Dennehy v Harlem Hosp. Ctr.
2020 NY Slip Op 35439(U)
July 28, 2020
Supreme Court, New York County
Docket Number: Index No. 805381/2017
Judge: George J. Silver
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Index №. 805381/2017
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10
---X
SUSAN DENNEHY as ADMINISTRATOR OF THE ESTATE OF WAI CHI LAM, and CHUNG KIU KWOK

Index №. 805381/2017

Plaintiffs

-against-

THE HARLEM HOSPITAL CENTER, ***et al.***

Defendants
---X

The following papers numbered 1 to 3 were read on this motion for (Seq. No. 003) for **SUMMARY JUDGMENT** (*see* CPLR §2219 [a]):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed No(s). 1
Answering Affidavit and Exhibits No(s). 2
Replying Affidavit and Exhibits No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order of the court.

Dated: July 28, 2020

Hon.
GEORGE J. SILVER J.S.C.

1. CHECK ONE............... ☐ CASE DISPOSED IN ITS ENTIRETY ■ CASE STILL ACTIVE
2. MOTION IS.................... ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10
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SUSAN DENNEHY as ADMINISTRATOR OF THE ESTATE OF WAI CHI LAM, and CHUNG KIU KWOK

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Plaintiffs

-against-

THE HARLEM HOSPITAL CENTER, *et al.*

Defendants
---X

HON. GEORGE J. SILVER:

With the instant motion, defendants NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("NYCHHC") s/h/a THE HARLEM HOSPITAL CENTER ("Harlem Hospital"), THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION'S HARLEM HOSPITAL CENTER, HARLEM MEDICAL ASSOCIATES, P.C., PHYSICIAN AFFILIATE GROUP OF NEW YORK, P.C., JOHN CLARK, M.D. ("Dr. Clark"), ALVIN ADELL, M.D. ("Dr. Adell"), THOMAS BYRNE, M.D. ("Dr. Byrne"), LEAGUE AHMED, M.D. ("Dr. Ahmed"), and BRIAN DONALDSON, M.D. ("Dr. Donaldson") (collectively hereinafter referred to as "defendants"). move for summary judgment (CPLR §3212) and an order dismissing the complaint of plaintiff SUSAN DENNHEY ("plaintiff"), as administrator of the estate of CHUNG KIU KWOK ("decedent"), as against them. Plaintiff opposes the motion.

BACKGROUND AND ARGUMENTS

Decedent arrived at Harlem Hospital on August 1, 2016 after delivering her son at home. Upon decedent's arrival, it was determined that she had retained her placenta following delivery. Correspondingly, decedent reported that she had suffered unknown vaginal blood loss while at home. Decedent continued to experience vaginal bleeding following her admission. As a consequence, decedent was promptly taken to the obstetrical operating room (OB OR) to deliver her retained placenta via dilatation and curettage.[1] There, she experienced low blood pressures, and was supported by anesthesia throughout with blood products and medication. Her blood pressure stabilized for about an hour in the OR, and she was deemed stable for transfer to the ICU with a normal blood pressure of 117/77. Once in the ICU, decedent's blood pressure dropped suddenly and a massive transfusion protocol was commenced. Lab results from blood draws in the ICU showed that decedent's hemoglobin and hematocrit continued to drop despite the massive transfusion protocol and a decision was promptly and timely made to transfer decedent to the OR

[1] a surgical procedure involving dilatation of the cervix and curettage of the uterus, usually performed during the removal of cysts or tumors.

for an exploratory laparotomy.[2] During the exploratory laparotomy, it is believed that decedent had suffered a catastrophic dissection/rupture of her aorta, an extremely rare occurrence in a young, healthy pregnant patient. Thereafter, decedent suffered cardiac arrest, and following a brief resuscitation, passed away. Decedent's autopsy revealed that she suffered significant internal bleeding, suspected to be a possible aortic dissection with subsequent rupture and diffuse retroperitoneal hemorrhage.

In support of the instant motion, defendants annex affirmations from experts in maternal fetal medicine, anesthesiology, and vascular surgery, who all opine that defendants care was appropriate and met the standard of care in all respects.[3] Specifically, defendants' experts all opine that the suspected aortic dissection/rupture was an extremely rare complication following a delivery in an otherwise healthy woman and that it was reasonable to surmise that decedent's change in status and drop in blood pressure were due to significant blood loss from postpartum hemorrhage and that there was no delay in diagnosing the aortic dissection/rupture. Further, defendants' experts opine that by the time it became apparent that decedent may be suffering bleeding from a source other than postpartum hemorrhage, decedent's aorta had already ruptured and the catastrophic nature of this injury meant there was nothing defendants could have done to save her life despite providing the best possible care.

In opposition, plaintiff argues that defendants have failed to meet their burden as the record bears substantial proof that decedent's internal bleeding was evident for hours prior to her death. In addition, plaintiff contends that defendants failure to recognize and heed multiple red flags allowed, caused, and permitted decedent's death, as she was allowed to progressively bleed out during the course of no less than eight hours under defendants' care. Plaintiff highlights that other than the retained placenta, decedent was healthy, awake, alert and oriented and had no other presenting symptoms upon her arrival at Harlem Hospital. Indeed, plaintiff states that decedent "arrived at the Hospital at around 12:30pm, happy and holding her newborn baby boy." Thereafter, from the initial point of decedent's admission to around 8:00pm, plaintiff alleges that defendants failed to entertain a differential diagnosis of internal bleeding, thereby allowing decedent's condition to advance and worsen unchecked. Put plainly, plaintiff states that "[t]his is a case regarding the failure to timely and properly diagnose and treat the patient's [decedent's] internal bleeding at the defendant's Harlem Hospital."

Plaintiff underscores that the record in this case is replete with absent notes. Most glaringly, plaintiff states that defendants' own records fail to support the assumption that decedent suffered a rare aortic dissection rather than an undiagnosed internal bleed that occurs every day and is diagnosed and treated in hospitals across the county. In opposing defendants' motion, plaintiff annexes the affirmations of experts[4] who opine that the medical records in this case are replete with a multitude of errors, departures, questionable entries and lack of entries, all of which point

[2] An exploratory laparotomy involves a surgical incision into the abdominal cavity.
[3] Specifically, defendants annex the affirmations of Nancy Kirshenbaum, M.D., an OB-GYN, Allison Lee, M.D., an anesthesiologist, and William Suggs, M.D., a vascular surgeon.
[4] Plaintiff annexes the affirmations of experts in the fields of obstetrics/gynecology, anesthesiology, and vascular surgery. Pursuant to CPLR §3101(d), plaintiff opposes this motion without disclosing the names of plaintiff's expert witnesses, and has served redacted copies of the experts' affirmations with the court for *in camera* inspection.

to serious misconduct that proximately caused decedent's death. Plaintiff's experts emphasize significant gaps in the entries on decedent's chart, and an overabundance of notes completed hours after decedent's treatment as indicative of departures from accepted medical practice. Among other things, plaintiff's experts opine that decedent's physicians' failure to make entities contravenes the applicable standard of care. Illustratively, plaintiff's experts reference Dr. Clark's purported failure to obtain documented informed consent for the performance of a "manual delivery" of decedent's placenta. When questioned at his deposition about such a procedure, plaintiff argues that Dr. Clark equivocally answered the question of whether he attempted a manual delivery, and instead testified that he performed a procedure that is not recognized in the field of medicine, and which he self-titled and named a "gentle traction on the cord." As to defendants' performance of the surgery itself, plaintiff's experts emphasize that once it was extracted, the placenta was in so many pieces that it needed to be pieced together to ensure that it had been fully removed. The condition of the placenta, according to plaintiff's experts, raises issues with regard to the surgical methods employed by Dr. Clark and other physicians attending to decedent's care. Moreover, plaintiff's experts highlight that once decedent's placenta had been removed and maternal hemorrhage was no longer a viable diagnosis for her continued bleeding, it was incumbent upon defendants to determine decedent's internal bleeding was coming from another source. As decedent did not have the signs and symptoms of an aortic dissection, plaintiff's experts opine that defendants should have carefully considered other origins for decedent's bleeding. Their delay in doing so, according to plaintiff's experts, constituted malpractice that proximately led to decedent's death. Indeed, plaintiff's experts opine that it was a deviation from accepted standards of care for defendants not to consult specialists, entertain a differential diagnosis, and perform immediate exploratory surgery. In sum, considering notes from decedent's autopsy and other factors, plaintiff's experts conclude that defendants' self-assured assumption that decedent suffered an aortic dissection is misguided. Rather plaintiff's experts deduce that a series of acts of malpractice prevented defendants from fully investigating the source decedent's bleeding. Those errors, plaintiff's experts unanimously infer, proximately caused decedent's death.[5]

In reply, defendants argue that this is a classic case of second-guessing a hospital's care and treatment to infer malpractice after the fact. In defendants' estimation, plaintiff's experts woefully ignore the record in this case, and instead tailor plaintiff's opposition to unsubstantiated speculation. Defendants contend that the admissible evidence, including defendants' expert affirmations in maternal-fetal medicine, vascular surgery, and anesthesiology, establish prima facie entitlement to judgment as a matter law that plaintiff has failed to rebut. Notwithstanding the length of plaintiff's opposition, defendants' argue that plaintiff's claim that defendants failed to diagnose and treat the source of decedent's "internal bleeding" earlier is unsupported by credible evidence within the record. Defendants emphasize that plaintiff ignores the fact that an aortic dissection under the circumstances presented in this case is an extremely rare and unpredictable event. Moreover, defendants argue that plaintiff fails to rebut defendants' experts' conclusion that there was no reason to suspect an aortic dissection during the treatment at issue before the exploratory laparotomy was commenced. Although tragic, defendants reiterate that decedent's death was due to a sudden, exceedingly rare, catastrophic complication of pregnancy not suggested by her clinical course in the OR, ICU, or elsewhere. Moreover, defendants state that plaintiff's

[5] Plaintiff also infers that NYCHHC negligently hired and retained at least one of the physicians implicated in this case (Dr. Byrne), as the physician's license to practice medicine had been suspended or revoked in multiple states.

characterization of them doing nothing is contravened by the record. To be sure, defendants highlight that when hemodynamic instability occurred in the ICU, a massive transfusion protocol was started. Defendants further state that the aortic dissection and rupture were found only at the emergency laparotomy when decedent could not be stabilized. Therefore, defendants state that plaintiff's assumption that a more aggressive course of treatment could have been administered is pure conjecture.

DISCUSSION

In an action premised upon medical malpractice, a defendant doctor or hospital establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr*., 66 AD3d 999, 1001 [2d Dept. 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). Indeed, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth*., 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars do not establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108, *supra*; *Wasserman*, 307 AD2d at 226, *supra*). To be sure, the defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp*., 69 AD3d 403, 404 [1st Dept 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept 2003]).

Courts have ruled that the failure to investigate a condition that would have led to an incidental discovery of an unindicated condition does not constitute malpractice (*see Rotante vs. New York Presbyt. Hospital*, 175 AD3d 1142, 1143 [1st Dept 2019]; *see also Farris v. Duprey*, 138 AD3d 565, 566 [1st Dept 2016]["Nor is malpractice established by defendant's alleged failure to pursue a more aggressive course in treating plaintiff's anemia, by performing blood work and ultimately a D & C, which would have led to the incidental discovery of plaintiffs cancer at an earlier time"). Nevertheless, where a plaintiff's opposition is predicated upon a better outcome resulting from additional treatment "evidence of proximate cause maybe found legally sufficient

even if [plaintiffs] expert is unable to quantify the extent to which defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury" (*Gaspard v. Aronoff*, 153 AD3d 795, 796-797 [2d Dept 2017]; *see Hernandez v. New York City Health & Hospitals Corp*, 129 AD3d 532 [1st Dept 2015]; *Stewart v. Presbyterian Hospital in the City of New York*, 12 AD3d 201 [1st Dept 2004]). Above all else, the court's function in deciding a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox*, 3 NY2d 395 [1957]).

Once the defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id*. at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp*., 47 AD3d 456 [1st Dept. 2008]; *Koeppel v Park*, 228 AD2d 288, 289 [1st Dept. 1996]). To meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston*, 66 AD3d at 1001, *supra*; *Myers,* 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*). "In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude a grant of summary judgment in a defendant's favor" (*Alvarez*, 68 NY2d at 325, *supra*). However, where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative force and is insufficient to withstand summary judgment (*id*., *citing Diaz v New York Downtown Hosp*., 99 NY2d 542, 544 [2002]; *see also Foster-Sturrup v. Long*, 95 AD3d 726, 728-729 [1st Dept 2012]; *see also Gilmore v. Mihail*, 174 AD3d 686, 688 [2d Dept 2019]["affirmation of the plaintiffs' expert was conclusory and speculative, and failed to address the specific assertions made by the defendants' expert]).

"To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion [citations omitted]" (*Hofmann v Toys "R" Us-NY Ltd. Partnership*, 272 AD2d 296, 296 [2d Dept 2000]). An expert "need not be a specialist in a particular field" in order to render an expert opinion "if he [or she] nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented" (*see Joswick v Lenox Hill Hosp.,* 161 AD2d 352, 355 [1st Dept 1990]).

In this case, the parties' experts have backgrounds ranging from maternal fetal medicine to vascular surgery in an obstetrical setting, and have based their opinions on their review of the decedent's medical records, as well as the pleadings and deposition transcripts herein. Accordingly, this court finds that all parties' experts are qualified to proffer their opinions (*see Frye v Montefiore Med. Ctr*., 70 AD3d 15, 24-25 [1st Dept 2009]; *Guzman v 4030 Bronx Blvd. Assoc. L.L.C.,* 54

AD3d 42, 49 [1st Dept 2008]["whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court"]).

Turning to the merits of the parties respective submissions, the court finds that defendants' submission of deposition transcripts, medical records and expert affirmations based upon the same established a prima facie defense entitling them the summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). To be sure, defendants' experts specifically provide that defendants' care and treatment of decedent comported with applicable standards of care, and did not proximately cause decedent's death. Notably, defendants experts surmise that decedent's presenting condition did not impose upon them a duty to requisition further testing or a differential analysis. Indeed, defendants experts state that within the confines of the applicable standard of care, there was no reason to suspect aortic dissection during the treatment at issue before the exploratory laparotomy was commenced. Defendants experts further opine that decedent's death was due to a sudden, tragic, exceedingly rare, catastrophic complication of pregnancy not suggested by her clinical course in the OR through transfer to the ICU and then in the ICU, and not the result of negligence. Defendants' experts emphasize that after hemodynamic instability occurred in the ICU, defendants actions were consistent with the applicable standard of care insofar as defendants commenced a massive transfusion protocol. Under such a circumstance, defendants' experts also surmise that a CT scan was impractical and unachievable. Since decedent's aortic dissection and rupture were found only at the emergency laparotomy when decedent could not be stabilized, defendants' experts conclude, based on their reference to the applicable medical records, that defendants' actions comported with the applicable standard of care and did not proximately cause decedent's death. As defendants' experts' findings are predicated upon ample evidence within the record, the court finds that defendants have established a prima facie showing in their favor.

In opposition to defendants' prima facie showing, plaintiff raises triable issues of fact sufficient to preclude summary judgment. To be sure, plaintiff's experts plausibly explain that there was reason for defendants' to suspect a differential diagnosis of internal bleeding where decedent exhibited none of the telltale signs of an aortic dissection, including sudden severe chest or upper back pain, sudden severe abdominal pain, loss of consciousness, and shortness of breath. Moreover, plaintiff's experts opine, based on support within the record, that where unrelenting bleeding is triggered by an unknown source, care and treatment within the applicable standard of care necessitates immediate exploratory surgery to diagnose the source and etiology of the bleeding for the repair of the same. In addition, plaintiff's experts state that defendants should have solicited expert consultations, and considered performing a CT scan during decedent's initial presentation to the hospital. As such, in contrast to defendants' experts' opinions that decedent suffered a rare and undetectable aortic dissection, plaintiff's experts state that decedent had internal bleeding from an unknown source that defendants negligently failed to adequately and immediately investigate, in contravention of the applicable standard of care. That failure, in plaintiff's experts' estimation, deviated from the standard of care, and proximately caused decedent's death by reducing the possibility of a better outcome for her. Had more testing been requisitioned earlier in decedent's admission, plaintiff's experts surmise that decedent's bleeding could have been controlled before her numerous transfers and ultimate emergency laparotomy, at which point it was too late to save decedent. In conflict with defendants' experts' assessment, plaintiff's experts' opinion, also predicated upon plaintiff's experts' review of the relevant medical records and testimony, is that defendants failed to appreciate, act upon, and document origins of

decedent's internal bleeding. To be sure, plaintiff's experts disagree with defendants' expert's assessment that an aortic dissection was a sudden and unavoidable complication following decedent's delivery. Regardless of the fact that defendants contend that plaintiff's experts ignore their experts' assessments as to causation, the court finds that plaintiff's experts present a plausible contrast to the opinions espoused by defendants' experts. Specifically, plaintiff's experts' opinions raise, among other issues, questions as to whether the delay in exploring the origins of decedent's internal bleeding caused decedent's death by delaying possible intervention at an earlier juncture. While defendants contend that the failure to investigate a condition does not constitute malpractice, the applicability of that principle is limited to circumstances where a condition is completely concealed and cannot reasonably be suspected (*see Rotante*, 175 AD3d at 1143, *supra*). Here, plaintiff's experts surmise that decedent's internal bleeding was evident for hours prior to her death and defendants failure to recognize and heed the multiple signs of it, allowed, caused, and permitted, decedent's death, as she was allowed to progressively bleed out during the course of no less than eight hours under the defendants' care. Even after decedent's placenta was removed and bleeding continued, plaintiff's experts contend that defendants had an opportunity to investigate other causes of plaintiff's internal bleeding. Among other things, plaintiff's experts state that a CT scan could have been timely requisitioned and performed.

Where, as here, opposing experts disagree on material issues of fact, those issues must be resolved by the trier of fact, thereby precluding summary judgment (*Barnett v Fashakin*, 85 AD3d 832 [2d Dept 2011]; *Frye*, 70 AD3d 15, *supra*). Accordingly, summary judgment is inappropriate at this juncture with respect to plaintiff's malpractice claims.

However, plaintiff does not convincingly oppose defendants' request for dismissal of plaintiff's claims predicated on negligent hiring and retention. The law is well-settled that where an employee is acting within the scope of his or her employment, thereby rendering the employer vicariously liable for any of the employee's departures from standards of accepted medical practice under a theory of respondeat superior, a claim for negligent hiring or retention (*Weinberg v Guttman Breast & Diagnostic Inst.*, 254 AD2d 213 [1st Dept 1998]) or supervision cannot stand (*Quiroz v Zottola*, 96 AD3d 1035, 1037 [2d Dept 2012]; *Segal v St. John's Univ.*, 69 AD3d 702, 703 [2d Dept 2010]). Here, as Dr. Byrne acted within the scope of his employment, any claim for negligent hiring, retention and supervision must be dismissed as inconsistent with plaintiff's claims for vicarious liability against NYCHHC.

Moreover, a cause of action for negligent hiring is based upon the hospital's status as an employer. Such a claim requires the employer to answer for a tort committed by an employee against a third person "when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm" (*Sandra M. v. St. Luke's Roosevelt Hosp. Center*, 33 AD3d 875 [2d Dept 2006]). "The employer's negligence lies in his having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of his employees" (*id.* at 878-879). In order to prevail on a cause of action for negligent hiring and supervision, a plaintiff must establish that the employer knew, or should have known, of the employee's propensity for

the sort of allegedly improper conduct which caused the plaintiff's injury (*see G.G. v. Yonkers General Hospital*, 50 AD3d 472 [1st Dept 2008]).

Here, plaintiff and plaintiff's experts have proffered no evidence whatsoever that defendants or NYCHHC staff had a propensity to act negligently in performing any of the care at issue. Further, Dr. Byrne was fully licensed to practice medicine in the State of New York at the time of decedent's care. Plaintiff's submission of a February 2016 letter from the North Carolina Medical Board regarding the issuance of Dr. Byrne's license to practice medicine in North Carolina, as well as a nearly thirty-year-old matter against Dr. Byrne in New York are insufficient to connect those prior matters to anything related to the care that was rendered to decedent in this case. Plaintiff's submissions do not reveal that any of the care at issue in those prior cases had anything to do with diagnosing an aortic dissection or internal bleeding, or any of the other care in this matter. As such, no negligence can inferred on the part of NYCHHC in in hiring Dr. Byrne or any of the staff that were involved in decedent's treatment (*see T.W. v. City of New York*, 286 AD2d 243 [1st Dept 2001][holding that in order to create a triable issue of fact on a claim of negligent hiring, plaintiff must offer evidence showing that the employer-defendant was aware of an employee's prior conduct that was either identical to the conduct that ultimately caused plaintiff's injury or of a slightly different nature that nevertheless made plaintiff's ultimate injury foreseeable]). Accordingly, this branch of defendants' motion is granted.

Finally, plaintiff's lack of informed consent claim must be dismissed as well. Plaintiff's own description of the treatment decedent received at Harlem Hospital fails to indicate that she received anything other than emergency treatment there, which in and of itself cannot form the basis for a claim for lack of informed consent (Pub. Health Law § 2805-d[2]; *see also Connelly v. Warner*, 248 AD2d 941, 942 [4th Dept 1998]). Indeed, plaintiff's entire case appears to be predicated upon defendants developing a quicker response to the source of decedent's bleeding. Such a theory founded on swift emergency intervention is inconsistent with simultaneously asserting a claim for a lack of informed consent. Plaintiff has also failed to plead that there was "'some unconsented-to affirmative violation of the plaintiffs physical integrity'" *Martin v. Hudson Valley Assocs*., 13 AD3d 419, 420 [2d Dept 2004], *quoting Hecht v. Kaplan*, 221 AD2d 100, 103 [2d Dept 1996]; *see also Smith v. Fields*, 268 AD2d 579, 580 [2d Dept 2000]). Instead plaintiff's lack of informed consent claim has been pleaded in a lawsuit where plaintiff's primary allegation is that defendants' failed to treat decedent by improperly evaluating the cause of her vaginal bleeding; such failure is not an affirmative act, and cannot form the basis of a claim for lack of informed consent (*see* Pub. Health Law § 2805[d][2]). Finally, even if it could be found that decedent underwent some form of non-emergency treatment or diagnosis at Harlem Hospital, plaintiff failed to plead that "a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he [she] had been fully informed" (Pub. Health Law § 2805-d[3]). Moreover, there is evidence within the record that decedent's husband was appropriately advised of the risks and alternatives to all of the procedures performed on decedent. Thus, plaintiff has not adequately pleaded a cause of action for failure to obtain informed consent. Accordingly, that cause of action is dismissed, pursuant to CPLR §321 l(a)(7), for failure to state a cause of action.

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment is granted solely to the extent that plaintiff's claims based on negligent hiring and retention as well as a lack of informed consent, are dismissed; and it is further

ORDERED that defendants' motion for summary judgment is otherwise denied; and it is further

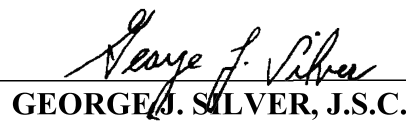
ORDERED that defendants are directed to serve a copy of this decision and order with notice of entry within 20 days of its issuance; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in defendants' favor accordingly; and it is further

ORDERED that the parties are directed to appear for a virtual pre-trial conference before the court on September 14, 2020 at 10:00 AM via Skype conferencing (invitation to follow).

This constitutes the decision and order of the court.

Dated: July 28, 2020



GEORGE J. SILVER, J.S.C.