

Begina v Mir

2023 NY Slip Op 33237(U)

September 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 9330/2014

Judge: Consuelo Mallafre Melendez

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At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of September 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
IMELDA BEGINA, as Administrator of the Estate of GARY
BEGINA,

Plaintiff,

-against-

PARVEZ MIR, M.D. and WYCKOFF HEIGHTS MEDICAL
CENTER,

Defendants.

-----X
PARVEZ MIR, M.D. and WYCKOFF HEIGHTS MEDICAL
CENTER,

Third-Party Plaintiffs,

-against-

JOHN VERNALEO, M.D., GEORGE WRIGHT, M.D.,
MICHAEL HYNES, M.D., NIGHTHAWK RADIOLOGY
SERVICES, LLC, and WYCKOFF IMAGING SERVICES, P.C.,

Third-Party Defendants.

-----X
WYCKOFF HEIGHTS MEDICAL CENTER,

Second Third-Party Plaintiff,

-against-

HARISH PATEL, M.D., SIDDHARTH PANDYA, M.D., and
RICHARD FISCHBEIN, as Administrator of the Estate of
JEFFREY FISCHBEIN, M.D., deceased,

Second Third-Party Defendants.

-----X
HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:
NYSCEF #s:

DECISION & ORDER

Index No. 9330/2014
Mo. Seq. 8, 9, 10, 11, 12 &
13

Seq. 8: 77 – 79, 80 – 102, 214 – 215, 216 – 217, 219

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Defendants PARVEZ MIR, M.D. (DR. MIR) and WYCKOFF HEIGHTS MEDICAL CENTER (WYCKOFF) move this Court for an Order Pursuant to CPLR § 3212, granting summary judgment and dismissing Plaintiff's Complaint in its entirety as to the moving Defendants (SEQUENCE 8).

Third-Party Defendant GEORGE WRIGHT, M.D. (DR. WRIGHT) and Second Third-Party Defendant RICHARD FISCHBEIN as administrator of the estate of JEFFREY FISCHBEIN, M.D. (DR. FISCHBEIN) move this Court for an Order Pursuant to CPLR § 3212, granting summary judgment and dismissing Plaintiff and Third-Party Plaintiffs Complaints in their entirety as to these parties (SEQUENCE 9).

Second Third-Party Defendant SIDDHARTH PANDYA, M.D. (DR. PANDYA) moves this Court for an Order Pursuant to CPLR § 3212, granting summary judgment and dismissing Second Third-Party Plaintiff's Complaint and any claims against DR. PANDYA in their entirety (SEQUENCE 10).

Second Third-Party Defendant HARISH PATEL, M.D. (DR. PATEL) moves this Court for an Order Pursuant to CPLR § 3212, granting summary judgment and dismissing Second Third-Party Plaintiff's Complaint in its entirety as to DR. PATEL (SEQUENCE 11).

Third-Party Defendant JOHN R. VERNALEO, M.D. (DR. VERNALEO) moves this Court for an Order Pursuant to CPLR § 3212, granting summary judgment and dismissing all claims and any cross-claims or counter claims in their entirety as to DR. VERNALEO (SEQUENCE 12).

Third-Party Defendants MICHAEL HYNES, M.D. (DR. HYNES) and NIGHTHAWK RADIOLOGY SERVICES, LLC (NIGHTHAWK) move this Court for an Order Pursuant to

CPLR § 3212, granting summary judgment and dismissing Third-Party Plaintiff's complaint in

its entirety as to these parties (SEQUENCE 13).

Plaintiff has submitted opposition as to Sequences 8, 11, and 12. No opposition has been submitted in regard to Sequences 9, 10, and 13. Plaintiff submitted and unredacted expert affirmation as well as their expert's curriculum vitae.

This case involves the treatment and care rendered to Plaintiff's decedent, GARY BEGINA (MR. BEGINA), at WYCKOFF between the dates of May 17, 2012, and May 21, 2012. MR. BEGINA presented to WYCKOFF on the morning of May 17 with a history of confusion, celiac disease, fever, abdominal pain, and non-bloody diarrhea for the past three days. MR. BEGINA was evaluated by DR. MIR upon admission, who ordered a CT scan and blood cultures. Infectious Disease consultation was performed by DR. VERNALEO in the late afternoon of May 17. DR. VERNALEO ordered a lumbar puncture and started MR. BEGINA on a medication regimen for treatment of possible meningitis. After MR. BEGINA was made NPO (no food or drink) in the afternoon of May 17, he was seen by General Surgery consultation, the results of which were discussed with DR. WRIGHT. No surgical intervention was deemed warranted at the time. On May 18, a transesophageal echocardiogram (TEE) was ordered by DR. MIR to rule out endocarditis, and was scheduled to be performed the following Monday, May 21. On May 19, DR. PATEL took over for DR. MIR as the ICU attending.

On the morning of May 20, MR. BEGINA suffered an embolic stroke. On-call neurologist DR. PANDYA performed a consultation on MR. BEGINA at 9:36 a.m. and noted that tPA could not be given due to the exclusion criteria. A resident note recorded on the afternoon of May 20 indicated that an MRI of the brain and an MRA of the neck was to be done as per DR. PANDYA. A preliminary report on the MRI, created in the NIGHTHAWK system, was issued by DR. HYNES. Infectious Disease physician DR. VERNALEO advised that the antibiotics regimen MR. BEGINA was on should be changed as blood cultures grew out MSSA.

When the TEE was finally performed on May 21, MR. BEGINA presented multiple vegetations in the mitral valve anterior leaflet with mild regurgitation. After discussion with DR. PATEL, it was determined that the patient would be transferred to Weill Cornell Medical Center (Cornell) later that night. The patient was still awaiting transfer at 6:36 p.m. on May 21, and a discussion with the transfer coordinator at Cornell informed WYCKOFF that they would be called when the transfer was approved and a bed was made available. At 3:45 a.m. on May 22, Cornell picked up MR. BEGINA for transfer. At Cornell, MR. BEGINA underwent the same tests that were performed at WYCKOFF, including an additional TEE. Cornell replaced the antibiotic MR. BEGINA was receiving, Nafcillin, with Oxacillin. Cardiothoracic surgery was consulted, and surgical intervention was deemed inappropriate.

Following treatment at Cornell, MR. BEGINA became more alert and was transferred for acute rehabilitation on June 5, 2012. While MR. BEGINA initially demonstrated progress from a functional standpoint, on July 5, 2012, he passed out at the gym during therapy, exhibited seizure activity, and was transferred to the Neurology ICU. By July 8, 2012, MR. BEGINA was determined to be brain dead. On July 9, 2012, MR. BEGINA was pronounced dead. Plaintiff IMELDA BEGINA brings this action against Defendants, alleging that the negligent treatment and care provided to decedent MR. BEGINA were substantial contributing factors in his injuries and subsequent death.

“In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries [internal citations omitted].” *Hutchinson v. New York City Health and Hosps. Corp.*, 172 A.D.3d 1037, 1039 [2nd Dept. 2019] citing *Stukas v. Streiter*, 83 A.D.3d 18, 23 [2nd Dept. 2011]. “Thus, in moving for summary judgment, a physician defendant must establish, prima facie, ‘either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.’”

Hutchinson, 132 A.D.3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 A.D.3d 959, 960 [2nd Dept. 2015]. “Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted].” *Navarro v. Ortiz*, 203 A.D.3d 834, 836 [2nd Dept 2022]. ““When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.”” *Stewart v. North Shore University Hospital at Syosset*, 204 A.D.3d 858, 860 [2nd Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2nd Dept. 2020] [internal citations omitted]. “Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve.” *Palmiero v. Luchs*, 202 A.D.3d 989, 992 [2nd Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2nd Dept. 2015]. However, “expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted].” *Wagner v. Parker*, 172 A.D.3d 954, 966 [2nd Dept. 2019].

Defendants DR. MIR and WYCKOFF (SEQUENCE 8) rely on the expert testimonies of Mark Silberman, M.D. and Stanley Jay Schneller, M.D. to support their motion for summary judgment. Dr. Silberman is licensed to practice medicine in the State of New York and is board certified in Emergency Medicine and Critical Care Medicine. Dr. Schneller is licensed to practice medicine in the State of New York and is board certified in Internal Medicine with a subspecialty of Cardiovascular Disease. Dr. Silberman and Dr. Schneller opine that neither DR. MIR nor the other treating personnel at WYCKOFF deviated from the accepted standards of medical treatment, and that the treatment provided was not a substantial factor to MR. BEGINA’s injuries and subsequent death.

The experts note that MR. BEGINA was originally kept NPO when he was first admitted on Thursday, May 17, 2012, until it could be determined whether he required urgent surgery or another procedure that required him to remain NPO. A 2D transthoracic echocardiogram (TTE) was performed that evening and returned normal results. Preliminary blood cultures performed

on the morning of Friday, May 18 revealed gram-positive cocci in clusters. Further testing of blood cultures at about 1:39 in the afternoon of May 18 was positive for *Staphylococcus aureus*. Dr. Silberman and Dr. Schneller both opine that the ordering of blood cultures and subsequent antibiotic regiment that MR. BEGINA was placed on were appropriate given the facts presented. DR. MIR, the attending who first examined MR. BEGINA, ordered a transesophageal echocardiogram (TEE). It was scheduled for Monday, May 21 to rule out infective endocarditis. Informed consent for the TEE procedure was obtained by physician assistant Timothy Akojenu at 4:28 on the afternoon of Friday, May 18. Akojenu testified that a TEE could not be performed on the weekend at WYCKOFF. Second Third-Party Defendant DR. HARISH PATEL, who took over for DR. MIR as the ICU attending overseeing the care of MR. BEGINA on Saturday, May 19, also indicated in his first note of the day his plan to follow up with a TEE in light of the normal TTE findings.

Defendants' experts opine that a TEE is not typically done as a STAT procedure, even at facilities larger than WYCKOFF. TEE procedures are performed by a team of doctors and nurses, including an anesthesiologist, and requires the patient to be NPO for at least eight hours prior to the test. For these reasons, Defendants' experts asserts that TEE is not routinely performed in the evening or on weekends, even at larger tertiary care centers. Dr. Schneller opines that performing a TEE is invasive and carries significant risks, and that they are not performed without due consideration of those risks.

Dr. Silberman opines that even had a TEE been performed either on the evening of May 18 or at some point the next day, the result of the TEE would have simply confirmed that the patient had bacterial endocarditis, and the same antibiotic treatment that MR. BEGINA was receiving would be continued. He asserts that performing the TEE earlier would not have changed the treatment and would not have changed the outcome that MR. BEGINA ultimately suffered.

These experts further opine that there was no indication to transfer the patient to a tertiary care center either when he was first admitted, or on the afternoon of Friday, May 18. They claim that MR. BEGINA received timely consultations and testing while at WYCKOFF and transferring MR. BEGINA would require the other hospital to perform its own evaluation of the patient, obtain its own blood cultures, and schedule the TEE in advance so that the patient could remain NPO for eight hours. Further, they claim that these repeated tests and assembly of a cardiac surgery team were not possible to complete before MR. BEGINA suffered his stroke in the early morning hours of May 20. Dr. Silberman and Dr. Schneller again assert that even had the receiving hospital performed a TEE, the treatment would have remained the same and the embolic stroke that MR. BEGINA suffered on the morning of May 20 would not have been prevented. The experts note that Cornell, the institution to which MR. BEGINA was eventually transferred, maintained the antibiotics treatment that MR. BEGINA was originally on, with the only difference being a substitution of Nafcillin instead of Vancomycin.

Second Third-Party Defendant DR. PATEL (SEQUENCE 11) relies on the expert testimony of Amit Uppal, M.D. to support his motion for summary judgment. Dr. Uppal is licensed to practice medicine in the State of New York and is board certified in Internal Medicine, Pulmonary Medicine, and Critical Care. Dr. Uppal opines that DR. PATEL did not deviate from the accepted standards of medical treatment, and nothing that he did or failed to do caused or contributed to the claimed injuries.

For reasons paralleling those asserted by DR. MIR and WYCKOFF's expert, Dr. Uppal opines that DR. PATEL was not negligent in failing to perform a TEE or failing to transfer MR. BEGINA to a facility where a TEE could be performed. As with the MRI, the TEE had already been ordered by DR. MIR prior to DR. PATEL taking over as the attending overseeing the care of MR. BEGINA. Again, it is pointed out that TEEs are not performed on weekends, which is when DR. PATEL first saw MR. BEGINA. Thus, Defendant's counsel argues that there's no

evidence that if DR. PATEL ordered a TEE on a STAT basis, it would have led to the

performance of a TEE on Saturday May 19. Dr. Uppal opines that TEEs in general are not performed urgently unless the patient was in cardiac shock or the TEE would provide guidance for a planned emergency cardiac procedure, neither of which Dr. Uppal believes applied to MR. BEGINA. Additionally, Dr. Uppal notes that MR. BEGINA was already being treated for endocarditis through Vancomycin and later Nafcillin, even though it had not been definitively diagnosed.

Dr. Uppal opines that it was appropriate to transfer MR. BEGINA from the ICU on May 19, 2012. MR. BEGINA's bloodwork was improving, many of his levels had normalized when they previously had abnormal results, his vital signs were normal, his kidney function was improving, and he was not feverish. For these reasons, Dr. Uppal opines that there was no indication on May 19 that MR. BEGINA had to remain in the ICU or that he needed close monitoring. In Dr. Uppal's opinion, it was unclear why MR. BEGINA was even admitted to the ICU in the first place as he had no indication for life supporting therapies or intensive monitoring at the time.

Dr. Uppal opines that DR. PATEL did not delay the performance of the brain MRI, or delay in diagnosing MR. BEGINA's stroke. The MRI had been ordered by DR. MIR prior to DR. PATEL taking over, and Dr. Uppal asserts that there was no indication that an MRI was needed on an urgent basis, as MR. BEGINA was talking, ambulating, eating, and was more alert, which had been his only neurological symptom. Thus, Dr. Uppal opines that it was appropriate for DR. PATEL to rely on the plan laid out by DR. MIR.

In Dr. Uppal's opinion, MR. BEGINA's improved condition and transfer out of the ICU prior to the stroke demonstrate that there was no indication for MR. BEGINA to be transferred to another facility. Dr. Uppal asserts that an interfacility transfer would require an accepting doctor,

adequate handoff, medical stabilization, financial clearance, identification of an available bed,

and arrangement for the physical transport. Dr. Uppal points out that one doctor at Cornell had refused MR. BEGINA's transfer before a second doctor ultimately accepted.

Dr. Uppal opines that even had the TEE been performed on the day DR. PATEL assumed care over MR. BEGINA, either at WYCKOFF or at the facility to which he was transferred, it is speculative to say that surgery would have been performed on MR. BEGINA right away. Based on MR. BEGINA's bloodwork, the fact that he was not in cardiac shock, and a high risk of hemorrhagic complications, Dr. Uppal opines that surgery would not have been emergent.

Plaintiff presents the expert testimony of REDACTED (THE PHYSICIAN) in opposition to Defendants' motion for summary judgment. THE PHYSICIAN is licensed to practice in the State of New York, and is board certified in Internal Medicine and Cardiovascular Disease. They have routinely diagnosed and treated patients with infective endocarditis and are familiar with the standard of care at the time MR. BEGINA was treated.

Defendants DR. MIR and WYCKOFF and Second Third-Party Defendant DR. PATEL assert that Plaintiff's expert is not qualified to opine on the treatment and care provided by DR. MIR and DR. PATEL, claiming that Plaintiff's expert lacks familiarity with the ICU setting and the standard of care in the locality of WYCKOFF in 2012. Although an expert need not practice in the same specialty as the defendant physician, the expert is required to lay a foundation tending to support the reliability of his or her opinion. *See, Gullo v. Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, 157 A.D.3d 773, 774 (2nd Dept. 2018). In cases where plaintiff's expert does not provide a factual basis as to the standard of care on which they are opining, either through their own experience or other proffered evidence, their opinion is insufficient as a matter of law to overcome a defendant's motion for summary judgment. *Diaz v. New York*

Downtown Hosp., 99 N.Y.2d 542, 545 (2002); *See also, Shectman v. Wilson*, 68 A.D.3d 848, 850

(2nd Dept. 2009).

Based on Plaintiff's expert's experience in Internal Medicine and as a practicing cardiologist in diagnosing and treating patients with infective endocarditis, this Court finds that Plaintiff's expert possesses the requisite skill, training, education, and knowledge to support the opinion's reliability as it pertains to the claims against DR. MIR, WYCKOFF, and DR. PATEL.

THE PHYSICIAN's primary assertion regarding the liability of Defendants DR. MIR and WYCKOFF HOSPITAL, Third-Party Defendant DR. VERNALEO, and Second Third-Party Defendant DR. PATEL in this claim for medical malpractice is that the Defendants negligently delayed the diagnosis of infective endocarditis by not performing the TEE on a STAT basis. They claim that this negligence caused MR. BEGINA to suffer an embolic stroke that was a substantial contributing factor to his demise. While a TTE was performed and returned normal results, Plaintiff's expert contends that a TTE and a TEE have complimentary roles, and that normal results from a TTE do not rule out infective endocarditis as the visualization of vegetation is obscured in a TTE due to functional limitations and reduced image quality. Plaintiff's expert opines that the superior visualization and sensitivity of a TEE provides for better detection of valvular vegetation, which they claim ultimately caused MR. BEGINA's embolic stroke. They claim that the standard of care when presented with positive blood cultures both now and in 2012 is to immediately perform a TEE to rule out infective endocarditis. The expert opines that a cardiology team should have been assembled to perform the TEE no later than May 19, 2012, and that DR. MIR, DR. VERNALEO, and DR. PATEL's failure to order the TEE on a STAT basis was a departure from the accepted standard of care. DR. MIR and DR. PATEL were the ICU attendings on May 18 and May 19, respectively. They claim that their failure to perform the TEE after MR. BEGINA's pre-assessment by PA Timothy Akajenu constitutes a departure from accepted standard of care.

Contrary to the assertion by Defendants' expert that an earlier TEE would not have

changed the course of treatment or MR. BEGINA's ultimate demise, Plaintiff's expert contends that the findings from a TEE directly correlates to the need for surgical intervention that would reduce the complications of infective endocarditis. Plaintiff's expert asserts that the findings from an earlier TEE would have prompted MR. BEGINA to be transferred to a facility equipped to perform immediate cardiac surgery to reduce the valvular vegetations in his heart before those vegetations embolized to his brain and caused him to suffer a stroke. Specifically, they claim that an MRI performed on May 20, after MR. BEGINA suffered his embolic stroke, demonstrate that there was objective evidence that numerous zones of bilateral stroke measuring up to 2 cm in size were initially on his mitral valve before embolization. They assert that since the TEE that was ultimately performed on May 21 was after MR. BEGINA suffered his embolic stroke, there was less vegetation displayed on the TEE that would have been present had the TEE been performed before the stroke occurred. Thus, if a STAT TEE had been performed either on Friday May 18 or ordered by Dr. Patel on Saturday May 19 and performed that day, surgery on the mitral valve could have been performed to eradicate the vegetations, and the embolic stroke would have been prevented.

Plaintiff's expert also raises an issue of fact as to proximate cause. The expert opines Defendants' negligent omission in timely performing a TEE prevented the diagnosis of severe valvular vegetation and precluded the ability to remove those vegetations prior to MR. BEGINA suffering his massive embolic stroke. Defendants negligently squandered an opportunity to not only diagnose but also to definitively treat IE. The expert opines that as a result of Defendants' negligence, Mr. BEGINA suffered a debilitating massive embolic stroke that was a substantial contributing factor to his demise.

Plaintiff's expert opines that the Defendants' conduct in transferring MR. BEGINA to Cornell after obtaining the results from the TEE that was ultimately performed on May 21

demonstrates that MR. BEGINA would have been transferred to Cornell earlier had they performed the TEE earlier. While Defendants' claim that the receiving hospital would have had to repeat a TEE which would have delayed any surgical intervention before MR. BEGINA suffered the stroke, Plaintiff's expert contends that MR. BEGINA's delayed transfer presented him to Cornell in a condition too poor to undergo surgical intervention, as noted by consultation from cardiothoracic surgery. In Plaintiff's expert's opinion, had MR. BEGINA been timely transferred before suffering his stroke, the findings that would have been seen on an earlier TEE would have been sufficient to warrant valve surgery without the need to repeat the TEE. Plaintiff's expert opines that as a result of the embolic stroke, MR BEGINA was no longer a candidate for cardiac surgical intervention once he finally was transferred to Weill Cornell Medical Center.

Plaintiff's expert notes that Defendants did not claim that WYCKOFF was not equipped to perform the TEE, but rather Defendants only asserted that TEEs are not generally performed on weekends. They point towards the objective clinical picture on May 18 as evidence that WYCKOFF should have ordered a TEE on an immediate basis. Further, if a hospital is not equipped to perform a STAT TEE, Plaintiff's expert contends that the appropriate course of action would be to transfer the patient to a facility that is equipped to perform the procedure.

The opinions of experts submitted on behalf of DR. MIR, WYCKOFF, and DR. PATEL are well detailed and demonstrate the absence of any material issues of fact. However, in opposition, Plaintiff has raised issues of fact regarding the claims against Defendants PARVEZ MIR, M.D. and WYCKOFF HEIGHTS MEDICAL CENTER. At the very least, issues of fact were raised as to these defendants regarding whether the timing of the TEE procedure constituted a departure from the standards of care. Plaintiff's expert also raised an issue of fact as to whether the claimed deviations were as substantial factor in causing Mr. Begina's injuries.

Plaintiff has also raised issues of facts against Second Third-Party Defendant HARISH PATEL, M.D., in particular, as to whether Dr. Patel departed from the standard of care in not ordering a TEE procedure on May 19. Here too, plaintiff also raised an issue of fact as to whether this alleged deviation was a substantial factor in causing Mr. Begina's injuries. Therefore, summary judgment is denied as to PARVEZ MIR, M.D. and WYCKOFF HEIGHTS MEDICAL CENTER and HARISH PATEL, M.D. (As noted below, claims for lack of informed consent against Dr. Patel are dismissed as summary judgment is granted on that cause of action against him.) "When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution" (*Shields v Baktidy*, 11 AD3d 671, 672 [2004]; see *Rosenstack v Wong*, 106 AD3d 804, 806 [2013]). *Russell* 189 AD3d at 1102.

Defendants contend that any of Plaintiff's allegations in their Bill of Particulars that were not addressed specifically by the Plaintiff's Expert Affirmation in Opposition should be dismissed. Defendants cite a variety of cases in support of this notion, including *Genovese v. Gambino*, 309 A.D.2d 832, 833 (2nd Dept. 2003) and *McNamee Constr. Corp. v. City of New Rochelle*, 29 A.D.3d 544, 545 (2nd Dept. 2006). However, these cases deal with dismissing claims in their entirety due to the plaintiff failing to address the defendants' arguments in that regard, as opposed to dismissing portions of the Bill of Particulars as unaddressed by plaintiff in their affirmation in opposition. As such, any portion of a claim not specifically rebutted by Plaintiff in their Expert's Affirmation in Opposition, is not dismissed in accordance with the decision herein. Regardless, the court is of the opinion that Plaintiff's expert covered and offered detailed opinions on all the claims for which these defendants established their prima facie entitlement. Indeed, as mentioned above, Plaintiff raised issues of fact to defeat the motions of DR. MIR, WYCKOFF, and DR. PATEL (except as to lack of informed consent claim regarding Dr. Patel only).

As to the claim against DR. PATEL regarding failure to obtain informed consent, Dr.

Uppal asserts that DR. PATEL did not perform any procedures on MR. BEGINA that would require informed consent. This is not opposed by Plaintiff, and thus summary judgment is GRANTED in favor of DR. PATEL as to this claim.

Third-Party Defendant DR. VERNALEO, an infectious diseases specialist, relies on the expert testimony of Irwin Ingwer, M.D. (Dr. Ingwer) to support his motion for summary judgment (SEQUENCE 12). Dr. Ingwer is licensed to practice medicine in the State of New York and is board certified in Internal Medicine and Infectious Disease. Dr. Ingwer opines that DR. VERNALEO did not deviate from the accepted standards of medical treatment, and nothing that he did or failed to do proximately caused the claimed injuries.

Dr. Ingwer opines that as an infectious disease consultant, DR. VERNALEO was not involved in the ordering, coordinating, or scheduling of a TEE. The patient was in the ICU when DR. VERNALEO saw the patient. As a consultant, DR. VERNALEO can see a patient in ICU and make recommendations. Dr. Ingwer notes that Dr. Mir testified that the ICU at Wyckoff is a closed unit, which means that patients admitted to the ICU they are under the care of the ICU attending. The ultimate decision with regards to the treatment of a patient in the ICU would be the ICU attending. The expert further opined that DR. VERNALEO followed the standard of care when, on May 18, he recommended that a TEE be obtained in view of the results of the blood culture findings and his differential changed from meningitis to staph aureus septicemia with possible endocarditis.

Dr. Ingwer opines that DR. VERNALEO appropriately considered meningitis and recommended a lumbar puncture be performed in light of the patient's condition. He further opines that the antibiotic coverage provided by DR. VERNALEO to MR. BEGINA for sepsis, encephalitis, concern for central nervous finding, and meningitis met the standard of care in

2012. Dr. Ingwer shares the same belief as the other Defendants regarding the TEE; notably, that the treatment provided to MR. BEGINA would have remained the same regardless of the timing of the TEE. Thus, the recommendations provided by DR. VERNALEO would have remained the same even had the TEE been performed earlier. Dr. Ingwer notes that even after Cornell obtained their own TEE and blood cultures, MR. BEGINA continued to receive the same antibiotic therapy for endocarditis, with the only difference being changing from Nafcillin to Oxacillin. As both medications are in the same class of antibiotics, Dr. Ingwer opines that they are equally effective for MR. BEGINA's condition.

The court finds that the opinions offered by the expert, Dr. Ingwer makes out prima facie showing of entitlement to summary judgment in favor of DR. VERNALEO. However, the court finds that Plaintiff's expert, an internist/cardiologist, is unqualified to proffer an opinion on care and treatment rendered by an infectious disease specialist. "An expert is qualified to proffer an opinion if he or she possesses the requisite skill, training, education, knowledge, or experience to render a reliable opinion." *de Hernandez v. Lutheran Medical Center*, 46 A.D.3d 517, 518 (2nd Dept. 2007). "It is within the Supreme Court's sound discretion to determine whether a particular witness is qualified to testify as an expert, and its determination will not be disturbed in the absence of a serious mistake, an error of law, or an improvident exercise of discretion." *Id.* at 517, 518. As Plaintiff's expert is board certified in Internal Medicine and Cardiovascular Disease, they are not qualified to opine as to the care and treatment provided by DR. VERNALEO as MR. BEGINA's infectious disease consultant. On the other hand, DR. VERNALEO's expert, Dr. Ingwer, possesses the proper expertise in Infectious Disease to opine on the care and treatment provided by DR. VERNALEO.

Even if the court had determined Plaintiff's expert qualified to opine as to DR. VERNALEO's treatment, summary judgment must nevertheless be granted to DR. VERNALEO as his role with this patient was solely as an infectious disease consultant. A physician's duty,

“may be limited to those medical functions undertaken by the physician and relied on by the

patient.” *Boone v. N. Shore Univ. Hosp. at Forest Hills*, 12 A.D.3d 338 (2nd Dept. 2004). His responsibilities did not include placing orders, rather as a consultant he was making recommendations with regards to the treatment of the patient. Further, the record indicates that on Friday May 18 at 2:57 pm DR. VERNALEO recommended that a TEE be performed. While it is a fact that TEE was not performed on Friday there is no evidence that its scheduling for Monday was a result of an order from DR. VERNALEO. Based on the submissions and expert opinions in support of this defendant’s motion, a prima facie burden has been met. As Plaintiff does not raise an issue of fact with the opinions of his expert, summary judgment is GRANTED as to JOHN R. VERNALEO, M.D. and all claims relating to this defendant are dismissed. The Clerk is directed to enter judgment accordingly to these defendants.

In conclusion, summary judgment is DENIED as to all claims relating to PARVEZ MIR, M.D., and WYCKOFF HEIGHTS MEDICAL CENTER (SEQUENCE 8).

Summary judgment is GRANTED only to the extent that claims against Second Third-Party Defendant HARISH PATEL, M.D. for failure to obtain informed consent are dismissed; and the motion is DENIED as to all remaining claims relating to HARISH PATEL, M.D. (SEQUENCE 11).

Summary judgment is GRANTED as to JOHN R. VERNALEO, M.D. and accordingly all claims relating to this Defendant are dismissed. The Clerk is directed to enter judgment accordingly to this Defendant (SEQUENCE 12).

Plaintiff does not oppose that portion of Third-Party Defendants’ and Second Third-Party Defendants’ motions seeking dismissal of claims relating to the alleged negligent care rendered by Third-Party Defendant GEORGE WRIGHT, M.D. and Second Third-Party Defendant RICHARD FISCHBEIN as Administrator of the Estate of JEFFREY FISCHBEIN, M.D. (SEQUENCE 9), Second-Third Party Defendant SIDDARTH PANDYA, M.D. (SEQUENCE

10), and Third-Party Defendants MICHAEL HYNES, M.D. and NIGHTHAWK RADIOLOGY

SERVICES, LLC (SEQUENCE 13). Claims against these defendants are also not opposed by Third-Party and Second Third-Party Plaintiffs. Accordingly, summary judgment is granted and all claims relating to GEORGE WRIGHT, M.D., RICHARD FISCHBEIN as Administrator of the Estate of JEFFREY FISCHBEIN, M.D., SIDDARTH PANDYA, M.D., MICHAEL HYNES, M.D., and NIGHTHAWK RADIOLOGY SERVICES, LLC are dismissed, as unopposed by the Plaintiffs.

The parties remaining in the case are directed to submit a stipulation to be so ordered amending the caption to reflect the dismissals granted herein

This constitutes the decision and order of the court.

ENTER.



Hon. Consuelo Mallafre Melendez, J.S.C.

This Decision was drafted with the assistance of intern Harrison Busalacchi, Brooklyn Law School.