Wood-Geraghty v Karanikolas
2024 NY Slip Op 35608(U)
October 4, 2024
Supreme Court, Queens County
Docket Number: Index No. 708220/2021
Judge: Tracy Catapano-Fox
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Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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ELIZABETH WOOD-GERAGHTY, as Temporary Executor of the Estate of GEORGE WOOD, Deceased,

Plaintiff,

-against-

NICHOLAS KARANIKOLAS, M.D., CHRISTOPHER F. GIORDANO, M.D., MICHAEL COOPER, M.D., KIMLYN LONG, M.D., and STATEN ISLAND UNIVERSITY HOSPITAL,

Defendants.

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Index No. 708220/2021

Part MDP
Motion Date: September 11, 2024

Calendar No. 28
Sequence No. 4

The following papers numbered EF-81 to EF-116 read on this motion by defendants NICHOLAS KARANIKOLAS, M.D., CHRISTOPHER F. GIORDANO, M.D., MICHAEL COOPER, M.D., KIMLYN LONG, M.D., and STATEN ISLAND UNIVERSITY HOSPITAL s/h/a STATEN ISLAND UNIVERSITY HOSPITAL NORTHWELL HEALTH for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits……	EF81-EF106
Affirmation in Opposition, Exhibits……...	EF110-EF114
Reply Affirmation……...	EF115-EF116

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants Nicholas Karanikolas, M.D., Christopher F. Giordano, M.D., Michael Cooper, M.D., Kimlyn Long, M.D., and Staten Island University Hospital s/h/a Staten Island University Hospital Northwell Health's (hereinafter collectively referred to as "defendants") motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted in part and denied in part. Defendants' motion for summary judgment is granted with respect to

plaintiff's claims for lack of informed consent, negligent hiring, and wrongful death. Defendants' motion for summary judgment is granted as to defendants Dr. Karanikolas and Dr. Giordano. Defendants' motion for summary judgment is also granted as to defendant Staten Island University Hospital with respect to the direct claims against it, but denied as to its vicarious liability for defendants Dr. Cooper and Dr. Long's alleged malpractice. Defendants' motion for summary judgment is denied as to the claims for medical malpractice against defendants Dr. Cooper and Dr. Long.

Plaintiff commenced this action for medical malpractice, wrongful death, lack of informed consent, negligent hiring and retention, loss of services and *res ipsa loquitor*, arising out of a catheter placement procedure decedent George Wood underwent on February 25, 2019 and subsequent medical treatment he received. Plaintiff filed the Summons and Complaint on April 9, 2021 and issue was joined by defendants Dr. Karanikolas, Dr. Giordano, Dr. Long, and Staten Island University Hospital via the filing of their Verified Answer on May 12, 2021. Plaintiff filed an Amended Complaint on July 19, 2021, and defendants filed a Verified Answer to plaintiff's Amended Complaint on August 17, 2021. Issue was joined by defendant Dr. Cooper via the filing of his Verified Answer on May 26, 2021.

Defendants argue that they are entitled to summary judgment and dismissal of plaintiff's Complaint and present the pleadings, plaintiff's Bills of Particulars, the parties' deposition testimony, decedent's medical records, and the affirmations of David A. Schulsinger, M.D., Jason Hoffmann, M.D., Peter Taub, M.D., M.S., FACS, FAAP, and Alexander McMeeking, M.D. in support of their motion. Defendants argue that the evidence shows there are no triable issues of fact, as the care and treatment they rendered was in accordance with the standard of care and did not proximately cause decedent's injuries and death. Defendants further argue that plaintiff's claim for lack of informed consent must be dismissed, as decedent executed an informed consent form and decedent's medical records demonstrate that the procedures, their risks, benefits, and alternatives were discussed with decedent. Defendants further argue that plaintiff's Complaint must be dismissed against defendant hospital, as there are no direct claims alleged and vicarious liability cannot be imputed because the individual defendants acted within the standard of care. Defendants also argue that plaintiff failed to offer any evidence to support the claim for negligent hiring. Defendants further argue that plaintiff's derivative claims for loss of services must be dismissed, as derivative claims cannot survive in light of dismissal of the main action. Defendants further argue that plaintiff's claim for wrongful death must be dismissed because there is no evidence that defendants' actions or inactions caused or contributed to decedent's death. Defendants argue that the evidence shows decedent passed away six months after he was discharged from the hospital and the treatment was therefore too remote from the date of his death to be attributable to defendants. Finally, defendants argue that *res ipsa loquitor* is inapplicable in this case, as plaintiff has not established the elements necessary to maintain this theory.

Defendants present the expert affirmation of Dr. David A. Schulsinger in support of their motion. Dr. Schulsinger affirmed to being a physician licensed in New York and board-certified in urology. Dr. Schulsinger further affirmed to reviewing plaintiff's Bills of Particulars, decedent's medical records, and the parties' deposition testimony in rendering his opinions. Dr. Schulsinger reviewed decedent's pertinent medical history and noted decedent presented to defendant Dr. Karanikolas on April 16, 2015 with complaints of lower urinary tract symptoms and urinary retention. He noted that decedent's past medical history included rectal fistula, left leg amputation, appendectomy and former heavy smoking that ended six years earlier. Dr. Karanikolas intermittently evaluated decedent from 2015 through January 2019 for elevated PSA, benign prostatic hyperplasia (hereinafter referred to as "BPH"), and urinary retention.

On January 14, 2019, decedent presented to Dr. Karanikolas with complaints of urinary retention, and was recommended for a repeat biopsy, with which decedent was noncompliant. Dr. Karanikolas noted that decedent had undergone a renal and bladder ultrasound on October 10, 2018, which noted an enlarged prostate and presence of a Foley catheter. Dr. Karanikolas recommended removing decedent's indwelling Foley catheter and replacing it with a suprapubic catheter via interventional radiology using no greater than a 20 French suprapubic tube. Decedent presented for the out-patient catheter surgery on February 25, 2019, which was performed by co-defendant Dr. Christopher F. Giordano. Dr. Giordano's procedure note indicated the surgery was performed after informed consent was obtained from decedent.

Post-surgery, decedent complained of abdominal and penile pressure and was treated with Tylenol with codeine. Decedent reported feeling "mildly better" and was discharged later that day between 4:45pm to 6:06pm. Later that night, at approximately 8:14pm, decedent called 911 for stomach pain and shortness of breath from pain and returned to the hospital. On February 26, 2019, it was noted that decedent became hypotensive and tachycardic, and notes indicate the impression was septic shock with poor prognosis. A CT cystogram revealed extraperitoneal bladder injury and decedent was also noted to have a severe scrotal/penis edema. Decedent was evaluated by infectious disease and plastic surgery, and on March 1, 2019, Dr. Karanikolas evaluated decedent for concerns of possible abdominal compartment syndrome. On March 6, 2019, decedent underwent an excisional debridement and abdominal irrigation, and the following day underwent another excisional debridement with irrigation of multiple wounds in the abdomen, pubis and groin. Decedent underwent surgical debridement on March 11, 2019 and March 16, 2019. Decedent underwent a surgical suprapubic cystostomy by co-defendant Dr. Kimlyn Long on March 20, 2019, and underwent a tracheostomy with a PEG tube placement on March 21, 2019. Decedent underwent another surgical debridement on March 28, 2019 and April 2, 2019, a bedside debridement on April 21, 2019, and another debridement on May 1, 2019. On May 16, 2019, co-defendant Dr. Michael Cooper examined decedent and noted the abdomen skin graft was healing with delayed wound healing, and noted decedent was cleared for discharge. However, decedent later developed tachycardia and tachypnea with positive blood cultures for MRSA and

enterococcus. On June 5, 2019, decedent was discharged to begin rehabilitation at Long Beach Rehab. After three months of admission to rehabilitation facilities and St. John's Episcopal Hospital, on September 22, 2019, decedent passed away due to cardiopulmonary arrest from sepsis due to a urinary tract infection and pneumonia.

Dr. Schulsinger opined to a reasonable degree of medical certainty that defendant Dr. Karanikolas rendered care and treatment to decedent in accordance with good and accepted practice and did not proximately cause or contribute to his injuries and death. Dr. Schulsinger noted that based upon plaintiff's Bills of Particulars, the claimed malpractice by Dr. Karanikolas allegedly occurred between October 18, 2018 and May 30, 2019. However, Dr. Schulsinger opined that based upon a review of the records, Dr. Karanikolas did not evaluate or treat decedent from October 18, 2018 through January 14, 2019, as the only reference to October 2018 involved Dr. Karanikolas' documented review of a renal and bladder ultrasound performed on October 10, 2018. Dr. Schulsinger further opined that during Dr. Karanikolas' care of decedent from 2015 through January 14, 2019, including evaluation, laboratory studies, diagnostic tests, intermittent Foley catheter placement, and medication, Dr. Karanikolas acted within the standard of care. Dr. Schulsinger further opined that the suprapubic tube placement was indicated and a pre-operative urinalysis was not necessary. Dr. Schulsinger reasoned that there is no standard of care regarding preoperative clearance prior to a suprapubic tube placement because it is typically placed in patients with history of urinary retention and chronic Foley use, so positive urinalysis is expected and bacteria in the bladder cannot be prevented when a Foley catheter was used. Therefore, Dr. Schulsinger reasoned that had a urinalysis been done, it would have been positive and would not have delayed or hindered the suprapubic catheter procedure.

Dr. Schulsinger also opined that Dr. Karanikolas' treatment of decedent while he was at Staten Island University Hospital was in accordance with good and accepted practice. Dr. Schulsinger opined that Dr. Karanikolas provided a urology consult and recognized the importance of stabilizing decedent with fluids, antibiotics, antifungal hydration, and monitoring prior to surgical exploration. Dr. Schulsinger further opined that the abdominal CT was timely performed and the foci of air revealed during the test was likely the result of the attempted placement of the suprapubic tube and not the beginning of an anerobic infection. Dr. Schulsinger further opined that this was supported by decedent's negative physical exam and decedent was therefore appropriately treated with broad spectrum antibiotics while waiting for the cultures to come back to narrow down the appropriate antibiotics. Dr. Schulsinger further opined that all appropriate specialties were consulted when decedent was at the hospital including urology, infection disease, general surgery, critical care, and interventional radiology. Dr. Schulsinger further opined that the CT cystogram was indicated to rule out bladder injury, and the timing of the cystogram was appropriate because decedent had to be stabilized prior to the test. Dr. Schulsinger further opined that based upon the cystogram revealing bladder injury, it was appropriate for Dr. Karanikolas to recommend continuation of the indwelling Foley catheter without irrigation to assist with healing.

Dr. Schulsinger further opined that at that point, further urological intervention was not necessary because decedent's care was being managed by critical care and plastic surgery/burn unit. Dr. Schulsinger further opined that Dr. Karanikolas appropriately placed the suprapubic catheter on March 6, 2019 in conjunction with co-defendant Dr. Cooper's debridement.

Dr. Schulsinger further opined that Dr. Karanikolas did not proximately cause or contribute to decedent's injuries or death. Dr. Schulsinger reasoned that Dr. Karanikolas was not involved in the attempted suprapubic catheter placement on February 25, 2019, and was not involved in decedent's debridement procedures or skin grafts. Dr. Schulsinger further reasoned that decedent passed away over six months after Dr. Karanikolas last evaluated him. Based upon the foregoing, Dr. Schulsinger opined to a reasonable degree of medical certainty that Dr. Karanikolas treated decedent within the standard of care and did not proximately cause or contribute to his injuries or death.

Defendants also presented the expert affirmation of Dr. Jason Hoffmann in support of their motion. Dr. Hoffmann affirmed to being a physician licensed in New York and board-certified in diagnostic radiology and interventional radiology. Dr. Hoffmann affirmed to reviewing plaintiff's Bills of Particulars, decedent's medical records, and the parties' deposition testimony in rendering his opinions. Dr. Hoffmann also reviewed decedent's pertinent medical history, and opined to a reasonable degree of medical certainty that defendant Dr. Giordano treated decedent at all times in accordance with good and accepted practices and did not proximately cause or contribute to his injuries and death.

Dr. Hoffmann opined to a reasonable degree of medical certainty that Dr. Giordano's performance of the attempted placement of the suprapubic catheter on February 25, 2019 was in accordance with good and accepted practice. Dr. Hoffman explained there are several risks carried by the procedure, the most common of which are infection and piercing the bladder. Dr. Hoffmann further explained that there are also several appropriate techniques to complete the procedure such as a percutaneous image guided technique done by an interventional radiologist. Dr. Hoffmann opined to a reasonable degree of medical certainty that Dr. Giordano appropriately performed the procedure which was indicated and done with the informed consent of decedent. Dr. Hoffmann further opined that Dr. Giordano's decision to use the percutaneous technique was in accordance with good and accepted practice. He also opined that Dr. Giordano's attempt to use a 26 French size catheter instead of Dr. Karanikolas' recommended 20 French size catheter was an appropriate judgment call, as there is no standard with respect to catheter size.

Dr. Hoffmann explained that based on the operative report, Dr. Giordano was in the bladder initially but access was lost, resulting in the catheter advancing and ending up in the anterior subcutaneous tissue. Dr. Hoffmann opined that this is a known risk of the procedure and at that point the only available and appropriate option was to insert a Foley catheter. He opined to a

reasonable degree of medical certainty that inserting the catheter was not an option because decedent complained and refused further intervention. Dr. Hoffman also argued that surgical intervention was not an option, because decedent was not an ideal candidate for general anesthesia and at that time had a benign abdominal exam. Therefore, Dr. Hoffman opined to a reasonable degree of medical certainty that the only available and appropriate option was placement of a Foley catheter in order to collapse and decompress the bladder, allowing urine to drain until the hole naturally closed. Dr. Hoffmann further opined that Dr. Giordano timely appreciated the appearance of extra-vesicular on fluoroscopy and immediately removed the catheter.

Dr. Hoffmann opined that Dr. Giordano's post-operative management was appropriate, as he was aware of decedent's symptoms, evaluated him and performed a bedside ultrasound showing no drainable fluid. He further opined that Dr. Giordano appropriately discharged decedent with instructions to return to the hospital if he worsened. Dr. Hoffmann also explained that although decedent returned the hospital and stayed there for approximately four months, Dr. Giordano did not render treatment or collaborate on any treatment decisions during that time.

Dr. Hoffmann also opined to a reasonable degree of medical certainty that Dr. Giordano's care and treatment of decedent on February 25, 2019 did not negatively affect decedent's outcome. Dr. Hoffmann reasoned that Dr. Giordano was not involved in decedent's prior outpatient urology care and was not involved in the skin debridement procedures or skin grafts he subsequently underwent. With respect to the suprapubic catheter placement, Dr. Hoffmann explained that loss of access and inability to insert the catheter are known and accepted complications. Dr. Hoffmann further reasoned that Dr. Giordano did not cause or contribute to the urine leakage in the surrounding tissue, urosepsis, or subsequent infections, and daily management was appropriately handled by the critical care and burn teams. Dr. Hoffmann also reasoned that decedent passed away more than six months after Dr. Giordano last evaluated him, and decedent passed away due to cardiopulmonary arrest due to sepsis due to UTI and pneumonia. Based upon the foregoing, Dr. Hoffmann opined to a reasonable degree of medical certainty that Dr. Giordano treated decedent with good and accepted standards of care and did not proximately cause or contribute to his injuries and death.

Defendants also present the expert affirmation of Dr. Peter Taub in support of their motion. Dr. Taub affirmed to being a physician licensed in New York and board-certified in general surgery and plastic surgery. Dr. Taub affirmed to reviewing plaintiff's Bills of Particulars, decedent's medical records, and the parties' deposition testimony in rendering his opinions. Dr. Taub also reviewed decedent's pertinent medical history and opined to a reasonable degree of medical certainty that defendants Dr. Cooper and Dr. Long rendered care and treatment to decedent in accordance with good and accepted practice and did not proximately cause his injuries and death.

Dr. Taub explained necrosis and necrotizing fasciitis, and how necrotic tissue is treated

through the surgical removal of dead tissue known as a debridement procedure. Dr. Taub also explained that there is no standard of care regarding how many debridement procedures should be performed to remove necrotic tissue. He reasoned that the amount of area debrided during each procedure and the total number of procedures required to remove the necrotic tissue depend on whether the patient is stable during the procedure, whether there is excess bleeding during the procedure, and whether the patient can tolerate having larger sections of tissue debrided at the same time. Dr. Taub further explained that the standard of care requires the surgeon to place the skin graft as soon as the surgeon determined the wound bed is clean, by taking skin from a "donor site" on another area of the patient's body. Dr. Taub further explained that when a surgeon debrides necrotic tissue, it is appropriate to administer the proper antibiotics to prevent new infection or the spread of an existing infection.

Dr. Taub opined within a reasonable degree of medical certainty that defendants Dr. Cooper and Dr. Long rendered care and treatment to decedent in accordance with the standard of care. Dr. Taub opined that it was a reasonable exercise of judgment for Dr. Cooper to perform a bedside debridement during his initial evaluation of decedent on March 5, 2019, and perform a subsequent debridement the following day in the operating room under general anesthesia. He also opined to a reasonable degree of medical certainty that Dr. Cooper timely and appropriately obtained wound cultures on March 5th, and used them to reassess decedent on March 6th under a more controlled and sterile environment.

Dr. Taub opined that Dr. Cooper and Dr. Long were aggressive in their management and treatment of decedent, and the performance of multiple debridement procedures was reasonable given the large amount of necrotic tissue that needed to be removed and decedent's debilitated health condition. He opined that it was reasonable for Dr. Long to recommend continued wound packing and further debridement of the abdomen, pubis and scrotum. Dr. Taub further opined that it was appropriate and consistent with the standard of care for Dr. Long, a plastic surgeon in the hospital's burn unit, to perform a bronchoscopy on decedent, and there is no evidence it was performed inappropriately or complications ensued. He also opined that Dr. Long's selection of decedent's right thigh as a donor site was within good and accepted practice. Dr. Taub reasoned that because debridement remove necrotic tissue, it is expected and anticipated for the wound size to increase, and opined that the absence of the only specific sign of necrotizing fasciitis and collective impact of decedent's comorbidities made necrotizing fasciitis difficult to detect. He further opined that the selection of antibiotics was appropriate and consistent with the standard of care, and appropriate for Dr. Cooper and Dr. Long to defer to the infectious disease consult regarding antibiotic treatment.

Dr. Taub also opined to a reasonable degree of medical certainty that decedent gave informed consent for each debridement and skin graft procedure, as well as the bronchoscopy. Dr. Taub reasoned that the risks and benefits associated with the procedures were explained to

decedent and on March 15, 2019, decedent consented to the bronchoscopy. Based upon the foregoing, Dr. Taub opined to a reasonable degree of medical certainty that defendants Dr. Cooper and Dr. Long rendered care and treatment to decedent in accordance with good and accepted standards of care and did not proximately cause or contribute to his injuries.

Defendants also presented the expert affirmation of Dr. Alexander McMeeking in support of their motion. Dr. McMeeking affirmed to being a physician licensed in New York and board-certified in internal medicine and infectious disease. Dr. McMeeking further affirmed to reviewing plaintiff's Bills of Particulars, decedent's medical records, and the parties' deposition testimony in rendering his opinions. Dr. McMeeking also reviewed decedent's pertinent medical history and opined to a reasonable degree of medical certainty that defendant hospital and its staff did not depart from accepted standards of care or proximately cause or contribute to his injuries and death.

Dr. McMeeking opined that it was appropriate pursuant to the standard of care to administer broad spectrum antibiotics, such as Flagyl, Fluconazole, and Vancomycin when a UTI is suspected and while urine culture and sensitivity results are pending. He further opined that it was appropriate and within the standard of care, both in 2019 and now, to utilize any of these antibiotics to treat a UTI caused by E.coli. He opined within a reasonable degree of medical certainty that it was in accordance with good and accepted practice to start decedent on broad spectrum antibiotics on February 25, 2019, and once a UTI was confirmed and the urine cultures revealed E.coli, it was appropriate to start decedent on Meropenem. Dr. McMeeking further opined that even if decedent's UTI existed during Dr. Giordano's attempted placement of the suprapubic tube, the administration of preoperative, intraoperative, or postoperative antibiotics would not have prevented decedent's outcome. Dr. McMeeking also opined to a reasonable degree of medical certainty that the standard of care did not require postoperative antibiotics prior to decedent's hospital discharge after the procedure because the bedside ultrasound did not show any drainable fluid in the subcutaneous tissues or perivascular space and decedent did not have UTI symptoms at that time.

Dr. McMeeking further opined that decedent was properly treated and administered antibiotics throughout his admission at Staten Island University Hospital. Dr. McMeeking explained the various consults by infectious disease and noted that blood and urine cultures were constantly performed and analyzed, and decedent's treatment regimen was modified accordingly. Dr. McMeeking further opined that decedent's injuries were caused by complications of a fast-spreading UTI, decedent's debilitated health condition and comorbidities. Dr. McMeeking further opined that decedent's injuries could not have been prevented although the appropriate antibiotics were administered. Based upon the foregoing, Dr. McMeeking opined to a reasonable degree of medical certainty that defendant State Island University Hospital and its staff adhered to the standard of care and did not proximately cause or contribute to the injuries. Therefore, defendants argue they demonstrated a prima facie entitlement to summary judgment.

Plaintiff opposes defendants' motion and argues the evidence shows there are several triable issues of material fact that warrant a jury determination. Plaintiff further argues that the evidence shows defendants departed from accepted standards of care and proximately caused decedent's injuries. Plaintiff presents the expert affirmations of a urologist and general surgeon in opposition to defendants' motion.

Plaintiff presents the affirmation of a physician licensed in New York and board-certified in urology in opposition to defendants' motion. Plaintiff's expert affirmed to reviewing decedent's medical records, the pleadings, and the parties' deposition testimony in rendering opinions. Plaintiff's expert also reviewed and summarized decedent's pertinent medical history. Based upon the review of the foregoing materials and decedent's medical history, plaintiff's expert opined to a reasonable degree of medical certainty that defendants Dr. Karanikolas, Dr. Giordano, and Staten Island University Hospital departed from good and accepted standards of care and proximately caused decedent's injuries and death. Plaintiff's expert opined that defendants departed by failing to administer antibiotics preoperatively and postoperatively, failing to provide an option to perform the procedure under spinal or local anesthesia, failing to perform an open surgical procedure, failing to use a 20 size Foley catheter, failing to timely recognize the need for better drainage with a suprapubic cystostomy prior to its placement on March 6, 2019, failing to timely suspect and test for a UTI, failing to obtain a proper urologic consultation, failing to timely implement a suprapubic drain, and discharging decedent from the hospital rather than admitting him for close monitoring. The expert further opined that these departures were a substantial factor in causing decedent's numerous injuries and death.

The expert analyzed and disagreed with Dr. Schulsinger's opinions. The expert argued that using a wide catheter, such as a 26 or 28 French Foley for a suprapubic cystostomy tube (SPT), is essential to reduce the likelihood of obstruction from debris and facilitates the placement of an appropriate drain during the procedure. The expert also disagreed with Dr. Schulsinger, and opined that the open method of placing an SPT is safer and provides greater control. The expert also argued that there is an established standard of care to obtain medical clearance for a patient with multiple comorbidities prior to a surgical procedure, and it is prudent for a patient with a chronic indwelling Foley catheter to have a urine culture and sensitivity test to identify existing bacteria and determine the effective antibiotics for preventing urosepsis. The expert also opined that omitting such a laboratory study was one of the factors that led to decedent's unfortunate outcome. The expert also opined that it would have benefited decedent to have appropriate and essential laboratory information available for treatment optimization prior to performing a procedure.

The expert opined within a reasonable degree of medical certainty, the attending urologic supervision should have been consulted and this complication that arose during placement of the

SPT was beyond the scope of the physician's assistant. The expert further opined within a reasonable degree of medical certainty that the finding of the foci of air on the CT scan should have raised concerns about the procedure and the possibility of an anerobic infection that could lead to necrotizing fasciitis. The expert opined within a reasonable degree of medical certainty that "Dr. Sagalovich" would not have placed another SPT drain on March 20, 2019, in light of the discovery and drainage of a left sided pre-peritoneal abscess. The expert further opined within a reasonable degree of medical certainty that an appropriate drain was not left in place following the placement of the SPT on March 6, 2019, nor was the bladder evaluated for extravasation intraoperatively after placement of the suprapubic tube before closure. The expert argued that the failure to obtain medical clearance, including a urine culture and sensitivity study, as well as ordering the placement of a SPT by Interventional Radiology, where no drain was placed, when decedent had multiple comorbidities, a chronic indwelling Foley catheter and presumed urinary tract infection, as well as discharging decedent prematurely contributed to decedent's injuries. The expert opined to a reasonable degree of medical certainty that Dr. Karanikolas did not cause or contribute to decedent's passing. The expert opined within a reasonable degree of medical certainty that there were deviations from the standard of care and substantial causes of decedent's injuries and death. The expert argued that the failure of a Urology attending to supervise the case immediately post-operatively compounded the situation, and not admitted decedent to the hospital for close observation and monitoring exacerbated decedent's conditions.

Plaintiff also presented the expert affirmation of a physician licensed in New York and board-certified in vascular surgery. Plaintiff's expert affirmed to reviewing decedent's medical records, the pleadings, and the parties' deposition testimony in rendering opinions. Plaintiff's expert also reviewed and summarized decedent's pertinent medical history.

Plaintiff's expert opined to a reasonable degree of medical certainty that Dr. Cooper and Dr. Long's failure to perform a thorough and complete exploration, debridement, and drainage was a clear departure from the standard of care and caused decedent to undergo multiple further debridement procedures that would have been avoided if the first procedure was done effectively, properly, and earlier. Plaintiff's expert further opined that Dr. Cooper and Dr. Long departed from accepted standards of care by failing to obtain a CT scan after the first two surgical debridement procedures, as a CT scan would have revealed areas of undrained infection that needed to be drained much earlier. Plaintiff's expert further opined that this departure also resulted in unnecessary subsequent and multiple debridement procedures causing decedent pain, persistent sepsis, loss of additional body tissue, and a significant delay in his recovery.

Plaintiff's expert also disagreed with defense expert Dr. Taub's opinions and findings. While Dr. Taub opined that necrotizing fasciitis can be difficult to detect, plaintiff's expert opined that is not the case here because decedent presented to the hospital with sepsis after the procedure and a CT scan performed the following day demonstrated air, fluid, and blood in the anterior

extraperitoneal space and blood tracking in the right retroperitoneal space. Plaintiff's expert also disagreed with Dr. Taub's opinion of the gold standard of care for treating necrotizing fasciitis and argued his opinion was misleading and incorrect. Plaintiff's expert explained that most cases of necrotizing fasciitis are not caused by anaerobic bacteria and merely surgically opening the affected area is not a sufficient or effective treatment. Rather, the standard of care requires wide and complete excisional debridement of all infected tissue with establishment of drainage of the effective area. Plaintiff's expert further opined that the standard of care requires debridement of all infected and necrotic tissue and establishing effective drainage of the area to prevent accumulation of infected tissue and abscess formation. Plaintiff's expert opined that Dr. Long and Dr. Cooper deviated from this standard by failing to properly identify, excise, and drain all the involved areas which resulted in abscess formation, persistent infection and sepsis. Additionally, while plaintiff's expert agreed that, in general, multiple surgical debridement procedures may be necessary, in the instant case they were necessary because of Dr. Long and Dr. Cooper's failure to debride the infected tissue adequately, fully, and properly during the procedures. Plaintiff's expert also opined that it was a clear departure from the standard of care to delay in performing a surgical debridement as necrotizing fasciitis cannot be effectively treated solely with antibiotics. Plaintiff's expert also opined to a reasonable degree of medical certainty that fewer procedures would have been done had they been properly performed. Plaintiff's expert opined this is evidenced by the abscess that developed, ultimately demonstrating the ineffectiveness of the treatment. Based upon the foregoing, plaintiff argues that defendants are not entitled to summary judgment.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolia & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia*

v. Mosca, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting with the scope of employment under the doctrine of *respondeat superior*. (*See Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

In an action to recover damages for wrongful death, the decedent's personal representative must establish that the defendant's wrong fact, neglect or default caused the decedent's death. (*Eberts v. Makarczuk*, 52 A.D.3d 772, 772-773 [2d Dept. 2008].) To establish a cause of action to recover damages based upon 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." (*Gilmore v. Mihail*, 174 A.D.3d 686, 688 [2d Dept. 2019].)

Defendants established a prima facie entitlement to summary judgment by demonstrating through the documentary evidence and expert affirmations that they rendered care and treatment in accordance with good and accepted standards of care and did not proximately cause decedent's injuries and death. Defendants established through Dr. Schulsinger's expert affirmation that Dr. Karanikolas adhered to accepted standards of care and did not proximately cause decedent's injuries. Defendants demonstrated that Dr. Karanikolas appropriately recommended the procedure and appropriately recommended it be done via placement by interventional radiology. Defendants further demonstrated that decedent was properly given preoperative clearance and a urinalysis culture was not necessary because it would not have influenced whether the procedure was ultimately performed. Defendants further demonstrated that Dr. Karanikolas appropriately performed the subsequent suprapubic catheter placement on March 6, 2019, and was not involved in plaintiff's debridement procedures or Dr. Giordano's attempted placement. They further demonstrated that none of Dr. Karanikolas' care and treatment resulted in decedent's passing, as

he died months later from cardiopulmonary arrest unrelated to Dr. Karanikolas' medical care.

Defendants also established through the medical records and Dr. Hoffmann's expert affirmation that Dr. Giordano rendered care and treatment to decedent in accordance with good and accepted standards of care and did not proximately cause decedent's injuries. Defendants demonstrated that Dr. Giordano properly performed the attempted suprapubic catheter placement procedure on February 25, 2019 after obtaining informed consent from decedent. They also demonstrated that failed placement is a known and accepted risk of the procedure, which Dr. Giordano timely discovered and promptly addressed. Defendants demonstrated through Dr. Hoffmann's affirmation that Dr. Giordano properly chose the only available and appropriate option, to insert a Foley catheter. Defendants further demonstrated that Dr. Giordano appropriately performed a bedside ultrasound that did not show drainable fluid and it was therefore appropriate for him to discharge decedent with instructions to come back if his condition changed. They further demonstrated that none of Dr. Giordano's acts or omissions resulted in decedent's passing, as he died months after Dr. Giordano rendered treatment.

Defendants also established through Dr. Taub's expert affirmation that Dr. Cooper and Dr. Long rendered care and treatment in accordance with good and accepted standards of care and did not proximately cause decedent's injuries. Defendants demonstrated that Dr. Cooper and Dr. Long properly performed each skin debridement procedure and several procedures were necessary in light of decedent's comorbidities and declining health condition. They also demonstrated that they obtained informed consent for the debridement procedures. Defendants also established through Dr. McMeeking's expert affirmation that defendant hospital and its staff rendered care and treatment within the standard of care and did not proximately cause decedent's injuries. Defendants demonstrated that upon admission decedent was properly treated with broad spectrum antibiotics that were narrowed down after it was discovered he had a UTI. Defendants further demonstrated that preoperative, intraoperative, and postoperative antibiotics would not have made a difference because a UTI cannot be treated with a one-dose antibiotic broad-spectrum antibiotic that is used before, during, or after surgery. Defendants further demonstrated that blood and urine cultures were constantly obtained in order to effectively treat decedent's UTI, but in light of decedent's comorbidities and declining health condition, it was difficult for him to fight off a serious and fast-spreading UTI. Defendants also demonstrated that decedent's informed consent was properly obtained for all procedures and there is no evidence to support plaintiff's claim for negligent hiring. Defendants also demonstrated that defendants did not cause decedent's wrongful death, as decedent passed away over six months after decedent was discharged from the hospital in stable health. They further demonstrated that the loss of services claim should be dismissed, as the main claims are entitled to dismissal. Based upon the foregoing, defendants established a prima facie entitlement to summary judgment.

Plaintiff failed to raise triable issues of material fact with respect to the claims for lack of

informed consent and negligent hiring, as plaintiff failed to sufficiently oppose those portions of defendants' motion. (*See Keun Young Kim v. Lenox Hill Hosp.*, 156 A.D.3d 774, 775 [2d Dept. 2017][holding that in opposing a motion for summary judgment, a plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden].) Plaintiff also failed to raise triable issues of material fact with respect to the claim for wrongful death, as plaintiffs' experts failed to rebut defendants' experts' findings that decedent's death was not causally related to the alleged actions or inactions of defendants. Plaintiff's experts failed to acknowledge the months between defendants' last care and treatment and decedent's ultimate passing, and opined in conclusory fashion that defendants' departures led to decedent's death without specifically relying upon the medical records. Plaintiff also failed to present any evidence to support a theory of liability under *res ipsa loquitor*.

Plaintiff failed to raise triable issues of material fact with respect to defendant Dr. Karanikolas, as plaintiff's experts' affirmations were insufficient to rebut defendants' prima facie case. Plaintiff's expert urologist's opinions were vague, conclusory, and not supported by the record. (*See Mendoza v. Maimonides Med. Ctr.*, 203 A.D.3d 715, 716 [2d Dept. 2022]["General and conclusory allegations of medical malpractice, however, unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician's summary judgment motion."]; *see also Lowell v. Flom*, 195 A.D.3d 801, 803 [2d Dept. 2021][holding that an expert opinion that is contradicted by the record or relies upon facts that are not supported by the record is speculative, conclusory, and insufficient to defeat summary judgment].) Plaintiff's expert conclusively states that Dr. Karanikolas failed to obtain medical clearance by not including a urine culture or sensitivity study, Dr. Karanikolas should not have ordered catheter placement by interventional radiology, he discharged decedent prematurely, and he should have been consulted as the attending urologist. However, plaintiff's expert failed to articulate the standard of care and failed to articulate with specificity how Dr. Karanikolas departed from the standard of care in asserting the above opinions. Plaintiff's expert also failed to rebut Dr. Schulsinger's opinion that even had a urinalysis been done, the procedure should have gone forward. Plaintiff's expert merely opined that it would have been beneficial to have the urinalysis results, but did not explain how the failure to order a urinalysis was a departure from the standard of care. Similarly, plaintiff's expert opined that placement by interventional radiology was not the best option, but failed to demonstrate that recommending this method was a departure from the standard of care.

Plaintiff's expert also failed to refute the medical records and defendants' expert opinions that Dr. Karanikolas was not involved in the February 25, 2019 surgery nor did he perform any debridement to decedent, and therefore could not be liable for these procedures. Additionally, plaintiff's expert failed to demonstrate how it was a departure by Dr. Karanikolas that decedent was discharged from the hospital prematurely when Dr. Karanikolas was not involved in the surgical care or discharge, or how it was a departure by Dr. Karanikolas that he was not paged for

a Urology consult. Plaintiff's expert also referenced a Dr. Sagalovich but failed to articulate who that doctor is or the doctor's involvement in this case. Additionally, while plaintiff's expert commented on several of Dr. Schulsinger's opinions, plaintiff's expert failed to sufficiently rebut or refute them with opinions based on medical certainty regarding the standard of care and in accordance with the records. Based upon the foregoing, plaintiff failed to raise triable issues of material fact with respect to Dr. Karanikolas.

Plaintiff also failed to raise triable issues of fact with respect to plaintiff's claims against defendant Dr. Giordano, as plaintiff's experts' affirmations were insufficient to rebut defendants' prima facie case. It is noted that plaintiff's expert affirmation sought to address and oppose some of defendants' expert opinions, but plaintiff's expert failed to articulate the standard of care applicable to Dr. Giordano, or state with specificity how Dr. Giordano departed from the standard of care. Rather, plaintiff's experts stated in conclusory and general fashion that there were departures, but failed to rebut defendants' opinions with respect to Dr. Giordano or articulate that Dr. Giordano departed from accepted standards of care. (*See 114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757 [2d Dept. 2019].) Plaintiff's experts failed to refute the medical records and parties' deposition testimony showing Dr. Giordano had no role in decedent's care and treatment prior to the February 25, 2019 procedure, and was not involved in decedent's subsequent care, including debridement procedures. Therefore, plaintiff failed to raise triable issues of fact as to liability against Dr. Giordano.

Plaintiff also failed to raise triable issues of material fact with respect to plaintiff's direct claims against defendant Staten Island University Hospital, as plaintiff's experts' affirmations were insufficient to rebut defendants' prima facie case. The experts presented opinions but did not relate them specifically to direct claims against Staten Island University Hospital, nor did they raise issues of fact as to how Staten Island University Hospital employee's actions or inactions proximately caused decedent's injuries and death. Plaintiff's experts failed to rebut defendants' opinions with respect to the hospital or articulate how the hospital or its staff departed from accepted standards of care. (*See 114 Woodbury Realty, LLC, supra*.) However, defendant hospital may be held liable on a theory of vicarious liability for the care and treatment of Dr. Cooper and Dr. Long, as indicated below.

Plaintiff raised triable issues of fact with respect to the medical malpractice claims against defendants Dr. Cooper and Dr. Long. Plaintiff raised issues of fact as to whether defendants Dr. Cooper and Dr. Long departed from accepted standards of care and proximately caused decedent's injuries. Specifically, plaintiff's vascular surgery expert raised triable issues of fact regarding whether Dr. Cooper and Dr. Long departed from the standard of care by improperly performing the debridement procedures and unnecessarily performing more debridement procedures than were needed, and whether these departures were a proximate cause of decedent's injuries. Plaintiff's expert sufficiently demonstrated that Dr. Cooper and Dr. Long improperly performed the

debridement procedures, requiring further debridement procedures that would have been unnecessary had they been properly performed the first time. Plaintiff's expert further demonstrated that these multiple debridement procedures caused decedent to sustain persistent sepsis, abscess, and delayed healing. Plaintiff's expert sufficiently rebutted Dr. Taub's opinion that multiple procedures were necessary because of decedent's comorbidities and declining health condition. Rather, plaintiff's expert opined that despite decedent's comorbidities and declining health condition, several procedures were necessary because they were not properly done and because surgical debridement was unnecessarily delayed. As there are conflicting expert opinions presented by defendants and plaintiff on this issue, there are material issues of fact necessitating a jury determination. (*See Mehtvin v. Ravi*, 180 A.D.3d 661, 664 [2d Dept. 2020][holding that summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, as issues of credibility are properly left to a jury for its resolution].) Based upon the foregoing, plaintiff raised triable issues of fact with respect to the claim for medical malpractice against defendants Dr. Cooper and Dr. Long.

Accordingly, defendants Nicholas Karanikolas, M.D., Christopher F. Giordano, M.D., Michael Cooper, M.D., Kimlyn Long, M.D., and Staten Island University Hospital s/h/a Staten Island University Hospital Northwell Health's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted in part and denied in part. Defendants' motion for summary judgment is granted with respect to plaintiff's claims for lack of informed consent, negligent hiring, and wrongful death against all moving defendants. Defendants' summary judgment motion is also granted as to defendants Dr. Karanikolas and Dr. Giordano. Defendants' motion is also granted as to defendant Staten Island University Hospital with respect to the direct claims against it. However, defendants' motion for summary judgment against Staten Island University Hospital is denied as to vicarious liability for defendants Dr. Cooper and Dr. Long. Defendants' motion for summary judgment is denied as to the claim for medical malpractice against defendants Dr. Cooper and Dr. Long and as to the loss of services claim against these defendants. It is hereby

ORDERED that plaintiff's Complaint is dismissed as to defendant NICHOLAS KARANIKOLAS, M.D., and it is further

ORDERED that plaintiff's Complaint is dismissed as to defendant CHRISTOPHER F. GIORDANO, M.D., and it is further

ORDERED that plaintiff's claim for lack of informed consent is dismissed as to all moving defendants, and it is further

ORDERED that plaintiff's claim for negligent hiring is dismissed as to all moving defendants, and it is further

ORDERED that plaintiff's claim for wrongful death is dismissed as to all moving defendants, and it is further

ORDERED that plaintiff's direct claims against defendant STATEN ISLAND UNIVERSITY HOSPITAL are dismissed, and it is further

ORDERED that all parties shall appear for a pretrial conference on Wednesday, October 30, 2024 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: October 4, 2024

Hon. Tracy Catapano-Fox, J.S.C.