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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS PART 6

Justice

WILLIAM LUCIA

INDEX NO. 104882/08

- V -

MOTION DATE 9/13/2011

BRIAN GOLDWEBER, M.D.

MOTION SEQ. NO. 001

The following papers, numbered 1 to 34, were read on this motion to/for dismiss.

Notice of Motion / Order to Show Cause – Affidavits – Exhibits	No(s). 1 → 21
Answering Affidavits – Exhibits	No(s). 22 → 33
Replying Affidavits	No(s). 34

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 12/15/11

JOAN B. LOBIS, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE:.....MOTION IS ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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WILLIAM LUCIA,

Plaintiff,

Index No. 104882/08

-against-

Decision and Order

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

Defendants.

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Joan B. Lobis, J.S.C.:

Motion sequence numbers 001, 002, and 003 are consolidated for disposition.

Abbe Carni, M.D. and Abbe Carni, M.D., P.C. ("Carni, P.C.") move (motion sequence 001), pursuant to C.P.L.R. Rule 3212, for an order granting them summary judgment dismissing plaintiff William Lucia's complaint. Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C. ("Goldberg, P.C.") move (motion sequence 002), pursuant to C.P.L.R. Rule 3212, for an order granting them partial summary judgment dismissing Lucia's punitive damages claim and the negligence and negligent hiring/retention causes of action. Lucia moves (motion sequence 003), pursuant to C.P.L.R. Rule 3025(b), for an order permitting him to amend the complaint to assert a claim for negligent misrepresentation against each of the moving defendants.

Goldberg, an employee and the principal of Goldberg, P.C., is an internist and a gastroenterologist. When Goldberg determined he needed the services of an anesthesiologist at his offices, he retained Carni, P.C. At first, the only specialist used by Carni, P.C. was Abbe J. Carni, a board-certified anesthesiologist. Carni was the president, sole shareholder, and sole administrator of Carni, P.C. As time passed, Carni decided that Carni, P.C. should concentrate on the business of providing anesthesiologists to practices which performed ambulatory procedures in their offices, and Carni began focusing his attention more on administration. Carni, P.C. retained anesthesiologists, including Brian A. Goldweber, M.D., L.L.C. ("Goldweber, L.L.C."), as alleged independent contractors. Carni looked for anesthesiologists with at least seven to eight years of post-residency experience. Carni found Goldweber on a website of anesthesiologists seeking work. Carni interviewed him and obtained his resume, which indicated that he had worked as an attending anesthesiologist for almost 20 years, through April 2001, at Rochester General Hospital and, from November 2001 through July 1, 2003, at Lakeside Memorial Hospital. Goldweber provided four highly favorable letters of recommendation from surgeons who had worked with him at Rochester General Hospital and a letter of recommendation from an anesthesiologist who had known him as a co-member of Rochester General Hospital's anesthesiology department. That anesthesiologist had subsequently become the chief of the anesthesiology department at Lakeside Memorial Hospital, and offered Goldweber a position after he left Rochester General Hospital. Carni did no further background check. He did, however, ascertain that Goldweber was licensed and had malpractice insurance and a May 1, 2002 infection control certification, which, to Carni's knowledge, had to be renewed every four years.

Carni then brought Goldweber to the office of Somerset Surgical Associates ("Somerset"), one of the groups which utilized Carni, P.C.'s services, discussed with Goldweber his anesthesiological technique, and had Goldweber administer anesthesia, including propofol from multi-dose vials provided by Carni, P.C., to six to eight of Somerset's patients to assess Goldweber's ability. Carni determined that Goldweber's performance was excellent and hired him. Neither at that time nor thereafter did Carni ever see Goldweber reuse a syringe to redose a patient from a vial of propofol. Goldweber, L.L.C. then entered into an alleged oral independent contractor agreement with Carni, P.C., and eventually, on January 4, 2006, entered into a written version, which added a non-compete clause.

Carni testified that "our routine" was to use multi-dose vials on more than one patient. Carni ebt, at 73. Carni also testified that, notwithstanding that propofol vial labels and the *Physicians' Desk Reference* ("PDR") indicated that the vials were for single-patient use only, it was within standards of acceptable medical practice to use a multi-dose vial of propofol on more than one patient, as long as sterile technique was maintained to withdraw the propofol from the vial, e.g. the physician before a procedure would withdraw three clean syringes of propofol from the vial for subsequent use during that procedure. Carni further testified that he would never store an open propofol vial overnight because propofol had to be discarded after six hours since, after that period, there would be an increased bacterial risk. Carni was, at all relevant times, unaware that Goldweber stored open vials of propofol overnight.

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., rather than its "independent contractors," determined the patients' fees and had them or their insurance companies billed for the anesthesiology services rendered, using information obtained by the offices where the procedures were performed. The bills did not reflect that the services had been rendered by the anesthesiologists who actually rendered the services.

Goldweber worked five days a week providing anesthesia services for medical practices to which he was sent by Carni. Goldweber, L.L.C. was paid a flat fee, regardless of the number of procedures Goldweber performed and the hours he worked. Also, Goldweber was paid during vacations, and received numerous bonuses from Carni, P.C., based on how well Carni, P.C. was doing, and not based on the work Goldweber performed. Carni, P.C. furnished Goldweber with the forms and anesthesia charts he used during the procedures, and paid for all equipment and medication which Goldweber used.

According to Goldweber, when he started working for Carni, P.C., 50 ml bottles of propofol were used, and later 100 ml bottles, which could serve about ten patients. Since those were the vial sizes Carni, P.C. used, he also used those sizes. Carni never directed Goldweber to order any particular vial size when he placed an order for the medication. According to Goldweber, he had free rein as to the medications and supplies he ordered and as to the techniques he used. Carni did not control Goldweber's administration of the medications. Carni also instructed the anesthesiologists to lay out money for holiday parties at the offices where services were rendered, which Carni reimbursed. It does not appear that Goldweber worked anywhere other than where Carni sent him. Goldweber's hours and where he worked were determined by Carni. Goldweber was required to obtain his own malpractice insurance, pay his own taxes, received no health

insurance from Carni, P.C., and received 1099 forms from Carni, P.C.

Carni placed Goldweber in Goldberg's office as his primary anesthesiologist. Goldberg's office had one room where procedures were performed, and Goldberg performed those procedures three days a week. Carni advised that, if Goldberg were unhappy with Goldweber, he would provide someone else. Carni, P.C. would place another anesthesiologist, including Carni, in Goldweber's office if Goldweber was unavailable on any occasion. Goldberg was advised by Carni that Carni, P.C. would ensure that the anesthesiologists provided would be licensed, would have the required certifications, and would carry malpractice insurance. Goldberg never asked Carni whether the anesthesiologists were board certified, and Carni never asked that of Goldweber. Goldberg did not independently investigate Goldweber's qualifications and, instead, relied on Carni to do so. Goldberg testified that Carni had assured him that Goldweber was Carni's employee. Even if Carni did not use the word "employee," Goldberg believed that an employer/employee relationship existed between Carni and Goldweber because Carni vouched for the anesthesiologists' credentials and told Goldberg that the anesthesiologists worked for him, were paid by him, and that their credentials would be annually maintained.

Lucia first presented to Goldberg on August 7, 2006, since he was in need of an internist. Goldberg examined Lucia, ordered some routine blood testing, and eventually scheduled an endoscopy, which Goldberg performed at about 3:00 p.m. on August 14, 2006. The anesthesia, including propofol, was administered by Goldweber. On the day of the procedure Goldweber simply introduced himself to Lucia as the anesthesiologist, without revealing his affiliation. Neither Goldberg nor Goldweber advised Lucia that Goldweber was not an employee of Goldberg, P.C. or

that he was provided by Carni, P.C. In September 2006, Goldberg performed two colonoscopies on Lucia, who had complained of bloody stools. Goldweber administered the anesthesia for those procedures.

On October 25, 2006, Lucia felt ill and went to a hospital where blood was drawn, which revealed elevated liver function test results. A test for hepatitis C was performed and was positive. Lucia, remembering that he had undergone blood testing when he first presented to Goldberg, obtained a copy of his records, which showed that he did not, at the time of that testing, have hepatitis C. Suspecting that he had acquired it during one of the procedures performed in Goldberg's office, Lucia contacted the New York City Department of Health (NYCDOH) in March 2007, which commenced an investigation that month.

NYCDOH's investigation initially focused on those who had undergone procedures in Goldberg's office on the day of Lucia's procedure and for the procedure days[1] before and after Lucia's procedure. Six cases of hepatitis C, including Lucia's, were discovered from around the time of his August 2006 endoscopy. Four of those occurred on August 14, 2006 in patients who had consecutively undergone procedures following the 1:30 p.m.[2] colonoscopy on a patient (the source patient) known to have had hepatitis C of the 1b genotype. Of those four and the source

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[1] A procedure day was not defined as a consecutive day. It was just the day when procedures were performed. NYCDOH's report reveals that no procedures were performed in Goldberg's office on August 11-13 or on August 16, 2006.

[2] Although NYCDOH's report is redacted, some of the relevant information, including times and dates, can be deduced from a review of the State Board for Professional Medical Conduct's determination and order following a hearing on charges leveled against Goldweber arising out of NYCDOH's investigation.

patient, two underwent colonoscopies and three underwent endoscopies. The last three of the four hepatitis C cases, including Lucia's, was determined to be outbreak-associated because: the hepatitis C strains were genetically related to that of the source patient; all patients were administered propofol by Goldweber; and Lucia's case and that of one other patient, there were no other known risk factors. The first of the four cases after the source patient's was considered a probable outbreak-associated case. NYCDOH's July 14, 2008 report reveals no cases of hepatitis C on the procedure day before Lucia's procedure. Two other cases of hepatitis C, but of the genotype 1a were found to have been probable outbreak-associated cases stemming from procedures performed on August 15, after a procedure was performed that day on a patient known to have hepatitis C of that genotype. In addition, a patient who was known to have hepatitis B had a procedure performed at 4:00 P.M. on August 14. Six patients over the course of the remainder of that day and on the next developed hepatitis B which was considered to probably be outbreak-associated because none of those patients had major risk factors for the disease, and because all of the patients received propofol from Goldweber in the same office and within a day of the other outbreak-associated cases. The investigation expanded after it appeared that the only common link in the discovered hepatitis cases was Goldweber's administration of propofol. NYCDOH found a number of additional probable outbreak-associated cases of hepatitis C.

NYCDOH's report contained the conclusion that the outbreaks of hepatitis B and C were caused by Goldweber's misuse of syringes when single-patient use 100 ml multi-dose vials of propofol were used to administer that medication to multiple patients. In particular, Goldweber was found, during source patients' procedures, to have withdrawn propofol from vials with syringes previously used to introduce propofol into source patients' intravenous ("IV") tubing, thereby

contaminating the vials, and thereafter withdrawing the contaminated propofol from the vial and administering it to other patients. NYCDOH ruled out actions on the part of the gastroenterologists, including Goldberg and his staff, as a cause of the transmission of hepatitis B and C.

NYCDOH, noting that propofol is labeled as a single-patient use product and that a vial should not be used on more than one patient, recommended in its report that in the future Goldweber should discard propofol remaining in a vial, rather than using it on another patient. This recommendation was also conveyed to Carni. NYDOH also found that open bottles of propofol, which had a six-hour life, had been stored overnight, and recommended that all anesthetic agents be stored in a locked cabinet and that expired agents be discarded. Further, to prevent inadvertent contamination, it was recommended that single-use medication vials (e.g. 20 ml vials) be used, if available, and that multi-dose agents be labeled with the opening day and discarded according to the manufacturers' recommendations or within 28 days, whichever was earlier. NYCDOH's report also indicated that if use of multi-dose vials was required, a sterile syringe should be used for each dose given to a patient. As a final recommendation, NYCDOH directed Goldweber to take the required infection control course to bring up to date his certification, which he did. NYCDOH's report recited that it was going to urge the FDA to consider limiting the availability of multi-dose vials of anesthetic agents, including propofol, to diminish the possibility of patient-to-patient infection transmittal.

NYCDOH's report further revealed that the committee had reviewed the New York State Office of Professional Misconduct ("OPMC") website during its investigation and found that Goldweber's license had previously been suspended for negligence on more than one occasion,

although none of the acts of negligence alleged involved infection control, and that the suspension had been stayed "with monitoring terms and medical competency evaluation and training." A review of the documents pertaining to that proceeding reveals that in 1999 Goldweber signed a consent agreement and order in which he admitted guilt to the third specification of charges leveled against him by OPMC and agreed to the terms of the stayed three-year suspension, which ended on November 1, 2002. The third specification charged him with negligence on more than one occasion in giving a patient a 3 cc bolus of medication, which had a concentration of .5%, evidently instead of .25%, and/or in failing to adequately monitor that patient after administering that medication, and/or in administering a medication to a patient with a history of adverse reaction to that medication and a family history of close to lethal reaction to that medication, and/or in administering a muscle relaxant to a patient without a secured airway, and/or in failing to remain with a patient until it was clear that the patient was medically stable. Although not mentioned in NYCDOH's report, in March 2002, OPMC again disciplined Goldweber, in that it censured, reprimanded, and fined him for responding "no" on a July 2001 hospital application to the question of whether his license had ever been suspended or limited. Neither Carni nor Goldberg had previously been aware of any disciplinary proceedings against Goldweber.

During the course of NYCDOH's investigation of the hepatitis outbreak, it reported the situation to OPMC. OPMC then began an independent investigation of Goldweber in May 2007, who agreed to discontinue his medical practice pending that investigation. Meanwhile, shortly before then, Carni, who had not annually checked whether Goldweber's credentialing and malpractice insurance were up-to-date, learned from Goldweber that his malpractice carrier had

dropped his coverage in the spring of 2004.[3] Carni, P.C. immediately discharged Goldweber.

In October 2008, OPMC charged Goldweber with gross incompetence, gross negligence, negligence and incompetence on more than one occasion, and with failing 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 his medical license was revoked.

OPMC essentially confirmed NYCDOH's findings. OPMC found that Goldweber regularly used multi-dose vials of anesthetic, i.e., 100 ml vials of propofol, and 50 cc vials of lidocaine and pentothal. OPMC noted that the American Society of Anesthesiologists ("ASA") guidelines did not prohibit using multi-dose vials and that multi-dose vials were permitted by the FDA. However, OPMC indicated that NYCDOH, the New York State Department of Health, and the Center for Disease Control urged the FDA to bar the use of multi-dose vials of medication, because they are susceptible to misuse and provide an opportunity for transmissions of infections. OPMC then observed that ASA guidelines recited that propofol was for single-patient use because it did not have adequate preservatives. OPMC concluded that Goldweber had inappropriately used propofol by using a product which was indicated for single-patient use on multiple patients, notwithstanding that it was sold in multi-dose form. OPMC also found that Goldweber improperly failed to discard propofol vials after six hours in accordance with its label and acted improperly in

[3]Goldweber testified that the coverage was dropped because he failed to pay the premiums and that he never attempted to obtain coverage from another carrier. Carni testified that Goldweber had informed him that he could not afford his premiums.

storing open vials overnight and then using those vials the next day. Additionally, OPMC found that Goldweber would occasionally re-dose a patient with the same syringe, thereby creating a risk of contaminating the vial. OPMC opined that, since syringes were labeled as single-use items, reusing them was a violation of infection control standards. OPMC then observed that Goldweber had expressed surprise that blood and viruses could flow back into a syringe from a patient's IV tubing, which contaminates the propofol by reintroducing the used syringe into the vial). At his deposition, Goldweber conceded that he told OPMC that he reused syringes to redose patients, but claimed that he only did that occasionally and only to empty a bottle.

Meanwhile, before either NYCDOH or OPMC issued their reports, Lucia, in May 2008, commenced this action against Goldweber, Goldweber, L.L.C., Goldberg, Goldberg, P.C., Carni, and Carni, P.C., and served bills of particulars, which amplified the complaint's allegations and also charged the defendants with Goldweber's negligent supervision. Goldweber and Goldweber, L.L.C. never appeared and were discharged in bankruptcy. The complaint asserts causes of action sounding in medical malpractice, based on departures from accepted standards of practice, negligence, lack of informed consent, negligent hiring and retention, res ipsa loquitor, and punitive damages.

Carni and Carni, P.C. move for an order for summary judgment to dismiss the legally-recognized causes of action alleged against. Goldberg and Goldberg, P.C. move for an order granting them partial summary judgment dismissing the punitive damages claim and the negligent hiring/retention and the negligence causes of action. Lucia opposes some of the relief sought, and

his counsel provides joint opposition papers to the separate motions.[4] Lucia also moves for an order permitting him to amend his complaint to allege that the moving defendants negligently misrepresented that they would provide Lucia with an anesthesiologist who was competent, skilled, and had the requisite qualifications.

Turning first to Lucia's motion to amend, the motion is denied. "Leave to amend a pleading should be freely granted where" there is no prejudice or surprise to the other side and the proposed pleading is not "totally devoid of merit." Rodriguez v. Paramount Dev. Assoc., LLC, 67 A.D.3d 767, 767–68 (2d Dep't 2009); Heller v. Louis Provenzano, Inc., 303 A.D.2d 20, 22, 25 (1st Dep't 2003). In the instant case, Lucia's application is devoid of merit. Specifically, as to Goldberg and Goldberg, P.C., Lucia's application is accompanied by his affidavit in which he admits that Goldberg never discussed who the anesthesiologist would be or what that individual's credentials or background would be. As to Carni and Carni, P.C., the record contains no evidence that Carni ever met Lucia before the procedure in issue, and Lucia does not urge otherwise in his supporting affidavit. In light of the foregoing, it is evident that neither Goldberg nor Carni ever misrepresented, negligently or otherwise, to Lucia about Goldweber's credentials, skill or competence. Since there were no misrepresentations, the requisite element of reliance is also lacking. Parrott v. Coopers & Lybrand, 95 N.Y.2d 479, 484 (2000). Accordingly, Lucia's motion to amend is denied.

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[4] Lucia's counsel also indicates that he is relying on papers he had submitted in an action commenced by another plaintiff who allegedly was infected with hepatitis C as a result of anesthesia administered by Goldweber. However, none of those papers were submitted on this motion, and those papers will, therefore, not be considered here.

The branch of Carni and Carni, P.C.'s motion which seeks an order granting them summary judgment dismissing the lack of informed consent cause of action on the ground that Goldweber was not required to inform Lucia that he might acquire hepatitis C as a result of the procedure because it was not a risk of the procedure, is granted, since Lucia does not offer any opposition to this branch of Carni and Carni, P.C.'s motion. Moreover, a physician is not required to inform a patient of the risks the patient might encounter if subjected to negligence or departures from accepted standards of medical care, and Lucia does not refute Carni and Carni, P.C.'s expert's assertion that hepatitis is not a foreseeable risk of endoscopy. Thus, the lack of informed consent cause of action is dismissed as to Carni and Carni, P.C.

Goldberg and Goldberg, P.C.[5] seek an order dismissing the negligence cause of action "against Goldberg and his employees and/or agents" (Patel aff., ¶ 5) on the ground that the claims set forth in those portions of the pleadings do not amount to negligence, but rather, only constitute malpractice. Effectively, the branch of the motion seeking to dismiss the negligence cause of action was one under C.P.L.R. Rule 3211(a)(7) (failure to state a cause of action). Lucia opposes the motion and claims that the misconduct alleged under this cause of action, including the improper storage of propofol and the use of a propofol vial on more than one patient, sounds in negligence, not malpractice, because the claimed acts do not challenge Lucia's actual treatment, but are, instead, ancillary to it. In addition, Lucia offers the affidavit of his expert internist, Edward Weissman, who asserts that, as an ambulatory surgical center, Goldberg, P.C. was required to have "an integrated infection control program" in place as mandated by the Center for Medicare Services,

[5]Goldberg and Goldberg, P.C. do not seek to distinguish between themselves on their motion, and, therefore, will be treated as one herein.

that such program would have prevented Goldweber from, among other things, using a propofol vial on more than one patient, storing a vial overnight, or using a vial for more than six hours after it was opened, and that the lack of such program constitutes negligence, rather than malpractice.

"[M]edical malpractice is simply a form of negligence, [and] no rigid analytical line separates the two[.]" Scott v. Uljanov, 74 N.Y.2d 673, 674 (1989). While a health care provider "in a general sense is always furnishing medical care to patients, ... clearly not every act of negligence toward a patient would be medical malpractice." Bleiler v. Bodnar, 65 N.Y.2d 65, 73 (1985). When "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the ... failure in fulfilling a different duty," the claim sounds in negligence. Id. Where the inquiry pertaining to whether a duty of care has been breached does not turn on an analysis of the medical treatment rendered to the patient, the claim sounds in negligence. Weiner v. Lenox Hill Hosp., 88 N.Y.2d 784, 788 (1996); Rodriguez v. Saal, 43 A.D.3d 272, 275 (1st Dep't 2007). The determinative question is "whether the challenged conduct bears a substantial relationship to the rendition of medical treatment to a particular patient." Weiner, 88 N.Y.2d at 788 (internal citation and quotation marks omitted); Wahler v. Lockport Physical Therapy, 275 A.D.2d 906, 907 (4th Dep't 2000). Thus, for example, a claim that a medical provider failed to establish proper procedures or regulations constitutes negligence, rather than malpractice, because the determination of whether a duty of care was breached does not depend on the treatment rendered to the plaintiff. Weiner, 88 N.Y.2d at 788. Further, that expert testimony might be needed to establish a claim, does not necessarily render that claim one sounding in malpractice. Id. at 789; Rodriguez, 43 A.D.3d at 276.

The lack of an integrated infection control program and other concerns about office procedure raise questions of fact regarding the claims sounding in negligence against Goldberg and Goldberg, P.C. A review of all of the pleadings, not just those referred to by defense counsel in his moving affirmation, reveals claims that these movants breached their duty of preventing Lucia from being infected with hepatitis (Complaint, ¶ 12) and failed to take steps to ensure that Goldweber was not spreading hepatitis (Bill of Particulars, at 5-6), which are claims broad enough to encompass a failure to establish proper procedures, and sound in negligence. To the extent that Goldberg and Goldberg, P.C. assert in their reply papers that this claim is without merit and that plaintiff has not substantively established the viability of this claim, he was not required to, since these defendants did not move on substantive grounds, effectively moved pursuant to C.P.L.R. Rule 3211(a)(7) only, and failed to mention these allegations and prima facie establish that they were not substantively viable in their initial moving papers. See Winegrad, 64 N.Y.2d at 853 (movants' failure to meet their prima facie burden mandates the denial of the application, "regardless of the sufficiency of the opposing papers"). Nor can the Goldberg defendants seek, in their reply papers, to rely on deposition transcripts appended to the Carni defendants' motion, but not to their own initial papers, or on the Carni defendants' expert's affirmation. See Rhodes v. City of New York, _AD3d_, 2011 NY Slip Op 07569, *2 (1st Dep't 2011) (internal citation and quotation marks omitted) ("[a]rguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion"). Accordingly, Goldberg and Goldberg, P.C.'s application to dismiss the negligence cause of action is denied.

Turning now to Carni and Carni, P.C.'s claim that they cannot be held vicariously

liable for any negligence or malpractice claims asserted against Goldweber and Goldweber, L.L.C.,[6] because Goldweber was Carni, P.C.'s independent contractor, and that Carni cannot be vicariously liable for Goldweber because it was Carni, P.C., rather than Carni personally, which retained Goldweber as an independent contractor, I agree with the latter proposition. Therefore, Lucia's claims of Carni's vicarious liability for Goldweber and Goldweber, L.L.C. are dismissed. See Yaniv v. Taub, 256 A.D.2d 273, 274 (1st Dep't 1998) (doctrine of respondeat superior does not impose vicarious liability on supervisor who was the sole shareholder of professional corporation which bore his name, but such individual can be liable for his own negligent supervision of the office staff). However, I decline to dismiss the claim that Carni, P.C. is vicariously liable for the acts and omissions of Goldweber.

Lucia, who disclaims any reliance on an apparent/ostensible agency theory as to this defendant, maintains that there are issues of fact as to whether Carni, P.C. actually employed Goldweber, thereby warranting the denial of summary judgment dismissing the vicarious liability claims. An entity which retains an independent contractor is usually not liable for the contractor's acts and omissions, since that entity "has no right to control the manner in which the work is to be done." Kleeman v Rheingold, 81 N.Y.2d 270, 273-274 (1993). In general, whether an employment relationship exists is based on whether the retaining party exercises control over the means utilized to produce the results or over those results. Chuchuca v. Chuchuca, 67 A.D.3d 948, 950 (2d Dep't 2009). The issue of whether one is an employee or an independent contractor is usually for the trier

[6] To the extent that Carni and Carni, P.C. urge, for the first time in their reply papers, that claims of vicarious liability for Goldweber's negligence should be dismissed because the claims actually sound in malpractice, I decline to entertain such belated application.

of fact. Carrion v. Orbit Messenger, 82 N.Y.2d 742, 744 (1992). In deciding whether one is an independent contractor or an employee, all the details of the parties' arrangement must be examined. Araneo v. Town Bd. for Town of Clarkstown, 55 A.D.3d 516, 518 (2d Dep't 2008). Some of the factors relevant in determining control are whether the person could engage in other work, paid their own taxes, was on a fixed schedule, could set their own hours, was given fringe benefits, furnished the materials they needed for their work, paid their own expenses, was free to compete with the retaining entity, and was on the retaining entity's payroll. See, e.g., Matter of O'Brien v. Spitzer, 7 N.Y.3d 239, 243 (2006); Barak v. Chen, 87 A.D.3d 955 (2d Dep't 2011). That a contract recites that one is an independent contractor "is not dispositive." Araneo v. Town Bd. for Town of Clarkstown, 55 A.D.3d at 518–19.

In the instant case, while some factors suggest that Goldweber was an independent contractor, numerous other factors suggest otherwise. These include that Goldweber appears to have worked full-time and only for Carni, P.C.; was required to sign a non-compete agreement; did not control the billing or where and when he worked; was not paid per job, but per week; received paid vacation and generous bonuses, which were not based on his performance; was not required to pay for his supplies; was required to use charts and anesthesia records provided by Carni, P.C.; and was instructed to hold holiday parties in the offices where he worked. In addition, Carni required Goldweber to provide anesthesia in his presence to numerous patients before he retained Goldweber, which suggests that Carni wanted to observe whether Goldweber's methodology was to his liking. If it was not, Carni would not necessarily have decided not to retain Goldweber, but instead could have dictated how he wanted the work performed. In light of the foregoing, Carni,

P.C.'s application to dismiss the claims of its vicarious liability for Goldweber and Goldweber, L.L.C. is denied.

Carni and Carni, P.C. also urge that the negligent hiring, retention, and supervision claims must be dismissed because Carni could not have reasonably known that Goldweber had a propensity to break sterile technique. Initially, it should be observed that negligent hiring, retention, and supervision claims can be asserted against one who retains an independent contractor (see Chuchuca v. Chuchuca, 67 A.D.3d at 950), and these movants do not claim otherwise. The fact that Goldweber was not board certified does not give rise to a claim of improper hiring, since there is no requirement that a practicing anesthesiologist be board certified. Thomas v. Solon, 121 A.D.2d 165, 166 (1st Dep't 1986). Further, that Carni did not check Goldweber's references, investigate the gap between his employment at Rochester General Hospital and at Lakeside Memorial Hospital, or seek to learn whether he had ever been sanctioned is unavailing, since Carni would not have learned that Goldweber had a propensity for breaking sterile technique and infecting patients. Coffey v. City of New York, 49 A.D.3d 449, 450 (1st Dep't 2008); Rochlin v. Alamo, 209 A.D.2d 499, 500 (2d Dep't 1994) (negligent hiring/retention claim requires showing of notice of the wrongdoer's particular tortious leanings). In addition, Goldweber's admission to being negligent on more than one occasion does not disqualify him from being retained, since no physician could be retained if that physician had been subjected to two unfavorable malpractice judgments. Further, despite having been previously sanctioned, Goldweber, by the time he was involved in Lucia's care, had no restrictions on his license, thereby indicating that OPMC was of the opinion that Goldweber was capable and free to provide anesthesia services to other practitioners' patients.

Lucia claims that Carni and Carni, P.C. negligently hired, retained, and supervised Goldweber on the grounds that Carni was aware from the start that Goldweber was using multi-dose vials of propofol on more than one patient. This argument is rather tenuous because the mere use of multi-dose vials of propofol, in general, is not impermissible. Nevertheless, OPMC's report asserts that Goldweber used propofol in an inappropriate manner, and lists as one impropriety the use of multi-dose vials on more than one patient where that medication was indicated for single-patient use. That package labeling or the PDR provides that propofol is for single-patient use is hearsay and does not, standing alone, establish the standard of care. Spensieri v. Lasky, 94 N.Y.2d 231, 236, n.1, 239 (1999); see also Saccone v. Gross, 84 A.D.3d 1208, 1209 (2d Dep't 2011). ASA guidelines, stating that propofol vials are for single-patient use, also do not establish the standard of care absent proof that "they reflected a generally-accepted standard or practice." cf. Scarito v. St. Joseph Hill Academy, 62 A.D.3d 773, 775 (2d Dep't 2009). It is unclear whether Lucia's expert is stating that propofol's single-patient use labeling has to be obeyed because propofol lacks the preservatives that "inhibit ... infectious growth" (Weissman aff.), and because hepatitis C, when introduced into a propofol vial, multiplies and increases the risk of transmission.

Moreover, Carni and Carni, P.C. wholly fail to address the point raised in Lucia's opposition papers that these movants were negligent in failing to take steps to ensure that 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. Here, where OPMC's report indicates that

Goldweber expressed surprise when informed that contaminants could flow back from a patient's IV into a syringe, it cannot be determined as a matter of law that the lack of recertification had no bearing on the outcome in this case. "[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 [internal citations omitted]." Gibson v. American Export Isbrandtsen Lines, 125 A.D.2d 65, 74 (1st Dep't 1987). Accordingly, this Court declines to dismiss the negligent hiring, supervision, and retention claims against Carni and Carni, P.C. In view of the foregoing, Carni and Carni, P.C.'s application to dismiss the negligent hiring, retention, and supervision claims is denied.

Goldberg and Goldberg, P.C. also seek an order granting them summary judgment dismissing the negligent hiring and retention cause of action on the grounds that it was Carni, evidently referring to Carni and Carni, P.C., who was involved in Goldweber's hiring and retention, whether as Carni, P.C.'s employee or its independent contractor, and because Lucia will be unable to show that Goldberg had knowledge of any of Goldweber's credentialing deficiencies or had any reason to believe that Goldweber had a propensity to transmit infectious diseases. This portion of Goldberg and Goldberg, P.C.'s motion is supported by parts of Carni's and Goldberg's deposition transcripts indicating that Goldweber was provided by Carni, P.C. and that Goldberg, since he was not an anesthesiologist, did not feel comfortable hiring and supervising anesthesiologists, and instead relied on Carni to provide appropriately credentialed anesthesiologists.

Lucia does not dispute Goldberg's testimony, in effect that, at the time in issue, he

lacked knowledge of inappropriate actions on Goldweber's part during the course of the procedures performed on Goldberg, P.C.'s premises, and does not contest Goldberg's deposition testimony, which Lucia's counsel points to in his affirmation (at 10), that Goldberg never investigated Goldweber's background. Lucia's counsel maintains, however, that Goldberg and Goldberg, P.C. were negligent because they were not permitted to delegate the duty of ensuring that Goldweber was appropriately credentialed.

This branch of Goldberg and Goldberg, P.C.'s motion is granted, and the negligent hiring and retention claims are dismissed as to them since there was no requirement that Goldweber be board certified; Goldberg had no knowledge of the prior disciplinary proceedings, and even if he had, the record pertaining to those proceedings would not have shown that Goldweber had the propensity to break sterile technique; and because Lucia offered and did not contest Goldberg's testimony that he was unaware of Goldweber's anesthesia technique and did not watch him perform his services. Moreover, Goldberg, and thus Goldberg, P.C., were entitled to delegate the hiring services and the service of ensuring that Goldweber's credentials were kept up-to-date to Carni, P.C., which acted through Carni. 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).

This leaves the defendants' applications to dismiss the punitive damages claims. Punitive damages are not intended to compensate a plaintiff, but instead serve to punish the

wrongdoer and deter that individual and those in a similar situation 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. Fordham-Coleman v. National 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 v. Louise Wise Services, Inc., 8 N.Y.3d at 489 (internal quotation marks and citations omitted). A conscious or reckless disregard of another's rights is necessary. Home Ins. Co. v. American Home Prods. Corp., 75 N.Y.2d 196, 203 (1990); Welch v. Mr. Christmas, 57 N.Y.2d 143, 150 (1982); Zuckerman v. Goldstein, 71 A.D.3d 407 (1st Dep't 2010); Melfi v. Mount Sinai Hosp., 64 A.D.3d 26, 41--3 (1st Dep't 2009). 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). 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).

In the instant case, Lucia's memorandum of law only resists Carni and Carni, P.C.'s

application to dismiss the punitive damages claim. That memorandum offers no resistance to Goldberg and Goldberg, P.C.'s motion to dismiss that claim. Further, Lucia's counsel acknowledges that Goldberg testified that he had no familiarity with Goldweber's anesthesiological technique and never observed Goldweber as he performed those services.[7] Accordingly, the branch of Goldberg and Goldberg, P.C.'s motion which seeks an order granting summary judgment dismissing the punitive damages claim is granted, without opposition.

The branch of Carni and Carni, P.C.'s motion which seeks an order granting them summary judgment dismissing Lucia's punitive damages claim is also granted. Carni testified that he never saw Goldweber reuse a syringe to redose a patient, and was unaware that Goldweber was storing propofol overnight. While Carni was aware that Goldweber was using single-patient multi-dose vials on multiple patients, Carni testified that such practice would be acceptable as long as the anesthesiologist used sterile techniques such as prefilling clean syringes at the start of a procedure, a position supported by Carni's expert. Assuming for argument's sake that new vials of propofol should have been used, Carni's actions in hiring, supervising, and/or retaining Goldweber, knowing that he engaged in this practice, did not rise to the level of gross or reckless behavior by Carni or the sanctioning of reckless behavior on the part of Goldweber.

Lucia further claims that questions of fact exist regarding whether Carni was himself

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[7] I further note in passing, although not part of the record on the Goldberg defendants' motion, but which presumably factored into Lucia's counsel's decision not to resist this branch of the Goldberg defendants' motion, that the transcript of Goldberg's deposition appended to the Carni defendants' motion reveals that Goldberg testified that he never saw Goldweber reuse a syringe.

grossly negligent in performing an inadequate background check on Goldweber and in failing to ensure that Goldweber kept his infection control certification current. Assuming for argument's sake that these omissions constituted negligence, neither rises to the level of gross negligence. In light of the foregoing, the punitive damages claim is dismissed as to Carni and Carni, P.C. In conclusion, it is

ORDERED that William Lucia's motion (sequence number 003) seeking an order permitting him to amend his complaint to assert a negligent misrepresentation cause of action against defendants Abbe J. Carni, M.D., Abbe J. Carni, M.D., P.C., Edward S. Goldberg, M.D., and Edward S. Goldberg, M.D., P.C. is denied; and it is further

ORDERED that the branch of Abbe J. Carni, M.D. and Abbe J. Carni, P.C.'s motion (sequence number 001) which seeks an order granting them summary judgment dismissing the lack of informed consent cause of action is granted, and that cause of action is dismissed and severed as to Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C.; and it is further

ORDERED that the branch of Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C.'s motion (sequence 002) which seeks an order granting them summary judgment dismissing William Lucia's negligence cause of action is denied; and it is further

ORDERED that the branch of Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C.'s motion (sequence number 1) which seeks an order granting them summary judgment dismissing

the claims that they are vicariously liable for Brian A. Goldweber, M.D. and Brian A. Goldweber, M.D., L.L.C. is granted to the extent that such claims are dismissed and severed as to Abbe J. Carni, M.D. but is denied as to Abbe J. Carni, M.D., P.C.; and it is further

ORDERED that the branch of Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C.'s motion (sequence number 001) which seeks an order granting them summary judgment dismissing all negligent hiring, retention, and supervision claims is denied; and it is further

ORDERED that the branch of Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C.'s motion (sequence number 2) which seeks an order granting them summary judgment dismissing the negligent hiring/retention cause of action is granted, and that cause of action is dismissed and severed as to Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C.; and it is further

ORDERED that the branch of Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C.'s motion (sequence number 1), and the branch of Edward S. Goldberg, M.D. and Edward S. Goldberg, M.D., P.C.'s motion (sequence number 002) seeking an order dismissing Lucia's punitive damages claims are granted and those claims are dismissed and severed as to Abbe J. Carni, M.D., Abbe J. Carni, M.D., P.C., Edward S. Goldberg, M.D., and Edward S. Goldberg, M.D., P.C.

Dated: Dec. 15, 2011 ENTER:

JOAN B. LOBIS, J.S.C.