Cooney v Medical One N.Y., P.C.
2017 NY Slip Op 32291(U)
October 26, 2017
Supreme Court, New York County
Docket Number: 151009/14
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11
---X
CAROLE COONEY,

INDEX NO. 151009/14

Plaintiffs

-against-

MEDICAL ONE NEW YORK, P.C., ARISDOV MEDICAL, P.C., VARUZHAN DOVLATYLAN, M.D., and ROSE MARIE PHILLIP, M.D.,

Defendants.
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JOAN A. MADDEN, J.:

In this medical malpractice action, defendant Rose Marie Phillip, M.D. ("Dr Phillip") moves for summary judgment dismissing the complaint against her on the grounds that a physician-patient relationship does not exist between her and the plaintiff, that she acted in accordance with accepted standards of medical practice, and that she did not proximately cause any of plaintiff's alleged injuries. Plaintiff Carol Cooney ("plaintiff" or Ms. Cooney") opposes the motion.

Background

This action, which sounds in medical malpractice and lack of informed consent , arises out of the administration of an epidural steroid injection by defendant Dr. Varuzhan Dovlatyan ("Dr. Dovlatyan") plaintiff on August 31, 2013, at the offices of defendant Medical One New York, P.C. Dr. Dovlatyan and Dr. Phillip are licensed anesthesiologists and co-owners of Medical One and defendant Arisdov Medical, P.C., which are office-based surgical facilities.

Plaintiff alleges that she suffered spinal nerve damage as a result of Dr. Dovlatyan's improper administration of this injection, including injury to the cervical nerve root as well as the

development of a hematoma which caused spinal compression, and his failure to diagnose the injury and to timely seek emergency medical treatment after the injection. With respect to Dr. Phillip, plaintiff alleges that Dr. Phillip departed from accepted medical practice by failing to diagnose the injury to plaintiff's spinal cord, and failing to timely take her to the hospital.

The record shows that at the time of the incident, plaintiff was 69 years-old and suffering from shoulder and neck pain. Her internist, Dr. Stephen Bernstein ("Dr. Bernstein") referred plaintiff to Medical One for epidural steroid injection. Ms. Cooney was seen by Dr. Dovlatyan for an initial epidural steroid injection on July 31, 2013. She received a second injection on August 10, 2013, also from Dr. Dovlatyan.

On August 31, 2013, the date in question, Ms. Cooney returned to Medical One for a third injection. Ms. Cooney testified that Dr. Phillip was present in the office that day at a desk and asked her to sign the consent forms (Cooney EBT at 144-145, 300, 309). In contrast, Dr. Phillip testified that she was not a Medical One that morning (Phillip EBT at 57-58). According to the medical records, the procedure began at 10:44 am and ended at 11 am, plaintiff exited the room at 11:04 am and anesthesia ended at 11:30 am (Dr. Phillip's motion, Ech. H.) Plaintiff was then moved to recovery area. Dr. Dovlatyan testified at his deposition that when he examined plaintiff she advised him that she was unable to move her arms (Dr. Dovlatyan EBT, at 143-144). Dr. Dovlatyan gave Ms. Cooney an injection Dexamethasone (a steroid) to decrease the inflammation and about 30 minutes later, gave her a second dose of Dexamethasone (Id, at 146-148). According to Ms. Cooney, Dr. Phillip was present in the recovery room, and when she told Dr. Phillip she was nauseous, Dr. Phillip got her a bucket to vomit into (Id at 162, 183, 308). Dr. Phillips denies this interaction occurred (Phillip EBT at 64). Plaintiff also testified that when she

awoke the recovery room, Dr. Phillip gave her a cell phone and dialed plaintiff's sister, Joan Zelenka.

Dr. Phillip testified that she was not in the office at the time Dr. Dovlatyan performed the procedure on August 31, 2013, but that she came to Medical One's offices after speaking to Dr. Dovlatyan on the telephone about "a patient in pain management who is taking a little long to recover [and that]...he's just going to observe her a little longer, and if she doesn't recover, he [is going to] take her to the hospital" (Dr. Phillip EBT at 52). According to Dr. Phillip, when she arrived at Medical One, Dr. Dovlatyan brought her to the recovery room where she saw plaintiff, and Dr. Dovlatyan told her the plaintiff's arm was weak; Dr. Dovlatyan told Ms. Cooney to lift her arm and "she was lifting it very weak, and that was the extent of the interaction that I observed between Dr. Dov[latyan] and Carole Cooney" (Id at 54). She denied making any conversation with Ms. Cooney (Id). She also testified that she did not ask Dr. Dovlatyan how the incident happened (Id at 62).

Dr. Phillip testified that she drove with Dr. Dovlatyan when he took plaintiff to the hospital and that she "was there for moral support, he's my colleague" (Id at 57). According to Dr. Phillip, she had no thoughts about when plaintiff needed to get help (at the hospital), since Ms. Cooney was "his (i.e. Dr. Dovlatyan's) patient, whatever he decided to do was his call, and I did not get involved in that judgment" (Id at 78). According to Dr. Phillip before plaintiff was taken to the hospital, she called Dr. Bernstein and told him that plaintiff was not moving her arm and that her arm was weak, and that Dr. Dovlatyan wanted to take her to the hospital, and asked him which hospital she should be brought to.

Dr. Dovlatyan testified that he called Dr. Phillips when he saw that Ms. Cooney "was not

moving her extremity, I called Dr. Phillip to give her opinion what we can do, how can we manage this condition" (Id at 144). When Dr. Phillip came to Medical One, Dr. Dovlatyan "explained the situation and I asked her opinion, what we should do" (Id at 151). Dr. Dovlatyan did not remember what Dr. Phillip said in response and testified that "we did whatever was necessary to be done with her [and that] we decided to take her to the hospital"(Id). When Dr. Dovlatyan was asked by what he meant by "we decided" and whether that referred to him and Dr. Phillip, he responded, "correct" (Id 152-153). However, when asked why did Dr. Phillip think it was necessary to take Ms. Cooney to the hospital, Dr. Dovlatyan answered "It's my decision. She's my associate. That's why she is there to discuss together." He did not remember what Dr. Phillip said about taking Ms. Cooney to the hospital and testified "[t]hat was mainly my decision. She approve[d] it" (Id at 154). Both Dr. Dovlatyan and Dr. Phillip testified that Ms. Cooney was not Dr. Phillip's patient (Id at 54, 154, 188; Phillip EBT at 49-50). The record also indicates that Dr. Phillip does not give injections (Dr. Dovlatyan EBT at 188).

Ms. Cooney's sister, Joan Zelenka, testified that she received a call from Medical One at around five o'clock, and the person from Medical One put Ms. Cooney on the telephone, and her sister asked her to come and pick her up (Zelenka EBT at 13-15). She took a car service into the Manhattan, and arrived about an hour later. She testified that Dr. Phillip answered the door at Medical One when she arrived and brought her to her sister in the recovery room and that Dr. Phillip and Dr. Dovlatyan were both there and they both told her that plaintiff's "arm was paralyzed and they thought it was like Novocain and it would wear off" (Id at 23), and that Dr. Phillip told her that her sister "would come out of it" (Id at 25). According to Ms. Zelenka, both Dr. Phillip and Dr. Dovlatyan, told her that "they'll leave her (i.e. Ms. Cooney) for an hour and

then come back." (Id at 27). When Dr. Phillip and Dr. Dovlatyan returned an hour later, and when Ms. Zelenka asked them if her sister belonged in a hospital, the two doctors got a wheelchair, and she along with Dr. Phillip and Dr. Dovlatyan took her sister by car to Lenox Hill hospital (Id at 32). Ms. Zelenka did not have any conversations with Dr. Phillip or Dr. Dovlatyan about sister's condition in the car or after they arriving at the hospital (Id at 49).

Ms. Cooney was seen by the emergency department at Lenox Hill hospital at 6:26 pm. The MRI showed abnormal findings including an acute hematoma on the right side of the spinal cord and some enlargement on the right side of the spinal cord. Plaintiff was treated non-surgically through the administration of Decadron, a steroid, and pain management medication. She was treated with steroids until she was discharged on September 4, 2013, and was transferred in-patient rehabilitation. At the time of her discharge, Ms. Cooney was noted to have motor strength of 2 out of 5 on her right upper extremity and 4 out of 5 on her left upper extremity (See Exhibit I to Phillip's Notice of Motion).

Dr. Phillip reviewed a report filed by Dr. Dovlatyan with the New York State Department of Health regarding the incident.

Dr. Phillip's Motion

Dr. Phillip moves for summary judgment dismissing the complaint against her on the grounds that a physician-patient relationship does not exist between her and the plaintiff, and that in the absence of such a relationship, she owes no legal duty to plaintiff, citing *inter alia*, Sawh v. Schoen, 215 AD2d 291 (1st Dept 1995). Dr. Phillip further argues that even if she owed a duty to plaintiff, she cannot be held liable for malpractice as she acted in accordance with accepted standards of medical practice, and there is no evidence that any act or omission by her

proximately cause any of plaintiff's alleged injuries. In addition, she argues that the claim against her for lack of informed consent is without merit since she had no obligation to obtain consent from Ms. Cooney.

In support of her motion, Dr. Phillip submits the expert affirmation Dr. Christopher Ghribo, who is a physician licensed to practice medicine in the State of New York and is board certified in Anesthesiology with a sub-specialty in pain management. After reviewing the factual record, Dr. Ghirobo opines, to a reasonable degree of medical certainty, that "there was nothing that Dr. Phillip did or should have done that was outside the standards of good and accepted medical practice; [t]here was no doctor-patient relationship that was established between Dr. Phillip and Ms. Cooney; [and]... Dr. Phillip did not have any involvement in plaintiff's care that was a substantial factor in causing plaintiff's alleged injuries" (Ghirob Aff. ¶ 18).

In support of his opinion that there was no doctor patient relationship between Dr. Phillips and Ms. Cooney, Dr. Ghirobo notes that "Dr. Phillip never interviewed, examined or saw plaintiff, as a patient, never provided any treatment to plaintiff and she never directed her care" and that Dr. Phillip "was not present when plaintiff received the steroid injection" and "agreed with Dr. Dovlatyan's decision to bring Ms. Cooney to the hospital if her condition did not improved" (Id ¶ 19, 20). With respect to Dr. Phillip's discussions with Dr. Dovlatyan regarding plaintiff, he states that "[p]hysicians often consult with one another as to the manner in which they manage a patient's care [but that] [t]his does not create a doctor-patient relationship and does not create an obligation to the patient on the physician offering an opinion" (Id ¶ 21).

In addition, Dr. Ghirobo opines that "though Dr. Phillip was not directing plaintiff's management agreeing with Dr. Dovlatyan's decision to wait to see if plaintiff's condition

improved, it is within accepted medical practice to do so" (Id ¶ 22). In this connection, he opines that "[t]he bupivacaine given to Ms. Cooney can cause muscle weakness for as long as 8-12 hours [and that] [i]t was within the standard of care and accepted medical judgment to wait to see if the symptoms resolved before bringing her for further evaluation. It was not incumbent upon Dr, Dovlatyan or Dr. Phillip to rush Ms. Cooney to the hospital for emergent neurosurgical intervention that was never needed" (Id ¶ 22).

In support of his opinion, he states that "[t]he findings of the MRI performed at the emergency department of Lenox Hill hospital do not warrant surgical intervention [and that] the condition was managed medically by the neurosurgeons at [the hospital]." (Id ¶ 23). Specifically, he states that "[t]here was no hematoma or area of impingement that was judged operable [and instead] the pathology was managed medically with intravenous steroids, allowing time for the bleed to be resorbed" (Id). He further states that "there was no delay in administrating steroids since Dr. Dovlatyan administered steroids in the form of DepoMedrol during epidural steroid injection, as part of the muscle injection, and following the procedure by administering Dexamethasone intravenously" (Id). He thus concludes that "it is without question that remaining at the Office of Medical One from the time the epidural steroid was given until plaintiff was brought to [the hospital] did not deprive the plaintiff of any type of medical intervention that would have affected her ultimate outcome" (Id).

Plaintiff opposes the motion, arguing that, at the very least, the record raises triable issues of fact as to whether Dr. Phillips owed a duty to plaintiff based on evidence that she took an active role in the care and treatment of plaintiff following the injection and, in particular, in connection with her participation in the decision to wait approximately seven hours after the

injection was administered and the signs of paralysis of her arms occurred to take Ms. Cooney to the hospital, citing, *inter alia*, Tom v. Sundaresan, 107 AD3d 479 (1st Dept 2013). Alternatively, plaintiff argues that even in the absence of a physician -patient relationship, Dr. Phillip may nonetheless be liable to her under the doctrine of agency by estoppel and a theory vicarious liability, citing, *inter alia*, Hill v. St Claire's Hosp., 67 NY2d 72 (1986). Plaintiff next argues that by waiting seven hours to bring plaintiff to the hospital, Dr. Phillip departed from accepted practices of medical care which were a substantial factor in causing or contributing to Ms. Cooney's injuries.

In support of her position, plaintiff submits expert affirmation of Alexander E. Weingarten, M.D., who is a physician licensed to practice medicine in the State of New York, and is board certified in anesthesiology and pain management. Upon reviewing the pleadings, the medical records, and deposition testimony, Dr. Weingarten opines, to a reasonable degree of medical certainty, that "Dr. Phillip's consultations with defendant [Dr. Dovlatyan] and Dr. Phillip's interaction with [plaintiff] created a physician-patient relationship between Phillip and plaintiff" (Weingarten Aff. ¶ 3). He also opines that Dr. Phillip "did not conform to the accepted standards of medical care and that she deviated from accepted standards of medical care regarding [plaintiff] when she failed to administer emergency care for [plaintiff] for seven hours post-injection after [plaintiff] was exhibiting paralysis in the right arm and the administration of dexamethasone was having no ameliorative effect" (Id.). Specifically, he notes that "[e]ven though [plaintiff] was experiencing paralysis as early as 11:30 am, Dovlatyan and Phillip decided not to take her to the emergency room until 7 hours later," and states that "[t]he standard of care required emergency intervention within 3-4 hours; waiting 7 hours was a deviation from accepted

standards of care" (Id ¶ 6). Dr. Weingarten further states that while Dr. Dovlatyan's administration of two doses of dexamethasone and waiting an hour to see if there is improvement is acceptable, and within the standard of care, once the two does of dexamethasone failed to provide any relief, it was incumbent on Dovlatyan and Phillip to ensure [plaintiff] received emergency care to ascertain what was causing the paralysis" (Id ¶ 8).

As for causation, Dr. Weingarten opines that "[h]ad intervention been taken hours earlier, the extent of damages to [plaintiff] could have been minimized" (Id). In support of this opinion, he notes that at the hospital an MRI of the cervical spine was performed which found, *inter alia*, "an acute hematoma on the right side of the spinal cord at C2-T1[1], with 'predominantly hypointense[2]' fluid collection... the same fluid that appeared predominantly isointense[3] on T1 weighted images. A small amount of fluid 'probably the medication injected at the time of the procedure'- appeared hypointense on T1 weighted images....There was also some enlargement on the right side of the spinal cord at the C2-T1 level" (Id ¶ 46). He then concludes that had Ms. Cooney "been taken to the hospital sooner and received care earlier, the findings on the MRI would not have been as extensive and her recovery would have been hastened" (Id ¶ 47). He also notes that on November 9, 2013, an EMG/nerve conduction study[4] was done, which found severe cervical root injury affecting C7-T1 roots, 'with more severed C8-

[1]C2 is the second neck/cervical vertebra and T1 is first chest/thoracic vertebra.

[2] Hypointense describes an abnormality that is dark on the MRI.

[3]Isointense refers to an abnormality that has the same intensity to a referenced structure.

[4]A EMG/nerve conduction study is an electrical of test of the nerves and muscles, intended to localize where the symptoms are coming from.

T1 involvement suspected. Prognosis for recovery is relatively poor given the degree axonal injury evinced" (Id ¶ 48).

In her reply, Dr. Phillips argues, *inter alia*, that Dr. Weingarten ignores key facts and evidence and offers conclusory and speculative opinions that have no probative value. She also argues that agency by estoppel does not apply to render her vicariously liable since plaintiff was a patient of Dr. Dovlatyan and not of Medical One, and there is no evidence that plaintiff believed otherwise.

Discussion

The threshold issue on this motion is whether a physician-patient relationship existed between Dr. Phillip and plaintiff, such that Dr. Phillip owed plaintiff a duty. Dallas-Stephenson v Waisman, 39 AD3d 303, 307 (1st Dept 2007). As a preliminary matter, the court notes that while the parties' experts have opined with respect to whether Dr. Phillip owed plaintiff a duty, this issue is "'a question of law, not medicine" and thus the expert opinions "transcend[] [the] bounds of [their] competence and intrudes upon the exclusive prerogative of the court.'" Sawh v. Schoen, 215 AD2d at 294, quoting Lipton v. Kaye, 214 AD2d 319, 322-323 (1st Dept 1995). At the same time, under certain circumstances, issues of fact are created as to whether a physician's advice gives rise to a sufficient basis for finding physician-patient relationship. See Campbell v. Hager, 274 AD2d 946, 947 (2000).

"The physician-patient relationship is a consensual one, and while it may arise out of a contract, the existence of the relationship does not depend upon the existence of any express contract. The relationship is created when the professional services of a physician are rendered to and accepted by another person for the purposes of medical or surgical treatment." Lee v. City of

New York, 162 AD2d 34, 36 (2d Dept 1990), 78 NY2d 863 (1991); see also; Gedon v. Bry-Lin Hospitals, 286 AD2d 892 (4th Dept 2001), lv denied 98 NY2d 601 (2002). An implied physician-patient relationship can arise based on evidence that "a physician gave advice to a patient by communicating through another health-care professional." Rogers v. Maloney, 77 AD3d 1427 (4th Dept 2010). In addition, "[i]t is not necessary that a [physician] see, examine, take a history of or treat a patient," in order to raise an issue of fact as to the existence of a physician-patient relationship. Tom v. Sunddarasan, 107 AD3d at 480, quoting Raptis-Smith v. St Joseph's Medical Center, 301 AD2d 246, 247 (1st Dept 2003). At the same time, it cannot be said that "a physician who engages in a discussion concerning a patient's condition thereby assumes an affirmative duty to accurately advise the treating physician regarding the care of their patient." Sawh v. Schoen, 215 AD2d at 293; see also Ingber v. Kandler, 128 AD2d 591, 592 (2d Dept 1987)(granting summary judgment to defendant doctor where record showed that although he "gave an informal opinion to a fellow physician regarding the case....there [was] no showing that the [the doctor] had any contact with the patient, saw any records relating to the case, or even knew the patient's name") .

Here, the court finds that the record raises triable issues of fact as to whether there is a patient-physician between Dr. Phillip and plaintiff based on evidence of that Dr. Dovlatyan consulted with, and/or sought the advice from, Dr. Phillip regarding Ms. Cooney's condition and when she should be taken to the hospital.[5] In this connection, the record shows that Dr.

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[5]The court notes that contrary to plaintiff's argument, evidence of Ms. Cooney's non-medical interactions with Dr. Phillip do not provide a basis for inferring a physician-patient relationship. See e.g. Garofalo v. State, 17 AD3d 1109 (4th Dept), lv denied 5 NY3d 707 (2005)(rejecting plaintiff's argument that a physician-patient relationship was created when a resident at the clinic directed that a letter be sent to claimant, scheduling her for an appointment

Dovlatyan called Dr. Phillip, who, as noted above along with Dr. Dovlatyan, is trained as an anesthesiologist, to come to the Medical One office. According to Dr. Dovlatyan, when Dr. Phillip arrived, "[he] explained the situation and asked her opinion." The record also shows that in the recovery room, Dr. Dovlatyan requested that Ms. Cooney move her arms and Dr. Phillip observed that Ms. Cooney's arms were weak. Moreover, while Dr. Phillip testified that she "had no thoughts" as to whether Ms. Cooney should go to the hospital, Dr. Dovlatyan testified that he, along with Dr. Phillip, decided as to when plaintiff should go to the hospital, and that while it was his decision, Dr. Phillip "approved it." Based on these facts, an inference can be drawn that a physician-patient relationship existed between Dr. Phillip and plaintiff.

In contrast, plaintiff's argument that Dr. Phillip can be held vicariously liable to plaintiff based on her control of Dr. Dovlatyan or under the doctrine of agency by estoppel is without merit as the record is devoid of evidence that Dr. Phillip actually exercised control over Dr. Dovlatyan, or that would provide a basis for plaintiff to reasonably believe that Dr. Phillip exercised such control. See generally, Hill v. St Clare's Hosp., 67 NY2d at 79.

The court will next address whether Dr. Phillip is entitled to summary judgment based on her arguments that she did not depart from the applicable standard of care, and that any departure was not a proximate cause of plaintiff's injuries. A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries

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on a nonemergency basis).

alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. In claiming that any treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. See Joyner–Pack v. Sykes, 54 AD3d 727, 729 (2d Dept 2008). A defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio–Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dept 2010). A defendant's expert opinion must "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dept 2003)).

If the movant makes a prima facie showing in medical malpractice action, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 NY2d 320, 324-325 (1986). Specifically, this requires that a plaintiff opposing a defendant's summary judgment motion "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact.... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." Id. at 324–25. In addition, a plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered." Dallas-Stephenson v Waisman, 39 AD3d at 307 (1st Dept

2007). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment." Diaz v. Downtown Hospital, 99 NY2d 542, 544 (2002).

Dr. Phillip has met her prima facie burden that she did not commit malpractice based on the opinion of her expert that it was within accepted medical practice to agree with Dr. Dovlatyan's decision to wait to see if plaintiff's condition improved before bringing her to the hospital. As for causation, her expert's opinion is sufficient to demonstrate that the alleged malpractice in connection with any delay in bringing plaintiff to the hospital was not a substantial factor in causing or exacerbating plaintiff's injuries as the MRI at the hospital indicated that no surgical intervention was necessary and that she was treated with intravenous steroids, like those injected by Dr. Dovlatyan at Medical One.

Accordingly, the burden shifts to plaintiff to raise a triable issue of fact. Here, while plaintiff's expert opines that Dr. Phillip deviated from accepted practices of medical care when she failed to administer emergency care to plaintiff for seven hours after the injection, the court notes that the record shows that any consultation that Dr. Phillip had with Dr. Dovlaytan regarding plaintiff's condition occurred well after the injection, and based on the record, approximately one and a half hours before plaintiff was taken to the hospital. As for causation, plaintiff's expert fails to adequately establish that any delay arising from any advice given by Dr. Phillip as to when to bring plaintiff to the hospital was a proximate cause of plaintiff's injuries or their exacerbation. While plaintiff's expert relies on the MRI results to support his opinion that plaintiff's injuries would not have been as extensive and her recovery would have been hastened if there had not been a seven hour delay in her emergency care at the hospital, the expert fails to specify a nexus between plaintiff's injuries and any delay flowing from Dr. Phillip's alleged

consultation, which according to the record occurred approximately one and a half hours before plaintiff was taken to the hospital. See e.g. Koeppel v. Park, 228 AD2d 288 (1st Dept 1996)(defendant gynecologist entitled to summary judgment where there was no nexus between the delay in diagnosing patient with colon cancer and defendant's alleged negligence in failing to take a complete medical history during a visit, and failing to follow up with patient and internist after referring the patient to the internist). Accordingly, Dr. Phillip is entitled to summary judgement dismissing the medical malpractice claims against her.

Finally, as the record is devoid of evidence that Dr. Phillip was involved in obtaining informed consent with respect to the epidural injection administered by Dr. Dovlatyan[6], the lack of informed consent claim must also be dismissed. See generally Public Health Law § 2805–d(1).

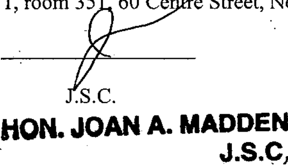
In view of the above, it is

ORDERED that the motion for summary judgment by Dr. Phillips is granted and the complaint against her is dismissed in its entirety; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the remaining parties shall appear on December 21, 2017 at 10:00 am for a previously scheduled pre-trial conference in Part 11, room 351, 60 Centre Street, New York.

DATED: October 26, 2017



J.S.C.

HON. JOAN A. MADDEN
J.S.C.

[6]While Ms. Cooney testified that Dr. Phillip gave her the consent forms, such testimony, even if accurate, would be insufficient to provide a basis for a lack of informed consent claim under the circumstances here.