

Prevete v Bernier

2012 NY Slip Op 30446(U)

February 15, 2012

Sup Ct, Suffolk County

Docket Number: 04-6776

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 6-22-11 (#009)
MOTION DATE 7-22-11 (#010 & #011)
MOTION DATE 11-16-11 (#012)
MOTION DATE 12-7-11 (#013)
ADJ. DATE 12-7-11
Mot. Seq. # 009-MG # 012 - X MotD
010 -MD # 013 - X MotD
011 -MG

PHILIP PREVETE, As Administrator of the
Estate of JOANNE PREVETE, deceased, and
Individually,

Plaintiffs,

- against -

JAYNE M. BERNIER, M.D., SUFFOLK
MEDICAL IMAGING, P.C., SUFFOLK BREAST
IMAGING, P.C., SUFFOLK ASSOCIATES FOR
WOMEN'S MEDICAL PROCEDURES, P.C.,
ISLANDIA MRI ASSOCIATES, P.C., REITER &
PERKES, P.C., DEBORAH M. DAVENPORT,
M.D., THREE VILLAGE OBSTETRICS &
GYNECOLOGY, P.C., VALERIE INFRANCO,
N.P., JAMES DROESCH, M.D., ARLENE
KAELBER, M.D., MAXINE L. SPICER, M.D.,
PHILIPA SCHOENFELD, M.D., THREE
VILLAGE WOMEN'S HEALTH, LLP,
MARTYN W. BURK, M.D., PUNIT AGHERA,
M.D., and PAUL FISHER, M.D.,

Defendants.

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Karlber, Spicer, and Schoenfeld, Three Village
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Mineola, New York 11501

Upon the following papers numbered 1 to 85 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (009)52-60; Notice of Cross Motion and supporting papers (010) 1-22;(011) 23-37;(012) 38-43; (013) 44-51; Answering Affidavits and supporting papers 61-68; 69-73; 74-76; Replying Affidavits and supporting papers 77-78; 79-81; 82-85; Other ____; (and after hearing counsel in support and opposed to the motion) it is,

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ORDERED that motion (009) by the defendant, Punit Aghera, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him, is granted; and it is further

ORDERED that motion (010) by the defendant, Valerie Infranco, NP, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against her, is denied; and it is further

ORDERED that motion (011) by the defendants, Jayne Bernier, M.D., Suffolk Medical Imaging, PC, Suffolk Breast Imaging, PC., Suffolk Associates for Women's Medical Procedures, PC, Islandia MRI Associates, PC, and Reiter & Perkes, PC, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them, is granted; and it is further

ORDERED that motion (012) by the defendants, Deborah M. Davenport, M.D., Three Village Obstetric & Gynecological Associates, P.C. s/h/a Three Village Obstetrics & Gynecology, PC, James N. Drosch, M.D, Arlene Kaelber, M.D., Maxine L. Spicer, M.D., Philip A. Schoenfeld, M.D. s/h/a Phillip A. Schoenfeld, M.D., and Three Village Women's Health, LLP, for an order granting summary judgment dismissing any and all claims based on allegations of vicarious liability for and by virtue of employment or collaboration in the care and treatment provided by co-defendant Valerie Infranco, NP, is denied as untimely; and in the alternative, pursuant to CPLR 3025, permitting the aforementioned movants to amend their answer to include a cross claim against Valerie Infranco, NP for apportionment of liability and contribution/ indemnification as set forth in their proposed amended answer, is granted, the proposed amended answer with cross claim is deemed served nunc pro tunc, and defendant Infranco, if so advised, may serve an answer to such cross claim within twenty days of the date of this order; and it is further

ORDERED that motion (013) by the defendant, Valarie Infranco, NP, for an order denying motion (012), is denied; and, in the alternative, pursuant to CPLR 3025, seeking an order granting leave to amend her answer to assert a cross claim against the moving defendants in motion (012) for apportionment of liability and contribution/indemnification, as set forth in her proposed amended answer, is granted, and the proposed amended answer asserting the cross claim is deemed served nunc pro tunc, and the defendants in motion (012), if so advised, may serve an answer to such cross claim within twenty days of the date of this order.

In this medical malpractice action, the plaintiff, Philip Prevete, as Administrator of the Estate of Joanne Prevete, deceased, alleges the defendants were negligent and failed to provide the decedent with proper informed consent, and otherwise departed from good and accepted standards of medical care and practice, and caused the wrongful death of Joanne Prevete on October 14, 2004. The decedent was thirty six years of age at the time of her death. It is alleged that the defendants failed to timely and appropriately diagnose and treat the decedent for breast cancer, and to properly interpret and evaluate the diagnostic testing relative thereto. A derivative claim has been asserted by the plaintiff.

The moving defendants seek summary judgment dismissing the complaint as asserted against them on the bases they did not depart from accepted standards of medical care and practice and that they did not contribute to or cause the decedent's claimed injuries and death. No defendant has asserted a cross claims against any other defendant in the respective answers.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]).

The medical records submitted in support of a motion for summary judgment must be certified as required by CPLR 3212 to be in admissible form. Expert testimony is limited to facts in evidence. (*see also Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

In motion (009), defendant Punit Aghera, M.D. seeks summary judgment dismissing the complaint on the bases that he was a resident physician during the applicable time period; that, as a resident, he did not exercise independent medical judgment or independently interpret the decedent's

sonogram images or films; and at the time, he was acting under the supervision of the defendant Paul Fisher, M.D. In support of his application, Dr. Aghera has submitted, inter alia, an attorney's affirmation; the affidavit of Punit Aghera, M.D.; a copy of the amended verified complaint, his answer, and the plaintiff's verified bill of particulars; a copy of the ultrasound report of May 14, 2003 of the decedent's right breast; and an unsigned and uncertified copy of the transcript of Paul Fisher, M.D. which is not in admissible form to be considered on a motion for summary judgment, (see *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), is not accompanied by an affidavit or proof of service pursuant to CPLR 3116, and is not considered on this motion.

Punit Aghera, M.D. has set forth in his supporting affidavit that he is currently licensed to practice medicine in New York State, and is a board certified radiologist. He states that on May 14, 2003, he was a resident in the field of radiology at Stony Brook University Hospital. Dr. Aghera states that his name appears on the radiology report of Joanne Prevete, dated May 14, 2002, and that he reviewed the radiological films, consisting of sonogram images. He avers that at the time, as a radiology resident, when he reviewed the films, such review would have been in the presence of Dr. Paul Fisher, the radiology attending physician. He states that all radiological findings would have been discussed between them for the purposes of instruction and training. He adds that Dr. Fisher would have conducted an independent review and interpretation of the films.

Dr. Aghera continues that the impression noted in the report states "Several simple or minimally complex cysts are seen within the right upper-outer quadrant. This represents a benign finding." Dr. Aghera did not know if he was present for the real-time evaluation of the sonogram images of Joanne Prevete, and if he was, it was under the supervision of Dr. Fisher. Dr. Aghera further avers that the radiology reports are generally dictated by the attending radiologist and electronically signed by the attending. On an occasion where he would dictate a report, Dr. Fisher would review and electronically sign the dictation. It is Dr. Aghera's opinion with a reasonable degree of medical certainty that he conformed to the standards of care of a radiology resident at all times and that the care he rendered did not cause or contribute to the alleged injuries.

While a private physician may be held vicariously liable for conduct of a resident physician where the resident is under the direct supervision and control of the private physician at the time of the conduct; the key is whether the resident exercises independent medical judgment (*Freeman v Mercy Medical Center*, 2008 NY Slip Op 31337U; 2008 Misc Lexis 10141 [Sup. Ct. of New York, Nassau County]). A resident who assists a doctor during a medical procedure, and who does not exercise independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (*Muniz v Katiowitz* 49 AD3d 511, 856 NYS2d 120 [2d Dept 2008]). Dr. Aghera has demonstrated prima facie that he did not exercise independent medical judgment. Although Dr. Aghera has not opined that Dr. Fisher did not deviate from normal practice in interpreting the sonogram films and, thus, Aghera should not be held liable for failing to intervene and seek further review of the films, he does aver that he conformed to the standards of care of a radiology resident at all times. Additionally, the plaintiff does not oppose this motion or otherwise object to the application by Dr. Aghera. Based

upon the foregoing, Dr. Aghera has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against him.

Accordingly, motion (009) is granted and the complaint as asserted against Dr. Aghera is dismissed with prejudice.

In motion (010), Valerie Infranco, NP, seeks summary judgment dismissing the complaint on the bases that she did not depart from accepted standards of medical care and practice; that the alleged departures were not a substantial factor in causing the decedent's claimed injuries and death; that on November 7, 2002, she appropriately noted that the ultrasound revealed benign cysts, and that she requested a repeat breast examination by a physician at the November 12, 2002 visit by the decedent. In support of this application, defendant Infranco has submitted, inter alia, an attorney's affirmation; the expert affidavit of Linda M. Wojtowicz, NP; copies of the pleadings and amended pleadings, the answers and amended answers served by Jayne M. Bernier, M.D, Suffolk Medical Imaging, PC, Suffolk Breast Imaging, PC., Suffolk Associates for Women's Medical Procedures, PC, Islandia MRI Associates, PC, Reiter & Perkes, PC, Deborah M. Davenport, M.D., Three Village Obstetric & Gynecology Associates, P.C., James N. Doersch, M.D., Arlene Kaelber, M.D., Maxine L. Spicer, M.D, Philip A. Schoenfeld, M.D., Three Village Women's Health, LLP, Valerie Infranco, NP, Martyn W. Burk, M.D., Punit Aghera, M.D., Paul Fischer, M.D.; plaintiff's verified bill of particulars as to defendant Infranco; an uncertified copy of the decedent's medical records of Three Village Women's Health, LLP, Suffolk Breast Imaging, University Physicians, and Memorial Hospital for Cancer and Allied Disease; an uncertified copy of the decedent's death certificate; and the unsigned and uncertified transcript of Valerie Infranco, dated October 27, 2009, which is not in admissible form but which is considered by this court as adopted as accurate by the moving defendant (*see Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

Valerie Infranco testified to the extent that she graduated with a BSN degree in 1979, and thereafter, obtained a masters degree at Stony Brook University as a family nurse practitioner, and a post-masters degree in perinatal women's health. She became certified as a nurse practitioner in 1996 and licensed in woman's health in 2006. She started working at Three Village Women's Health (Three Village) in 1992 as a registered nurse, and in 1996 as a nurse practitioner. In 1997, pursuant to a Practice Agreement describing her scope of practice, she worked solely as a nurse practitioner at Three Village where she cared for both obstetrical and gynecology patients. The Practice Agreement contained a Quality Assurance clause in which the physicians were to review her charts every three months.

Valerie Infranco testified that she saw Joanne Prevete on April 18, 1997 for a five-week postpartum check following delivery of an infant resulting from her third pregnancy. She had two other children. She was noted to be in the process of a divorce; she was breast feeding; and upon examination, no fibrocystic changes were noted in her breasts. Nurse Infranco testified that on September 13, 2002, the decedent telephoned her advising that her home pregnancy test was positive twice for an unplanned pregnancy. The decedent also advised her that she lost 24 pounds, which weight loss, Infranco stated, was of no significance, and she did not inquire into the reason for the loss. She saw the decedent on September 20, 2002 and noted the 24 pound weight loss, and her history of autoimmune disorder, questionable post-partum depression in 1994, skin cancer on the face, and synovial cancer of her right leg which involved an amputation of her leg followed by chemotherapy and radiation for a year, and for

which she wore a prosthesis. Trace pedal edema was noted in her left leg. All Pap smears had been negative. She described the physical examination she conducted, including examinations of the breasts in both sitting and lying positions, which examinations revealed some changes in the upper outer quadrant of the right breast, which changes were noted to be fibrotic in texture. She considered this finding to be a fibrocystic change and did not order any tests other than an ultrasound because it was not unusual to find a breast change in the first trimester of pregnancy. She did not consider that the patient might be having a recurrence of cancer. She testified that she did not tell the decedent that she had a lump in her breast.

Nurse Infranco continued that the sonogram report by Dr. Bernier, dated September 25, 2002, noted two small 4 millimeter cysts in the right upper quadrant of the right breast. She felt this report was consistent with her clinical findings. On November 7, 2002, the decedent came into the office for a non-regular visit due to the feeling of rectal pressure and cramping, so a breast examination was not done. The decedent was scheduled for a routine obstetrical appointment on November 12, 2002, at which time a breast examination was to be conducted, pursuant to Infranco's request in the patient's chart. Nurse Infranco did not see her on that date, but testified that Dr. Davenport saw the decedent and charted that the breast examination was okay. She next saw the decedent on April 17, 2003, at which time she complained of sporadic bleeding from the nipple of the right breast for several weeks. She stated that the decedent advised that her mother had been diagnosed with ductal carcinoma in situ or breast cancer. She also advised that the two lumps in her right breast were now very prominent. However, nurse Infranco testified that that portion of the note was written by the staff that placed the decedent in the room for examination, and not by her. She testified that she did not find any prominent lumps when she examined the decedent's right breast, but did find increased density in the breast, as well as blood and serosanguineous fluid coming from the nipple upon expression. The findings were concerning, nurse Infranco stated, and her differential diagnoses were papilloma, irritation of the nipple, mastitis, or breast cancer. She instructed the decedent to see a physician at the Carol Baldwin Breast Center based upon the discharge. Thereafter, delivery of the infant by induction was scheduled for April 21, 2003, as the decedent had a history of a very rapid labor. Nurse Infranco had no recollection of speaking to any of the Three Village physicians about Ms. Prevete. She did not see the decedent after the April 17, 2003 visit.

Linda M. Wojtowicz, NP, has submitted her expert affidavit and avers that she is licensed as a registered nurse in New York since 1983 and has been a licensed nurse practitioner in family health in New York State since 1992. She sets forth her education and work experience, the records and materials which she reviewed, and states her opinions with a reasonable degree of medical certainty. Nurse Wojtowicz opines that nurse Franco did not depart from accepted standards of medical care and practice during her treatment of Ms. Prevete, and that no acts or omissions by her were a substantial factor in causing the deceased plaintiff's eventual demise. She set forth the care and treatment rendered by nurse Infranco to the decedent, including the palpation of the breasts and cystic finding in the right breast on September 20, 2002, for which she referred the decedent for a sonogram. She avers that referral for a sonogram or mammography, for what appears to be benign finding, is the proper procedure, which nurse Infranco followed. She further opines that a sonogram in a woman under the age of forty is more reliable than a mammogram. She states that nurse Infranco then followed up with a request for a repeat breast examination in November 2002. She saw the decedent on November 7, 2002, noted the sonogram result and requested a breast exam by a physician at the November 12, 2002 appointment. However, she

stated, a physician examined the decedent on November 12, 2002, but did not perform a breast exam, but on December 16, 2002, Dr. Davenport examined the decedent and noted that her breasts were bilaterally cystic with no dominant masses. No further care was recommended by Dr. Davenport for this finding. Although the decedent was seen at the office by other staff for scheduled prenatal visits on six other dates, nurse Infranco did not see the decedent until April 17, 2003, at which time, after ascertaining that the decedent was having bloody and serosanguineous drainage from the right nipple, she referred the decedent to a breast surgeon, Dr. Martyn Burk. On April 19, 2003, the decedent delivered an infant son; she had her initial consultation with Dr. Burk on May 7, 2003; Dr. Burk performed a core biopsy of the right breast on November 11, 2003, which lead to the diagnosis of invasive ductal carcinoma; and that the decedent succumbed to breast cancer and died on October 14, 2004.

Based upon the foregoing, it is determined that Valerie Infranco has established prima facie entitlement to summary judgment dismissing the complaint as asserted against her.

The plaintiff opposes this motion with, among other exhibits, the affirmation of his expert physician who affirms to being certified to practice medicine in New York State, and who is board certified in obstetrics and gynecology. The plaintiff's expert sets forth the records and materials reviewed. It is the plaintiff's expert's opinion, set forth with a reasonable degree of medical certainty, that the care and treatment rendered to the plaintiff's decedent by the defendant, Valerie Infranco, NP, was substandard, and that she departed from accepted standards of medical, obstetrical and gynecological care and practice. The plaintiff's expert opines that nurse Infranco had, and continued to have, the responsibility to be aware of, and to approve or alter, the decedent's treatment at Three Village Obstetrics & Gynecology; that she was responsible for the coordination and implementation of whatever consultations were necessary regarding Ms. Prevete's breast symptoms and abnormalities; and that although other providers, to some degree, share responsibility for her care, it in no way relieved nurse Infranco of her responsibility for the medical, obstetrical, and gynecological management of the decedent.

It is the plaintiff's expert's opinion that the individuals managing the gynecological and obstetrical care of female patients, including prenatal patients, includes the timely recognition, diagnosis and treatment of breast symptoms and abnormalities, that nurse Infranco had such an obligation to the decedent, and that the departure from proper care and vigilance in this regard was a contributory cause of the injuries and death of the decedent from breast cancer. The plaintiff's expert continues that breast cancer is the most common cancer in women and in pregnant women, and therefore, it is essential that any suspicious breast lumps and other symptoms be investigated and documented. The expert continues that the hormones of pregnancy can accelerate the growth of a breast mass which requires thorough and conscientious care in the examination, re-examination, and surveillance of any new or suspicious breast lump that develops during pregnancy, especially during early pregnancy, and especially when a patient presents with predisposing risk factors such as a history of cancer. Surgery to remove either the suspicious mass or the breast itself can usually be performed without risk, even during pregnancy, states the plaintiff's expert.

The plaintiff's expert states that the 34 year old Joanne Prevete was seen by Valerie Infranco for a first prenatal visit on September 20, 2002. The medical history revealed this was her fourth pregnancy, that she and an expected due date of May 1, 2003, that she gave a past medical history of synovial cancer

of the right leg which required surgical amputation and treatment with radiation and chemotherapy, as well as a prior history of skin cancer, a remotely positive PAP test, a recent weight loss of 24 pounds, and trace edema in the left leg. The plaintiff's expert set forth the care and treatment of the decedent by nurse Infranco, whom he states did not note or set forth any description of the abnormal right breast findings in her note for September 20, 2002, nor did she request a consult with any of the physicians at Three Village or refer the decedent for a surgical consult for evaluation of the right breast findings. The expert notes there were fibrocystic changes confined to the right upper outer quadrant of the right breast, which had not been present ten months earlier on November 26, 2001, and that 50% of breast cancers occur in the upper outer quadrant of the breast. The plaintiff's expert states that the failure of nurse Infranco to properly document her findings in the patient's medical record; to consider the decedent's past medical history and her risk for developing cancer, and to refer the decedent to a breast surgeon immediately for evaluation of the suspicious findings was a clear departure from good and accepted practice which deprived the patient of an early diagnosis and treatment of her right breast cancer.

The plaintiff's expert further states that the right breast sonogram performed on September 25, 2002, does not report that Ms. Prevete had a fibrocystic breast, but rather documents that there were two small 4 mm cysts at the 9 o'clock position. The continues that a mass, including cysts, must be at least 1 cm before a trained person can feel it, and therefore, nurse Infranco's notation on the sonogram report indicating that the sonogram correlated with her findings is incompatible with her findings, as she must have felt a palpable lump since she could not have felt the two small cysts reported on the sonogram. The expert adds that the radiologist recommended that, in the presence of a palpable lump, follow-up should be based on clinical findings, and that because nurse Infranco did not advise the radiologist of the decedent's significant history of cancer and recent unexplained weight loss, it was her responsibility to follow-up based on the patient's clinical findings and history of cancer. He adds that she did not follow up on a plan to perform a breast examination on the routine prenatal examination of November 12, 2002. These failures, states the plaintiff's expert, were departures from good and accepted practice.

The plaintiff's expert further opines that when nurse Infranco examined the decedent on April 17, 2003, she found the decedent had sporadic bleeding from the nipple of the right breast, and had two very prominent lumps. The decedent reported that her mother had recently been diagnosed with breast cancer. Despite the same, nurse Infranco did not request any of her colleagues to see the decedent, did not request an immediate breast sonogram, breast biopsy, or surgical consultation be done. These departures, concludes the plaintiff's expert, are departures from the accepted standard of care by Valerie Infranco, and were substantial contributing factors to the metastasis of Ms. Prevete's right breast mass which went undiagnosed and untreated, and ultimately caused her death.

Based upon the foregoing, it is determined that the plaintiff has raised sufficient factual issue to preclude summary judgment on both departures from the accepted standards of care and proximate cause of the injuries suffered by the plaintiff's decedent.

Accordingly, motion (010) by defendant, Valerie Infranco, N.P., for summary judgment dismissing the complaint is denied.

In motion (011), the defendants, Jayne Bernier, M.D., Suffolk Medical Imaging, PC, Suffolk Breast Imaging, PC., Suffolk Associates for Women's Medical Procedures, PC, Islandia MRI

Associates, PC, and Reiter & Perkes, PC, seek summary judgment dismissing the complaint as asserted against each of them on the bases that the defendants correctly interpreted and reported the findings of the sonogram of September 25, 2002, that their care and treatment of the decedent did not result in a delay in diagnosing the decedent's breast cancer, nor did it proximately cause the decedent's death. In support of this application, the moving defendants have submitted, inter alia, an attorney's affirmation; affirmation of defendants' expert Joshua Kalowitz, M.D.; copies of the summons and complaint and amended summons and complaint, the answers and amended answers served by the moving defendants, plaintiff's verified bills of particulars; right breast ultrasound report dated September 25, 2002; unsigned but certified copy of the transcript of the examination before trial of Valerie Jean Infanco, NP; and a copy of the signed and certified transcript of the examination before trial of Jayne M. Bernier, M.D.

Jayne Bernier testified that she is licensed to practice medicine in New York State and Florida, and became board certified in diagnostic radiology in 1990. She stated she is employed by Stony Brook University Medical Center Department of Radiology and Islandia MRI. In 2002, she did not have any hospital affiliations and did not obtain any until 2008. She was a partner in Suffolk Medical Imaging with Joel Reiter and Ed Perkes. At Islandia MRI, she worked as a radiologist with Reiter and Perkes. She stated that they obtained Suffolk Breast Imaging, PC and incorporated Suffolk Medical Imaging, expanding it to include other modalities such as CAT scans and x-rays. The practice was sold in 2004. She indicated that the radiologists rotated through the various offices. She stated that diagnostic breast ultrasound requires a high frequency transducer, 7.5 megahertz or greater, which equipment they had at their office.

Dr. Bernier testified that with regard to a pregnant patient, ultrasound is the imaging modality of choice as there would have to be an absolutely compelling reason to do an exam that had radiation on a pregnant patient. She added, that due to breast changes and increased densities, ultrasound is going to be the most sensitive test in this setting for a 34 year old pregnant patient with a question of a palpable abnormality, as indicated by the referring prescription and the technician's notes. The technicians who work in the offices present each case to either her or the covering radiologist while the patient is still in the office. They also fill out the history and clinical impression portion of the registration form. With regard to Joanne Prevete, the technician indicated that she was pregnant, and further indicated on the form (plaintiff's exhibit 2B) the date of the prescription for a right breast ultrasound, and the diagnosis of FCB (fibrocystic breast) changes, followed with a question mark. The technician also added that the patient is nine weeks pregnant and that the nurse practitioner felt a lump at 10 o'clock. The technician gave a diagram of the breast labeled "R" for right breast, with an arrow toward the area of indicated palpable concern, and further added the sonogram revealed two small cysts incidently at 9 o'clock.

Dr. Bernier testified that she reviewed the ultrasound films and did not find a sonographic abnormality of palpable concern at the 10 o'clock site indicated by the nurse practitioner. She did not perform a mammography thereafter due to concerns with radiation as there has to be a compelling indication to have the benefits outweigh the risks and to be clinically indicated. She also stated that the breast tissue during pregnancy becomes denser, thereby limiting the sensitivity of the mammography. Dr Bernier stated that the fact that the decedent had previously suffered from synovial sarcoma was not an indication to perform a breast MRI as the ultrasound is the modality of choice. An MRI would require the intravenous administration of gadolinium which would not be given to a pregnant patient without a compelling reason. The gadolinium provides for the optimal evaluation for breast cancer or the extent of

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disease. Previous extended ionized radiation would not be an indication to perform a breast MRI. Dr. Bernier testified that a 4 mm cyst would not usually be palpable. Because her area of expertise is in imaging, she would not perform an examination of the patient's breast, which, in this case, had been conducted by the referring nurse practitioner. The radiology report of September 25, 2002 was sent to Dr. Davenport. It was Dr. Bernier's opinion that there were two small 4 mm cysts at 9 o'clock and that they were not indicative of cancer. She also testified that the finding of the two small 4 mm cysts at 9 o'clock did not correlate to the finding of a palpable lump lesion three days earlier at the physician's office. She stated that once there is a diagnosis of breast cancer, an MRI can be helpful in determining the extent of the disease, but stage is determined at surgery. She did not recommend a biopsy of the palpable lump as she did not see anything on imaging. Biopsy, she stated, is recommended if there is something suspicious found upon which to base an image-guided biopsy. She further testified that there was no breast mass sizable or perceptible at this stage on the decedent's sonogram, and that there were no imaging findings that would prompt any imaging follow-up.

Joshua Kalowitz, M.D. affirmed that he is a physician licensed to practice medicine in New York State and is board certified in internal medicine and diagnostic radiology. He set forth his professional experience and affiliations, the records and materials which he reviewed, and set forth his opinions with a reasonable degree of medical certainty. It is Dr. Kalowitz's opinion that there were no departures from accepted standards of care and treatment on the part of the moving defendants, nor did their care and treatment proximately cause the decedent's death. In reviewing the sonogram images of the decedent's right breast, interpreted by Dr. Bernier, he states that the images were sufficient to evaluate the decedent's right breast; that his findings were two simple cysts measuring 4.3 mm and 3.6 mm at the nine o'clock position; and that there are no other cysts and no solid nodules present, and, specifically, there are no masses present at the ten o'clock position. Dr. Kalowitz continues that the structures identified are consistent with the diagnosis of cysts as they have all the necessary identifying features of cysts, including the fact that they are anechoic/fluid filled, they are smooth and oval with no spiculation, and one shows posterior acoustic through transmission and the other is too small to demonstrate this feature.

Dr. Kalowitz states further that he agrees with Dr. Bernier's opinion that the sonogram of September 25, 2002 did not reveal any evidence of breast cancer, that it did not reveal any suspicious findings, and that there is nothing contained within the images that should have caused Dr. Bernier to suspect anything other than simple cysts. He continues that he agrees with Dr. Bernier that no further imaging was indicated based upon the fact that the breast ultrasound was negative. He states that Dr. Bernier acted within the standard of care when she reported that in the presence of a palpable lump, follow-up should be based upon clinical grounds. He opines that there were no imaging findings which required further imaging follow-up, and that the reported findings were appropriately reported to the referring treatment provider. Dr. Kalowitz concludes that the defendants correctly interpreted and reported the findings of the sonogram of September 25, 2002, and that the care and treatment by them did not result in a delay in the diagnosing of the decedent's breast cancer, nor did it proximately cause the decedent's death.

Based upon the foregoing, the moving defendants have demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis that they did not depart from good and

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accepted standards of care and treatment, the imaging studies were sufficient and appropriately read and reported to the referring physician's office, and that they did not cause a delay in the diagnosis and treatment of the decedent's breast cancer. The plaintiff has submitted no opposition to this motion and, thus, has failed to raise a factual issue to preclude summary judgment from being granted.

Accordingly, motion (011) by the defendants, Jayne Bernier, M.D., Suffolk Medical Imaging, PC, Suffolk Breast Imaging, PC., Suffolk Associates for Women's Medical Procedures, PC, Islandia MRI Associates, PC, and Reiter & Perkes, PC, is granted, and the complaint as asserted against them is dismissed.

In motion (012), the defendants, Deborah M. Davenport, M.D., Three Village Obstetric & Gynecological Associates, P.C. s/h/a Three Village Obstetrics & Gynecology, PC, James N. Droesch, M.D, Arlene Kaelber, M.D., Maxine L. Spicer, M.D., Philip A. Schoenfeld, M.D. s//h/a Phillip A. Schoenfeld, M.D., and Three Village Women's Health, LLP, seek an order pursuant to CPLR 3212 granting partial summary judgment dismissing any and all claims based on allegations of vicarious liability, for and by virtue of employment or collaboration in the care and treatment provided by co-defendant Valerie Infranco, NP. In the alternative, the aforementioned movants seek an order pursuant to CPLR 3025 granting leave to amend their answer to include a cross claim against Valerie Infranco, NP. In support of this application, the moving defendants have submitted an attorney's affirmation; a copy of the amended summons and complaint, the answers to the amended complaint served by defendant Infranco and the moving defendants; and a proposed amended complaint which asserts a cross claim against co-defendant Infranco.

It is noted that the Note of Issue was filed in this action on February 25, 2011. The last date to serve a motion for summary judgment pursuant to CPLR 3212 was on June 25, 2011. The moving defendants did not serve this cross motion (012) for summary judgment until October 19, 2011, well beyond the statutory 120 days. The moving defendants have made no application for leave of court on good cause shown to file this cross motion beyond the statutory one hundred twenty days, and, in fact, have not submitted any reason for the delay in submitting the moving papers (*see Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]).

Accordingly, that branch of the moving defendants' application which seeks summary judgment based on allegations of vicarious liability for and by virtue of the employment of collaboration in the care and treatment provided by co-defendant Valerie Infranco, NP is denied as untimely.

Turning to that part of application (012) wherein the moving defendants seek leave to amend their answer to the amended complaint to assert a cross claim against co-defendant Valerie Infranco, NP for apportionment of liability and contribution and/or indemnification, the moving defendants have submitted a copy of their proposed amended answer containing the cross claim.

In motion (013), Valerie Infranco, NP, opposes the motion (012) wherein her co-defendants seek leave to amend their answer to assert cross claims against her. She requests, in the alternative, leave to amend her answer to assert a cross claim against the moving defendants in motion (012) for

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apportionment of liability and contribution/indemnification, as set forth in her proposed amended answer.

Pursuant to CPLR 3025, leave to amend a pleading should be freely given upon such terms as may be just and will not be denied unless the amended pleading is palpably insufficient or totally devoid of merit, or unless prejudice or surprise to the opposing party would directly result from the delay in seeking leave to amend, (*see Weber v Purow*, 2011 NY Slip op 7837, 931 NYS2d 905 [2d Dept]). Here, none of the moving defendants in either motion (012) or (013) have demonstrated surprise or prejudice sufficient to preclude the parties' respective applications to serve an amended answer with their respective proposed cross claims.

Accordingly, the branches of motion (012), and (013), wherein defendants seek leave to amend their respective answers to include cross claims is granted, and the proposed amended answers are deemed served nunc pro tunc. If so advised, the moving defendants may serve a response to the cross claims within twenty days of the date of this order.

Dated: FEB 15 2012



J.S.C.

 FINAL DISPOSITION

 X ~~HON. JEFFREY ARLEN SPINNER~~
 NON-FINAL DISPOSITION

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