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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS Justice PART 6

TIMOTHY GREEN

-v-

BRIAN GOLDBERG, M.D.,

INDEX NO. 113781/07

MOTION DATE 12/20/11

MOTION SEQ. NO. 2

MOTION CAL. NO.

The following papers, numbered 1 to 25 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-21
Answering Affidavits — Exhibits	22-24
Replying Affidavits	25

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 20 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/19/12

JOAN B. LOBIS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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TIMOTHY GREER,

Plaintiff,

Index No. 113781/07

-against-

Decision and Order

BRIAN GOLDWEBER, M.D., BRIAN A. GOLDWEBER, M.D., LLC, ABBE J. CARNI, M.D., ABBE J. CARNI, M.D., P.C., EDWARD S. GOLDBERG, M.D., P.C., and EDWARD S. GOLDBERG, M.D.,

Defendants.

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JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 002 and 003 are hereby consolidated for disposition. In Sequence 002, defendants[1] Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C. ("Carni P.C.") (collectively the "Carni Defendants") move, by order to show cause, for an order pursuant to C.P.L.R. Rule 3212 granting them summary judgment and dismissing plaintiff Timothy Greer's complaint. In Sequence 003, defendants Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C. ("Goldberg P.C.") (collectively the "Goldberg Defendants"), move, by order to show cause, for partial summary judgment dismissing plaintiff's claims sounding in punitive damages, negligent hiring and retention, lack of informed consent, and vicarious liability for the acts and omissions of Brian A. Goldweber, M.D.

This case is one of a number of cases involving patients of Dr. Goldweber, an anesthesiologist whose license to practice medicine has since been revoked in New York. Dr.

[1] Defendants Brian Goldweber, M.D., and Brian A. Goldweber, M.D., LLC, have been discharged in bankruptcy and have not appeared in this action.

Goldweber was retained by Carni P.C., and Carni P.C. had a contract to provide anesthesiology services to patients of Goldberg P.C. Mr. Greer underwent a colonoscopy on August 14, 2006. Dr. Goldberg performed the colonoscopy, and Dr. Goldweber administered the anesthesia using propofol. Plaintiff testified that he recalled that prior to the procedure, Dr. Goldweber spoke to him for about a minute, during which Dr. Goldweber introduced himself and briefly explained how he would administer the anesthesia. The colonoscopy and accompanying anesthesia were then performed. The propriety of the colonoscopy is not at issue in this lawsuit.

In 2007, Dr. Goldweber became the focus of an investigation by the New York City Department of Health ("NYCDOH") after a number of his patients were discovered to have contracted hepatitis B and C after their treatment with him. NYCDOH eventually determined that the manner in which Dr. Goldweber administered anesthesia caused a hepatitis outbreak among these patients. Specifically, NYCDOH found that Dr. Goldweber had been using multi-dose vials of propofol, an anesthetic, on more than one patient. The contamination of the vials occurred when Dr. Goldweber would reinsert into a vial a syringe that he had already used on a source patient for hepatitis. Then, when he used propofol from the same vial on subsequent patients, he exposed them to the virus from the source patient.

Independent from the NYCDOH investigation, in February 2007, Mr. Greer found out that he had contracted hepatitis C. He was started on treatment for the hepatitis C infection, and by June 2007, tests revealed that he had "cleared" the virus. NYCDOH later determined that Mr. Greer had probably contracted the virus during the August 14, 2006 colonoscopy, based on the test results of the other patients treated on the same day.

During the course of NYCDOH's investigation, it reported the situation to the New York State Department of Health State Office of Professional Medical Conduct ("OPMC"). In May 2007, OPMC began its own investigation of Dr. Goldweber, who agreed to discontinue his medical practice pending that investigation. Meanwhile, shortly before Dr. Goldweber discontinued his practice, Dr. Carni, who had not annually checked whether Dr. Goldweber's credentialing and malpractice insurance were up-to-date, learned from Dr. Goldweber that his malpractice carrier had dropped his coverage in the spring of 2004. Carni P.C. immediately discharged Dr. Goldweber.

In October 2008, OPMC charged Dr. Goldweber with gross incompetence; gross negligence; negligence and incompetence on more than one occasion; and failure to comply with provisions governing the practice of medicine by violating infection control practices, inappropriately using propofol, and allowing his infection control certification to lapse. All of the charges were sustained by a determination and order of March 20, 2009, and Dr. Goldweber's medical license was revoked.

Mr. Greer commenced this lawsuit on October 12, 2007, by purchasing an index number and filing a summons and verified complaint. He asserted claims sounding in medical malpractice and negligence for Dr. Goldweber's transmission of hepatitis C to him; claims against the Carni and Goldberg Defendants sounding in their vicarious liability for Dr. Goldweber's transmission of hepatitis C to him; claims for lack of informed consent against all defendants; and claims sounding negligent hiring, supervision, and retention as against the Carni and the Goldberg Defendants. In responding to these motions, plaintiff has agreed to withdraw his claims sounding

in lack of informed consent. Since there is no opposition to those branches of the moving defendants' respective motions seeking to dismiss plaintiff's claims for lack of informed consent, those branches of the motions are granted.

As Dr. Goldweber has been discharged in bankruptcy, his injured patients' lawsuits have primarily focused on the relationships between Dr. Goldweber and other parties who may be liable to these patients due to either their vicarious liability for Dr. Goldweber's acts or their negligent hiring or retention of him. During the events in question, Carni P.C. retained Dr. Goldweber, through Brian A. Goldweber, M.D., LLC ("Goldweber LLC"), to provide anesthesiology services to various medical practices that performed ambulatory procedures. Dr. Carni, a board certified anesthesiologist, was the president, sole shareholder, and sole administrator of Carni P.C. In retaining Dr. Goldweber, Dr. Carni testified that he took into consideration: (i) Dr. Goldweber's experience, which indicated that he worked as an attending anesthesiologist for almost twenty (20) years, cumulatively, at Rochester General Hospital and at Lakeside Memorial Hospital; (ii) four highly favorable letters of recommendation from surgeons who worked with him at Rochester General Hospital; and (iii) a letter of recommendation from an anesthesiologist who was Dr. Goldweber's co-member at Rochester General Hospital's anesthesiology department and who subsequently became the chief of the anesthesiology department at Lakeside Memorial Hospital. He did not contact the OPMC nor conduct any other independent checks on Dr. Goldweber.

Dr. Carni did not know that Rochester General Hospital had limited Dr. Goldweber's privileges by not allowing him to administer anesthesia for major vascular and cerebral vascular treatment, or for treatment involving children under five years old. Dr. Carni was also unaware that

in 1999, OPMC had charged Dr. Goldweber with several acts of misconduct, including altering a medical record; failing to monitor a patient; administering anesthesia that was contraindicated by a patient's medical history; administering a long acting anesthesia without securing a patient's airway; and failing to stay with a patient until she became medically stable. In April 1999, Dr. Goldweber admitted guilt to the charges insofar as they implicated him in negligence, and OPMC suspended his license for three years. The suspension was stayed as long as Dr. Goldweber complied with a number of terms, including that his practice be supervised for one year and randomly supervised thereafter; that he complete a training program; and that he pass a competency evaluation. On or about February 4, 2002, OPMC charged Dr. Goldweber with misrepresenting the status of his license and Rochester General Hospital's limitation on his privileges on two job applications. Dr. Goldweber admitted to the professional misconduct and was fined $20,000.

Prior to retaining Dr. Goldweber, Dr. Carni further assessed Dr. Goldweber's qualifications by personally observing Dr. Goldweber's administration of anesthesia, including his use of propofol from multi-dose vials, to six to eight patients. Dr. Carni testified that he never observed Dr. Goldweber reuse a syringe to dose a patient from a vial of propofol. After Dr. Carni determined that he was satisfied with Dr. Goldweber's performance, Carni P.C. and Goldweber LLC entered into an oral agreement that Dr. Goldweber would provide anesthesia services on behalf of Carni P.C. In 2006, Dr. Carni and Dr. Goldweber entered into a written agreement, which was allegedly identical to the oral version, but included a non-compete provision. Dr. Carni testified that at the time of his retention, Dr. Goldweber had malpractice insurance and an infection control certificate dated May 1, 2002.

Dr. Goldweber worked five days a week providing anesthesia services for the approximately ten medical practices to which he was sent by Dr. Carni. According to Dr. Goldweber, he had free rein as to the medications and supplies he ordered, and the Carni Defendants did not control his administration of medications or the techniques he used. Dr. Carni testified that the routine was to use multi-dose vials on more than one patient. His practice did not use single-use (20 ml) vials of propofol. Dr. Goldweber continued Dr. Carni's practice of using multi-dose vials. It does not appear that Dr. Goldweber worked anywhere but where the Carni Defendants sent him. Dr. Goldweber's hours and where he worked were determined by the Carni Defendants. Carni, P.C. paid Dr. Goldweber $12,000 every two weeks, with yearly salary increases and bonuses, though it did not furnish him with health insurance. Dr. Goldweber was supposed to obtain his own malpractice insurance and pay his own taxes as a "1099 employee." Carni P.C. furnished Dr. Goldweber with the forms and anesthesia charts that he used during the procedures, and paid for all equipment and medication which Dr. Goldweber used. Carni P.C. paid rent to the offices where anesthesiology services were provided in exchange for use of office space, a computer, a telephone, and a place to store its medications and equipment. Carni P.C. determined the patients' fees and the patients, or their insurance companies, were billed directly for the anesthesiology services rendered. The bills did not reflect that the services were rendered by the anesthesiologists who actually rendered the services.

Carni P.C. placed Dr. Goldweber in Dr. Goldberg's office as his primary anesthesiologist. Dr. Carni advised Dr. Goldberg that if he were unhappy with Dr. Goldweber, Dr. Carni would provide someone else. Dr. Carni advised Dr. Goldberg that Carni P.C. would ensure that the anesthesiologists provided would be licensed, would have the required certifications, and

would carry malpractice insurance. Dr. Goldberg did not independently investigate Dr. Goldweber's qualifications, but relied on Dr. Carni to do so. Dr. Goldberg testified that he believed that an employer-employee relationship existed between Dr. Carni and Dr. Goldweber because Dr. Carni vouched for his anesthesiologists' credentials and told Dr. Goldberg that the anesthesiologists worked for him, were paid by him, and were maintaining their credentials. Dr. Goldberg testified that had he known of Dr. Goldweber's prior sanctions, he would have further investigated before allowing Dr. Goldweber to administer anesthesia to patients.

The moving defendants now seek summary judgment. The law is well settled that the movant on a summary judgment application bears the initial burden of prima facie establishing their entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." Id. Once a moving party makes its required showing, the burden shifts to the other side to demonstrate the existence of a material fact requiring a trial of the issue. Id.

Dr. Carni maintains that he cannot be held vicariously liable for Dr. Goldweber's medical malpractice because he did not personally hire Dr. Goldweber, rather, his professional corporation Carni P.C. hired Dr. Goldweber. Dr. Carni asserts that B.C.L. § 1505(a) precludes the imposition of liability against the sole shareholder of a professional corporation where the individual did not directly render or supervise the person rendering the professional services giving rise to the alleged malpractice. He argues that there is no evidence that he was present during the procedure;

administered anesthesia to the patient; or personally directed Dr. Goldweber in his administration of anesthesia to Mr. Greer on August 14, 2006.

Plaintiff largely fails to address Dr. Carni's arguments under B.C.L. § 1505(a), though he directs the court to another decision in a case against Dr. Goldweber and Dr. Carni (and other defendants) pending in Supreme Court, Kings County, titled Von Stackelberg v. Goldweber, 2011 N.Y. Slip Op. 52158(U), 33 Misc. 3d 1229A (Sup. Ct. Kings Co. 2011) (Steinhardt, J.). In Von Stackelberg, the court permitted the plaintiff's claim against Dr. Carni for vicarious liability to survive on the basis that issues of fact remained as to whether Dr. Carni permitted negligent conduct by those under his supervision or failed to exercise propr control over his agents. Plaintiff asserts that estoppel should apply to preclude Dr. Carni from relitigating his liability. However, issue preclusion is not available here, where it has not been determined that the issues are identical between the cases and where there has been no judgment rendered in Von Stackelberg. In this case, plaintiff has failed to rebut Dr. Carni's showing that B.C.L. § 1505(a) applies to preclude the imposition of liability against Dr. Carni, personally, for the acts of Dr. Goldweber. Plaintiff argues that Dr. Carni had direct supervision over Dr. Goldweber, but his examples pertain to the administrative side of the business of providing anesthesiologists, not to medical technique. Further, the fact that Dr. Goldweber may have adopted Dr. Carni's technique for administering propofol does not show that Dr. Carni had direct supervision over Dr. Goldweber's medical technique. There is no allegation that Dr. Carni was either present during Mr. Greer's procedure or had any supervision over the anesthesia administered by Dr. Goldweber during that procedure. The crux of the vicarious liability claim is that Dr. Carni should be held liable for supervising the alleged malpractice, but

there is no allegation that Dr. Carni did so in this case. Accordingly, the claim against Dr. Carni, individually, for vicarious liability for Dr. Goldweber's malpractice must be dismissed.

Carni P.C. argues that it cannot be held vicariously liable for Dr. Goldweber's malpractice because Dr. Goldweber was an independent contractor. Carni P.C. maintains that it did not exercise control over the means or results of Dr. Goldweber's work. It asserts that the evidence shows that Dr. Goldweber controlled the means and results of his own work and made his own decisions about technique; was paid as a non-employee; received no fringe benefits from Carni P.C.; and did not receive medical malpractice coverage under Carni P.C.'s policy but was obligated to maintain his own malpractice insurance. Carni P.C. asserts that the fact that it had some general supervision over Dr. Goldweber is not dispositive; that the non-compete clause in the contract between Carni P.C. and Dr. Goldweber was limited in nature and was only intended to prevent Dr. Goldweber from working directly for a practice that had a contract with Carni P.C.; and that Carni P.C.'s control over Dr. Goldweber's schedule would only be dispositive if that control affected the manner of Dr. Goldweber's administration of anesthesia, which it did not. Carni P.C. maintains that it did not supervise Dr. Goldweber in performing anesthesia on Mr. Greer.

Carni P.C. further argues that it cannot be held vicariously liable for Dr. Goldweber's action based on the theory of apparent authority because there is no evidence that Carni P.C. held itself out as Dr. Goldweber's employer, nor is there any evidence that Mr. Greer reasonably relied on any such statements. Carni P.C. sets forth that Dr. Goldweber testified that he made no reference to Dr. Carni or Carni P.C. when introducing himself to patients.

Plaintiff argues that issues of fact exist as to whether Carni P.C. can be held vicariously liable for Dr. Goldweber based on actual agency. Plaintiff does not address whether Carni P.C. could be held vicariously liable for Dr. Goldweber based on ostensible or apparent agency. Plaintiff sets forth that Dr. Goldberg testified that Dr. Carni held Dr. Goldweber out to be his employee in Dr. Goldberg's discussions with Dr. Carni. Plaintiff also argues that Carni P.C. controlled the means and manner in which Dr. Goldweber administered anesthesia because Dr. Goldweber testified that, prior to working for Carni P.C., he had never used the technique of administering anesthesia with a multi-dose vial and a "spike" for drawing propofol from the vial (the technique at issue in this case), but that once he started working for Carni P.C., he began using this technique because that was the system already in place. Plaintiff also points out that Carni P.C. had control over Dr. Goldweber's schedule; paid for Dr. Goldweber's supplies; and paid Dr. Goldweber a flat rate every two weeks for five days of work a week, including vacation time and time off.

In general, "the employer of an independent contractor is not liable for injury caused to a third party by an act or omission of an independent contractor[.]" Lazo v. Mak's Trading Co., Inc., 199 A.D.2d 165, 167 (1st Dep't 1993), aff'd 84 N.Y.2d 896 (1994). The question of whether someone is an independent contractor or employee is a question of fact concerning which party controls the methods and means by which the work is to be done. Lazo, 199 A.D.2d at 166. The issue of whether one is an employee or an independent contractor is usually for the trier of fact. Carrion v. Orbit Messenger, 82 N.Y.2d 742, 744 (1993). However, when the evidence on the issue of control over the work has no conflict, the court may determine the issue as a matter of law. Lazo, 199 A.D.2d at 166. See also Greene v. Osterhoudt, 251 A.D.2d 786, 787 (3d Dep't 1998).

Determining whether a person acts as an employee or an independent contractor is fact specific (In re O'Brien v. Spitzer, 7 N.Y.3d 239, 242 [2006]), and cannot be stated with "mathematical precision[.]" Liberman v. Gallman, 41 N.Y.2d 774, 778 (1977) (internal quotes and citations omitted). "Broadly speaking, an employee is someone who works for another subject to substantial control, not only over the results produced but also over the means used to produce the results. A person who works for another subject to less extensive control is an independent contractor." O'Brien, 7 N.Y.3d at 242. The Court of Appeals has set forth:

> the critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results. Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule.

Bynog v. Cipriani Group, Inc., 1 N.Y.3d 193, 198 (2003) (internal citations omitted). Other factors taken into consideration are whether the worker uses his own tools, the manner in which wages are paid, and whether the employer withholds taxes from the worker's wages. Gfeller v. Russo, 45 A.D.3d 1301, 1302 (4th Dep't 2007); Stevens v. Spec Inc., 224 A.D.2d 811, 812 (3d Dep't 1996). These factors are not singularly dispositive, but rather relevant to assessing the extent of control over the worker. See Gagen v. Kipany Prods., Ltd., 27 A.D.3d 1042, 1043 (3d Dep't 2006).

"An employer-employee relationship exists when the evidence demonstrates that the employer exercises control over the results produced by claimant or the means used to achieve the results." In re Hertz Corp. v. Comm'r of Labor, 2 N.Y.3d 733, 735 (2004) (citation omitted).

> "The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to

> achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used."

Liberman, 41 N.Y.2d at 778, quoting In re Morton, 284 N.Y. 167, 172 (1940). "[T]he mere retention of general supervisory powers over independent contractors cannot form a basis for the imposition of liability against the principal." Melbourne v. N.Y. Life. Ins. Co., 271 A.D.2d 296, 297 (1st Dep't 2000) (citations omitted). "'The requirement that the work be done properly is a condition just as readily required of an independent contractor as of an employee and not conclusive as to either.'" Hertz Corp., 2 N.Y.3d at 735 (2004), quoting CBA Indus. v. Hudacs (In re Claim of Werner), 210 A.D.2d 526, 528 (3d Dep't 1994), appeal denied, 86 N.Y.2d 702 (1995). Rather, when an "employer assumes control of the details of the work or some part of it," the worker is considered an employee and not an independent contractor. Wright v. Esplanade Gardens, 150 A.D.2d 197, 198 (1st Dep't 1989). The focus of this determination is control over the direction of the mode and manner of the work.

Though Carni P.C. established its entitlement to summary judgment, plaintiff has raised sufficient issues of fact as to preclude granting Carni P.C. summary judgment on the issue of its liability for the acts or omissions of Dr. Goldweber. Issues of fact exist as to whether Carni P.C. assumed control over the details of Dr. Goldweber's work, namely, Dr. Goldweber's technique in administering anesthesia and the supplies he used to implement that technique. It was Carni P.C. who purchased and supplied Dr. Goldweber with the multi-dose vials. Though Carni P.C. argues that Dr. Goldweber could administer anesthesia in any way he chose, and that he "chose the path of

last [sic] resistance by employing the system already in place," the credibility of that assertion is best left to the trier of fact. Additionally, a review of the record indicates that other factors point to an employment relationship, including that Dr. Goldweber appears to have worked full-time and only for Carni P.C.; did not control the billing or where and when he worked; was not paid per case; received paid vacation and bonuses; was not required to pay for his supplies; and was required to use charts and anesthesia records provided by Carni, P.C. Further, Dr. Carni required Dr. Goldweber to provide, in his presence, anesthesia to numerous patients before he retained Dr. Goldweber, which suggests that Dr. Carni wanted to observe whether Dr. Goldweber's methodology was to his liking. If it was not, Dr. Carni would not necessarily have declined to retain Dr. Goldweber, but instead could have dictated how he wanted the work performed. In light of the foregoing conflicting evidence, Carni P.C.'s application to dismiss the claims against it sounding in vicarious liability is denied.

The Goldberg Defendants argue that they cannot be held vicariously liable for Dr. Goldweber's malpractice because he was neither their employee nor their independent contractor. They assert that Dr. Goldberg is not an anesthesiologist; that they neither supervised nor directed Dr. Goldweber's professional activities; and that Dr. Goldberg never administered propofol himself. The Goldberg Defendants assert that Dr. Carni represented to Dr. Goldberg that Dr. Goldweber was qualified and capable, and that they relied on Dr. Carni to supervise the anesthesiologists who provided care to patients of Goldberg P.C.

Plaintiff asserts that issues of fact exist with respect to whether the Goldberg Defendants are vicariously liable for Dr. Goldweber's negligence. Plaintiff argues that the Goldberg Defendants failed to cite any case law to support their position that they are not vicariously liable for Dr. Goldweber and that they failed to address the issue of apparent authority or ostensible agency; thus, plaintiff argues, the Goldberg Defendants failed to establish a prima facie case for summary judgment. Plaintiff argues that in this case, the Goldberg Defendants did more than simply furnish the facility to Mr. Greer, but actually arranged for and provided anesthesia services to him during his colonoscopy. Plaintiff submits his own affirmation in which he states that he assumed that Dr. Goldweber was Dr. Goldberg's employee based on Dr. Goldberg's representation that the colonoscopy could be performed in Dr. Goldberg's office, because such procedures typically entail the administration of anesthesia. He maintains that he was not given a choice as to who would be his anesthesiologist. Thus, plaintiff argues that the Goldberg Defendants should not be granted summary judgment with respect to the causes of action sounding in medical malpractice and negligence.

There remains open issues of fact as to whether Dr. Goldweber was acting as the Goldweber Defendants' apparent agent. Mr. Greer did not choose Dr. Goldweber to perform the anesthesia and only interacted with Dr. Goldweber for the anesthesia portion of the procedure. The Goldberg Defendants failed to address the issues regarding ostensible or apparent agency, and thus failed to eliminate all issues of fact as to the claims sounding in vicarious liability. Accordingly, the branch of Goldberg Defendants' motion seeking to dismiss the vicarious liability claim is denied.

The Carni Defendants argue that the claims sounding in negligent hiring, retention, and supervision[2] must be dismissed because there is no evidence that they could have reasonably known that Dr. Goldweber had a propensity to break sterile technique. The Carni Defendants' expert, Alan Pollock, M.D., opines that the mere use of a multi-dose vial of propofol is an acceptable technique, provided that the anesthesiologist does not reinsert a previously-used syringe or needle into the vial.

In opposition, plaintiff argues that the Carni Defendants breached the most minimal duty of care with respect to retaining Dr. Goldweber because they never contacted his professional references, relied exclusively on his curriculum vitae ("CV"), and failed to investigate a gap in his CV. Plaintiff alleges that had the Carni Defendants properly investigated Dr. Goldweber's work history, they would have found out that Dr. Goldweber was unqualified to administer anesthesia. Plaintiff argues that since the 1999 OPMC findings are publicly available, the Carni Defendants were on constructive notice of Dr. Goldweber's propensity for unsafe medical practices. He maintains that Dr. Carni personally witnessed Dr. Goldweber's propensity when he observed Dr. Goldweber utilize a multi-use vial of propofol to dose more than one patient. Plaintiff argues that the Carni

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[2] The court notes that while plaintiff's pleadings raise claims against the Carni and Goldberg Defendants sounding in negligent hiring, negligent supervision, and negligent retention, neither defendants nor plaintiff argued any distinction between negligent supervision and negligent retention. The parties' arguments focus on whether defendants knew or should have known of Dr. Goldweber's propensity for the conduct that caused the injury. There are no arguments from either side focusing on whether the moving defendants breached a duty to instruct, train, educate, or supervise Dr. Goldweber in the context of a claim for negligent supervision. Accordingly, the court will consider the arguments only as they pertain to negligent hiring and negligent retention. To the extent that plaintiff asserted a claim for negligent supervision, he has not particularized that such a claim exists outside the context of his claim for negligent retention.

Defendants negligently continued to retain Dr. Goldweber by failing to make inquiries and ensure that he was up-to-date on his infection control certificates and medical malpractice insurance, both of which Dr. Goldweber allowed to lapse after he was hired.

A defendant moving for summary judgment on claims sounding in negligent hiring or retention must demonstrate with sufficient evidence that the defendant neither knew nor should have known of the contractor's propensity to engage in the conduct that caused the injury. State Farm Ins. Co. v. Cent. Parking Sys., Inc., 18 A.D.3d 859, 860 (2d Dep't 2005). If the defendant meets this burden, in order to raise an issue of fact, the plaintiff must offer evidence showing that the employer-defendant was aware of an independent contractor's prior conduct that was either identical to the conduct that ultimately caused the plaintiff injury or of a slightly different nature that nevertheless made the plaintiff's ultimate injury foreseeable. See T.W. v. City of New York, 286 A.D.2d 243, 245-46 (1st Dep't 2001); Colon v. Jarvis, 292 A.D.2d 559, 561 (2d Dep't 2002). Cf. Rochlin v. Alamo, 209 A.D.2d 499, 500 (2d Dep't 1994) (plaintiff whose vehicle was struck in the rear by a vehicle driven and stolen by defendant's employee could not make a negligent hiring claim without proof that defendant was aware of employee's propensity to steal).

Contrary to plaintiff's contentions, even if Dr. Carni had checked Dr. Goldweber's references, had investigated the gap between his employment at Rochester General Hospital and at Lakeside Memorial Hospital, or had discovered whether he had ever been sanctioned, these investigations would not have given Dr. Carni actual or constructive notice of the injurious conduct, or have revealed that Dr. Goldweber had a propensity for breaking sterile technique and infecting

patients with infectious diseases. Additionally, Dr. Carni has prima facie demonstrated that it was appropriate to use a multi-dose vial of propofol on more than one patient, as long as sterile technique was maintained, and plaintiff has not shown that the mere use of multi-dose vials on more than one patient is de facto negligence. Dr. Carni had no knowledge simply from observing Dr. Goldweber, prior to his retention, of his propensity to break sterile technique, because Dr. Carni did not witness any acts or omissions of Dr. Goldweber that amounted to a break in sterile technique. Accordingly, the claims against the Carni Defendants for negligent hiring must be dismissed.

However, there is one unresolved issue related to negligent retention: that the Carni Defendants were negligent in failing to take steps to ensure that Dr. Goldweber kept his requisite infection control certification up-to-date. Presumably, this requirement for recertification every four years, which is imposed on all physicians, serves some purpose, whether to reeducate a physician who has forgotten something or to reinforce the importance of using proper sterile techniques. It cannot be determined as a matter of law that the lack of recertification had no bearing on the outcome in this case.[3] "[T]he remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Gibson v. Am. Exp. Isbrandtsen Lines, 125 A.D.2d 65, 74 (1st Dep't 1987) (internal citations omitted). Accordingly, the court declines to dismiss the negligent retention claims against the Carni Defendants.

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[3] Indeed, OPMC's report indicates that Dr. Goldweber expressed surprise when informed that contaminants could flow back through a patient's intravenous line into a syringe.

The Goldberg Defendants argue that they are entitled to summary judgment as to plaintiff's claims against them sounding in negligent hiring and retention. They assert that a claim for negligent hiring or retention cannot be successfully asserted against them because they neither employed Dr. Goldweber nor retained him as an independent contractor. Rather, they contracted with the Carni Defendants for anesthesia services, and relied upon Dr. Carni and the Carni Defendants' expertise in and familiarity with anesthesiology to determine Dr. Goldweber's qualifications and abilities. Further, the Goldberg Defendants maintain that Dr. Goldberg had no notice of any problems with Dr. Goldweber's qualifications or had any reason to believe that Dr. Goldweber had a propensity to transmit infectious diseases.

Plaintiff asserts that issues of fact exist with respect to whether the Goldberg Defendants may be held liable for negligent hiring and retention. Plaintiff maintains that the Goldberg Defendants breached their duty of care with respect to selecting Dr. Goldweber to render anesthesia services to Dr. Goldberg's patients by failing to conduct any independent research into Dr. Goldweber's work history, competency, qualifications, or malpractice coverage, and failing to ask Dr. Carni whether Dr. Goldweber had ever been disciplined. Plaintiff alleges that but for the Goldberg Defendants' negligence, they would have discovered that Dr. Goldweber's history involved patterns of negligence in the manner in which he administered anesthesia. Plaintiff also makes similar arguments as to the Goldberg Defendants as it did regarding the Carni Defendants with respect to the 1999 OPMC findings and the lapses in Dr. Goldweber's malpractice insurance in infection control certification.

The Goldberg Defendants had no knowledge of the prior disciplinary proceedings, and even if they had, the records pertaining to those proceedings would not have shown that Dr. Goldweber had the propensity to break sterile technique. Dr. Goldberg's testimony that he was unaware of Goldweber's anesthesia technique and did not watch him perform his services is not disputed. Moreover, the Goldberg Defendants were entitled to delegate the hiring services and the service of ensuring that Dr. Goldweber's credentials were kept up-to-date by the Carni Defendants. Cf. Sandra M. v. St. Luke's Roosevelt Hosp. Ctr., 33 A.D.3d 875, 880 (2d Dep't 2006) (service of supplying staff to hospital is not so integral to hospital's main job of providing health care that hospital is barred from delegating that ancillary service, as well as the liability for doing so negligently, to an independent contractor). Accordingly, the negligent hiring and retention claims asserted against the Goldberg Defendants shall be dismissed.

The Carni and Goldberg Defendants also seek summary judgment dismissal of plaintiff's claims for punitive damages on the basis that such damages are not warranted under the circumstances of the case. However, the Carni Defendants failed to make any arguments or cite any case law in support of their position in their moving papers or their memorandum of law; thus, they have failed to make out a prima facie case in support of their position. As to the Goldberg Defendants, they maintain that the conduct alleged against them does not rise to the level of warranting punitive damages, as there is no proof of the existence of an "evil motive" or any willful or intentional misdoing. They further maintain that the deterrent intent of punitive damages is not applicable here, where the wrongdoer is no longer in the case. Finally, the Goldberg Defendants assert that punitive damages cannot be assessed for vicarious liability under these circumstances.

Punitive damages are not intended to compensate a plaintiff, but instead serve to punish the wrongdoer and deter that individual and those in similar situations from engaging in the same behavior in the future. Ross v. Louise Wise Servs., Inc., 8 N.Y.3d 478, 489 (2007). More than mere negligence or carelessness is required to permit a punitive damages claim. See Fordham-Coleman v. Nat'l Fuel Gas Distrib. Corp., 42 A.D.3d 106, 113 (4th Dep't 2007); Rey v. Park View Nursing Home, 262 A.D.2d 624, 627 (2d Dep't 1999); Gruber v. Craig, 208 A.D.2d 900, 901 (2d Dep't 1994).

To justify the imposition of punitive damages, the conduct must be "exceptional, 'as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights.'" Ross, 8 N.Y.3d at 489, quoting Sharapata v. Town of Islip, 56 N.Y.2d 332, 335 (1982). A conscious or reckless disregard of another's rights is necessary. Home Ins. Co. v. Am. Home Prods. Corp., 75 N.Y.2d 196, 203 (1990); Welch v. Mr. Christmas, Inc., 57 N.Y.2d 143, 150 (1982). In a malpractice action, punitive damages are "not recoverable unless the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless." Schiffer v. Speaker, 36 A.D.3d 520, 521 (1st Dep't 2007) (citations omitted). A principal can be liable for punitive damages as a result of an employee or agent's reckless conduct where the principal "orders, participates in, or ratifies outrageous conduct." Loughry v. Lincoln First Bank, 67 N.Y.2d 369, 378 (1986) (citations omitted).

The Goldberg Defendants have established that they are entitled to summary judgment on the issue of punitive damages. In opposition to the Goldberg Defendants' arguments,

plaintiff does not dispute that punitive damages cannot be assessed on his claims against the Goldberg Defendants for vicarious liability for the acts or omissions of Dr. Goldweber. It is also undisputed that the Goldberg Defendants did not witness Dr. Goldweber breaking sterile technique; thus, they did not ratify Dr. Goldweber's behavior as to be placed on the requisite notice. Plaintiff does argue, however, that the Goldberg Defendants can be assessed punitive damages on claims of negligent hiring and retention. Because this decision dismisses plaintiff's negligent hiring and retention claims against the Goldberg Defendants, they are entitled to dismissal of the claims for punitive damage premised on the claims of negligent hiring or retention. Regardless, the court points out that failing to investigate Dr. Goldweber's disciplinary history, failing to properly supervise Dr. Goldweber, and being aware of Dr. Goldweber's use of multi-dose vials are not allegations that amount to willful behavior on the part of the Goldberg Defendants.

Accordingly, it is hereby

ORDERED that the motion (Motion Sequence Number 002) of defendants Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C. seeking summary judgment is partially granted, to the extent that the claim against Abbe J. Carni, M.D., sounding in vicarious liability for Brian Goldweber, M.D.'s negligence or medical malpractice, is dismissed; the claim against Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C. sounding in lack of informed consent is dismissed; and the claim against Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C. sounding in negligent hiring is dismissed; and it is further

ORDERED that the motion (Motion Sequence Number 003) of Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C. is partially granted, to the extent that the claim against Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C. sounding in lack of informed consent is dismissed; the claims against Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C. sounding in negligent hiring and retention are dismissed; and those claims against Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C. which assert punitive damages are dismissed; and it is further

ORDERED that the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the following claims survive the moving defendants' respective motions for summary judgment: plaintiff's claims against Abbe J. Carni, M.D., P.C., Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C., sounding in vicarious liability for Brian Goldweber, M.D.'s negligence or medical malpractice; plaintiff's claims against Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C. sounding in negligent retention; and plaintiff's claims asserting punitive damages against Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C.; and it is further

ORDERED that the parties shall appear for a pre-trial conference on March 27, 2012, at 9:30 a.m.

Dated: March 19, 2012

ENTER:

JOAN B. LOBIS, J.S.C.