

<b>Cumberbatch v Holtkamp</b>
2021 NY Slip Op 32443(U)
November 16, 2021
Supreme Court, Kings County
Docket Number: Index No. 503480/2017
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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MARGARET CUMBERBATCH,

Plaintiffs,

-against-

DIEDRICH K. HOLTKAMP, DIEDRICH K.  
HOLTKAMP, M.D., JOSEPH YACOVONE,  
THE NEW YORK HOTEL TRADES COUNCIL AND  
HOTEL ASSOCIATION OF NEW YORK CITY HEALTH  
CENTER, INC., a/k/a BROOKLYN HEALTH CENTER,  
JOHN /JANE DOE (radiologist who provided ultrasound  
guidance during a biopsy on November 4, 2014) and  
CHELSEA DIAGNOSTIC RADIOLOGY, P.C.,

Defendants.  
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Index No.: 503480/2017

**DECISION/ORDER**

Hon. Bernard J. Graham  
Supreme Court Justice

KINGS COUNTY CLERK  
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**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendants, pursuant to CPLR sec. 3212.**

**The following e-filed papers read herein:**

**NYSEF #:**

Notice of Motion and Affidavits Annexed.....	(1)134-151 (seq. 8)
	(2) 152-174 (seq. 9)
	(3) 177-196 (seq. 10)
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	(1) 207-212 (seq. 8)
	(2) 213-218 (seq. 9)
	(3) 219-224 (seq. 10)
Replying Affidavits.....	(1) 228-229 (seq. 9)
	(2) 230 (seq. 8)
	(3) 231-234 (seq. 10)
Exhibits.....	_____
Other: ..... (memo).....	_____

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Counsel for defendants Joseph Yacovone, M.D. (“Dr. Yacovone”) and Chelsea Diagnostic Radiology, P.C. (“CDR”) have moved (seq. 8), pursuant to CPLR §3212 for an Order awarding summary judgment and a dismissal of plaintiff’s complaint upon the grounds that they were neither negligent nor departed from accepted medical practice, and that any alleged departure was not the proximate cause of plaintiff’s alleged injuries.

Counsel for defendants Diedrich K. Holtkamp, M.D. (“Dr. Holtkamp”) s/h/a Diedrich K. Holtkamp and Diedrich K. Holtkamp, M.D., P.C. has also moved (seq. 9), pursuant to CPLR §3212, for an Order awarding summary judgment and a dismissal of plaintiff’s complaint upon the same grounds.

Counsel for defendants The New York Hotel Trades Council and Hotel Association of New York City, Inc., Health Center, Inc., (“NYHTC”) s/h/a New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc., a/k/a Brooklyn Health Center, have moved (seq. 10), pursuant to CPLR §3212 for an Order awarding summary judgment and a dismissal of plaintiff’s complaint upon the grounds that they cannot be held vicariously liable for the alleged malpractice of Dr. Holtkamp.

Counsel for the plaintiff has opposed the defendants’ motions for summary judgment and a dismissal of plaintiff’s complaint upon the grounds that there are material issues of fact regarding the causes of action that have been pled by the plaintiff as against these defendants for negligence and medical malpractice, and whether a departure from good and accepted medical practice through their alleged acts and omissions was a proximate cause of the plaintiff’s injuries.

Background:

The within action sounding in medical malpractice was commenced on behalf of the plaintiff by the filing of a Summons and Complaint with the Clerk of this Court on or about February 21, 2017. Issue was joined as to Dr. Holtkamp by the service of a Verified Answer on March 17, 2017. Orange Regional Medical Center served their

Verified Answer on May 1, 2017. Dr. Yacovone served his Verified Answer on May 4, 2017. NYHTC served their Verified Answer on May 16, 2017.

Plaintiff served Bills of Particulars as to Dr. Holtkamp, Dr. Yacovone, and Orange Regional Medical Center on or about July 18, 2017.

On January 3, 2018, Orange Regional Medical Center moved for summary judgment and a dismissal of the action, which motion was granted by Order of this Court on December 6, 2018.

An Order dated February 13, 2020 granted plaintiff leave to amend her Complaint to add CDR as a named defendant, after which plaintiff filed and served an Amended Summons and Complaint. CDR served their Verified Answer on September 15, 2020, which included a demand for a Verified Bill of Particulars, to which plaintiff served a response.

The Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on October 19, 2020. The deadline for defendants to file motions for summary judgment was extended to January 30, 2021 by stipulation.

Argument of the instant motions was heard on September 9, 2021 on Microsoft Teams before the undersigned.

Facts:

On April 15, 2014, plaintiff was treated by Dr. Holtkamp at the Brooklyn Medical Center<sup>1</sup> regarding pain in her left breast. At that time Dr. Holtkamp performed a breast exam during which he determined no palpable masses were present, and reviewed an ultrasound report dated April 9, 2014<sup>2</sup> that reflected a stable eight-millimeter nodule in plaintiff's left breast. Based on Dr. Yacovone's BIRADS assessment ("Category 3: Recommend short-term follow-up study"), Dr. Holtkamp ordered a follow-up ultrasound in six months.

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<sup>1</sup> Brooklyn Medical Center is a health clinic that provides care to members of the New York Hotel Trades Counsel union.

<sup>2</sup> This report was prepared by Dr. Yacovone based on an ultrasound performed at Midtown Health Center.

Plaintiff returned to Brooklyn Medical Center on October 21, 2014, at which time Dr. Holtkamp performed another breast exam and reviewed the report for the follow-up ultrasound performed on October 15, 2014 (hereinafter referred to as the “October 2014 ultrasound”). The report reflected two nodules in plaintiff’s left breast: a previously reported nodule<sup>3</sup> and a new 0.8 x 1.0 x 1.2 cm irregular mass in the 300 retroareolar region. The report classified the new mass as Category 4, indicating it was suspicious and required biopsy under ultrasound guidance.

On November 1, 2014, Dr. Holtkamp performed a Vacora biopsy<sup>4</sup> (hereinafter referred to as the “November 2014 biopsy”) at his office in Brooklyn.<sup>5</sup> After the procedure, Dr. Holtkamp sent the biopsied tissue and a Surgical Pathology Request Form for the specimen to BioReference Laboratories, which returned a form describing Dr. Holtkamp’s order as “Cytology<sup>6</sup>, Aspiration” and “Site (CYT) – Left,” and noted “Tube: ALC,” which indicates the presence of alcohol in the specimen tube (which would not be included for histology).<sup>7</sup> Records from Brooklyn Health Center also reflect that in November of 2014 Dr. Holtkamp ordered: “Cytology, biopsy, FNA.” (See Holtkamp Exhibit “N1”, p. 209). The specimen sample was described as “70 ml cloudy white fluid, 1-Cytospin, 1-smear, 1-cell block” and did not mention a tissue sample. The pathology report from BioReference Laboratories provided that no malignant cells were present and reflected that the lab performed a cytology diagnosis.<sup>8</sup> The diagnosis stated in the report was:

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<sup>3</sup> The previously reported nodule was described as “Lipoma left breast 2:00 position, 3 cm from the nipple measuring 3 x 6 x 7 mm.”

<sup>4</sup> According to plaintiff’s radiology expert, a Vacora biopsy “is used to obtain solid matter tissue with absolutely no fluid extraction for pathology examination.” (See Plaintiff’s Exhibit “B” para. 15).

<sup>5</sup> Dr. Holtkamp testified this was plaintiff’s first time visiting his Brooklyn office, rather than the union clinic, and that the biopsy was paid for “by the union.” (See Holtkamp EBT p. 58, 106, 110).

<sup>6</sup> Dr. Holtkamp testified he intended to order a histologic examination, not a cytologic examination. (See Holtkamp Exhibit “G” p. 124-126).

<sup>7</sup> At his deposition, Dr. Holtkamp stated he was “mystified by all these things on the page,” as he claims the form did not represent the examination he requested the lab to perform nor accurately describe the sample he sent to the lab.

<sup>8</sup> The title of the report was “non-gyn cytology report” and the reflects “Test Ordered: cytology, alcohol-based FNA”).

“FNA<sup>9</sup> left breast for cytology. No malignant cells present. Benign breast tissue (cell block) with stromal fibrosis and focal calcification (intraluminal).” (See Holtkamp Exhibit “O”, p. 10).

On November 18, 2014, Dr. Holtkamp reviewed the biopsy results with plaintiff at the Brooklyn Health Center and performed another breast exam. Dr. Holtkamp did not order a repeat biopsy and advised plaintiff to have a follow-up ultrasound in three months.

On February 5, 2015, plaintiff had another ultrasound (hereinafter referred to as the “February 2015 ultrasound”), which was interpreted by Dr. Yacovone, who had been informed of the results from the biopsy and correlated those results against the ultrasound findings from October 2014 and February 2015. Dr. Yacovone reported “no interval change in size and appearance of the complex cystic and solid circumscribed round 1.1 x 0.9 cm mass at 3:00 in the retroareolar region.” In his deposition, Dr. Yacovone claimed the mass appeared unchanged because it remained circumscribed, but also stated that it appeared “partly cystic, partly solid” and that its “heterogeneous internal architecture” looked suspicious. However, Dr. Yacovone found that the images from the October 2014 and February 2015 ultrasounds were concordant with stromal fibrosis and there was no reason to recommend a rebiopsy or mammogram. Dr. Yacovone classified the findings as “Category 3” and recommended a follow-up ultrasound in six months.

On February 24, 2015, plaintiff was informed of the ultrasound results by her primary care provider, Dr. Pilosov, and then discussed the results with Dr. Holtkamp, who also performed a breast examination at that time.<sup>10</sup> Dr. Holtkamp’s notes state that the ultrasound “shows stable nodule” and that the physical exam was “within normal limits,” which according to Dr. Holtkamp means that he did not feel any mass in plaintiff’s left breast.

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<sup>9</sup> Dr. Holtkamp testified he did not perform a “FNA” (fine needle aspiration). (See Holtkamp Exhibit “G”, p. 124-126).

<sup>10</sup> Dr. Pilosov and Dr. Holtkamp are located on the same floor at Brooklyn Health Center.

On August 19, 2015, plaintiff had another ultrasound (hereinafter referred to as the “August 2015 ultrasound”), which was performed by a different radiologist, Dr. Marie Leong (“Dr. Leong”). Dr. Leong’s report stated there was an

“Irregular 2.2 cm mass left 3:00 retroareolar region, increased in size from previously. This is worrisome and biopsy is recommended. There is also an abnormal appearing left axillary lymph node, also worrisome, which should also be biopsied.”

The report also upgraded the BIRADS classification to “Category 5 – Highly suspicious of malignancy.” Based on this report, Dr. Leong requested that plaintiff undergo an emergency bilateral mammogram, which revealed “an enlarged abnormal appearing left axillary lymph node, which likely correlates to the abnormal-appearing left axillary lymph node seen in today’s ultrasound,” and Dr. Leong recommended a biopsy.

On August 25, 2015, plaintiff visited Dr. Pilosov and Dr. Holtkamp, who noted plaintiff “had a palpable lesion.” (See Holtkamp Exhibit “G”, p. 162). Dr. Holtkamp informed plaintiff he would remove the lump in her left breast and lymph node in her arm at Maimonides Medical Center (“Maimonides”), and scheduled a biopsy of the mass in her left breast to be done under needle localization, as well as a “sentinel biopsy.” Dr. Burns, a Maimonides radiologist, re-read these images prior to the biopsy and sent a report to Dr. Holtkamp on September 4, 2015. The Maimonides report noted

“an irregular shaped bilobed mass with two distinctly separate lobes vs. adjacent masses, is present at the 3:00 axis and measures 2.0 cm maximally,” and a “morphologically abnormal axillary lymph node partially imaged [that] measures at least 2.6 cm.”

The report recommended an ultrasound to “demonstrate whether the mass is distinct from likely site of prior biopsy,” a core biopsy of the left breast mass, and an FNA of the axillary lymph node. (See Holtkamp Exhibit “O”, p. 27).

On September 8, 2015, Dr. Holtkamp examined plaintiff’s left breast and felt a mass at the 3:00 axis. Dr. Holtkamp recommended plaintiff undergo a Vacora biopsy in his office instead of the scheduled open biopsy at Maimonides. After this visit, plaintiff began to suffer excruciating pain in her left breast. She informed the union delegate that she wanted to cease treatment with Dr. Holtkamp and Dr. Pilosov and began treating with

Dr. Pond Kelemen (“Dr. Kelemen”), a breast surgical oncologist, and Dr. Rhim, a primary care provider, at Midtown Health Center on September 16, 2015. At that time, Dr. Kelemen performed a breast examination and recommended a biopsy on her left breast and lymph nodes.

On September 23, 2015, Dr. Kelemen performed a sonographic-guided biopsy, which confirmed an “infiltrating poorly differentiated duct carcinoma” of the left breast mass at the 3:00 axis. In addition, the pathology findings reflected that “fragments of the lymph node [were] extensively replaced by metastatic carcinoma.”

In October of 2015, plaintiff underwent a PET scan, MRI, and an ultrasound, and she was diagnosed with Stage 3 breast cancer. Following this diagnosis, plaintiff underwent further treatment and surgeries, including a bilateral mastectomy, chemotherapy, and radiation.

Parties’ Contentions:

Here, the Court is presented with the issue as to whether a question of fact exists with respect to the alleged negligence of Dr. Holtkamp, Dr. Yacovone, CDR and NYHTC, and if they deviated from the standard of medical care in failing to diagnose plaintiff’s breast cancer.

In support of the motion for summary judgment by Dr. Holtkamp, counsel offers the affirmation of Mark D. Novick, M.D. (“Dr. Novick”), who opines that Dr. Holtkamp did not fail to diagnose plaintiff’s breast cancer and in no way caused or contributed to plaintiff’s alleged injuries because the plaintiff’s breast cancer was not detectable until after the February 2015 ultrasound.

In support of the motion for summary judgment by Dr. Yacovone and CDR, counsel offers the affirmation of Nathaniel Margolis, M.D. (“Dr. Margolis”), who opines that Dr. Yacovone’s interpretation of the February 2015 ultrasound comported with good and accepted standards of medical and radiologic care and did not contribute to plaintiff’s alleged injuries.



In support of the motion for summary judgment by NYHTC, counsel offers the affirmation of Lana T. Vardanian, M.D. (“Dr. Vardanian”), who opines that neither Dr. Holtkamp or Dr. Yacovone were employees of NYHTC, and that NYHTC cannot be held vicariously liable for any alleged malpractice on their behalf.

Plaintiff, by her attorneys, opposes the defendants’ motions for summary judgment, arguing that defendants committed specific acts of malpractice in the treatment of the plaintiff, such as Dr. Holtkamp ordering the incorrect pathology on the tissue specimen submitted for the November 2014 biopsy, and Dr. Yacovone incorrectly interpreting the February 2015 ultrasound imaging of the mass as stable and benign. Plaintiff asserts that these departures were substantial factors in causing plaintiff’s breast cancer to remain undetected until it reached Stage 3 and spread to her lymph node.

Discussion:

A defendant moving for summary judgment in a case sounding in medical malpractice “must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the plaintiff’s injuries.” Guctas v Pessolano, 132 AD3d 632, 633 [2d Dept 2015], quoting Matos v Khan, 119 AD3d 909, 910 [2d Dept 2014].

This Court finds that the defendants have presented evidence sufficient to meet this burden, including expert affirmations.

With respect to the claims against Dr. Holtkamp, Dr. Novick opines that the cancer was not detectable until after the February 2015 ultrasound<sup>11</sup>, and Dr. Holtkamp’s reliance on Dr. Yacovone’s interpretation of the February 2015 ultrasound as unchanged<sup>12</sup> from the October 2014 ultrasound was within the standard of care and did not cause a delay in the diagnosis of plaintiff’s breast cancer. Dr. Novick asserts that Dr. Holtkamp’s recommendation for plaintiff to undergo a follow-up ultrasound six months

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<sup>11</sup> After comparing the August 2015 ultrasound images with the February 2015 ultrasound images, Dr. Novick opines that the new cancerous growth adjacent to the subject lesion was not visible on the February 2015 ultrasound.

<sup>12</sup> Dr. Novick agrees with Dr. Yacovone’s findings that the February 2015 ultrasound depicted a 1.1 x 0.9 c mass in the 3:00 retroareolar region of the left breast that was stable and unchanged from the October 2014 ultrasound.

later was appropriate and within the standard of care, given the November 2014 biopsy results and the February 2015 ultrasound results. Dr. Novick maintains that the plaintiff was closely monitored, and plaintiff's cancer diagnosis was made at the first sign of cancer, which was the new growth observed on the August 2015 ultrasound. Dr. Novick asserts that there was no act or omission on the part of Dr. Holtkamp that contributed to or caused a delay in the diagnosis or treatment of the plaintiff's breast cancer.

With respect to the claims against Dr. Yacovone and CDR, Dr. Margolis opines that Dr. Yacovone accurately interpreted the February 2015 ultrasound of plaintiff's left breast as showing a stable 1.1 x 0.9 cm complex, circumscribed mass at the 3:00 retroareolar region, with no interval change in its size and appearance as compared to the October 2014 ultrasound. Dr. Margolis asserts that the mass continued to have the appearance of a circumscribed round and well-defined mass consistent with stromal fibrosis, which is a benign condition. As Dr. Yacovone knew the mass had been previously biopsied by Dr. Holtkamp in November 2014<sup>13</sup>, and there had been no change in size and appearance from October 2014 to February 2015, Dr. Margolis opines that Dr. Yacovone's recommendation for plaintiff to have a follow-up ultrasound within six months was within the standard of radiological care. Dr. Margolis further opines that the lack of change in the size and appearance of the mass indicates the mass was not cancerous, and it was appropriate for Dr. Yacovone to grade the mass as "BI-RADS Category 3," which means the mass was probably benign, or has a 2% or less chance of malignancy. As such, Dr. Margolis asserts there was no reason for Dr. Yacovone to recommend a repeat biopsy of this mass because the findings of the November 2014 biopsy were in accordance with the October 2014 and February 2015 ultrasound images. Further, Dr. Margolis opines that it is Dr. Holtkamp's responsibility, as the physician treating the plaintiff, to recommend follow-up radiological studies and/or biopsies if indicated.

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<sup>13</sup> Dr. Margolis also addresses the claim that Dr. Yacovone failed to recognize that a biopsy in the incorrect area had occurred by asserting that there is nothing on the ultrasound of plaintiff's left breast taken on February 5, 2015 that would have suggested that the mass at the 3:00 position in the retroareolar area of the left breast was not biopsied by Dr. Holtkamp.

With respect to the claims against NYHTC, Dr. Vardanian opines that NYHTC cannot be held vicariously liable for the alleged malpractice of Dr. Holtkamp and Dr. Yacovone because neither physician was employed by NYHTC. Dr. Vardanian states that both Dr. Holtkamp and Dr. Yacovone were independent consulting physicians who were not under the direction, control, or supervision of NYHTC with respect to professional services rendered outside of NYHTC health facilities. At the time of the alleged malpractice, Dr. Holtkamp was a general surgeon specialist who agreed to provide services to NYHTC patients at a contractually agreed upon rate, and Dr. Yacovone was a consulting radiologist employed by co-defendant CDR, an independent company that had a contract with NYHTC to provide independent radiologists' services for NYHTC patients. Dr. Vardanian asserts that Dr. Holtkamp rendered the biopsy services to plaintiff in his private office, and that both Dr. Holtkamp and Dr. Yacovone provided services solely in their capacity as independent consultants. Defendant NYHTC also argues that plaintiff has only asserted claims of vicarious liability as to Dr. Holtkamp and Dr. Yacovone and is foreclosed from seeking vicarious liability against NYHTC for the actions of any other health care providers.

Once the movant has made a prima facie showing, the plaintiff must submit evidence in opposition to rebut the movant's prima facie showing. Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Poter v Adams, 104 AD3d 925 [2d Dept 2013]; Stukas v Streiter, 83 AD3d 18 [2d Dept 2011]. The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such a departure was a proximate cause of injury." Sheridan v Bieniewicz, 7 AD3d 508, 509 [2d Dept 2004]; Gargiulo v Geiss, 40 AD3d 811-812 [2d Dept 2007]. In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause." Nicholas v Stammer, 49 AD3d 832-833 [2008].

In opposing the defendants' motions, plaintiff's expert has pointed to several possible departures by Dr. Holtkamp, Dr. Yacavone, and CDR. While Dr. Holtkamp testified that the standard of care would have been to order a histologic (not a cytologic) diagnosis of the tissue specimen he obtained during the November 2014 biopsy, it is uncontested that the record reflects Dr. Holtkamp ordered a cytologic examination. (*See Holtkamp Ex. N1, p. 000209*). Plaintiff's expert opines that Dr. Holtkamp's failure to recognize he obtained the wrong pathology diagnosis for the tissue specimen was a departure from the standard of care, and that the error should have been remedied by a re-biopsy, as the diagnosis reported was meaningless. Plaintiff's expert argues that the pathology findings must be correlated with the abnormal ultrasound, and Dr. Holtkamp's failure to do so was a departure. In addition, plaintiff's expert disputes Dr. Novick's opinion that there was a new growth that was cancerous, which was allegedly first identified in the August 2015 ultrasound, and claims that the cancer diagnosis should have been made as a result of the November 2014 biopsy and February 2015 ultrasound, when plaintiff's breast cancer was at Stage 1 and had not metastasized to her lymph nodes. Plaintiff's expert opines that Dr. Holtkamp's departures caused a 10-month delay in diagnosis, during which time plaintiff's cancer metastasized by spreading to the lymph nodes and thereby progressed from Stage 1 to Stage 3, resulting in a less favorable outcome and decreased chance of survival.

Plaintiff also cites Dr. Yacovone's testimony that the standard of care required him to recommend a re-biopsy if he believed there was a discordance between the imaging and pathology results. Although Dr. Yacovone claims he correlated the pathology from the November 2014 biopsy and the imaging from the February 2015 ultrasound, plaintiff's expert opines that there was clearly a discordance between the October 2014 ultrasound ("irregular" and "suspicious" mass at 3:00 axis), the November 2014 biopsy pathology report (no malignancy), and the February 2015 ultrasound ("irregular" and "suspicious" mass at 3:00 axis), and that a re-biopsy should have been ordered. Plaintiff's expert argues Dr. Yacovone should have immediately recognized that the pathology results were erroneous because they were in response to the incorrect

pathology request. It is undisputed that cytology (which is for fluid specimen) was requested and performed, when histology (for tissue specimen) should have been requested and performed. In addition, plaintiff's expert asserts that Dr. Yacovone incorrectly concluded that there was no interval change in the size and appearance of the mass in the February 2015 ultrasound because the mass had actually appeared "more irregular than on previous 10/15/2014 study," which is highly suggestive of malignancy, and as such, the downgrading of the mass from Category 4 (probable malignancy) to Category 3 (possibly benign) was completely unsupported by the imaging. (See Plaintiff's Exhibit "B," para. 41-42). Plaintiff's expert also disagrees with Dr. Margolis' claim that Dr. Yacovone had no responsibility to recommend further biopsies and asserts that it was Dr. Yacovone's role to advise Dr. Holtkamp what radiological work-up is warranted given the findings, including a repeat ultrasound guided biopsy. With respect to proximate cause, plaintiff's expert asserts that Dr. Yacovone's departures were a substantial factor in causing the delay in the diagnosis of plaintiff's breast cancer, as Dr. Holtkamp relied on Dr. Yacovone's report in deciding the appropriate course of treatment.

It is well settled that where parties to a medical malpractice action offer conflicting expert opinions on the issue of malpractice and causation, issues of credibility require resolution by the factfinder (see Loaiza v Lam, 107 AD3d 951, 953 [2013]; Omane v Sambaziotis, 150 AD3d 1126, 1129 [2d Dept. 2017]; Dandrea v Hertz, 23 AD3d 332, 333 [2005]). Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions (see Elmes v Yelon, 140 AD3d 1009, 1011 [2d Dept. 2016], Feinberg v Feit, 23 AD3d 517, 519 [2d Dept. 2005]; Shields v Baktidy, 11 AD3d 671, 672 [2d Dept. 2014]). This Court has considered the conflicting expert testimony regarding Dr. Yacovone's interpretation of the October 2014 and February 2015 ultrasounds, the issue regarding the inappropriate type of analysis performed of the November 2014 biopsy tissue sample submitted by Dr. Holtkamp, as well as Dr. Holtkamp and Dr. Yacovone's reliance on these findings, and finds that questions of fact have been raised that require resolution by the jury. As such, defendants

Dr. Holtkamp, Dr. Yacovone and CDR's motions for summary judgment dismissing plaintiff's medical malpractice claim, as against them, is denied.

With respect to plaintiff's claim of vicarious liability on behalf of NYHTC, it is undisputed that plaintiff was a hotel employee who sought care from NYHTC's network of clinics and medical providers based on her union membership. It is also undisputed that the union established clinics for medical care and treatment of its workers (including the Brooklyn Health Center and Midtown Health Center), directed its workers to seek all medical care and treatment at those clinics, and hired Dr. Holtkamp and Dr. Yacovone to treat workers like the plaintiff. Vicarious liability for medical malpractice generally turns on agency or control in fact. *See Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Hylton v Flushing Hosp. & Med. Ctr.*, 218 AD2d 604, 606 [1995], *lv denied* 87 NY2d 807 [1996]. "Under the doctrine of respondeat superior, a hospital may be vicariously liable for the medical malpractice of physicians who act in an employment or agency capacity." *Deltoro v Arya*, 44 AD3d 896 [2d Dept 2007]; *Mendez v White*, 40 AD3d 1057 [2d Dept 2007]; *Boone v North Shore Univ. Hosp.*, 12 AD3d 338, 339 [2d Dept 2004]. While NYHTC refers to the contracts with Dr. Holtkamp and Dr. Yacovone, NYHTC has failed to produce these contracts, raising a question of fact as to whether NYHTC had any control over the care these defendants rendered to plaintiff. In addition, plaintiff has presented records reflecting that Dr. Holtkamp requested pathology for the November 2014 biopsy in his capacity as a physician at the union clinic, as the address listed on the surgical pathology request form is the Brooklyn Health Center, the "account" is Brooklyn Health Center and the "ordering provider" is Dr. Holtkamp. In addition, NYHTC failed to provide any evidence to support the claims that it lacked control over CDR or Dr. Yacovone. This Court finds that it would have been reasonable for plaintiff to believe the physicians treating her were provided by NYHTC or acted on NYHTC's behalf, as plaintiff was directed to seek all of her medical care at the union's clinics, and had been treated for years by various physicians at NYHTC's clinics. As such, NYHTC's motion for summary judgment dismissing plaintiff's claim of vicarious liability for the alleged medical malpractice of Dr. Holtkamp and Dr. Yacovone is denied.

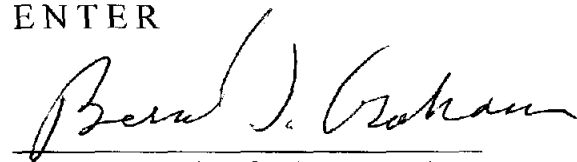
Conclusion:

While the defendants have met their burden for establishing a prima facie case for summary judgment, the plaintiff, in opposition, has met their burden to offer admissible evidence raising a question of fact as to whether the defendants departed from good and accepted medical practice in the diagnosis and treatment of the plaintiff. The issue of credibility regarding conflicting expert testimony must be submitted to the trier of fact. Accordingly, the motions by the defendants for summary judgment and a dismissal of plaintiffs' complaint, pursuant to CPLR §3212, are denied.

This shall constitute the decision and order of this Court.

Dated: November 16, 2021  
Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

HON. BERNARD J. GRAHAM

KINGS COUNTY CLERK  
FILED  
2021 NOV 23 AM 9:51