Severin v Southside Hospital
2018 NY Slip Op 31769(U)
July 20, 2018
Supreme Court, Suffolk County
Docket Number: 11-20101
Judge: Sanford N. Berland

SHORT FORM ORDER

INDEX No. 11-20101
CAL. No. 16-01563MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 1-31-17
ADJ. DATE 9-5-17
Mot. Seq. # 002 - MD

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ELIZABETH SEVERIN, as Administratrix of the Estate of JOHN CLAUER, Deceased,

Plaintiff,

- against -

SOUTHSIDE HOSPITAL,

Defendant.

THE LAW OFFICES OF JOHN J. GUADAGNO
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Upon the following papers numbered 1 to 30 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-20 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 21- 26 ; Replying Affidavits and supporting papers 27-30 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Southside Hospital seeking summary judgment dismissing the complaint is denied.

Plaintiff Elizabeth Severin, as administratrix of the estate of her father, decedent John Clauer, commenced this action to recover damages for injuries allegedly sustained by her father as a result of medical malpractice, negligence and negligent supervision and hiring. By her complaint and bill of particulars, plaintiff alleges that as a result of the negligence and malpractice of defendant Southside Hospital, her father sustained a comminuted fracture of the distal shaft of his left femur, which required open reduction and caused him to undergo retrograde intramedullary nailing of his damaged left femur, all of which subjected him to much pain and suffering and resulted in surgical scarring of his left leg. In addition to alleging negligence and malpractice in the care they rendered to her father, plaintiff also alleges that Southside Hospital was negligent in the hiring, training and supervision of its staff and employees.

The following facts are not in dispute. At the time of his admission to Southside Hospital on July 3, 2009, John Clauer was 85 year old. His medical history was complex: he had had a cerebral hemorrhage and radiation therapy for prostate cancer in 1990 and an above-the-knee amputation of his right leg, as well as a stroke, in 2001, and he was suffering from dysphagia and asphasia together with diabetes with peripheral vascular disease, obesity, end-stage renal disease and hypertension, left ankle edema and a contracture of the left leg. Radiological records show that he also had been diagnosed with osteoporosis, including of his left hip and knee. He was unable to walk and was largely confined to his bed, although he was able to sit with his daughter's family for breakfast and dinner, and interact with family members, prior to his 2009 hospitalizations.

From June 3 through June 30, 2009, Mr. Clauer was a patient at John T. Mather Hospital's Wound Care Center, where he was treated for right buttock wounds. At 5:00 a.m. on July 3, 2009, several days after his discharge home from Mather, Mr. Clauer experienced difficulty breathing, and the plaintiff administered oxygen to him and called an ambulance to their home. Emergency medical technicians transported Mr. Clauer to Southside Hospital, where plaintiff reported that her father's upper airway was very congested and that he was diaphoretic, cold and clammy. In addition to reflecting those reported conditions, Mr. Clauer's admission history included cerebrovascular accident x3, coronary artery disease, chronic renal insufficiency, renal impairment, right arm contracture, urinary and bowel incontinence, left lower atelectasis and left kidney stone. There was, however, no record made that Mr. Clauer was suffering from osteoporosis.

At approximately 7:13 a.m. on July 3, Mr. Clauer was diagnosed with pneumonia and dyspnea, and he was admitted to the cardiothoracic unit under the care of attending physician Dr. Enisa Goljo, an internist. A pain management assessment completed at 9:30 a.m. indicated that Mr. Clauer denied he was in pain, and the patient flow sheet showed that sensation was present in his left lower extremity but that his motor response was weak.

On July 6, 2009, at approximately 8:00 p.m., Beth Blumenfeld, a registered nurse, performed a head-to-toe assessment of Mr. Clauer, which indicated, among other things, that Mr. Clauer was not complaining of pain and that he needed assistance with positioning as he had left leg contracture and his right leg had been amputated, and that a two-person assist was required to lift and reposition Mr. Clauer, which was to be performed every two hours per hospital protocol. Nurse Blumenfeld's notes also show that Mr. Clauer had been placed on fall prevention. On July 7, 2009, at approximately 3:30 a.m., she noted that Mr. Clauer was alert, oriented with stable vital signs, that he had expressive aphasia with no shortness of breath or chest pain and that he denied having any nausea. She also noted that Mr. Clauer was incontinent and had right-sided weakness secondary to a history of cerebrovascular accident x3; that a portable chest X-ray had been performed; that there was no skin breakdown; and that he had been turned and positioned every two hours and was resting comfortably. At approximately 4:00 a.m., Nurse Blumenfeld conducted another pain assessment and indicated that Mr. Clauer again denied pain.

At approximately 7:00 a.m. on July 7, Nurse Blumenfeld's shift ended and Nurse Jennifer Hawkins took over as the nurse on duty in charge of Mr. Clauer's care. Nurse Hawkins' initial assessment of Mr. Clauer noted that he was not exhibiting any signs of pain and that he continued to be turned and positioned every two hours with the assistance of either a nurse's aide, another nurse or a physical therapist. However, her assessment also shows that she did not observe, and was not aware of, Mr. Clauer's left leg contracture. Plaintiff testified that when she visited her father that morning, he

complained that his left knee hurt; she lifted the covers and saw that the knee was swollen and bruised - mainly blue in color - and she immediately went to the nurses' station to report her father's condition and was told that they would let the doctors know. A medical progress note made later that same day states that Mr. Clauer was complaining of lower left knee pain and swelling, and Dr. Goljo testified that she was approached by a nurse who told her that Mr. Clauer's daughter was concerned about her father's knee pain. In fact, a note in the medical record recites "family requesting x-ray." Dr. Goljo placed Mr.Clauer on Colchicine to rule out gout versus septic arthritis as possible causes of the pain Mr. Clauer was experiencing. She also ordered an X-ray of Mr. Clauer's left knee, as well as an infectious disease consultation and an orthopedic consultation. At approximately 1:15 p.m., three X-rays of Mr. Clauer's left knee revealed a left distal femur shaft fracture, soft tissue swelling in the thigh and marked osteopenia, which made the assessment of fine bony detail difficult.

The records for Mr. Clauer's hospitalization at Southside Hospital include a July 7, 2009 orthopedic note stating that Mr. Clauer had reported left thigh pain for a few days and recalled sustaining a fall but did not remember when or where it had occurred, and that he had ambulated on his left extremity prior to the onset of pain. There is no indication, however, in Mr. Clauer's medical records that he was permitted to ambulate - or that he could even do so - given the above-the-knee amputation of his right leg and his left leg contracture, which caused that leg to be stiff and bent. In any event, following a physical examination, the hospital determined that Mr. Clauer had not fallen as he exhibited no ulcers, abrasions or bleeding. An X-ray of Mr. Clauer's pelvis performed on July 8, 2009, did, however, reveal a comminuted displaced femoral shaft fracture along with osteopenia, and a plan was devised to perform an open reduction with internal fixation ("ORIF"). On July 11, 2009, Mr. Clauer underwent retrograde intra-medullary nailing of the left femur for fracture, performed by Dr. John Saugy, an orthopedist.

Following the surgery, Mr. Clauer was brought to the recovery room in stable condition. Dr. Saugy noted in his operative report that the surgery was performed without incident and that the fracture was stable. A July 13, 2009, orthopedic note indicates that Mr. Clauer did not have any new complaints, that his left lower extremity wound was clean, dry, and intact, and that two pillows were placed under his left knee and his calves were soft and non-tender. An orthopedic note written on July 16, 2009, states that Mr. Clauer was comfortable and would be "discharged home 'as his daughter wishes' once he was cleared by cardiology." Notes written on July 18 and 19 indicate that Mr. Clauer did not have any complaints and that his incision was healing well. On July 20, 2009, Mr. Clauer was discharged home with home care and in stable condition, with a final diagnosis that included, among other things, femur fracture secondary to osteoporosis.

From July 21, 2009 through August 18, 2009, Mr. Clauer's home care was provided by North Shore-LIJ Home Health Care, and included physical therapy and transfer training. On July 28, 2009, Mr. Clauer presented to Dr. Saugy's private office for follow-up care regarding his left femur fracture. Following an examination of Mr. Clauer, Dr. Saugy removed the sutures and covered them with steri-strips, and instructed him to remain non-weight bearing. Dr. Saugy noted in his report that the contusions were clean and dry, and appeared to be healed, but that there still was pain with range of motion of the left lower extremity. In addition, a review of the X-ray films of Mr. Clauer's femur fracture by Dr. Saugy showed severe osteoporosis with good position of the femoral nail, and that the femur fracture appeared to have some callus formation medially.

On July 30, 2009, Dr. Goljo, for the purpose of billing, made an addendum to Mr. Clauer's medical record to include a diagnosis for the fracture to his left leg. Dr. Goljo, in the addendum, states "[p]atient with history of severe osteoporosis. Most likely femur fracture secondary to osteoporosis." On August 19, 2009, Mr. Clauer was referred to Hospice Care Network with a diagnosis of dementia, prostate cancer, pneumonia, and debility unspecified. Mr. Clauer also was described as "wheelchair bound" with impaired mobility and the presence of contractures. It further was noted that due to expressive aphasia, Mr. Clauer was incapable of maintaining conversation, but that he communicated by nodding his head. On September 7, 2009, Mr. Clauer was discharged from Hospice Care Network to Good Shepard Hospice and began receiving hospice care at home. Good Shepard Hospice's diagnoses for Mr. Clauer included debility, senile dementia, dysphagia/difficulty swallowing, and diabetes. A Good Shepard Hospice note dated September 8, 2009, indicated that Mr. Clauer's left femur was broken during a hospital stay but that the cause was not known. On September 15, 2009, Mr. Clauer passed away at his home.

Southside Hospital now moves for summary judgment, contending that its staff did not deviate from accepted medical practice in the care and treatment rendered to Mr. Clauer during his admission to its facility and that the care and treatment rendered by its staff did not proximately cause the fracturing of Mr. Clauer's left femur. Southside Hospital also contends that plaintiff's claim for negligent hiring and supervision must be dismissed, as its employees were always acting within the scope of their employment during their treatment of Mr. Clauer and that there can be no claim for negligent hiring and supervision[1]. In support of the motion, Southside Hospital submits copies of the pleadings, the parties' deposition transcripts, certified copies of plaintiff's decedent's medical records and the affirmation of its expert, Dr. Philip Robbins.

Plaintiff opposes the motion on the grounds that the staff at Southside Hospital deviated from good and acceptable standards of medical care while rendering care to Mr. Clauer during his admission to the facility and that this deviation from the acceptable standard of medical care proximately caused the injuries sustained by Mr. Clauer. In particular, plaintiff asserts that the staff failed to take into account the contracture of Mr. Clauer's left leg and the special care that was required when turning and repositioning him on the morning of July 7, 2009, when the fracture evidently occurred, thereby failing to exercise the degree of care required to avoid injuring him, which resulted in the fracturing of Mr. Clauer's left femur. Plaintiff further asserts that there are triable issues of fact as to whether Southside Hospital is liable under a theory of res ipsa locquitur. In opposition to the motion, plaintiff, in addition to relying upon the medical records and deposition testimony submitted by the defendant, also submits her own affidavit and the affirmation of her expert, Dr. Frank Segreto.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that its actions or inactions were not a proximate cause of the plaintiff's injuries (*see* ***Castro***

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[1] These are not asserted in the complaint as distinct causes of action but are, rather, included among the forms of alleged conduct on the part of the defendant that the plaintiff alleges constitute the negligence, gross negligence, gross negligence, recklessness, carelessness and malpractice that caused Mr. Clauer's injury. *See* Complaint at Paragraph 14.

v New York City Health & Hosps. Corp., 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***Deutsch v Chaglassian***, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; ***Plato v Guneratne***, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; ***Jones v Ricciardelli***, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; ***Mendez v City of New York***, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see* ***Roques v Noble***, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; ***Ward v Engel***, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see* ***Garbowski v Hudson Val. Hosp. Ctr.***, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (*see* ***Spensieri v Lasky***, 94 NY2d 231, 701 NYS2d 689 [1999]; ***Barrett v Hudson Valley Cardiovascular Assoc., P.C.***, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]). It is fundamental that the primary duty of a hospital's nursing staff is to follow the physician's orders, and that a hospital, generally, will be protected from tort liability if its staff follows the orders" (***Toth v Community Hosp. at Glen Cove***, 22 NY2d 255, 265, 292 NYS2d 440 [1968]; *see* ***Sledziewski v Cioffi***, 137 AD2d 186, 538 NYS2d 913 [3d Dept 1988]). "A hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of the same" (***Toth v Bloshinsky***, 39 AD3d 848, 850, 835 NYS2d 301 [2d Dept 2007]; *see* ***Sela v Katz***, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; ***Cerny v Williams***, 32 AD3d 881, 882 NYS2d 548 [2d Dept 2006]). "A hospital may also be held liable on a negligent hiring and/or retention theory to the extent that its employee committed an independent act of negligence outside the scope of employment, where the hospital was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" (***Doe v Gutherie Clinic, Ltd.***, 22 NY3d 480, 485, 982 NYS2d 431 [2014]; *see* ***Sieden v Sonstein***, 127 AD3d 1158, 7 NYS3d 565 [2015]). However,"an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the of the patient's choosing" (***Schultz v Shreedhar***, 66 AD3d 666, 666, 886 NYS2d 484 [2d Dept 2009] *quoting* ***Salvatore v Winthrop Univ. Med. Ctr.*** 36 AD3d 887, 888, 829 NYS2d 183 [2d Dept 2007]; *see* ***Sampson v Contillo***, 55 AD3d 588, 865 NYS2d 634 [2d Dept 2008]). Furthermore, a hospital will not be found liable for damages caused by an employee's negligence under a theory of negligent hiring, supervision and retention, where the employee is acting within the scope of his or her employment (*see* ***Talavera v Arbit***, 18 AD3d 738, 795 NYS2d 708 [2d Dept 2005]; ***Watson v Strack***, 5 AD3d 1067, 773 NYS2d 676 [4th Dept 2004]).

Although "not every negligent act of a nurse [is] considered medical malpractice, . . . a negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice" (***Bleiler v Bodnar***, 65 NY2d 65, 72, 489 NYS2d 885 [1985]; *see* ***Spiegel v Goldfarb***, 66AD3d 873, 889 NYS2d 45 [2d Dept 2009]). This conclusion is no different with respect to the emergency room nurse, functioning in that role as an integral part of the process of rendering treatment to a patient (***Bleiler v Bodnar***, *supra* at 72, 489 NYS2d 885). Again, on a motion for summary judgment in a medical malpractice action, a medical professional has the initial burden of demonstrating that the medical treatment rendered to the patient was within the acceptable standards of medical care, or that any departure or deviation was not a

proximate cause of the alleged injury or damage sustained by the plaintiff (*see* ***Maki v Bassett Healthcare***, 85 AD3d 1366, 924 NYS2d 688 [3d Dept 2011]; ***Suits v Wyckoff Hgts. Med. Ctr.***, 84 AD3d 487, 922 NYS2d 388 [1st Dept 2011]). Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 5088 NYS2d 923 [1986]). If the defendant makes a prima facie showing, then the burden shifts to the plaintiff to produce evidentiary proof, in admissible form, sufficient to establish the existence of triable issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Kelley v Kingsbrook Jewish Med. Ctr.***, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; ***Fiorentino v TEC Holdings, LLC***, 78 AD3d 911 NYS2d 146 [2d Dept 2010]). In a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing (*see* ***Bhim v Dourmashkin***, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; ***Hayden v Gordon***, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; ***Schichman v Yasmer***, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

Southside Hospital endeavors, through the affirmation of its expert, Dr. Philip Robbins, and the evidentiary materials submitted in support of its motion, to demonstrate that the treatment afforded by its staff to Mr. Clauer during the course of his admission to its facility in July 2009 conformed to good and acceptable medical and nursing practice (*see* ***Hamilton v Good Samaritan Hosp.***, 73 AD3d 697, 900 NYS2d 368 [2d Dept 2010]; ***Shahid v New York City Health & Hospitals Corp.***, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]; ***Mattis v Keen***, 54 AD3d 610, 864 NYS2d 6 [1st Dept 2008]), and that the treatment provided by its staff was not the proximate cause of the injuries allegedly sustained by plaintiff's decedent (*see* ***Buckso v Gordon***, 118 AD3d 653, 987 NYS2d 402 [2d Dept 2014]; *cf.* ***Orsi v Haralbatos***, 20 NY3d 1079, 965 NYS2d 71 [2013]). "A hospital is responsible to a patient who sought medical care at the hospital" (***Hill v St. Clare's Hosp.***, 67 NY2d 72, 80-81; 499 NYS2d 904 [1986]), "and must follow accepted and approved standards of practices in the care and treatment of its patients" (***O'Connell v Albany Med. Ctr. Hosp.***, 101 AD2d 637, 638 475 NYS2d 543 [3d Dept 1984]). A defendant moving for summary judgment in an action alleging medical malpractice must specifically address the allegations of medical malpractice contained in the plaintiff's bill of particulars (***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 144-45, 912 NYS2d 77 [2d Dept 2010]; ***Terranova v Finklea***, 45 AD3d 572, 572, 845 NYS2d 389 [2d Dept 2007]).

In his affirmation, Dr. Robbins, a board certified orthopedic surgeon, opines that the treatment and care rendered to Mr. Clauer during his admission to Southside Hospital in July 2009 was at all times appropriate and well within good and acceptable standards of medical and nursing care and that there were no departures from accepted standards of medical or nursing practice. To that end, Dr. Robbins opines that since Mr. Clauer was not able to ambulate on his own and was bed bound, the use of a two-person assist by the nursing staff at Southside Hospital to turn and position Mr. Clauer was well within the standard of care for treating a non-ambulatory patient. For that reason, and also because, in his opinion, the "highly fragile state of Mr. Clauer's femur" - the result of the osteoporosis from which he reportedly suffered - meant that his femur was "predisposed to fracture," Dr. Robbins further opines that "the fracture suffered by Mr. Clauer did not result from any negligent act on the part of the hospital staff," and "likely resulted from his severely osteoporotic bones." In his view, "even a properly performed two-person positioning and turning could have resulted in such a fracture." In addition, Dr. Robbins discounts the July 7, 2009 orthopedic consultation note in which Mr. Clauer is said to have

"complained of a fall" as the source of his injury, as "obviously unreliable," given that Mr. Clauer was unable to ambulate, there is no other notation in which Mr. Clauer is said to have complained of pain before the morning of July 7, he was suffering from dementia and had only a limited ability to speak, there were no bruises, contusions or abrasions consistent with a fall, and had he fallen, he would have been found on the floor. Dr. Robbins does not address in his affirmation whether the contracture of Mr. Clauer's left leg or his osteoporotic condition necessitated that special precautions be taken in turning and repositioning him.

As noted above, in opposition to Southside Hospital's motion, plaintiff undertakes to demonstrate that there are triable issues of fact with respect both to liability and to causation. First, she presents the expert affirmation of Dr. Frank Segreto, who is also board certified in orthopedic surgery. Dr. Segreto asserts, based upon the pertinent medical records and the deposition testimony that has been submitted, that in his opinion, within a reasonable degree of medical certainty, the fracture of Mr. Clauer's left distal femur occurred on July 7, 2009 when he was turned and repositioned between the hours of 8:30 a.m. and 1:15 p.m.; that Southside Hospital's employees were negligent and departed from good and accepted medical practice by failing to recognize that Mr. Clauer's left leg had a severe contracture, which required that extreme care be employed during all turning and repositioning so as to avoid further injury to that leg and in failing to employ such extreme care in turning and repositioning Mr. Clauer; and that such failures by Southside Hospital's employees were the proximate cause of the comminuted distal femur fracture of Mr. Clauer's left leg (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Forrest v Tierney***, 91 AD3d 707, 936 NYS2d 295 [2d Dept 2012]; ***Cerny v Williams***, 32 AD3d 881, 822 NYS2d 548 [2d Dept 2006]). In addition, plaintiff provides her own affidavit, in which she recounts the additional precautions that she and her father's home health care aides took in turning and repositioning her father, in light of his right-side amputation and left-leg contracture, during the seven-year period she cared for him at home, and during which time he suffered no fractures.

Second, plaintiff invokes the doctrine of res ipsa loquitur. Specifically, plaintiff contends that the injury suffered by her father occurred while he was entirely under the care of personnel within the exclusive control of the defendant hospital, was of a kind that, given his condition, he could not have inflicted upon himself and to which he himself could not in any way have contributed, and ordinarily would not occur in such circumstances in the absence of negligence. As the Court of Appeals has written:

> Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it (*see, **Abbott v Page Airways,*** 23 NY2d 502, 510; Restatement [Second] of Torts § 328 D, comments *a, b*). Res ipsa loquitur "simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence" (***Dermatossian v New York City Tr. Auth.***, 67 NY2d 219, 226).
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> To rely on res ipsa loquitur a plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions afford a rational basis for concluding that "it is more likely than not" that

> the injury was caused by defendant's negligence (Restatement [Second] of Torts § 328 D, comment *e*). Stated otherwise, all that is required is that the likelihood of other possible causes of the injury "be so reduced that the greater probability lies at defendant's door" (2 Harper and James, ***Torts*** § 19.7, at 1086). Res ipsa loquitur thus involves little more than application of the ordinary rules of circumstantial evidence to certain unusual events (*see,* Prosser and Keeton, ***Torts*** § 40, at 257 [5th ed]), and it is appropriately charged when, "upon 'a commonsense appraisal of the probative value' of the circumstantial evidence, ... [the] inference of negligence is justified" (***George Foltis, Inc. v City of New York***, 287 NY 108, 115).

Kambat v. St. Francis Hosp., 89 N.Y.2d 489, 494-95 [1997]. The three conditions upon which application of the doctrine of res ipsa loquitor depend in a given case have been stated by the Second Department as follows:

> . . . (1) the injury does not ordinarily occur in the absence of negligence, (2) the instrumentality that caused the injury is within the defendants' exclusive control, and (3) the injury is not the result of any voluntary action by the plaintiff (*see* ***States v. Lourdes Hosp.***, 100 N.Y.2d 208, 211–213, 762 N.Y.S.2d 1, 792 N.E.2d 151; ***Kambat v. St. Francis Hosp.***, 89 N.Y.2d 489, 494, 655 N.Y.S.2d 844, 678 N.E.2d 456; ***Simmons v. Neuman***, 50 A.D.3d 666, 855 N.Y.S.2d 189; ***DiGiacomo v. Cabrini Med. Ctr.***, 21 A.D.3d 1052, 1054, 803 N.Y.S.2d 587). "[T]he doctrine concerns circumstantial evidence which allows, but does not require, the fact finder to infer that the defendant was negligent" (*Simmons v. Neuman,* 50 A.D.3d 666, 667, 855 N.Y.S.2d 189; *see* ***Kambat v. St. Francis Hosp.***, 89 N.Y.2d at 495, 655 N.Y.S.2d 844, 678 N.E.2d 456; ***Bodnarchuk v. State of New York***, 49 A.D.3d 581, 856 N.Y.S.2d 143).

Antoniato v. Long Island Jewish Med. Ctr., 58 A.D.3d 652, 654–55, 871 N.Y.S.2d 659, 661 [2d Dept 2009]. Although the medical malpractice actions in which the doctrine is most commonly applied are those in which a foreign object has been left in a patient during surgery or where a part of the body remote from the surgical site has been injured (*see* ***Kambat v. St. Francis Hosp.***, *supra*; ***Matlick v. Long Island Jewish Hosp.,*** 25 A.D.2d 538 [2d Dept 1966]) *cf.* ***Fogal v. Genesee Hopsital***, 41 AD2d 468 [4th Dept 1973]), res ipsa loquitor has also been applied where negligence or malpractice is alleged to have produced more proximate injury (*see, e.g.*, ***Cornacchia v. Mount Vernon Hosp.,*** 93 A.D.2d 851, 461 N.Y.S.2d 348 [2d Dept 1983] (failure properly to secure drain inserted in plaintiff's scalp post-brain surgery). The common factor in those cases in which res ipsa loquitor has been properly applied is that the injury, in the context of the circumstances in which it occurred, is of kind that "common knowledge indicates" does not occur in the absence of negligence (***Schoch v. Dougherty***, 122 A.D.2d 467, 469 [3rd Dept 1986], *citing* ***Fogal v. Genesee Hospital***, 41 AD2d 468, 475 [4th Dept 1973]).

Here, although Dr. Robbins is at great pains in his affirmation to emphasize that, in his opinion, there was no deficiency in the treatment afforded Mr. Clauer by the physicians and staff at Southside hospital and, further, that "Mr. Clauer's femoral shaft was severely osteoporotic and predisposed to fracture, even with the best of care," so that "even a properly performed two-person positioning and turning could have resulted in such a fracture," at no point does he go so far as to attribute the fracture to such a properly performed two-person positioning and turning of Mr. Clauer. Indeed, and as Dr.

Robbins also notes, neither the notations made in Mr. Clauer's medical records by the attending physician and staff nor their deposition testimony reveal the circumstances in which Mr. Clauer's left femur was fractured. Nor do they, or Dr. Robbins, respond to Dr. Segereto's opinion that the fracture was the result of Mr. Clauer being turned and positioned without recognizing that Mr. Clauer "had a severe left leg contracture which required [defendant's employees] to utilize extreme care during all turning and positioning so as to avoid further injury to his left leg." As Dr. Segreto asserts in his affirmation

> . . . In view of the fact that John Clauer had a right above the knee amputation and a left leg contracture, the standard of care requires that extreme caution be utilized during turning and positioning to avoid exertion of any pressure on the contracted limb. Any forces applied to the contracted limb could cause further injury including fracture. Extreme care should be utilized to keep the contractured limb in its stable bent position so as to avoid injury. No force should be applied to the limb when turning the patient side to side and no force should be exerted to attempt to straighten the limb during examination.

Logically, that Mr. Clauer suffered from osteoporosis would have amplified, not obviated, the need for such care to be exercised.

Ultimately, Dr. Robbins' opinion is grounded in speculation, as neither the medical records nor the depositions identify the event - other than the discounted self-reported fall recorded in the July 7, 2009 orthopedic consultation note - during which the fracture occurred. Further, while Dr. Robbins opines that the procedures used in turning and positioning Mr. Clauer complied with good and accepted medical practice, Dr. Segreto's opinion is squarely to the contrary, i.e., that the failure to discover, note and take into account Mr. Clauer's severe left leg contracture in positioning and turning him, and to take the necessary special precautions to avoid further injury to his left leg, were both a departure from good and accepted medical practice and a proximate cause of the fracturing of Mr. Clauer's femur. Such a stark difference in expert opinion is one that cannot be resolved on a motion for summary judgment (*see* ***Severino v. Weller***, 148 A.D.3d 272, 276 [1st Dept 2017], *citing* ***Bradley v Soundview Healthcenter***, 4 AD3d 194 [1st Dept 2004] ("conflicting expert affirmations present issues of fact and credibility not to be resolved summarily")), particularly where, as here, a jury could reasonably conclude, independently of any expert opinion, that the fracturing of Mr. Clauer's femur was the result of negligence on the part of the defendant and its staff[2].

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[2] Although the defendant also seeks dismissal of the plaintiff's "claim" for negligent hiring, training and supervision on the ground that its employees were always acting within the scope of their employment during their treatment of Mr. Clauer, their answer does not appear to contain corresponding concessions or admissions (*see* ***Saretto v. Panos,*** 120 A.D.3d 786, 788 [2d Dept 2014) ("Since Mid Hudson did not concede that Panos acted completely within the scope of his employment when committing all of the acts alleged in the complaint, the Supreme Court did not err in refusing to direct the dismissal of the claims against Mid Hudson to recover damages for negligent hiring and supervision"[citation omitted]). Accordingly, that request must also be denied at this time.

For all of the foregoing reasons, the motion for summary judgment is denied. This constitutes the decision and order of the Court.

Dated: Jan 20, 2018
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

____ **FINAL DISPOSITION** ___XX__ **NON-FINAL DISPOSITION**