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Is It Medical Malpractice? Targeted Research on Causes of Action Tangential to Diagnosis and Treatment. Decision-Summaries Drawn Entirely from the New York Appellate Digest Database. Research on December 17, 2020.

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IS IT MEDICAL MALPRACTICE?

TARGETED RESEARCH ON CAUSES OF ACTION TANGENTIAL TO DIAGNOSIS AND TREATMENT.

BATTERY, INTENTIONAL ACT WITHOUT CONSENT.

HE ALLEGATION THAT DEFENDANT SURGEONS PERFORMED A CHIROPRACTIC PROCEDURE DURING SPINAL FUSION SURGERY SOUNDED IN BATTERY, NOT MEDICAL MALPRACTICE, AND WAS TIME-BARRED; PLAINTIFF'S EXPERT, A CHIROPRACTOR, WAS NOT QUALIFIED TO OFFER AN OPINION ABOUT DEFENDANTS' SURGERY (THIRD DEPT).

The Third Department determined plaintiff's allegation the defendant doctors derotated her pelvis (a chiropractic procedure) during spine fusion surgery sounded in battery, not medical malpractice, because the claim alleged intentional, not negligent, conduct. Therefore the one-year statute of limitations applied and the action was time-barred. Plaintiff's expert, a chiropractor, was not qualified to offer an opinion about the surgery performed by the defendants:

… [A]ny claim that defendants derotated plaintiff's pelvis as a separate procedure from the surgery to which she consented is necessarily an allegation that they acted intentionally. Despite the fact that plaintiff's complaint alleges only negligence, "when a patient agrees to treatment for one condition and is subjected to a procedure related to a completely different condition, there can be no question but that the deviation from the consent given was intentional" … . As such, this claim is subject to the one-year statute of limitations for the intentional tort of battery — that is, "intentional physical contact with another person without that person's consent" — rather than the 2½-year period applicable to medical malpractice claims … . Young v Sethi, 2020 NY Slip Op 06330, Third Dept 11-5-20

BATTERY, NO CONSENT.

COMPLAINT ALLEGING A MEDICAL PROCEDURE WAS PERFORMED TO WHICH PLAINTIFF DID NOT CONSENT STATED A CAUSE OF ACTION FOR BATTERY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff had stated a cause of action for battery alleging a medical procedure, a colonoscopy, was performed without her consent, causing bleeding.

"It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided no consent at all' " … . Here, in moving under CPLR 3211 (a) (7), defendants attached all of the pleadings, which alleged, inter alia, that defendants "performed a procedure upon the Plaintiff while she was under general anesthesia without informing her or obtaining any consent, which conduct constituted a battery upon her." Defendants also referenced and provided to the court the informed consent form executed by plaintiff that explicitly authorized the performance of a flexible sigmoidoscopy, but not a colonoscopy. The form further noted in relevant part that, "[i]f any unforeseen condition arises during the procedure calling for, in the physician's judgment, additional procedures, treatments, or operations, [defendant is] authorize[d] . . . to do whatever he . . . deems advisable." We conclude that plaintiff has sufficiently asserted a cause of action sounding in battery by alleging that she provided no consent to the performance of a colonoscopy … , and that the evidentiary submissions considered by the court, including the consent form, do not "establish conclusively that plaintiff has no cause of action" sounding in battery … . McCarthy v Shah, 2018 NY Slip Op 04887, Fourth Dept 6-29-18

BATTERY, NO CONSENT.

BATTERY CAUSE OF ACTION BASED UPON THE COMPLETE ABSENCE OF CONSENT OR FRAUDULENTLY INDUCED CONSENT IS NOT DUPLICATIVE OF A DENTAL MALPRACTICE ALLEGATION—CRITERIA EXPLAINED/QUESTIONS OF FACT RAISED RE: THE DECEPTIVE BUSINESS PRACTICES CAUSE OF ACTION—SOME OF THE CRITERIA EXPLAINED

The Fourth Department determined the cause of action for battery was not duplicative of the cause of action for dental malpractice because it was based upon the allegations consent to the procedure was completely absent or was fraudulently induced. In addition, there were questions of fact re: the deceptive business practices cause of action:

…[T]he cause of action asserting the complete absence of consent and/or fraudulently induced consent for treatment is properly treated as one for battery rather than for dental malpractice, and it is not duplicative of the dental malpractice cause of action … . "It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided no consent at all' " … . The court properly denied that part of the … defendants' motion with respect to the battery cause of action, inasmuch as they failed to meet their initial burden of establishing that they "did not intentionally engage in offensive bodily contact without plaintiff's consent"… . …

A cause of action for deceptive business practices under section 349 "requires proof that the defendant engaged in consumer-oriented conduct that was materially deceptive or misleading, causing injury" … . Even assuming, arguendo, that the … defendants met their initial burden by establishing that the underlying transaction was private in nature and the allegedly deceptive acts were not aimed at the public at large …, we conclude that plaintiff's submissions raised issues of fact concerning whether the … defendants engaged in a scheme to place profits before patient care, which allegedly included fraudulent practices that impacted consumers at large beyond a particular dentist's treatment of an individual patient … . Matter of Smiles, 2015 NY Slip Op 01362, 4th Dept 2-13-15

BATTERY.

SIGNED CONSENT FORM PRECLUDED CAUSE OF ACTION FOR ASSAULT AND BATTERY (RE: A HYSTERECTOMY)—DEFENDANT DEMONSTRATED THE ALLEGATION PLAINTIFF DID NOT CONSENT TO THE HYSTERECTOMY WAS "NOT A FACT AT ALL"–QUESTION OF FACT RAISED RE: THE "LACK OF INFORMED CONSENT" CAUSE OF ACTION

The Second Department, over a partial concurrence/dissent, determined defendant was entitled to dismissal of the assault and battery cause of action, which was based on the allegation a hysterectomy was performed without plaintiff's consent. The evidence however demonstrated plaintiff signed a consent form, and thereby demonstrated that the "without consent" factual allegation was "not a fact at all." Plaintiff did, however raise a question of fact concerning the "lack of informed consent" cause of action. The court explained the elements of assault and battery in this context, the elements of a "lack of informed consent" cause of action, as well as how to handle a motion to dismiss for failure to state a cause of action which is accompanied by evidentiary submissions:

"When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one . . . [The motion] must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" … .

"To plead a cause of action to recover damages for assault, a plaintiff must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact'" … . "To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature" … . Here, the evidence in the record upon which the Supreme Court relied established that "a

material fact as claimed by the plaintiff" was "not a fact at all" … . Notwithstanding the plaintiff's allegations and testimony that she never gave permission for the performance of a hysterectomy, the signed consent form clearly authorized such a procedure, and she admitted that she signed the consent form. Therefore, dismissal of the assault and battery cause of action was proper … .

"To succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment (see Public Health Law § 2805-d [1], [3])…). Here the plaintiff's deposition testimony indicates that she was not fully advised of the risks, benefits, and alternatives to the procedure or treatment, including the fact that one of the risks was a total hysterectomy and/or perforation of the bowel, nor was it established as a matter of law that if the plaintiff received full disclosure, she still would have consented to the procedure. Since the defendants' submissions included the plaintiff's deposition testimony, they failed to establish, prima facie, that there were no triable issues of fact with respect to the cause of action alleging lack of informed consent … . Accordingly, the Supreme Court should have denied that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging lack of informed consent. Thaw v North Shore Univ. Hosp., 2015 NY Slip Op 05173, 2nd Dept 6-17-15

DEPRESSION, SUICIDE.

MALPRACTICE ACTION FOR DEPRESSION-TREATMENT PRIOR TO SUICIDE IS ACTIONABLE.

The Second Department determined a cause of action for malpractice in treating plaintiff's decedent for depression prior to her committing suicide should not have been dismissed:

Here, the complaint sought damages for conscious pain and suffering arising from Family Services' alleged negligence in treating the decedent's depression during the period between October 19, 2005, and the time of her death about 10 days later. That cause of action states a cognizable legal theory sounding in professional malpractice … .

Further, EPTL 11-3.2(b), referred to as the "survival statute" …, provides that "[n]o cause of action for injury to person . . . is lost because of the death of the person in whose favor the cause of action existed." A cause of action based on personal injuries which survives the death of the decedent is distinct from a cause of action to recover damages for wrongful death … . Accordingly, the cause of action to recover damages for conscious pain and suffering predicated on alleged acts of professional malpractice committed between October 19, 2005, and October 28, 2005, survived the decedent's death, and damages for such pain and suffering may be recoverable by her estate … . **Stolarski v Family Servs of Westchester Inc, 2013 NY Slip Op 06850, 2nd Dept 10-23-13**

FAILURE TO WARN OF DISORIENTING EFFECTS OF DRUGS.

DOCTORS, WHO ALLEGEDLY FAILED TO WARN PATIENT OF DISORIENTING EFFECTS OF DRUGS, OWED A DUTY OF CARE TO PLAINTIFF, WHO WAS STRUCK BY A VEHICLE DRIVEN BY THE PATIENT.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over an extensive dissenting opinion by Judge Stein (in which Judge Abdus-Salaam concurred), determined a medical malpractice complaint alleging defendant hospital and doctors owed a duty of care to plaintiff, who was injured by a patient, should not have been dismissed. The patient was treated with drugs which could impair her ability to drive but allegedly was not warned of that effect by the treating doctors. Shortly after leaving the hospital, the patient crossed a double yellow line and struck plaintiff's vehicle. The Court of Appeals held that the injured plaintiff's complaint, which alleged the negligent failure to warn the patient of the impairment of the ability to drive, stated a cause of action, sounding in medical malpractice, against the defendant hospital and doctors:

Here, put simply, to take the affirmative step of administering the medication at issue without warning [the patient] about the disorienting effect of those drugs was to create a peril affecting every motorist in [the patient's] vicinity. Defendants are the only ones who could have provided a proper warning of the effects of that medication. Consequently, on the facts alleged, we conclude that defendants had a duty to plaintiffs to warn [the patient] that the drugs administered to her impaired her ability to safely operate an automobile … . Davis v South Nassau Communities Hosp., 2015 NY Slip Op 09229, CtApp 12-16-15

FALLS, BLOOD DRAW.

THE ALLEGED NEGLIGENCE IN THE PROCEDURE USED WHEN PLAINTIFF DONATED BLOOD SOUNDED IN MEDICAL MALPRACTICE, DESPITE THE FACT THAT NO DOCTOR WAS INVOLVED IN THE PROCEDURE; PLAINTIFF'S FAILURE TO PROVIDE A CERTIFICATE OF MERIT AS REQUIRED BY CPLR 3012-a WAS DUE TO THE GOOD FAITH BELIEF THE ACTION SOUNDED IN COMMON LAW NEGLIGENCE; THE ACTION SHOULD NOT HAVE BEEN DISMISSED WITHOUT AFFORDING PLAINTIFF THE OPPORTUNITY TO PROVIDE A CERTIFICATE OF MERIT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court, determined: (1) the action stemming from alleged negligence in drawing blood donated by plaintiff sounded in medical malpractice, not common law negligence; (2) therefore a certificate of merit was required (CPLR 3012-a); and (3) the failure to provide a certificate of merit does not warrant dismissal of the action, rather the plaintiff should be allowed 60 days to provide the certificate:

… [M]any of the plaintiff's allegations bear a substantial relationship to the rendition of medical treatment to a particular patient …. The complaint alleges, inter alia, that the defendant failed to properly screen the plaintiff for health problems, obtain her medical history, monitor her physical condition, measure her hemoglobin levels, and keep her at the donation site for a specific period of time to observe any signs of an adverse reaction. The issues of whether the plaintiff needed additional screening, monitoring, or supervision, and whether she was at risk of falling due to a medical condition, involve the exercise of medical

judgments beyond the common knowledge of ordinary persons. Only a medical professional would know what factors make a person ineligible to donate blood, how much blood should be drawn, what constitutes the signs and symptoms of an adverse reaction, and how to immediately treat an adverse reaction. Thus, the interaction between the plaintiff and the defendant implicates issues of medical judgment that sound in medical malpractice. * * *

… [A]lthough the complaint was not accompanied by a certificate of merit as required by CPLR 3012-a, dismissal of the complaint is not warranted as the plaintiff's attorney should be provided with an opportunity to comply with the statute now that it is determined that the statute applies to this particular action … . There is no reason to believe from this record that the plaintiff's attorney's failure to file a certificate of merit was motivated by anything other than a good faith assessment that CPLR 3012-a did not apply to the action. The proper remedy at this stage, since the defendant had also sought in its underlying motion "such other and further relief as this court may deem just, proper and reasonable" … , is for this Court to extend the plaintiff's time to serve a certificate of merit upon the defendant until 60 days after service of this opinion and order. Only if the plaintiff is recalcitrant in complying with both the statute and this Court's order may the Supreme Court, in its discretion, then dismiss the complaint … . Rabinovich v Maimonides Med. Ctr., 2019 NY Slip Op 08724, Second Dept 12-4-19

FALLS, FAILURE TO RESTRAIN.

INJURIES STEMMING FROM FAILURE TO RESTRAIN A PATIENT WITH DEMENTIA FALL UNDER THE MEDICAL MALPRACTICE, NOT NEGLIGENCE, STATUTE OF LIMITATIONS, PLAINTIFF'S ACTION IS TIME-BARRED (SECOND DEPT).

The Second Department determined the medical malpractice (2 1/2 year) rather than the negligence (3 year) statute of limitations applied to this action stemming from the alleged failure to restrain a patient (plaintiff's decedent) with dementia. The patient was injured when she fell. The court held the action was governed by the medical malpractice limitations period and was therefore untimely:

"The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art

requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts" … . Generally, a claim will be deemed to sound in medical malpractice "when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician'" … . Thus, when the complaint challenges a medical facility's performance of functions that are "an integral part of the process of rendering medical treatment" and diagnosis to a patient, such as taking a medical history and determining the need for restraints, the action sounds in medical malpractice… .

… The defendants' evidence showed that on April 12, 2009, the plaintiff's decedent, Ruby Bell (hereinafter the decedent), was admitted to New Island Hospital with a history of dementia, and placed on "Fall Prevention Protocol." After the decedent was found standing at her bedside trying to remove her foley catheter, a physician ordered that she be restrained with a vest and wrist restraints. On the morning of April 18, 2009, the decedent was discovered sitting on the floor next to her bed. The bed's side rails were up and the decedent was not aware of how she came to be on the floor. She had apparently fallen while trying to climb out of her bed. Thereafter, the decedent was diagnosed with a distal radius fracture of the right forearm. The plaintiff alleged that this incident arose out of the failure of the defendants' staff to follow the physician's order to restrain her … .

In opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contentions, the allegations at issue essentially challenged the defendants' assessment of the decedent's supervisory and treatment needs … . Bell v WSNCHS N., Inc., 2017 NY Slip Op 05937, 2nd Dept 8-2-17

FALLS, FALL FROM BED.

QUESTION OF FACT WHETHER FALL FROM BED WAS THE RESULT OF THE FAILURE TO TAKE ADEQUATE PRECAUTIONS AGAINST FALLING AND QUESTION OF FACT WHETHER THE FALL EXACERBATED THE PROGRESSION OF PLAINTIFF'S INTERCRANIAL HEMORRHAGE IN THIS MEDICAL MALPRACTICE ACTION, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs raised a question of fact about whether defendants in this medical malpractice case deviated for accepted standards of care. Plaintiff Salgado, who was suffering from an intercranial hemorrhage, fell out of bed, which may have exacerbated the progression of the hemorrhage. There was a question of fact whether proper precautions to prevent a fall were taken, given that Salgado had no right hand grip or right arm or leg movement:

… [T]he plaintiffs raised triable issues of fact as to whether the defendants departed from accepted standards of practice by failing to prevent Salgado from falling out of bed and whether his injuries were exacerbated by his fall. More particularly, the plaintiffs submitted the affirmation of an expert who opined that the monitoring and precautions against falls implemented by the hospital in its Medical Intensive Care Unit departed from accepted standards of practice because, given the medical condition noted in Salgado's chart, i.e., "calm" and "lethargic" with no right hand grip or right arm or leg movement early the same day, Salgado's fall could not have occurred unless restraints were improperly applied. Furthermore, with respect to causation, the plaintiffs' expert opined that the increase in the size of Salgado's intercranial hemorrhage from the morning of the fall, accompanied by the new onset of midline shift, was too extensive and rapid in onset to be due solely to the natural progression of Salgado's original hemorrhage. Salgado v North Shore Univ. Hosp., 2018 NY Slip Op 08967, Second Dept 12-26-18

FALLS, FALL FROM EXAMINING TABLE.

ELDERLY PATIENT'S FALL FROM AN EXAMINING TABLE IMPLICATED A DUTY OF CARE WHICH TAKES INTO ACCOUNT PATIENT'S INFIRMITIES/ELDERLY AND INFIRM PATIENT'S FALL FROM EXAMINING TABLE SOUNDS IN MEDICAL MALPRACTICE, NOT ORDINARY NEGLIGENCE.

The Third Department, in a full-fledged opinion by Justice Garry, determined a new trial was necessary in a case stemming from 81-year-old plaintiff's decedent's fall from an examining table in a doctor's office. The Third Department found that the trial judge fashioned a jury instruction which erroneously included premises liability principles and erroneously failed to take into account the particular infirmities of plaintiff's decedent. In addition the trial court erroneously determined the case sounded in negligence, as opposed to medical malpractice:

Recovery in a premises liability action is predicated on "ownership, occupancy, control or special use of [a] property" where a dangerous or defective condition exists … . Here, decedent neither alleged that [defendant's] liability arose from its ownership of dangerous or defective premises nor that any defects or dangerous conditions existed … . Instead, decedent asserted that [defendant] was liable for the acts and omissions of its employees in failing to recognize the need for, or provide decedent with, adequate assistance and supervision — an analysis unrelated to the physical condition of the medical office or the legal principles underlying premises liability. Supreme Court's attempt to combine the two concepts resulted in an instruction that improperly advised the jury that decedent was required to prove that the premises were unsafe. Moreover, the instruction confusingly directed the jury to evaluate the actions of the medical assistant twice, first by determining whether her actions were "reasonably safe" and then — without clarifying the distinction, if there is one — whether those same actions were negligent.

The modified instruction further misstated the threshold issue of the applicable duty of care. "Although the existence of a duty is a question of law to be determined by the courts, the factfinder must be instructed on the nature and scope of such duty so as to ascertain any breach thereof" … . The modified instruction used the language of PJI 2:90 to charge the jury that "[t]he possessor of a building has a duty to use reasonable care to keep the premises in a reasonably safe

condition for the protection of all persons whose presence is reasonably foreseeable," followed by new language advising the jury that "[a] facility also has a duty to exercise ordinary and reasonable care to ensure that no unnecessary harm befalls a patient." The first of the two statements pertains to premises liability and, as previously discussed, is inapplicable here. The second statement, although not inapplicable to a negligence analysis, is incomplete. It is well settled that a medical facility used by persons who may be ill, disabled or otherwise vulnerable "ha[s] a duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his [or her] own safety" … . "The degree of reasonable care is measured by the physical and mental infirmities of the patient[] as the [facility's] officials and employees know them" … . * * *

The assessment of a patient's risk of falling as a result of his or her medical condition, and the patient's consequent need for assistance, protective equipment or supervision, are medical determinations that sound in malpractice … . Likewise, whether Horizon breached applicable standards of care for medical offices in supervising and assisting decedent in view of her medical condition "necessitates a comparison to the standard of care customarily exercised by [comparable medical facilities] . . . [that] cannot be determined without a full appreciation and understanding of the operational demands and practices of [such facilities]" and raises issues of malpractice rather than negligence … .

Expert testimony is a necessary part of a malpractice action, as the plaintiff is required to establish the relevant professional standard of care … . This case hinges upon a malpractice standard. Martuscello v Jensen, 2015 NY Slip Op 07711, 3rd Dept 10-22-15

FALLS, FALL FROM OPERATING TABLE.

PLAINTIFF INJURED FALLING OFF OPERATING TABLE—RECORD INSUFFICIENT TO DETERMINE WHETHER ACTION SOUNDED IN MEDICAL MALPRACTICE (RENDERING IT UNTIMELY) OR NEGLIGENCE (RENDERING IT TIMELY)

The Third Department determined there was insufficient information in the record to determine whether plaintiff's action sounded in negligence or medical malpractice. Plaintiff was injured when she fell off the operating table. The case

hinged on whether the 2 1/2 year medical malpractice of the 3 year negligence statute of limitations applied. Supreme Court determined the medical malpractice statute applied and dismissed the complaint. The Third Department sent the matter back for the service of an amended complaint:

The sole issue here is whether the complaint sounds in medical malpractice such that it is subject to a 2½-year statute of limitations, which would make it untimely, or whether it alleges personal injury claims based on ordinary negligence that are subject to a three-year statute of limitations (compare CPLR 214-a, with CPLR 214 [5]). "Conduct may be deemed malpractice, rather than negligence, when it 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician'" … .

The record here does not contain enough factual information to make such a determination. The complaint contains some language that generally refers to malpractice, such as that the "action arose from a surgery," that plaintiff was "owed a duty by [d]efendants to use the due care of medical specialists in performing" the surgery, and that plaintiff fell after she "was extubated by the [a]nesthesiologist" or "while extubated by" him. While some of the medical records also indicate that plaintiff's fall from the operating table may have been substantially related to the rendition of medical treatment, one medical note indicates that plaintiff rolled off the table due to the failure to remove an obstruction that prevented a stretcher from being placed next to the operating table. Plaintiff's causes of action would sound in medical malpractice if she fell off the table due to improper pressure or movement in the removal of the breathing tube, or the failure to properly evaluate her safety and restraint needs while she was under anesthesia … .

On the other hand, her causes of action would sound in ordinary negligence if she never received any safety assessment, if the hospital staff failed to remove an obstruction between the operating table and stretcher and allowed her to fall between them, or if she was simply dropped by the staff members when they were transferring her from the operating table to the stretcher … . Newell v Ellis Hosp, 2014 NY Slip Op 02992, 3rd Dept 5-1-14

FALLS, FALL FROM STRETCHER.

THE COMPLAINT, STEMMING FROM A FALL OFF A STRETCHER WHILE BEING POSITIONED FOR AN X-RAY, SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, AND WAS THEREFORE UNTIMELY, PROPOSED NEGLIGENT HIRING CAUSE OF ACTION COULD NOT BE ADDED UNDER THE RELATION BACK DOCTRINE (FIRST DEPT).

The First Department determined the complaint sounded in medical malpractice, not common law negligence, and was therefore untimely. Plaintiff alleged she fell off a stretcher as she was being positioned for a chest X-ray. The attempt to amend the complaint to allege a negligent hiring cause of action failed because the facts underlying negligent hiring were not the same as the facts underlying the original complaint. Therefore the relation-back doctrine did not apply:

As described by plaintiff in her affidavit, the technician's conduct in placing plaintiff's body in a certain position, so as to obtain accurate imaging in an Xray directed by a physician at defendant hospital, bore a "substantial relationship to the rendition of medical treatment by a licensed physician" … . Accordingly, plaintiff's complaint sounds in medical malpractice and was correctly dismissed as untimely (see CPLR 214-a). …

CPLR 203(f) provides, "A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" … .

The original complaint asserts one cause of action that arose from plaintiff's Xray on July 5, 2012. The proposed negligent hiring and failure to promulgate regulations claims arise from different facts and implicate different duties based on conduct preceding, and separate and different from, the alleged negligence of the Xray technician on that date. Thus, the relation back doctrine is inapplicable because the facts alleged in the original complaint failed to give notice of the facts necessary to support the amended pleading … . Lang-Salgado v Mount Sinai Med. Ctr., Inc., 2018 NY Slip Op 00248, First Dept 1-16-18

FALLS, FALL FROM X-RAY TABLE.

FALLING OFF X-RAY TABLE RAISED QUESTION OF FACT

The Fourth Department determined plaintiff had raised a question of fact re: medical malpractice where decedent fell off an x-ray table when the attendant left the room to develop the x-rays:

Defendant failed to meet its " 'initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff['s decedent] was not injured thereby' " … . With respect to decedent's fall from the X ray table, defendant failed to present competent proof that it did not deviate from the applicable standard of care when the technician left the room to develop the X rays that had just been taken, with decedent still on the table. **Welsh, et al, v St Elizabeth Medical Center, 332, CA 12-01576, 4th Dept. 3-22-12**

FALLS, FALL IN REST ROOM (UNSUPERVISED).

ACTION BASED UPON FAILURE TO SUPERVISE PLAINTIFF'S USE OF A HOSPITAL REST ROOM SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, THE ACTION WAS THEREFORE TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's action, which alleged inadequate supervision when plaintiff used a hospital rest room, sounded in medical malpractice, not negligence. Therefore the action was time-barred:

Plaintiff alleges that defendants failed to properly assess her condition and the degree of her supervisory needs in the restroom, a claim sounding in medical malpractice, and her action, brought three years after her injuries, is therefore untimely … . Because the loss of consortium claim is derivative of the injured

plaintiff's claim, that cause of action must also be dismissed as untimely … . Kim v New York Presbyt., 2019 NY Slip Op 02425, First Dept 3-28-19

FALLS, INJURY TO HEALTHCARE WORKER TRYING TO PREVENT PATIENT FROM FALLING.

PLAINTIFF'S EXPERT DID NOT RAISE A QUESTION OF FACT IN THIS MEDICAL MALPRACTICE ACTION.

The Third Department determined plaintiff's expert did not raise a question of fact in this medical malpractice action. Plaintiff injured her shoulder when she caught a patient (Lisa Clark) who started to fall as she was being transferred from a sideboard to a physical therapy bed. The action was deemed to sound in medical malpractice:

The gravamen of plaintiff's claim is that initiating a slide board transfer of Clark with minimal to moderate assistance deviated from the applicable standard of care, thereby causing Clark's fall and plaintiff's injuries. Defendants met their initial burden of establishing entitlement to judgment as a matter of law by submitting, among other things, an expert affidavit from a physical therapist opining that utilizing a slide board transfer with minimal assistance did not deviate from the accepted standard of care and noting, based on a review of Clark's records, that Clark had successfully completed slide board transfers with minimal or moderate assistance on prior occasions … . Thus, "the burden shifted to plaintiff to present expert medical opinion evidence that there was a deviation from the accepted standard of care" … .

In opposition, plaintiff submitted, among other things, the affidavit of an orthopedic surgeon, Matthew J. Nofziger. Even assuming that Nofziger was qualified to provide an opinion with respect to the standard of care used in the physical therapy field for the purpose of assessing the appropriateness of transfer procedures … , we find his affidavit to be insufficient to raise a triable issue of fact. Although Nofziger criticized the assessment of Clark's physical and cognitive abilities prior to the slide board transfer, he failed to identify or define the applicable standard of care appropriate in this case, merely asserting, in a conclusory manner, that Clark required a higher level of assistance than was provided to her … . Nor did Nofziger set forth any particular actions or procedures

that could have prevented Clark from falling, thereby failing to establish the requisite nexus between the alleged malpractice and plaintiff's injury … . Therefore, even if considered, Nofziger's affidavit was patently insufficient to raise a triable issue of fact as to whether the transfer procedure used in this case deviated from the applicable standard of care … . Webb v Albany Med. Ctr., 2017 NY Slip Op 05146, 3rd Dept 6-22-17

FALLS, PHYSICAL THERAPY.

THE NEGLIGENT SUPERVISION ACTION AGAINST PHYSICAL-THERAPY DEFENDANTS SOUNDED IN MEDICAL MALPRACTICE REQUIRING EXPERT OPINION EVIDENCE; THE DOCTRINE OF OSTENSIBLE OR APPARENT AGENCY RAISED A QUESTION OF FACT WHETHER THE PHYSICAL-THERAPY FACILITY WAS VICARIOUSLY LIABLE FOR THE ALLEGED NEGLIGENCE OF THE THERAPIST, WHO WAS AN INDEPENDENT CONTRACTOR (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined: (1) the negligent supervision cause of action against defendants' physical therapy services sounded in medical malpractice and therefore required expert opinion evidence; and (2) the defendant physical therapist (Gonikman) was an independent contractor but the doctrine of ostensible or apparent agency raised a question of fact about the facility's (KCM's) vicarious liability for Gonikman's alleged negligence. Plaintiff's infant daughter, who was receiving physical therapy, fell off a scooter and was injured:

Though a medical facility can be held liable for the negligence or malpractice of its employees, it is not generally held liable when the treatment is provided by an independent contractor, even if the facility affiliates itself with that independent contractor … . However, the facility may be held vicariously liable under a theory of apparent or ostensible agency by estoppel … . "In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal" … . "The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent" … . "Moreover, the third party must accept the

services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill" … . …

… [S]ince the conduct at issue in the complaint stems from Gonikman's generalized treatment plan and alleged negligent supervision of the infant daughter during her physical therapy session, the allegation sounds in medical malpractice, not ordinary negligence, because Gonikman's duty towards the infant daughter derived from the physical therapist-patient relationship … . In support of his cross motion, Gonikman merely submitted a conclusory statement that his therapy plan of activities was consistent with the accepted standard of care, and he failed to submit an expert's affidavit to establish that he did not deviate from the accepted standard of care for physical therapy … . Weiszberger v KCM Therapy, 2020 NY Slip Op 07425, Second Dept 12-9-20

HOME BIRTH, FAILURE TO ADVISE AGAINST.

DEFENDANT PHYSICIAN MAY BE LIABLE FOR FAILURE TO ADVISE DECEDENT AND THE NURSE MIDWIFE AGAINST HOME BIRTH; SUCH FAILURE COULD CONSTITUTE A PROXIMATE CAUSE OF DEATH; JUDGE SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT BASED IN PART ON A GROUND NOT RAISED BY THE PARTIES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should not have been granted. Defendant, Lascale, is a board-certified obstetrician and gynecologist specializing in maternal-fetal medicine. Plaintiff's decedent died in childbirth when she was assisted at home by a certified nurse midwife (Moss Jones). Plaintiffs alleged Lascale negligently failed to advise decedent and Moss Jones of the dangers of a home birth given the baby's size and the fact decedent had previously given birth by caesarian section. Lascale argued his limited role, analyzing periodic sonograms, did not include advice on delivery. The Second Department noted that the motion court, sua sponte, should not have granted defendant's motion based in part on an issue not raised by the parties:

Although Lescale, a board-certified obstetrician and gynecologist, purported to limit the scope of his duty to the field of maternal-fetal medicine, and the

performance and interpretation of ultrasounds, it was within such limited scope of duty to consult with the decedent and Moss Jones … , concerning his diagnosis of suspected fetal macrosomia [the baby was very large], and how such diagnosis would increase the risks of a VBAC [vaginal birth after caesarian section] home birth, given all of the other risk factors that were present. Given such risks, it was also within the scope of Lescale's duty to advise the decedent and Moss Jones against proceeding with the planned VBAC home birth. * * *

"When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" . "It is only where the intervening act is extraordinary under the circumstances, not foreseeable in the norm… al course of events, or independent of or far removed from the defendant's conduct, that it may possibly break the causal nexus" … .

* * * Whether the decedent would have heeded appropriate warnings and advice by Lescale in light of, inter alia, the purported warnings she was given by Moss Jones, or her own views, is for the jury to decide … . Romanelli v Jones, 2020 NY Slip Op 00316, Second Dept 1-15-20

INFORMED CONSENT.

DECEDENT'S CONSENT TO SURGERY SUBMITTED IN SUPPORT OF SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION DID NOT VIOLATE THE DEAD MAN'S STATUTE, THE CONSENT WAS AUTHENTICATED BY THE MEDICAL RECORDS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the medical malpractice and wrongful death actions should have been dismissed. With respect to the "lack of informed consent" cause of action, the court held that the submission of the informed consent form by the defendant did not violate the Dead Man's Statute:

The plaintiff contends that Meyerson [defendant surgeon] cannot rely upon the portion of his expert's affidavit which states that the decedent was aware of the risks of the procedure because he signed a consent form for a similar procedure in 2012, because this evidence would be inadmissible pursuant to CPLR 4519, the so-called Dead Man's Statute. CPLR 4519 "precludes a party or person interested in the

underlying event from offering testimony concerning a personal transaction or communication with the decedent" … .

While evidence excludable at trial under CPLR 4519 may be considered in opposition to a motion for summary judgment so long as it is not the sole evidence proffered … , such evidence "should not be used to support summary judgment" … . However, the statute does not bar "the introduction of documentary evidence against a deceased's estate. . . . [A]n adverse party's introduction of a document authored by a deceased does not violate the Dead Man's Statute, as long as the document is authenticated by a source other than an interested witness's testimony concerning a transaction or communication with the deceased" … . Inasmuch as the expert's affidavit as to the decedent's execution of the form was predicated upon the medical records, which contained the decedent's consent form for the prior surgery and on which the expert relied, and the records were properly authenticated and submitted on the motion, Meyerson properly relied upon the expert opinion to support his motion … . Wright v Morning Star Ambulette Servs., Inc., 2019 NY Slip Op 02381, Second Dept 3-27-19

INFORMED CONSENT.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS PODIATRIC MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED, REQUIREMENTS FOR A LACK OF INFORMED CONSENT CAUSE OF ACTION EXPLAINED.

The Second Department, reversing Supreme Court, determined summary judgment should not have been awarded to defendant podiatrist in this malpractice action. The defendant's expert did not address the precise claims of malpractice made in the pleadings and did not demonstrate plaintiffs gave informed consent to the procedure. On the issue of informed consent, the court wrote:

To succeed on a cause of action to recover damages for podiatric malpractice based on lack of informed consent, a plaintiff must demonstrate (1) the failure of the podiatric practitioner providing the professional treatment or diagnosis to disclose to the patient the alternatives thereto and the reasonably foreseeable risks and

benefits involved that a reasonable podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation, and (2) that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought … . Here, the plaintiffs' deposition testimony indicates that they were not fully advised of the risks, benefits, and alternatives to the surgical procedure. Further, the generic consent form signed by the infant plaintiff's mother did not establish the defendants' prima facie entitlement to judgment as a matter of law since it did not disclose the risks specific to the surgical procedure performed, and the defendants' expert failed to aver that the consent form complied with the prevailing standard for such disclosures applicable to reasonable podiatrists performing the same kind of surgery ,,, , Parrilla v Saphire, 2017 NY Slip Op 02803, 2nd Dept 4-12-17

INFORMED CONSENT.

DEFENDANTS DID NOT DEMONSTRATE SURGICAL CONSENT FORM COMPLIED WITH THE ACCEPTED STANDARD OF DISCLOSURE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants did not submit sufficient evidence to warrant dismissal of the "lack of informed consent" cause of action. Plaintiff alleged the breast implants she received were not of the type and size she requested . The proof submitted by the defendants did not demonstrate the consent form at issued complied with the standard for disclosure in this context:

Although the defendants demonstrated that they cannot be held liable for lack of informed consent based upon the size of the implants used, the defendants failed to establish that they cannot be held liable for lack of informed consent based on the type of implants used. The consent forms signed by the plaintiff stated that she would be receiving "gel" implants, but did not identify the particular brand or manufacturer of the implants. Although the defendants' expert averred that the operative report

indicated that "Palaia explained the risks, benefits and alternatives to [the plaintiff] prior to the procedure," and noted that consent forms were signed, he failed to aver that "the consent form complied with the prevailing standard for such disclosures applicable to reasonable practitioners performing the same kind of surgery" … . Whitnum v Plastic & Reconstructive Surgery, P.C., 2016 NY Slip Op 05710, 2nd Dept 8-3-16

INFORMED CONSENT.

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO MEET 60-DAY DEADLINE IMPOSED BY A LOCAL COURT RULE, QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE TOLLED THE STATUTE OF LIMITATIONS, LACK OF INFORMED CONSENT DOES NOT APPLY TO FAILURE TO DIAGNOSE (FIRST DEPT).

The First Department, reversing Supreme Court, over an extensive dissent, determined Supreme Court should not have dismissed defendants' motions for summary judgment in this medical malpractice. The motions were dismissed on procedural grounds because they were filed and served a few days after the 60-day deadline imposed by the local court rules. The courts had been closed when the papers were supposed to be filed due to a storm. The 2nd Department went on to determine the merits. Plaintiff had experienced headaches over a period of years and had sought treatment for them. Eventually a benign brain tumor was discovered. In removing the tumor plaintiff was rendered legally blind. The malpractice action alleged a negligent failure to diagnose the tumor, and lack of informed consent. The court held that the continuing treatment doctrine tolled the statute of limitations even though the treatment was for headaches, not the tumor, because the presence of the tumor had not been diagnosed. The court went on to find that the informed consent cause of action was not viable because the alleged malpractice was a failure to diagnose, not the negligent performance of a surgical procedure:

… [T]he record presents issues of fact as to continuous treatment. As is well established, "the continuous treatment doctrine tolls the Statute of Limitations for a medical malpractice action when the course of treatment which includes the

wrongful acts or omissions has run continuously and is related to the same original condition or complaint" … . In addition, "[w]here the malpractice claim is based on an alleged failure to properly diagnose a condition, the continuous treatment doctrine may apply as long as the symptoms being treated indicate the presence of that condition" … . * * *

… [T]he informed consent claim lacks merit. As we have held, "[a] failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that involve[s] invasion or disruption of the integrity of the body'" … . Lewis v Rutkovsky, 2017 NY Slip Op 06342, First Dept 8-29-17

INFORMED CONSENT.

DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT).

The Second Department, affirming Supreme Court, determined defendants' motions for summary judgment on the lack of informed consent cause of action were properly denied. Plaintiff had signed a consent form but alleged the wrong tooth was extracted:

"[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" … . "To establish a cause of action for malpractice based on lack of informed consent, plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" … . "The mere fact that the plaintiff

signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law"… .

… Supreme Court properly determined that triable issues of fact precluded an award of summary judgment dismissing the cause of action alleging lack of informed consent insofar as asserted against them. The deposition testimony of the parties and the generic consent form signed by the plaintiff revealed a factual dispute as to whether the plaintiff was adequately informed about the extraction, namely which tooth would be removed… . In addition, each of the expert opinions submitted on the summary judgment motions was in agreement that a root canal was a viable alternative treatment to the extraction of tooth number four. Thus, there were triable issues of fact as to whether a reasonably prudent patient in the plaintiff's position would have undergone the extraction of tooth number four if he or she had been fully informed … . Godel v Goldstein, 2017 NY Slip Op 08260, Second Dept 11-22-17

INFORMED CONSENT.

FAILURE TO DEMONSTRATE SCARRING WAS DISCUSSED PRIOR TO THE SIGNING OF THE CONSENT FORM, AND FAILURE TO DEMONSTRATE PLAINTIFF WOULD HAVE GONE THROUGH WITH THE SURGERY DESPITE FULL DISCLOSURE ABOUT SCARRING, REQUIRED DENIAL OF PHYSICIAN'S MOTION FOR SUMMARY JUDGMENT.

The Second Department determined defendant physician (Barazani) was not entitled to summary judgment on the "lack of informed consent" cause of action, despite the plaintiff's signing of a consent form. Although the consent form mentioned scarring as a possibility, there was no showing the defendant discussed scarring with the plaintiff before the consent form was signed. In addition, there was no showing plaintiff would have gone through with the surgery had scarring been adequately discussed. [Another example of the need for a defendant seeking summary judgment to affirmatively address every possible theory of recovery.]:

To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the

professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the actual procedure performed for which there was no informed consent was the proximate cause of the injury (see Public Health Law § 2805-d[1]…).

Here, the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging lack of informed consent. The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law … . The consent form provided by the defendants and signed by the plaintiff warned generally that there was a risk of scarring after the biopsy was conducted. However, the deposition testimony of the plaintiff and Barazani, which was submitted by the defendants in support of their motion, revealed a factual dispute as to whether Barazani properly advised the plaintiff of the risk of scarring before she signed the form … . The defendants also failed to establish, prima facie, that if the plaintiff had received full disclosure, she still would have consented to the procedure … . Schussheim v Barazani, 2016 NY Slip Op 00958, 2nd Dept 2-10-16

INFORMED CONSENT.

MEDICAL MALPRACTICE STEMMING FROM "LACK OF INFORMED CONSENT" EXPLAINED/SIGNING A GENERIC CONSENT FORM DOES NOT PRECLUDE SUIT

The Second Department determined that a question of fact had been raised about medical malpractice stemming from a lack of informed consent. The plaintiff's signing of a generic consent form did not entitle the doctor to summary judgment:

…"[L]ack of informed consent is a distinct cause of action which requires proof of facts not contemplated by an action based merely on allegations of negligence" … . A cause of action premised on a lack of informed consent "is meant to redress a failure of the person providing the professional treatment or diagnosis to disclose to

the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation'" … . Thus, "[t]o establish a cause of action [to recover damages] for malpractice based on lack of informed consent, [a] plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" … . Walker v Saint Vincent Catholic Med Ctrs, 2014 NY Slip Op 00653, 2nd Dept 2-5-14

INFORMED CONSENT.

NEW THEORY PRESENTED IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LACK-OF-INFORMED-CONSENT CAUSE OF ACTION SHOULD NOT HAVE BEEN CONSIDERED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's lack-of-informed-consent cause of action in this medical malpractice case should have been dismissed. Plaintiff had alleged a new theory in response to defendant's motion for summary judgment which should not have been considered because the theory was not discernable from the pleadings:

… [T]he Supreme Court should have granted that branch of the defendant's motion which was for summary judgment dismissing the cause of action to recover damages for lack of informed consent insofar as asserted against him. The defendant made a prima facie showing of his entitlement to judgment as a matter of law dismissing that cause of action insofar as asserted against him through the affidavit of his expert, the deposition testimony, and the written consent form signed by the plaintiff, which demonstrated that the defendant disclosed to the plaintiff the risks, benefits, and alternatives to the procedure … .

In opposition, the plaintiff alleged, for the first time, a new theory that the procedure performed by the defendant exceeded the scope of her consent in specific respects, a theory that was not referred to when the plaintiff's counsel questioned the defendant at his deposition. The general rule is that " [a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars'" … . If the theory is discernable from the pleadings, it may be considered … , especially if the theory is referred to in the depositions … . In this case, the assertion of the new theory was not discernable from the pleadings, nor alluded to by the plaintiff's counsel when deposing the defendant … . Therefore, that theory should not have been considered. Larcy v Kamler, 2020 NY Slip Op 03652, Second Dept 7-1-20

INFORMED CONSENT.

QUESTION OF FACT WHETHER PLAINTIFF WAS PROPERLY INFORMED OF THE POTENTIAL COMPLICATIONS OF A DENTAL PROCEDURE, DESPITE PLAINTIFF'S SIGNING OF A CONSENT FORM (SECOND DEPT).

The Second Department determined defendants' (Herman's and Capuano's) motions for summary judgment in this dental malpractice action were properly denied. With respect to the lack-of-informed consent cause of action, despite plaintiff's signing of a consent form, the deposition testimony raised a question of fact whether plaintiff was properly informed before signing it:

"To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the actual procedure performed for which there was no informed consent was the proximate cause of the injury" … . "The mere fact that the plaintiff signed a consent

form does not establish the defendants' prima facie entitlement to judgment as a matter of law" … .

Here, both Herman and Capuano failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging lack of informed consent. Although Herman and Capuano each submitted a consent form signed by the plaintiff for the respective procedures, they also submitted, in support of their respective motions, the plaintiff's deposition testimony, which revealed factual disputes as to whether the plaintiff was properly advised before signing each of the forms … . Mathias v Capuano, 2017 NY Slip Op 06174, Second Dept 8-16-17

INFORMED CONSENT.

QUESTION OF FACT WHETHER THE DOCTRINE OF RES IPSA LOQUITUR APPLIES IN THIS MEDICAL MALPRACTICE CASE; QUESTION OF FACT WHETHER THE MEDICAL CENTER IS LIABLE UNDER THE OSTENSIBLE AGENCY DOCTRINE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined: (1) there is a question of fact whether the doctrine of res ipsa loquitur applied in this medical malpractice action; (2) the lack of informed consent cause of action should be reinstated; (3) there is a question of fact whether the medical center (NYU Langone) is liable for the anesthesiologist (Coopersmith) who performed the pre-surgery nerve block pursuant to the doctrine of ostensible agency; and (4) the action against the doctor who assisted Dr. Coopersmith was properly dismissed because she didn't exercise any independent judgment in the procedure:

… [W]e agree with plaintiff that she sufficiently established that the doctrine of res ipsa loquitur applies to her cause of action for medical malpractice. The parties' experts disagreed as to whether plaintiff's injury ordinarily occurs in the absence of negligence, raising an issue of fact on that point … . Plaintiff also established that defendants were in control of all instruments used in the nerve block, and plaintiff's actions did not contribute to her injuries … . To the extent that defendants' expert opined that post-operative symptoms and image studies were not consistent with needle trauma to a nerve, that opinion did not refute plaintiff's assertion of res ipsa

loquitur because it failed to identify any other possible cause of plaintiff's plexopathy, let alone a more probable cause … . Moreover, defendants' expert did not dispute that plaintiff sus tained nerve damage and did not opine that the nerve damage pre-existed the surgery. …

Plaintiff's lack of informed consent cause of action should be reinstated because defendants' expert's opinion that there was informed consent was conclusory in that it did not set forth what reasonable foreseeable risks should have been disclosed to plaintiff regarding the nerve block … . …

We agree with defendants that they were entitled to a determination that no actual agency existed between NYU Langone and Dr. Coopersmith because NYU Langone did not employ or otherwise control Dr. Coopersmith. However, we find that an issue of fact exists as to whether NYU Langone could be held liable for Dr. Coopersmith's actions in his treatment of plaintiff through ostensible agency. It is undisputed that plaintiff was treated by Dr. Feldman [the surgeon] because she sought out his care. However, Dr. Feldman testified that he did not choose which anesthesiologist at NYU Langone would perform the nerve block on plaintiff, instead an anesthesiologist was assigned by the Department of Anesthesia. A jury could reasonably infer from this testimony that Dr. Coopersmith was provided by NYU Langone and that plaintiff reasonably believed that Dr. Coopersmith was acting on NYU Langone's behalf … . Sklarova v Coopersmith, 2020 NY Slip Op 01033, First Dept 2-13-20

INFORMED CONSENT.

UESTIONS OF FACT WHETHER DENTIST WAS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR AND WHETHER PLAINTIFF GAVE INFORMED CONSENT (THIRD DEPT).

After finding there was a question of fact whether the dentist (Weiss) who treated plaintiff was an employee of defendant-Toothsavers or an independent contractor, the Second Department determined there was a question of fact about whether plaintiff gave informed consent to the procedure:

"The Toothsavers defendants contend that because Weiss was an independent contractor, not an employee, they cannot be vicariously liable for Weiss's malpractice. The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" … . "The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced or, more importantly, the means used to achieve the results" … . …

"To establish a cause of action [to recover damages] for malpractice based on lack of informed consent, [a] plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" … . Chan v Toothsavers Dental Care Inc, 2015 NY Slip Op 01236, 2nd Dept 2-11-15

INFORMED CONSENT.

SUPREME COURT SHOULD NOT HAVE RULED PLAINTIFF'S EXPERT WAS NOT QUALIFIED, EXPERT WAS QUALIFIED AND THE ISSUE WAS NOT RAISED BY THE PARTIES, QUESTION OF FACT WHETHER PLAINTIFF GAVE INFORMED CONSENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the dentist who provided an affidavit for plaintiff was an expert, the expert raised a question of fact whether defendant departed from the accepted standard of care, and a question of fact was raised about whether plaintiff gave informed consent to the procedure. The court noted that plaintiff's expert's qualifications were not questioned in defendant's reply papers. Therefore, the court should not have raised the issue on its own and used the issue to support granting summary judgment to the defendant. With regard to informed consent, the court wrote:

"A cause of action predicated on a lack of informed consent is meant to redress a failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation"… .. To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury … .

Here, the defendant failed to submit proof sufficient to establish, prima facie, that he had informed the plaintiff of the reasonably foreseeable risks associated with the treatment, and, in any event, that a reasonably prudent patient in the same position would have undergone the treatment if he or she had been fully informed … . Dyckes v Stabile, 2017 NY Slip Op 06252, Second Dept 8-23-17

INFORMED CONSENT.

THE ELEMENTS OF A LACK-OF-INFORMED-CONSENT CAUSE OF ACTION WERE NOT ACCURATELY STATED IN THE JURY INSTRUCTIONS AND VERDICT SHEET; MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department reversed Supreme Court, in the interest of justice, because the jury instructions and verdict sheet did not accurately state the elements of malpractice based upon a lack of informed consent. Plaintiff's motion to set aside the verdict should have been granted. The elements of a "lack of informed consent" cause of action were explained:

"[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" … . To

establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" … . "The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury" … . " To state it in other terms, the causal connection between a doctor's failure to perform his [or her] duty to inform and a patient's right to recover exists only when it can be shown objectively that a reasonably prudent person would have decided against the procedures actually performed. Once that causal connection has been established, the cause of action in negligent malpractice for failure to inform has been made out and a jury may properly proceed to consider plaintiff's damages' " … . Figueroa-Burgos v Bieniewicz, 2016 NY Slip Op 00329, 2nd Dept 1-20-16

INFORMED CONSENT.

THE SURGICAL PROCEDURE FOR WHICH THERE ALLEGEDLY WAS NO CONSENT WAS NOT DEMONSTRATED TO BE THE PROXIMATE CAUSE OF THE CLAIMED INJURIES, THEREFORE THE LACK OF INFORMED CONSENT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED PURSUANT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's expert's affirmation concerning the alleged malpractice was deemed conclusory and therefore did not raise a question of fact. The informed consent cause of action was dismissed because the medical procedure was not the proximate cause of the claimed injuries:

To establish a cause of action to recover damages based on lack of informed consent, a plaintiff" must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury'" … . " The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury'" … . Here, the defendants established through their expert affirmation that the surgery performed … did not proximately cause the injured plaintiff's claimed injuries … . Gilmore v Mihail, 2019 NY Slip Op 05647, Second Dept 7-17-19

INFORMED CONSENT.

SIGNED CONSENT FORM PRECLUDED CAUSE OF ACTION FOR ASSAULT AND BATTERY (RE: A HYSTERECTOMY)—DEFENDANT DEMONSTRATED THE ALLEGATION PLAINTIFF DID NOT CONSENT TO THE HYSTERECTOMY WAS "NOT A FACT AT ALL"–QUESTION OF FACT RAISED RE: THE "LACK OF INFORMED CONSENT" CAUSE OF ACTION

The Second Department, over a partial concurrence/dissent, determined defendant was entitled to dismissal of the assault and battery cause of action, which was based on the allegation a hysterectomy was performed without plaintiff's consent. The evidence however demonstrated plaintiff signed a consent form, and thereby demonstrated that the "without consent" factual allegation was "not a fact at all." Plaintiff did, however raise a question of fact concerning the "lack of informed consent" cause of action. The court explained the elements of assault and battery in this context, the elements of a "lack of informed consent" cause of action, as well as how to handle a motion to dismiss for failure to state a cause of action which is accompanied by evidentiary submissions:

"When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one . . . [The motion] must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" … .

"To plead a cause of action to recover damages for assault, a plaintiff must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact'" … . "To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature" … . Here, the evidence in the record upon which the Supreme Court relied established that "a material fact as claimed by the plaintiff" was "not a fact at all" … . Notwithstanding the plaintiff's allegations and testimony that she never gave permission for the performance of a hysterectomy, the signed consent form clearly authorized such a procedure, and she admitted that she signed the consent form. Therefore, dismissal of the assault and battery cause of action was proper … .

"To succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment (see Public Health Law § 2805-d [1], [3])…). Here the plaintiff's deposition testimony indicates that she was not fully advised of the risks, benefits, and alternatives to the procedure or treatment, including the fact that one of the risks was a total hysterectomy and/or perforation of the bowel, nor was it established as a matter of law that if the plaintiff received full disclosure, she still would have consented to the procedure. Since the defendants' submissions included the plaintiff's deposition testimony, they failed to establish, prima facie, that there were no triable issues of fact with respect to the cause of action alleging lack of informed consent … . Accordingly, the Supreme Court should have denied that branch of the

defendants' motion which was for summary judgment dismissing the cause of action alleging lack of informed consent. Thaw v North Shore Univ. Hosp., 2015 NY Slip Op 05173, 2nd Dept 6-17-15

PATIENT WANDERED FROM HOSPITAL.

ADEQUATE SUPERVISION OF PLAINTIFF AFTER SURGERY RESULTING IN MEMORY LOSS WAS PART OF PLAINTIFF'S TREATMENT, THEREFORE A CAUSE OF ACTION RESULTING FROM PLAINTIFF'S LEAVING THE HOSPITAL SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, PLAINTIFF'S MOTION TO AMEND THE COMPLAINT, ALTHOUGH PARTIALLY GRANTED, SHOULD HAVE BEEN GRANTED IN ITS ENTIRETY (SECOND DEPT).

The Second Department determined plaintiff's action against defendant hospital sounded in medical malpractice, not negligence, and plaintiff's motion to amend the complaint to add a medical-malpractice cause of action (which was granted by Supreme Court) and other allegations should have been granted in its entirety. Plaintiff suffered memory loss after surgery and repeatedly threatened to leave the hospital. She did in fact leave and was not found for five days. The Second Department determined the failure to supervise plaintiff was an element of her treatment and therefore the actions sounded in medical malpractice:

… [W]hen the complaint challenges the medical facility's performance of functions that are "an integral part of the process of rendering medical treatment" and diagnosis to a patient, such as taking a medical history and determining the need for restraints, it sounds in medical malpractice … .

… [T]he allegations at issue essentially challenged the hospital's assessment of the plaintiff's supervisory and treatment needs … . Thus, the conduct at issue derived from the duty owed to the plaintiff as a result of a physician-patient relationship and was substantially related to her medical treatment … . …

… "Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit" … . Here, there was no showing of prejudice, and the plaintiff's proposed

amended complaint was not papably insufficient or patently devoid of merit. Therefore, the court should not have limited the allegations that the plaintiff could include in her amended complaint. Jeter v New York Presbyt. Hosp., 2019 NY Slip Op 04148, Second Dept 5-29-19

RELEASE FROM HOSPITAL.

ALTHOUGH THE HOSPITAL WAS NOT LIABLE IN ORDINARY NEGLIGENCE FOR RELEASING PLAINTIFF AND NOT ENSURING A SAFE RETURN HOME, THE COMPLAINT STATED A CAUSE OF ACTION IN MEDICAL MALPRACTICE.

The Fourth Department, over a dissent, determined the motion to dismiss the medical malpractice cause of action was properly denied. The negligence cause of action against the hospital stemming from the same facts had previously been dismissed. Plaintiff was released from the hospital and found two hours later, disoriented and frost-bitten. The hospital, in the negligence cause of action, was found to have no duty to prevent plaintiff from leaving the hospital against medical advice and no duty to ensure plaintiff's safe return home. However, allegations that the assessment plaintiff's medical and mental status and the discharge of plaintiff from the hospital were not in accordance with good and accepted medical practice stated a cause of action in medical malpractice:

Although "no rigid analytical line separates the two" … , we have long recognized the distinction between an ordinary negligence cause of action against a hospital and/or a physician … and a medical malpractice cause of action against a hospital and/or a physician … . We note that there is no prohibition against simultaneously pleading both an ordinary negligence cause of action and one sounding in medical malpractice … . It is simply beyond cavil "that an action for personal injuries may be maintained, in the proper case, on the dual theories of medical malpractice or simple negligence where a person is under the care and control of a medical practitioner or a medical facility" … . Moreover, in a proper case, both theories may be presented to the jury … .

Here, the medical malpractice cause of action alleges, inter alia, that defendant did not properly assess plaintiff's medical and mental status and rendered medical care that was not in accordance with good and accepted medical practice, and that the

discharge of plaintiff was not in accordance with good and accepted medical practices. Ingutti v Rochester Gen. Hosp., 2016 NY Slip Op 08615, 4th Dept 12-23-16

RESTRAINTS IMPROPER RESTRAINTS.

THE DEFENDANT HOSPITAL DID NOT DEMONSTRATE THAT A DOCTOR ORDERED THE RESTRAINT OF PLAINTIFF'S DECEDENT AND THEREFORE DID NOT DEMONSTRATE THAT MEDICAL MALPRACTICE, AS OPPOSED TO NEGLIGENCE, WAS THE APPROPRIATE THEORY; THE ACTION SHOULD NOT HAVE BEEN DISMISSED BASED UPON THE EXPIRATION OF THE 2 1/2 YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss the complaint on statute of limitations grounds should not have been granted. Plaintiff's decedent's injuries were alleged to relate to defendant-hospital's improper restraint of plaintiff's decedent (apparently to keep him from getting up from his hospital bed). Defendant argued the 2 1/2 year statute of limitations for medical malpractice actions had passed. The Second Department held that defendant did not demonstrate that a doctor had ordered the restraints; therefore the defendant had not made out a prima facie case that the action sounded in medical malpractice as opposed to negligence:

" The critical question in determining whether an action sounds in medical malpractice or simple negligence is the nature of the duty to the plaintiff which the defendant is alleged to have breached'" … . " When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence'" … . " The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts'" … .

Here, the defendant failed to establish, prima facie, that the plaintiff's claims were time-barred under the 2½-year statute of limitations applicable to medical

malpractice actions (see CPLR 214-a). Since the defendant did not present any evidence that a doctor ordered the decedent to be restrained at any point prior to or during the subject incident, the defendant failed to establish that the plaintiff's claims related to medical treatment, as opposed to the failure of hospital staff to exercise ordinary and reasonable care to prevent harm to the decedent … .
Wesolowski v St. Francis Hosp., 2019 NY Slip Op 06646, Second Dept 9-18-19

RESTRAINTS, FAILURE TO RESTRAIN.

INJURIES STEMMING FROM FAILURE TO RESTRAIN A PATIENT WITH DEMENTIA FALL UNDER THE MEDICAL MALPRACTICE, NOT NEGLIGENCE, STATUTE OF LIMITATIONS, PLAINTIFF'S ACTION IS TIME-BARRED (SECOND DEPT).

The Second Department determined the medical malpractice (2 1/2 year) rather than the negligence (3 year) statute of limitations applied to this action stemming from the alleged failure to restrain a patient (plaintiff's decedent) with dementia. The patient was injured when she fell. The court held the action was governed by the medical malpractice limitations period and was therefore untimely:

"The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts" … . Generally, a claim will be deemed to sound in medical malpractice "when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician'" … . Thus, when the complaint challenges a medical facility's performance of functions that are "an integral part of the process of rendering medical treatment" and diagnosis to a patient, such as taking a medical history and determining the need for restraints, the action sounds in medical malpractice… .

… The defendants' evidence showed that on April 12, 2009, the plaintiff's decedent, Ruby Bell (hereinafter the decedent), was admitted to New Island Hospital with a history of dementia, and placed on "Fall Prevention Protocol." After the decedent was found standing at her bedside trying to remove her foley catheter, a physician

ordered that she be restrained with a vest and wrist restraints. On the morning of April 18, 2009, the decedent was discovered sitting on the floor next to her bed. The bed's side rails were up and the decedent was not aware of how she came to be on the floor. She had apparently fallen while trying to climb out of her bed. Thereafter, the decedent was diagnosed with a distal radius fracture of the right forearm. The plaintiff alleged that this incident arose out of the failure of the defendants' staff to follow the physician's order to restrain her … .

In opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contentions, the allegations at issue essentially challenged the defendants' assessment of the decedent's supervisory and treatment needs … . Bell v WSNCHS N., Inc., 2017 NY Slip Op 05937, 2nd Dept 8-2-17