

<b>Clifford v White Plains Hosp. Med. Ctr.</b>
2022 NY Slip Op 33416(U)
October 3, 2022
Supreme Court, New York County
Docket Number: Index No. 805010/2019
Judge: Erika M. Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ERIKA M. EDWARDS PART 10M**

*Justice*

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MICHAEL CLIFFORD and JESSICA CLIFFORD,  
  
Plaintiffs,

- v -

WHITE PLAINS HOSPITAL MEDICAL CENTER, a/k/a  
WHITE PLAINS HOSPITAL, RAFAEL TORRES, M.D.,  
DEAN STRAFF, M.D., THE HOSPITAL FOR SPECIAL  
SURGERY PHO, INC., a/k/a HOSPITAL FOR SPECIAL  
SURGERY, JAMES WYSS, M.D., JOHN DOES 1-10,  
BEING FICTITIOUS NAMES OF DOCTORS, NURSES OR  
OTHER PERSONNEL WHO TREATED PLAINTIFF  
MICHAEL CLIFFORD AT WHITE PLAINS HOSPITAL AND  
HOSPITAL FOR SPECIAL SURGERY, THE REAL  
IDENTITIES OF SAID DEFENDANTS BEING UNKNOWN  
TO PLAINTIFFS,

Defendants.

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INDEX NO. 805010/2019  
  
MOTION DATE 01/24/2022,  
01/24/2022  
  
MOTION SEQ. NO. 002, 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 116, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 156, 157

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 155

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and oral argument held before this court on July 18, 2022, the court grants in part Defendants White Plains Hospital Medical Center, a/k/a White Plains Hospital’s (“WPH”), Rafael Torres, M.D.’s (“Dr. Torres”) and Dean Straff, M.D.’s (“Dr. Straff”) motion for summary judgment dismissal of Plaintiffs Michael Clifford’s (“Mr. Clifford”) and Jessica Clifford’s (“Ms. Clifford”) (collectively, “Plaintiffs”) complaint, filed under motion sequence 002, to the extent that the court grants the portion of the motion seeking dismissal of

Plaintiffs' second cause of action for negligent hiring and supervision, but denies the remainder of the motion.

The court grants in part Defendants James Wyss, M.D.'s ("Dr. Wyss") and The Hospital for Special Surgery Pho, Inc., a/k/a Hospital for Special Surgery's ("HSS") motion for summary judgment dismissal of Plaintiffs' complaint, filed under motion sequence 003, to the extent that the court grants the portion of the motion seeking dismissal of Plaintiffs' second cause of action involving negligent hiring and supervision, but denies the remainder of the motion.

Plaintiffs brought this medical malpractice, negligent hiring and supervision, and loss of consortium action against Defendants WPH, Dr. Torres, Dr. Straff, HSS and Dr. Wyss (collectively "Defendants") involving Defendants' alleged negligent care and treatment of Mr. Clifford, which included Defendants' failure to timely and properly diagnose and treat a cervical spine epidural abscess caused by MRSA, requiring emergency surgery, which resulted in nerve damage, paralysis and left Mr. Clifford wheelchair dependent.

Mr. Clifford, who was 45 years old, was treated in the emergency room at WPH on October 2, 2017, treated by his chiropractor, Dr. Richard Hess, on October 3, 2017 and October 5, 2017, and at HSS on October 5, 2017. Mr. Clifford had a lumbar MRI on October 6, 2017, which was negative for abscesses or fluid collections. After returning home from the MRI, Mr. Clifford began experiencing shortness of breath and difficulty moving his arms and legs, so he was taken to Good Samaritan Hospital. At Good Samaritan Hospital he complained of full body numbness, immobility and respiratory failure. A cervical MRI revealed that he had mass versus fluid collection in his epidural space at the C2 level. Additional follow up tests and examinations revealed that Mr. Clifford had a cervical spine epidural abscess which compressed his spinal nerves and sepsis secondary to MRSA. Emergency surgery was conducted to evacuate the

abscess, but Mr. Clifford was or remained paralyzed following the surgery. His upper mobility improved, but he remains dependent on the wheelchair.

Plaintiffs allege in substance that Defendants departed from the standards of good medical care by failing to timely and properly diagnose and treat Mr. Clifford's cervical spine epidural abscess, failing to appreciate, treat, monitor and observe his constant, unbearable, radiating back pain and failing to appreciate abnormal blood and urine test results. Plaintiffs further allege that Defendants failed to order spinal surgery, infectious disease consultations and radiological testing, which caused a delay in diagnosing and treating Mr. Clifford's cervical epidural MRSA abscess resulting in his injuries.

Defendants WPH and Drs. Torres and Straff now move under motion sequence 002 for summary judgment in their favor and for dismissal of Plaintiffs' complaint. They rely on the expert affirmations of Dr. Andy S. Jagoda and Dr. William Mandell and argue in substance that there were no departures from standards of good medical practice committed by Dr. Torres, Dr. Straff, or any other staff member at WPH and there is no proximate causal connection between the treatment rendered and Mr. Clifford's alleged injuries.

Defendants WPH and Drs. Torres and Straff further argue in substance that the medical records demonstrate that Mr. Clifford only complained of right lower back pain after sleeping wrong after kickboxing two days earlier. He never complained of cervical pain, like tenderness in his neck, shoulder or upper back areas, never had any neurological symptoms and never exhibited any signs or symptoms of a cervical spinal epidural abscess or systemic infection while being treated at WPH, nor in the days following his discharge. Defendants WPH and Drs. Torres and Straff argue that Mr. Clifford denied having fever, chills, nausea, urinary symptoms, urinary or bowel incontinence, penile numbness, focal weakness, sensory loss, or any prior history of

similar pain. During neurological examinations, he was found to be within normal range of motion and had no neurological deficits. Therefore, Defendants WPH and Drs. Torres and Straff argue that there was no need for them to perform blood tests, refer Mr. Clifford to other specialists, order an MRI on his cervical spine, nor order any additional testing. They further argue that it was appropriate for Mr. Clifford to have been prescribed pain medication and that they appropriately discharged him with proper follow up instructions.

Additionally, Defendants WPH and Drs. Torres and Straff further argue that based on Mr. Clifford's symptoms, they properly treated him and diagnosed him as having sciatica on his right side and his symptoms improved upon discharge. Additionally, they argue that after Mr. Clifford was discharged from WPH, co-Defendant Dr. Wyss and Dr. Hess, also made the same diagnosis and found that there were no symptoms of infection and/or a spinal abscess. Therefore, Defendants WPH and Drs. Torres and Straff argue that there were no departures on their part and no proximate cause of Mr. Clifford's alleged injuries.

Defendants HSS and Dr. Wyss, who was employed by HSS, now move under motion sequence 003 for summary judgment in their favor and for dismissal of Plaintiffs' complaint. They rely on the expert affirmations of Dr. Christopher G. Gharibo and Dr. Alan A. Pollack and argue in substance that Dr. Wyss conformed to the applicable standard of care in his treatment of Mr. Clifford and that his treatment was not the proximate cause of Mr. Clifford's alleged injuries. They further argue that since Dr. Wyss has no liability for Mr. Clifford's injuries, HSS cannot be held vicariously liable for Dr. Wyss' treatment of Mr. Clifford, that Plaintiffs' claims for negligent hiring and credentialing and their claims for loss of consortium must be dismissed.

Dr. Wyss and HSS further argue in substance that the medical records demonstrate that Mr. Clifford did not exhibit any signs or symptoms of having an infection, cervical spine

epidural abscess, cervical pain or neurological disfunction. Defendants Dr. Wyss and HSS argue that Mr. Clifford only complained of right lower back pain which radiated to his right thigh from sleeping wrong after kickboxing. They argue that an examination of Mr. Clifford's cervical spine was normal and that Dr. Wyss appropriately diagnosed Mr. Clifford with acute right-sided low back pain with right-sided sciatica, myalgia and muscle spasm. Dr. Wyss' notes indicated that he thought it was likely that Mr. Clifford had a lumbar disc herniation. They further argue that Dr. Wyss appropriately gave Mr. Clifford a trigger point injection to his right lumbar paraspinal muscles, not in his spine, and prescribed a different pain medication and ordered a lumbar MRI.

Defendants Dr. Wyss and HSS further argue that the evidence demonstrates that Mr. Clifford presented to Dr. Wyss with all the classic signs and symptoms of severe radiculopathy/sciatica. Therefore, he had no reason to diagnose, or even suspect, that Mr. Clifford had a cervical epidural abscess or infection in his cervical region. Additionally, Defendants Dr. Wyss and HSS argue that the evidence demonstrates that Dr. Wyss' treatment and in particular, the trigger point injection, could not have caused Mr. Clifford to develop, nor exacerbate, the abscess in the cervical epidural space. They further argue that Mr. Clifford's epidural abscess was caused by MRSA, which was transient bacteria that entered his body, and which was unrelated to the trigger injection.

In reply to both motions, Drs. Torres, Straff and Wyss argue in substance that Plaintiffs failed to raise any triable issues of fact, they misstate the facts and inappropriately use hindsight reasoning. Drs. Torres and Straff also argue that Plaintiff's emergency medicine expert lacks the qualifications to opine on Dr. Wyss' alleged departures from the standard of care. Dr. Wyss argues that Plaintiffs' experts raised self-serving alternative facts that directly contradicted Plaintiffs' testimony.

Plaintiffs oppose both motions and rely on the expert affirmations of Dr. Mark Silverberg and Dr. Mitchell Blass. Plaintiffs argue in substance that Mr. Clifford presented to Drs. Torres, Straff and Wyss with additional complaints other than pain in his right lower back. Plaintiffs argue that Defendants Drs. Torres, Straff and Wyss departed from the standards of good medical care by failing to appropriately perform a differential diagnosis that included infection/spinal epidural abscess as a potential cause of Mr. Clifford's symptoms and failing to order appropriate tests, like imaging studies or routine bloodwork, to confirm or rule out each potential condition beginning with the most dangerous condition. Plaintiffs further argue that Drs. Torres, Straff and Wyss did not attempt to determine the cause of Mr. Clifford's pain and they ignored abnormal diagnostic test findings. They misdiagnosed him with sciatica due to a herniated disc and administered high-dose narcotics, anti-inflammatories and sedatives. Plaintiffs further argue in substance that if Drs. Torres, Straff and Wyss had properly performed such differential diagnosis, then they could have and should have timely diagnosed and treated Mr. Clifford's MRSA infection and cervical epidural abscess before the abscess had progressed to cause irreversible paralysis to Mr. Clifford's upper and lower extremities.

Plaintiffs further argue in substance that on October 2, 2017, Mr. Clifford presented in the emergency room of WPH with signs and symptoms consistent with a potential infection/spinal epidural abscess which included, but was not limited to, tenderness and swelling of his back, borderline fever, tachycardia, hypertension and severe, unbearable lumbar pain which radiated down to the front of his thigh. Plaintiffs argue in substance that on October 5, 2017, Mr. Clifford presented to Dr. Wyss with red-flag signs and symptoms consistent with a potential spinal epidural abscess including, but not limited to tenderness of the back, decreased range of motion of the cervical and lumbar spines, severe, excruciating spinal pain radiating

through the right hip and thigh that had progressed to neurological dysfunction in the lower extremity, which included weakness and diminished reflexes. Plaintiffs further argue that Mr. Clifford had a fever and since Dr. Wyss failed to take his temperature, Dr. Wyss could not know whether or not Mr. Clifford had a fever. Therefore, Plaintiffs argue that all three doctors had the opportunity to diagnose Mr. Clifford with the infection and abscess, but they failed to do so because they failed to appropriately perform a differential diagnosis.

Plaintiffs further argue that if Drs. Torres, Straff and Wyss had performed an immediate MRI of the lumbar spine then they would have ruled out sciatica, nerve impingement, or any other problems with Mr. Clifford's lumbar spine which caused his severe pain and other symptoms. Then, they would have followed up with an MRI of Mr. Clifford's cervical spine and performed bloodwork which would have led to the discovery of the abscess and MRSA infection. Plaintiffs further argue that Defendants' malpractice, including their failure to timely diagnose and treat Mr. Clifford's infection and abscess, proximately caused his injuries.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good

and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, 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 the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1<sup>st</sup> Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1<sup>st</sup> Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the 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.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

Here, the court grants in part both motions and dismisses Plaintiffs' second cause of action for negligent hiring and supervision, but denies the remainder of the motion. The court determines that Defendants met their initial burdens of demonstrating their entitlement to summary judgment in their favor as a matter of law, however, Plaintiffs raised material issues of fact to require a trial on Plaintiffs' first and third causes of action regarding medical malpractice and loss of consortium, respectively. These issues of fact include, but are not necessarily limited to, whether Drs. Torres, Straff and Wyss departed from good and accepted standards of medical care by failing to consider an infectious etiology as the cause Mr. Clifford's pain and symptoms; whether Mr. Clifford presented to them with signs and symptoms that could be consistent with an infection and/or cervical spine epidural abscess; whether they failed to appreciate abnormal blood and urine test results; whether they failed to order infectious disease consultations and appropriate tests on an emergency basis, including imaging of the lumbar and cervical spines and routine bloodwork, which caused a delay in diagnosing and treating Mr. Clifford's cervical epidural MRSA abscess; and whether their actions or inactions were a proximate cause of Mr. Clifford's alleged injuries.

The court determines that Plaintiffs failed to raise any triable issues of fact regarding their second cause of action for negligent hiring and supervision.

Therefore, the court grants Defendants' motion to dismiss Plaintiff's second cause of action for negligent hiring and supervision, but denies the remainder of both motions.

The court has considered any additional arguments raised, but not specifically discussed herein, and the court denies all additional requests for relief, not expressly granted herein.

As such, it is hereby

