms. Cowan was within accepted standards of medical practice. Dr. Griffel further sets forth his opinion, within a reasonable degree of medical certainty, that such anesthesia care was not the proximate cause of Ms. Cowan's cardiopulmonary arrest and death.

By Dr. Griffel's expert affirmation, as well as Dr. Pena's deposition testimony and the submission of the medical records, Dr. Pena has made a prima facie showing of entitlement to judgment as a matter of law, shifting the burden to plaintiff to submit, in opposition, evidentiary facts or materials to rebut this prima facie showing and to establish the existence of triable issues of fact (*see Alvarez*, 68 NY2d at 324). Plaintiff has not submitted any papers in opposition to Dr. Pena's motion. Thus, summary

judgment dismissing plaintiff's complaint as against Dr. Pena is warranted (*see* CPLR 3212 [b]).

Dr. Gulmatico and Gulmatico Associates' Motion for Summary Judgment (Mot. Seq. No. 3)

Plaintiff's Claims Against Gulmatico Associates

As discussed above, Dr. Gulmatico was the surgeon who performed the surgery on Ms. Cowan for placement of the permacath and the second surgery for placement of the chest tube. Gulmatico Associates is Dr. Gulmatico's professional corporation.

Dr. Gulmatico testified, at his deposition, that Gulmatico Associates was formed in 2002 or 2003, and is mainly a solo private practice with his wife, who is an allergist, also helping out with it (NYSCEF Doc No. 97, Dr. Gulmatico's deposition tr at 8, line 22, through 9, line 12). The bills submitted by Fidelis Care New York (NYSCEF Doc No. 109) with respect to the treatment provided to Ms. Cowan do not show that Ms. Cowan was ever billed by Gulmatico Associates, but only by Dr. Gulmatico. Ms. Cowan did not go to Dr. Gulmatico's private office and was never treated there (NYSCEF Doc No. 97, Dr. Gulmatico's deposition tr at 14, lines 23-25). Dr. Gulmatico testified that he only knew Ms. Cowan from treating her at New York Community Hospital (*id*. at 15, lines 1-3). Thus, there was no relationship between Ms. Cowan and Gulmatico Associates.

Where "a physician working for a professional corporation renders medical care to a patient within the scope of his or her employment, the professional corporation is

considered vicariously liable for the negligence of the physician" (*Petruzzi v Purow*, 180 AD3d 1083, 1084-1085 [2d Dept 2020]; *see also* Business Corporation Law § 1505 [a]). However, Dr. Gulmatico was not rendering professional services on behalf of Gulmatico Associates at the time of the alleged medical malpractice or acting within the scope of his employment by it. Rather, Dr. Gulmatico was individually working as an attending physician at New York Community Hospital. Therefore, summary judgment dismissing plaintiff's complaint as against Gulmatico Associates is warranted (*see* CPLR 3212 [b]).

Plaintiff's Medical Malpractice Claims Against Dr. Gulmatico

In support of Dr. Gulmatico's motion,[4] Dr. Gulmatico has submitted the expert affirmation of Michael G. Persico, M.D. (Dr. Persico), a physician duly licensed to practice medicine in the State of New York, who is board certified in surgery. Dr. Persico asserts that while the insertion of the permacath resulted in iatrogeic injuries in the form of a partial pneumothorax and mediastinal bleed, these are known complications of this procedure and were not the result of a departure from surgical standards or the failure to adhere to an accepted technique. Dr. Persico further asserts that Dr. Gulmatico recognized that an artery had been injured since Dr. Gulmatico ordered a chest X ray and CT scan which showed the widened mediastinum, which was attributed to bleeding.

Dr. Persico states that Ms. Cowan's lung was reinflated, and she was stable in the hours after the chest tube was placed. Dr. Persico asserts that a thoracic surgeon was the

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[4]Since the court finds that summary judgment dismissing plaintiff's complaint as to Gulmatico Associates is warranted, the court shall hereinafter refer to Dr. Gulmatico and Gulmatico Associates' motion as Dr. Gulmatico's motion.

appropriate specialist to call, and that Dr. Gulmatico made calls to a thoracic surgeon. Dr. Persico notes that a thoracic surgeon did not come to the hospital for several hours, but states that the timing of a consultant's response to Dr. Gulmatico's call was not within Dr. Gulmatico's control. Dr. Persico opines that once Ms. Cowan was transferred to the ICU, the management of Ms. Cowan, including the monitoring of her condition, was entrusted to the critical care team.

Dr. Persico points out that Ms. Cowan was stable for about five hours after Dr. Gulmatico became aware of the widened mediastinum, i.e., from about 12:00 p.m. to 5:00 p.m. He states that since Ms. Cowan's pneumothorax was corrected and she was stable and was seen by a critical care specialist, and since calls were made for the thoracic consult, it would not be expected or customary for Dr. Gulmatico to remain in the hospital under these circumstances. He further states that there is no reason to think that Ms. Cowan's outcome would have been any different if Dr. Gulmatico remained at the hospital.

Dr. Persico notes that according to plaintiff's expert disclosures, plaintiff's experts will testify that there was a failure to obtain an emergency thoracic surgery or vascular surgery consult, and that such a consult, if rendered sooner, would have resulted in intervention in the form of a pericardiac window or pericardicentesis, which would have stopped the bleeding into the mediastinum and prevented Ms. Cowan's death. Dr. Persico asserts that this claim is unfounded because there was no cardiac tamponade, which refers to the buildup of fluid in the pericardium or the sac surrounding the heart,

which compressed heart function, and that this is evidenced by the fact that Ms. Cowan remained stable until about 5:30 p.m., showing that neither a pericardiac window or pericardicentesis was indicated. Dr. Persico opines that, instead, it was appropriate to monitor Ms. Cowan in an ICU setting. Dr. Persico points to the note of P.A. Shah, which stated that the thoracic surgeon consult, Dr. Yun, agreed that there was no acute need for a pericardiac window or pericardicentesis.

Dr. Persico asserts that plaintiff's claims that the failure to perform a pericardiac window or pericardicentesis ignore that cardiac tamponade was not a factor in Ms. Cowan's death. He states that plaintiff's death was, instead, due to cardiac arrest. He concludes that since Ms. Cowan was stable before her cardiac arrest, no intervention was needed, and that it was appropriate just to observe Ms. Cowan in the ICU.

In opposition, plaintiff has submitted the affidavit of his medical expert, Michael S. Weingarten, M.D. (Dr. Weingarten), a physician duly licensed to practice medicine in the State of Pennsylvania,[5] who is board certified in general surgery with a certificate of special qualifications in vascular surgery. Dr. Weingarten asserts that a surgical emergency was created when Ms. Cowan's left subclavian artery was perforated during the performance of the permacath placement by Dr. Gulmatico on January 26, 2017. Dr. Weingarten states that Ms. Cowan's extensive past medical history is not germane to this issue and does not change what Dr. Gulmatico was required to do in responding to that emergency.

Dr. Weingarten explains that Dr. Gulmatico attempted to place a permacath into Ms. Cowan's left subclavian vein on the late morning of January 26, 2017, finishing shortly before noon. Dr. Gulmatico testified, at his deposition, that after the permacath was inserted, Ms. Cowan complained of chest discomfort and became desaturated, and that is why he ordered the chest X ray (NYSCEF Doc No. 97, Dr. Gulmatico's deposition tr at 30, lines 15-24). Dr. Weingarten sets forth that the chest X ray that Dr. Gulmatico obtained around noon showed a new widening of the mediastinum and a new left pneumothorax, and that the CT scan taken shortly thereafter revealed and quantified the pneumothorax, a right mediastinal shift, and right-sided focal infiltrates, and showed the catheter tip in the mediastinum, surrounded by gas, bubbles, and fluid consistent with blood.

Dr. Weingarten notes that Dr. Gulmatico recognized that the tip of the catheter had injured a blood vessel, and that this constituted an emergency. He further notes that Dr. Gulmatico attempted to obtain a consultation with a thoracic surgeon, but was unable to reach the intended consultant. Dr. Gulmatico, in his deposition, described his unsuccessful attempts to reach a thoracic surgeon. Dr. Weingarten notes that the pneumothorax, which was also a medical emergency that is usually treated by a thoracic surgeon, was addressed by Dr. Gulmatico himself by inserting a chest tube in Ms. Cowan because no thoracic surgeon was immediately available. Dr. Weingarten points to the fact that Dr. Gulmatico did not, however, address the surgical emergency of the widened

[5]As required by CPLR 2309 (c), Dr. Weingarten's out-of-state affidavit is notarized and contains

mediastinum himself. Dr. Weingarten asserts that this required emergent intervention, but Dr. Weingarten failed to address it himself even though he could not reach a thoracic surgeon. Dr. Weingarten points out that the second chest X ray taken at 3:16 p.m. showed that the pneumothorax had resolved after replacement of the chest tube by him, but showed that the widened mediastinum, which he did not address, was still present.

Dr. Gulmatico argues that he did not owe Ms. Cowan a duty of care once she was transferred to the ICU despite the fact that the surgery that he performed caused the injury, which ultimately resulted in her cardiac arrest and death. This argument must be rejected. Dr. Weingarten explains that the emergency created by the left subclavian artery was never addressed. Dr. Weingarten points to the fact that Dr. Gulmatico left the hospital, and allowed Ms. Cowan to be transferred to the ICU with no surgeon in attendance, and without the emergency thoracic surgery consult being obtained. Dr. Weingarten opines that merely calling for an emergency thoracic consult is insufficient since Dr. Gulmatico knew that he did not reach the thoracic surgeon. Dr. Weingarten asserts that given the uncontrolled bleeding into the mediastinum, Ms. Cowan's demise was probable if the situation was not surgically and emergently addressed.

Dr. Weingarten acknowledges that Ms. Cowan remained hemodynamically stable until 5:35 p.m., at which time she suffered cardiac arrest due to the bleeding from her left subclavian artery perforation. Dr. Weingarten asserts, however, that with bleeding of this nature, a patient may very well remain stable for hours. He states that a patient who

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a certificate of conformity.

is bleeding from an artery within the chest can go into cardiogenic shock at any time, and that is why this was an emergency. He opines that not addressing the situation surgically because Ms. Cowan was stable, even though she was bleeding, was a departure from the accepted standard of care.

Dr. Weingarten opines, to a reasonable degree of medical certainty, that the known bleeding, which went unaddressed despite Dr. Gulmatico's knowledge of it, caused Ms. Cowan's death. He specifically sets forth his opinion that if that bleeding had been addressed before Ms. Cowan coded and while she was still stable, she would have had a substantially better chance to survive and would have survived.

Dr. Gulmatico argues that plaintiff's claim lacks causation because Dr. Yun did not advise the performance of a pericardial window or a pericardiocentesis. He asserts that since Dr. Yun advised against these procedures, it is speculative that an earlier intervention by a thoracic surgeon would have made a difference. This argument is rejected. Dr. Weingarten acknowledges that a pericardial window may not have been necessary for the reasons specified by Dr. Persico. Dr. Weingarten asserts, however, that until a surgeon "goes into the chest," the surgeon cannot know precisely how to address the bleeding. Dr. Weingarten opines that Dr. Gulmatico was obligated to know that the bleeding had to be addressed and was obligated to address it as the only surgeon immediately available in this emergency situation. Dr. Weingarten asserts that the bleeding vessel needed to be surgically repaired. Dr. Weingarten points out that the size of the accumulation of blood shown on the autopsy was very large. Dr. Weingarten

explains that the bleeding caused Ms. Cowan's death because the bleeding stressed her heart to such an extent that it could not function properly, causing her to go into cardiac arrest. Dr. Weingarten opines that had the proper surgical intervention taken place, Ms. Cowan would not have had her heart stressed in this manner, she would not have become unstable, and she would not have died.

Dr. Weingarten acknowledges that Dr. Yun finally did arrive and saw Ms. Cowan and did not perform a surgical procedure. However, Dr. Weingarten opines that by that time, the risks versus the benefits of surgery were completely altered such that any intervention at that time was likely to fail.

Dr. Weingarten opines, to a reasonable degree of medical certainty, that Dr. Gulmatico deviated and departed from the applicable standard of care in failing to address the known bleeding that he had inadvertently created with his surgical procedure in placing the permacath. Dr. Weingarten explains that while the creation of the vascular injury itself was not a departure from the standard of care, Dr. Gulmatico departed from the accepted standard of care because he admitted that he knew that this injury was present and was causing Ms. Cowan to bleed into her mediastinum, causing it to widen, and he knew that this required an emergency thoracic consult. Dr. Weingarten opines that since Dr. Gulmatico was unable to reach the thoracic surgeon for the emergency consult, leaving the hospital and leaving Ms. Cowan unattended surgically, was a departure from the accepted standard of care. Dr. Weingarten explains that Dr. Gulmatico departed from the accepted standard of care by simply transferring Ms. Cowan

out of his care into the ICU without addressing the surgical emergency which remained unaddressed and needed to be addressed emergently. Dr. Weingarten opines that since Dr. Gulmatico was a general surgeon, he was required, by the accepted standard of care, to address the emergency himself or to have called in a vascular surgeon, who was also capable of performing the necessary procedure, after being unable to reach the thoracic surgeon, and his failure to do so was a departure from such standard of care.

Dr. Weingarten further opines that Dr. Gulmatico's merely calling for a thoracic surgeon was not enough to fulfill his obligations to Ms. Cowan since he knew that a thoracic surgeon had not been contacted. He sets forth his opinion that Dr. Weingarten departed from the accepted standard of care in leaving the hospital, with the emergency consult never being accomplished and Ms. Cowan's bleeding remaining unaddressed. Dr. Weingarten opines that Dr. Gulmatico remained responsible for Ms. Cowan's care until the emergency condition which he created by the permacath surgery was surgically addressed.

In reply, Dr. Gulmatico contends that plaintiff, in opposition to his motion, has improperly raised new liability theories not alleged in his bill of particulars. Specifically, Dr. Gulmatico asserts that plaintiff did not previously allege that he abandoned Ms. Cowan by leaving the hospital after Ms. Cowan was transferred to the ICU, or that Dr. Gulmatico should have performed a surgical procedure to stop active arterial bleeding himself.

While Dr. Gulmatico argues that plaintiff is improperly relying on theories of liability which were not asserted in his bill of particulars, plaintiff's bill of particulars alleges, among other things, that Dr. Gulmatico committed medical malpractice in failing to act with respect to the injured artery, in failing to recognize that Ms. Cowan needed immediate treatment, in failing to recognize that Ms. Cowan's case presented a surgical emergency, in failing to take appropriate and necessary steps to stop Ms. Cowan's bleeding, in failing to obtain a STAT consult with a thoracic surgeon, in failing to treat bleeding, in allowing the patient to decline into cardiogenic shock and death, in failing to ensure that a timely thoracic consult was done, in failing to diagnose and appreciate the significance of a mediastinal hemorrhage and act accordingly, and in failing to recognize that Ms. Cowan was in danger. Thus, the court finds that the theories relied upon by plaintiff in his opposition papers are not new theories, but are encompassed in the allegations contained in plaintiff's bill of particulars and merely expound upon those allegations (*see Mehtvin v Ravi*, 180 AD3d 661, 663 [2d Dept 2020]; *Bubar v Brodman*, 177 AD3d 1358, 1361 [4th Dept 2019], *rearg denied* 179 AD3d 1558 [4th Dept 2020]; *Salvania v University of Rochester*, 137 AD3d 1607, 1608 [4th Dept 2016]).

Dr. Gulmatico, in reply, has also submitted an additional expert affirmation by Dr. Persico, who disputes Dr. Weingarten's assertion that there was active arterial bleeding. Dr. Persico bases this on Dr. Gulmatico's belief that intervention was unnecessary and on the fact that Ms. Cowan had stable vital signs from about 12:00 p.m. to 5:00 p.m. Dr. Persico sets forth that the clinical picture did not support active arterial bleeding because

there was an absence of the sudden onset of severe chest pain, diaphoresis, shortness of breath, an altered mental state, lightheadedness, severe hypotension, or other clinical signs that would be associated with an active arterial bleed in the chest. Dr. Persico further points to the fact that the repeat chest X ray taken at 3:16 p.m. showed no change in the amount of mediastinal fluid, as compared to the chest X ray taken at 12:16 p.m. Dr. Persico also states that the CT scan showed that only some of the mediastinal fluid was blood since it also included irrigation fluid.

However, as noted above, Dr. Weingarten opines, in contrast, that the bleeding was an emergency situation and that the bleeding stressed Ms. Cowan's heart to such an extent that it could not function properly, causing her to go into cardiac arrest. In addition, Dr. Persico's opinion is inconsistent with the fact that the size of the accumulation of blood shown on the autopsy was very large.

Dr. Persico also disagrees with Dr. Weingarten's expert opinion that Dr. Gulmatico should have stayed in the hospital while waiting for the thoracic consult or that Dr. Gulmatico should have performed a surgical procedure himself to stop Ms. Cowan's active arterial bleeding. Dr. Persico acknowledges that an open thoracotomy[6] could have been performed by Dr. Gulmatico to stop arterial bleeding. Dr. Persico asserts, however, that Ms. Cowan had many comorbidities which made such surgery very risky even if performed by a vascular or thoracic surgeon. Dr. Persico opines that neither a vascular or thoracic surgeon would have intervened as long as Ms. Cowan was stable.

Dr. Gulmatico has submitted his own affidavit in reply, in which he asserts that he is not credentialed by the hospital to perform a thoracotomy or repair of a major arterial injury, and would only do so in an extreme emergency. He states that he has not performed such a procedure in 32 years of practice. However, Dr. Gulmatico, at his deposition, testified that he could have performed such a repair, and specifically stated that "if necessary, if I have to do it, I will do it. If its an emergency, then I would do it" (NYSCEF Doc No. 97, Dr. Gulmatico's deposition tr at 56, lines 16-17). While Dr. Gulmatico now claims that there was no emergency, Dr. Gulmatico admitted that a patient could die from bleeding, that bleeding can cause a heart attack, and that if a patient bleeds enough, it can stress the heart (*id.* at 58, line 17, through 59, line 3). Dr. Gulmatico testified that where bleeding is uncontrolled, the patient could die (*id.* at 38, line 24, through 39, line 2). Dr. Gulmatico acknowledged that he was aware that there was bleeding based on the chest X ray in the recovery room, and that the widened mediastinum, which meant that there was fluid accumulating, showed this (*id.* at 37, lines 9-22). Significantly, Dr. Gulmatico specifically conceded that even though Ms. Cowan was stable, there was still an emergent need for a thoracic surgeon (*id.* at 94, lines 6-9, at 106, lines14-19, at 110, lines 1-2). Dr. Gulmatico testified that Dr. Yun did not see Ms. Cowan until about 6:00 p.m., which was at least four and a half hours after he called for a thoracic surgeon at about 1:30 p.m. (*id.* at 44, lines 1-9; at 94, lines 18-20; at 106, lines 24-25; at 110, lines 1-2; at 114, lines 3-6; at 114, line 22, through 115, line 5). Dr.

[6]While Dr. Weingarten does not specify the procedure to repair the artery, both Dr. Persico and

Gulmatico further testified that he was unsure if Dr. Yun saw Ms. Cowan before or after her first code, but also testified that when Dr. Yun was in the ICU seeing Ms. Cowan, at which time P.A. Shah and Dr. Yun called him, Ms. Cowan was "crashing" (*id*. at 28, lines 2-3; at 110, lines 8-12). Furthermore, P.A. Shah testified, at his deposition, that Dr. Yun had not yet come to see Ms. Cowan when Ms. Cowan coded (NYSCEF Doc No. 103, P.A. Shah's deposition tr at 59, line 25, through 60, line 13). Dr. Gulmatico also testified that he was "unsure" if it would have made a difference in Ms. Cowan's outcome if Ms. Cowan had been treated by a thoracic surgeon two hours earlier (NYSCEF Doc No. 97, Dr. Gulmatic's deposition tr at 93, lines 9-15).

Dr. Gulmatico, in his reply affidavit, states that he was only obligated to request a thoracic consult and was under no obligation to ensure that it was rendered. Dr. Gulmatico, however, testified, at his deposition. that he had called thoracic surgery because he believed there was a vascular injury, and needed a thoracic consult to handle it by opening Ms. Cowan's chest and addressing the problem (*id*. at 43, lines 6-12; at 44, lines 1-9; at 56, lines 8-13). He explained that he called for a thoracic consult because he thought this would need repair (*id*. at 56, line 24, through 57, line 2). Dr. Gulmatico further testified that he either told P.A. Shah to call the thoracic surgeon or called himself, that when he called, he did not say why a thoracic consult was needed, but may have said that he might need help with thoracic surgery (*id*. at 63, lines 3-24). Dr. Gulmatico also testified that he knew that no thoracic surgeon had been reached and that there was no

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Dr. Gulmatico state that they presume that he is referring to an open thoracotomy.

response by the thoracic surgeon (*id.* at 63, lines 3-10). Dr. Gulmatico acknowledged that there was nothing in the computer system or in Ms. Cowan's chart to alert the thoracic surgeon and no order written for a thoracic surgeon, and only his dictation says that he called thoracic surgery (*id.* at 64, lines 3-9; at 95, lines 22-23; at 96, lines 3-9). He also testified that there was no answer when he attempted to call the thoracic surgeon, who was Dr. Yun's partner, and that he did not follow up with anyone about the thoracic surgeon after telling P.A. Shah to follow up with the thoracic consult (*id.* at 99, lines 18-22; at 104, lines 7-11). Dr. Gulmatico thus knew that the thoracic surgeon had not been contacted when he left the hospital and that Ms. Cowan's bleeding artery had remained unrepaired. As discussed above, Dr. Weingarten opines that this was not in accordance with accepted medical practice.

"Where, as here, the parties adduce conflicting medical expert opinions, summary judgment is not appropriate, as such credibility issues can only be resolved by a jury" (*Bjorke v Rubenstein*, 53 AD3d 519, 520 [2d Dept 2008]; *see also Castillo v Surasi*, 181 AD3d 786, 788-789 [2d Dept 2020]; *M.C. v Huntington Hosp.*, 175 AD3d 578, 581 [2d Dept 2019]; *Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]; *Elmes*, 140 AD3d at 1011; *Nisanov*, 137 AD3d at 1094; *Guctas*, 132 AD3d at 633; *Loaiza v Lam*, 107 AD3d 951, 953 [2d Dept 2013]; *Feinberg*, 23 AD3d at 519). Thus, in view of the conflicting opinions of Dr. Persico and Dr. Weingarten and the issues of fact raised by the medical records and Dr. Gulmatico's deposition testimony, Dr. Gulmatico's motion for summary judgment dismissing plaintiff's complaint as against him must be denied.

Plaintiff's Wrongful Death Claim

Dr. Gulmatico further argues that he is entitled to partial summary judgment dismissing plaintiff's wrongful death claim, thereby limiting the triable issues pursuant to CPLR 3212 (e) to exclude such claim. He relies on the wrongful death statute, EPTL 5-4.1 (1), which permits the personal representative of a decedent, who is survived by distributees, to maintain an action for wrongful death. It is undisputed that Ms. Cowan left behind three distributees, i.e., her son, who, as previously noted, is the plaintiff herein, and two daughters, namely, Viola McKay and Charlotte McKay. All three of Ms. Cowan's children are adults.

Dr. Gulmatico asserts that EPTL 5-4.3 limits recovery in a wrongful death action to provable actual pecuniary loss, and argues that this solely means financial support. Dr. Gulmatico states that EPTL 5-4.3 does not allow compensation based upon sorrow, grief, or the loss of society or comfort. He points to Charlotte McKay's deposition testimony that Ms. Cowan was not providing financial support or services to her or her family during the five years before she died (NYSCEF Doc No. 102, Charlotte McKay's deposition tr at 23, lines 2-10), and plaintiff's deposition testimony that Ms. Cowan was supporting herself with SSI disability payments and help from her husband (NYSCEF Doc No. 96, plaintiff's deposition tr at 56, lines 17-20). Dr. Gulmatico also states that Venus McKay's deposition testimony confirmed that Ms. Cowan was not providing financial support to her or her siblings (NYSCEF Doc No. 101, Venus McKay's deposition tr at 59, lines 16-20). Dr. Gulmatico acknowledges that Ms. Cowan's adult children paid the

funeral bill, but contends that where the payment of the funeral bill is the only economic loss to the estate, a wrongful death claim must be dismissed.

The court rejects Dr. Gulmatico's arguments. EPTL 5-4.3 (a) provides that a plaintiff may recover for "pecuniary injuries" resulting from a decedent's death. It is true that since damages for wrongful death are limited to pecuniary loss, damages for loss of society and affection and the children's grief or emotional loss are not recoverable[7] (*see* EPTL 5-4.3; *Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 668 [1991]; *Motelson v Ford Motor Co.*, 101 AD3d 957, 962 [2d Dept 2012], *affd* 24 NY3d 1025 [2014]). However, pecuniary injuries for the wrongful death of a parent are not limited to only the loss of financial support or voluntary financial assistance, but also include the loss of parental care, guidance, and advice, and the loss of household services (*see Gonzalez*, 77 NY2d at 668; *Milczarski v Walaszek*, 108 AD3d 1190, 1190 [4th Dept 2013]; *Leger v Chasky*, 55 AD3d 564, 565 [2d Dept 2008]; *Zygmunt v Berkowitz*, 301 AD2d 593, 594 [2d Dept 2003]). Loss of parental guidance and advice in a wrongful death action are pecuniary and are recoverable damages (*see Milczarski*, 108 AD3d at 1190; *Gardner v State of New York*, 134 AD3d 1563, 1565 [4th Dept 2015]; *Zygmunt*, 301 AD2d at 594; *Kiker v Nassau County*, 175 AD2d 99, 102 [2d Dept 1991]; *Raefski v Hirsch*, 2020 NY Slip Op 30970[U], *30 [Sup Ct, NY County 2020]; *Averso v North Shore Univ. Hosp. Manhasset*, 60 Misc 3d 1028, 1030 [Sup Ct, Nassau County 2018]).

[7]A New York bill in committee seeks to modify EPTL 5-4.3 so as to include grief and anguish, loss of love, society, protection, comfort, companionship, and consortium resulting from the

Recovery of damages for loss of parental guidance and advice in a wrongful death action is not barred solely because the distributees were self-supporting financially independent adults at the time of their mother's death (*see Gonzalez*, 77 NY2d at 668; *Gardner*, 134 AD3d at 1565). "The argument that an adult distributee cannot state a claim for pecuniary injuries based on the loss of a parent's guidance was long ago rejected" by the Court of Appeals (*Gonzalez*, 77 NY2d at 669, citing *Gross v Abraham*, 306 NY 525, 529-531 [1954]; *Countryman v Fonda, Johnstown & Gloversville R. R. Co.*, 166 NY 201, 209-210 [1901]; *McIntyre v New York Cent. R. R. Co.*, 37 NY 287, 295-296 [1867]; *Tilley v Hudson River R.R. Co.*, 29 NY 252, 288 [1864]).

Dr. Gulmatico's reliance on the case of *Bumpurs v New York City Hous. Auth.* (139 AD2d 438 [1st Dept 1988]) to argue that no damages for wrongful death may be recovered here is misplaced since the decedent in *Bumpurs* had provided no services to her adult children (*see id*. at 439; *Gonzalez*, 77 NY2d at 669 [distinguishing *Bumpurs*). Here, in contrast, there was deposition testimony as to the parental advice and guidance and household services provided by Ms. Cowan.

Plaintiff specifically testified, at his deposition, that his mother would give him "advice and stuff" (NYSCEF Doc No. 96, plaintiff's deposition tr at 61, lines 21-22). Plaintiff also testified that his mother would sometimes babysit his siblings' children (*id*. at 62, lines 7-15). Charlotte McKay testified, at her deposition, that she spoke to her mother on the phone every day, and saw her about once a week (NYSCEF Doc No. 102,

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decedent's death as compensable damages (*see* New York Senate Bill S4006, Finance

Charlotte McKay's deposition tr at 9, line 15, through 10, line 2). Dr. Gulmatico had the opportunity to further explore the issue of loss of parental guidance and advice at this deposition, but did not do so.

Venus McKay testified, at her deposition, that she lived 20 minutes away from her mother, that she spoke to her mother every day, and that she visited with her "all the time" (NYSCEF Doc No. 101, Venus McKay's deposition tr at 7, lines 3-7; at 7, line 19, through 8, line 4; at 56, lines 4-5). She explained that she and her mother would "either go out to eat, shop, or do sisterly things (*id*. at 8, lines 8-9). She further testified that she would go shopping with her mother all the time (*id*. at 54, lines 4-5). She also testified that her mother did things for her "all the time" (*id*. at 58, lines 10-14). She set forth, in detail, that her mother would come to her house, that when she was at work, her mother would sit in her house and walk the dog for her, and that her mother had keys to her house (*id*. at lines 16-19). She further set forth that her mother would leave her little desserts, and that if she did not make up her bed, her mother would make it (*id*. at 58, line 22, through 59, line 2). She described how her mother would leave her notes in her apartment to tell her she was there, and that her mother would help her out (*id*. at 59, lines 5-12). She also specified that if she did not take out her dinner, her mother would take it out, boil it for her, leave her a note that she had taken it out, and leave it on plates for the next day (*id*. at 59, lines 12-15). Thus, Venus McKay specifically testified, at her deposition, that Ms. Cowan rendered household services for her regularly.

Committee, 2019-2020 Legislative Session).

Contrary to Dr. Gulmatico's contentions, there is no basis to limit plaintiff's damages to the conscious pain and suffering of Ms. Cowan. The distributees may prove loss of parental guidance and advice at the trial (*see Gonzalez*, 77 NY2d at 669; *Milczarski*, 108 AD3d at 1190-1191).

Furthermore, there was also deposition testimony by plaintiff that Ms. Cowan provided him with occasional financial support. Plaintiff testified, at his deposition, that his mother helped him pay his rent sometimes, and if he needed something, she would help him out financially if she could (NYSCEF Doc No. 96, plaintiff's deposition tr at 60, lines 14-23). He further testified that his mother had given him about $200 in the year before she died (*id*. at 61, lines 10-15).

Plaintiff has presented evidence of pecuniary injuries suffered by him and his two siblings by reason of their mother's wrongful death (*see Gonzalez*, 77 NY2d at 670; *Johnson v Richmond Univ. Med. Ctr.*, 101 AD3d 1087, 1089 [2d Dept 2012]). A plaintiff, of course, bears the burden of proving the pecuniary loss, which includes proving the monetary value of services, such as parental advice and guidance. Since it is difficult to establish direct evidence of pecuniary loss, damages in a wrongful death case are typically for a jury to calculate (*see Milczarski*, 108 AD3d at 1190; *McKenna v Reale*, 137 AD3d 1533, 1536 [3d Dept 2016]). Thus, whether Ms. Cowan's three adult children sustained pecuniary injuries from her death is a question for a jury to resolve.

In addition, while Dr. Gulmatico claims that funeral expenses cannot be recovered under plaintiff's wrongful death claim, EPTL 5-4.3 (a) expressly provides for the recovery

of any reasonable funeral expenses paid by the distributees as a proper element of damages (*see* EPTL 5-4.3 [a]; *Erbstein v Savasatit*, 274 AD2d 445, 446 [2d Dept 2000]; *Arias v State of New York*, 8 Misc 3d 736, 741 [Ct Cl 2005], *affd* 33 AD3d 951 [2d Dept 2006]). Although it has been held that where a decedent's estate pays the funeral expenses, those expenses may be recovered under a cause of action to recover damages for personal injuries, as opposed to a cause of action for a wrongful death (*see* EPTL 11-3.3 [a]; *Montalvo v Chiaramonte*, 74 AD3d 455, 455 [1st Dept 2010]; *Erbstein*, 274 AD2d at 446; 21A Carmody-Wait 2d § 130:160), here, plaintiff testified, at his deposition, that he and his two sisters paid their mother's funeral expenses (NYSCEF Doc No. 96, plaintiff's deposition tr at 64, lines 6-15). Thus, it appears that the three adult children paid Ms. Cowan's funeral expenses in their individual capacities, as opposed to plaintiff having paid them as the administrator of the estate. Such reasonable funeral expenses are recoverable under plaintiff's wrongful death claim (*see* EPTL 5-4.3 [a]; *Erbstein*, 274 AD2d at 446; *Manessis v Chang-Nam Song*, 8 Misc 3d 1018[A], 2005 NY Slip Op 51148[U], *2 [Sup Ct, Queens County 2005], *affd* 29 AD3d 958 [2d Dept 2006]). Consequently, Dr. Gulmatico's motion, insofar as it seeks partial summary judgment dismissing plaintiff's wrongful death claim, must be denied.

New York Community Hospital's Motion for Summary Judgment (Mot. Seq. No. 4)

New York Community Hospital argues that it cannot be held vicariously liable for the alleged departures from the accepted standard of practice by the defendant physicians, or any nonparty physicians or peripheral staff members under its employ at the time of the

alleged malpractice, and that it is, therefore, entitled to summary judgment. In support of its motion, New York Community Hospital relies on the affidavit of Annie Turchiano, who is employed as its credentialing coordinator. Ms. Turchiano attests that Dr. Nozad has never been employed by New York Community Hospital. She states that in January 2017, Dr. Nozad was a voluntary private attending physician at New York Community Hospital within the department of medicine, and served as New York Community Hospital's director of medicine with admitting and clinical privileges at that time. Ms. Turchiano further attests that Dr. Gulmatico has never been employed by New York Community Hospital.[8] She states that in January 2017, Dr. Gulmatico was a voluntary private attending physician at New York Community Hospital within the department of surgery, and that he held admitting and clinical privileges at New York Community Hospital at that time.

"'In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself [or herself]'" (*Fuessel v Chin*, 179 AD3d 899, 901 [2d Dept 2020], quoting *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]; *see also Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Dupree v*

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[8]While Dr. Gulmatico testified, at his deposition, that he was unsure as to whether he drew a salary from New York Community Hospital before or after January 25, 2017 (NYSCEF Doc No. 97, Dr. Gulmatico's deposition tr at 12, line 21, through 13, line 10), plaintiff does not dispute Ms. Turchiano's assertion that Dr. Gulmatico was not employed by New York Community Hospital at the time of the alleged malpractice.

Westchester County Health Care Corp., 164 AD3d 1211, 1213 [2d Dept 2018]). "However, '[a]n exception to this general rule exists where a plaintiff seeks to hold a hospital vicariously liable for the alleged malpractice of an attending physician who is not its employee where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing'" (*Fuessel*, 179 AD3d at 901, quoting *Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 683 [2d Dept 2014]; *see also Mitchell v Goncalves*, 179 AD3d 787, 789 [2d Dept 2020]; *Smolian v Port Auth. of N.Y. & N.J.*, 128 AD3d 796, 801 [2d Dept 2015]; *Tart v New York Bronx Pediatric Medicine, P.C.*, 116 AD3d 515, 516 [1st Dept 2014]; *Gardner v Brookdale Hosp. Med. Ctr.*, 73 AD3d 1124, 1124 [2d Dept 2010]; *Salvatore v Winthrop Univ. Med. Ctr.*, 36 AD3d 887, 888 [2d Dept 2007]; *Orgovan v Bloom*, 7 AD3d 770, 771 [2d Dept 2004]; *Schiavone v Victory Mem. Hosp.*, 292 AD2d 365, 366 [2d Dept 2002]; *Mduba v Benedictine Hosp.*, 52 AD2d 450, 453 [3d Dept 1976]).

"'Thus, in order to establish its entitlement to judgment as a matter of law defeating a claim of vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee and that the exception to the general rule did not apply'" (*Fuessel*, 179 AD3d at 901, quoting *Muslim*, 118 AD3d at 683). Furthermore, "'vicarious liability for the medical malpractice of an independent, private attending physician may be imposed under a theory of apparent or ostensible agency by estoppel'" (*Diller v Munzer*, 141 AD3d 628,

629 [2d Dept 2016], quoting *Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept 2007]; *see also Hill*, 67 NY2d at 80-81; *Loaiza*, 107 AD3d at 953).

Here, plaintiff does not dispute that Dr. Nozad and Dr. Gulmatico were not New York Community Hospital's employees. However, the medical records show that Ms. Cowan came by ambulance to New York Community Hospital on an emergency basis. The medical records disclose that Dr. Shesik saw Ms. Cowan in the emergency room. The medical records state that Dr. Shesik noted that he discussed the case with "PMD" Dr. Nozad, that the care of Ms. Cowan was "handed over" to Dr. Nozad and accepted, and Dr. Nozad would arrange a nephrology consult by himself. Ms. Cowan was admitted to the general medical floor by Dr. Nozad.

The medical record reflects that Dr. Gulmatico was called in as a surgical consult. The medical record states that "Dr. Gulmatico was consulted to evaluate [Ms. Cowan] for [a p]erma[c]ath," and that Ms. Cowan "was refusing to do the surgery." As to the selection of Dr. Gulmatico as the surgical consult, the medical record states that Ms. Cowan was "seen and examined by Dr. Gulmatico and Alalwee the resident in the surgery rotation for the month." Dr. Alalwee was a podiatry resident rotating with Dr. Gulmatico (NYSCEF Doc No. 97, Dr. Gulmatico's deposition tr at 96, lines 20-22).

There is no evidence that Ms. Cowan played any role in selecting Dr. Gulmatico to perform the surgery. There is also no showing that Dr. Nozad selected Dr. Gulmatico in particular to perform the surgical consult. As argued by plaintiff, the medical records indicate that Dr. Nozad only called for a surgical consult, and that New York Community

Hospital assigned Dr. Gulmatico as the attending surgeon on duty for that surgery rotation (*see Litwak v Our Lady of Victory Hosp. of Lackawanna*, 238 AD2d 881, 881 [4th Dept 1997]).

New York Community Hospital concedes that Ms. Cowan arrived at its hospital through its emergency room, but claims that she was admitted as a private patient under the direction and control of her primary care physician, nonparty attending physician, Dr. Nozad. Ms. Cowan, however, did not arrive at New York Community Hospital's emergency department at the direction of Dr. Nozad (*see Fuessel*, 179 AD3d at 902; *Diller*, 141 AD3d at 629; *Smolian*, 128 AD3d at 801; *Salvatore*, 36 AD3d at 888; *Loaiza*, 107 AD3d at 953; *Malcolm v Mount Vernon Hosp.*, 309 AD2d 704, 706 [1st Dept 2003], *lv dismissed* 2 NY3d 793 [2004]; *Schiavone*, 292 AD2d at 366; *Abraham v Dulit*, 255 AD2d 345, 345 [2d Dept 1998]; *Mduba*, 52 AD2d at 453). Ms. Cowan was not referred to New York Community Hospital or advised or directed to go there by Dr. Nozad, and did not request to be treated by him or Dr. Gulmatico (*see Loaiza*, 107 AD3d at 953; *Finnin v St. Barnabas Hosp.*, 306 AD2d 189, 189 [1st Dept 2003]). Thus, while New York Community Hospital has established that Dr. Nozad[9]

and Dr. Gulmatico were not its employees, the evidence submitted in support of its motion for summary judgment is insufficient to demonstrate, prima facie, that Ms. Cowan entered New York Community Hospital's emergency room seeking treatment from a

[9]As noted above, Dr. Nozad is not named as a defendant herein. No acts of medical malpractice have been attributed to Dr, Nozad and there is no claim as to vicarious liability with respect to Dr. Nozad. Dr. Nozad was also not deposed in this action as a nonparty.

privately selected physician, i.e., Dr. Nozad or Dr. Gulmatico, rather than from the hospital itself (*see Fuessel*, 179 AD3d at 901-902; *Malcolm*, 309 AD2d at 706; *Abraham*, 255 AD2d at 345; *Litwak*, 238 AD2d at 881).

New York Community Hospital relies on the fact that the claimed medical malpractice by Dr. Gulmatico took place five days after Ms. Cowan came to the emergency room. New York Community Hospital asserts that the alleged medical malpractice, therefore, occurred in a non-emergent setting while Ms. Cowan's care was under the control and management of Dr. Gulmatico, who was a private attending physician, and who, like Dr. Nozad, was not employed by it. The fact that the surgery did not immediately occur, however, is of no moment. The relevant issue is whether Ms. Cowan could have reasonably believed that Dr. Gulmatico was acting on behalf of New York Community Hospital (*see Keitel v Kurtz*, 54 AD3d 387, 390 [2d Dept 2008]).

New York Community Hospital contends that the issue of whether Dr. Nozad requested Dr. Gulmatico specifically or if Dr. Gulmatico responded to a general consult request made by Dr. Nozad is irrelevant. New York Community Hospital asserts that this is because Dr. Nozad, who was not its employee, ordered the surgical consult for which Dr. Gulmatico responded. It argues that since the surgical consult request came from Dr. Nozad and not from a physician employed by it, it cannot be held vicariously liable.

This argument is rejected. As noted above, there is no evidence that Ms. Cowan requested a particular doctor, and there is also no evidence that Ms. Cowan was aware of the particular nature of Dr. Nozak or Dr. Gulmatico's affiliation with New York

Community Hospital (*see Malcolm*, 309 AD2d at 706). Ms. Cowan had no expectation that she would be treated by Dr. Gulmatico, and Dr. Gulmatico only ended up being involved in her care because he was the on-call attending surgeon at the time (*see Mitchell*, 179 AD3d at 789; *Thompson-Cassie v Sarabanchong*, 2020 NY Slip Op 30654[U], *16-17 [Sup Ct, Kings County 2020]). Dr. Gulmatico testified, at his deposition, that while at New York Community Hospital, he would sometimes be called in to insert a central catheter in Ms. Cowan (NYSCEF Doc No. 97, Dr. Gulmatico's deposition tr at 15, lines 8-12). Dr. Gulmatico knew Ms. Cowan solely from providing treatment to her at New York Community Hospital, and treated her there for vascular access (*id*. at lines 1-6). As discussed above, Dr. Gulmatico never treated Ms. Cowan at his private office (*id*. at 14, lines 23-25). Under these circumstances, Ms. Cowan could properly have believed that Dr. Gulmatico was employed by and provided by New York Community Hospital (*see Loaiza*, 107 AD3d at 953).

New York Community Hospital argues that the fact that plaintiff also named Gulmatico Associates as a defendant constitutes an admission by plaintiff that Ms. Cowan was a private patient of Dr. Gulmatico. This argument is rejected. As discussed above, the evidence demonstrates that Dr. Gulmatico only saw Ms. Cowan at New York Community Hospital when called in to do so, and that Ms. Cowan was never treated by him at his private practice as his private patient. Plaintiff was entitled to plead in the alternative (*see* CPLR 3014), and plaintiff's complaint also alleges that Dr. Gulmatico was an employee, agent, or servant of New York Community Hospital, and that New

York Community Hospital was vicariously liable for the alleged malpractice of Dr. Gulmatico.

New York Community Hospital additionally argues that the billing record from Ms. Cowan's medical insurance company, Fidelis Care New York, shows that Dr. Gulmatico and Dr. Nozad both billed for the services provided to Ms. Cowan separately from it, and that this shows that it cannot be held vicariously liable. This argument lacks merit. In support of this argument, New York Community Hospital has submitted a list of claims paid by Fidelis Care New York, which lists the service dates, the names of the service providers, and the net amounts paid for these services (NYSCEF Doc No. 109). This list includes Dr. Nozad and Dr. Gulmatico, and sets forth the amounts paid by Fidelis Care New York for the services provided by them on particular dates. This list does not show that Dr. Nozad and Dr. Gulmatico were billing them for services privately provided by them. Indeed, this list from Fidelis Care New York also reflect bills by Dr. Brener, who was an employee of New York Community Hospital (NYSCEF Doc No. 109 at 25).

Contrary to New York Community Hospital's argument, the fact that Ms. Cowan signed informed consent forms with respect to the procedures performed by Dr. Gulmatico also does not permit New York Community Hospital to escape vicarious liability for any alleged medical malpractice by Dr. Gulmatico. In fact, these informed consent forms support plaintiff's claim of apparent authority since both the informed consent form for the placement of the permacath by Dr. Gulmatico and the informed consent form authorizing Dr. Gulmatico to insert the left chest tube and to perform any

other surgical procedure are both on the letterhead of New York Community Hospital (NYSCEF Doc No. 120 at 136, 139).

New York Community Hospital has failed to satisfy its burden of proving, as a matter of law, that it is not vicariously liable for Dr. Gulmatico's alleged acts of medical malpractice (*see Fuessel*, 179 AD3d at 902; *Mitchell*, 179 AD3d at 789; *Diller*, 141 AD3d at 629; *Malcolm*, 309 AD2d at 706). New York Community Hospital has not come forward with sufficient evidence to demonstrate the absence of any material issues of fact (*see Fuessel*, 179 AD3d at 902; *Mitchell*, 179 AD3d at 789; *Malcolm*, 309 AD2d at 706; *Abraham*, 255 AD2d at 345). Thus, inasmuch as triable issues of fact exist as to whether New York Community Hospital may be held vicariously liable for the alleged negligent acts or omissions constituting medical malpractice claimed to have been committed by Dr. Gulmatico, New York Community Hospital's motion for summary judgment must be denied in this respect (*see Fuessel*, 179 AD3d at 902; *Mitchell*, 179 AD3d at 789; *Loaiza*, 107 AD3d at 953; *Malcolm*, 309 AD2d at 706; *Abraham*, 255 AD2d at 345; *Litwak*, 238 AD2d at 881).

Insofar as New York Community Hospital, in its motion, also argues that it cannot be held vicariously liable for any alleged medical malpractice by Dr. Pena, Dr. Farhat, and Dr. Brener, and that it cannot be held liable for any independent claims against it for any alleged negligent act or omission by any nonparty physicians or peripheral staff members under its employ, plaintiff, in his opposition papers, does not set forth any arguments in opposition to the dismissal of such claims. Since the court has found that

summary judgment dismissing plaintiff's complaint as against Dr. Pena (as discussed above), Dr. Farhat (as discussed below), and Dr. Brener (as discussed below) must be granted, there is no basis for a claim of vicarious liability against New York Community Hospital with respect to these defendants and summary judgment dismissing such claims is warranted (*see* CPLR 3212 [b]). In addition, as contended by New York Community Hospital, plaintiff has not identified any separate alleged acts and omissions by New York Community Hospital's staff. New York Community Hospital has sustained its prima facie burden of establishing that there are no independent claims against it, and plaintiff does not assert that there are any such claims (*see Negron v Shou*, 179 AD3d 516, 516 [1st Dept 2020]; *Suits v Wyckoff Hgts. Med. Ctr.*, 84 AD3d 487, 489 [1st Dept 2011]). Thus, summary judgment dismissing any independent claims against New York Community Hospital for any allegedly negligent act or omission by any nonparty physicians or peripheral staff members employed by it is also warranted (*see* CPLR 3212 [b]).

Dr. Farhat's Motion for Summary Judgment (Mot. Seq. No. 5)

As noted above, Dr. Farhat was the critical care consultant, who was called in at approximately 4:33 p.m. while Ms. Cowan was in the recovery room, to evaluate Ms. Cowan for transfer to the ICU. In support of his motion for summary judgment, Dr. Farhat has submitted the expert affirmation of Mark Silberman, M.D. (Dr. Silberman), a physician duly licensed to practice medicine in the State of New York, who is board certified in critical care medicine, pulmonary medicine, and emergency medicine.

Dr. Silberman points out that Dr. Farhat had absolutely no involvement in the decision or discussion to have a permacath surgically placed for Ms. Cowan's dialysis access, and that Dr. Farhat took no part in the surgery to insert the permacath, which led to the left subclavian artery tear and mediastinal hemorrhage. Dr. Silberman notes that the only post-surgical involvement by Dr. Farhat was to provide one critical care consultation, at which time Ms. Cowan's vital signs were stable, and which took place about one hour before she went into cardiac arrest

Dr. Silberman opines, within a reasonable degree of medical certainty, that Dr. Farhat comported with the accepted standard of care. Dr. Silberman sets forth that Dr. Farhat appropriately examined Ms. Cowan, took into account her signs and symptoms, and diagnosed pneumothorax and mediastinal hemorrhage. Dr. Silberman further sets forth that Dr. Farhat appropriately recommended that Ms. Cowan be transferred to the ICU, appropriately arranged for her transfer to the ICU, and appropriately recommended close monitoring and a thoracic surgery consultation, which had already been called for by the time Dr. Farhat was involved.

Dr. Silberman notes that Dr. Farhat was not responsible for ongoing ICU care on that day, and that Dr. Farhat was merely doing private consults. Dr. Silberman sets forth his opinion that Dr. Farhat appropriately turned over the monitoring and care of Ms. Cowan, once she was in the ICU, to Giordani Desir, M.D., who was the ICU attending physician attending on duty that day, and the ICU staff. Dr. Silberman addresses all of

plaintiff's claims, as alleged against Dr. Farhat in the bill of particulars, and sets forth why they are meritless.

Dr. Silberman explains that there was no indication for Dr. Farhat to order any consultations other than those which had already been ordered by Dr. Gulmatico since Dr. Farhat was informed that the thoracic surgery consultant had already been called. Dr. Silberman opines, within a reasonable degree of medical certainty, that there was nothing that Dr. Farhat did or did not do that proximately caused Ms. Cowan's injuries.

By Dr. Silberman's expert affirmation, as well as the submission of the medical records and the relevant deposition testimony, Dr. Farhat has made a prima facie showing of his entitlement to judgment as a matter of law, shifting the burden to plaintiff to submit, in opposition, evidentiary facts or materials to rebut this prima facie showing and to establish the existence of triable issues of fact (*see Alvarez*, 68 NY2d at 324). Plaintiff has not submitted any papers in opposition to Dr. Farhat's motion. Consequently, summary judgment dismissing plaintiff's complaint as against Dr. Farhat must be granted (*see* CPLR 3212 [b]).

Dr. Brener's Motion for Summary Judgment (Mot. Seq. No. 6)

As noted above, Dr. Brener was the consulting nephrologist for Ms. Cowan. In support of his motion, Dr. Brener has submitted the expert affirmation of Marius L. Pesach (Dr. Pesach), a physician duly licensed in the State of New York, who is board certified in internal medicine with a subcertification in nephrology.

Dr. Pesach opines, within a reasonable degree of medical certainty, that Dr. Brener did not depart from the standards of good and accepted medical care and practice in his care and treatment of Ms. Cowan. Dr. Pesach sets forth that Dr. Brener properly evaluated Ms. Cowan when he first saw her on January 23, 2017. He asserts that Dr. Brener properly identified her malfunctioning AV fistula and properly ordered the appropriate vascular consult, as well as required blood pressure control.

Dr. Pesach further opines, within a reasonable degree of medical certainty, that Dr. Brener acted within good and accepted medical practice during his additional visits and treatments of Ms. Cowan on January 24 and 25, 2017. Dr. Pesach notes that Ms. Cowan had no new nephrology related complaints after her initial visit with Dr. Brener, and asserts that from a nephrology point of view, Dr. Brener properly monitored and treated Ms. Cowan.

Dr. Pesach asserts that while the surgical intervention which resulted in the complications which are the subject of this action were necessitated due to Ms. Cowan's advanced kidney disease, Dr. Brener was, in no way, involved in the performance of the surgery or in the postoperative care following Ms. Cowan's surgical complications on January 26, 2017. Dr. Pesach sets forth his opinion that plaintiff's allegations against Dr. Brener, as stated in plaintiff's bill of particulars, are groundless and not supported by the medical records. In conclusion, Dr. Pesach opines, within a reasonable degree of medical certainty, that nothing Dr. Brener did or did not do with respect to the care and

treatment of Ms. Cowan constituted a departure from good and accepted medical practice, or was the proximate cause of any injury to Ms. Cowan.

By Dr. Pesach's expert affirmation, as well as the submission of the medical records, Dr. Brener has made a prima facie showing of his entitlement to judgment as a matter of law, shifting the burden to plaintiff to submit, in opposition, evidentiary facts or materials to rebut this prima facie showing and to establish the existence of triable issues of fact (*see Alvarez*, 68 NY2d at 324). Plaintiff has not submitted any papers in opposition to Dr. Brener's motion. Therefore, summary judgment dismissing plaintiff's complaint as against Dr. Brener is warranted (*see* CPLR 3212 [b]).

Conclusion

Accordingly, Dr. Pena, Dr. Farhat, and Dr. Brener's motions for summary judgment are granted and the caption of this action is hereby amended to delete their names therefrom. Dr. Gulmatico and Gulmatico Associates' motion for summary judgment: (1) is granted solely to the extent that plaintiff's complaint as against Gulmatico Associates is dismissed; (2) is denied insofar as it seeks dismissal of plaintiff's complaint as against Dr. Gulmatico; and (3) is denied insofar as it seeks partial summary judgment dismissing plaintiff's wrongful death claim. New York Community Hospital's motion for summary judgment: (1) is denied insofar as it seeks dismissal of plaintiff's claims of vicarious liability against it for the alleged medical malpractice of Dr. Gulmatico; and (2) is granted insofar as it seeks dismissal of plaintiff's claims of vicarious liability against it for any alleged medical malpractice by Dr. Pena, Dr. Farhat,

and Dr. Brener, and insofar as it seeks dismissal of any independent claims against it for any alleged negligent act or omission by any nonparty physicians or peripheral staff members under its employ.

The parties are directed to appear for a settlement conference in MMTRP on October 28, 2020.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.