

Bergin v Jackson

2014 NY Slip Op 30661(U)

February 19, 2014

Sup Ct, Suffolk County

Docket Number: 09-7349

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY**COPY****PRESENT:**Hon. JOSEPH C. PASTORESSA
Justice of the Supreme CourtMOTION DATE 11-26-13
ADJ. DATE 1-8-14
Mot. Seq. # 010 - MG
011 - MG-----X
EILEEN BERGIN, as Administratrix of the Estate
of LAWRENCE BERGIN, deceased, and EILEEN
BERGIN, individually,

Plaintiffs,

- against -

DAVID JACKSON, R.P.A., KAREN EYNON,
M.D., CARL GOODMAN, M.D., CHRISTINE
KAM, M.D., U.S. RADIOLOGY ON-CALL,
RANDOLPH PHILLIPS, M.D., PATRICIA
PICCIANO, R.N., BROOKHAVEN MEMORIAL
HOSPITAL, DENISE ABSELET, D.O., PORT
JEFFERSON INTERNAL MEDICINE
ASSOCIATES, P.C., ALEXANDER
WEINGARTEN, M.D., PHILLIP FYMAN, M.D.,
ALEXANDER WEINGARTEN, M.D., P.C.,
LOUIS MALESARDI, PA-C, PHILLIP N.
FYMAN, M.D., COMPREHENSIVE PAIN
MANAGEMENT ASSOCIATES, and RICHARD
BALTER, M.D.,Defendants.
-----XSULLIVAN PAPAIN BLOCK MCGRATH &
CANNAVO, P.C.
Attorney for Plaintiffs
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Garden City, New York 11530FUMUSO, KELLY, DEVERNA, SNYDER
SWART & FARRELL, LLP
Attorney for Defendants Jackson, R.P.A.,
Goodman, M.D., Picciano, R.N., & Brookhaven
Memorial Hospital
110 Marcus Boulevard, Suite 500
Hauppauge, New York 11788LAWRENCE WORDEN & RAINIS & BARD, PC
Attorney for Defendant Phillips, M.D.
225 Broad Hollow Road, Suite 105E
Melville, New York 11747

Upon the following papers numbered 1 to 55, read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (010)1-15; (011) 16-30; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 31-41; 42-52; Replying Affidavits and supporting papers 53-55; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (010) by the defendants, Richard Balter, M.D. and Port Jefferson Internal Medicine Associates, pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against them is granted; and it is further

ORDERED that motion (011) by the defendant, Denise Abselet, D.O. and Port Jefferson Internal Medicine Associates, pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against them is granted.

In this action, the plaintiff, Eileen Bergin, as the Administratrix of the Estate of Lawrence Bergin, seeks damages on behalf of the estate, and derivatively, for personal injuries allegedly sustained by the decedent, Lawrence Bergin. It is alleged that the decedent was caused to suffer an infection in his right hip caused by Methicillin Resistant Staphylococcus Aureus (MRSA), allegedly as a result of a superficial greater trochanteric injection administered by defendant Louis Malesardi, PA-C on November 7, 2006, at the office of Comprehensive Pain Management Associates, for pain in the decedent's right hip and lower extremity. The plaintiff's decedent was also administered various interventional techniques to manage his pain, including trigger point injections to his neck and lower back in 2004 and 2005, and hip injections, lumbar interlaminar epidural steroid injections, and prescription medication. The decedent was seen for right thigh pain at Comprehensive Pain Management Associates on October 3, 2006. On October 8, 2006, the plaintiff's decedent presented to Brookhaven Memorial Hospital emergency room with complaints of right thigh pain since Thursday, October 5, 2006. Examination at that time revealed, inter alia, a urine culture positive for MRSA, for which an oral antibiotic, to which the organism was sensitive, was prescribed on October 13, 2006, by Brookhaven Memorial Hospital staff when the culture report was received. On October 9, 2006, the decedent was seen at the office of Richard Balter, M.D. and Port Jefferson Internal Medicine Associates, where co-defendant Denise Abselet M.D. was a partner. It is alleged, inter alia, that the moving defendants failed to follow up on the results of the urine culture, proximately causing a worsening of an infection caused by MRSA in plaintiff's right hip. The moving defendants did not see the decedent after October 9, 2006. Co-defendant Malesardi saw the decedent on November 7, 2006, for complaints of low back pain radiating down his left lower extremity, and right hip pain, and administered an injection of DepoMedrol and Bupivacaine via right superficial greater trochanteric injection which the plaintiff alleges caused the MRSA infection in decedent's right hip. The complaint asserts claims premised upon the alleged negligent departures from the good and accepted standard of care by the defendants, and for lack of informed consent.

In motion (010), defendants Richard Balter, M.D. and Port Jefferson Internal Medicine Associates seek summary judgment dismissing the complaint on the bases that Dr. Balter saw the plaintiff's decedent on only one visit on October 9, 2006, and that there is nothing which he did or did not do which was the proximate cause of the decedent's injuries. In motion (011), Denise Abselet, D.O. and Port Jefferson Internal Medicine Associates seek summary judgment dismissing the complaint on the bases that she last saw the decedent on September 27, 2006, and did not treat him thereafter. Both defendants Balter and Abselet were shareholders/partners in Port Jefferson Internal Medicine Associates.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to

the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [1981]).

In support of motion (010) defendant Balter submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, his answer and demands, and plaintiff’s verified bill of particulars; uncertified medical records; the unsigned and uncertified copies of the transcripts of the examination of Eileen Bergin dated November 11, 2010, non-party Patricia Picciano, R.N., and defendant Balter; and the signed copy of the transcript of the examination before trial of defendant Abselet; and the affirmation of Howard Kolodny, M.D.

In support of motion (011) defendant Abselet submitted, inter alia, an attorney’s affirmation; copies of the summons and amended complaint, answers, plaintiff’s bills of particulars, various uncertified medical records; the unsigned and uncertified transcript of the examination before trial of Patricia Picciano, R.N. which is not in admissible form; the unsigned transcripts of the examinations before trial of defendants Balter and Abselet; and the expert affirmation of Howard Kolodny, M.D.

Unsigned and uncertified deposition transcripts without an affidavit or proof of service pursuant to CPLR 3116, are inadmissible and not considered (see, Martinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; McDonald v Maus, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; Pina v Flik Intl. Corp., 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]). When the deposition transcript of the moving defendant is unsigned, it is considered by this court as adopted as accurate by the moving defendant (see, Ashif v Won Ok Lee, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). Uncertified medical records are not in admissible form pursuant to CPLR 3212 and 4518. Expert testimony is limited to facts in evidence (see, Allen v Uh, 82 AD3d 1025 [2nd Dept 2011]; Marzuillo v Isom, 277 AD2d 362 [2nd Dept 2000]; Stringile v Rothman, 142 AD2d 637 [2nd Dept 1988]; O’Shea v Sarro, 106 AD2d 435, 482 NYS2d 529 [2nd Dept 1984]; Hornbrook v Peak Resorts, Inc., 194 Misc2d 273 [Sup Ct, Tomkins County 2002]). Here, the uncertified records are not in evidence.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2nd Dept 1998], app denied 92 NY2d 818). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant’s negligence was a substantial factor in producing the alleged injury (see, Derdiarian v Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff’s injury (see, Fiore v Galang, 64 NY2d 999, 489 NYS2d 47 [3d Dept 1985]; Lyons v McCauley, 252 AD2d 516 [2nd Dept 1998], app denied 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [2nd Dept 1994]).

Denise Abselet, M.D. testified to the extent that she was a partner with Dr. Balter in Port Jefferson Internal Medicine Associates from 2003. She is licensed to practice medicine in New York State as a

doctor of osteopathy, which she states differs from being a medical doctor as it encompasses a different kind of thinking and employs manipulation and osteopathic principles, however, the board certification is the same. Port Jefferson Internal Medicine Associates employed physicians assistants who were under their supervision. In 2006, Port Jefferson Internal Medicine Associates did not do hospital in-patient care and did not have admitting privileges at any hospitals, but instead, used hospitalists for the admission and treatment of their patients.

Dr. Abselet testified that she had been the decedent's primary care physician since October 17, 2003, and treated him for hypertension and depression. He was being treated for chronic knee and back pain and asthma by other physicians outside the practice and was under the care of a pulmonologist, orthopedist, allergist, and pain management specialists. She filled out a disability form for the decedent on August 7, 2005. He was on continuous steroids for severe COPD, as ordered by Dr. Guida. Because he was on anti-inflammatory medication, or steroids, he was monitored for osteopenia, osteoporosis, and abnormal blood work, mostly elevated white blood count or neutrophils. She testified that steroids impact a patient's ability to resist infection as they can lower immunity. She testified about the decedent's ongoing care and treatment at her office, including treatment for anemia, low potassium, swelling in his right leg, hypoglycemia, and medication adjustments, pre-medication for dental work, and blood work. She last saw the decedent on September 27, 2006, at which time she noted he was non-compliant with follow-up for pain management and the orthopedist. He was still taking prednisone and using five Percocets a day for pain, which she stated was a lot.

Dr. Abselet testified that on September 28, 2006, she filled out a doctor's note on a prescription pad indicating the decedent could not attend jury duty. October 8, 2006, the decedent was treated at Brookhaven Memorial Hospital and diagnosed with a MRSA urinary tract infection, however, she was not made aware of it. Had she known, she would have followed up on it, called the decedent, seen that the infection was treated, then would have obtained another urinary culture and sensitivity. If it were still positive, she would have sent him to a urologist. She stated that MRSA is Methicillin Resistant Staph Aureus, which required treatment and precautions for patients in the hospital. Dr. Abselet continued that on October 9, 2006, Dr. Balter and the physician's assistant, Jackie Arigema, saw the decedent in their office. There were entries in his chart for October 27, 2006, and on November 1, 2006, indicating he was a "no-show, and when a voice mail was attempted, they were unable to leave messages. She did not recall any telephone calls from Mrs. Bergin advising that her husband was in the hospital in intensive care at Mather Hospital. Because her office did not do hospital rounds, they did not see him during his hospitalization. Dr. Abselet testified that she was never advised that the decedent had a urinary tract infection.

Dr. Richard Balter testified to the extent that he had been a partner in Port Jefferson Internal Medicine Associates since 1986. In 2006, he had admitting privileges at Mather Memorial Hospital, and St. Charles Hospital and Rehabilitation Center. He was on staff at Stony Brook Hospital but was no longer admitting there. He testified that he never saw the decedent as a patient at Mather or St. Charles Hospitals. He was not the decedent's primary physician. He did, however, see the decedent on October 9, 2006 at his office. Jackie Aurigema, the physician's assistant at his office, saw the decedent first, as was the custom and practice of the office. He then independently evaluated the decedent with Jackie. The record indicated that the decedent presented with pain in his right leg, which was worse with movement. He had been seen in the emergency room at Brookhaven Hospital the day before.

Dr. Balter's plan and assessment was that the decedent had a right lower extremity contusion and was to see Dr. Hindes the following day.¹ Follow-up blood work and Ultram was ordered. Dr. Balter stated that the plaintiff's pain was in his proximal right leg, somewhere below the hip and above the knee, and that he needed an orthopedic evaluation. He thought the decedent could be having arthritic pain, or a cartilage or a labrum tear. There was no evidence of ecchymosis or history of trauma. He continued that patients on steroids are prone to aseptic necrosis, or vascular insufficiency of the hip, which was why he wanted the decedent seen by an orthopedist the next day. He had no recollection concerning whether the decedent had been receiving trigger point injections or any injections into his spine. Dr. Balter testified that pain in the proximal lower leg can be consistent with pain in the hip joint and aseptic necrosis of the hip. He was not aware that the decedent had been informed that he had a urinary tract infection or that he had a MRSA infection. Such an urinary infection would not necessarily link to the cause of the hip pain, but would be a problem that would need to be addressed and followed.

Turning to motions (010) and (011), defendants' expert, Howard Kolodny, M.D., affirmed that he is a physician licensed to practice medicine in New York State and is board certified in internal medicine with a subspecialty in endocrinology, however, he did not set forth his education and training. He set forth the materials and records which he reviewed. Dr. Kolodny stated that decedent, Larry Bergin, had a past history of hernia repair, sinus surgery, cervical spine fusion at C4-5, and lumbar spine fusion at L3-5 with hardware. He had been involved in an automobile accident in 1996, and after the spinal fusion surgery and lumbar surgery, he was diagnosed with chronic pain including failed back surgery syndrome, failed neck surgery syndrome, degenerative joint disease, and myofascial pain syndrome. He also had steroid dependent asthma and hypertension. He was taking both short and long-acting opioids for pain, anticonvulsants, antidepressants, non-steroidal anti-inflammatory drugs, and combinations of analgesics. Dr. Kolodny set forth the decedent's care and treatment at Port Jefferson Internal Medicine Associates by Dr. Denise Abselet for hypertension and depression. He was seeing a pain management specialist, and an orthopedist for his chronic pain, a pulmonologist for COPD and breathing problems, and a surgeon for hernia repair. In 2004, an echocardiogram revealed mild mitral valve regurgitation. Because he stopped taking his blood pressure medication, his blood pressure elevated.

Dr. Kolodny continued that when the decedent saw Dr. Abselet for right leg knee problems in August 14, 2005, he advised her that he had a Doppler exam and x-rays of the knee, which tests were negative, so he was referred to an orthopedist. Percocet was prescribed for the knee pain at a later visit, but was then switched to Darvocet. Dr. Abselet filled out disability forms for the decedent in about July 2005. On July 16, 2005, he was seen at Brookhaven Hospital for a seizure thought to have been caused by low potassium. Mrs. Bergin faxed the lab report to Dr. Abselet. Because the blood pressure medication was too expensive, and the decedent was being non-compliant with his blood pressure medication, she switched the decedent to another medication in January 2006. Dr. Kolodny set forth the additional visits the decedent had with Dr. Abselet. On the last visit with her on September 27, 2006, she noted that the decedent was non-compliant with follow-up and was using five Percocets per day. He made no complaints of right leg pain, right thigh pain, or pain in the lower right abdomen or lower extremities, or any complaints consistent with a urinary tract infection.

¹It is noted that this action was discontinued against defendants Richard D. Hindes, M.D., Richard D. Hindes, M.D., P.C. and Orthopedic Associates of Long Island, LLP by order dated January 15, 2014 (Pastoressa, J.)

On October 5, 2006, the decedent presented to Brookhaven Memorial Hospital emergency room with complaints of right thigh pain since October 5, 2006. A CT of the abdomen and pelvis revealed left colon diverticulosis and prior spinal surgery at L5-S1. He was treated with intravenous pain medication, blood work and a urine culture were obtained, and he was discharged home. On October 9, 2006, the decedent presented to the defendant's office where he was seen by the physician's assistant and Dr. Balter for complaints of pain in his right leg with no history of trauma, and which became worse with movement. Dr. Kolodny set forth the examination performed by Dr. Balter, and noted that he recommended that the decedent see an orthopedist. Thereafter, the decedent received no further medical care at the defendants' office. Dr. Kolodny stated that decedent's urine culture obtained at the Brookhaven Memorial Hospital emergency department cultured positive for MRSA, and that the decedent was notified by hospital staff of the positive urine culture, a prescription for an antibiotic to which the organism was sensitive to was called in to his pharmacy, and he was instructed to follow up with his primary medical doctor.

Dr. Kolodny opined within a reasonable degree of medical certainty that there is no evidence of any malpractice on behalf of Richard Balter, M.D., or Port Jefferson Internal Medical Associates, P.C. for vicarious liability, in that the treatment rendered by Dr. Balter was not the source of a MRSA infection in the decedent's hip which was subsequently diagnosed during his hospitalization at John T. Mather Memorial Hospital from November 23, 2006 to December 8, 2006. He continued that although the decedent complained of pain in his right hip on the October 9 (incorrectly stated as December 9) visit with Dr. Balter, he did not present with signs or symptoms consistent with MRSA infection of the bladder, there was no clinical indication of an infection of the right hip joint as a result of a MRSA infection, and the decedent was promptly referred to an appropriate orthopedic specialist. Additionally, there is nothing that Dr. Balter did that exacerbated the MRSA infection. Dr. Kolodny continued that on October 9, 2006, the treatment provided by Dr. Balter was entirely within the accepted standards of care of internal medicine, and that care and treatment was not the proximate cause of the injuries sustained by the decedent. None of the signs and symptoms presented by the decedent were consistent with a MRSA infection, and there was no contradiction in any medical care rendered to the decedent by Dr. Balter or Port Jefferson Internal Medicine Associates.

Dr. Kolodny continued that the plaintiff testified that ten days after her husband's visit to Brookhaven Hospital emergency room, she received a call from the hospital advising that her husband had a MRSA infection. She then spoke to an unknown female at defendant's office to make an appointment, and advise her of the MRSA infection. Another call was made four hours later, and she was told they would look into the matter, then was told they were not affiliated with Brookhaven Hospital and nothing could be done. Dr. Kolodny stated that the Port Jefferson Internal Medicine Associates' records contain no record of the phone calls, and neither Dr. Balter nor Dr. Abselet spoke with the plaintiff. Dr. Kolodny continued that even if the calls were made, there is no proximate cause of the injuries claimed by the plaintiff as the decedent had been properly advised by the hospital of the positive urine culture, and he received therapeutic and proper antibiotic treatment.

Based upon the foregoing, it is determined that Dr. Balter and Port Jefferson Internal Medicine Associates have demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against them on the basis that they did not depart from the standards of medical care and treatment and did not proximately cause the injuries to the decedent claimed by the plaintiff.

Turning to motion (011), Dr. Kolodny stated that it is his opinion within a reasonable degree of medical certainty that there is no evidence of any malpractice by Dr. Denise Abselet and Port Jefferson Internal Medicine Associates concerning the care and treatment rendered to the decedent, and that there is nothing that Dr. Abselet did or did not do which proximately caused the injuries to the decedent claimed by the plaintiff. Dr. Kolodny reviewed the complaints made by the decedent, and care and treatment rendered to plaintiff's decedent on the various dates of office visits. He stated that on the decedent's last visit with Dr. Abselet on September 27, 2006, he made no complaints of pain in his right leg, thigh, lower right abdomen, or lower extremities, and made no complaints consistent with a urinary tract infection. He was subsequently seen at Brookhaven Memorial Hospital emergency room on October 8, 2006, at which time a urine culture was obtained and came back positive for MRSA infection. Brookhaven Hospital staff treated the infection with an antibiotic to which the organism was sensitive by ordering the proper antibiotic on October 13, 2006 at decedent's pharmacy.

Dr. Kolodny opined that no medical treatment rendered by Dr. Abselet was the source of the MRSA infection in the decedent's hip which was diagnosed during his hospitalization at Mather Memorial Hospital from November 23, 2006 through December 8, 2006. Dr. Kolodny continued that during the decedent's visits with Dr. Abselet or the physician's assistant at her office, the decedent did not present with any signs or symptoms consistent with a MRSA infection of the bladder, and the decedent made no complaints consistent with an infection of the right hip. There was no treatment provided which exacerbated any MRSA infection. There was no treatment which was the proximate cause of the decedent's MRSA or hip infection, and no contraindication to the care and treatment provided. With regard to the telephone calls which the plaintiff asserts she made to Port Jefferson Internal Associates, there is nothing in the records which indicates such calls were made, and even if they were, the response, or lack thereto, was not the proximate cause of any injuries which are claimed to have been suffered by plaintiff's decedent. The plaintiff failed to follow-up with a scheduled office visit on October 27, 2006.

Based upon the foregoing, it is determined that Dr. Abselet and Port Jefferson Internal Medicine Associates have demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against them on the basis that they did not depart from the standards of medical care and treatment, and did not proximately cause the injuries to the decedent claimed by the plaintiff, including the MRSA infections found in decedent's urine and hip.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div., 7 AD3d 759 [2nd Dept 2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [2nd Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (Bengston v Wang, 41 AD3d 625 [2nd Dept 2007]).

The plaintiff has submitted a redacted affirmation from her medical expert² and has provided an unredacted copy to this court for review as required. The plaintiff's expert affirmed he is licensed to practice medicine in New York State and is board certified in internal medicine and emergency medicine, and set forth his work experience, although he has not provided his education and training or submitted a copy of a curriculum vitae. He has set forth the materials and records reviewed. The plaintiff's expert opined within a reasonable degree of medical certainty that it was a deviation from the accepted standards of medical practice for defendants Balter, Abselet, and Port Jefferson Internal Medicine Associates, upon being informed by the plaintiff of decedent's diagnosis of a MRSA urinary tract infection, to fail to ensure that the decedent had further testing for the same, and referral. The plaintiff's expert further opined that the moving defendants failed to obtain a copy of the Brookhaven Memorial records regarding the positive urine culture and the treatment provided. The plaintiff's expert continued that after learning of the MRSA urine infection, had the decedent been appropriately tested and followed, including repeat testing of the blood and urine and imaging of the right hip joint, and right hip joint aspiration, the MRSA infection would have been diagnosed and treated before the infection had advanced and spread to the degree and extent which resulted in sepsis, DIC, and severe necrosis and destruction of the hip joint, requiring extensive surgery and removal of bone.

The plaintiff's expert set forth the decedent's medical history, and care and treatment by the moving defendants. He continued that the CT scan report issued by Dr. Kam, the remote reading radiologist of the CT scan performed at Brookhaven Hospital emergency room on October 8, 2006, was negative. The CT scan was also read as negative by Dr. Phillips, the radiologist at Brookhaven Memorial Hospital. The plaintiff's expert stated that plaintiff's radiology expert now opines that there was a small effusion in the right hip. Here, while there are factual issues concerning Dr. Balter's testimony that the decedent did not complain of right hip pain, but complained of right thigh pain/ right proximal upper leg, Dr. Balter did refer the plaintiff to an orthopedist for evaluation when he saw him on October 9, 2006. The plaintiff's expert does not address this referral or raise factual issues that such referral was not done. The plaintiff's expert noted that it was not until October 13, 2006, that the plaintiff learned that the decedent had an urinary tract infection caused by MRSA, and that an antibiotic to which the MRA was sensitive was started. The decedent did not keep his scheduled appointment with the moving defendants on October 27, 2006.

The plaintiff has submitted a redacted copy of her radiology expert, however, an unredacted copy has not been provided to this court as required, although it is relied upon by plaintiff's medical expert in rendering his opinion in part.³ It is noted that the plaintiff's radiology expert, who is licensed to practice

²A signed copy of plaintiff's expert affirmation has been submitted to this court for in camera inspection (Marano v Mercy Hospital, 241 A.D.2d 48 [2nd Dept 1998]; McCarty v Community Hosp. of Glen Cove, 203 A.D.2d 432 [2nd Dept 1994], and is returned to counsel for the plaintiff.

³A redacted version of the radiology expert affirmation submitted by the plaintiff lacks evidentiary value (Marano v Mercy Hospital, 241 AD2d 48, 670 NYS2d 570 [2nd Dept 1998]). "A party may successfully oppose a summary judgment motion without disclosing the names of the party's expert witnesses. In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an unredacted original is provided to the court for its in camera inspection (Marano v Mercy Hospital, supra). This procedure preserves the confidentiality of the name of plaintiff's medical expert while also preserving plaintiff's obligation in opposing defendant's motion, in that by submitting a redacted affirmation and by offering

medicine in New York State, was not board certified in 2006, was doing a residency in radiology, and did not become certified in radiology until 2007. The plaintiff's radiology expert set forth that he reviewed the deposition transcripts of Dr. Kam and Dr. Phillips, which have not been provided to this court and which are not in evidence to be considered. Dr. Kam was the remote reading radiologist of the CT film of October 8, 2006, and Dr. Phillips was the reading radiologist for Brookhaven Memorial Hospital. Even considering the plaintiff's radiology expert's opinion that had the correct reading of the CT film of October 8, 2006 been made regarding the effusion found in the decedent's right hip, that it would have permitted the decedent to be referred to an orthopedist for care and treatment and evaluation of the hip pain, it is noted that Dr. Balter did refer the decedent to an orthopedist for evaluation of the pain in his right thigh on October 9, 2006, the day after the decedent's October 8, 2006 visit to Brookhaven Memorial Hospital emergency room.

The plaintiff's medical expert does not address the care and treatment from any orthopedist between October 9, 2006 and his admission to Mather Hospital on November 23, 2006, or any diagnoses made, and no orthopedic records have not been provided. Therefore, the plaintiff's expert has not demonstrated that the defendants proximately caused the injuries due to a departure from the standard of care which required Dr. Balter or Dr. Abselet to perform repeat testing of the blood and urine and imaging of the right hip joint, and right hip joint aspiration on October 9, 2006. Nor has he demonstrated that it was the standard of care for the moving defendants to obtain an aspirate from the decedent's hip. The decedent was referred to an orthopedist on October 9, 2006, prior to the diagnosis of MRSA urinary tract infection having been made. Thus, the plaintiff's expert has not demonstrated that any act or omission by the moving defendants delayed the diagnosis of the MRSA infection and treatment prior to the advancing and spreading of the infection to the degree and extent which resulted in sepsis, DIC, and severe necrosis and destruction of the hip joint, requiring extensive surgery and removal of bone.

The plaintiff's expert does not opine that the urinary tract infection spread to the decedent's right hip from the urinary tract. The plaintiff's medical expert does not opine as to the amount of progression of the infection in the right hip, when such infection began, or the source of the MRSA infection in the hip. He stated that the presence of fluid or effusion in the decedent's right hip demonstrated by CT scan on October 8, 2006, was an infection. He opined that this infection in the hip was the same MRSA infection in the bladder which spread from the hip to the bladder. He does not indicate how the MRSA infection was introduced into the hip, or the source of such infection. He indicated that the aspirate from the right hip tested positive for MRSA on November 24, 2006 at Mather Hospital. He does not indicate when the decedent was seen by the orthopedist and only a scant and partial copy of the Mather Memorial Hospital admission record has been provided to this court. The admitting notes and history have been omitted, although plaintiff's expert bases his opinions, in part, on the Mather Hospital records.

the original to the court for in camera inspection, plaintiff has opposed the motion with evidence in admissible form (Rubenstein v Columbia Presbyterian Medical Center, 139 Misc.2d 349, 527 NYS2d 680 [N. Y. County 1988]). A copy of the affirmation with the expert's name and signature have not been provided to this court under separate cover. Accordingly, plaintiff's radiology expert affirmation is not in admissible form and is insufficient to raise a triable issue of fact as to the defendant's alleged malpractice (Rose v Horton Medical Center, 29 AD3d 977, 816 NYS2d 174 [2nd Dept 2006]).

The plaintiff's expert set forth various departures by the moving defendants, including failing to properly chart phone calls and obtain the Brookhaven CT reports and records, and to follow-up on the missed appointments, however, he does not relate these alleged departures to proximate cause of the claimed injuries. He does not reconcile that the CT scan was read by two radiologists as negative for any findings, and that the decedent was properly referred to an orthopedist for care and treatment. The plaintiff's medical expert opined that it is uncontested that on October 8, 2006, there was no destruction in the right hip, and specifically the right femur, as evidenced by the CT scan. He continued that there is controversy, however, as to whether or not there was the presence of fluid in the joint. The plaintiff's expert does not opine that such controversy is related to any departure in diagnosing or interpreting such films by the moving defendants, causing a delay in investigation, testing, or treatment. The plaintiff's expert does not opine that any failure by the moving defendants to follow-up on the urinary tract infection was the proximate cause of the destruction and necrosis of the decedent's right hip, and the sequelae which followed. While the plaintiff's expert opined that the defendants should have ascertained what antibiotic was prescribed for the urinary tract infection, it is not disputed that the medication prescribed was appropriate to treat the infection.

This court takes judicial notice of expert testimony submitted by the plaintiff in motion (007) in response to defendant Malesardi's application for summary judgment, wherein it was determined that defendant Malesardi saw the decedent on November 7, 2006 for complaints of low back pain radiating down his left lower extremity, and right hip pain for which an injection of DepoMedrol and bupivacaine was administered by Malesardi via right superficial greater trochanteric injection. It was alleged that this injection introduced the MRSA infection into the plaintiff's right hip. Malesardi, was a physician's assistant, who was employed by defendants Fyman, Weingarten and Comprehensive Pain Management. In opposition to Malesardi's application for summary judgment, the plaintiff submitted an expert affirmation wherein the plaintiff's expert affirmed to being a physician licensed to practice medicine in New York State, who was certified in neurology, and experienced in treating patients with acute and chronic pain syndromes. He set forth that the defendants Malesardi, Fyman, Weingarten and Comprehensive Pain Management departed from accepted standards of care in failing to know and/or consider the decedent's chronic steroid use given for his asthmatic condition, and the effects of the same, including the risk of the development of vascular necrosis of the hip joint and the increased risk of infection. He continued that the defendants failed to monitor the decedent for the same, and failed to properly diagnose the plaintiff's decedent's condition when he presented with severe groin/hip pain. He continued that the defendants also performed a "contraindicated greater trochanteric injection" when they knew, or should have known, of the decedent's infection with MRSA, without confirming that such infection had been successfully treated. The plaintiff's expert stated that the vascular necrosis from steroid use is most common at the head of the femur. The steroids also depress the resistance to infection. Pain in the affected joint is the most common presenting symptom, exacerbated by weight bearing, which was how the plaintiff presented to the defendant Malesardi on October 3, 2006 as well.

The plaintiff's expert in (007) continued that in 2006, the plaintiff's decedent could not bear weight due to the disabling right groin pain. Defendant Malesardi saw the plaintiff on October 3, 2006 for severe right groin pain and discussed his use of Oxycontin with him. The plaintiff's expert opined that this was a new and significant change in the decedent's condition which warranted a full and comprehensive evaluation. Despite the administration of the subject injection on November 7, 2006, the decedent returned to see Malesardi on November 10, 2006 due to complaints of pain for which he was referred for physical

therapy to the right hip. When the decedent saw defendant Dr. Weingarten the following day, the record does not indicate this severely disabled condition, and there was no indication the decedent was using crutches. However, he was administered an epidural injection. He stated that the defendants failed to obtain the emergency department record of October 8, 2006 from Brookhaven Memorial Hospital, and failed to make a differential diagnosis including vascular necrosis, immune compromise, and increased fracture susceptibility due to the history of prolonged steroid use. He stated that confirmation of the successful treatment of the MRSA urinary tract infection should have been ascertained, especially in light of the fact that the plaintiff was treated with oral, rather than intravenous, antibiotics. The plaintiff's expert opined that the plaintiff's decedent developed sepsis, or an infection or osteomyelitis, of the right hip with MRSA, due to the lack of blood supply to the hip.

The plaintiff's expert continued that on November 23, 2006, the decedent was admitted to Mather Memorial Hospital with severe right leg pain and swelling at the right hip region, with restricted range of motion, and inability to flex the hip more than five degrees, and abduction or adduction of only a few degrees, without excoriating pain. This pain, opined the plaintiff's expert, was due to the infection in the right hip which now had pus and fluid therein, so advanced that the decedent developed Disseminated Intravascular Coagulopathy (DIC) with anemia, requiring intensive care. An aspiration of the fluid cultured MRSA. On November 28, 2006, incision and drainage of the decedent's right hip was performed, and the surgeon found that the hip had degenerative arthritis, vascular necrosis, osteomyelitis of the proximal femur and acetabulum, and a pathological fracture of the femoral head due to intrinsic bone destructive process caused by the insufficiently treated MRSA osteomyelitis.

The plaintiff's expert continued that there was a failure by defendants Malesardi, Fyman, Weingarten and Comprehensive Pain Management to timely diagnose and treat the decedent's condition, and that they administered contraindicated steroid injections to the decedent's infected and necrotic right hip. He continued that the treating physicians were obligated to timely and carefully evaluate the decedent's condition throughout the three years of treatment and failed to do so, and more egregiously when the decedent presented with new and severe right hip pain with painful weight bearing on October 3, 2006. The plaintiff's expert stated that Malesardi testified he would not have given the greater trochanteric injection had he been aware of the MRSA infection diagnosed at Brookhaven Hospital on October 8, 2006. He opined that the defendants' expert does not address the significance of the decedent's new groin/hip pain with inability to walk without limping or using crutches, and that he disagrees that the MRSA urinary tract infection was successfully treated with oral antibiotics when there was no follow-up culture done. The plaintiff's expert concluded that Malesardi deviated from the accepted standards of care in his treatment of the plaintiff's decedent, and that such deviations were the proximate cause of the decedent's injuries.

In light of plaintiff's expert opinion in motion (007) that defendant Malesardi administered injections into decedent's right hip on November 7, 2006, without having obtained urine cultures to ascertain that the MRSA infection had been successfully treated, and that his departures from the standard of care were the proximate cause of the decedent's injuries, there are factual issues concerning proximate cause of the decedent's injuries now raised by plaintiff's various experts. If the greater trochanteric injection of November 7, 2006, is alleged to be the proximate cause of the MRSA infection in the decedent's hip, the injection was administered prior to the decedent's admission to Mather Memorial Hospital, and nearly one month after he was seen by defendant Balter on October 9, 2006, or at Brookhaven Hospital emergency department on October 9, 2006. Thus, there are factual issues raised by plaintiff's

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experts, but those factual issues concern plaintiff's expert's differing opinions in the motions separately filed by plaintiff for summary judgment.

Based upon the foregoing, it is determined that the plaintiff has failed to raise a triable factual issue concerning that the care and treatment rendered by the moving defendants was the proximate cause of the injuries to plaintiff's decedent.

Accordingly, motion (010) and (011) are granted and the complaint and any cross claims asserted against the moving defendants are dismissed.

Dated: February 19, 2014


HON. JOSEPH C. PASTORELLA, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION

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