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| <b>Henderson v Takemoto</b>                                                                                                                                                                                                    |
| 2022 NY Slip Op 35197(U)                                                                                                                                                                                                       |
| August 2, 2022                                                                                                                                                                                                                 |
| Supreme Court, Otsego County                                                                                                                                                                                                   |
| Docket Number: Index No. EF2019-576                                                                                                                                                                                            |
| Judge: John F. Lambert                                                                                                                                                                                                         |
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At a term of the Supreme Court of the State of New York, held in and for the County of Otsego, Cooperstown, New York on July 11<sup>th</sup>, 2022.

PRESENT: Hon. John F. Lambert,  
Acting Supreme Court Judge

Filed & Entered  
Aug 3rd 2022 @ 3:30  
Otsego County Clerk's Office

STATE OF NEW YORK SUPREME COURT  
COUNTY OF OTSEGO

VERONICA HENDERSON,

Plaintiff,

-against-

DECISION & ORDER  
Index Number: EF2019-576

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  
HOSPITAL d/b/a BASSETT MEDICAL CENTER,  
Defendants.

Defendants filed a motion for an order granting summary judgment and dismissing the complaint pursuant to CPLR § 3212. Pursuant to CPLR § 2219(a), the Court reviewed and sets forth the submissions considered in the review of the defendants' motion for summary judgment.<sup>1</sup>

### BACKGROUND

Plaintiff commenced this action by filing a summons and complaint on July 12<sup>th</sup>, 2019. Plaintiff seek damages for claimed injuries resulting from the alleged medical malpractice committed by the named defendants. Plaintiff presented to the emergency department of Bassett Medical Center on January 31<sup>st</sup>, 2018, complaining of an injured left wrist. She was treated by the performance of a closed reduction left distal traction and finger traps, and a split was applied. This

<sup>1</sup> The following e-filed documents, listed by NYSCEF document number (Motion #2 88-148, 151-157 and 160 were read on this motion for summary judgment.

matter involves an alleged failure to treat a left distal radius and ulnar styloid fracture. Plaintiff alleges that she was left with various injuries due to the negligence of the defendants.

Plaintiff asserts that the defendants deviated from good and accepted practice in their treatment of the plaintiff that those deviations were the actual and proximate cause of the plaintiff's injuries.

Defendants maintain that, at all times, the appropriate standard of care necessary to treat the plaintiff's injury, was followed by the defendants. Additionally, they assert that there were no deviations from the standard of care that proximately caused the plaintiff's alleged injuries.

It is noted that a stipulation of discountenance regarding Matthew W. Jones, M.D., and David A. Fanion, M.D., was filed with the Court on September 23<sup>rd</sup>, 2021. A further stipulation of discountenance regarding Jessie M. Welch, RPA-C, was filed with the Court on November 30<sup>th</sup>, 2021.<sup>2</sup>

### DISCUSSION

On a motion for summary judgment, it is the moving party's burden to establish its prima facie entitlement to judgment as a matter of law by presenting sufficient evidence demonstrating the absence of any material questions of fact. Once a prima facie case has been established, the burden shifts to the party opposing the motion to demonstrate the existence of a material issue of fact (see *Edw Drywall Constr., LLC v U.W. Marx, Inc.*, NY Slip Op 07255, [2020]). To succeed on a medical malpractice claim, a plaintiff must ultimately show that the defendant had deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury (see *Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 2027 [3d Dept 2020]). As a

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<sup>2</sup>The facts articulated herein are taken from the moving papers.

proponent of summary judgment in a medical malpractice action, defendants have the initial burden of establishing as a matter of law that there was no deviation from accepted standards of care and that plaintiff's injury was not a cause of the alleged deviation. (see *D.Y. v. Catskill Regional Medical Center*, 156 A.D.3d 1003, 1005 [3rd Dept. 2017]). General, conclusory allegations of medical malpractice, based on speculation or unsupported by competent evidence, are insufficient to meet plaintiff's burden and defeat summary judgment (see *Longtemps v Oliva*, 110 AD3d 1316, 1319 [3d Dept 2013]). If the defendant meets that standard, then the plaintiff must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); CPLR 3212 [b]). The evidence offered by the nonmoving party must be accepted as true and a decision on the motion must be made on the version of the facts most favorable to the nonmoving party (see *Isedore Siegal & Son, Inc. v. Burberrys International, Ltd.*, 78 A.D.2d 930 [3d Dep't 1980]). "To establish a prima facie case of negligence, the plaintiff is required to demonstrate that the defendant owed a duty to him or her, that the defendant breached that duty and that such breach was a proximate cause of the injuries sustained. The existence and scope of the alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court giving due consideration to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm and whether the accident was within the reasonably foreseeable risks (internal, brackets, quotation marks and citation omitted)" *Evarts v Pyro Eng'g, Inc.*, 117 AD3d 1148, 1150 [3d Dept 2014]). If the defendants meet their initial burden of establishing prima facie entitlement to summary judgment, the burden shifts to plaintiff to present expert medical opinion evidence that there was a deviation from the accepted standard of care and that this departure was a proximate cause (see *Goldschmidt*

*v Cortland Regional Med. Ctr., Inc.*, 190 AD3d 1212, 1214 [3d Dept 2021])

Defendants assert that Orthopaedic Surgeon Dr. James Schneider stated a detailed account of the treatment provided by each of the defendants to this action and offers his opinion that the standard of care was met at all times throughout the plaintiff's course of treatment. Further, if the plaintiff succeeds in raising a question of fact with regard to the quality of the care provided, Neurologist Alexander Merkler provides his expert opinion that the plaintiff's symptoms are all a result of CRPS and that the sole cause of the CRPS developing was the fracture itself. Dr. Merkler explains in detail that the plaintiff's outcome was a result of the initial injury and was not caused by any medical treatment, lack of medical treatment, or failure to diagnose. Defendants assert that with regard to defendant Dr. Herbst, the plaintiff is unable to establish the existence of any physician/patient relationship. Dr. Herbst's role was limited to performing an informal consultation. She did not undertake to provide any treatment to the plaintiff, and the plaintiff did not rely on Dr. Herbst.

In opposition, plaintiff's expert in orthopedics opined that the standard of care required PA Ostrander, Dr. Diaz and Dr. Herbst to recognize the lack of adequate alignment on imaging in the postreduction setting, and take certain corrective actions in the form of another reduction or surgical intervention (open reduction, internal fixation). It is the opinion of the plaintiff's expert that, within a reasonable degree of orthopedic certainty, PA Ostrander, Dr. Diaz and Dr. Herbst deviated from the standard of care in failing to recognize the loss of reduction and/or lack of adequate alignment and take corrective action - which was a substantial factor in causing Ms. Henderson's symptoms of weakness, stiffness, lack of mobility and loss of wrist/hand function. Plaintiff's expert also opined that if PA Ostrander, Dr. Diaz and Dr. Herbst did recognize the lack of adequate alignment, and performed certain interventions in the form of another reduction or

open surgery (open reduction, internal fixation), which the standard of care required, then it is more likely than not that sufficient alignment would have occurred and Ms. Henderson would not be left with the residuals issues she now experiences on a daily basis.

Contrary to the assertions of the defendants, the assertions of the plaintiff's experts are not conclusory. Plaintiff's expert opinions demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered. Any scrutiny with respect to the source or basis for the plaintiff's experts opinions, or the credibility of those opinions, is properly left to cross-examination at trial (*Fischella v St. Luke's Cornwall Hosp.*, 204 AD3d 1343, 1345 [3d Dept 2022]). In this case, this Court follows the rule that summary judgment is not authorized in a medical malpractice action where the parties adduce conflicting opinions of medical experts, in that conflicting opinions of medical experts merely create a credibility question for a jury to resolve (*Fischella v St. Luke's Cornwall Hosp.*, *id.*; *Prediletto v Syed*, 166 AD3d 1456 [3d Dept 2018]; *Severino v Weller*, 148 AD3d 272, 273 [1st Dept 2017]).

Regarding defendants' assertion that there was no patient doctor relationship between Dr. Herbst and the plaintiff, "a physician-patient relationship is created when professional services are rendered and accepted for purposes of medical or surgical treatment. Where no direct patient-physician relationship exists, an implied physician-relationship can arise when a physician gives advice to a patient, even if the advice is communicated through another health care professional. Whether a medical professional owed a duty of care to the plaintiff is generally a legal question for courts to determine. However, whether a physician's proffer of advice furnishes a sufficient basis upon which to conclude that an implied physician-patient relationship has arisen is ordinarily a question of fact for a jury. Moreover, a physician may be held vicariously liable for the negligent acts of those they 'exercise some general authority or control over [internal quotation marks,

brackets and citations omitted]” *Liquori v Dolkart*, 204 AD3d 1099 [3d Dept 2022]). Here, the question as to whether or not Dr. Herbst’s proffer of advice furnishes a sufficient basis upon which to conclude that an implied physician-patient relationship has arisen is a question of fact for a jury to determine.

Regarding Bassett Medical Center and Bassett Medical, P.C.’s application to dismiss the action as against them, the Court finds that plaintiff submitted sufficient evidence from the exhibits which creates issue of fact which should be left for resolution at trial.

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*Fischella v St. Luke's Cornwall Hosp.* id.). Taking the evidence offered by the nonmoving party as true and considering the motion on the version of the facts most favorable to the nonmoving party, this Court finds that there are factual issues for the finder of fact to determine regarding whether or not the defendants deviated from good and accepted standards of hospital and medical practice in their treatment of the plaintiff and that such hospital and medical malpractice proximately caused plaintiff’s injuries.

### CONCLUSION

Plaintiff submitted evidentiary facts or materials in rebuttal to the prima facie claim made by the defendant’s claim that they were not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (*Schrader v Nichols*, 198 AD3d 1153 [3d Dept 2021]). Applying the above noted standards, and for the reasons set forth above, and given that there is a question of fact between the parties, the defendants’ motion for summary judgment must be denied.

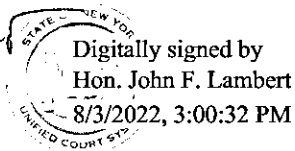
As such it is,

**ORDERED** that summary judgment dismissing the complaint pursuant to CPLR § 3212 is denied as to Defendants; and it is further

**ORDERED** that a conference shall be held on August 26<sup>th</sup>, 2022 at 11:00 a.m. via  
**TEAMS.**

This is the decision and order of the Court.

Dated: August 2<sup>nd</sup>, 2022  
Cooperstown, New York



Digitally signed by  
Hon. John F. Lambert  
8/3/2022, 3:00:32 PM

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Hon. John F. Lambert  
Acting Justice of the Supreme Court

TO: Attorneys of Record via NYSCEF