Burgos v Tse Chiang Lau
2025 NY Slip Op 33250(U)
August 28, 2025
Supreme Court, New York County
Docket Number: Index No. 805350/2020
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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LUIS BURGOS, JR.,

Plaintiff,

- v -

TSE CHIANG LAU, M.D., and HUNTINGTON HOSPITAL,

Defendants.

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INDEX NO. 805350/2020

MOTION DATE 07/23/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for JUDGMENT - SUMMARY .

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is granted to the extent that summary judgment is awarded to the defendant Huntington Hospital (Huntington) dismissing so much of the medical malpractice cause of action against it as was premised on its negligent hiring and supervision of health-care personnel, the doctrine of res judicata, a failure to diagnose the nature of an abnormality that Huntington personnel observed in the plaintiff's spine on a computed tomography (CT) scan, and all additional claims, other than the plaintiff's claim that Huntington personnel failed properly, directly, immediately, and explicitly to inform him, as well as medical personnel at the hospital to which Huntington transferred him, that a suspicious lesion had been identified in his lumbar spine, and that Huntington medical personnel recommended that he undergo a magnetic resonance imaging (MRI) scan with contrast as soon as practicable to evaluate it. The motion is otherwise denied, as there are triable issues of fact in connection with that latter claim, and whether that alleged failure caused or contributed to a delay in diagnosing a lumbar tumor.

The crux of the plaintiff's claim is that, while he was a patient in Huntington's emergency department, physicians employed by that hospital failed properly to diagnose the conditions present his lumbar spine, including a type of tumor known as a lumbar hemangioblastoma, thus delaying his treatment, which, in turn, caused him to experience a less-than-optimal outcome.[1]

In his medical malpractice cause of action, which was the only one that he asserted in the complaint, the plaintiff asserted that Huntington was negligent in "hiring, retaining, and contracting employees/personnel that failed to follow accepted and standard medical practices and procedures."[2] He further alleged that Huntington committed malpractice in failing to obtain a proper medical history, in failing properly to chart and/or maintain his medical records, and in failing properly to consult his chart and medical records. In addition, the plaintiff averred that Huntington failed to appreciate his complaints, signs, and symptoms, and minimized his concerns. He further contended that Huntington failed to perform proper diagnostic testing, including certain additional radiological testing, failed properly and timely to diagnose him with lumbar hemangioblastoma, thus delaying both the ultimate diagnosis and treatment of that condition, failed to schedule a timely follow-up visit, and failed to obtain consultations with appropriate specialists or to obtain a second opinion. Moreover, the plaintiff alleged that Huntington did not properly, directly, and timely inform either him or physicians at Lenox Hill Hospital (LHH), to which Huntington had transferred him for treatment of an obstructed bowel, of the presence of the tumor, thus delaying diagnosis and treatment of the hemangioblastoma. Additionally, the plaintiff asserted that he would be relying on the doctrine of res ipsa loquitur.

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[1] On August 29, 2024, the plaintiff stipulated with both defendants to discontinue the action against the defendant Tse Chiang Lau, M.D. Hence, Huntington is now the only defendant in this action.

[2] The court notes that, while allegations of negligent hiring, training, supervision, and retention constitute a cause of action independent of a medical malpractice cause of action, and the plaintiff did not separately plead a such cause of action, the court will address that claim as if it had been separately pleaded (see Estate of Gebert v Huntington Hills Ctr. for Health, 2024 NY Misc LEXIS 51911, *16 [Sup Ct, Suffolk County, Sep. 5, 2024]; see also Taylor v Methodist Hosp., 6 Misc 3d 1008[A], 2004 NY Slip Op 51750[U], *4, 2004 NY Misc LEXIS 2898, *9 [Sup Ct, Kings County, Nov. 1, 2004] [deeming allegation of "negligent credentialing" to constitute an independent cause of action]).

In his bill of particulars, the plaintiff reiterated the specific allegations set forth in his complaint, adding that Huntington not only failed to diagnose the hemangioblastoma, thus failing timely or properly to determine the etiology thereof, but also failed to be cognizant of his increased risk of developing further hemangioblastomas because of his age, sex, and weight, and failed to provide timely and proper patient education regarding hemangioblastoma screening. He also faulted Huntington for failing timely and properly to perform a complete physical examination, failing timely to order appropriate laboratory testing, and failing to be cognizant of the nature and significance of the abnormal results of testing that they did perform. The plaintiff specified that the radiological studies that Huntington should have ordered and performed included both regular and serial imaging studies, such as ultrasonography, as well as CT scans and magnetic resonance imaging (MRI) scans, both with and without contrast.

The plaintiff asserted that, as a consequence those departures, he not only experienced a further growth of the hemangioblastoma, but was caused to lose the opportunity to cure it. He further asserted that he needed to undergo a laminectomy at the L3 and L4 levels of his lumbar spine, as well as at the inferior portion of the lamina at the L2 level of his lumbar spine. The plaintiff additionally claimed that Huntington's misdiagnosis, and concomitant delay in allowing other physicians to make a proper diagnosis, caused surgeons to be unable to remove the hemangioblastoma because the nerve roots could not be dissected off of the capsule. He also contended that Huntington's malpractice has caused him to experience back pain, with radiation to both of his lower extremities, along with numbness and tingling throughout both of his lower extremities, causing him to be unable to ambulate properly.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the

pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Flanders v Goodfellow,* _____NY3d_____, 2025 NY Slip Op 02261, *1 [Apr. 17, 2025]; *Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]; *see Haymon v Pettit*, 9 NY3d 324, 327 n [2007]). Once the movant meets that burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn*., 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet the burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case, but must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr*., 70 AD3d 15, 24 [1st Dept 2009]; *see Foster-Sturrup v Long,* 95 AD3d 726, 727 [1st Dept 2012]; *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008];

DeFilippo v New York Downtown Hosp., 10 AD3d 521, 522 [1st Dept 2004]). Such a cause of action may be premised upon a claim that those departures allowed a patient's condition to worsen, and thus deprived him or her of an opportunity for a cure or a better outcome (*see Mortensen v Memorial Hosp.*, 105 AD2d 151, 156, 159 [1st Dept 1984]; *Kallenberg v Beth Israel Hosp.*, 45 AD2d 177, 178 [1st Dept 1974], *affd no op.* 37 NY2d 719 [1975]). Moreover, where a physician fails properly to diagnose a patient's condition, thus providing less than optimal treatment or delaying appropriate treatment, and the insufficiency of or delay in treatment proximately causes injury, he or she will be deemed to have departed from good and accepted medical practice (*see Perez v Fitzgerald,* 115 AD3d 177, 178 [1st Dept 2014]; *Perlin v King*, 36 AD3d 495, 495 [1st Dept 2007]; *see generally Zabary v North Shore Hosp. in Plainview,* 190 AD3d 790, 795 [2d Dept 2021]; *Lewis v Rutkovsky*, 153 AD3d 450, 451 [1st Dept 2017]; *Monzon v Chiaramonte*, 140 AD3d 1126, 1128 [2d Dept 2016] ["(c)ases . . . which allege medical malpractice for failure to diagnose a condition . . . pertain to the level or standard of care expected of a physician in the community"]; *O'Sullivan v Presbyterian Hosp. at Columbia Presbyterian Med. Ctr.*, 217 AD2d 98, 101 [1st Dept 1995]).

Although a plaintiff asserting a medical malpractice claim usually must demonstrate that the defendant physician or hospital deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury (*see Rivera v Kleinman*, 16 NY3d 757, 759, [2011]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24; *Terranova v Finklea*, 45 AD3d at 572; *Zellar v Tompkins Community Hosp.*, 124 AD2d 287, 288-289 [3d Dept 1986]), the theory of res ipsa loquitur may be applied to occurrences "[w]here the actual or specific cause of an accident is unknown" (*Kambat v St. Francis Hosp*., 89 NY2d 489, 494 [1997]). Under such circumstances, "a jury may . . . infer negligence merely from the happening of an event and the defendant's relation to it" (*id*.; *see States v Lourdes Hosp*., 100 NY2d 208, 211-212 [2003]; Restatement [Second] of Torts § 328D). To establish a prima facie case of negligence in support of a res ipsa loquitur charge, plaintiff must establish three elements:

> "[1.] the event must be of a kind that ordinarily does not occur in the absence of someone's negligence;
>
> "[2.] it must be caused by an agency or instrumentality within the exclusive control of the defendant; and
>
> "[3.] it must not have been due to any voluntary action or contribution on the part of the plaintiff"

(*Kambat v St. Francis Hosp.,* 89 NY2d at 494; *see James v Wormuth*, 21 NY3d 540, 545-546 [2013]; *Ebanks v New York City Tr. Auth*., 70 NY2d 621, 623 [1987]; Prosser and Keeton, Torts § 39 at 244 [5th ed]). Res ipsa loquitur, a doctrine of ancient origin (*see Byrne v Boadle*, 2 H & C 722, 159 Eng Rep 299 [1863]), derives from the understanding that some events ordinarily do not occur in the absence of negligence (*see id.; see also Dermatossian v New York City Tr. Auth*., 67 NY2d 219, 226 [1986]). Once a plaintiff satisfies the burden of proof on these three elements, the res ipsa loquitur doctrine permits the jury to infer negligence from the mere fact of the occurrence (*see States v Lourdes Hosp.*, 100 NY2d at 211-212; *Kambat v St. Francis Hosp.,* 89 NY2d at 495). Thus, for example, where "a foreign object is left in the body of the patient, or the patient, while anesthetized, experiences an unexplained injury in an area which is remote from the treatment site" (*McCarthy v Northern Westchester Hosp*., 139 AD3d 825, 827 [2d Dept 2016] [citation omitted]), the invocation of the doctrine of res ipsa loquitur may be warranted (*see id.; see also Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 2027 [3d Dept 2020]*; Swoboda v Fontanetta*, 131 AD3d 1042, 1045 [2d Dept 2015]; *DiGiacomo v Cabrini Med. Ctr*., 21 AD3d 1052, 1054 [2d Dept 2005]; *Escobar v Allen*, 5 AD3d 242, 243 [1st Dept 2004]; *Leone v United Health Servs*., 282 AD2d 860, 860-861 [3d Dept 2001]; *Hill v Highland Hospital*, 142 AD2d 955, 956 [4th Dept 1988]).

To make a prima facie showing of entitlement to judgment as a matter of law, a defendant physician moving for summary judgment must establish the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *Barry v Lee*, 180 AD3d 103, 107 [1st Dept

2019]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or establish that the plaintiff was not injured by such treatment (*see Pullman v Silverman,* 28 NY3d 1060, 1063 [2016]; *McGuigan v Centereach Mgt. Group, Inc*., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital,* 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id*., quoting *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Moreover, as noted, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr*., 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and/or opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely

conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.,* 68 NY2d at 325; *see also Pancila v Romanzi,* 140 AD3d 516, 516 [1st Dept 2016]; *Callistro ex rel. Rivera v Bebbington*, 94 AD3d 408, 410 [1st Dept 2012], *affd sub nom. Callistro v Bebbington*, 20 NY3d 945 [2012]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24).

In support of their motion, the defendants submitted the pleadings, the bill of particulars, transcripts of the parties' deposition testimony, relevant medical and hospital records, the note of issue, an attorney's affirmation, and the expert affirmation of board-certified emergency medicine specialist Andrew Wallowitz, M.D., who opined that none of Huntington's medical personnel departed from good and accepted practice, and that nothing that they did or did not do caused or contributed to the plaintiff's injuries.

As Dr. Wallowitz interpreted the relevant hospital chart, at 3:13 p.m. on November 1, 2018, the plaintiff, who was then 64 years old, presented to the intake room at Huntington's emergency department, complaining of decreased oral intake and worsening abdominal pain, subsequent to a hernia repair surgery that he had undergone at LHH on October 30, 2018. At 3:50 p.m. on November 1, 2018, emergency medicine attending physician Tse Chang Lau, M.D., a former defendant in this action, assessed the plaintiff at the latter's bedside in the intake room, and reported in the chart that the plaintiff experienced abdominal pain, nausea, vomiting, and decreased oral intake, noting that the plaintiff's pulse rate was 109 beats per minute. According to Dr. Wallowitz, Lau ordered a CT scan and laboratory testing, prescribed antibiotics and intravenous fluids, and ordered that the plaintiff be transferred to the main floor of the emergency department for further evaluation. Dr. Wallowitz asserted that, at 5:49 p.m. on November 1, 2018, attending radiologist Alvand Hassankhani, M.D., performed a CT scan, with

intravenous contrast, of the plaintiff's abdomen and pelvis, reporting that the plaintiff evinced the presence of extensive pnuemoperitonium, that is, free air in the abdominal cavity, as well as gas in the subcutaneous soft tissues along the abdominal wall, along with small bowel obstruction transition in the right lower quadrant at the level of the surgical clips that were placed at LHH.

As relevant to this action, Dr. Wallowitz asserted that the November 1, 2018 CT scan reflected an "incidental finding" of an "enhancing intradural or extradural lesion in the spinal canal at L3-4 level, for which MRI with contrast was suggested." Huntington surgical resident Shannon Caesar-Peterson, M.D., and attending surgeon David Buchin, M.D., met with the plaintiff at 7:30 p.m. on November 1, 2018, and diagnosed the plaintiff with a small bowel obstruction. Dr. Buchin requested that the plaintiff be transferred to LHH under the care of surgeon Rebecca B. Kowalski, M.D.

Dr. Wallowitz explained that, at the time that the plaintiff presented to Huntington, he was "very ill" and "presented with life threatening symptoms," including not only the bowel obstruction, but also an elevated white blood cell count and "critical" lactate levels. He opined that, in light of the severity of the plaintiff's condition, Huntington medical personnel "appropriately contacted surgical consults, who determined that surgical intervention and management was indicated." Dr. Wallowitz stated that, at 11:09 p.m. on November 1, 2018, the plaintiff was transferred by ambulance from Huntington to LHH for "management" of the bowel obstruction. According to Dr. Wallowitz, upon the plaintiff's transfer to LHH, LHH attending surgeon Filippo Filicori, M.D., noted that the plaintiff had experienced the onset of abdominal pain and vomiting on November 1, 2018, causing a "pressure-like sensation" in the plaintiff's chest and continued emesis continuing until the time of his presentation. Dr. Filicori agreed with Dr. Buchin's assessment that the plaintiff was suffering from an obstruction of the small bowel, and thus formulated a plan for the placement of nasogastric tubes, laboratory blood and urine testing, serial abdominal examinations, and a transfer to the operating room for a diagnostic laparoscopy. On November 2, 2018, the plaintiff underwent the latter procedure, which,

according to Dr. Filicori, reflected that the bowel was adherent to the mesh that previously had been placed during the October 30, 2018 surgery. As Dr. Wallowitz described it, the bowel was "dissected down" during the November 2, 2018 procedure. The plaintiff was discharged to his home on November 5, 2018.

Dr. Wallowitz asserted that the records from Huntington, including the CT scan and imaging report that referred to the presence of the lesion in the lumbar region of the plaintiff's spine, were provided to LHH. In this respect, he noted that both Dr. Filicori and LHH physician Daryl Goldman, M.D., documented the CT scan in the history and physical examination notes in the LHH chart. Consequently, Dr. Wallowitz opined that Huntington "clearly complied" with its "obligation to provide the plaintiff's pertinent medical records to the subsequent treating facility." Moreover, he explained that it was important that Huntington had not discharged the plaintiff from its care, but, instead, had transferred him to LHH, thus relieving Huntington of any obligation to provide the plaintiff with discharge instructions and, in effect, placing the onus on LHH physicians in connection with the plaintiff's care. For that reason, and also because the plaintiff had presented to Huntington on an emergent basis with a life-threatening condition, Dr. Wallowitz concluded that it would have been "inappropriate for Huntington Hospital to perform a work-up of the spinal lesion and/or order further imaging."

Given the facts underpinning the plaintiff's presentation to Huntington, Dr. Wallowitz opined that, in accordance with the standard of care, and in the context of an emergent bowel obstruction in an emergency room setting, neither Lau nor other Huntington medical personnel were required to be cognizant of signs and symptoms of hemangioblastoma, or to work up the plaintiff for, or diagnose him with, that condition. Nor, according to Dr. Wallowitz, would they be obligated by the standard of care to determine the etiology that condition, to educate him with respect thereto, to provide him with discharge instructions, or to refer him to an otherwise appropriate specialist. Rather, Dr. Wallowitz concluded that Lau and other Huntington medical providers appropriately performed a proper workup in connection with the plaintiff's complaints,

appropriately obtained a surgical consultation, and properly transferred him by ambulance to LHH for management by the surgical team who had performed the initial surgery. He reiterated that the finding of a mass on the plaintiff's lumbar spine was an "incidental finding" that "would not have been addressed given his acute" abdominal symptoms. Hence, Dr. Wallowitz concluded that it would not have been appropriate to delay the treatment of the plaintiff's obstructed bowel by performing a workup in connection with the lumbar lesion, including an "unnecessary test, such as an MRI with contrast," as there was no indication for doing so during the plaintiff's "brief stay" at Huntington.

Dr. Wallowitz expressly opined that Huntington satisfied the applicable standard of care by providing LHH with all of the plaintiff's records and reports, including the report of the CT scan, which, he noted, contained a suggestion that the plaintiff ultimately undergo an MRI scan. He asserted that, in fact, the entirety of the Huntington chart actually was incorporated into the LHH chart. As he framed the issue, "[i]f further workup was indicated, regardless of whether the workup" was undertaken on inpatient or outpatient basis, "it was incumbent upon the subsequent hospital," that is, LHH, to perform it. Dr. Wallowitz further concluded that Lau and Huntington personnel properly obtained the plaintiff's medical history, performed a complete physical examination, and obtained appropriate laboratory and imaging studies, particularly because the CT scan performed at Huntington revealed the bowel obstruction, which was the basis of the plaintiff's complaints. He asserted that there was no merit to the plaintiff's contention that Huntington personnel should have taken an MRI scan with contrast, since that would be improper for a patient with an obstructed bowel, in light of the fact that the plaintiff would not have been able to remain still while the scan was being performed.

With respect to plaintiff's allegations that Lau and Huntington medical staff failed to follow good and accepted medical practices and procedures, render proper medical treatment, and determine the etiology of unresolved and recurrent complaints, signs, and symptoms, Dr. Wallowitz averred that his review of the pertinent medical records established that these claims

were without merit, inasmuch as the defendants' conduct was within the standard of care and timely performed. In this respect, he noted that Lau only examined, spoke with, and treated the plaintiff during the triage assessment, and thereupon transferred the plaintiff to the main emergency department, where his care was managed by emergency medicine attending physician Zackary Webb, M.D. an emergency medicine resident Allison Walker, M.D. In addition to concluding that Lau satisfied the applicable standard of care, Dr. Wallowitz opined that emergency room personnel also performed appropriate examinations and testing, and that they all properly directed the plaintiff's transfer to LHH on an emergent basis.

In opposition to the defendants' motion, the plaintiff relied on many of the documents that they had submitted, and also submitted an attorney's affirmation and the expert affirmation of board-certified emergency medicine specialist Vipul Kella, M.D., who opined that Huntington medical personnel, specifically Drs. Webb and Walker, departed from good and accepted practice, and that their departures caused or contributed to the plaintiff's claimed injuries.

In particular, Dr. Kella concluded that Drs. Webb and Walker departed from accepted practice in failing directly to inform the plaintiff himself of the finding that his CT scan revealed a lesion in his lumbar spine, and in failing to document, on the patient transfer order itself, both the abnormal CT scan finding and the recommendation of a follow-up MRI scan with contrast. He further opined that these departures from good practice caused or contributed to a delayed workup and diagnosis of the plaintiff's lumbar hemangioblastoma and the other lumbar injuries that the plaintiff identified in the bill of particulars.

Dr. Kella adverted to Lau's deposition testimony, in which the latter averred that he told Drs. Webb and Walker about the findings that had been reported by Dr. Hassankhani, the radiologist who had reviewed the plaintiff's CT scan, but that Lau had not spoken with the plaintiff himself about those findings. He explained that Dr. Walker, as a resident, was working under the supervision of Dr. Webb, as the attending physician, and that, by 7:30 p.m. on November 1, 2018, attending surgeons had an encounter with the plaintiff, had diagnosed his

small bowel obstruction, and had requested that the plaintiff be transferred to LHH for anticipated surgery to remove the obstruction. Dr. Kella further asserted that Dr. Walker signed the patient transfer order at 7:55 p.m. on November 1, 2018, but that the plaintiff was not actually transferred until 11:06 p.m. on that date. According to Dr. Kella, Dr. Webb testified at his deposition that there was nothing in the hospital chart documenting that the plaintiff himself was informed about the lesion on his spine or the recommendation that LHH physicians follow up with an MRI scan for further assessment. Moreover, although Dr. Wallowitz asserted that the CT scan report and recommendation were provided to LHH and incorporated in the LHH chart, Dr. Kella asserted that "[t]he hospital records show that there is nothing documenting that the incoming team at Lenox Hill Hospital *were informed and discussed with* DR. WEBB, DR. WALKER, or any other provider at HUNTINGTON HOSPITAL" the fact that there was a "finding of the lesion on the plaintiff's lumbar spine with recommended MRI follow-up for further assessment." As he framed the issue, there was no documentation in the chart, "specifically the Patient Transfer Order," regarding the lumbar spine finding with the recommendation that an MRI be performed. Dr. Kella further explicated this statement by stating that,

> "[s]ignificantly, while the 'Medical Orders' section of HUNTINGTON HOSPITAL's 'Patient Transfer Order' documented specific instruction by the HUNTINGTON HOSPTIAL emergency department provider for the nasogastric tube to be maintained on low continuous suction, the medical orders did not document the instruction that MRI for the plaintiff's lumbar spine finding that was recommended."

Consequently, Dr. Kella opined that Drs. Webb and Walker departed from the applicable standard of care because they failed to "follow good and accepted medical practices and procedures at all times herein; . . . failed to timely and/or properly document plaintiff's medical chart/record, . . . [and] failed to provide timely and/or proper patient education," and that they also failed "to properly chart and/or maintain the plaintiff's medical records [and] to fully inform plaintiff of all pertinent information." He asserted that Dr. Wallowitz himself conceded that emergency department personnel at Huntington did not inform the plaintiff, at any time, that a

radiologist had found an abnormality on the relevant CT scan, or that subsequent treating physicians should have followed up by performing an MRI scan with contrast, which he characterized as a departure from the applicable standard of care. In this respect, Dr. Kella noted that Dr. Webb himself, at his deposition, "unequivocally concede[d]" that the provision of that information to the plaintiff was the applicable standard of care, since it was his "responsibility to tell that to Mr. Burgos."

Dr. Kella explicitly disagreed with Dr. Wallowitz's opinion that Huntington had no obligation beyond providing the plaintiff's medical records to LHH, and rejected the latter's assertion that the mere provision of the records was appropriate because of the plaintiff's life-threatening condition. As he explained it, while a small bowel obstruction can be life threatening if left untreated, at no time during the plaintiff's stay at the Huntington emergency department was he in so serious a condition, inasmuch as he was "actively monitored at all times versus untreated at any time," while the Huntington chart reflected that the plaintiff's condition in the Huntington emergency department was reported to be "stable" at all times, including the time when he was being transferred to LHH. Moreover, Dr. Kella asserted that, while anticipated surgical management for the plaintiff's small bowel obstruction was a primary concern and the reason for his transfer to LHH, the plaintiff's medical condition was not life threatening at any time for the additional reason that the plaintiff was hemodynamically stable throughout his entire emergency department presentation, was awake, oriented, alert, and conversant, and was not intubated. Dr. Kella thus disagreed with Dr. Wollowitz's suggestion that the plaintiff's condition prevented either Dr. Webb or Dr. Walker from proactively discussing, with both the plaintiff himself and the incoming LHH team, the facts and medical issues referable to the finding of a lesion on the CT scan, particularly in light of the three-hour delay between Dr. Walker's entries in the patient transfer order and the plaintiff's actual transfer to LHH, and the additional nine-hour delay between the transfer and the bowel surgery performed at LHH. Dr. Kella thus concluded that there was ample time during those intervals for Drs. Webb or Walker to have

informed the plaintiff or instruct the LHH team that, after addressing the plaintiff's emergent condition, LHH or other health-care providers should have addressed the lumbar lesion.

Dr. Kella thus reiterated that Huntington's failure to inform the plaintiff, and directly inform LHH medical personnel, either verbally, or in a medical order, that the plaintiff's lumbar lesion needed to be evaluated and treated, and instead only included the CT report and recommendations as part of the plaintiff's overall chart, was a departure from the applicable standard of care that led to a delay in the diagnosis and treatment of the lumbar hemangioblastoma, which, in turn, caused a less than optimal outcome.

In reply, the defendants submitted an attorney's affirmation, in which counsel argued that Dr. Kella's opinions were conclusory, speculative, and unsupported by the medical records. Counsel contended that Dr. Kella did not provide a sufficient opinion that any departure caused or contributed to any specific injury claimed by the plaintiff. He also argued that Dr. Kella was not qualified to render an opinion, both because the latter ostensibly based his conclusions on the standard of care applicable in Maryland and Kansas, where he most recently has practiced medicine, and because his affirmation was not accompanied by a certificate of conformity.

Contrary to the defendants' contention, a medical expert need not be licensed to practice medicine in New York for his or her affidavit to be considered by a court in connection with a summary judgment motion (*see Grey v Garcia-Fusco*, 2020 NY Slip Op 32280[U], *20 n 19, 2020 NY Misc LEXIS 3270, *30 n 19 [Sup Ct, N.Y. County, Jun. 16, 2020]; *Solano v Ronak Med. Care*, 2013 NY Slip Op 30837[U], *7, 2013 NY Misc LEXIS 170, *8-9 [Sup Ct, N.Y. County, Apr. 22, 2013]). The court notes that, although Dr. Kella submitted an affirmation rather than an affidavit, CPLR 2106 was amended, effective January 1, 2024, to authorize the use of an affirmation in lieu of an affidavit by "*any person* wherever made," as long as the statement set forth therein had been "affirmed by that person to be true under the penalties of perjury" (L 2023, ch 559) (emphasis added). Although the affirmation was not accompanied by the

certificate of conformity required by CPLR 2309[3], there is no indication that Dr. Kella did not execute his affirmation outside of New York, counsel merely speculated that it was executed in Maryland, and the defendants provided no proof that Dr. Kella executed his "docusigned" affirmation outside of this state. There is thus no basis for requiring the submission of a certificate of conformity. In any event, the absence of a certificate of conformity, even where required, does not require the court to disregard or reject an affirmation, as the failure to include a certificate of conformity is a mere irregularity that may be cured by the submission of the proper certificate nunc pro tunc (*see Khurdayan v Kassir*, 223 AD3d 590, 591 [1st Dept 2024]; *Parra v Cardenas,* 183 AD3d 462, 463 [1st Dept 2020]; *Bank of New York v Singh*, 139 AD3d 486, 487 [1st Dept 2016]; *DaSilva v KS Realty, L.P.,* 138 AD3d 619, 620 [1st Dept 2016]; *Diggs v Karen Manor Assoc., LLC*, 117 AD3d 401, 402-403 [1st Dept 2014]; *Matapos Tech., Ltd. v Compania Andina de Comercio Ltda.*, 68 AD3d 672, 673 [1st Dept 2009]).

With respect to the merits of the defendants' motion, the court concludes that Huntington established its prima facie entitlement to judgment as a matter of law with its submissions, including Dr. Wallowitz's expert affirmation. The plaintiff, however, raised triable issues of fact as to both liability and proximate cause with his submissions, including Dr. Kella's affirmation. These triable issues however, are limited to the plaintiff's claims that Drs. Webb and Walker departed from good and accepted practice by failing directly to inform him that his CT scan revealed the presence of a suspicious lesion in his lumbar spine, and by failing explicitly and directly to call the attention of LHH medical personnel, either verbally or in the relevant "medical orders," to the presence of the lesion and the concomitant recommendation that the plaintiff undergo an MRI scan with contrast as soon as possible, instead burying that finding and recommendation a the 219-page chart. Although "the failure to investigate a condition that

[3] A certificate of conformity is a written instrument, pursuant to which a person qualified by the laws of the state in which an affidavit or affirmation is executed and notarized, or by the laws of New York, certifies that the out-of-state affidavit or affirmation has indeed been drafted, executed, and notarized in conformity with the laws of that state.

would have led to an incidental discovery of an unindicated condition, does not constitute malpractice" (*David v Hutchinson*, 114 AD3d 412, 413 [1st Dept 2014]; *see Clifford v White Plains Hosp. Med. Ctr.,* 217 AD3d 405, 405 [1st Dept 2023]; *Rotante v New York Presbyt. Hosp.-N.Y. Weill Cornell Med. Ctr*., 175 AD3d 1142, 1144 [1st Dept 2019]; *Curry v Dr. Elena Vezza Physician, P.C.,* 106 AD3d 413, 413 [1st Dept 2013]; *Rivera v Greenstein*, 79 AD3d 564, 568 [1st Dept 2010]), this action does not present that issue. Although the lumbar lesion was an incidental finding on the CT scan of the plaintiff's small bowel obstruction, the plaintiff has abandoned his claims that Huntington personnel should have undertaken a further workup and investigation of the nature and etiology of the lesion. Rather, he now concedes that Huntington properly observed it, but he nonetheless asserts that its personnel failed to impart the finding of a lesion, and the related recommendation as to an appropriate evaluation, in a proper and timely fashion to those persons who were in a position to undertake the necessary investigation and render the appropriate treatment in a properly expeditious manner.

As to the plaintiff's assertion that he intended to rely on the doctrine of res ipsa loquitur as an aspect of his medical malpractice cause of action,

> "[c]ases such as this, which allege medical malpractice for failure to diagnose a condition or to render appropriate treatment, pertain to the level or standard of care expected of a physician in the community, and do not encompass matters within the ordinary knowledge and experience of laypersons (*see Mosberg v Elahi,* 176 AD2d 710 [1991], *affd* 80 NY2d 941 [1992]). The doctrine of res ipsa loquitur is therefore not applicable to this case (*see Bin Xin Tan v St. Vincent's Hosp. & Med. Ctr. of N.Y.,* 294 AD2d 122 [2002])"

(*Monzon v Chiaramonte*, 140 AD3d 1126, 1128 [2d Dept 2016]). Hence, that branch of the defendants' motion seeking summary judgment dismissing so much of the medical malpractice cause of action as was premised upon the doctrine of res ipsa loquitur must be granted. Moreover, to establish a cause of action to recover for negligent hiring, supervision, training, and retention of health-care personnel, a plaintiff must demonstrate that the defendants either "knew, or should have known," of their employees' "propensity for the sort of conduct which caused the [patient's] injury" (*Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]; *see*

Kuhfeldt v New York Presbyt./Weill Cornell Med. Ctr., 205 AD3d 480, 481-482 [1st Dept 2022]). The defendants established, prima facie, that Drs. Lau, Webb, and Walker were properly trained. Since the plaintiff, in his opposition papers, adduced no facts with respect to whether Huntington knew or should have known of the propensity of any employee to commit acts of malpractice, that branch of the defendants' motion seeking summary judgment dismissing that claim as against Huntington must be granted.

Since Huntington established its prima facie entitlement to judgment as a matter of law in connection with alleged departures that the plaintiff alleged in his complaint and bill of particulars, other than those relating to the proper and timely communication of the issues surrounding the lumbar lesion, and Dr. Kella did not address them in his affirmation, summary judgment must be awarded to Huntington dismissing those other claims.

"'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 negligent treatment provided by an independent physician, as when the physician is retained by the patient himself'" (*Valerio v Liberty Behavioral Mgt. Corp*., 188 AD3d 948, 949 [2d Dept 2020], quoting *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]; *see Hill v St. Clare's Hosp*., 67 NY2d 72, 79 [1986]; *Dupree v Westchester County Health Care Corp*., 164 AD3d 1211, 1213 [2d Dept 2018]). Since there is no dispute that Drs. Webb and Walker were employed by Huntington during the time that they rendered care to the plaintiff, to the extent that the court has determined that there are triable issues of fact as to whether those physicians' malpractice caused or contributed to the plaintiff's injuries, there are triable issues of fact as to whether Huntington may be held vicariously liable therefor.

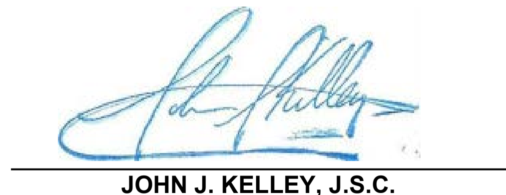
In light of the foregoing, it is,

ORDERED that the motion is granted to the extent that summary judgment is awarded to the defendant Huntington Hospital dismissing so much of the medical malpractice cause of action insofar as asserted against it as was premised on negligent hiring and supervision of

health-care personnel, the doctrine of res judicata, a failure to suspect, test for, and diagnose a lumbar hemangioblastoma, and all additional claims of malpractice, other than the claim that Huntington Hospital personnel failed properly, directly, immediately, and explicitly to inform him and medical personnel at Lenox Hill Hospital that (a) a suspicious lesion had been identified in the lumbar region of his spine on a computed tomography scan, and (b) Huntington Hospital's medical personnel recommended that the plaintiff's undergo a magnetic resonance imaging scan with contrast as soon as practicable, the clams asserting negligent hiring and supervision of health-care personnel, the doctrine of res judicata, a failure to suspect, test for, and diagnose a lumbar hemangioblastoma, and all additional claims not related to the alleged failure to inform the plaintiff and Lenox Hill Hospital of the presence of the lesion and recommendations related thereto, are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the attorneys for all of the remaining parties shall appear for an initial pretrial settlement conference before the court, in Room 204 at 71 Thomas Street, New York, New York 10013, on September 16, 2025, at 12 noon, at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.



8/28/2025
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	