

<b>Alvarez v Pang L. Kooi</b>
2020 NY Slip Op 34053(U)
December 2, 2020
Supreme Court, New York County
Docket Number: 805085/15
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

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OMAR J. ALVAREZ and DIANA GRECEQUET-  
ALVAREZ,

INDEX NO. 805085/15

Plaintiffs,

-against-

PANG L. KOOI, M.D., R. WAYNE COTIE, M.D.,  
CORTLAND REGIONAL MEDICAL CENTER, INC.,

Defendants.

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JOAN A. MADDEN, J.:

In this action asserting the claims for medical malpractice and lack of informed consent, defendant Cortland Regional Medical Center (“Cortland” or “the Hospital”) moves, by order to show cause, for summary judgment dismissing the complaint against it on the ground that it cannot be held vicariously liable for the alleged malpractice of non-parties Jung Wang (“Dr. Wang”), and William Shang, M.D. (“Dr. Shang”), who are not Cortland’s employees.

Plaintiffs oppose the motion and cross move for summary judgment on the issue of Cortland’s vicarious liability for the acts and omissions of its Department of Pathology, Dr. Wang, and Dr. Shang, and on their cause of action for medical malpractice against Cortland based on an alleged departure in misreading or misdiagnosing plaintiff Omar J. Alvarez (“Alvarez” or “plaintiff”) with a benign condition or, in the alternative, granting partial summary judgment based on the misdiagnosis of the pathology specimen by Dr. Wang and on the issuance of a report containing the misdiagnosis.

Defendant Dr. Pang L. Kooi, M.D. (“Dr. Kooi”) opposes Cortland’s motion and cross moves for summary judgment on the issue of Cortland’s vicarious liability for the acts and omissions of Dr. Wang and Dr. Shang, and on the issue of Cortland’s liability for medical

malpractice based on the departure of these pathologists in misdiagnosing plaintiff's Hodgkin's lymphoma as a benign condition.

### BACKGROUND<sup>1</sup>

This action seeks damages in connection with the medical treatment received by Alvarez in 2012 and 2013, when he was an inmate in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS") and was housed at Auburn Correctional Facility ("Auburn"). In particular, it is alleged that the delay in diagnosing plaintiff with Hodgkin's lymphoma resulted in cord compression, lower extremity weakness, paraplegia and related injuries.

While at Auburn, Alvarez was under the medical care of Dr. Kooi, a physician employed by DOCCS as Auburn's health services director, in which position he clinically treated patients and oversaw other medical providers at Auburn (Kooi EBT at 21-22). On May 16, 2012, plaintiff presented at the Auburn infirmary concerning a lump in his right axilla. On August 3, 2012, Dr. R. Wayne Cotie,<sup>2</sup> a private surgeon who was retained as an outside consultant by DOCCS and was also affiliated with Cortland, examined plaintiff and recommended a biopsy.

The biopsy was performed at Cortland on September 10, 2012. Dr. Cotie testified that he originally intended to remove the entire mass during the surgery but when he could not effectuate the plan after discovering the mass was in lymph nodes rather than a separate tumor, he took surgical specimens for pathological inspection. (Id at 62-75).

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<sup>1</sup> Unless otherwise noted, the following facts are based on the undisputed medical records and other documentary evidence submitted in connection with the motion and cross motions.

<sup>2</sup> Plaintiff originally asserted claims against Dr. Cotie. However, when Dr. Cotie died during the pendency of this action, the claims against him were discontinued with prejudice by so-ordered stipulation dated September 15, 2018.

The pathology inspection was performed at the Hospital's Department of Pathology. Under an Agreement for Clinical Pathology Laboratory Services, dated November 14, 2011, ("the Agreement") between the Hospital and Cortland Pathology, P.C. ("the P.C."). Under the Agreement, the P.C. agreed to provide the Hospital "with professional pathology services and administrative supervisory and training services," and to "use [the Hospital's] facilities to operate [the Hospital's] Laboratory Department and to provide professional anatomical and clinical pathology services and supervision of clinical laboratory..." In exchange for these services, the P.C. was granted "the exclusive right...to practice pathology at [the Hospital]" and was paid an annual stipend. The Agreement is signed by Dr. Shang, as President of the P.C. and also by Dr. Wang, who was hired by Dr. Shang, as a pathologist for the P.C. (Shang EBT at 21).

The Agreement identifies Dr. Shang as the "Medical Director" of the Hospital's Pathology Department,<sup>3</sup> whose appointment is subject "to [the Hospital's] approval and is responsible for, *inter alia*, organizing qualified personnel ...to effectively and efficiently accept specimens, perform tests, report tests results...." It further provides, *inter alia*, that the physicians providing services under the Agreement are Dr. Shang and Dr. Wang; that the Hospital shall furnish the space, equipment and other supplies appropriate for conducting the Department of Pathology; that the P.C. would be acting as an independent contractor; and that Hospital remains responsible for "assuring any services provided under this Agreement complies with all pertinent provisions of Federal, State and Local statutes, rules and regulations."

According to Dr. Shang, he participated in the Hospital's quality assurance, quality improvement, and peer review meetings, and that the Pathology Lab did not write its own

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<sup>3</sup>Dr. Shang testified that at various times he held that title of "Laboratory Director" and "Assistant Laboratory Director," and that when the Cortland gave Dr. Wang the title of Medical Director, he became Assistant Lab Director (Id at 24-26).

policies but did so with the Hospital, which also had control over designation of titles and roles (Shang EBT at 133-137).<sup>4</sup>

Plaintiff's biopsy specimen was examined by Dr. Wang, who interpreted the specimen as a lymph node with reactive lymphoid hyperplasia, which is not a malignancy.<sup>5</sup> The biopsy specimen was sent to SUNY Upstate Medical University Hospital Pathology Department ("SUNY") for further flow cytometry studies. Dr. Shang testified that Dr. Wang sent the biopsy to SUNY, received the report back from SUNY dated September 11, 2012 ("the SUNY report"), and signed off on the SUNY report via computer entry as a "final report," and that he was not involved in either the review of the pathological slides or at that time that they were sent to SUNY flow cytometry or subsequently. (Shang EBT at 74-80).

The SUNY report states:

Diagnosis: Flow cytometry of FNA shows no phenotypic evidence of non-Hodgkin's lymphoma. Correlation with lymph node biopsy is recommended to rule out Hodgkin's lymphoma (presence of large cells on touch imprint).

The pathology report, dated September 13, 2012, which was released on Cortland letterhead ("the pathology report")<sup>6</sup> states:

**GROSS:**

Received fresh labeled, "RIGHT AXILLARY LYMPH NODE" is a 3.8 x 2.5 x 1.1 cm. tan, soft lymph node. The surface is inked, the specimen is serially sectioned. On cut surface the specimen has a fish-flesh like appearance. Touch preps were

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<sup>4</sup> Dr Shang also testified that he ended his ownership of the P.C. and Dr. Wang took a 100 percent ownership. He did not know the date that it occurred but testified that it was sometime in 2012 (Shang EBT at 32-34).

<sup>5</sup> According to plaintiffs, Cortland declined to produce Dr. Wang for deposition and he was not deposed due to his unavailability and that, upon information and belief, he relocated to Tennessee and remained more than 100 miles outside the jurisdiction since the inception of this action.

<sup>6</sup> While the pathological report identified Dr. Wang, as "the Medical Director" and Dr. Shang as "Assistant Laboratory Director," the hospital's pathology lab manager, Vickie Walczak testified that she believed that Dr. Shang was still in charge of the lab at the time the pathology report was issued, but could not be sure (Walczak EBT at 24-26).

performed for management purposes. He specimen is submitted for flow cytometry study. Representative sections are submitted in two blocks. JW/clf

**FROZEN SECTION DIAGNOSIS:**

TOUCH PREPARATION BY DR. JUN WANG

MARKEDLY LARGE ATYPICAL CELLS IN A BACKGROUND OF A MIXED POPULATION OF LYMPHOID CELLS.

**MICROSCOPIC:**

Sections reveal a lymph node with marked follicular hyperplasia. The overall architecture of the germinal centers are unremarkable.

**DIAGNOSIS:**

RIGHT AXILLARY LYMPH NODE”: LYMPH NODE WITH REACTIVE LYMPHOID HYPERPLASIA.

JW 09/13/2012 1147 AM

**INTERPRETATION COMMENT:**

Flow cytometry studies were performed at SUNY Upstate Medical University (HP 12-1701). No evidence of non-Hodgkin lymphoma is identified.

Although the SUNY report recommended further study of the large cells to rule out Hodgkin’s lymphoma, the pathology report, does not mention the SUNY recommendation. Dr. Shang testified that the follow up procedure recommended by SUNY was “boilerplate” and “standard verbiage” which is why Dr. Cotie was not informed of the suggestion for further study (Shang EBT 111-112). He also testified that flow cytometry “is designed to pick up non-Hodgkin’s lymphoma” and in 2012, it was “not designed to pick up Hodgkin’s lymphoma...it’s to alert somebody who does not know any better that just because it’s negative doesn’t mean you got a clean bill of health.” (Id at 112).

Dr. Cotie was provided a copy of the pathology report, and testified that he read and understood the report to say that plaintiff’s biopsy specimen was a benign mass, negative for any malignancy (Cotie EBT at 75-77). He also testified that he was never was given the SUNY report

or otherwise made aware of the SUNY report's recommendation for further study of the specimen (Id). Dr. Cotie and Dr. Kooi testified that they relied on the benign pathology report's finding of no malignancy in treating Alvarez (Id at 70-77) (Kooi EBT at 128-133).

In September 17, 2013, Auburn received a call from Alvarez's spouse reporting that the lump in his armpit had been growing for some time and "proper attention was not being paid to it." (Kooi EBT at 113-116). Plaintiff was given a medical appointment on September 19, 2013 based on this complaint and was referred to Dr. Cotie's surgical clinic for the next available date. Dr. Cotie saw plaintiff on October 29, 2013, and noted that the lump in his right armpit was approximately 9 x 3 cm whereas before it was approximately 8 cm, and that while it had stayed essentially the same size, it had not gone away. Dr. Cotie recommended that plaintiff have a hematologic consultation and return to surgery for a complete excision and repeated biopsy of the mass. The recommendation was submitted by Dr. Kooi as an ASAP request and approved. (Cotie EBT at 103, 123-127; Kooi EBT at 59-60). Two weeks later, on November 15, 2013, plaintiff had an appointment with Dr. Michael Poiesz, a hematologist/oncologist at SUNY Upstate Regional Cancer Center, who agreed with Dr. Cotie's plan for a complete excision of the lymph node with a further pathological evaluation. A request from Auburn for a PET scan and biopsy was approved on November 19, 2013.

Plaintiff was seen by Dr. Cotie on the morning of November 27, 2013. Dr. Cotie's note reiterated that the mass should be excised. That afternoon, plaintiff presented at the Auburn infirmary with back pain, leg numbness and an inability to walk. Five days later, plaintiff was transferred from the Auburn infirmary to Auburn Community Hospital Emergency Department based on his severe back pain and unsteady walk. A CT scan showed "severe degenerative disc disease causing lateral recess and neural foraminal stenosis and central canal stenosis" in the areas

of L5-S1, L3-4 and L4-5. Plaintiff was transferred to SUNY Upstate Regional Cancer Center, where a week later he was diagnosed with Hodgkin's lymphoma, and treated for his cancer. On December 20, 2013, plaintiff was discharged to Walsh Correctional Facility, which is a facility for inmates with medical conditions. By October 9, 2014, plaintiff's PET scan showed that he was in complete remission from Hodgkin's lymphoma. Plaintiff continues to suffer from lower extremity weakness, paraplegia and sequelae of that condition.

In this action plaintiffs allege that Cortland, through Dr. Wang and Dr. Shang and its technicians and staff at the Hospital's Department of Pathology, departed from good and accepted medical practice in misreading and misinterpreting plaintiff's biopsy specimen. As for Dr. Kooi, plaintiffs allege that he departed from the standard of care in failing to appreciate the medical significance of the persistent and growing axillary mass and advancing signs of Hodgkin's lymphoma before and after the September 2012 biopsy and, in particular, in November 2013, when Alvarez exhibited difficulty walking and complained of numbness in his hands and legs. It is further alleged that departures by Cortland and Dr. Kooi resulted in a delay in diagnosing plaintiff with Hodgkin's lymphoma until it progressed to Stage IV with spinal cord compression, and that these departures were a substantial factor in causing Mr. Alvarez's paraplegia and related injuries.

Following the completion of discovery, the parties made these motions for summary judgment. Cortland moves for summary judgment on the ground that it cannot be held vicariously liable for the departures of related to the alleged misdiagnosis of plaintiff's biopsy specimen, as the P.C. operating the laboratory was an independent contractor and Cortland did not employ Dr. Wang, who was solely responsible for interpreting the specimen, or Dr Shang. As for

the claim of lack of informed consent, Cortland argues that this claim must be dismissed as the interpretation of the biopsy specimen did not constitute an invasive procedure.

Plaintiffs and Kooi separately oppose the motion and cross move for summary judgment on the claim for medical malpractice against Cortland. There is no opposition to the dismissal of the lack of informed consent claim.

### DISCUSSION

The first issue to be addressed is whether Cortland is entitled to summary judgment based on its argument that it cannot be held vicariously liable for the alleged departure relating to the misreading and misdiagnosing of plaintiff's biopsy specimen. Specifically, Cortland argues that record shows that Dr. Wang was solely responsible for reviewing and interpreting the specimen, and that Cortland cannot be held liable for any negligence or malpractice by Dr. Wang and Dr. Shang, who are not its employees, but are employed by the P.C.

In support of its argument, Cortland relies on the Agreement between it and the P.C. which provides that the P.C. is independent contractor performing pathology services by its physicians, including Dr. Wang in exchange for a monthly stipend. Cortland also submits an affidavit from its Human Resources Manager who states that a search of the Cortland's personnel system shows that Dr. Wang and Dr. Shang were not employees of Cortland at any time on or after October 1, 2011.

In addition, Cortland relies on the affirmation of James A. Terzian, M.D., a physician licensed in New York State who is Board Certified in Anatomic and Clinical Pathology. Dr. Terzian states that he is "knowledgeable with respect to the standards of treatment in pathology, including the operation of a pathology lab by a pathologist...[and] the standards of care applicable to non-pathologist technicians and staff..." Upon reviewing the bill of particulars, amended bill

of particulars, Cortland's medical and laboratory records, the medical records from Auburn, the relevant deposition transcripts, and expert disclosures, Dr. Terzian opines that "the claims against Cortland arise solely from the medical care provided by Dr. Wang, the pathologist who interpreted the biopsy specimen [and that] ...Dr. Wang, as the interpreting pathologist, has the sole responsibility for reviewing the specimen, interpreting the same, and reporting the results of the review. The technicians and staff at Cortland did not have the medical education and training necessary to interpret the specimen." He also opines that "there was no departure from the standard of care with respect to the physicians and staff at Cortland. The medical records reflect that the biopsy specimen of the patient was correctly registered and accessioned and that the interpretation of Dr. Wang was transmitted to Dr. Cotie and Auburn."

As for Dr. Shang, Dr. Terzian opines that "there is no medical basis for plaintiffs' claims...that [he] departed from good and accepted medical practice. The medical records and pathology report reflect that Dr. Shang did not provide any medical treatment to the patient, and did not contribute to Dr. Wang's interpretation of the biopsy specimen [and that] Dr. Wang, as the interpreting pathologist, was solely responsible for the interpretation of the biopsy specimen."

In opposition, plaintiffs assert that the record establishes that Cortland undertook to provide pathology services to plaintiff, held itself out as a facility capable of supplying pathological services, and that Dr. Wang and Dr. Shang were agents or ostensible agents of the hospital, and points to evidence, including the Agreement and Dr. Shang's testimony, which plaintiffs argue shows that Cortland supervised and controlled the provision of pathology services, staffed the pathology lab, and required the lab to operate in accordance with Cortland's rules and regulations. In addition, plaintiffs argue that the record shows that Mr. Alvarez sought pathology services from the Hospital and not a specific pathologist and that he was unaware of

Dr. Wang or Dr. Shang. Under these circumstances, plaintiffs argue that the law imposes vicarious liability on Cortland based on the doctrines of apparent or ostensible agency, citing Mduba. v. Benedictine Hospital, 52 AD2d 450, 453 (3d Dept 1976).

Dr. Kooi also opposes Cortland's motion, arguing that as the Cortland's pathologists, Dr. Shang and Dr. Wang were its agents or ostensible agents, and cites evidence that Cortland exercised control over the non-employee pathologists, and that Mr. Alvarez reasonably believed that the pathologists were rendering care provided by the Hospital.

In general, "affiliation of a doctor with a hospital ... not amounting to employment, alone is insufficient to impute the doctor's negligent conduct to the hospital or facility." See Hill v. St Clare's Hosp., 67 NY2d 72, 79 (1986). However, "[a] hospital is not exempt from liability for the negligence of physicians utilizing its facilities to practice medicine based upon the particular doctor's status as a private attending physician, or an independent contractor." Malcolm v. Mount Vernon Hospital, 309 AD2d 704, 705-706 (1st Dept 2003), lv dismissed 2 NY3d 793 (2004), citing Mduba v. Benedictine Hosp., 52 AD2d at 453. Instead, "vicarious liability for malpractice on the part of nonemployee physicians may be imposed... on a theory of ostensible or apparent agency [by estoppel]." St. Andrews v. Scalia, 51 AD3d 1260, 1261, 1262 (3d Dept 2008).

As the proponent of a motion for summary judgment, Cortland has the burden of proving, as a matter of law, that it is not vicariously liable for the pathologists' negligence. Malcolm v. Mount Vernon Hospital, 309 AD2d at 705. In this connection, Cortland must come forward with evidence sufficient to demonstrate the absence of material issues of fact as to whether the pathologists were acting as its agents. Id. Relevant to the issue of whether a non-employee physician is the agent of a hospital is the degree of control exercised by the hospital over the nonemployee. See Contreras v. Adeyemi, 102 AD3d 720, 722 (2d Dept 2013)(denying summary

judgment to defendant hospital where it failed to meet its burden of demonstrating that that non-party off-site radiologist who allegedly committed the underlying malpractice was not under its control or its ostensible agent); Halkias v. Otolaryngology-Facial Plastic Surgery Associates, P.C., 282 AD2d 650, 651 (2d Dept 2001)(holding that “the mere showing that [the pathologist] is employed by another entity is insufficient to entitle [defendant hospital] to summary judgment” where triable issues of fact exist as to the degree of control the hospital exercised over the pathologist despite being employed by another entity). And, “[i]n the context of evaluating whether a doctor is the apparent agent of the hospital, a court should consider the attendant circumstances...to determine if the patient could properly believe that the physician was provided by the hospital.” Sampson v. Contillo, 55 AD3d 588, 590 (2d Dept 2006)(internal citations and quotations omitted); see also, Dragotta v. Southampton Hosp. 39 AD3d 697, 699 (2d Dept 2007).

Under the above standards, assuming *arguendo*, that Cortland submitted sufficient evidence to establish that the pathologists were not its employees, it has not met its burden of showing that it is not vicariously liable for any negligence by the pathologists. Specifically, Cortland has failed to submit evidence establishing, as a matter of law, that Dr. Shang and Dr. Wang were not under the Hospital’s control and/or ostensibly acting as its agents in providing its services to plaintiff. In this connection, the court notes that the record shows that the pathology lab was located Cortland, the equipment and supplies were provided by Cortland, Dr. Shang attended various quality assurance and other meetings at the Hospital, the Hospital was involved in writing policies for the pathology lab, had control over designation of titles at the lab and required compliance with applicable laws and regulations.

With respect to whether Dr. Wang, Dr. Shang and the pathologist lab were apparent agents of Cortland, Cortland fails to meet its burden of showing plaintiff “could not have reasonably

believed that [the pathologists were] acting at the hospital's behest.” Chapman v. Tovar, 170 AD3d 518, 518 (1st Dept 2019); see also Malcolm v. Mount Vernon Hospital, 309 AD2d at 706 (1<sup>st</sup> Dept 2003) (affirming trial court's denial of summary judgment to defendant hospital in the absence of a showing that plaintiff “could not have reasonably believed that [the defendant doctor] was acting the hospital's behest”) (internal citation and quotation omitted). In this connection, plaintiff testified that names Dr. Wang and Dr. Shang were unfamiliar to him, and were never mentioned to him with regard to his medical care. (Plaintiff EBT at 6-10; 137-138). In addition, Dr. Shang testified that Cortland medical patients did not have the opportunity to select which pathologists reviewed their specimens once the specimens were sent by the referring physician (Shang EBT at 87-88). Notably, the pathology lab used Cortland’s letterhead in reporting the pathology results.

Accordingly, Cortland has failed to establish that it cannot be held vicariously liable as a matter of law for the alleged malpractice in connection with the failure to properly interpreted plaintiff’s biopsy specimen, nor can it be determined on this record whether Dr. Wang is solely responsible for the alleged medical malpractice.<sup>7</sup>

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<sup>7</sup> The cases cited by Cortland are factual distinguishable and not controlling here. Thus, for example, in Hylton v. Flushing Hosp. & Medical Center, 218 AD2d 604 (1<sup>st</sup> Dept 1995), ly denied 87 NY2d 807 (1996), the First Department held that the defendant landlord could not be held liable for the alleged malpractice of defendant physician who leased the premises for a medical clinic and that plaintiff’s subjective belief that the landlord operated the clinic was insufficient to raise an issue of fact. And, in Schiffer v. Speaker, 36 AD3d 520 (1<sup>st</sup> Dept 2007), the First Department upheld the trial court’s directed verdict in favor of a defendant eye treatment center on the issue of vicarious liability based on the jury’s factual determination that the defendant doctor was not the eye treatment center’s ostensible agent. In Teer v. Queens Long Island Medical Group, 303 AD2d 488, 490 (2d Dept 2003), the Second Department found that the defendant Medical Group was entitled to summary judgment as there was “no evidence that [the Medical Group] exercised any control” over the defendant laboratory or defendant doctor performing the laboratory work, or that was a basis for plaintiff “to reasonably believe that the Medical Group performed laboratory services.” In contrast, as noted above, here, Cortland has not established as a matter of law that it lacked control over the laboratory at issue, and the record

The record also raises issues of fact as to the degree of control that Cortland exercised over the P.C. and as to Cortland's liability based on a theory of apparent or ostensible agency, and thus plaintiffs and Dr. Kooi have failed to establish Cortland's vicarious liability as a matter of law.

The remaining issues concern the cross motions by plaintiff and Dr. Kooi seeking summary judgment as to liability on the malpractice claim alleging that Cortland, through its Department of Pathology Laboratory and Dr. Wang and Dr. Shang, departed from accepted standards of medical practice in failing to diagnose plaintiff with Hodgkin's lymphoma based on an examination of plaintiff's biopsy specimen, and that such departure was a substantial factor in causing Mr. Alvarez's injuries.

In support of their cross motion, plaintiffs submit the affirmations of two experts. The first expert, Steven I. Hajdu, M.D., is a physician licensed to practice medicine in New York State, who is Board Certified in Anatomic and Clinical Pathology. Dr. Hajdu opines that "based upon my microscopic examination of the [subject] pathology slides ... that these pathology slides demonstrated classic findings of Hodgkin's Lymphoma [and that] the [SUNY report] regarding the flow cytometry studies performed there ruled out non-Hodgkin's Lymphoma, specifically informed Cortland that it should do further correlation to rule out Hodgkin's Lymphoma, because of the presence of large cells on the touch imprint." Dr. Hajdu further opines, to a reasonable degree of medical certainty, that the diagnosis in the pathology report of "Lymph Node with reactive Lymphoid hyperplasia... was incorrect and the diagnosis should have been Hodgkin's Lymphoma, which is a cancer of the lymphatic system that should be diagnosed at the earliest

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raises factual issues as to whether plaintiff's reasonable belief that the laboratory was acting on behalf of Cortland.

possible date to avoid morbidity and mortality to the patient...[and that] in [his] experience, Hodgkin's Lymphoma is readily diagnosed microscopically, even by Residents in pathology." He opines that "the failure to diagnosis Hodgkin's Lymphoma...was a misdiagnosis and a departure from good and accepted medical practice on the part of Dr. Wang, Cortland and its Department of Pathology under whose auspices, Dr. Wang signed the report."

Dr. Hajdu also opines that the misdiagnosis "was a particularly glaring departure," given the "specific recommendation contained in the [SUNY report that] ... essentially informed Cortland...that the pathology specimen needed to re-examined. However, there is no documentation that this follow-up recommendation for correlation was ever appreciated by any of the staff at Cortland...or performed by either Dr. Wang...or Dr. Shang."

Plaintiffs also submit the affirmation of Paul Bader, M.D., who is a physician licensed to practice medicine in the State of New York, and is Board Certified in Internal Medicine and Oncology. Upon reviewing Alvarez's medical records, and the affirmation of Dr. Hajdu, Dr. Bader opines to a reasonable degree of medical certainty, that the departures identified in Dr. Hajdu's affirmation are each a substantial factor in causing [plaintiff's] injuries [and that] these departures denied Mr. Alvarez a substantial possibility of a better outcome and were a substantial factor in causing Mr. Alvarez's spinal cord compression, resulting [in] paraplegia, impaired bladder control, ..and the sequelae of the Stage IV disease and his paraplegia." He further opines that "if Mr. Alvarez's Hodgkin's Lymphoma had been timely and properly diagnosed in September 2012, accepted standards of care would have required that he received an immediate referral to an oncologist for treatment [and that] [t]he failure on the part of Dr. Wang and the Cortland Department of Pathology to diagnose Hodgkin's Lymphoma prevented Mr. Alvarez from receiving this treatment at the earliest possible time, before progression to Stage IV, with

central nervous system involvement.” As for causation, he opines that “[t]he compression of the spinal cord occurred as a result of the progression of his disease caused permanent damage to the cord and, ultimately, his severe and permanent neurological impairments....”

In support of his cross motion, Dr. Kooi submits the affirmation of a physician who is licensed to practice medicine in the State of New York and is Board Certified in Anatomic Pathology and Clinical Pathology, and whose identity is redacted. The expert states that he obtained the pathology specimens originally excised from Mr. Alvarez on September 10, 2012 from Cortland, and the specimens excised from plaintiff on December 6, 2013, and in 2014, from SUNY Upstate Medical University Pathology Department. The expert opines that biopsy performed on September 10, 2012 “clearly showed the presence of nodular sclerosis classic Hodgkin’s lymphoma; there were numerous atypical large binucleated cells which are morphologically consistent with Hodgkin-Reed-Sternberg (HRS) cells.” The expert opines that the failure of the pathology report to identify the Hodgkin’s lymphoma “was a departure from good medical practice for the pathologist to miss this diagnosis.” The expert notes that the Cortland pathologist “had prepared direct smear slides from the specimen at the time of the intraoperative evaluation... and noted ‘markedly large atypical cells,’ in the specimen” and opines that “these cells are cytologically consistent with HRS cells.”

As for the pathologist’s identification of the specimen “as representing only the benign condition of ‘reactive lymphoid hyperplasia’” the expert opines that “[w]hile it is true that this condition was also present in the specimen, and that the lymph nodes can become reactive for many reasons, most of which are benign, the standard of good medical practice requires additional studies to rule out malignancy before Hodgkin’s lymphoma can be totally excluded.” As for the follow up flow cytometry study ordered at SUNY Upstate Medical Center, the expert

opines that “flow cytometry is not able to rule out the presence of Hodgkin’s lymphoma ...[and] the standard of good medical practice among pathologists would require additional follow studies to definitely rule out Hodgkin’s lymphoma...which were not done at Cortland.” The expert states that “I performed immunohistochemical studies on the tissue block provided by Cortland...which confirmed the diagnosis of Hodgkin’s lymphoma.”

The expert states while the SUNY report “suggests that Hodgkin lymphoma is a possibility and should be ruled out by morphologic exam, which may include further studies (i.e. immunohistochemical studies) the SUNY recommendation was not followed, and was not even included in the pathology report.” The expert also states that “it is expected, and the standard of good medical practice, that a referring physician does, should, and will rely on the accuracy and completeness of a pathologist’s examination, interpretation of report of his findings.”

In opposition to the cross motions, Cortland submits the expert affirmation of Robert M. Zielinski, M.D., a physician licensed to practice medicine in New York State and a Board Certified in Internal Medicine and Oncology and states that he is knowledgeable with respect to, *inter alia*, the treatment and monitoring of patients who have undergone a biopsy, or have exhibited symptoms consistent with malignancy, and in connection with the standard of care in staging Hodgkin’s lymphoma, and treating and monitoring patients who have sustained cord compression as the result of an oncologic tumor. He states that his opinion is based upon his training, education and experience, his review of the pleadings, the relevant depositions, and plaintiff’s medical records, and that his opinions are stated with a reasonable degree of medical certainty.

According to Dr. Zielinski, “[a]fter a patient undergoes a biopsy to test for a potential malignancy, the patient is typically treated and monitored by internal medicine and oncology

providers [and that] ...the standard of care requires these providers to assess the patient's clinical symptoms, and provide medical intervention as these symptoms may require." In this connection, he opines that "[w]hen a patient develops symptoms that are inconsistent with the diagnosis denoted on a pathology report, there is a substantial concern for a malignancy ...[and] the standard of care requires the patient's physician to identify the cause of the symptoms in order to diagnose a malignancy or rule one out."

Dr. Zielinski states that the pathology report interpreted the growth as "a reactive lymphoid hyperplasia, or a benign reactive process, ...the reactive process is a transient event that occurs temporarily, for a period up to several weeks [after which] the reactive process ceases." He opines that complaints by plaintiff's wife on September 17, 2013, which triggered an examination of plaintiff's growth under the right axilla revealing an increase size of the growth was a finding "inconsistent with the pathology report, because reactive processes are transient and to do not last for over a year." He further opines that "the finding was clinically concerning for the possibility of a malignancy [and][t]he standard of care required an immediate biopsy...and an immediate referral to an oncologist for immediate and emergent evaluation." Dr. Zielinski states that Dr. Kooi failed to order and obtain an immediate biopsy and referral "which would have revealed plaintiff had Hodgkin lymphoma and resulted in treatment shortly thereafter [and that] [i]f plaintiff had been treated at this time, then plaintiff would not have sustained cord compression, and paraplegia and its sequelae...." He also opines that when plaintiff presented on November 14, 2013 for medical care and back pain radiating down his leg, with weight loss of 30 pounds on November 15, 2013, and back pain and some difficulty walking on November 25, 2013 and on and off numbness in his hands and legs, "there should have been clinical concern for

a malignancy... and the standard of care necessitated an immediate biopsy...which would have revealed Hodgkin's Lymphoma and lead to diagnosis and treatment before the onset of paralysis."

Dr. Zielinski opines that "[i]n my training and experience Hodgkin's Lymphoma metastasizes into the spinal cord and leads to cord compression and paraplegia in the less than 1% of the cases....As such, in the rare case where Hodgkin's Lymphoma leads to paraplegia, there has been typically a long course of clinical mismanagement that caused this unlikely outcome [and that] Dr. Kooi's persistent clinical mismanagement of plaintiff from September 19, 2013 to December 1, 2013 caused plaintiff to sustain cord compression and paraplegia." He opines that "it was not foreseeable or plausible that Dr. Kooi would rely on an over one-year old pathology report of September 10, 2012, despite the fact that plaintiff exhibit multiple symptoms from September 19, 2013 to December 1, 2013, that were inconsistent with the report. He further opines that "[t]he care of Dr. Kooi was the sole substantial cause of plaintiff's cord compression and paraplegia and its sequelae."

In reply, plaintiffs and Dr. Kooi variously argue that Cortland has failed to controvert evidence that its pathologist failed to diagnose plaintiff with Hodgkin's lymphoma based on plaintiff's biopsy specimen; Cortland improperly raises argument for the first time regarding causation through an Dr. Zielinski's expert affirmation and that Dr. Zielinski's opinion is conclusory and contrary to medical evidence.

"To establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach of the standard was the proximate cause of the injury." Zak v. Brookhaven Memorial Hosp. Medical Center, 54 AD3d 852, 852-853 (2d Dept 2008)(internal citations omitted). With respect to causation, a plaintiff

must show that “the alleged deviation was a substantial factor in producing the injury.” *Id* at 853 (internal citations and quotations omitted). “The issue of whether a doctor's negligence is more likely than not a proximate cause of [a plaintiff's] injury is usually for the jury to decide.” *Polanco v. Reed*, 105 AD3d 438, 439 (1<sup>st</sup> Dept 2013) (internal citations and quotations omitted).

Here, assuming *arguendo* that the expert affirmations submitted by plaintiffs and Dr. Kooi are sufficient to make a prima facie showing the failure to diagnose Hodgkin's lymphoma based on the biopsy specimens was a departure from good and accepted practice, summary judgment is not warranted as the opinion of Cortland's expert, Dr. Zielinski, raises factual issues as to causation.<sup>8</sup> Specifically, the record raises triable issues of fact as to whether the failure to diagnose a malignancy based on the specimen was a substantial factor in causing plaintiff's injuries, particularly in light of allegations, which are supported by Dr. Zielinski's opinion, that a subsequent delay by Dr. Kooi in diagnosing plaintiff was responsible for plaintiff's injuries. *See e.g. Neyman v. Doshi Diagnostic Imaging Services, P.C.*, 153 AD3d 538, 544 (2d Dept 2017)(finding that “where... oncological experts present competing opinions on causation, particularly about the progression of the disease, there is a triable issue of fact for a jury to decide”); *Schaub v. Cooper*, 34 AD3d 268 (1<sup>st</sup> Dept 2006) (issues of fact existed as to whether physician's delay in testing or referring patient to a specialist diminished plaintiff's chances of survival); *Hughes v. New York Hospital-Cornell Medical Center*, 195 AD2d 442, 444 (2d Dept 1993)(reversing trial court's dismissal of medical malpractice claim where it could not be concluded “as a matter of law that the two-week delay in testing or referring the patient to a lung specialist was not responsible for a diminished chance of survival”).

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<sup>8</sup> As Dr. Zielinski's affirmation was submitted in opposition to the cross motions and not in reply as alleged by plaintiffs, it will be considered by the court.

Accordingly, the cross motions for summary judgment as to claim for medical malpractice against Cortland are denied.

Finally, Cortland's motion for summary judgment dismissing the claim for lack of informed consent on the ground that the examination of pathology slides does not involve an invasive procedure is granted without opposition. See Janeczko v. Russell, 46 AD3d 324, 325 (1<sup>st</sup> Dept 2007) ("A failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that 'involve[s] invasion or disruption of the integrity of the body,'" quoting Public Health Law § 2805-d[2][b]).

#### CONCLUSION

In view of the above, it is

ORDERED that Cortland's motion for summary judgment is denied; and it is further

ORDERED that plaintiffs' cross motion for summary judgment is denied; and it is further

ORDERED that Dr. Kooi's cross motion for summary judgment is denied

DATED: December 2, 2020

  
**HON. JOAN A. MADDEN**  
**J.S.C**