SHORT FORM ORDER

INDEX No. 611775/2020
CAL No. 202300984MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:
Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 11/22/23 (001)
MOTION DATE 12/21/23 (002)
ADJ. DATE 4/18/24
Mot. Seq. # 001 MotD
Mot. Seq. # 002 MotD

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SUSAN ROSSI, Individually and as Administrator of the Estate of ROBERT ROSSI, deceased,

Plaintiff,

- against -

ROBERT A. CHOW, M.D., MICHAEL HAPPES, M.D., ROY STEIGBIGEL, M.D., MITCHELL KIRSCH, M.D., PAUL RICHMAN, M.D., ASHA PATNAIK, M.D., EERA JAIN, D.O., LLOYD LENSE, M.D., ST. CATHERINE OF SIENA MEDICAL CENTER, STONY BROOK INTERNISTS, UNIVERSITY FACULTY PRACTICE CORPORATION, INFECTIOUS DISEASE MEDICAL PRACTICE OF NEW YORK, LLC, SUFFOLK HEART GROUP, LLP, and SUFFOLK NEPHROLOGY CONSULTANTS, P.C.,

Defendants.

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Upon the following papers read on these motions for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants Michael Happes, M.D., and Suffolk Heart Group, LLP, filed October 26, 2023; Answering

Affidavits and supporting papers by plaintiff, filed March 14, 2024; Replying Affidavits and supporting papers by defendants Michael Happes, M.D., and Suffolk Heart Group, LLP, filed March 27, 2024; Other by plaintiff, filed March 26, 2024; Notice of Motion/Order to Show Cause and supporting papers by defendant St. Catherine of Siena Medical Center, filed October 27, 2023; Answering Affidavits and supporting papers by plaintiff, filed March14, 2024; Replying Affidavits and supporting papers by defendant St. Catherine of Siena Medical Center, filed April 17, 2024; Other by defendant St. Catherine of Siena Medical Center, filed October 31, 2023; and Other by plaintiff, filed March 26, 2024; it is

ORDERED that the motion (seq. 001) by defendants Michael Happes, M.D., and Suffolk Heart Group, LLP and the motion (seq. 002) by defendant St. Catherine of Siena Medical Center are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants Michael Happes, M.D., and Suffolk Heart Group, LLP for summary judgment dismissing the complaint against them is granted in part and denied in part; and it is further

ORDERED that the motion by defendant Catherine of Siena Medical Center for summary judgment dismissing the complaint against it is granted in part and denied in part.

Plaintiff Susan Rossi, as the administrator of the estate of her late husband, Robert Rossi (hereinafter the decedent), commenced this action against, among others, defendants Robert A. Chow, M.D., Michael Happes, M.D., Mitchell Kirsch, M.D., St. Catherine of Siena Medical Center (hereinafter SCSMC), Suffolk Heart Group, LLP (hereinafter Suffolk Heart Group) to recover damages for, in part, medical malpractice and wrongful death allegedly arising out of the decedent's care and treatment. Dr. Chow allegedly was employed by SCSMC and defendant Infection Disease Medical Practice of New York, LLC. Dr. Happes allegedly was employed by SCSMC and Suffolk Heart Group. Dr. Kirsch allegedly was employed by SCSMC and defendant Suffolk Nephrology Consultants, P.C. Plaintiff also sues derivatively for loss of services.

The facts of this case, subject to some dispute, are briefly set forth as follows: The decedent's prior medical history included an aortic valve replacement in 2006. On August 4, 2018, the decedent was admitted to SCSMC with complaints of, inter alia, hemoptysis and weight loss of approximately 30 pounds over a 3-month period. During his admission at SCSMC, the decedent was evaluated by, among others, Dr. Happes, who is a cardiologist, and Dr. Kirsch, who is a nephrologist, and Dr. Chow, who is an infectious disease physician. On August 14, 2018, the decedent was transferred from SCSMC to Stony Brook University Hospital (hereinafter SBUH), where he remained until August 21, 2018, when he was discharged home. On September 6, 2018, Dr. Happes performed a cardiac catheterization at Southside Hospital. The decedent subsequently was hospitalized at North Shore University Hospital from September 11, 2018 through September 12, 2018, when he passed away.

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury" (***Kunwar v Northwell Health***, ___ AD3d ___, 2024 NY Slip Op 03740, *3 [2d Dept 2024], quoting ***Mendoza v Maimonides Med. Ctr.***, 203 AD3d 715, 716, 160 NYS3d 663, 664 [2d Dept 2022]). A defendant moving for summary judgment dismissing a medical malpractice cause of action bears the initial burden of establishing, prima facie, either the absence of any departure from good and accepted medical practice, or that any alleged departure did not proximately cause the plaintiff's injuries (*see* ***Belotti v Northern Westchester Hosp.***, ___ AD3d___, 2024 NY Slip Op 04121 [2d Dept 2024]; ***Starre v Dean***, ___ AD3d___, 2024 NY Slip Op 03901 [2d Dept 2024]). Once the defendant makes such a prima facie showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden (*see* ***Rybek v New York City Health & Hosps. Corp.***,

228 AD3d 968, 214 NYS3d 135 [2d Dept 2024]; ***Armond v Strangio***, 227 AD3d 758, 210 NYS3d 491 [2d Dept 2024]). Generally, summary judgment is not appropriate in a medical malpractice action where the parties present conflicting medical expert opinions, as such conflicting opinions raise credibility issues that must be resolved by a fact finder (*see* ***Starre v Dean***, ___ AD3d ___, 2024 NY Slip Op 03901; ***Armond v Strangio***, 227 AD3d 758, 210 NYS3d 491).

Where a medical malpractice plaintiff also alleges a cause of action for lack of informed consent, the plaintiff must demonstrate "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (***Fairchild v Lerner***, 229 AD3d 506, 509, 214 NYS3d 757, 761-762 [2d Dept 2024], quoting ***Pirri-Logan v Pearl***, 192 AD3d 1149, 1151, 145 NYS3d 545, 549 [2d Dept 2021]). Moreover, "[a] cause of action alleging lack of informed consent requires an affirmative violation of physical integrity in the absence of informed consent" (***Kelly v Ahn***, 224 AD3d 673, 675, 205 NYS3d 137, 140 [2d Dept 2024], quoting ***S.W. v Catskill Regional Med. Ctr.***, 211 AD3d 890, 180 NYS3d 561 [2d Dept 2022]).

"In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for the negligence or malpractice of an independent physician, as when the physician is retained by the patient himself or herself" (***Ciceron v Gulmatico***, 220 AD3d 736, 738, 197 NYS3d 564, 567 [2d Dept 2023], quoting ***Goffredo v St. Luke's Cornwall Hosp.***, 194 AD3d 699, 700, 143 NYS3d 597, 598 [2d Dept 2021]). "However, an exception to the rule that a hospital may not be held vicariously liable for the treatment provided by an independent physician applies where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the plaintiff's choosing, or a nonemployee physician otherwise acted as an agent of the hospital or the hospital exercised control over the physician" (***Ciceron v Gulmatico***, 220 AD3d at 738, 197 NYS3d at 567-568, quoting ***Vargas v Lee***, 207 AD3d 684, 685, 172 NYS3d 694, 697 [2d Dept 2022] [citations and internal quotation marks omitted]). To establish its prima facie entitlement to summary judgment dismissing a vicarious liability claim, "a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee, and that the exception to the general rule did not apply" (***Ciceron v Gulmatico***, 220 AD3d at 738, 197 NYS3d at 568, quoting ***Muslim v Horizon Med. Group, P.C.***, 118 AD3d 681, 683, 988 NYS2d 628, 630 [2d Dept 2014] [citations and internal quotation marks omitted]).

I. The Motion by Dr. Happes and Suffolk Heart Group (Collectively, the Suffolk Heart Defendants)

The Suffolk Heart defendants now move for summary judgment dismissing the complaint against them. The Suffolk Heart defendants argue, in part, that their treatment of the decedent did not depart from the standard of care, and that such treatment did not proximately cause the alleged injuries. The Suffolk Heart defendants also contend that lack of informed consent cause of action does not apply here, since the injuries alleged resulted from a failure to undertake a procedure or postponing of a procedure. The Suffolk Heart defendants submit, inter alia, various medical records, and the affirmation of their medical expert, Malcolm Phillips, M.D. In opposition, plaintiff argues, among other things, that issues of fact remain as to whether the Suffolk Heart defendants deviated from accepted standards of care in their treatment of the decedent, and whether such deviations substantially contributed to the decedent's

death. In support of her opposition, plaintiff submits, in part, the unredacted affirmations of her medical experts.

A. Medical Malpractice and Wrongful Death

The Suffolk Heart defendants demonstrated their prima facie entitlement to summary judgment dismissing the medical malpractice and wrongful death causes of action against them. By the complaint, as amplified by the amended bill of particulars, plaintiff alleges that the Suffolk Heart defendants were negligent in, inter alia, failing to detect vegetations on transthoracic echocardiogram (hereinafter TTE) and transesophageal echocardiogram (hereinafter TEE) studies; failing to timely diagnose infectious endocarditis; failing to consult with an infectious disease physician in September 2018 after bacterial endocarditis was diagnosed and the cardiac catheterization revealed severe aortic stenosis and decreased heart function; and failing to admit the decedent to the hospital. Dr. Phillips, who is board-certified in internal medicine with a subspeciality in cardiovascular disease and adult echocardiography, supplied an affirmation on behalf of the Suffolk Heart defendants. By his affirmation. Dr. Phillips avers that he reviewed, inter alia, various medical records, and the deposition testimony of Dr. Happes, and that his opinions set forth therein are expressed within a reasonable degree of medical certainty.

With regard to the treatment rendered prior to September 6, 2018, the Suffolk Heart defendants established, prima facie, that they did not depart from the applicable standard of care, and that such treatment did not proximately cause the alleged injuries (*see* ***Starre v Dean***, ___ AD3d ___, 2024 NY Slip Op 0390; ***Weston v Staten Is. Care Ctr., LLC***, 223 AD3d 769, 203 NYS3d 390 [2d Dept 2024]; ***Balgobind v Long Is. Jewish Med. Ctr.***, 218 AD3d 428, 193 NYS3d 93 [2d Dept 2023]). In his affirmation, Dr. Phillips states that on August 10, 2018, when Dr. Happes examined the decedent, the standard of care required that Dr. Happes ensure that the decedent was hemodynamically stable and did not need immediate surgery or medical treatment for ischemic, congestive heart failure, or significant arrhythmia. Dr. Phillips agrees with the findings set forth in the report corresponding to the TTE performed on August 6, 2018, (hereinafter the August 6, 2018, TTE). Due to the findings on the August 6, 2018 TTE, a TEE allegedly was indicated to assess the nature of the vales.

Dr. Phillips explains that Dr. Happes's role in the decedent's care was limited, since the decedent already was seen by other cardiologists. Dr. Philips contends that it was appropriate to perform a TEE here and agrees with the findings as set forth in the report corresponding to the TEE performed on August 10, 2018 (hereinafter the August 10, 2018 TEE). Dr. Phillips opines that even assuming arguendo that Dr. Happes misinterpreted both the August 6, 2018, TTE and the August 10, 2018, TEE, such errors would not have caused detriment to the decedent's clinical status, since he was re-evaluated at SBUH seven days later and there was no significant change in his status at that time. The expert also explains that as the autopsy of the decedent revealed no gross or microscopic evidence of vegetation, the August 6, 2018, TTE and the August 10, 2018, TEE findings were likely from degeneration of the valve, rather than vegetations.

Dr. Phillips also states that while the autopsy attributes the decedent's death to myocarditis, there was no clinical evidence of myocarditis when Dr. Happes saw the decedent. The expert explains that the decedent made no complaints of chest pain, and that the prior atypical chest pain had since resolved. In addition, Dr. Phillips contends that there were no EKG changes or cardiac enzyme elevations suggestive of myocarditis. Dr. Phillips avers that the August 6, 2018, TTE and the August 10, 2018, TEE revealed "excellent" left ventricular function, which is not consistent with significant myocarditis. He opines that no act or omission on the part of Dr. Happes affected the decedent's diagnosis, treatment, and prognosis.

Notwithstanding Dr. Phillips' failure to address plaintiff's specific allegations of medical malpractice relating to Dr. Happes's treatment of the decedent on September 6, 2018 (*see* ***Ciceron v Gulmatico***, 220 AD3d 732, 197 NYS3d 556; ***Martinez v Orange Regional Med. Ctr.***, 203 AD3d 910, 165 NYS3d 573 [2d Dept 2023]; ***McCarthy v Ashikari***, 206 AD3d 718, 169 NYS3d 352 [2d Dept 2022]), the Suffolk Heart defendants' submissions were sufficient to demonstrate, prima facie, that such treatment did not proximately cause the alleged injuries (*see* ***Marsh v City of New York***, 191 AD3d 973, 142 NYS3d 598 [2d Dept 2021]; ***Joyner v Middletown Medical, P.C.***, 183 AD3d 593, 123 NYS3d 169 [2d Dept 2020]; ***Aliosha v Ostad***, 153 AD3d 591, 61 NYS3d 55 [2d Dept 2017]). As previously stated in greater detail above, Dr. Phillips affirms that there was no clinical evidence of myocarditis when Dr. Happes saw the decedent, and that no conduct on Dr. Happes's part affected the decedent's diagnosis, treatment, and prognosis. The opinions of Dr. Phillips were not so conclusory or unsupported by the record as to render his affirmation entirely inadmissible (*see* ***Richter v Menocal***, 216 AD3d 823 [2d Dept 2023]; ***Hall v Bolognese***, 210 AD3d 958, 178 NYS3d 564 [2d Dept 2022]).

In opposition, plaintiff raised triable issues of fact as to whether the Suffolk Heart defendants departed from the accepted standards of care in their treatment of the decedent prior to September 6, 2018, and whether the treatment rendered by the Suffolk Heart defendants to the decedent proximately caused his alleged injuries and death (*see* ***Gardiola v Sung Chui Park***, 229 AD3d 602, 2024 NY Slip Op 03808 [2d Dept 2024]; ***Armond v Strangio***, 227 AD3d 758, 210 NYS3d 491; ***Feng Xie v New York City Health & Hosps. Corp.***, 226 AD3d 751, 209 NYS3d 105 [2d Dept 2024]). Plaintiff submits, in part, the affirmation of a cardiology expert. The cardiology expert avers, among other things, that he is board-certified in internal medicine with sub-certifications in cardiovascular medicine and interventional cardiology. In preparation for rendering his opinion on the matter, the expert contends that he reviewed, inter alia, the deposition transcripts of the parties, and various medical records. He opines that Dr. Happes departed from accepted standards of care in his treatment of the decedent in August and September of 2018, and that such departures were substantial contributing causes of the decedent's injuries and premature death.

Plaintiff's cardiology expert explains that Dr. Happes departed from accepted standards by, inter alia, failing to detect moderate aortic regurgitation on the August 10, 2018, TEE, and in failing to document its presence on the corresponding report. The cardiology expert further contends that the August 10, 2018, TEE revealed moderate aortic insufficiency. He explains that given the August 10, 2018, TEE findings, along with the decedent's clinical presentation, Dr. Happes should have suspected endocarditis and considered Bartonella endocarditis. The expert explains that the absence of apparent vegetations on the August 10, 2018 TEE did not rule out endocarditis. Additionally, the cardiology expert opines that Dr. Happes departed from accepted standards of care by failing to convey that endocarditis remained in the differential to other treating medical providers, and that such departure contributed to the continued incorrect assumption that the decedent had a primary autoimmune condition and the initiation of steroid therapy, which masked the infection and contributed to the delay in proper diagnosis and treatment.

The cardiology expert further opines that the decedent already was in heart failure at the time of cardiac catheterization, and that Dr. Happes departed from accepted standards of care by failing to recognize the existence of significant congestive heart failure. He explains that given the presence of heart failure, endocarditis, and worsening kidney function, the decedent required hospitalization and diuresis of fluid. The cardiology expert also opines that Dr. Happes departed from accepted standards of care by failing to advise Dr. Hartman that the decedent was in congestive heart failure.

The cardiology expert explains the decedent developed an arrhythmia as a result of the congestive heart failure which arose in the setting of myocarditis. The expert contends that the decedent's arrhythmia was preventable with treatment of his congestive heart failure by Dr. Happes. The cardiology expert explains that the lack of vegetations on macroscopic and microscopic evaluations at the time of the decedent's death did not exclude Bartonella endocarditis.

Plaintiff also submits the affirmation of a physician who is board-certified in internal medicine and infectious diseases. The infectious disease expert avers that he reviewed, in part, the parties' deposition transcripts and various medical records in preparation for rending his opinion. The expert opines that had Dr. Happes advised of findings consistent with the development of infectious endocarditis, Dr. Chow likely would have changed the focus of his work-up to include endocarditis as the suspected cause of illness. The expert opines that the failure to work up the patient for endocarditis at SCSMC led to a delay in the diagnosis of Bartonella henselae endocarditis, which should have been made during his 10-day admission at SCSMC. The expert further explains that the decedent would have survived the infection with appropriate antibiotic treatment. In light of the foregoing, the Suffolk Heart defendants are not entitled to summary judgment dismissing the medical malpractice and wrongful death claims against them.

B. Informed Consent

The Suffolk Heart defendants established their prima facie entitlement to summary judgment dismissing the cause of action alleging lack of informed consent against them (*see* ***S.W. v Catskill Regional Med. Ctr.***, 211 AD3d 890, 180 NYS3d 561; ***Pinnock v Mercy Med. Ctr.***,180 AD3d 1088, 119 NYS3d 559 [2d Dept 2020]; ***Ellis v Eng***, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]). As the Suffolk Heart defendants contend, "[l]ack of informed consent does not apply where, as here, injuries allegedly resulted from a failure to undertake a procedure or a postponing of a procedure" (***S.W. v Catskill Regional Med. Ctr.***, 211 AD3d at 891, 180 NYS3d at 563, quoting ***Ellis v Eng***, 70 AD3d at 892, 895 NYS2d at 467; ***Pinnock v Mercy Med. Ctr.***,180 AD3d at 1091, 119 NYS3d at 564; ***Samer v Desai***, 179 AD3d 860, 864, 116 NYS3d 377, 382 [2d Dept 2020]). Inasmuch as plaintiff failed to address or specifically oppose that branch of the Suffolk Heart defendants' motion which was for summary judgment dismissing the cause of action alleging lack of informed consent against them, plaintiff failed to raise a triable issue of fact, and that branch of the motion is granted (*see* ***Clarke v New York City Health & Hosps.***, 210 AD3d 631, 177 NYS3d 681 [2d Dept 2022]; ***Capobianco v Marchese***, 125 AD3d 914, 4 NYS3d 127 [2d Dept 2015]; ***Brady v Westchester County Healthcare Corp.***, 78 AD3d 1097, 912 NYS2d 104 [2d Dept 2010]).

II. The Motion by SCSMC

SCSMC also moves for summary judgment dismissing the complaint against it. SCSMC contends, among other things, that it is entitled to summary judgment dismissing the claims against it for negligence, medical malpractice, wrongful death, and loss of services, since its care and treatment did not depart or deviate from the accepted standard of medical care, and its treatment did not proximately cause the alleged injuries. SCSMC also contends that the lack of informed consent claim should be dismissed since the failure to provide treatment or diagnose, rather than the performance of an invasive procedure or treatment, forms the basis of that claim. With regard to the negligent hiring, training, supervision, retention, and credentialing, SCSMC contends, among other things, that each physician rendering care to the decedent was trained in his or her respective field as well as board-certified in his or her respective area of specialty. In addition, SCSMC contends that it cannot be held vicarious liable for the acts or omissions of Dr. Happes or other cardiologists treating the decedent at SCSMC, namely, Dr. Littman, and Dr. Gidseg, since those physicians

were employees of Suffolk Heart Group, rather than SCSMC, at the relevant time, and there was a pre-existing physician-patient relationship between Suffolk Heart Group and the decedent. In support of its motion, SCSMC submits, inter alia, the deposition transcripts of, among others, plaintiff, Dr. Chow, Dr. Happes, various medical records, and the affidavits of their experts, Luis Gruberg, M.D., and Gregg Rosner, M.D. In opposition to SCSMC's motion, plaintiff argues, among other things, that SCSMC failed to address and rebut all of her allegations of medical malpractice, and that issues of fact remain as to whether its treatment of the decedent conformed to the applicable standard of medical care, and whether such departures substantially contributed to his death.

A. Medical Malpractice and Wrongful Death

As an initial matter, SCSMC failed to make a prima facie case of entitlement to summary judgment dismissing so much of the complaint as alleged that it was vicariously liable for the alleged medical malpractice of Dr. Happes, Dr. Littman, and Dr. Gidseg based on a pre-existing physician-patient relationship (*see* ***Sessa v Peconic Bay Med. Ctr.***, 200 AD3d 1085, 159 NYS3d 126 [2d Dept 2021]; ***Pinnock v Mercy Med. Ctr.***,180 AD3d 1088, 119 NYS3d 559; ***Abraham v Dulit***, 255 AD2d 345, 679 NYS2d 707 [2d Dept 1998]). Significantly, SCSMC's submissions do not establish, as a matter of law, that the decedent presented to its emergency department seeking treatment from Dr. Happes, Dr. Littman, or Dr. Gidseg, privately, rather than from the hospital itself (*see* ***Sessa v Peconic Bay Med. Ctr.***, 200 AD3d 1085, 159 NYS3d 126; ***Pinnock v Mercy Med. Ctr.***,180 AD3d 1088, 119 NYS3d 559; ***Abraham v Dulit***, 255 AD2d 345, 679 NYS2d 707). SCSMC's evidence that there was a pre-existing physician-relationship between the decedent and certain cardiologists at Suffolk Heart Group is unavailing here (*see* ***St. Andrews v Scalia***, 51 AD3d 1260, 857 NYS2d 807 [3d Dept 2008]; ***McDonald v Ambassador Const. Co.***, 273 AD2d 108, 709 NYS2d 177 [1st Dept 2000]).

Nevertheless, SCSMC demonstrated a prima facie case of entitlement to summary judgment dismissing the medical malpractice and wrongful death causes of action against it, except for the vicarious liability claims based on the alleged acts and omissions of Dr. Chow and Dr. Kirsch, through the submission of, inter alia, the affidavits of Dr. Gruberg and Dr. Rosner, who opine that SCSMC did not depart from the accepted standard of care in its treatment of the decedent, and that such treatment did not proximately cause the alleged injuries (*see* ***Starre v Dean***, ___ AD3d ___, 2024 NY Slip Op 03901; ***Weston v Staten Is. Care Ctr., LLC***, 223 AD3d 769, 203 NYS3d 390; ***Balgobind v Long Is. Jewish Med. Ctr.***, 218 AD3d 428, 193 NYS3d 93). By the complaint, as amplified by amended bill of particulars, plaintiff alleges that SCSMC was negligent in, inter alia, failing to diagnose and treat infectious endocarditis; failing to question the decedent regarding exposure to cats; failing to perform Bartonella IgM, IgG, and PCR testing; and failing to timely diagnose endocarditis. By his affidavit, Dr. Gruberg, who is board-certified in internal medicine, interventional cardiology, and cardiovascular disease, opines, within a reasonable degree of medical certainty, based on, among other things, various medical records, and the deposition testimony of the individually named defendants, that SCSMC did not deviate from the accepted standard of care when treating the decedent, and that such care and treatment did not proximately cause his alleged injuries or death.

Dr. Gruberg explains that the doctors involved in the decedent's care were fully aware, based on the results of the August 6, 2018, TTE and August 10, 2018, TEE, of the existence and significance of severe aortic stenosis and the elevated peak and mean AV gradients depicted on those studies. The expert explains that there was no evidence that the decedent suffered from congestive heart failure during his admission at SCSMC. Likewise, Dr. Gruberg denies that there was any indication that the decedent was at increased risk for developing heart failure. Dr. Gruberg avers that the increase in the level of aortic stenosis did not

meaningfully increase the risk of bacterial endocarditis, and that, without meeting the Duke criteria, a diagnosis of possible bacterial endocarditis was not warranted. He contends that the decedent's condition when treated at SCSMC pointed to an immunological/rheumatological process and rendered infectious endocarditis very unlikely. He also opines that surgery was not required on an emergent basis during the decedent's admission at SCSMC.

Dr. Gruberg recounts that multiple specialists rendered care and treatment to the decedent at SCSMC, and that all necessary consultations were arranged to work up the decedent's condition. The expert avers that the decedent continually was assessed by the nursing staff and underwent multiple physical examinations on a daily basis at appropriate intervals. He also avers that timely blood, stool, urine, and sputum cultures were performed at appropriate intervals throughout the decedent's admission, and that those cultures were negative and were not indicative of microorganisms. Dr. Gruberg contends that the determination as to what antibiotic therapy, if any, to be provided was to be determined by infectious disease.

Dr. Gruberg notes that the decedent did not have a fever at SCSMC until he developed a superficial infection of the right antecubital fossa due to phlebitis from an IV placed at that location. He contends that the decedent properly was placed on ceftriaxone, and that the fever resolved within a few days. The expert also opines that there was no evidence the decedent had metabolic acidosis or enlarged mediastinal lymph nodes during his admission at SCSMC. There allegedly was also no evidence that the decedent was "throwing" emboli due to endocarditis or aortic stenosis.

Dr. Gruberg explains that given, among other things, that the decedent did not meet the Duke criteria for infectious endocarditis, and the lack of vegetations on the valve per the August 6, 2018, TTE and August 10, 2018, TEE, there was no reason to perform Bartonella IgG, igM, and PCR testing. He explains that the decedent was under the care of infectious disease specialists, and that such testing was not required until potential vegetations were detected on the heart valve.

Dr. Gruberg contends that the decedent did not receive Solu-Medrol until after the kidney biopsy on his last day at SCSMC, and that the amount of Solu-Medrol administered had no impact on the decedent's immune system or health, did not cause any injury, and did not mask any evidence of infection. The expert recounts that the physicians involved in the decedent's care and treatment were fully aware that the absence of vegetation does not rule out endocarditis, and that the absence thereof did not rule in vasculitis. The expert contends that the doctors involved in the decedent's care were aware of the existence and significance of risk factors for bacterial endocarditis.

The expert contends that the physicians involved in the decedent's care were aware of the link between culture-negative endocarditis from Bartonella and endocarditis, and that endocarditis could cause glomerulonephritis. He explains that until there was a diagnosis of Bartonella infection, there was no need to provide aminoglycosides. Dr. Gruberg contends that there was no evidence of a need to inquire about exposure to cats at home based on the negative work-up for infection and the failure of the patient to meet the Duke criteria for diagnosis of bacterial endocarditis. The expert explains that as a community hospital, SCSMC was not required to have rheumatology services. He opines that the decedent timely was transferred to SBUH, a tertiary facility, to receive additional treatment including a rheumatology consult.

SCSMC also submits the affidavit of Dr. Rosner, who is board-certified in internal medicine, cardiovascular disease, echocardiography, cardiovascular computed tomography, and nuclear cardiology. Dr. Rosner avers that he reviewed, inter alia, the August 6, 2018, TTE and the August 10, 2018, TEE. The

expert opines, within a reasonable degree of medical certainty, among other things, that SCSMC did not depart from the accepted standard of care, and that the such care and treatment did not proximately cause the alleged injuries.

By his affirmation, Dr. Rosner agrees with the findings of both the August 6, 2018, TTE and the August 10, 2018, TEE. He contends that neither of those studies revealed evidence of, inter alia, vegetation, abscess, dehiscence of the aortic valve, or other evidence of bacterial or nonbacterial endocarditis. The expert explains that the decedent had moderate stenosis as of June 11, 2018, and that the change in stenosis seen on a TTE performed on June 11, 2018, (hereinafter the June 11, 2018 TTE) and the August 10, 2018, TEE did not require emergent intervention. It appears that Dr. Rosner's initial reference in his affidavit to the mean gradient report from the June 11, 2018, TTE was a typographical error. As Dr. Rosner later refers to the correct value when opining on the change in the degree of stenosis seen in the June 11, 2018, TTE and the August 10, 2018, TEE, and the value, itself, is not in dispute, the court disregards such error (*see* CPLR 2001; ***Luo v Wang***, 176 AD3d 1016, 111 NYS3d 27 [2d Dept 2019]).

Dr. Rosner contends that neither the August 6, 2018, TTE nor the August 10, 2018, TEE revealed evidence of, among other things, vegetation or thrombi on or being generated as a result of the prosthetic valve. He also avers that neither of these studies depicted evidence of any type of cardiac infectious process, infectious/bacterial endocarditis, or noninfectious endocarditis. The expert contends that there was no imminent need for surgical intervention based on the change in the degree of stenosis, and that it was appropriate for the valve to be handled on an outpatient basis with the decedent's treating physician, Dr. Hartman, who replaced the aortic valve in 2006. The expert contends that subsequent to the decedent's admission to SCSMC, he experienced worsening of the stenosis of the prosthetic aortic valve and moderate aortic insufficiency. He contends that the decedent did not suffer from bacterial endocarditis. The opinions of SCSMC's expert were not so conclusory or unsupported by the record as to render their affirmations entirely inadmissible (*see* ***Richter v Menocal***, 216 AD3d 823 [2d Dept 2023]; ***Hall v Bolognese***, 210 AD3d 958, 178 NYS3d 564 [2d Dept 2022]).

In opposition, plaintiff relies upon, inter alia, the very same expert affirmations as submitted in opposition to the motion by the Suffolk Heart defendants. For similar reasons that the Suffolk Heart defendants are not entitled to summary judgment dismissing the medical malpractice and wrongful death claims against them, plaintiff, in opposition to SCSMC's motion, raised triable issues of fact as to whether Dr. Happes departed from accepted standards of care in his treatment of the decedent, and whether those departures were a proximate cause of the decedent's alleged injuries and death (*see* ***Gardiola v Sung Chui Park***, 229 AD3d 602, 2024 NY Slip Op 03808; ***Armond v Strangio***, 227 AD3d 758, 210 NYS3d 491; ***Feng Xie v New York City Health & Hosps. Corp.***, 226 AD3d 751, 209 NYS3d 105). As set forth in greater detail previously herein, plaintiff's cardiology expert opines, within a reasonable a reasonable degree of medical certainty, among other things, that Dr. Happes departed from accepted standard of care by failing to detect and report the true findings of the August 10, 2018, TEE, and by failing to communicate to other physicians treating the decedent that the TEE findings were consistent with infectious endocarditis, rather than normal deterioration of the valve due to age, and that those departures directly contributed to a delay in diagnosis and treatment of endocarditis and the development of myocarditis, arrhythmia, and cardiac arrest leading to the decedent's premature demise. Moreover, plaintiff's infectious disease expert affirms, as described in more detail previously herein, that if Dr. Happes had advised of findings consistent with the development of infectious endocarditis, Dr. Chow's work-up likely would have included endocarditis as the suspected cause of illness, and that the failure to work up the patient for endocarditis at SCSMC led to a delay in diagnosis of Bartonella henselae endocarditis, which in turn, was fatal to the decedent.

Further, SCSMC failed to establish, prima facie, that it was not vicarious liable for the alleged medical malpractice of Dr. Chow and Dr. Kirsch (*see* ***Sessa v Peconic Bay Med. Ctr.***, 200 AD3d 1085, 159 NYS3d 126; ***Mitchell v Goncalves***, 179 AD3d 787, 116 NYS3d 667 [2d Dept 2020]; ***Dupree v Westchester County Health Care Corp.***, 164 AD3d 1211, 84 NYS3d 176 [2d Dept 2018]). Significantly, neither of SCSMC's experts were infectious disease physicians or nephrologists and they failed to establish a foundation supporting the reliability of their opinions in the fields of infectious disease or nephrology (*see* ***Abruzzi v Maller***, 221 AD3d 753, 199 NYS3d 190 [2d Dept 2023]; ***Roizman v Stromer***, 185 AD3d 978, 128 NYS3d 261 [2d Dept 2020]; ***Montanari v Lorber***, 200 AD3d 676, 157 NYS3d 102 [2d Dept 2021]).

Accordingly, SCMC is not entitled to summary judgment dismissing the medical malpractice and wrongful death causes of action against it.

B. Informed Consent

SCSMC established its prima facie entitlement to summary judgment dismissing the lack of informed consent claim against it by demonstrating, inter alia, that the treatment rendered by SCSMC to the decedent did not involve an affirmative violation of his physical integrity (*see* ***Kelly v Ahn***, 224 AD3d 673, 205 NYS3d 137 [2d Dept 2024]; ***Rosenthal v Alexander***, 180 AD3d 826, 118 NYS3d 658 [2d Dept 2020]; ***Galluccio v Grossman***, 161 AD3d 1049, 78 NYS3d 196 [2d Dept 2018]). SCSMC's submissions include, inter alia, Dr. Gruberg's affirmation wherein he attests, among other things, that there is no evidence of a failure to provide informed consent for any of the procedures which required informed consent to be obtained. Moreover, "a failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that involve[s] invasion or disruption of the integrity of the body" (***Lewis v Rutkovsky***, 153 AD3d 450, 456, 58 NYS3d 391, 397 [1st Dept 2017] [internal quotation marks omitted], quoting ***Janeczko v Russell***, 46 AD3d 324, 325, 848 NYS2d 44, 45 [1st Dept 2007]; *see* ***Thomas v Farrago***, 154 AD3d 896, 62 NYS3d 478 [2d Dept 2017]).

Since plaintiff failed to address or specifically oppose the branch of SCSMC's motion which was for summary judgment dismissing the cause of action alleging lack of informed consent against it, plaintiff failed to raise a triable issue of fact and that branch of the motion is granted (*see* ***Clarke v New York City Health & Hosps.***,210 AD3d 631, 177 NYS3d 681; ***Elstein v Hammer***, 192 AD3d 1075, 145 NYS3d 572 [2d Dept 2021]; ***Brady v Westchester County Healthcare Corp.***, 78 AD3d 1097, 912 NYS2d 104).

C. Negligent Hiring, Training, Supervision, Retention, and Credentialing

SCSMC demonstrated a prima facie case of entitlement to summary judgment dismissing the negligent hiring, training, supervision, retention and credentialing claims against it (*see* ***Aklipi v American Med. Alert Corp***., 216 AD3d 712, 189 NYS3d 533 [2d Dept 2023]; ***Shewbaran v Laufer***, 177 AD3d 510, 111 NYS3d 601 [1st Dept 2019]; ***Cross v Supersonic Motor Messenger Courier***, 140 AD3d 503, 33 NYS3d 252 [1st Dept 2016]; ***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]). To establish a claim for negligent hiring, retention, supervision, training, and credentialing, a plaintiff must demonstrate that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (*see* ***Lea v McNulty***, 227 AD3d 971, 212 NYS3d 152 [2d Dept 2024]; ***Olsen v Butler***, 227 AD3d 916, 211 NYS3d 476 [2d Dept 2024]; ***Hooker v Magill***, 140 AD3d 589, 33

NYS3d 697 [1st Dept 2016]). The evidence submitted by SCSMC indicated, among other things, that each physician rendering care to the decedent was trained in his or her respective field and was board-certified in his or her respective area of speciality, and that, throughout his admission to SCSMC, the decedent was seen and evaluated by numerous doctors and nurses on a daily basis (*see* ***Shewbaran v Laufer***, 177 AD3d 510, 111 NYS3d 601; ***Cross v Supersonic Motor Messenger Courier***, 140 AD3d 503, 33 NYS3d 252; ***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 884 NYS2d 131).

As plaintiff did not address or specifically oppose the branch of SCSMC's motion for summary judgment dismissing the negligent hiring, training, supervision, retention and credentialing claims against it, plaintiff failed to raise a triable issue of fact, and thus that branch is granted (*see* ***Gobind v Nercessian***, 227 AD3d 464, 209 NYS3d 402 [1st Dept 2024]; ***Guarino v ProHEALTH Care Assoc., LLP***, 219 AD3d 467, 194 NYS3d 517 [2d Dept 2023]; ***Aklipi v American Medical Alert Corp***.,216 AD3d 712, 189 NYS3d 533).

III. Conclusion

To summarize, the motion by the Suffolk Heart defendants and the motion by SCSMC are granted in part and denied in part.

The foregoing shall constitute the decision and Order of this Court.

Dated: August 29, 2024

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION