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| <b>Henderson v Takemoto</b>                                                                                                                                                                                                    |
| 2020 NY Slip Op 35805(U)                                                                                                                                                                                                       |
| May 20, 2020                                                                                                                                                                                                                   |
| Supreme Court, Otsego County                                                                                                                                                                                                   |
| Docket Number: Index No. EF2019-576                                                                                                                                                                                            |
| Judge: Michael V. Coccooma                                                                                                                                                                                                     |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

At a Term of the Supreme Court of the State  
of New York held in and for the County of  
Otsego at the Village of Cooperstown, New  
York on the 20<sup>th</sup> day of May, 2020

PRESENT: HON. MICHAEL V. COCCOMA  
SUPREME COURT JUSTICE

Filed & Entered  
5/21/2020  
Otsego County Clerk's Office

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF OTSEGO

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VERONICA HENDERSON

Plaintiff

-against-

RICHELLE TAKEMOTO, M.D., JESSIE WELCH,  
RPA-C, MATTHEW W. JONES, M.D., DAVID A.  
FANION, M.D., BRINN M. OSTRANDER, PA,  
MICHAEL R. DIAZ, D.O., KRISTEN HERBST, D.O.,  
BASSETT HEALTHCARE NETWORK, THE MARY  
IMOGENE BASSETT HOSPITAL d/b/a BASSETT  
MEDICAL CENTER

Defendants  
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**DECISION AND ORDER**

Index No. EF2019-576

This is a medical malpractice action seeking money damages for Defendants' alleged failure to properly treat a distal radius fracture suffered by the Plaintiff when she slipped and fell on ice at her home. Defendants move to compel Plaintiff to provide Amended Bills of Particulars to each of them because of alleged deficiencies contained in the separate

Bills of Particulars that were served. Plaintiff opposes the motion on the basis that she has provided the specificity required by the CPLR and case law at this early stage of the litigation.

The record reveals that Plaintiff served nine Bills of Particulars on December 11, 2019 and that Defendants objected to the allegations by letter dated December 20, 2019. The parties exchanged multiple communications in an effort to resolve their differences without the need for motion practice. The effort was unsuccessful, but was undertaken in good faith and the present motion was filed by Defendants.

Both parties agree that the purpose of a Bill of Particulars is to amplify the pleadings, limit the proof and prevent surprise at trial. Meyers v. Community Gen. Hospital of Sullivan County, 51 AD3d 1359 (3<sup>rd</sup> Dept. 2008). Rule 3043 of the CPLR requires a Bill of Particulars in a personal injury action to specify the date and approximate time of the occurrence; its approximate location; and a general statement of the acts or omissions constituting the negligence claimed. Courts have repeatedly held that a Bill of Particulars need not provide evidentiary material or information to be gleaned from expert disclosure or testimony. Felock v. Albany Med. Ctr. Hospital, 258 AD2d 772 (3<sup>rd</sup> Dept. 1999); Neissel Rensselaer Polytechnic Inst., 30 AD3d 881 (3<sup>rd</sup> Dept. 2006). Each Defendant is entitled to a Bill of Particulars that clearly details the specific acts of negligence attributed to them individually. Felock, supra; Hayes v. Kearney, 237 AD2d 769 (3<sup>rd</sup> Dept. 1997); Stoddard v. New York Oncology Hematology, P.C., 172 AD3d 1504 (3<sup>rd</sup> Dept. 2019). Courts have broad discretion in determining if a Bill of Particulars provides the required specificity.

From a complete review of the record, I find that Plaintiff's Bills of Particulars are

deficient in certain respects. There are nine different Defendants in this case. Seven are individuals and two are institutions. The individual Defendants are a mixture of MD's, DO's and PA's with various specialties represented including emergency medicine, radiology and orthopedic surgery. Yet, Plaintiff sets forth identical claims of negligence against each Defendant regardless of the specialty or the provider level of the particular Defendant. Plaintiff's counsel claims it is appropriate and necessary to make these identical claims because "several of the Defendants departed from the standard of care in similar ways on different dates." He also contends that he needs to conduct depositions to clarify the function of each individual Defendant beyond what is reflected in the medical records. Additionally, counsel argues that since he can only amend the Bills of Particulars once without leave of court, he must wait to amend after depositions are conducted and issues are clarified.

I find Plaintiff's position untenable in light of the Third Department's recent decision in Stoddard. The Appellate Division reiterated the long standing rule that a Bill of Particulars will be deemed insufficient where there are several Defendants and the Plaintiff serves Bills of Particulars with "essentially identical" responses "even though it seems obvious that the role[s] of the [several] defendants differed." (Quoting Batson v. LaGuardia Hospital, 194 AD2d 705 at 706 [2<sup>nd</sup> Dept. 1993]). There can be little doubt that the roles of the various medical specialties involved in Plaintiff's care differed and even less doubt that the roles of the medical doctors differed from that of the mid-level providers. Therefore, Plaintiff must amend the Bills of Particulars to "clearly detail the specific acts of negligence attributed to each defendant" (quoting Hayes, supra at 769) because "each defendant is entitled to a bill of particulars that narrows the issues sufficiently to permit a reasonable defense" (quoting Hayes,

*supra* at 770). Plaintiff's concern about being allowed only one amended pleading without leave of court is unfounded given the fact that amendments are freely granted by the Courts of this state particularly when new information is learned through ongoing discovery.

In Stoddard, *supra*, the Appellate Division also addressed the improper use of phrases such as "including but not limited to" or "among other things" in a Bill of Particulars. Such phrases are improper because they destroy a Bill of Particulars most essential functions. The Bills of Particulars served by Plaintiff are replete with the type of vague and overly broad phrases found to be improper in Stoddard and many cases before it. Plaintiff must amend the Bills of Particulars to eliminate the improper phrases such as "and at all times thereafter"; "and continuing onwards"; "and all imaging taken thereafter"; "and at all subsequent visits"; "and thereafter"; "and continuing forward/onward"; and "otherwise were negligent, careless and reckless and/or deviated from the standard of care and treatment of Plaintiff on January 31, 2018 and continuing forward/onward."

I have considered the remaining arguments made by defense counsel regarding other alleged deficiencies in the Bills of Particulars and have found them unavailing. If the Bills of Particulars are amended as directed herein, Defendants will have sufficient information from the pleadings and from their inherent knowledge of the care and treatment they rendered to Plaintiff to prepare a defense and conduct depositions.

Therefore, it is hereby

ORDERED, that Defendants' Motion to Compel is granted to the extent set forth in this Decision; and it is further

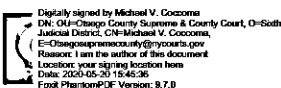
ORDERED, that Plaintiff serve Amended Bills of Particulars in conformity with this Decision within 45 days of service of this Decision and Order with Notice of Entry; and it is further

ORDERED, that failure of Plaintiff to serve the Amended Bills of Particulars as directed herein will allow for further motion practice by Defendants to determine the proper sanction or remedy, including preclusion or dismissal of the action, to be imposed for Plaintiff's failure to comply with this Decision and Order.

THIS SHALL CONSTITUTE THE DECISION AND ORDER OF THE COURT.

Dated: May 20, 2020  
at Cooperstown, New York

ENTER

Michael V. Coccoma  
  
Digitally signed by Michael V. Coccoma  
DN: cn=Otsego County Supreme & County Court, o=Sixth  
Judicial District, cn=Michael V. Coccoma,  
e=Ccocomam@nyscourts.gov  
Reason: I am the author of this document  
Location: your signing location here  
Date: 2020.05.20 16:45:36  
First PersonPDF Version: 9.7.0

Hon. Michael V. Coccoma  
Supreme Court Justice

To: Attorneys of Record via NYSCEF

The following documents upon which this Decision and Order is based have been filed in the Office of the Otsego County Clerk:

1. Notice of Motion dated March 11, 2020
2. Attorney Affidavit executed by Molly C. Casey, Esq. on March 11, 2020 along With Exhibits A – H
3. Memorandum of Law signed by Molly C. Casey, Esq. on March 11, 2020
4. Attorney Affirmation signed by Peter C. Papayanakos, Esq. on April 30, 2020 along with Exhibit A
5. Reply Affirmation signed by Molly C. Casey, Esq. on May 6, 2020