Montant v Gluck
2022 NY Slip Op 35144(U)
August 31, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 005619/2011
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

TOWNSEND MONTANT, Individually and as Administrator of the Estate of Teresa Montant,

Plaintiff,

-against-

BRADLEY GLUCK, M.D., HAMPTON RADIOLOGY, P.C., EAST END RADIOLOGY, P.C., SOUTHAMPTON RADIOLOGY, P.C., NORTH FORK RADIOLOGY, P.C., JOHN HUNT, M.D., BETH JOSEPHS, P.A.C., HAMPTONS GYNECOLOGY & OBSTETRICS, P.C., PECONIC BAY MEDICAL PRIMARY CARE, P.C., PECONIC BAY MEDICAL CARE, P.C., and SOUTHAMPTON HOSPITAL,

Defendants.

Index No.
005619/2011

Motion Seq:
007 MG
008 MG
009 MD
010 MG

Decision/Order

The following electronically filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	47-73; 74-97; 98-119; 120-139;
Answering Papers.....	143-150
Reply.....	152; 154; 157; 163

Plaintiff's decedent Teresa Montant commenced this action as one for medical malpractice related to her breast cancer diagnosis. After her death from metastatic breast cancer on October 27, 2011, an action for wrongful death was commenced under Index No. 29554/2012 and thereafter consolidated under this index number by written Decision and Order of the former Hon. William B. Rebolini, J.S.C. dated September 8, 2013.

Presently, defendant Southampton Hospital moves for summary judgment dismissal of the complaint and all cross-claims (Sequence 007); defendants Gluck, Hampton Radiology, East

End Radiology, Southampton Radiology, and North Fork Radiology (the radiology defendants) collectively move for the same relief (Sequence 008), as do defendants Hunt, Josephs and Hamptons Gynecology & Obstetrics (the gynecology defendants) (Sequence 009) and defendant Peconic Bay Medical (Sequence 010).

The plaintiff opposes the gynecology defendants' motion (Sequence 009). Plaintiff submits only partial opposition to Southampton Hospital's motion on the basis that the hospital failed to make a prima facie showing that co-defendants John Hunt, Beth Josephs, and HGO were not agents, servants, or employees of the hospital; thus, plaintiff opposes only that portion of Southampton Hospital's motion asserting its alleged lack of vicarious liability for these co-defendants (Sequence 007). Plaintiff takes no position on the motions made by the radiology defendants and by Peconic Bay Medical (Sequences 008 and 010).

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (***Vega v. Restani***, 18 NY3d 499, 505 [2012]). Issue-finding rather than issue determination is the court's function upon a summary judgment motion (***Sillman v. Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404 [1957]).

"'The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage'" (***Whitnum v Plastic and Reconstructive Surgery, P.C.***, 142 AD3d 495 [2d Dept 2016], *quoting* ***Geffner v. North Shore University Hospital***, 57 AD3d 839, 842 [2d Dept 2008]). A defendant "moving for summary judgment must establish, *prima facie*, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries" (***Leigh v Kyle***, 143 AD3d 779 [2d Dept 2016], *quoting* ***Gillespie v New York Hospital Queens***, 96 AD3d 901, 902 [2d Dept 2012]). This showing must be established "through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant's treatment of the plaintiff" (***Jones v. Ricciardelli***, 40 AD3d 935, 935 [2d Dept 2007]). "'Once this showing has been made, a plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those

elements on which the defendant met the *prima facie* burden'" (***Reid v Soults***, 138 AD3d 1087 [2d Dept 2016] *quoting* ***DeGiorgio v Racanelli***, 136 AD3d 734, 737 [2d Dept 2016] [internal quotation marks and citation omitted]).

"In a cause of action to recover damages for medical malpractice which is based upon a claim of lack of informed consent, the pleadings must establish, *inter alia*, that there was some unconsented-to affirmative violation of the plaintiff's physical integrity" (***Hecht v. Kaplan***, 221 AD2d 100, 103 [2d Dept 1996]). Further, it must be established that the medical professional providing the treatment failed to disclose alternatives and failed to inform the patient of reasonably foreseeable risks associated with the treatment that a reasonable practitioner would have disclosed, that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and that the lack of informed consent is a proximate cause of the injury (***Public Health Law § 2805-d***; ***Schuck v. Stony Brook Surgical Associates***, 140 AD3d 725 [2d Dept 2016]; ***Zapata v. Buitriago***, 107 AD3d 977 [2d Dept 2013]; ***Johnson v. Staten Island Medical Group***, 82 AD3d 708 [2d Dept 2011]).

Southampton Hospital's Motion (Sequence 007)

Based upon a review of the submitted evidence, it appears that allegations of malpractice against the hospital concern care and treatment rendered to Teresa Montant from January 2005 through Mrs. Montant's passing on October 27, 2011, in addition to a claim of lack of informed consent. Apparently, most, or all the imaging studies of Teresa Montant's breasts from 2005 through 2009 were performed at the hospital, and those images were read by Dr. Gluck and Southampton Radiology. The hospital offers the expert affidavits of Dr. Axelrod and Dr. Tuvia regarding the care and treatment rendered by the hospital, Dr. Gluck, and Southampton Radiology P.C. only, and not as to any other co-defendants. The hospital asserts that the treatment rendered by the other co-defendants was performed at private facilities having nothing to do with the hospital; therefore, if there is any medical malpractice committed by those other co-defendants, it cannot be attributed to the hospital via the theory of vicarious liability.

In support of its motion, the hospital has submitted, *inter alia*, the pleadings and the testimony of Dr. Hunt, physician's assistant Josephs, and the testimony of Teresa Montant. In addition, the hospital offers the affidavits of its experts, Drs. Axelrod and Tuvia. Dr. Axelrod primarily opines about the treatment that was rendered to Mrs. Montant at the hospital following the diagnostic imaging performed on October 5, 2009 consisting of a mammogram and ultrasound that detected a suspicious finding. She addresses the claims alleging failure to timely and improperly treat and excise the mass/cancer in the patient's left breast; failure to timely and properly order, advise, recommend and perform fine needle aspiration of the mass in the left breast and/or perform a lumpectomy; failure to properly perform a bilateral mastectomy with lumpectomy, including incomplete removal of metastatic tissue and lymph nodes, and failure to utilize needle localization. Dr. Axelrod notes the undisputed fact that Teresa Montant received gynecological care from Dr. Hunt and PA Josephs at HGO, not from the hospital.

According to the submitted evidence, Teresa Montant palpated a mass in her left breast on Labor Day Weekend in 2009. She thereafter contacted HGO and saw a nurse practitioner on October 1, 2009. On October 5, 2009, Mrs. Montant presented at the hospital for the

aforementioned diagnostic imaging. Ultrasound guided biopsy was performed at the hospital on October 7, 2009 and tissue samples extracted. The pathology report disclosed invasive ductal carcinoma involving the lymph nodes. Mrs. Montant was referred to a breast surgeon who ultimately performed a bilateral mastectomy in December 2009, after Mrs. Montant was first treated with chemotherapy. Following the surgery, Mrs. Montant received more chemotherapy. Ultimately, the cancer recurred as diagnosed on a PET scan study performed in 2011.

Dr. Axelrod opines that the treatment rendered to Mrs. Montant following the October 5, 2009 radiological studies was appropriate. Two days after those radiological studies, the ultrasound guided biopsy was performed, and the invasive, triple-negative cancer diagnosed. The administration of chemotherapy prior to surgery was entirely appropriate given the size of the cancer in Mrs. Montant's left breast, as was the bilateral mastectomy. According to Dr. Axelrod, there is no evidence of an incomplete removal of the cancer as a result of the surgery, but further according to Dr. Axelrod, "a certain percentage of cancer recur and/or metastasizes to other body parts, which occurred through no fault of any of the medical care providers involved in the care and treatment of Mrs. Montant at SHH from the time that the cancer was first detected on the diagnostic left mammogram and diagnostic lab sonogram on October 5, 2009, through the time of her passing." Dr. Axelrod also states that she finds no evidence of any invasive procedure performed by any of the parties that caused any injury to Teresa Montant, and so the claim of lack of informed consent should also be dismissed.

Dr. Tuvia, a board-certified radiologist, opines about the radiology portion of the care and treatment rendered to Teresa Montant, not the clinical care and treatment rendered following the cancer diagnosis. Dr. Tuvia defers to Dr. Axelrod concerning the treatment rendered following the cancer diagnosis. Dr. Tuvia further states that her affidavit is not intended to offer any opinions regarding the care and treatment rendered by any of the co-defendants aside from the hospital, Dr. Gluck, and Southampton Radiology, P.C.

Dr. Tuvia opines that, based upon her experience in interpretation of 2D and 3D mammograms, sonograms/ultrasounds and MRIs of the breasts, plus the performance of ultrasound guided biopsies to extract tissue for pathological evaluation for cancer, she is of the opinion that the hospital and its doctors, nurses and staff did not deviate from the accepted standard of care with regard to Teresa Montant's care and treatment, and further that the hospital staff, Dr. Gluck and the other radiologists associated with Southampton Radiology, P.C. were not the proximate cause of any of Mrs. Montant's injuries.

In reaching her opinion, Dr. Tuvia specifically reviewed the reports and images for the mammograms performed in 2001, 2004, 2005, 2006, 2008 and 2009. The 2007 mammogram images were not available due to a backup error by the service provider, Fuji, but the written report of the 2007 mammogram was reviewed by Dr. Tuvia. In addition, Dr. Tuvia reviewed the images and reports from the October 5, 2009 left breast mammogram and sonogram, the ultrasound guided left biopsy performed on October 7, 2009, the bilateral breast MRIs performed on October 19, 2009 and November 23, 2009, the radiographic and ultrasound images taken in December 2009, the bone scan, and an ultrasound guided core biopsy of the left axilla performed on April 11, 2011.

The mammogram reports all stated that Mrs. Montant's breasts were heterogeneously dense, which may lower the sensitivity of mammography by limiting internal visualization. All of the reports also indicated that there were no masses, significant calcifications or other abnormalities seen in either breast, and so the findings of a "negative mammogram, BI-RADS-1 with a recommendation for further mammogram in one year" were correctly interpretations by the radiologists affiliated with Southampton Radiology, P.C. Dr. Tuvia further stated that the images were of "good technical quality, allowing for the radiologist to review the images and to make their findings and impressions." The CAD system was not available to the interpreting radiologists for the mammograms performed from 2001 to 2005, but commencing in 2006, the CAD system was utilized with respect to the mammogram images obtained in 2006 and for each subsequent mammogram performed on Teresa Montant. Dr. Tuvia further notes that all of the reports were forwarded to the gynecology practice caring for Mrs. Montant, namely HGO/Dr. Hunt/Beth Josephs, in a timely fashion immediately following the interpretation of the study. Mrs. Montant did not receive gynecological care at the hospital.

According to Dr. Tuvia, between 2001 and 2009, the standard of care did not require a radiologist to recommend an ultrasound for patients with dense breasts, nor was it the standard of care for a radiologist to inform a patient that dense breasts can reduce the sensitivity of mammography/result in false negatives/obscure cancer, and that a sonogram increases sensitivity. Dr. Tuvia states that the determination as to whether a patient with dense breasts should undergo additional tests "is left to the clinical provider, who can determine based on the patient's medical history, physical examinations, the patient's complaints, and any other information available to them as to whether such additional testing was warranted." Although Dr. Tuvia states that in 2012 or 2013 some studies have revealed that ultrasound in conjunction with annual mammography for patients with dense breasts "might have a clinical benefit," Dr. Tuvia noted that "many cancers are not visible on ultrasound," and ultrasound does not replace annual mammography. As per Dr. Tuvia's affidavit, "[t]he reason in this particular instance why the ultrasound was diagnostic of an abnormality within a breast, was because there were palpable masses that the ultrasound study could focus on [Montant's own palpation of a mass on Labor Day 2009]." Likewise, the decision to order bloodwork for the BRCA testing results is within the determination of the clinical provider, herein HGO/Hunt/Josephs.

Based upon her review of the 2006 and 2008 mammogram images and reports, both of which were, in her opinion, appropriately interpreted as being negative, the lost images from the 2007 mammogram which were lost due to the Fuji failure to properly back up the images, were correctly interpreted in the available report as "BI-RADS-1: Negative Mammogram." Like Dr. Axelrod, Dr. Tuvia also opines that, based upon the medical records, no invasive procedure is proximally related to Mrs. Montant's injuries.

Although the complaint alleges that the gynecology defendants were agents, servants and/or employees of the hospital, the hospital denied that claim in its answer, and none of the Bills of Particulars allege a claim of vicarious liability against the hospital. Moreover, the submitted deposition testimony establishes that none of the gynecology defendants (Hunt, Josephs, and Hamptons Gynecology & Obstetrics [HGO]) was employed by the hospital defendant, and none of the gynecological care and treatment prior to Teresa Montant's cancer diagnosis was rendered at the hospital.

Dr. Hunt testified that he was a shareholder in HGO in the year 2000, and HGO later combined with Women's Health Professionals in 2004 but kept the HGO name and logo since patients were familiar with HGO. When HGO combined with the other practice, Dr. Hunt became a shareholder in that LLC or PLLC. Dr. Hunt explained that it was advantageous for HGO to join with Women's Health because the practice would "get better rates from the insurance companies, for the services [ ] rendered to patients, and two, [ ] profits would be bigger because your overhead would be reduced by consolidating management and billing in one area." He further testified that Women's Health Professionals issued the paychecks to employees and administered the billing. He was paid a base salary by Women's Health and, as a partner, he received bonuses depending how the practice was doing financially. Dr. Hunt also testified that the physician's assistant, Beth Josephs, was paid her salary by the Women's Health LLC/PLLC. Beth Josephs also testified that she was paid by the practice. Teresa Montant stated that all of her treatment prior to her cancer diagnosis occurred at HGO, and not at the hospital. Accordingly, the hospital has established its *prima facie* entitlement to summary judgment as to any claim of vicarious liability asserted against it.

The testimony of the hospital employees establishes that Fuji inadvertently overwrote the images of the 2007 mammogram, but as noted in Dr. Tuvia's affidavit, she agrees with the written report of that study because the interpretation of the 2006 and 2008 mammograms were negative. Moreover, an independent cause of action alleging negligent spoliation of evidence is not recognized in New York (***Montagnino v Inamed Corp.***, 120 AD3d 1317, 1318 [2d Dept 2014]).

By and through the affidavits of Drs. Axelrod and Tuvia, plus the other submitted evidence, the hospital has established its *prima facie* entitlement to summary judgment dismissal of all claims of medical malpractice and lack of informed consent alleged against it, including any purported claims for vicarious liability.

In opposition, the plaintiff partially opposes the hospital's motion claiming that the hospital failed to refute the vicarious liability claim in its moving papers. As noted herein above, the hospital submitted overwhelming evidence that Hunt/Josephs/HGO were not employees, agents, or servants of the hospital; therefore, the plaintiff has failed to raise a triable issue of fact on this issue. Plaintiff has not submitted any evidence at all supporting a claim for vicarious liability or the acts and/or admissions of the gynecology defendants.

Aside from the foregoing, the plaintiff does not challenge the hospital's showing of its entitlement to summary judgment on the remaining claims for medical malpractice, negligence, or lack of informed consent asserted against it. Accordingly, on those issues that the plaintiff does not submit any opposition, the statements made in the affidavits of defendant hospital's experts submitted in support of the summary judgment motion are deemed admitted by plaintiff (***Kuehne & Nagel, Inc. v. Baiden***, 36 NY2d 539 [1975]; ***McNamee v. City of New Rochelle***, 29 AD3d 544 [2d Dept 2006]; ***Bell Atlantic Yellow Pages Co., v. Padded Wagon, Inc.***, 292 AD2d 317 [1st Dept 2002]; ***Schneider Fuel Oil, Inc. v. DeGennaro***, 238 AD2d 495 [2dDept 1997]).

The hospital's summary judgment motion is granted and the complaint and all cross-claims are hereby dismissed as asserted against the hospital.

The Radiology Defendants' Motion (Sequence 008)

The radiology defendants (Gluck, Hampton Radiology, East End Radiology, Southampton Radiology, and North Fork Radiology) have established their entitlement to summary judgment dismissal of the claims asserted against them through the submitted evidence, including the affidavits of their experts, Dr. Tuvia and Dr. Ruth Rosenblatt.

As discussed in detain in connection with the hospital's motion, Dr. Tuvia's affidavit established not only the hospital's freedom from liability, but she also addressed and opined that Dr. Gluck and the other radiologists associated with Southampton Radiology did not depart from any standards of care in their interpretation of the mammogram imaging, recommendation for further testing, or notification to gynecological care provider/patient, nor was there any basis for a lack of informed consent cause of action.

Further, it is also Dr. Rosenblatt's "opinion, within a reasonable degree of medical certainty that the radiologic services provided by Dr. Gluck, and the radiology groups to the plaintiff at all times conformed with accepted standards of care, and that there were no deviations from accepted standards of practice by these defendants." According to Dr. Rosenblatt, the mammography reports appropriately corresponded with the findings on the images that she reviewed in preparing her opinion affidavit. Dr. Rosenblatt keys in on the June 17, 2009 mammogram read by Dr. Gluck, "which generally appears to be the study at issue, in terms of the claims being made by the plaintiffs in this case." With regard to that study, Dr. Rosenblatt concurs that there are no masses, significant calcifications or other abnormalities seen on the images. As did the other studies, the report accurately states that Mrs. Montant's breasts are heterogeneously dense, limiting internal visualization. In Dr. Rosenblatt's opinion, "Dr. Gluck and the radiology groups, [ ] provided the proper and appropriate radiology services to Ms. Montant, and made the proper recommendations;" and "[t]here was no delay in the diagnosis of this cancer which can be attributable to any negligence by Dr. Gluck or the radiology groups, as the radiologic services provided by these defendants were at all times within the appropriate standard of radiologic care."

Like Dr. Tuvia, Dr. Rosenblatt also states that the standard of care during the relevant time period was to have interval mammograms for breast cancer screening, and that "[t]his is the standard of care even for patients who have dense breasts." She continues, stating, "[t]he standard of care, particularly at the time at issue, dictates that Ultrasound/sonograms and MRIs are not used for screening purposes in patients who have no indication for these imaging studies. That is to say, without a clinical indication, such as complaints of pain or a palpably abnormality on exam, MRIs or ultrasound is not used solely to screen a patient for cancer. Dense breast tissue is not an indication for recommending these additional tests. Moreover, from the radiologist's perspective, nothing about the images in the June 2009 mammogram would have warranted Dr. Gluck to make a recommendation for further radiologic testing at that time. It was not the standard of care for a radiologist to recommend a screening sonogram for patients with negative mammograms in 2009 in circumstances like this. There was no significant family history of breast cancer reported to Dr. Gluck, no genetic pre-disposition to breast cancer that was known

at that time, no physical complaints and no positive findings on multiple breast examinations performed over the years." She also writes, "[l]ike Dr. Gluck, none of the other radiologists interpreting Ms. Montant's mammograms recommended Ms. Montant undergo additional screening testing such and an MRI or ultrasound, and this is because it was not the standard of care to do so."

Further according to Dr. Rosenblatt, "as a radiologist, Dr. Gluck was not the patient's clinician, and his role in the care was limited to that of a consultant. From the records and the testimony (which is consistent with the custom and practice in the radiology community), Dr. Gluck had no interaction or any discussion whatsoever with Ms. Montant, and he provided no clinical care to her. His knowledge of the patient's history and prior care was limited to intake information provided, and the previous images and reports with which he compared the 2009 images. His duty as a radiologist was to properly interpret the mammogram images taken, and to accurately report these findings to the patient's clinicians, which he did. The findings were properly conveyed by Dr. Gluck to the gynecology clinicians, who would then discuss the findings with the patient and make an assessment on whether or not additional studies might be necessary."

Accordingly, the radiology defendants have established their *prima facie* entitlement to summary judgment as a matter of law.

The plaintiff takes no position regarding the motion of the radiology defendants; therefore, the plaintiff fails to raise any triable issue of fact sufficient to defeat their motion. Accordingly, the radiology defendants' motion for summary judgment is granted, and the complaint and all cross-claims are dismissed as asserted against them.

The Peconic Bay Defendants' Motion (Sequence 010)

Peconic Bay Primary Medical Care, P.C. s/h/a Peconic Bay Medical Primary Care, P.C. is undisputedly a general internal medicine practice, and it was not involved in the gynecological care rendered to the deceased plaintiff. The claims against Peconic Bay are not particularized, other than to allege that these defendants failed to timely diagnose breast cancer, to perform tests, studies and examinations, and timely and properly treat breast cancer. There are no vicarious liability claims lodged against these defendants.

In support of this motion, Peconic Bay submits, *inter alia*, the affidavit of Neal Friedberg, M.D. Dr. Friedberg, a physician board certified in internal medicine, with sub-certifications in hematology and oncology. In preparation for rendering his opinion, Dr. Friedberg reviewed Peconic Bay's records, HGO's records, the hospital's records and the records of the surgeon who performed the double mastectomy on Teresa Montant. Dr. Friedberg also reviewed the deposition testimony of Drs. Gluck and Hunt, as well as the testimony of the deceased plaintiff, that of her husband and Beth Josephs, P.A.C.

According to Dr. Friedberg, a review of the records demonstrates that Teresa Montant presented to the Peconic Bay practice for acute illnesses and/or complaints and for routine physical examinations, but that she was under the care of a gynecologist who performed yearly

pap smears and sent her for yearly mammograms. Reports related to Mrs. Montant's gynecological care were not managed by Peconic Bay, and Peconic Bay was not responsible for her gynecological care. Furthermore, according to Dr. Friedberg's review, the deceased plaintiff did not discuss the results of her mammogram reports with anyone at Peconic Bay, nor did she ever report any complaints about her left breast to Peconic Bay, and there was no indication that she had cancer in her left breast in July of 2007 or August of 2009 when she was seen at Peconic Bay for routine, general medical care. Peconic Bay did not render any care to Mrs. Montant after August 2009. Thus, Dr. Friedberg states that "[t]here is no indication that any care and treatment rendered by this facility in any way caused the plaintiff s death from metastatic cancer," and that Peconic Bay did not deviate from good and accepted practice in its care and treatment of Teresa Montant.

Accordingly, the Peconic Bay defendants have established their prima facie entitlement to summary judgment dismissal of the complaint and any and all cross-claims as asserted against them.

Plaintiff's papers submitted in response to this motion take no position regarding the motion of the Peconic Bay defendants; therefore, the plaintiff fails to raise any triable issue of fact sufficient to defeat their motion. Accordingly, the Peconic Bay defendants' motion for summary judgment is granted, and the complaint and all cross-claims are dismissed as asserted against them.

Dr. Hunt, PA Josephs, and HGO's Motion (Sequence 009)

It is alleged that these defendants departed from accepted standards of medical care starting on or about January 2005 through and including the time that Teresa Montant died on October 27, 2011. Specifically, plaintiff alleges that these defendants failed to order specific additional tests such as breast ultrasound and breast MRIs for each of the years that sheh underwent annual breast mammograms, failed to appreciate the significance of fibroglandular breast tissue and the effect such tissue has on mammography, failed to appreciate the significance of dense breasts, failed to tell Teresa Montant that she had dense breasts and that dense breasts reduce the sensitivity of mammograms, failed to tell her that additional, non-invasive testing, such as ultrasound and MRI are available for women with dense breasts, failed to recommend or perform bloodwork, order BRCA testing, diagnose left breast cancer/mass in plaintiff's left breast, perform needle aspiration, properly excise the cancer, excise all masses in the left breast, and properly care and treat the plaintiff's left breast cancer. It appears from a review of the papers that the gravamen of the claims is that these defendants departed from good and accepted standards of gynecological care by not ordering breast ultrasounds in conjunction with the mammograms ordered between January 2005 and plaintiff's last office visit with HGO, and as a result of this alleged departure, the plaintiff was caused to sustain the need for mastectomy, chemotherapy, pain and suffering, loss of enjoyment of life, and eventually, death.

In support of their motion, these defendants submit, *inter alia*, the pleadings, HGO's and the hospital's medical records for the deceased, the deposition transcripts of Teresa Montant, Dr.

Hunt, PA Josephs, and Dr. Gluck, a copy of the Breast Density Law,[1] Teresa Montant's death certificate, and the affirmations of their experts, Drs. Prince and Vinciguerra.

The submitted evidence, namely the affirmations of their medical oncology expert, Dr. Vinciguerra, and their gynecology expert, Dr. Prince, establish the defendants' *prima facie* entitlement to summary judgment dismissal of the complaint and any and all cross-claims asserted against them.

Dr. Vinciguerra advances his opinion that the cancer from which Teresa Montant suffered was the "most aggressive form of cancer" based upon the laboratory results of the biopsy performed on October 5, 2009. The biopsy results revealed invasive ductal carcinoma with lymph node involvement, triple negative breast cancer, which is not responsive to available treatments existing at the time, and a Nottingham Score of 9/9. The Nottingham score, according to Dr. Vinciguerra "reflects the existence of the most aggressive form of cancer cells," and "[t]riple negative breast cancer is the most aggressive form of breast cancer. The decedent's particular type of cancer was extremely malignant and aggressive. It is my opinion, within a reasonable degree of medical certainty, that any woman who has been diagnosed with this type of cancer has the potential to relapse quickly. There is a significantly poor overall prognosis for patients with triple negative disease, in part, because hormone therapy as a treatment is not effective. This cancer does not have receptors commonly found in breast cancer that can make it receptive to many treatments. Treatment does not respond to therapy that targets these receptors. TNBC has the worst overall survival increase and a dramatic increase in death within two years of diagnosis." Also according to the doctor, "the biology of the decedent's cancer was extremely aggressive and at an advanced stage when diagnosed, so even if it could have been diagnosed 110 days earlier [on June 17, 2009], as alleged by the plaintiff-decedent, her treatment course and life expectancy would have been the same." The sudden enlargement of plaintiff's left breast in September 2009 is established by plaintiff's own testimony and the HGO records from October 1, 2009 noting the abnormality "with sudden onset." It is apparently undisputed that this is the first occasion that the plaintiff made any complaint about her breasts of this nature to any personnel at HGO.

Dr. Vinciguerra bases his opinion that plaintiff's cancer was of more recent origin because the hospital's pathology report revealed "no tumor miscocalcifications were identified." According to Dr. Vinciguerra, "[t]his is significant because it indicates that the tumor was more recent, as older tumors develop calcifications."

In discussing the post-diagnosis treatment, Dr. Vinciguerra notes that because the chemotherapy prior to surgery had only a minimal effect on the size of the tumor, that leads him to the conclusion that plaintiff's cancer was extremely aggressive and resistant to optimal therapy. Nonetheless, he opines that Teresa Montant received appropriate and aggressive oncological treatment including neoadjuvant therapy, bilateral mastectomies, chemotherapy, and radiation treatment. The BRCA genetic testing that was eventually done revealed that plaintiff

[1] The law (Public Health Law §2404-c), which became effective in 2013 was passed after the plaintiff died. The statute mandates that providers of mammography services advise the patient if the mammogram demonstrates dense breast tissue, making it harder to find cancer on a mammogram, and to advise patients to ask their doctors if more screening tests might be useful.

did not have the BRCA gene. Moreover, according to Dr. Vinciguerra, there is not diagnostic blood test that indicates a patient was developing or was likely to develop cancer.

Regarding the issue of testing in addition to mammography, Dr. Vinciguerra state that breast ultrasound or MRI was not warranted because breast mammographies "were the gold standard of breast screening at that time."

Dr. Vinciguerra concluded that "the care and treatment rendered by the defendants, DR. HUNT, PA JOSEPHS and HG&O was not a substantial factor in causing or contributing to the decedent's death or injury. Rather, the decedent's medical course and untimely demise was caused solely by the biology of the cancer the decedent suffered from."

Dr. Prince, the defendants' expert in obstetrics and gynecology, cites to the American Cancer Society's guidelines for breast cancer screening in women in the year 2009, which do not mention of ultrasound/sonograms to be performed in conjunction with yearly mammographies. Moreover, there was no history of breast cancer in Mrs. Montant's family and there were no abnormalities detected on any mammography studies performed in the relevant time period until October 1, 2009 when plaintiff presented to HGO with an abnormal circumstance. Accordingly, the standard of care at the time, which is essentially from 2005 through the time of Mrs. Montant's death, did not require additional testing in the context of such a presentation; therefore, the moving defendants did not depart from the appropriate standard of care prevailing during the relevant time period.

Dr. Prince's review of the submitted records reveals that when the plaintiff had a complaint about her breasts between 2000 and 2004, the practice performed diagnostic tests, mammograms, sonogram and spot compressions resulting in the aspiration and treatment of right and left breast cysts. Thus, according to Dr. Prince, this record demonstrates that when the plaintiff had a breast complaint, HGO did follow up with further studies. It is further evident to Dr. Prince that aside from the cysts, the plaintiff did not make any complaints about her breasts during the time period from 2005 until October 1, 2009. Once the mass was palpated by the midwife at HGO on October 1, 2009, the plaintiff was appropriately referred for further diagnostic tests. Like Dr. Vinciguerra, Dr. Prince states that the "gold standard" for breast screening of all women at the relevant time, including those with dense breasts, was for a screening mammography only, absent a specific complaint.

Dr. Prince further comments that the mammography reports were comprehensive, and that Dr. Gluck and the radiology practice noted that the plaintiff's breasts were heterogeneously dense, but that there were no masses seen, no significant calcifications or abnormalities, and the impression was a negative mammogram. Accordingly, per Dr. Prince, Dr. Hunt, PA Josephs and HGO appropriately relied upon the radiology reports that no additional testing was required after each of those studies. Further according to Dr. Prince, dense breasts in women of childbearing age is not an abnormal finding; thus, there was no need to advise the plaintiff. Dr. Prince also is of the opinion that BRCA testing was not warranted as there was no family history of breast cancer.

Accordingly, based upon the evidence submitted by the moving defendants, including the affirmations of their experts, they have demonstrated, *prima facie*, that they did not depart from the prevailing and accepted standards of gynecological care when they treated plaintiff, nor did their treatment proximately cause her cancer; they did not delay in diagnosing her cancer and they did not cause or contribute to her death.

Concerning the cause of action for lack of informed consent, this cause of action is not viable as against the moving defendants since they did not prescribe or perform any invasive procedures or surgeries (***Hecht***, ***supra*** at 103).

In opposition, the plaintiff offers the affirmations of her experts in the fields of obstetrics and gynecology and in internal medicine/medical oncology, the June 17, 2009 radiology report for the mammogram, the letter sent to plaintiff referred to as a "lay letter," and a letter that the plaintiff wrote to Dr. Hunt during the time period when she was receiving cancer treatment.

It is undisputed that the mammography reports sent to the moving defendants each noted that the plaintiff had "heterogeneously dense breasts," which "may lower the sensitivity of mammography," and in the 2009 report it was noted that the dense breasts "limit[ed] internal visualization." It is further undisputed that the "lay letters" sent to the plaintiff did not advise her that she had dense breasts, let alone advise her of the limitations of mammography in detecting cancer in dense-breasted women, and that other types of non-invasive testing were available, such as ultrasound and MRI, that could better detect breast cancers in women with dense breasts.

The deposition testimony of Dr. Hunt further establishes that he did not recall ever having a discussion with Teresa Montant concerning her dense breast tissue, that the tissue could obscure the detection of cancer on mammogram, or that other testing was available for her presentation. PA Josephs conceded at deposition that the lay letter and the radiology report sent to HGO by the mammography provider did not contain the same information, namely because the lay letter advised that the result of the mammogram was negative, without mention of density and the fact that internal visualization was limited. Apparently, based upon the deposition testimony of the parties, the information concerning plaintiff's dense breasts was not shared with the plaintiff prior to her diagnosis of breast cancer.

In the opinion of the expert in obstetrics and gynecology, dense breast tissue, as opposed to fatty tissue, appears white upon mammography, as does cancer; therefore, dense breast tissue is "well known to obscure breast cancer on mammograms." Further according to the expert, dense breast tissue can put women at higher risk of breast cancer, and the term "heterogeneously dense" means that over 80% of the breast tissue is dense.

The expert further opines that Hunt/Josephs/HGO departed from the standard of care by failing to tell plaintiff that she had dense breasts, failing to tell her that dense breasts reduce the sensitivity of mammograms, that additional testing was available, and that the defendants failed to recommend that she undergo annual ultrasound or MRI in addition to her yearly mammograms. The expert attributes these failures to a delay in the diagnosis of plaintiff's breast cancer, the spread of the cancer, the need for surgeries and chemotherapy, and ultimately her death.

Regarding Public Health Law §2404-c, effective 2013, plaintiff's gynecological expert notes, as does this Court, that the plain language of that statute requires mammography providers to directly inform patients with dense breast tissue of the limitations of mammography, that dense breast tissue is normal, but that such tissue can make it harder to detect cancer on mammogram; therefore, the patient is encouraged to talk to "your doctor" about risk for breast cancer and if more screening tests might be useful. Plaintiff's expert states that "[b]etween 2000 and 2009 it was the duty of the referring clinicians (Hunt and Josephs), to educate their patients about their health so that patients could make informed decisions about their own medical care. That was not done in this case. The depositions of Hunt, Josephs, and the patient reveal that the defendants did not discuss the issue of breast density with the patient at any point prior to the diagnosis of late-stage breast cancer in 2009." The expert further states that "[b]efore the enactment of the inform laws in New York, it was the sole responsibility of the referring clinicians (Dr. Hunt, Beth Josephs, and [HGO]) to inform the patient of the limitations of mammography in patients who were found to have dense breasts."

Plaintiff's expert's statement that it was the clinician's/gynecological care provider's obligation to advise the patient about the issue of dense breasts, the impact of such a condition upon the sensitivity of mammography, and additional testing modalities raises the issue as to whether the gynecological defendants in this case departed from the standard of care in this regard. The expert's statements concerning the obligation of the clinician to educate the patient during the relevant time period at issue in this action are underscored by the fact that the statute was passed requiring someone (now the mammography provider) to tell the patient this important information. Prior to passage of this law, there is certainly a question as to whose obligation it was to inform the patient. Clearly it was not statutorily mandated that the mammography provider do; therefore, the material question exists as to whether it was the gynecological care provider's obligation, since these defendants received the full radiological reports from the mammography provider stating that Teresa Montant had dense breasts, and Teresa Montant regularly visited Hunt, Josephs, and HGO over the period of nine years but never had any contact with the mammography provider. The law also underscores the expert's opinions as to the apparent limitations of mammography in detecting cancer in women with dense breasts, the existence of more screening tests, and the ultimate obligation of the clinician to determine if additional screening is warranted.

Plaintiff's gynecological expert also pines that had Teresa Montant been so informed about her dense breasts and the additional available screening tests, that her cancer would have been detected, diagnosed, and treated sooner, thereby resulting in less surgery, reduction or elimination of the need for chemotherapy, and a longer life.

Plaintiff's oncological expert also states that the gynecological defendants violated the standard of care thus depriving Teresa Montant of the opportunity for curative therapy "without the morbidity she otherwise experienced and eventually her dying as a result of progressive metastatic disease." The oncology expert, like the gynecology expert, states that women who are diagnosed with dense breasts must be informed of that fact and that this condition can make it difficult to detect cancer by mammogram at an early stage. The expert also states what is undisputed, which is that Teresa Montant was never told by the gynecological defendants that

she had dense breasts, that dense breast tissue reduces the sensitivity of mammograms, and she was never offered additional testing with ultrasound or MRI. According to this expert, if the additional testing in the form of ultrasound or MRI had been performed in 2008 or June 2009, the cancer would have been detected at a significantly smaller size, contained to the breast.

Further according to the expert, triple-negative breast cancer has a low rate of survival and detection of these type of tumors in their "earliest stages of development represents a critical window of opportunity for curative intervention." The expert continues, stating that this type of breast cancer "cannot be accurately diagnosed using conventional imaging examinations, i.e., mammograms and is often only detected at an advanced stage. For these reasons, the expert opines that Mrs. Montant lost the opportunity to detect her triple-negative breast cancer at an early stage.

So, the opposition papers raise material questions of fact as to whether the gynecological defendants' apparent failure to inform Teresa Montant about her dense breasts, the limitations of mammography under these circumstances, and the availability of additional screening tests departed from the standard of care. Also, the conflicting opinions concerning whether Mrs. Montant would have survived triple-negative breast cancer had it been detected earlier, including whether it developed after the June 2009 mammogram raise more material questions of fact.

In sum, plaintiff's experts have raised questions of fact as to whether the gynecological defendants (Hunt, Josephs, HGO) were negligent by departing from accepted standards of medical care and whether the alleged negligence was a substantial contributing factor to Mrs. Montant's injuries and death (*see generally* ***Hayden v. Gordon***, 91 AD3d 819 [2d Dept 2012]; ***Bennett v. Knipfing***, 262 AD2d 260 [2d Dept 1999]; ***Weissman v. Wider***, 235 AD2d 474 [2d Dept 1997]; ***Viti v. Franklin General Hospital***, 190 AD2d 790 [2d Dept 1993]).

Motion Sequence 009 is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: August 31, 2022
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]