SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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VELVER DAVIS,

Plaintiff,

-against-

ST. LUKE'S-ROOSEVELT HOSPITAL, MOUNT SINAI ST. LUKE'S, MOUNT SINAI HOSPITALS GROUP, INC., SETH URETSKY, M.D., et al.

Defendants.
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Index No. 805129/14

Decision & Order

Martin Shulman, J.:

In this medical malpractice action, defendants St. Luke's-Roosevelt Hospital ("St. Luke's"), Mount Sinai St. Luke's, Mount Sinai Hospitals Group, Inc. and Seth Uretsky, M.D. ("Dr. Uretsky") (collectively, "defendants") move pursuant to CPLR 3212 for summary judgment dismissing this action against them.[1] Plaintiff Velver Davis ("Ms. Davis" or "plaintiff") opposes the motion.

BACKGROUND

On August 7, 2012, Ms. Davis, then 58 years old, presented to the emergency department at St. Luke's, arriving via ambulance. Her complaints at that time included an abnormally rapid heart rate. Her past medical history is significant for diabetes, asthma, atrial fibrillation, high cholesterol and high blood pressure. Her past surgical history includes mitral valve replacement, left shoulder replacement and two hip replacement surgeries.

[1] Plaintiff discontinued this action against co-defendants Katherine Rutledge, M.D. and Rajan Gurunathan, M.D.

Various tests confirmed that plaintiff was in atrial fibrillation.[2] She was admitted to St. Luke's for additional monitoring and testing, including a coronary CT angiogram ("CTA scan") with intravenous ("IV") contrast (dye), which was performed the next morning.[3] This action is based upon Ms. Davis' claim that this procedure was improperly performed, resulting in "infiltration of the intravenous line with extravasation of some of the contrast"[4] from her vein into surrounding tissues in her left arm at or near the infusion site. She alleges she sustained nerve damage and as a result experiences persistent and ongoing numbness, weakness and swelling in her left arm and hand.

St. Luke's employees Ramon Thomas, R.N. ("Nurse Thomas"), Albert Figueras and Elizabeth Bisceglie (both radiation technologists) performed the procedure on plaintiff. The medical records indicate that Nurse Thomas, an IV nurse in St. Luke's radiology department, placed the IV in plaintiff's left forearm. Although he testified at his deposition that he did not recall the specifics of

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[2] Atrial fibrillation is an irregular heartbeat that increases the risk of stroke and heart disease. See https://www.webmd.com/heart-disease/atrial-fibrillation/default.htm.

[3] Defendants' expert, Stephen C. Machnicki, M.D. ("Dr. Machnicki"), describes the procedure as follows: first, a calcium scoring is done to identify calcium deposits in the heart. Next, a radiation technologist performs a timing bolus, wherein a small amount of contrast is injected to determine the amount of time it will take for the contrast to reach a particular vessel in the heart. The technologist then inputs this information into a computer to create a "delay time". After the timing bolus is completed, the remaining contrast is injected. The actual scanning of the heart does not occur until after the delay time to allow the contrast to reach the heart.

[4] See Dr. Uretsky's report of the procedure (Motion at Ex. Q, 098, 140).

placing the IV in Ms. Davis' arm, he testified that his practice is to check a patient's arms to find a "highly visible" vein (Motion at Ex. K, 23:17-18). The medical records indicate that Nurse Thomas inserted a 20 Nexiva gauge needle in plaintiff's left forearm, which he explained is used in these procedures in order to "give a very, very high infusion rate over a short period of time" (*id.* at 15:14-17; 22:7-9; and Ex. Q, p 208). Ms. Davis testified that she experienced pain when the IV was inserted.

Nurse Thomas testified that his primary responsibility during a CTA scan is to ensure that the IV line remains patent and functioning by flushing it with saline at various times before and during the procedure and constantly monitoring the line (*id.* at Ex. K, 13:20-25). Prior to injecting a patient with the contrast dye Nurse Thomas flushes the IV line multiple times and palpates the vein, continually confirming that the IV line is patent. No complications arose when the IV lines were flushed at various points during Ms. Davis' procedure.

During the last phase of the CTA scan Nurse Thomas discovered the extravasation of the contrast medium. The medical records note that a radiologist was notified, warm compresses were applied to plaintiff's arm and the arm was elevated. Nurse Thomas examined Ms. Davis and found that her brachial and radial pulses were present. He also gripped her hands and noted her hand strength was good, leading him to conclude that there were no signs of nerve damage.

Dr. Uretsky, a cardiologist, read and interpreted the CTA scan results. Although some contrast was visualized in the heart, the report he prepared states

that the results of the CTA scan were non-diagnostic because not all of the contrast made its way to the heart.

The medical records from St. Luke's (Motion at Ex. Q) document the following:

- Ms. Davis' left forearm was swollen after the extravasation and the next morning (*id.* at 068);
- plaintiff denied severe pain and discomfort but expressed her annoyance at the situation (*id.*);
- subsequent neurological assessments on both August 8 and August 9 were within normal limits and plaintiff's left arm strength was 5/5 (*id.* at 054, 057);
- musculoskeletal assessments on both August 8 and August 9 were within normal limits and Ms. Davis had full range of motion in all extremities (*id.* at 056, 058);
- plaintiff complained of tenderness at the IV site but made no other complaints as to her left arm (*id.* at 203);
- during seven periodic examinations conducted on August 8 and August 9 plaintiff reported a pain level of 0/10 (*id.* at 041-045); and
- swelling continued through plaintiff's discharge on August 9, 2012 (*id.* at 155).

Upon discharge Ms. Davis was advised to follow up with her primary care physician with respect to her atrial fibrillation. She presented to this physician on August 14, 2012. Records from that visit contain no indication that plaintiff was experiencing any problems with her left arm or that she mentioned the extravasation that occurred approximately six days earlier (*id.* at Ex. R).

Plaintiff commenced this action on April 16, 2014 asserting causes of action for medical malpractice (first cause of action), violations of various

provisions of the Public Health Law (second cause of action) and lack of informed consent (third cause of action).[5] In her opposition to this motion, Ms. Davis does not dispute defendants' characterization of the second cause of action as being duplicative of the first cause of action.

DEFENDANTS' EXPERT

In support of their motion for summary judgment dismissing the complaint, defendants submit an expert affirmation from Dr. Machnicki, a physician licensed to practice medicine in the state of New York who is board certified in radiology and avers that he is fully familiar with the standards of care applicable to CTA scans in 2012 (Motion at Ex. A). Dr. Machnicki offers the following opinions within a reasonable degree of medical certainty as to the treatment defendants rendered to plaintiff:

- extravasation is a known risk of procedures requiring the injection of IV contrast and can occur without negligence;
- defendants took all necessary precautions to reduce the risk of extravasation (*i.e.*, properly inserted the IV needle in plaintiff's left forearm; injected an appropriate amount of contrast at an appropriate flow rate; continuously tested the IV line for patency before and during the procedure, including flushing the line with saline multiple times without any complications);
- once the extravasation occurred, defendants properly applied warm compresses to plaintiff's arm to increase blood circulation and elevated the arm to decrease swelling and pain; and

[5] In her opposition to this motion, plaintiff withdraws her allegations of negligent hiring and supervision and does not oppose dismissal of the third cause of action alleging lack of informed consent. Accordingly, the portion of defendants' motion seeking summary judgment dismissing the third cause of action is granted.

- based upon plaintiff's complaints (or lack thereof) no surgical, neurological or other consultation was needed, as there were no signs of severe extravasation injury.

PLAINTIFF'S EXPERT

In opposition to defendants' motion plaintiff submits an affidavit from Daryl R. Fanney, M.D. ("Dr. Fanney"), a physician licensed to practice medicine in the state of Virginia, who is board certified in diagnostic radiology (Edinburgh Aff. in Opp., Exh. 1).[6] Dr. Fanney avers within a reasonable degree of medical certainty that defendants:

- failed to take into account plaintiff's poor vein structure, causing vein collapse when too much contrast was administered at an excessive rate;
- failed to obtain a surgery, plastic surgery and/or neurology consultation after the extravasation to diagnose and consider possible compartment syndrome and nerve damage, particularly where, as here, a large amount (90 to 100 ccs) of the contrast medium extravasated;
- disregarded plaintiff's complaints of pain, numbness and tingling in her left hand and fingers, and swelling, all of which are symptoms of severe extravasation induced injury; and
- failed to maintain written protocols for the prevention and treatment of extravasation.

SUMMARY JUDGMENT

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st

[6] In reply, defense counsel contends that Dr. Fanney's affidavit, which was executed in Virginia, is inadmissible because it lacks an appropriate certificate of conformity pursuant to CPLR §2309 [c]. However, plaintiff's counsel's sur-reply affidavit, to which defense counsel does not object, accurately notes that the language in the certificate of acknowledgment accompanying Dr. Fanney's affidavit is in fact sufficient because it complies with Real Property Law §309-b's requirements.

Dept), *aff'd* 62 NY2d 938 (1984); *Andrea v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

In deciding the motion, the court views the evidence in the light most favorable to the nonmoving party and gives him the benefit of all reasonable inferences that can be drawn from the evidence. *See Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 (1985). Moreover, the court should not pass on issues of credibility. *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad*, *supra*), once such proof has been offered, in order to defend the summary judgment motion, the opposing party 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, 562 (1980); *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 (1977); see also, *Friends of Animals, Inc.*, *supra*.

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury." *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 (1st Dept 2009)

(citation omitted). A defendant physician seeking summary judgment must make a prima facie showing establishing the absence of a triable issue of fact as to the alleged departure from accepted standards of medical practice (*id*).

In opposition, "a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that alleges '[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice'." *Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d at 325. "In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude a grant of summary judgment in a defendant's favor (citation omitted)." *Id.* However, where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative force and is insufficient to withstand summary judgment. *Id.*, citing *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 (2002).

"To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion [citations omitted]" (*Hofmann v Toys "R" Us-NY Ltd. Partnership,* 272 AD2d 296, 296 [2d Dept 2000]). An expert "need not be a specialist in a particular field" in order to render an expert opinion "if he [or she] nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented" (*see Joswick v Lenox Hill Hosp.,* 161 AD2d 352, 355 [1st Dept 1990]).

In this case, both parties' experts have radiology backgrounds and based their opinions on their review of plaintiff's medical records, as well as the pleadings and deposition transcripts herein. Therefore, both experts appear to be qualified to offer their opinions. *See Frye v Montefiore Med. Ctr.,* 70 AD3d at 24-25; *Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 (1st Dept 2008) ("whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court . . .").

The Procedure

At the outset, plaintiff does not dispute Dr. Machnicki's assertion that extravasation is a known risk of procedures requiring the injection of IV contrast that can occur without negligence. Indeed, Ms. Davis concedes as much in her supplemental bills of particulars, as well as in her expert witness disclosure pursuant to CPLR §3101(d), by stating that defendants "fail[ed] to understand that extravasation is a common complication of intravenous injection of intravenous contrast media" (Motion at Ex. M, ¶2; and Ex. O, ¶3). Dr. Fanney similarly does not dispute Dr. Machnicki's opinion that the standard of care only requires that necessary precautions be taken to reduce the risk of the known complication of extravasation.

Plaintiff's expert takes issue *inter alia* with the placement of the IV needle. Specifically, Dr. Fanney concludes defendants departed from the applicable standard of care as follows:

> Given Ms. Davis' testimony and the chart entry of poor venous access, St. Luke's pre insertion of the IV and performance of the coronary CT angiography failed to consider, plan for and monitor

> for vein collapse and account for Ms. Davis' poor and fragile vein architecture. St. Luke's failed to take into account Ms. Davis' weak, brittle, fragile, and difficult to palpate upper extremity superficial veins. St. Luke's failed to isolate and identify the upper extremity veins. St. Luke's failed to select an IV injection site which was not already compromised venous territory without previous puncture and of the highest possible caliber.

See Edinburgh Aff. in Opp., Ex. 1, ¶33.

The foregoing opinion is unsupported and conclusory. Dr. Fanney states only that the flow chart Nurse Thomas prepared simultaneously with performing the CTA scan did not indicate where on plaintiff's left forearm he placed the needle/IV line (*id.* at ¶21). He merely assumes that "[t]he IV needle was likely placed in one of the superficial veins in the forearm . . ." (*id.* at ¶30). There is no proof in the record corroborating this equivocal statement.[7]

While Dr. Fanney faults Nurse Thomas for not selecting "a thick vein from the elbow crease" (*id.* at ¶35), he fails to state that the standard of care required same. Nor does he affirmatively state that selecting a vein from the forearm is improper or that extravasation would not have occurred if a vein from the elbow crease had been selected.[8]

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[7] Dr. Fanney does not dispute that Nurse Thomas used a proper size IV needle.

[8] As Dr. Machnicki notes in his reply affidavit, the American College of Radiology's (ACR) *Manual on Contrast Media*, Version 8 (2012) ("ACR Manual"), which Dr. Fanney also cites to support certain of his opinions, provides that: "An antecubital or large forearm vein is the preferred venous access site for power injection." See Deaner Reply Aff., Ex. T at 13. While the court acknowledges that the ACR Manual is hearsay, both experts apparently agree that it is authoritative and reliable.

As previously stated, while Nurse Thomas did not specifically recall each step he took in placing and monitoring Ms. Davis' IV line, he testified as to his general practice of checking both of a patient's arms to find a "highly visible" vein, then selecting an appropriate vein "based on my clinical experience and the integrity of the veins" (Motion at Ex. K, 23:17-18; 22-24).[9] Plaintiff's deposition testimony confirms that Nurse Thomas administered hot cloths to her arm in an attempt to locate an appropriate vein (*id.* at Ex. H, 163:13-15).

Dr. Fanney does not dispute that the steps Nurse Thomas and the radiology technicians took with respect to saline flushes (both prior to and during the test) and the timing bolus were performed in accordance with the applicable standard of care. Ms. Davis' testimony further confirms the multiple times Nurse Thomas checked the IV prior to injecting the contrast medium (*id.* at 163-164). Significantly, Dr. Fanney does not dispute that some contrast material was visualized in plaintiff's heart, thus indicating that the IV line was properly placed and functioning.

Dr. Fanney also contends that defendants departed from the standard of care in improperly administering the contrast medium. Defendants utilized approximately 130 ccs of contrast. A small amount of contrast (approximately 40 ccs) was injected during the timing bolus at a lower flow rate (approximately 2 ccs per second). The remaining contrast was then injected at the approximate

[9] Nurse Thomas testified that he has been employed as a radiology nurse at St. Luke's since 1992 (Motion at Ex. K, 8:17-19).

rate of 4 to 5 ccs per second. Dr. Machnicki opines that this is the standard amount and flow-rate for this test.

From the fact that only a small amount of contrast was observed in plaintiff's heart, Dr. Fanney estimates that approximately 100 ccs of contrast extravasated. He contends that: "A rate of 2-3 ccs per second would have reduced the likelihood of the contrast rate/volume overcoming or overwhelming the vein wall resistance." Edinburgh Aff. in Opp., Ex. 1, ¶34).

This opinion is also speculative and conclusory. Dr. Fanney does not state that extravasation would not have occurred if the test had been performed at a lower flow rate, nor does he state that the standard of care required same.[10] Finally, Dr. Machnicki explains that the CTA scan could not have been completed at the rate of only 2 to 3 ccs per second because it would not be possible to visualize the heart and arteries.

Here, the standard of care only required defendants to take necessary precautions to reduce the risk of extravasation. Plaintiff fails to refute that defendants met this standard. For all of the foregoing reasons, summary judgment is granted in defendants' favor on the medical malpractice causes of action to the extent that such claims are premised upon defendants' alleged negligent performance of the CTA scan.

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[10] As set forth in Dr. Machnicki's reply affidavit (Deaner Reply Aff., Ex. S), the ACR Manual confirms his opinion that "contrast medium can be safely administered intravenously by power injector, even at high-flow rates" (*id.* at Ex. T).

Post-Procedure

Plaintiff's primary claim with respect to her post-procedure care is that defendants ignored her symptoms which allegedly warranted consultations with a surgeon, plastic surgeon and/or neurologist in order to diagnose and consider possible compartment syndrome and nerve damage.[11] The medical records indicate only symptoms of hematoma, soreness and swelling, which were still present upon plaintiff's discharge. However, in addition to the documented swelling,[12] hematoma and soreness at the injection site, plaintiff testified at her deposition that she also reported numbness and tingling in her forearm and hand which gradually spread to her fingers (Motion at Ex. H, 206-209). These symptoms are not noted in her chart.

Viewing the evidence in the light most favorable to Ms. Davis, as this court must (*Negri v Stop & Shop, Inc.*, *supra*), the question is whether or not the standard of care dictated that plaintiff's specific symptoms were indicative of a severe extravasation injury and required further medical consultations. Both experts agree that generally, if extravasated iodinated contrast causes a toxic reaction there will be an acute local inflammatory response within 24 to 48

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[11] The record contains no indication that Ms. Davis was ever diagnosed with compartment syndrome.

[12] Plaintiff testified to having extreme swelling immediately after the extravasation, describing her left arm as being "about the size of my head" (Motion at Ex. H, 211:17-19).

hours.[13] Dr. Machnicki elaborates that the following can be symptoms of such a response:

> progressive swelling and pain, redness, lack of pulse, decreased capillary refill and altered tissue perfusion, change in sensation, or skin ulceration and blistering. **Further, if there was a sufficient enough volume of fluids extravasated, it would compress the nerves, and one would expect signs of nerve compression, such as numbness and tingling, as soon as the volume of fluids compressed the nerve**. (Emphasis added).

See Motion at Ex. A, ¶50.

Relying solely upon the medical records, Dr. Machnicki concludes that "plaintiff did not exhibit signs and symptoms of an acute inflammatory response or any signs of nerve compression, which would signify that she suffered a toxic reaction . . . or . . . nerve damage" (*id.* at ¶51). Defendants' expert explains that swelling and tenderness are common but on their own are not signs of a toxic reaction (*id*). Since no further symptoms allegedly arose 24 to 48 hours after the extravasation, Dr. Machnicki opines that Ms. Davis' symptoms did not warrant further consultations.

However, Dr. Machnicki does not address plaintiff's testimony regarding numbness and tingling which she claims occurred while she was still hospitalized (*i.e.*, within 24 to 48 hours of the extravasation). While defense counsel characterizes Ms. Davis' testimony as self-serving, *Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 743 (2d Dept 2014), which defendants cite for the proposition that hearsay statements alone are insufficient to raise a triable

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[13] The ACR Manual is in accord with both experts' opinions in this regard. See Deaner Reply Aff., Ex. T at 17.

issue of fact, plaintiff's testimony here is not hearsay. As stated in *Lewis v Rutkovsky*, 153 AD3d 450, 455 (1st Dept 2017), "[t]here is nothing 'self serving,' in a legal sense, about deposition testimony that favors the party giving it. Rather, testimony is said to be self serving when it contradicts prior testimony."

This is not the situation in the case at bar as Ms. Davis testified as to her recollection of events. Whether her testimony is credible when compared to the medical records is an issue to be evaluated by a jury. *Id.* at 456.

As highlighted above, Dr. Machnicki is of the opinion that signs of numbness and tingling, such as plaintiff claims to have experienced, in the presence of a sufficient volume of extravasated contrast, are indicative of nerve compression. He does not challenge or even address Dr. Fanney's conclusion that a significant amount (approximately 100 ccs) of contrast medium was extravasated as evidenced by the small amount of contrast observed in plaintiff's heart and arteries. Thus, Dr. Machnicki's opinion essentially confirms that an issue of fact exists as to whether Ms. Davis' symptoms should have alerted defendants to the possibility of nerve damage and the potential need for further consultation with a specialist(s).[14]

Finally, defendants' argument that the medical records from plaintiff's August 14, 2012 follow up visit with her internist confirm their entitlement to

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[14] Parenthetically, the ACR Manual states: "An immediate surgical consultation is indicated for any patient in whom one or more of the following signs or symptoms develops: progressive swelling or pain . . . [and] **change in sensation in the affected limb** (emphasis and bracketed matter added). See Deaner Reply Aff., Ex. T at 18.

summary judgment is unavailing. While the records from that visit do not indicate that Ms. Davis apprised her physician of any complaints regarding her left arm or of the extravasation that occurred six days prior, her testimony again contradicts the medical records. See Motion at Ex. H, 215:7-21.

For all of the foregoing reasons, plaintiff has established that an issue of fact exists with respect to the post-procedure care defendants provided. Accordingly, defendants' motion for summary judgment is denied as to the medical malpractice causes of action to the extent they are based upon allegations concerning Ms. Davis' post-procedure treatment.

Written Procedures/Protocols

Defendants' motion does not address the portion of the medical malpractice causes of action that is predicated upon allegations that St. Luke's departed from accepted standards of medical care by failing to maintain certain written procedures and protocols. By demand dated September 28, 2015, plaintiff requested copies of "all written policies, procedures and/or guidelines" in effect in 2012 with respect to: (1) placement and maintenance of IV lines used to administer contrast material for CTA scans; and (2) treatment and care of patients who have suffered from extravasation of contrast material (Edinburgh Aff. in Opp., Ex. E) ("protocols").

Dr. Uretsky, who was no longer employed at St. Luke's at the time of his deposition, testified that protocols for performing CTA scans existed in 2012 and that he "believe[d]" protocols concerning responses to events of extravasation existed. See Motion at Ex. L, 14:7-19; 16:14-21; 18:15-24). St. Luke's radiologic

technologist Albert Figueras also testified to the existence of written protocols for performing CTA scans (*id.* at Ex. I, 15:25-16:1-16).

By letter dated November 5, 2015, defense counsel advised plaintiff that defendants were searching for the protocols (Edinburgh Aff. in Opp., Ex. E). Subsequent court orders dated June 6, 2017 and August 8, 2017 provided for St. Luke's to produce the protocols in 30 days (*id.*). St. Luke's was unable to locate any such protocols and court orders dated September 19, 2017 and November 14, 2017 directed them to provide an affidavit detailing their search and to clarify "whether they exist/existed" (*id.*). Defense counsel concedes that St. Luke's never provided such an affidavit.

For purposes of this motion, plaintiff's counsel, claiming spoliation of evidence and that St. Luke's failed to place a "litigation hold" on the requested documents once this action was commenced, requests that this court draw "an adverse inference against St. Luke's that those protocols would have contained procedures, guidelines and standards, which were not followed here, to prevent and to treat incidents of extravasation thus creating factual issues in this regard requiring the denial of defendants' summary judgment motion." Edinburgh Aff. in Opp., ¶17. Dr. Fanney states that St. Luke's failure to have "written action and management protocols for treatment of extravasation arising from injection of intravenous contrast media" in its radiology and cardiology departments is a deviation from the standard of care.

Defendants respond by dismissing Dr. Fanney's opinion as conclusory and further argue that plaintiff cannot establish that failure to maintain and/or

produce the protocols proximately caused plaintiff's alleged injuries. They note that Dr. Uretsky also testified that any such protocols regarding responses to an extravasation "would entail checking [the] site, making sure the patient's pulses are good, that the arm was not tender or painful, and of course hot compresses and removing the IV", as well as informing a radiologist or cardiologist of the event. See Motion at Ex. L, 16:22-17:8. Since St. Luke's staff performed all of the foregoing, defendants maintain that it is irrelevant to this motion whether or not written protocols existed or were produced.

Finally, defendants note that in filing the note of issue plaintiff certified that all discovery was complete. As a result, defendants were under the impression that plaintiff waived the admittedly outstanding discovery.

While not condoning defendants' failure to comply with court ordered discovery, having found that defendants did not negligently perform the procedure, it follows that there can be no negligence based upon failure to maintain and comply with protocols for performing CTA scans with IV contrast. With respect to protocols applicable to plaintiff's post-procedure treatment for the extravasation, having determined that issues of fact exist regarding these malpractice claims, it is unnecessary to draw a negative inference for purposes of this motion.

For all of the foregoing reasons it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted in part to the extent that the third cause of action alleging lack of informed consent is dismissed; and it is further

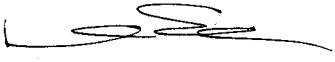
ORDERED that defendants' motion for summary judgment dismissing the complaint is granted in part and the first and second causes of action alleging medical malpractice and negligence are dismissed to the extent they are predicated upon allegations concerning defendants' August 8, 2012 performance of the coronary CT angiogram upon plaintiff; and it is further

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied as to the first and second causes of action alleging medical malpractice and negligence to the extent they are predicated upon allegations concerning defendants' treatment of plaintiff after performing the August 8, 2012 coronary CT angiogram and through her discharge on August 9, 2012.

Counsel for the parties are directed to appear for a pre-trial conference at Part 1 MMSP, 60 Centre St., Room 325, New York, New York on August 28, 2018 at 9:30 a.m. In the event that no settlement can be reached, counsel shall be prepared on that date to stipulate to a firm trial date in Part 40 TR.

The foregoing constitutes this court's decision and order.

Dated: New York, New York
August 20, 2018



HON. MARTIN SHULMAN, J.S.C.