Lane v Horl
2024 NY Slip Op 35595(U)
April 9, 2024
Supreme Court, Nassau County
Docket Number: Index No. 606872/2020
Judge: Rhonda E. Fischer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - CIVIL TERM PART 47

Present: HON. RHONDA E. FISCHER
Acting Justice of the Supreme Court

STACY LANE, as Executrix of the Estate of PETER J. NAVARRA, deceased

Plaintiff(s),

-against-

LAWRENCE P. HORL, D.P.M., LAWRENCE P. HORL, D.P.M., P.C., ROBERT H. CLARK, M.D., ROBERT H. CLARK, M.D., P.L.L.C., H. BIANCA JAPAL, M.D., H. BIANCA JAPAL, M.D., P.C., ALVIN D. HOLCOMB, M.D., ALVIN D. HOLCOMB, M.D. P.C., SOUTH NASSAU COMMUNITIES HOSPITAL, and MOUNT SINAI SOUTH NASSAU HOSPITAL,

Defendant(s).

INDEX NO: 606872/2020

MOTION SEQ. Nos. 5, 6, 7, 8

The following papers were read on these motions:
Motion Seq. 005, NYSCEF Nos: 225-231, 322-339, 397, 399;
Motion Seq. 006, NYSCEF Nos: 232-258, 343-360, 398;
Motion Seq. 007, NYSCEF Nos: 259-294, 319-320, 361-378, 400-401;
Motion Seq. 008, NYSCEF Nos: 295-318, 340-342, 379-396, 402-403.

This is a medical malpractice and wrongful death action arising from the treatment and care provided to PETER J. NAVARRA ("decedent") at the defendant facility SOUTH NASSAU COMMUNITIES HOSPITAL and MOUNT SINAI SOUTH NASSAU HOSPITAL ("Hospital" or "South Nassau") on various dates of admission from on or about June 12, 2018 through December 28, 2018, the date of decedent's death.

It is alleged that the Hospital provided negligent care and treatment from June 12, 2018 through December 28, 2018. As against the remaining defendants, it is alleged that they negligently provided treatment and care from September 24, 2018 through December 28, 2018.

Essentially, plaintiff alleges against defendants a failure to timely diagnose and treat an infection in decedent's right lower extremity including osteomyelitis; a failure to recommend an amputation of the right foot and / or below the knee amputation; a failure to administer and / or prescribe intravenous antibiotics; prematurely discharging decedent from the hospital; and a failure to advise alternatives and risks of treatment as well as complications. It is alleged that as a result of

defendants' malpractice, decedent's infection was permitted to progress resulting in his death.

The action commenced by the filing of a Summons and Complaint on July 8, 2020. Discovery has been completed, and the parties certified the case ready for trial on March 23, 2023. A Note of Issue was filed on June 2, 2023.

Plaintiff was treated at the Hospital on multiple occasions from June 12, 2018 to December 24, 2018, and was admitted on seven of those hospitalizations. On August 6, 2018, decedent was treated in the emergency department at the Hospital at which time he underwent a partial right foot amputation. He subsequently developed an infection and was prescribed Augmentin. He returned to the Hospital on August 28 to September 26, 2018, September 24 to September 28, 2018, October 17 to October 24, 2018, November 10, 2018, November 28 to December 4, 2018, and December 24 to December 28, 2018, the date of his death.

In their motions, defendants note the numerous interactions with decedent and chart entries that reflect decedent's reluctance and refusal to receive care. Defendants assert that plaintiff's refusal of receiving the recommended treatment had a serious impact upon his care, treatment, and lack of recovery.

Dr. Alvin D. Holcomb

Defendants ALVIN D. HOLCOMB, M.D. and ALVIN D. HOLCOMB, M.D., P.C. ("Dr. Holcomb") move (seq. #005) for an Order pursuant to CPLR § 3212 granting summary judgment on behalf of Dr. Holcomb on the grounds that there are no genuine issues of material fact that would warrant a trial in this matter and directing the clerk of the court to enter judgment accordingly together with such other and further relief as this Court deems just and proper.

Dr. Holcomb was the attending physician at the Hospital from October 17, 2018 to October 25, 2018. He served as the attending physician on this one admission for plaintiff, and had consults called in podiatry and infectious disease. Dr. Holcomb alleges that the injuries alleged by plaintiff occurred either prior to or subsequent to this admission in October.

Additionally, Dr. Holcomb alleges that his treatment was rendered in accordance with good and accepted medical practice and was not a substantial factor in causing any injuries to decedent. Dr. Holcomb also argues that plaintiff's claim for informed consent should be dismissed as there is no injury caused by acts or omissions of Dr. Holcomb. Therefore, there can be no proximate cause argument.

In support, Dr. Holcomb submits, *inter alia*, an affidavit from Dr. Vincent P. Garbitelli, a licensed physician who practices in internal medicine. Dr. Garbitelli asserts that Dr. Holcomb appropriately ordered consults with infectious disease and podiatry, and the plan and physical exam

were appropriate. He appropriately deferred to these specialists called on the case in infectious disease and podiatry for the treatment and management of plaintiff. The decision to perform a below knee amputation is not a decision to be made by Dr Holcomb. Dr. Garbitelli states that his opinion with a reasonable degree of medical certainty is that all treatment by Dr. Holcomb was within good and accepted medical practice. Additionally, the patient had no signs and symptoms of acute or subacute endocarditis or myocardial infarction at the time of discharge in October. Accordingly, none of the treatment by Dr. Holcomb was a substantial factor in causing any of the injuries alleged by plaintiff.

Dr. H. Bianca Japal

Defendants H. BIANCA JAPAL, M.D. and H. BIANCA JAPAL, M.D., P.C. ("Dr. Japal") move (seq. 006) for an Order: a) pursuant to CPLR § 3212, granting summary judgment in favor of these defendants; b) dismissing the complaint as to these defendants, in its entirety and with prejudice; and c) for such other and further relief as this Court deems just and proper.

Dr. Japal was decedent's attending physician on three of the four occasions when decedent was admitted to the Hospital from September 24, 2018 to his death on December 28, 2018. Decedent presented to the Hospital on September 24, 2018, after complaints of a foot infection and pain. Dr. Horl had been treating decedent as decedent's podiatrist.

On September 25, 2018, Dr. Japal examined decedent, cleared him for podiatry surgery, requested an infectious disease consult and started IV antibiotics. Infectious disease physician, Dr. Clark saw the decedent. Dr. Clark determined that decedent was not clinically septic and recommended contact isolation for MRSA and draining of the wound. During that admission, no surgical interventions other than incision and drainage were recommended. On September 26, 2018, Dr. Horl performed an incision and drainage on decedents' right foot. Decedent was discharged the next day and would follow up with podiatry.

On November 28, 2018, decedent returned to the Emergency Department, referred there by Dr. Horl for surgical debridement. Dr. Japal requested that Dr. Clark consult, and he recommended continued treatment with IV antibiotics. A vascular surgery consult also took place. Dr. Japal was managing the patient as an internist during this admission, ordering necessary consults based on issues at that time, such as infection, right leg ulcerations, and Chacot foot. Decedent was discharged on December 4, 2018.

Dr. Japal argues that she did not depart from accepted standards of care at any time during her care and treatment of decedent. Additionally, there is no question of fact that the patient's alleged injuries did not arise through any action or negligence of these moving defendants.

In support, Dr. Japal submits, *inter alia*, an expert affirmation of Dr. Elias Sakalis. Dr.

Sakalis affirms that Dr. Japal acted within the standard of care during the September 24, 2018 admission. She appropriately examined the patient on admission and made the recommendation for consults in podiatry, vascular surgery, and infectious disease. Both vascular surgery and podiatry were already following the patient as an outpatient, and Dr. Japal deferred to them in regard to treatment related to the right foot. Dr. Sakalis affirms that Dr. Japal appropriately deferred recommendations for antibiotics to Infectious Disease, and that the antibiotic administration was indicated and within the standard of care.

Dr. Sakalis opines that "[t]he decedent was receiving appropriate IV antibiotics and the possible need for amputation was not within Dr. Japal's purview. She properly deferred to podiatry and vascular surgery in regard to any amputation or other interventions for the foot or leg. She ordered the appropriate consults based on decedent's varying long-term issues."

On December 24, 2018, decedent was admitted to the Hospital with complaint of right foot infection and was febrile. He had been previously told of the recommended below the knee amputation and chose to schedule the surgery after the holidays. However, decedent noticed that his leg became infected, and he had a fever. Dr. Japal saw the decedent during this admission at which time decedent indicated that he was ready for amputation because he could no longer walk. Dr. Japal ordered consults in cardiology, vascular surgery, podiatry, orthopedics, and infectious disease. She ordered an echocardiogram, continuation of IV antibiotics, wound care, and Tamiflu. Dr. Japal monitored decedent, making sure his antibiotics and other medications were continuing and ensuring consults were occurring. The surgery was not scheduled as it was pending medical clearance.

Expert Dr. Sakalis affirms that Dr. Japal's actions were within the standard of care as an internist. The amputation was scheduled, but cardiac clearance was not provided. There was nothing additional Dr. Japapl could do at that point, but wait for decedent's cardiac catheterization and cardiac clearance before amputation. On December 27, 2018, decedent was still not cleared as per cardiology. Dr. Japal continued to follow decedent daily and deferred to consulting specialists with respect to treatment outside internal medicine. Decedent then complained of severe chest pain. Dr. Japal conferred with cardiology as to how to proceed.

Dr. Sakalis opines that Dr. Japal could not make the recommendation for an amputation as that was not in her purview as an internist. She would defer to podiatry and vascular surgery on the recommendation of amputation as both of those specialties perform same and she does not. Neither podiatry nor vascular surgery ever recommended amputation, and only recommended incision and drainage up to the December 24, 2018 admission.

The expert opines that Dr. Japal did nothing to cause or worsen decedent's cellulitis or presumed osteomyelitis. During the three admissions where decedent was under the care of Dr. Japal, she ordered proper consults and medications based on those consults to address decedent's

issues. Decedent was continued on IV antibiotics, and Dr. Japal properly deferred to Infectious Disease to direct the medication regimen required for cellulitis or other infections. Further, on the date of decedent's death, Dr. Japal's differential diagnosis included myocardial infarction and possible endocarditis, which he was treated for. And, cardiology was consulted. Dr. Sakalis opines that Dr. Japal, as an internist could do nothing further in treating the decedent.

Dr. Japal argues that any claim of lack of informed consent must be dismissed because as a matter of law, Dr. Japal and her P.C. could not be liable under the Public Health Law. Specifically, defendants argue that plaintiff cannot simultaneously complain that informed consent should have been obtained while also arguing that specific testing or specific procedures were not performed but should have been. Therefore, as the allegations are related to the failure to diagnose certain conditions, to provide certain medications and to recommend an amputation, an informed consent claim is inapplicable.

Dr. Robert H. Clark

Defendants ROBERT H. CLARK, M.D. and ROBERT H. CLARK, M.D., P.L.L.C. ("Dr. Clark") move (seq. 007) for an Order: a) granting summary judgment in favor of these moving defendants; b) dismissing plaintiff's complaint in its entirety against these moving defendants; c) dismissing all claims against these defendants; d) permitting the entry of judgment in favor of these defendants; and e) for such other and further relief as this Court deems just and proper.

Dr. Clark is an infectious disease specialist who saw decedent on various days during his hospital admissions in October, November, and December 2018. Dr. Clark first became involved with decedent during his admission to the Hospital on August 28, 2018. Decedent was admitted through September 6, 2018. Upon decedent's admission, it was requested that Dr. Clark consult on this matter. He noted his findings, which included that the patient underwent an incision and drainage of his right lower extremity abscess in the ER, morbid obesity, neuropathy, that the patient was status post a right transmetartarsal amputation with underlying osteomyelitis with an open nonhealing wound. Dr. Clark prescribed continuation of Vancomycin and Zosyn.

Dr. Clark made further findings relative to decedent, and recommended that the patient required long term IV antibiotic therapy requiring placement of a PICC line. On September 2, 2018 and September 4, 2018, Dr. Clark notes that decedent could not or would not comply with the antibiotic treatment plan recommended. Dr. Clark then prescribed Bactrim in order to suppress plaintiff's MRSA infection of his foot and leg. Decedent was discharged on September 6, 2018.

Dr. Clark treated decedent again at his next admission to the Hospital, from September 25, 2018 through September 28, 2018. Decedent's foot was not improving and became painful. Dr. Clark saw decedent on consultation. Dr. Clark recorded the issues due to plaintiff's refusal to treat with the previously-recommended IV antibiotics, reportedly due to cost. And, decedent refused to

go to the Veterans Administration in Northport for treatment, for which he was eligible. Upon being admitted, antibiotics were started. Dr. Clark noted that decedent "had a grave prognosis with little chance of a cure without removal of the infected nidus of the leg and foot." Decedent was discharged upon being cleared by podiatry.

Decedent was admitted again on October 17, 2018, at which time Dr. Clark provided an infectious disease consult and recommended continuation of intravenous Vancomycin and Zosyn.

In support of Dr. Clark's motion, he submits, *inter alia*, the expert affirmation of Irwin Ingwer, who opines that the care rendered by Dr. Clark was appropriate and reasonable. He further affirms that Dr. Clark's care and treatment of the plaintiff did not cause or contribute to any injury or harm to the plaintiff.

Dr. Ingwer opines that Dr Clark's treatment plan was appropriate. Dr. Ingwer analyzed and formed an opinion as to each action pertinent to this action and opined "within reasonable degree of medical certainty, that all the care and treatment rendered by Dr. Clark was appropriate and within the standards of the medical community. It is my opinion that [Dr. Clark] made the appropriate recommendations at all times, and appropriately fulfilled his function as an infectious disease consultant. It is further my opinion within reasonable degree of medical certainty that no injury was proximately related to or caused by the care and treatment recommended by Robert Clark, M.D.

Dr. Ingwer opines upon Dr. Clark's initial interaction with decedent, Dr. Clark appropriately recommended the administration of Intravenous antibiotics while in the Hospital and recommended that the patient undergo 8 weeks of same. During the subsequent admissions, Dr. Clark appropriately continued to recommend Vancomycin. Dr. Ingwer, opines that the administration of Vancomycin on a long-term basis to treat the MRSA infection, which was confirmed upon cultures, was "the gold standard choice of antibiotic to treat the patient." Upon reappearing to the hospital on September 25, 2018, Dr. Clark again appropriately recommended IV therapy, but also noted at that stage, surgical intervention involving removal of the infected tissues was required to obtain limb salvage.

Dr. Clark noted that in the primary admission, that based upon decedent's condition, the prognosis was poor, to which Dr. Ingwer agrees.

Plaintiff consistently declined the gold standard treatment of choice. Dr. Clark referenced those refusals and ramifications. As a result, he attempted alternative oral antibiotic treatment. However, Dr. Clark asserts that due to the virulence of decedent's MRSA infection, oral antibiotic treatment was not successful.

Dr. Clark argues that all claims of lack of informed consent should be dismissed as appropriate and informed consent was provided with information that was imparted in accordance

with the standard of care. Decedent was well aware of the treatment contemplated and recommended, and discussions occurred accordingly. The records and depositions confirm that an appropriate consent was provided to decedent after numerous conversations took place.

South Nassau Communities Hospital

Defendants SOUTH NASSAU COMMUNITIES HOSPITAL s/h/a SOUTH NASSAU COMMUNITIES HOSPITAL AND MOUNT SINAI SOUTH NASSAU HOSPITAL move (seq. #008) for an Order: a) pursuant to CPLR 3212, granting summary judgment in favor of these defendants, and dismissing this action against it with prejudice; b) pursuant to CPLR 3212 (e) & (g), granting partial summary judgment in favor of the said defendants and limiting the issues for trial; and/or c) for such other and further relief as the Court deems just and proper.

South Nassau asserts that decedent was under the care of his private podiatrist for many years for management of lower extremity wounds and Charcot food. The Hospital argues it has no duty to manage a private patient under the care of his own private physicians, but merely to follow the orders of those private physicians.

South Nassau submits the expert affirmation of Dr. Gary Fantini, who opines that the treatment rendered by the Hospital staff was at all times under the direction and supervision of the patient's attending physicians. Dr. Horl supervised the residents, Dr. Clark managed the patient's antibiotic regimen, and Dr. Japal, as the patient's attending physician, coordinated the care. Additionally, the Hospital staff at all times conformed to the standard of care with regard to its treatment of the patient. Therefore, the Hospital argues that it cannot be held vicariously liable for the treatment rendered and decisions made by the patient's private attending physicians. Moreover, since the staff carried out the orders of plaintiff's private attending physician and did not exercise any medical judgment, and since these orders were "not so clearly contraindicated by normal [] practice that ordinary prudence would require inquiry into the correctness of the orders" the Hospital cannot be held liable for medical malpractice.

The Hospital also argues that the non-party doctors, Dr. Singh and Dr. Sticco, had a limited duty to render a vascular consultation to evaluate arterial blood flow. They did not assume the role of wound care, antibiotic management, or determining if the patient required an amputation.

Dr. Lawrence P. Horl

Defendants LAWRENCE P. HORL, D.P.M. and LAWRENCE P. HORL, D.P.M., P.C. submit a response solely to the extent to "clarify for the Court certain issues regarding the treatment by employees of [the Hospital], the non-party witness vascular surgeons, Dr. Singh and Dr. Sticco. Dr. Horl asserts that Drs. Singh and Sticco both took part in wound care and had the potential for performing a below-knee amputation. Thus, their roles were not simply as alleged by the Hospital for the limited purposed of providing input regarding decedent's arterial blood flow to the lower

extremities. In support of these assertions, Dr. Horl submits an expert affidavit of Dr. Larray Alan Scher, M.D., a vascular surgeon

Dr. Horl emphasizes that the Court should not decide issues concerning the treatment of Dr. Horl because his treatment is not the subject of the Hospital's motion for summary judgment.

Plaintiff's Opposition

Decedent had been under the care of Dr. Horl since September 21, 2013. Decedent's past medical history is significant for right foot toe amputations which left him with a stump on his right foot. He also suffered from neuropathy which caused decreased sensation in his feet and Charcot foot.

On June 12, 2018, Dr. Horl performed amputations due to ulcers on the right foot, and ulcers on the bottom of the foot were debrided. Decedent was discharged from the Hospital that date.

Decedent was admitted to the Hospital from August 6, 2018 to August 7, 2018. He was diagnosed with cellulitis of the right lower leg, given intravenous antibiotics in the Hospital and was prescribed Augmentin upon discharge.

On August 28, 2018, decedent was seen in the emergency room at the Hospital due to, among other conditions, open wounds in the right shin and distal end of the right foot. Surgical debridement of the pretibial wound took place, and decedent was admitted through September 6, 2018. Dr. Japal was the attending physician and Dr. Clark was assigned as the infectious disease specialist.

Dr. Clark noted impressions of osteomyelitis of the midfoot, and a wound culture of the right lower extremity was positive for MRSA. Decedent was placed on intravenous antibiotics. Dr. Clark noted decedent's refusal of the recommended 8 weeks of intravenous antibiotics.

On September 3, 2018, Dr. Clark recommended an evaluation for curative surgical intervention and noted a "grave prognosis for limb salvage." He was not more specific in his notes, and he deferred to the surgical team for surgical recommendations. Decedent was discharged with oral antibiotics.

Decedent returned to the Hospital on September 24, 2018, for the right lower leg wounds and infection. Dr. Clark noted the failure of antibiotic therapy, chronic osteomyelitis and little chance of cure without removal of the source of the infection in the leg and foot. Dr. Horl did irrigation and debridement of the right lower leg and foot. Decedent was discharged on September 28, 2018.

On October 17, 2018, decedent returned to the hospital. MRSA was still present, and the wounds were reportedly "open and nonhealing." He was put on intravenous antibiotics, and another

irrigation and debridement of the right lower extremity and foot was performed. Decedent was discharged on November 5, 2018.

On November 28, 2018, decedent returned to the hospital due to the pain and swelling of his right lower extremity. His condition was worsening. On November 30, 2018, Dr. Horl again performed irrigation and debridement of the right lower leg and foot. On December 4, 2018, decedent was discharged.

Plaintiff argues that at this point, the infection had been present in decedent's right lower leg for several months, the infectious disease physician had noted that the source of the infection should have been removed weeks prior, decedent failed oral antibiotic therapy, the Hospital could no longer insert an intravenous into his veins, he had osteomyelitis, and there was significant progression and deterioration of his condition. Yet, to date, no one recommended amputation to decedent.

On December 24, 2018, decedent was readmitted with complaints of right lower leg pain, fevers, chills and shoulder pain. During this admission blood cultures were positive for MRSA.

Upon decedent's death, Dr. Kevin Kay performed an autopsy. He listed various diagnoses, but did not list a cause of death.

In support of plaintiff's opposition to all four motions for summary judgment, plaintiff submits three expert witness affidavits – from physicians specializing in internal medicine, infectious disease and forensic pathology – who all stated that the defendants departed from the accepted standards of care and that the departures were a proximate cause of decedent's injuries and death.

The expert forensic pathologist affirms that the cause of death was "multisystem organ failure, due to MRSA sepsis, due to Bacterial endocarditis and myocarditis, due to Chronic osteomyelitis of right foot with Diabetes mellitus and Peripheral vascular disease as contributing factors to his death." He also concluded that had the infection in the right leg been properly treated or the right lower leg been timely amputated, decedent would not have developed sepsis, endocarditis and myocarditis, and would not have died.

The infectious disease expert opined within a reasonable degree of medical certainty that decedent needed an amputation of the right lower extremity as of September 24, 2018. He asserts that Dr. Clark, though not a surgeon, had a duty to advise the attending physicians that the patient needed the amputation. Plaintiff's expert infectious disease affirms various failures of Dr. Japal, Dr. Holcomb, Dr. Clark. and the Hospital that indicated a departure from the accepted standards of care.

The internal medicine expert opines that it was the responsibility of the attending physicians to coordinate decedent's care, and they failed to coordinate and communicate with the other treating

physicians to organize a proper treatment plan.

Plaintiff argues that defendant Hospital is vicariously liable for the acts of the codefendants Dr. Japal, Dr. Holcomb, and Dr. Clark.

Applicable Law and Discussion

Summary judgment is warranted when there are no factual disputes to be resolved by the trier of fact. *Mallad Const. Corp. v. Cty. Fed. Savings*, 32 N.Y.2d 285 (1973). This may occur when all issues are strictly legal, *Long Island R.R. Co. v. Northville Indus. Corp.*, 42 NY2d 455 (1977), or when uncontroverted facts allow only one conclusion as a matter of law. *Alvord & Swift v. Stewart M. Muller Constr. Co., Inc.*, 46 N.Y.2d 276 (1978). In determining a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. *Stukas v. Streiter*, 83 A.D.3d 18 (2nd Dept. 2011). Thus, where conflicting inferences may be drawn, it must draw those most favorable to the non-moving party. *LeBlanc v. Skinner*, 103 A.D.3d 202, (2nd Dept 2012). The motion should not be granted when conflicting inferences may be drawn or where there are issues of credibility regarding material facts. *See McKenna v. McKenna*, 121 A.D.3d 864, (2nd Dept 2014); *Open Door Foods, LLC v. Pasta Machs., Inc.*, 136 A.D.3d 1002 (2nd Dept 2016). Resolving questions of credibility, assessing the accuracy of witnesses, and reconciling conflicting deposition testimony are tasks entrusted to the triers of fact. *Calderon - Scotti v. Rosenstein*, 119 A.D.3d 722 (2nd Dept. 2014); *Tringali v. Sieber*, 115 A.D.3d 934 (2nd Dept 2014); *Peritore v. Anna & Diane Cab Corp.*,127 A.D.3d 669 (1st Dept. 2015).

To establish a claim of medical malpractice against a medical service provider, plaintiff bears the burden of demonstrating that the provider owed the patient a duty of care, deviated from the accepted standard of care and such deviation was a proximate cause of the patient's injuries. *Liquori v. Dolkart*, 204 A.D.3d 1099, 1101 (3rd Dept. 2022), *citing Marshall v. Rosenberg*, 196 A.D.3d 817, 818 (3rd Dept. 2021); *Burtman v. Brown*, 97 A.D.3d 156, 161 (2012). "'Generally, a doctor only owes a duty of care to his or her patient' " (*Marshall v. Rosenberg*, 196 A.D.3d at 818-819, *quoting, McNulty v. City of New York*, 100 N.Y.2d 227, 232 (2003)), and "that duty may be limited to those medical functions undertaken by the physician and relied upon by the patient." *Romanelli v Jones*, 179 A.D.3d 851, 852 (2nd Dept. 2020).

"In general, a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee." *Gattling v. Sisters of Charity Med. Ctr.*, 150 A.D.3d 701, 703-704 (2nd Dept. 2017), *quoting Toth v. Bloshinsky*, 39 A.D.3d 848, 850 (Dept. 2007); *see Hill v St. Clare's Hosp.*, 67 N.Y.2d 72, 79 (1986); *Diller v. Munzer*, 141 A.D.3d 628, 629 (2nd Dept. 2016); *Muslim v. Horizon Med. Group, P.C.*, 118 A.D.3d 681, 683 (2nd Dept. 2014); *Corletta v. Fischer*, 101 A.D.3d 929, 930 (2nd Dept. 2012). A hospital may not be held liable for injuries sustained by a patient who is under the care of a private attending physician chosen by the patient where the resident physicians and nurses employed by the hospital merely carry out the orders of the

private attending physician, unless the hospital staff commits "independent acts of negligence or the attending physician's orders are contraindicated by normal practice." *See Tomeo v. Beccia*, 127 A.D.3d 1071, 1073 (2nd Dept. 2015) [internal quotation marks omitted]; *see also, Cham v St. Mary's Hosp. of Brooklyn*, 72 A.D.3d 1003, 1004 (2nd Dept. 2010); *Cerny v. Williams*, 32 A.D.3d 881, 883 (2nd Dept. 2006). However, vicarious liability for the medical malpractice of an independent, private attending physician may be imposed under a theory of apparent or ostensible agency by estoppel. *Dragotta v. Southampton Hosp.*, 39 A.D.3d 697, 698 (2nd Dept. 2007), *citing Hill v. St. Clare's Hosp.*, *supra*; *Hannon v Siegel-Cooper Co.*, 167 N.Y. 244 (1901); *King v. Mitchell*, 31 A.D.3d 958, 959 (3rd Dept. 2006).

In opposing a motion for summary judgment, plaintiff must demonstrate by admissible evidence the existence of a factual issue requiring trial. In a medical malpractice action, a plaintiff must submit an affidavit of a medical expert setting forth that expert's opinion that the defendant did not, in fact, follow good and accepted medical practice. The plaintiff must demonstrate not only a deviation or departure from accepted practice by defendants, but also evidence that such departure was a proximate cause of the injury. *Ansler v. Verrilli*, 119 A.D.2d 786 (2nd Dept. 1986). An affidavit of a medical expert stating an opinion that defendant physician was negligent and that negligence harmed plaintiff, when accompanied by the specific factors used as the basis of that opinion, is sufficient to raise a triable issue of fact. *Menzel v. Plotnick*, 202 A.D.2d 558 (2nd Dept. 1994). Absent any indicia of proof of medical malpractice in the opposing papers submitted by plaintiff a defendant/physician's motion should be granted. *Fileccia v. Massapequa Gen. Hosp.*, 63 N.Y.2d 639 affd 99 A.D.2d 796 (N.Y. 1984).

"To establish a cause of action [to recover damages] for malpractice based on lack of informed consent, [a] plaintiff must prove (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." *Khosrova v. Westermann*, 109 A.D.3d 965, 966 (2nd Dept. 2013) *quoting Spano v. Bertocci*, 299 A.D.2d 335, 337-338 (2nd Dept. 2002) [internal quotation marks omitted]; *see* Public Health Law § 2805-d [1]; *Magel v John T. Mather Mem. Hosp.*, 95 AD3d 1081, 1082 (2nd Dept. 2012).

Here, defendants have made a *prima facie* showing that they are entitled to summary judgment as a matter of law based on the deposition testimony, the medical reports and records, as well as the expert affidavits from each of the moving defendants who state that the treatment from each of the moving defendants did not deviate from good and accepted medical practice and did not

cause the injury complained of by the plaintiff. *See Bumbaca v. Bonanno*, 39 A.D.3d (2nd Dept 2007); *Thompson v. Orner*, 36 AD3d 791 (2nd Dept 2007).

In opposition, plaintiff provides expert medical opinions in the applicable fields of medicine. Plaintiff's expert witnesses rely on hospital records, deposition transcripts, the autopsy report, and defendants' expert affirmations. The expert witnesses sufficiently state that the failures of defendants with respect to decedent's treatment actually shortened his life expectancy or caused his death. The experts are specific with respect to causation and rebut the opinions rendered by defendants' experts.

As to the Hospital's liability, Drs. Japal and Holcomb were assigned by the Hospital as attending physicians. And, Dr. Clark was assigned to see decedent as an infectious disease consultant when decedent was seen in the emergency room and / or admitted to the Hospital. Therefore, as decedent sought medical care at the Hospital, not from any particular private physician, the Hospital would be responsible for any acts of malpractice. *See Hill v. St. Clare's Hospital*, 67 N.Y.2d 72 (1986).

Plaintiff's opposition raises various issues of fact, including as to the circumstances under which decedent was advised regarding amputation of his right lower leg, who was in charge of coordinating and making final decisions about his care, whether defendants properly communicated relative to his treatment in light of his limitations and worsening condition, whether defendants met the accepted standard of care, and decedent's cause of death.

Additionally any alleged comparative negligence on the part of decedent for the failure to follow treatment recommendations is an issue for the jury.

As to the claims regarding lack of informed consent, it is clear that at some point amputation and long-term antibiotics were discussed with decedent. However, defendants have failed to eliminate all triable questions of fact as to whether decedent was timely and sufficiently advised of the risks associated with each course of action and the failure to proceed with each, and whether a reasonablely prudent person in decedent's position would have undergone the amputation if fully informed. *See Mirshah v. Obedian*, 200 A.D.3d 868 (2nd Dept. 2021).

Based on the proof presented, the Court finds that there are triable issues of fact in dispute which preclude summary judgment as to all moving defendants.

Accordingly, it is hereby

ORDERED, that defendants ALVIN D. HOLCOMB, M.D. and ALVIN D. HOLCOMB, M.D., P.C., motion (seq. 005) for summary judgment is DENIED; and it is further

ORDERED, that defendants H. BIANCA JAPAL, M.D. and H. BIANCA JAPAL, M.D., P.C., motion (seq. 006) for summary judgment is DENIED; and it is further

ORDERED, that defendants ROBERT H. CLARK, M.D. and ROBERT H. CLARK, M.D., P.L.L.C., motion (seq. 007) for summary judgment is DENIED; and it is further

ORDERED, that defendants SOUTH NASSAU COMMUNITIES HOSPITAL s/h/a SOUTH NASSAU COMMUNITIES HOSPITAL AND MOUNT SINAI SOUTH NASSAU HOSPITAL motion (seq. #008) for summary judgment is DENIED; and it is further

ORDERED, that all relief requested herein that is not expressly addressed is DENIED.

This shall constitute the Decision and Order of the Court.

It is **SO ORDERED**.

Dated: April 9, 2024
Mineola, NY

Rhonda E. Fischer

HON. RHONDA E. FISCHER
A.J.S.C.

ENTERED
Apr 12 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE