Leach v Sherman
2026 NY Slip Op 31606(U)
April 10, 2026
Supreme Court, New York County
Docket Number: Index No. 805076/2023
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY, *Justice* — PART 56M

INDEX NO. 805076/2023
MOTION DATE 02/03/2026
MOTION SEQ. NO. 001

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JOSEPH LEACH,

Plaintiff,

- v -

ALEX SHERMAN, M.D., "JANE DOE," the exact name, title and identity unknown, and VANGUARD GASTROENTEROLOGY LLP,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42
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, lack of informed consent, and negligent hiring, training, supervision, and retention of healthcare personnel, the defendants Vanguard Gastroenterology, LLP (Vanguard), and Alex Sherman, M.D. (together the Vanguard defendants), move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff opposes the motion. The motion is granted only to the extent that (a) Sherman is awarded summary judgment dismissing the complaint insofar as asserted against him, and (b) Vanguard is awarded summary judgment dismissing the lack of informed consent and the negligent hiring, training, supervision, and retention of healthcare personnel causes of action insofar as asserted against it, and so much of the medical malpractice cause of action insofar as asserted against it as was premised upon allegations that it failed to generate and keep complete and accurate medical records of the plaintiff's treatment, failed to report his loss of consciousness to the New York State Department of Health, failed to perform an adequate workup, failed to perform proper testing, failed to diagnose his condition, failed to refer him to

medical specialists, and failed to come to his assistance after he sustained an injury during an examination and blood-drawing procedure. The motion is otherwise denied, since there are triable issues of fact as to whether a phlebotomist employed by Vanguard departed from good and accepted phlebotomy practice in failing properly to position the plaintiff while she was drawing his blood, despite the fact that the plaintiff informed her that he had a history of fainting when his blood was drawn, whether that departure caused or contributed to his fall from an examination table onto the floor when he did, in fact, faint, and whether Vanguard may be held vicariously liable for the phlebotomist's negligence.

In both his complaint and bill of particulars, the plaintiff alleged that, on August 20, 2021, the defendant gastroenterologist Sherman, while working for Vanguard, negligently treated, tested, and diagnosed his condition. In addition, he asserted that the Vanguard defendants failed properly and safely to draw blood from him in order to test it, more particularly, that they failed safely and properly to position him, thus causing him to lose consciousness and thereupon to fall from an examination table to the floor, causing him to sustain injuries. In this respect, the plaintiff further alleged that the Vanguard defendants failed to heed his warnings that he had experienced previous incidents of lightheadedness and syncope when having blood drawn. Furthermore, he alleged that, after his fall, the Vanguard defendants failed to render proper assistance and treatment, thus depriving him of the opportunity for a cure or a better outcome. In addition, the plaintiff contended that those defendants failed to generate and keep complete and accurate medical records of his treatment and failed to report his loss of consciousness to the New York State Department of Health. He also faulted the Vanguard defendants for failing to perform an adequate, sufficient, and thorough workup of his symptoms, complaints, and condition, and for negligently "dismissing" the signs, symptoms, and complaints with which he presented. In addition, he claimed that the Vanguard defendants failed to undertake necessary, required, and indicated "steps, diagnostic tests, procedures, medical and/or surgical interventions" to diagnose his condition in a timely fashion, and failed to refer

him to appropriate specialists. The plaintiff also made several general allegations that the Vanguard defendants departed from good and accepted practice by failing to adhere to applicable standards of care and by failing to provide adequate medical treatment.

The plaintiff additionally averred that the Vanguard defendants failed to obtain his fully informed consent to an invasive procedure that required drawing blood from him, and negligently hired, trained, supervised, and retained medical and healthcare staff.

The plaintiff averred that, as a consequence of these departures and wrongful acts, he sustained comminuted depressed fractures of the left nasal bones, with obliteration of the left nasal vestibule, fracture of the bony nasal septum, with air in the nasal septum and bony septal hematoma, nasal obstruction and inferior turbinate hypertrophy, deviated right and left nasal bones, a deviated nasal tip, a laceration to the nasal bridge/nose, a laceration and a hematoma to the philtrum, that is, his upper and lower lip, edema and hematoma to the nose, and scarring to, and deformity of, his nose.

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,* 44 NY3d 57, 62-63 [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 his or her 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]).

The court notes that 8 NYCRR 29.2(a), among other things, requires physicians and hospitals to maintain accurate records, and that a violation of that state regulation may, under certain circumstances, constitute a departure or deviation from accepted practice (*see generally Collado v New York and Presbyterian Hosp.,* 2022 NY Misc LEXIS 43557, *61-62 [Sup Ct, N.Y. County, Aug. 3, 2022] [Kelley, J.]; *Khosrova v Westermann*, 2011 NY Slip Op 32628[U], *5, 2011 NY Misc LEXIS 4768, *13 [Sup Ct, Suffolk County, Oct. 4, 2011] [plaintiff's expert opined that failure to maintain adequate records constituted a departure from good practice]; *cf. Pharr v Cortese*, 147 Misc 2d 1078, 1081 [Sup Ct, N.Y. County 1990] [no implied private right of action for violation of regulation]; *but cf. Sorrentino v Iofel*, 2021 NY Misc LEXIS 26098, *6 n 2 [Sup Ct, Queens County, Jan. 21, 2021] [even assuming that regulation creates private right of action, plaintiff failed to assert one]).

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]; *see generally Kristie M. v. Mercy Hosp. of Buffalo,* 240 AD3d 1228 [4th Dept 2025]; *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]; *Jones v Ricciardelli*, 40 AD3d 935, 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 the burden on a summary judgment motion, 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, 1045 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 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; *Luu v Paskowski*, 57 AD3d 856, 857 [2d Dept 2008]; *see also Kristal R. v Nichter,* 115 AD3d 409, 411-412 [1st Dept 2014]; *Bacani v Rosenberg*, 74 AD3d 500, 501-502 [1st Dept 2010]). 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).

The elements of a cause of action to recover for lack of informed consent are

> "(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"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]). "'[T]his showing of qualitative insufficiency of the consent [is] required to be supported by expert medical testimony'" (*King v Jordan*, 265 AD2d 619, 620 [3d Dept 1999], quoting *Hylick v Halweil*, 112 AD2d 400, 401 [2d Dept 1985]; *see* CPLR 4401-a; *Gardner v Wider*, 32 AD3d 728, 730 [1st Dept 2006]). Hence, where a defendant establishes his or her prima facie entitlement to judgment as a matter of law in connection with a lack of informed consent cause of action by submitting an expert affirmation from a physician, a plaintiff can only raise a triable issue of fact by submitting "an expert affirmation stating with certainty that the information defendant[ ] allegedly provided to plaintiff before the [medical] procedures at issue departed from what a reasonable practitioner would have disclosed" (*Leighton v Lowenberg*, 103 AD3d 530, 530 [1st Dept 2013]). Expert testimony, however, is not necessary with respect to the issue of whether a reasonably prudent person, fully informed, would not have consented to the treatment (*see Gray v Williams*, 108 AD3d 1085, 1086-1087 [4th Dept 2013]; *Hugh v Ofodile*, 87 AD3d 508, 509 [1st Dept 2011]; *Andersen v Delaney*, 269 AD2d 193, 193 [1st Dept

2000]; *Hardt v LaTrenta*, 251 AD2d 174, 174 [1st Dept 1998]; *Osorio v Brauner*, 242 AD2d 511, 511-512 [1st Dept 1997]).

"'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law'" (*Huichun Feng v. Accord Physicians*, 194 AD3d 795, 797 [2d Dept 2021], quoting *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]). Nonetheless, a defendant may satisfy the burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a detailed consent form, and there is also evidence that the necessity of the procedure, along with known risks and dangers, were discussed prior to the surgery (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

In any event, "[a] failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that 'involve[s] invasion or disruption of the integrity of the body'" (*Janeczko v Russell*, 46 AD3d 324, 325 [1st Dept 2007], quoting Public Health Law § 2805-d[2][b]; *see Lewis v Rutkovsky*, 153 AD3d at 456), and that invasion or disruption is claimed to have caused the injury.

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 plaintiff's claim alleging negligent hiring, training, supervision, and retention of healthcare employees, as set forth in his complaint and bill of particulars, sounds in common-law negligence (*see Calamari v Panos*, 131 AD3d 1088, 1090 [2d Dept 2015] [negligent hiring cause of action against private medical practice sounds in general common-law negligence, and is subject to 3-year limitations period, rather than the 2-year-and-6-month period applicable to medical malpractice causes of action]).

In support of their motion, the Vanguard defendants submitted the pleadings, the plaintiff's bill of particulars, the transcripts of the parties' deposition testimony, relevant medical and hospital records, the note of issue, a statement of allegedly undisputed material facts, an attorney's affirmation, and the affirmation of board-certified internist Brian D. Feingold, M.D., who opined that the Vanguard defendants did not depart from good and accepted practice, and that nothing that they did or did not do caused or contributed to the plaintiff's claimed injuries.

Dr. Feingold first briefly reviewed the plaintiff's medical history leading up to the subject incident, explaining that, on multiple occasions between 2008 and 2021, the plaintiff had presented to his primary care physician, internist Michael Glasser, M.D., complaining of gastrointestinal (GI) symptoms, such as vomiting, diarrhea, and gastro-esophageal reflux disease (GERD), and that the plaintiff's medical history was significant for depression, anxiety disorder, and vasovagal syncope. Dr. Glasser referred the plaintiff to Sherman. On August 20, 2021, the plaintiff presented to Sherman for a GI consultation, at which time the plaintiff reported a 20-year history of GI issues that included GERD, diarrhea, constipation, and heartburn, with the onset of symptoms of burping having occurred in November 2020.

As Dr. Feingold interpreted the relevant medical chart, Sherman performed a physical examination of the plaintiff in an examination room at Vanguard, which yielded results that Sherman characterized as unremarkable, after which Sherman ordered laboratory blood tests, an abdominal sonogram, and an esophagogastroduodenoscopy (EGD). According to Dr. Feingold, the plaintiff remained in the examination room while Sherman exited in order to inform Vanguard's phlebotomist, Anna Gomez, that the plaintiff needed to have his blood drawn. As he explained it, Gomez entered the examination room and began to draw the plaintiff's blood, and that, during the course of drawing the blood, the plaintiff experienced a vasovagal syncope episode, and fainted. Dr. Feingold conceded that, as a result of this fall, the plaintiff hit the bridge of his nose, which caused a laceration and bleeding. Dr. Feingold asserted that Sherman returned to the examination room shortly thereafter, and assisted with the plaintiff's

resuscitation. He averred that the plaintiff regained consciousness within one minute, and that an emergency medical services ambulance was called and arrived, upon which the plaintiff was transported to the emergency room of NYU Langone Tisch Hospital (NYU) for an evaluation. As Dr. Feingold interpreted the NYU records, NYU medical personnel performed a computed tomography (CT) scan of the plaintiff's face, which revealed a depressed left nasal fracture, with stenosis of the left nasal vestibule, and a bony nasal septal fracture, after which an NYU surgeon performed a closed reduction procedure was performed. He asserted that, on December 21, 2021, the plaintiff underwent an elective rhinoplasty and septoplasty.

Dr. Feingold explained that patients who are prone to vasovagal episodes "have a duty to inform their healthcare providers of this condition," and that once this information is disclosed, the standard of care requires medical providers and healthcare facilities to take appropriate precautions, such as having the patient recline during a blood draw, which could prevent injuries or complications. According to Dr. Feingold, Sherman suspected that the plaintiff likely was suffering from GERD, and thus recommended laboratory blood tests to rule out any potential pancreatic or hepatobiliary disorder. Based on his review of Sherman's new patient intake form that the plaintiff had completed, Dr. Feingold asserted that there was no written indication that the plaintiff had a history of vasovagal syncope reactions during blood draws. Dr. Feingold asserted that, although the intake form did not explicitly ask the plaintiff to provide information about prior vasovagal syncope episodes, the plaintiff had a responsibility to disclose this of his history of vasovagal symptoms. He concluded that, given the lack of any documentation or verbal communication indicating that Sherman was made aware of plaintiff's vasovagal episodes, Sherman was not put on notice of this condition, and could not be held liable.

Dr. Feingold opined that, in documenting a patient's medical history, a medical provider relies on the information provided directly by the patient. He noted that Sherman had provided the plaintiff with an intake form, which the latter completed, after which Sherman documented the plaintiff's medical history, based on the information that had been provided. He thus

concluded that Sherman did not depart from accepted standards of practice in his treatment of plaintiff, specifically as it pertained to the subject vasovagal syncope event, and Sherman's conduct could not be deemed a proximate cause of the plaintiff's injuries. Dr. Feingold expressly opined that Sherman did not have a duty to contact the plaintiff's primary care physician or other treating physicians prior to the subject visit to obtain the plaintiff s medical history, or for any other reason for that matter.

Dr. Feingold further concluded that there was no merit to the plaintiff's allegation that the Vanguard defendants failed to obtain a fully informed consent to the blood-drawing procedure, since Sherman appropriately advised the plaintiff that he was going to have his blood drawn. He also approved of Sherman's conduct in returning to the examination room after the plaintiff had fainted and fallen. He further asserted that Sherman assisted with resuscitation in a satisfactory manner, and immediately contacted emergency medical services. In addition, Dr. Feingold expressly rejected the plaintiff's claims of negligent hiring and supervision, as he found no evidence to support such claims either in the medical records or deposition testimony.

In opposition to the Vanguard defendants' motion, the plaintiff relied on many of the same documents that those defendants had submitted. He also submitted a counterstatement of material facts, a notarized statement from Gomez, an attorney's affirmation, and the expert affirmation of a phlebotomist and certified medical laboratory scientist, who is licensed as a clinical laboratory technologist and who had earned a Ph.D. in health sciences and clinical laboratory science (hereinafter the phlebotomist).

In her notarized statement, Gomez attested that Sherman had instructed her to draw the plaintiff's blood. She asserted that "[t]he usual procedure" that she "would follow was to ask the patient if they had any problems or difficulties with having their blood drawn." She nonetheless asserted that she did not specifically recall asking the plaintiff that question, and that, if she did, she did not recall his answer. She did, however, remember placing a tourniquet on the plaintiff's arm and inserting a needle to draw blood, and that, at some point after she had commenced the

procedure, the plaintiff passed out, fell forward, and struck his face on the corner of the desk that was located behind the two of them. Gomez explained that she immediately untied the tourniquet and ran out to a hallway to summon Sherman, who entered the examination room, tended to the plaintiff while he was on the floor, and attempted to stop the bleeding. According to Gomez, a secretary called the 911 emergency telephone number and that, when emergency medical services personnel arrived, the plaintiff regained consciousness.

The plaintiff's retained phlebotomist noted that, although the plaintiff may not have recalled explicitly advising *Sherman* of his history of vasovagal syncope when having his blood drawn, the plaintiff did testify at his deposition that he "said something" to Gomez "along the lines of I'm very squeamish and I have fainted before when drawing blood." In fact, the plaintiff also testified that, in communicating with Gomez, "the vibe I got was rushed, hurried, not paying a lot of attention. I don't think she said much of anything. I felt like it was ignored." The phlebotomist opined that, "[d]espite the clear warning given by the Plaintiff, the phlebotomist proceeded to draw the Plaintiff's blood without taking appropriate precautions in violation of accepted standards of practice for such a procedure." As this expert explained it, patients who have a history of syncope must be recumbent, that is, lying flat or nearly flat, when having their blood drawn, since this precaution prevents patients from falling should they faint during or shortly after the procedure. According to the phlebotomist, this requirement is described in standard GP41 og the Clinical and Laboratory Standards Institute (CLSI) in Collection of Diagnostic Venous Blood Samples, which explicitly provides that "[p]atients with a history of syncope must be recumbent." The plaintiff's expert attested that CLSI GP41 is "by far" the most widely recognized and referenced standard for accepted practices in phlebotomy in the United States, and that most accredited hospitals and licensed clinical laboratories develop blood collection policies and procedures in accordance with this standard.

The plaintiff's retained phlebotomist asserted that the plaintiff was not placed in a recumbent position before blood collection but that, instead, Gomez drew blood while the

plaintiff was sitting upright on an examination table, which is never permitted regardless of syncope history, as there are no safeguards present to prevent a fall. Rather, the expert adverted to the CLSI standard, which provides that

> "[p]atients undergoing a blood draw in a seated position must sit in chairs that have safety features (e.g., arm rests or commercial venipuncture chairs) to provide support and prevent falls if the patient loses consciousness. When chairs with safety features are not available, the specimen must be collected with the patient in a recumbent position."

The expert thus asserted that it is a well-settled standard for phlebotomists to ensure that all patients are seated in an appropriate chair or in a recumbent position when blood is collected, and that the Vanguard defendants admitted they had neither the requisite phlebotomy chair, nor seating with any safety devices to prevent falls like this from occurring. Inasmuch as the plaintiff informed Gomez of his history of fainting during blood draws, the plaintiff's phlebotomist concluded that the Vanguard defendants should have assured that the plaintiff was in a recumbent position before blood was drawn, and that Gomez failed to follow the accepted standard of care by failing properly to position the plaintiff in such a recumbent position, which proximately led to the injuries that the plaintiff sustained.

In reply, the Vanguard defendants submitted an attorney's affirmation, in which counsel, among other things, contended that the plaintiff failed to raise a triable issue of fact in opposition to Sherman's prima facie showing of entitlement to judgment as a matter of law because the plaintiff did not submit an affirmation or affidavit from a gastroenterologist or other physician with similar medical education, training, and experience. She argued that the absence of such an expert affirmation or affidavit required summary dismissal of the complaint insofar as asserted against Sherman. In addition, counsel argued that the affirmation of the plaintiff's phlebotomist was conclusory, speculative, and unsupported either by the medical records or the parties' deposition testimony, and that, consequently, the plaintiff failed to raise a triable issue of fact as to whether Vanguard departed from good and accepted phlebotomy practice.

The court concludes that the Vanguard defendants established their prima facie entitlement to judgment as a matter of law in connection with all of the plaintiff's causes of action with their submissions, including Dr. Feingold's affirmation. Since, in opposition to that showing, the plaintiff failed to submit an affirmation or affidavit from a gastroenterologist or some other physician with similar medical education, training, and experience, he failed to raise a triable issue of fact with respect to his claims against Sherman. The determination of whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court, the provident exercise of which will not be disturbed absent a serious mistake or an error of law (*see Guzman v 4030 Bronx Blvd. Assoc., LLC*, 54 AD3d 42, 49 [1st Dept 2008]). Although the courts of this State repeatedly have rejected the concept that only a specialist practicing in a defendant's particular specialty is competent to testify that another specialist departed from accepted practice in the specialty (*see Fuller v Preis*, 35 NY2d 425, 431 [1974]; *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 572 [1st Dept 2017]; *Bickom v Bierwagen*, 48 AD3d 1247,1248 [4th Dept 2008]; Julien v Physician's Hosp., 231 AD2d 678, 680 [2d Dept 1996]; *Matter of Enu v Sobol*, 171 AD2d 302, 304 [3d Dept 1991]; *Joswick v Lenox Hill Hosp*., 161 AD2d 352, 355 [1st Dept 1990]), a non-physician is not qualified to render an opinion as to whether a physician departed from the standards of care applicable to the practice of medicine (*see LaMarque v North Shore Univ. Hosp*., 227 AD2d 594, 594-595 [2d Dept 1996] [even though a non-physician psychologist may have familiarity with similar mental-health conditions and treatments, the psychologist was not qualified "to render an expert opinion as to the appropriate standards of medical and psychiatric care, and what, if any, departures from that standard of care were committed by the defendants"]; *see also Geffner v North Shore Univ. Hosp*., 57 AD3d 839, 842, [2d Dept 2008] [suggesting that pharmacist is not qualified to render medical opinion as to the appropriate standard of care for physicians in the administration and use of drugs]; *Elliot v Long Is. Home, Ltd*., 12 AD3d 481, 482 [2d Dept 2004] [registered nurse is not qualified to render expert opinion as to whether physician departed from accepted standard of care]; *Hoffman v*

Pelletier, 6 AD3d 889, 890-891 [3d Dept 2004] [licensed practical nurse and dentist/ psychologist]; *Mills v Moriarty*, 302 AD2d 436, 436 [2d Dept 2003] [nurse practitioner]; *Jordan v Glens Falls Hosp.*, 261 AD2d 666, 666-667 [3d Dept 1999] [pharmacologist]; *Montant v Gluck*, 2018 NY Slip Op 30820, *4, 2018 NY Misc LEXIS 1617, *7-8 [Sup Ct, Suffolk County, Apr. 23, 2018] [physician's assistant]). Hence, summary judgment must be awarded to Sherman dismissing the complaint insofar as asserted against him.

Nonetheless, contrary to the Vanguard defendants' contentions, the plaintiff raised triable issues of fact as to whether Gomez departed from good phlebotomy practice, whether that departure caused or contributed to his injuries, and whether Vanguard may be held liable for Gomez's negligence, "'In general, under the doctrine of respondeat superior, a hospital [or medical practice] may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment'" (*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]). Gomez was concededly an employee of Vanguard when she drew the plaintiff's blood, and even where a non-physician employee of healthcare-related entity commits professional malpractice, the entity may be held vicariously liable for that employee's negligence (*see Bledsoe v Center for Human Reproduction*, 228 AD3d 96, 101-103 [1st Dept 2024] [fertility clinic that was managed by a physician may be held vicariously liable for negligence committed by one of its embryologists]; *Schacherbauer v University Assoc. in Obstetrics & Gynecology, P.C.,* 56 AD3d 751, 751-752 [2d Dept 2008] [private medical practice may be held vicariously liable for the negligence of a phlebotomist who, although not actually employed by the practice, acted as its agent, and was subject to its control]; *Giarretto v North Shore Univ. Hosp. at Glen Cove,* 2009 NY Slip Op 31246[U], *2, 4-6, 2009 NY Misc LEXIS 5777, *3, 11-12 [Sup Ct, Nassau County, May 28, 2009] [same, in action

where patient who had informed phlebotomist of prior episodes of fainting, in fact fainted during blood draw]).

The court rejects the defendants' contention that the affirmation of the plaintiff's expert phlebotomist was conclusory or speculative. The opinions of the plaintiff's expert were "neither conclusory nor speculative, as [they] established the elements of a medical malpractice claim by specific factual references to the care and treatment" of the plaintiff (*Wiands v Albany Med. Ctr*., 29 AD3d 982, 984 [2d Dept 2006]), particularly with respect to Gomez's failure properly to position the plaintiff during the blood draw, and whether that malpractice caused the plaintiff to fall to the floor and sustain an injury when he fainted.[1] It is well settled that a battle of experts, such as presented here, raises credibility issues which must be resolved by a fact finder and which preclude summary judgment (*see Frye v Montefiore Med. Ctr.*, 70 AD3d at 25). Moreover, the plaintiff's deposition testimony to the effect that he, in fact, advised Gomez of his history of fainting when blood had been drawn from him raised a triable issue of fact as to whether Vanguard was on notice of that condition, and whether its employees should have taken necessary precautions in his positioning or the type of chair that it made available to him when drawing his blood. Gomez's statement that she could not recall whether she asked the plaintiff about prior incidents or whether he informed her of prior incidents was not sufficient to contradict the plaintiff's deposition testimony in this regard.

The plaintiff did not submit any expert opinion as to whether the consent that the Vanguard defendants obtained from him in connection with the blood drawing procedure was qualitatively insufficient, whether they negligently hired, trained, supervised, and retained healthcare personnel, or whether they committed malpractice because they failed to generate

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[1] The court notes that a cause of action alleging that non-physician healthcare professionals departed from accepted standards of care in their particular profession sounds in medical malpractice (*see generally Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1089 [2d Dept 2014] ["A medical malpractice cause of action may be asserted against a registered nurse for departures from good and accepted nursing practice that proximately cause a plaintiff's injuries"]).

and keep complete and accurate medical records of the plaintiff's treatment, failed to report his loss of consciousness to the New York State Department of Health, failed to perform an adequate workup, failed to perform proper testing, failed to diagnose his condition, failed to refer him to medical specialists, and failed to come to his assistance after he sustained an injury during the blood-drawing procedure. Even had he done so, in light of the facts underlying his claim, there appears to be no argument that any such wrongdoing or departure caused him to faint, to fall, or to strike his nose on a piece of furniture. Thus, Vanguard must be awarded summary judgment dismissing those causes of action and claims insofar as asserted against it.

In light of the foregoing, it is,

ORDERED that the motion of the defendants Alex Sherman, M.D., and Vanguard Gastroenterology, LLP, is granted to the extent that (a) summary judgment is awarded to Alex Sherman, M.D., dismissing the complaint insofar as asserted against him, and (b) summary judgment is awarded to Vanguard Gastroenterology, LLP, dismissing the lack of informed consent and the negligent hiring, training, supervision, and retention of healthcare personnel causes of action insofar as asserted against it, and so much of the medical malpractice cause of action insofar as asserted against it as was premised upon allegations that it failed to generate and keep complete and accurate medical records of the plaintiff's treatment, failed to report his loss of consciousness to the New York State Department of Health, failed to perform an adequate workup, failed to perform proper testing, failed to diagnose his condition, failed to refer him to medical specialists, and failed to come to his assistance after he sustained an injury during the blood-drawing procedure, the complaint is dismissed insofar as asserted against the defendant Alex Sherman, M.D., the lack of informed consent and the negligent hiring, training, supervision, and retention of healthcare personnel causes of action, and so much of the medical malpractice cause of action as was premised upon allegations that it failed to generate and keep complete and accurate medical records of the plaintiff's treatment, failed to report his loss of consciousness to the New York State Department of Health, failed to perform an adequate

workup, failed to perform proper testing, failed to diagnose his condition, failed to refer him to medical specialists, and failed to come to his assistance after he sustained an injury during the blood-drawing procedure are dismissed insofar as asserted against the defendant Vanguard Gastroenterology, LLP, and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant Alex Sherman, M.D.; and it is further,

ORDERED that the Clerk of the court shall enter judgment in favor of the defendant Alex Sherman, M.D., and against the plaintiff, dismissing the complaint insofar as asserted against the defendant Alex Sherman, M.D.; and it is further,

ORDERED that, on the court's own motion, the attorneys for the plaintiff and the defendant Vanguard Gastroenterology, LLP, shall appear for an initial pretrial settlement conference before the court, in Room 204 at 71 Thomas Street, New York, New York 10013, on May 1, 2026, at 2:15 p.m., at which time they shall be prepared to discuss resolution of the action, the scheduling of a future two-hour, mediation-style settlement conference, and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

4/10/2026
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**	