

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

-----X
WINSOME SPAULDING,

Plaintiff-Appellant,

- against -

MT. VERNON HOSPITAL, DR. GLORIA TANG, and
NURSE IMELDA CORAZA,

Defendants-Respondents.

-----X

PLAINTIFF-APPELLANT'S BRIEF

Law Offices of Mark R. Bower, P.C.
Attorneys for Plaintiff-Appellant
15 Maiden Lane, 16th floor
New York, NY 10038
(212) 240-0700

To be argued by Mark R. Bower, Esq.
Time requested: 15 minutes

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATUTES AND REGULATIONS AT ISSUE vii

PRELIMINARY STATEMENT

THE NATURE OF THE CASE 1

THE PRIOR MOTIONS 5

POINT I

**THE DEFENDANT HOSPITAL IS VICARIOUSLY LIABLE
FOR ITS ANESTHESIOLOGIST, DR. TANG:**

**A. THE HOSPITAL IS VICARIOUSLY LIABLE FOR ITS
ANESTHESIOLOGIST UNDER THE “MDUBA DOCTRINE” 7**

**B. THE HOSPITAL IS VICARIOUSLY LIABLE FOR ITS
ANESTHESIOLOGIST, BECAUSE IT HAD A NON-DELEGABLE DUTY
UNDER BOTH FEDERAL LAW AND NEW YORK STATE REGULATIONS, TO
SUPPLY PROPER ANESTHESIOLOGY SERVICES 10**

POINT II

**BECAUSE THE HOSPITAL IS VICARIOUSLY LIABLE FOR THE
ANESTHESIOLOGIST’S MALPRACTICE, TIMELY SERVICE OF PROCESS
ON THE HOSPITAL TOLLS THE STATUTE OF LIMITATIONS AS TO THE
ANESTHESIOLOGIST
..... 14**

POINT III

**THE DEFENDANT’S MOTION SHOULD HAVE BEEN DENIED
BECAUSE IT VIOLATED “THE LAW OF THE CASE” 20**

POINT IV

**THE PLAINTIFF’S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT
SHOULD HAVE BEEN GRANTED 23**

**A. DR. TANG’S AFFIDAVIT DENYING MALPRACTICE SHOULD NOT HAVE
BEEN CONSIDERED 23**

**B. PLAINTIFF’S MEDICAL EXPERT ATTESTED TO DEPARTURES WHICH
THE DEFENDANT DID NOT ADDRESS, THEREBY CONSTITUTING
UNCONTROVERTED PROOF OF MALPRACTICE 27**

CONCLUSION

..... 29

TABLE OF AUTHORITIES

CASES:

<u>Adamski v Tacoma Gen. Hosp.</u> , 20 Wash. App. 98, 579 P2d 970	9
<u>Agustin v. Beth Israel Hospital</u> , 185 A.D.2d 203, 205-206	17
<u>Austin v. Interfaith Medical Center</u> , 264 A.D.2d 702, 694 N.Y.S.2d 730 (2 nd Dept., 1999)	17
<u>Brock v. Bua</u> , 83 A.D.2d 61, 69 (2 nd Dept., 1981)	16, 19
<u>Buran v Coupal</u> , 87 NY2d 173	18
<u>Citron v. Northern Dutchess Hospital</u> , 198 A.D.2d 618	17
<u>Connell v Hayden</u> , 83 A.D.2d 30	14, 15, 19
<u>Felice v St. Agnes Hosp.</u> , 65 A.D.2d 388	9
<u>Ferretti v Town of Greenburgh</u> , 191 A.D.2d 608, 595 N.Y.S.2d 494	24
<u>Graber v. Dr. Goldfarb and West Palms Hospital</u> , 15 th Judicial Circuit (Palm Beach Co.), FL, CL-96-10230-AF.	12
<u>Hannon v Siegel-Cooper Co.</u> 167 N.Y. 244	9
<u>Heinsohn v Putnam Community Hosp.</u> , 65 A.D.2d 767	9
<u>Hill v. St. Clare's Hospital</u> , 490 N.E.2d 823, 67 N.Y.2d 72 (1986)	8, 17
<u>Howard v Park</u> , 37 Mich. App. 496, 195 NW2d 39	9
<u>Irving v. Doctors Hospital of Lake Worth, Inc.</u> , 415 So.2d 55 (Fla. 4th DCA), <i>rev. denied</i> , 422 So.2d 842 (Fla. 1982)	12
<u>Jackson v. Power</u> , 743 P.2d 1376 (Alaska 1987)	12
<u>Kladek v. St. Vincent's Hospital</u> , 491 N.Y.S.2d 948, 128 Misc. 2d 985 (1985)	17

<u>Lanza v. Parkeast Hospital</u> , 102 A.D.2d 741	9, 17
<u>Magwood v Jewish Hosp. & Med. Center</u> , 96 Misc. 2d 251	9
<u>Matter of Parker v Port Auth.</u> , 113 A.D.2d 763	15
<u>Mduba v. Benedictine Hospital</u> , 384 N.Y.S.2d 527, 52 A.D.2d 450 (1986)	7, 9
<u>Mehlman v Powell</u> , 281 Md 269, 378 A2d 1121	9
<u>Montalbano v North Shore Univ. Hosp.</u> , 154 A.D.2d 579, 546 N.Y.S.2d 408	24
<u>Muscatello v. City of New York</u> , 627 N.Y.S.2d 567, 215 A.D.2d 463 (Second Dept., 1995)	24
<u>Neuman v Greenstein</u> , 99 A.D.2d 1018	24
<u>Noble v. Porter</u> , 188 A.D.2d 1066	17
<u>Pan v Coburn</u> , 95 A.D.2d 670	24
<u>Prudential Ins. Co. v. Stone</u> , 270 N.Y. 154, 200 N.E. 679 (1936)	14
<u>Raschel v Rish</u> , 69 N.Y.2d 694	14
<u>Rivera v Bronx-Lebanon Hosp. Center</u> , 70 A.D.2d 794	9
<u>Ryan v. New York City Health & Hospitals Corporation</u> , 633 N.Y.S.2d 500, 220 A.D.2d 734 (2 nd Dept., 1995)	17
<u>Scheff v. St. John's Episcopal Hospital et al.</u> , 496 N.Y.S.2d 58, 115 A.D.2d 532 (2 nd Dept., 1985)	14-16
<u>Seneris v Haas</u> , 45 Cal 2d 811, 291 P2d 915	9
<u>Shafran vs. St. Vincent's Hospital and Medical Center</u> , No. 779 (N.Y. App. Div. 09/02/1999)	17
<u>Soltis v. State of New York</u> , 172 A.D.2d 919	17
<u>Stratso v Song</u> , 17 Ohio App. 3d 39, 477 N.E.2d 1176	9

Winegrad et al vs. N.Y.U. Medical Center et al, ___ A.D.2d ___, 480 N.Y.S.2d 472 (First Dept., 1984); *reversed* 476 N.E.2d 642, 64 N.Y.2d 851 (1985) 23, 24

STATUTES AND REGULATIONS:

42 CFR Part 482, “Conditions for Participation For Hospitals” ii

42 CFR §482.12(e) 3

42 CFR §482.52 9

5. Standard for Contracted Services (§482.12(e)) 17

Federal Register at 51 Red Reg 116 (1986), 22010-22029 17

Medicare Act, 42 U.S.C. § 1395, *et. seq.* 16, 19

New York State Hospital Code, 10 NYCRR 405.2 [h] 18

TEXTS AND TREATISES:

1 NY PJI 2:255 17

1 NY PJI2d 396 14, 15, 19

Bower, “Defending Motions for Summary Judgment in Malpractice,” 17 *Trial Lawyers Quarterly* 1 at 30-35 (1985) 9

McLaughlin, *Practice Commentaries*, McKinney's Cons. Laws of NY, Book 7B, CPLR C203:3, at 147 24

Restatement (Second) of Agency §267,*fn5 12

Restatement (Second) of Torts §429,*fn6. 9

Restatement of Torts, *op. cit.*, § 409, comment b, at 371,*fn2 9

Siegel, New York Practice, 45 8, 17

STATUTES AND REGULATIONS AT ISSUE

N.Y. State Hospital Code - 10 NYCRR 405.2 [h]:

The governing body [of the hospital] shall be responsible for services furnished in the hospital whether or not they are furnished by outside entities under contracts. [Emphasis added]

42 CFR §482.12(e):

(e) Standard: Contracted Services. **The governing body [of the hospital] must ensure that a contractor of services (including one for shared services and joint ventures) furnishes services that permit the hospital to comply with all applicable conditions of participation and standards for the contracted services.**

(1) The governing body must ensure that the services performed under a contract are provided in a safe and effective manner.

42 CFR §482.52:

If the hospital furnishes anesthesia services, they must be provided in a well-organized manner under the direction of a qualified doctor of medicine or osteopathy. **The service is responsible for all anesthesia administered in the hospital.**

CPLR §203. Method of computing periods of limitation generally.

(a) Accrual of cause of action and interposition of claim. The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed.

[continued on next page]

(b) Claim in complaint where action commenced by service. In an action which is commenced by service, **a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest** with such defendant **when:**

1. the summons is served upon the defendant. [emphasis added]

CPLR §3212. Motion for summary judgment.

(a) **Time; kind of action.** Any party may move for summary judgment in any action, after issue is joined; provided, however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of a note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except for good cause shown.

PRELIMINARY STATEMENT

Plaintiff appeals from an Order of the Supreme Court, Westchester Co., dated March 2, 2000, that granted defendant DR. TANG's motion for summary judgment and dismissal of the medical malpractice claims against her, and denied plaintiff's cross-motion for partial summary judgment against DR. TANG only (R. 8-11).

THE NATURE OF THE CASE:

In this medical malpractice action, it is alleged that on November 19, 1994, patient WINSOME SPAULDING was admitted to MT. VERNON HOSPITAL for delivery of a baby, and tubal ligation the next day, to prevent further pregnancies. The delivery and tubal ligation were uneventful, but the mother suffered severe injuries to her wrist and hand due to the improper insertion of an intravenous line in her right hand, and her anesthesiologist's failure to timely recognize and treat the injury. As a result of the injury and the lack of prompt treatment, the patient required additional hospitalization and surgery for "DeQuervain's contracture" (stenosing tenosynovitis) of the right wrist and forearm area, and is left with a partially crippled hand.

Plaintiff SPAULDING was a "service patient" of the hospital; that is, she had no private doctor and was a patient of the hospital's staff (including its anesthesiologists) at large. She did not know who her doctors were, as she had no personal relationship with any of them, never saw them as a private patient or outside the hospital premises, etc. She did

not know Dr. TANG to be her anesthesiologist. All she knew was that the hospital supplied her with anesthesia services. As a Medicaid patient, she was not billed for her care, and had no paperwork, bills, receipts, or other documents that would identify DR. TANG as her anesthesiologist.

It is unclear whether the improper “needle stick” was done by defendant anesthesiologist DR. TANG, or defendant NURSE CORAZA, but it certainly was done by one or the other. Both were working at co-defendant MT. VERNON HOSPITAL, and both were involved in giving intravenous infusions in WINSOME SPAULDING’s arm during her hospitalization. The two look sufficiently alike that the physical description given by the plaintiff at her deposition (R. 91-92) could apply to either one. (Defense counsel *concedes* that, at R. 468-469.) At the trial, the patient will identify the person who inserted the intravenous needle at issue. For purposes of the underlying motion and for this appeal, it may be assumed that anesthesiologist DR. TANG placed that needle.¹

¹ For present purposes, it doesn’t matter whether it was anesthesiologist DR. TANG or co-defendant NURSE CORAZA who inserted the needle. Both defendants are before the court, and it had to be one or the other. This is a case where the doctrine of “alternative liability” applies between the defendant HOSPITAL and NURSE CORAZA (for whom the Hospital admitted vicarious liability) and DR. TANG. “Alternative liability” applies where either of two or more defendants may be the tortfeasor, but the plaintiff cannot state which one is the actual actor that caused the injury.

The classic “alternative liability” situation is found in Summers v Tice (33 Cal2d 80, 199 P2d 1), where two hunters, armed with identical shotguns and ammunition, fired simultaneously into the brush at what they mistakenly believed to be a bird, and a nearby third hunter sustained injuries from one of the two identical weapons. The court recognized that the injured hunter would be unable to prove that either of the two shooters was the cause of his injuries, since there was only a 50% chance that either was the responsible party. The court therefore allowed the burden of proof to shift to the defendants; each was afforded the opportunity of exculpation, otherwise both would be held jointly and severally liable (see also, Restatement [Second] of Torts § 433B[3]). The viability of the tort doctrine of alternative liability was reiterated by the Court of Appeals, in Hymowitz v Lilly & Co., 73 NY2d 487:

In addition to the allegations that DR. TANG caused the injury by the unskillful opening of the intravenous line, plaintiff also contends that DR. TANG committed malpractice by failing to recognize and diagnose the injury when she did her pre-and post-anesthesia examinations of the patient. Had the injury been timely diagnosed and treated, the severity of the harm could have been significantly reduced. (Plaintiff's expert's Medical Affirmation, R. 447-451). Thus, assuming *arguendo* that it cannot be shown that DR. TANG *created* the injury, plaintiff will nonetheless provide proof that DR. TANG's failure to diagnose the injury and start timely treatment deprived the patient of a substantial chance for cure.

The medical proof (per the expert's affidavit submitted by the plaintiff) is that the person who inserted the needle, whether DR. TANG or NURSE CORAZA, did so in a technically deficient way, lacking the requisite careful, skillful technique to do so correctly,

“In order to apply a Summers v Tice theory of alternative liability in its classic form, a plaintiff must demonstrate that all possible tortfeasors are before the court; that all have breached a duty toward the plaintiff; that the conduct of one of the defendants has caused his injuries; and that the defendants, as a group, have better access to information concerning the incident than does the plaintiff (see, Hymowitz, (*supra*) at 505-506; Summers v Tice, (*supra*) at 86; Restatement [Second] of Torts § 433B, comment h)...

* * * * *

“Once that nexus is established, all defendants who are unable to exculpate themselves will be held jointly and severally liable for the full amount of plaintiff's damages.” New York Telephone Company v. Aaer Sprayed Insulations, Inc., 98 NY .420.

That nexus is established herein. Both NURSE CORAZA and DR. TANG opened intravenous lines in WINSOME SPAULDING's arm. No one else opened an intravenous line. Plaintiff has brought all possible potential tortfeasors before the Court. One or the other of them performed the “needle stick” that injured plaintiff WINSOME SPAULDING. Both NURSE CORAZA and Dr. TANG share a similar physical appearance, such that until and unless the plaintiff sees both of them at trial, the plaintiff may not be able to specifically identify which one is the actual culprit. Even then, the plaintiff may not be able to identify or exclude one or the other. Therefore “alternative liability” applies.

thereby causing the wrist injury, and that this was a departure from good practice (R. 447-451). Plaintiff's expert further attested that regardless of who inserted the needle, DR. TANG had a duty to do a careful examination of the patient's arm as part of her administration of intravenous anesthesia, and departed from good medical practice in failing to promptly recognize the injury when she examined the patient (R. 449-451). Timely recognition of the injury would have resulted in it being treated immediately to minimize the injury (R. 450). DR. TANG's failure to timely diagnose the injury deprived the patient of a substantial chance for cure and exacerbated the injury. (R. 450-451) No medical proof contrary to this latter claim was submitted by the defendants.

B. RELEVANT PROCEDURAL HISTORY.

This lawsuit was started in November 1997 by service of a Summons & Complaint on MT. VERNON HOSPITAL within the statute of limitations.

The original Summons & Complaint did not name DR. TANG as a party defendant, for the simple reason that the plaintiff did not know who her anesthesiologist was, and as a "service patient," had no reason to suspect that the anesthesiologist was an independent contractor rather than a staff employee of the defendant hospital.

In 1998, counsel for the HOSPITAL identified DR. TANG as the anesthesiologist who opened the intravenous line, and represented for the first time that DR. TANG was an independent contractor not employed by the hospital. Plaintiff promptly moved for leave to amend her pleadings to add DR. TANG as an additional defendant. Plaintiff's motion was

granted by Mr. Justice Rudolph's decision dated March 31, 1998 (R. 408-409). The decision gave us 30 days – until April 30, 1998 – to effect service. Dr. TANG's motion papers concede service was made on April 24, 1998 - easily within the time period permitted by Justice Rudolph's decision. DR. TANG answered on May 20, 1998 (R. 14-15), and was deposed on March 17, 1999 (R. 250).

Absent tolling of the statute of limitations, the action against DR. TANG would be time-barred. However, plaintiff contends that the statute of limitations against DR. TANG was tolled, so that the action against her is timely.

THE PRIOR MOTIONS:

In September 1999, DR. TANG moved for summary judgment/dismissal, based on the alleged expiration of the statute of limitations. Plaintiff opposed on several grounds, including that DR. TANG's motion itself was untimely. Of particular interest to this appeal is the confluence of the "Mduba doctrine" (which holds a hospital vicariously liable for the negligence of its independent contractors under certain circumstances), the state and federal rules and regulations which impose a non-delegable duty on a hospital to supply proper anesthesia services, and the "relation back" doctrine for defendants "united in interest" such that the timely service of process on one defendant tolls the statute of limitations as against other defendants "united in interest" with the defendant timely served. CPLR 203(b).

Plaintiff contends that since MT. VERNON HOSPITAL was timely served with process and is vicariously liable for the alleged malpractice of DR. TANG (notwithstanding that she

claims to have been an independent contractor), the vicarious liability creates a “unity of interest” which tolled the statute of limitations, so that service on DR. TANG was also timely.

In addition to opposing DR. TANG’s motion for summary judgment/dismissal, plaintiff cross-moved for partial summary judgment on liability as against DR. TANG only. Plaintiff’s expert’s affidavit supplied uncontroverted proof that DR. TANG’s failure to timely recognize the injury to the patient’s arm was a deviation from the standard of care (regardless of who started the intravenous line), and deprived the patient of a substantial chance for cure (R. 449-451). DR. TANG did not supply proof to the contrary.

The Court below (Rudolph, J.) ruled that the statute of limitations expired before DR. TANG was served with process, and dismissed the case without reaching the merits of plaintiff’s proof of liability, or DR. TANG’s denials of malpractice. (Order Appealed From, R. 8-11).

POINT I

THE DEFENDANT HOSPITAL IS VICARIOUSLY LIABLE FOR ITS ANESTHESIOLOGIST, DR. TANG:

A. THE HOSPITAL IS VICARIOUSLY LIABLE FOR ITS ANESTHESIOLOGIST UNDER THE “MDUBA DOCTRINE”

The “Mduba doctrine” provides that a hospital is vicariously liable for the negligence or malpractice of its staff physicians, notwithstanding that they might be independent contractors rather than employees, where the patient had no private doctors, the hospital provided the doctors as part of its overall care of the patient, and the patient had no way to know that the doctor was not an employee of the hospital. Plaintiff-Appellant WINSOME SPAULDING had no private doctors, the hospital provided the anesthesiologist as part of its overall care of the patient, and she had no way to know of the undisclosed independent contractor relationship.

This doctrine is based on Mduba v. Benedictine Hospital, 384 N.Y.S.2d 527, 52 A.D.2d 450 (1986), where the patient was assigned an emergency room doctor to render care in the hospital’s emergency room. The patient had no relationship with the emergency room doctor, and no reason to suspect that the emergency room doctor was employed by an independent contracting service rather than by the hospital itself. The Appellate Division ruled that the hospital was vicariously liable for the emergency doctor’s malpractice, notwithstanding that he was in independent contractor, because,

“the defendant hospital, having held itself out to the public as an institution furnishing doctors, staff and facilities for emergency treatment, was under a duty to perform those services and is liable for the negligent performance of

those services by the doctors and staff it hired and furnished to decedent. Certainly, the person who avails himself of hospital facilities has a right to expect satisfactory treatment from any personnel who are furnished by the hospital.”

In so holding, the Court specifically noted that the hospital could not use the undisclosed independent contractor relationship with the physician to shield itself from liability:

“Patients entering the hospital through the emergency room, could properly assume that the treating doctors and staff of the hospital were acting on behalf of the hospital. Such patients are not bound by secret limitations as are contained in a private contract between the hospital and the doctor.”

Applying the same criteria to WINSOME SPAULDING’s care, this plaintiff was a “service patient” of the defendant hospital. As a Medicaid recipient, she had no relationship with any private doctors, and accepted care from those doctors assigned to her by the hospital. She was not billed for their professional services, and had no reason to know that the anesthesiologist assigned to her care was an employee of an independent anesthesiology group rather than the hospital itself. She had the right to expect competent, non-negligent care from the anesthesiologist supplied by the hospital. Having had no reason to know of the undisclosed relationship between DR. TANG and the HOSPITAL, she could not be charged with knowing, nor faulted for *not* knowing, that DR. TANG was not an employee of the defendant HOSPITAL. When she did not get treatment within the accepted standard of care, the hospital was vicariously liable for the anesthesiologist’s malpractice, per Mduba.

In Hill v. St. Clare's Hospital, 490 N.E.2d 823, 67 N.Y.2d 72, (1986), the Court of Appeals explained the genesis of this rule imposing vicarious liability on hospitals, at length:

“In Hannon v Siegel-Cooper Co. (167 N.Y. 244), [we] recognized as a predicate for malpractice liability, apparent or ostensible agency (or, as it is sometimes called, ‘agency by estoppel’ or by ‘holding out’). Hannon was an action against a New York City department store which [offered dental services through an independent contracting dentist]... [T]he plaintiff had a right to rely not only on the presumption that the defendant would employ a skillful dentist as its servant, but also on the fact that if that servant, whether skillful or not, was guilty of any malpractice, she had a responsible party to answer therefor in damages.

“The principle of the Hannon case is accepted in both the Restatement (Second) of Agency §267,*fn5, and the Restatement (Second) of Torts §429,*fn6. **It has been applied to hold a hospital or clinic responsible to a patient who sought medical care at the hospital or clinic rather than from any particular physician although the physician whose malpractice caused injury to the patient was not an employee of the hospital or clinic, by both New York courts** (Lanza v Parkeast Hosp., 102 A.D.2d 741; Rivera v Bronx-Lebanon Hosp. Center, 70 A.D.2d 794; Heinsohn v Putnam Community Hosp., 65 A.D.2d 767; Mduba v Benedictine Hosp., 52 A.D.2d 450; Magwood v Jewish Hosp. & Med. Center, 96 Misc. 2d 251; see, Felice v St. Agnes Hosp., 65 A.D.2d 388; see also, 1 NY P.J.I.2d 396 and 1 NY P.J.I. 2:255) **and the courts of other States** (see, e.g., Seneris v Haas, 45 Cal 2d 811, 291 P2d 915; Mehlman v Powell, 281 Md 269, 378 A2d 1121; Howard v Park, 37 Mich App 496, 195 NW2d 39; Stratso v Song, 17 Ohio App 3d 39, 477 N.E.2d 1176; Adamski v Tacoma Gen. Hosp., 20 Wash App 98, 579 P2d 970).”

Thus, plaintiff WINSOME SPAULDING had the right to “rely not only on the presumption that the defendant [MT. VERNON HOSPITAL] would employ a skillful [anesthesiologist, DR. TANG] as its servant, but also on the fact that if that servant, whether skillful or not, was guilty of any malpractice, she had a responsible party to answer therefor in damages.” Hill, supra, citing Hannon, supra. Therefore, the defendant hospital is vicariously liable for the malpractice of its anesthesiologist, DR. TANG.

B. THE HOSPITAL IS VICARIOUSLY LIABLE FOR ITS ANESTHESIOLOGIST, BECAUSE IT HAD A NON-DELEGABLE DUTY UNDER BOTH FEDERAL LAW AND NEW YORK STATE REGULATIONS, TO SUPPLY PROPER ANESTHESIOLOGY SERVICES:

It is a black letter law that a duty imposed by a statute or ordinance cannot be delegated to an independent contractor. Liability for the improper execution of such a duty cannot be avoided by using a contractor to perform the task. If a non-delegable duty is “farmed out” to an independent contractor, the principal is vicariously liable for the contractor’s negligent performance of the job. *See*, generally, Restatement of Torts, *op. cit.*, § 409, comment b, at 371,*fn2.

The defendant hospital’s participation in the Medicare Program subjects it to Federal law that imposes a non-delegable responsibility on the hospital to properly provide the anesthesia services in question. It is a matter of public record that MT. VERNON HOSPITAL participates in the Medicare Program and receives reimbursement under the Medicare Act, 42 U.S.C. § 1395, *et. seq.* Pursuant to the authority contained in the Medicare Act, the Department of Health and Human Services has established conditions for participation that hospitals must meet to participate in the Medicare and Medicaid programs, 42 CFR Part 482, “Conditions for Participation For Hospitals.”

42 CFR §482.12(e) states:

(e) Standard: Contracted Services. The governing body [of the hospital] must ensure that a contractor of services (including one for shared services and joint ventures) furnishes services that permit the hospital to comply with all applicable conditions of participation and standards for the contracted services.

- (1) The governing body must ensure that the services performed under a contract are provided in a safe and effective manner.

Further, 42 CFR §482.52 states in part:

“If the hospital furnishes anesthesia services, they must be provided in a well-organized manner under the direction of a qualified doctor of medicine or osteopathy. The service is responsible for all anesthesia administered in the hospital.”

The clear language of the above regulations is meant to create a non-delegable duty. “The governing body must be responsible for services furnished in the hospital whether or not they are furnished under contracts” is a clear and unambiguous statement. It imposes vicarious liability on MT. VERNON HOSPITAL for the anesthesia services rendered by its independent contractors, including DR. TANG.

The comments in the Federal Register at 51 Fed Reg 116 (1986), 22010-22029, fully support plaintiff’s position, providing a literal and unambiguous reading of the regulations making the governing body of the hospital responsible for contracted services furnished in the hospital:

5. Standard for Contracted Services (§482.12(e)):

NPRM Provisions. The 1983 NPRM was intended to clarify that **the hospital has ultimate responsibility for services, whether they are provided directly, such as by its own employees, by leasing, or through arrangement, such as formal contracts, joint ventures, informal agreements, or shared services. Because many contracted services are integral to direct patient care and are important aspects of health and safety, a hospital cannot abdicate its responsibility simply by providing that service through a contract with an outside resource. For purposes of assuring adequate care, the nature of the arrangement between the hospital and the “contractor” is irrelevant.** The NPRM, therefore, proposed to specify that the governing body must be responsible for these services and that the services must be provided in a safe and effective manner . . . *51 Fed Reg 116* (1986), 22015

New York State regulations are to exactly the same effect: "**The governing body [of the hospital] shall be responsible for services furnished in the hospital whether or not they are furnished by outside entities under contracts.**" New York Hospital Code, 10 NYCRR 405.2 [h].

Applying the common law rule that a principal is vicariously liable for the negligence of its independent contractor where there is a non-delegable duty imposed by a law or regulation, the Supreme Court of Alaska held that a general acute care hospital had a non-delegable duty to provide physicians for emergency room care, so that the hospital was responsible for the care rendered by the independent contractor physicians it had a duty to provide. Jackson v. Power, 743 P.2d 1376 (Alaska 1987).

Extending this doctrine from emergency room services, Irving v. Doctors Hospital of Lake Worth, Inc., 415 So.2d 55 (Fla. 4th DCA), *rev. denied*, 422 So.2d 842 (Fla. 1982), to anesthesiology services, the Florida Circuit Court (15th Circuit, Palm Beach Co.) likewise **held the hospital vicariously liable for the negligence of its independent contractor anesthesiologists, because of the non-delegable duty to provide proper anesthesia services.** Graber v. Dr. Goldfarb and West Palms Hospital, CL 96-10230-AF.

The common law in New York is the same - one cannot avoid liability for the negligent performance of a non-delegable duty by farming the work out to an independent contractor. The federal and state regulations providing that a hospital cannot abdicate its responsibility simply by providing anesthesia services through a contract with an outside resource are the same. It

necessarily follows that the conclusion is the same: MT. VERNON HOSPITAL is vicariously liable for the malpractice of DR. TANG, notwithstanding that she is an independent contractor.

POINT II

BECAUSE THE HOSPITAL IS VICARIOUSLY LIABLE FOR THE ANESTHESIOLOGIST'S MALPRACTICE, TIMELY SERVICE OF PROCESS ON THE HOSPITAL TOLLS THE STATUTE OF LIMITATIONS AS TO THE ANESTHESIOLOGIST

The service of process on DR. TANG in April 1998 was timely, because the prior, timely service on the hospital tolled the statute of limitations as to DR. TANG indefinitely.

CPLR 203(b) provides that where there are two or more defendants in a single action are “united in interest,” service on one within the statutory period preserves the action against the others. *See*, Siegel, New York Practice, 45. This provision permits service on the other defendants to be made after the statutory period expired, provided that one such co-defendant was timely served. Prudential Ins. Co. v. Stone, 270 N.Y. 154, 200 N.E. 679 (1936).

Where one defendant is vicariously liable for another - as herein - the two defendants are “united in interest” *as a matter of law*, Raschel v Rish, 69 N.Y.2d 694; Connell v Hayden, 83 A.D.2d 30. “Co-defendants are united in interest for purposes of CPLR 203 when one defendant is responsible for the acts or omissions of the other.” McLaughlin, *Practice Commentaries*, McKinney's Cons. Laws of NY, Book 7B, CPLR C203:3, at 147.

The leading case explaining the “unity in interest” rule in the malpractice arena that deprives a later-served defendant of the statute of limitations defense, is Scheff v. St. John's Episcopal Hospital et al., 496 N.Y.S.2d 58, 115 A.D.2d 532 (2nd Dept., 1985). In Scheff, the defendant doctor (an anesthesiologist, the same as DR. TANG) was not served with process until after the statutory period expired, but the anesthesiology group with which the anesthesiologist

was affiliated, was timely served.² The Second Department found that the anesthesiologist was “united in interest” with the group *as a matter of law*, so that timely service on the group deprived the individual of the statute of limitations defense:

“The complaint served in this case alleges, and Anala [the anesthesiologist] has admitted, that at the time he treated the decedent he was associated with Suffolk Anesthesiology Associates, P. C., and was acting within the scope of his employment. Anala must therefore be found, as a matter of law, to be united in interest with the timely served co-defendant medical group (see, Connell v Hayden (supra) at pp 46-47; see also, Matter of Parker v Port Auth., 113 A.D.2d 763). **Because Anala is united in interest with his timely served co-defendant Suffolk Anesthesiology Associates, P. C., the date of claim interposition upon Anala relates back to the date upon which the latter was served and renders the Statute of Limitations defense without merit.** [Emphasis added.]

Applying the criteria from *Scheff* to the case at bar, there is no question that DR. TANG, analogous to defendant Dr. Anala in *Scheff*, was affiliated with (and was a partner in) MT. VERNON HOSPITAL Anesthesia Group, and was acting within the scope of her professional duties, when the alleged malpractice occurred.³ MT. VERNON HOSPITAL is vicariously liable for its Anesthesia Group, per Point I *supra*. Like the anesthesiology group in *Scheff*, the co-defendant HOSPITAL was timely served. Thus, as in *Scheff*, “**because Anala** [read TANG] **is united in interest with his** [her] **timely served co-defendant Suffolk Anesthesiology Associates, P. C.** [read MT. VERNON HOSPITAL], the date of claim interposition upon Anala [read TANG]

² The Court below missed the point of the *Scheff* case, distinguishing it from the case at bar on the basis that the anesthesia group in *Scheff* was a named co-defendant, while the anesthesia group herein is not. That is a distinction without a difference, as the HOSPITAL’s vicarious liability herein creates the same “unity of interest” between the anesthesiologist and the hospital, as existed between the anesthesiologist and the anesthesia group in *Scheff*.

³ Defendant DR. TANG so testified at her deposition, appended to her moving papers, at pages 53-54, R. 302-303.

relates back to the date upon which the latter was served and **renders the Statute of Limitations defense without merit.**” 496 N.Y.S.2d at 60.

There is a 3-prong test for “relation back” in order to activate the “unity of interest” tolling of the statute of limitations, per Brock v. Bua, 83 A.D.2d 61, 69 (2nd Dept., 1981).⁴ Plaintiff easily passes all three tests:

1. The claims must arise from the same conduct, transaction, or occurrence. That is easy in this case. WINSOME SPAULDING was injured by an intravenous needle that was badly placed, and the consequent injury was not timely diagnosed or treated. There is only one “occurrence” here - the improper placement of a needle in the patient’s arm. While it remains unclear exactly who it was that placed the needle, it either NURSE CORRAZA or DR. TANG. That is the only “transaction” or “occurrence” at issue. That there are factual issues as to *who* placed the needle does not constitute more than one “occurrence.”
2. The parties are “united in interest.” That, too, is easy. Both defendants pose the same medical and legal defenses, presenting a commonality of interests in defeating plaintiff’s claims. The HOSPITAL’s vicarious liability for DR. TANG’s malpractice creates a unity of interest as a matter of law. DR. TANG is not in any way prejudiced by the service of process which would otherwise be late, and indeed, has not even *attempted* to show prejudice.
3. DR. TANG knew, or should have known, that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against her. The failure to name and serve DR. TANG at the outset was an excusable mistake by the plaintiff. The patient had

⁴ In Brock v Bua, 83 A.D.2d 61, *supra*, the Appellate Division gave the rule a three-prong specificity, patterned largely after the Federal “relation back” test codified in rule 15 © of the Federal Rules of Civil Procedure (see generally, 1 Weinstein-Korn-Miller, NY Civ. Prac. P 203.05, at 2-92, 2-93; compare also, Duffy v Horton Mem Hosp., 66 N.Y.2d 473, 476-477). The “Brock test” examines whether (1) both claims arose out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well (Brock v Bua (*supra*) at 69). All three features must be met for the statutory relation back remedy to be operative.

no way of knowing that the anesthesiologist who treated her (TANG) was not an employee of the defendant HOSPITAL. From the patient's perspective, all the visible evidence was that DR. TANG was a staff employee. The patient-plaintiff had no way to know of the undisclosed independent contractor relationship, and had no say in the selection of her anesthesiologist. She accepted, without questioning, the doctors assigned to her by the HOSPITAL. There was no "inexcusable neglect."

Thus, the "relation back" and "unity of interest" criteria are completely fulfilled. To the same effect, see, Kladek v. St. Vincent's Hospital, 491 N.Y.S.2d 948, 128 Misc. 2d 985 (1985); Lanza v. Parkeast Hospital, 102 A.D.2d 741; Hill v. St. Clare's Hospital et al., 483 N.Y.S.2d 695, 107 A.D.2d 557; Noble v. Porter, 188 A.D.2d 1066; Agustin v. Beth Israel Hospital, 185 A.D.2d 203, 205-206; Soltis v. State of New York, 172 A.D.2d 919; Citron v. Northern Dutchess Hospital, 198 A.D.2d 618; Ryan v. New York City Health & Hospitals Corporation, 633 N.Y.S.2d 500, 220 A.D.2d 734 (2nd Dept., 1995). This principle of law was reaffirmed by the unanimous Second Department in Shafran vs. St. Vincent's Hospital and Medical Center, No. 779 (N.Y. App. Div. 09/02/1999).

In another recent (September 1999) Second Department decision, Austin v. Interfaith Medical Center, 264 A.D.2d 702, 694 N.Y.S.2d 730 (2nd Dept., 1999), this Court affirmed the Brooklyn Supreme Court, finding that the defendant hospital was "united in interest" with its independent contractor emergency room doctor, so that the doctor's statute of limitations defense was invalid. In Austin, the plaintiff sued the hospital for malpractice by its emergency room doctor, but did not sue the independent contractor directly, because the plaintiff was unaware of the independent contractor relationship. The hospital impleaded the contractor in a third-party

action, and over the independent contractor's objections, the plaintiff amended his pleadings to add a direct claim against the independent contractor/third-party defendant. The Appellate Division found that all three prongs of the "Brock test" were met, and reiterated the principle that "the fact that one of the parties is vicariously liable for the conduct of the other, permits the new party to be charged with timely notice," and, particularly, that "[w]ith respect to the third prong, the Supreme Court providently exercised its discretion in permitting the plaintiff's amended complaint against the third-party defendants to relate back to her original complaint against the Hospital since there was no showing of bad faith on the part of the plaintiff or prejudice to the third-party defendants in failing to initially identify them (see, Buran v Coupal, 87 NY2d 173, *supra*)."

Notably, DR. TANG has not and cannot demonstrated any *actual* prejudice arising from the application of the "relation back" rule. Her mere conclusory assertions of prejudice have no weight. All of her actions and involvement in the case were documented by her, in her own hand, in the hospital records. Every record, and every witness she wanted to call for examinations before trial (and there were none), were available to her. As she remained on the anesthesia service of the defendant HOSPITAL at least until her deposition was completed, she had full access to all of the hospital records and departmental documents. No showing of actual prejudice was made, or even attempted, because none was possible. In this context, it is also important to note that DR. TANG's Answer contains no cross-claim against her co-defendants (R. 44-49), putting the lie to her attorneys' argument that their defense might be to blame the co-defendants.

Further, DR. TANG knew, or should have known, of the claim against her. As the Appellate Division noted in Scheff, *supra*, “It is to be remembered that the notice policy relevant to the unity of interest rule relates to claim interposition only; as such, ‘[the] notice required . . . may be informal because it is intended only to satisfy the rationale underlying the Statute of Limitations . . . and not the more stringent notice requirement underlying the acquisition of jurisdiction over a defendant by the service of a summons’ (Brock v Bua, 83 A.D.2d 61, 69; see also, Connell v Hayden (*supra*) at pp 40-41).”

Thus, Plaintiff-Appellant respectfully concludes that the defendant’s motion for summary judgment/dismissal should have been denied because the statute of limitations against DR. TANG was tolled under the specific facts and applicable law of “unity of interest” and “relation back.”

POINT III

THE DEFENDANT'S MOTION SHOULD HAVE BEEN DENIED BECAUSE IT VIOLATED "THE LAW OF THE CASE"

A Preliminary Conference was held before Mr. Justice Rudolph on October 29, 1998 (R.404-407.) The provisions of the Preliminary Conference Order were entered on consent, and no objection and no appeal was taken therefrom. As such, those provisions are final, and unquestionably constitute the binding "law of the case."

The Preliminary Conference Order plainly requires that all dispositive motions, including the defendant's motion for summary judgment/dismissal, "**shall be made within 90 days after the completion of depositions.**" Notably, this provision was completed *in the handwriting of defense counsel*. (R. 404-497).

The last deposition herein was Dr. TANG's, taken on March 17, 1999. As such, the binding "law of the case" required that the defendant's motion had to be made **by June 16, 1999 at the latest.** Instead, the defendant delayed more than three additional months, not bringing the motion until September 22, 1999.

A defendant who moves for dismissal for failure to meet strict legal deadlines should not be heard to seek forgiveness for violating the legal deadline for bringing a motion to dismiss. One who demands punctiliousness of other should be punctual themselves. Their equitable argument lacks the requisite "clean hands."

The defendant's attempted explanation for their lateness in the Court below, is that the 90-day deadline in the Preliminary Conference Order conflicts with CPLR 3212(a), and that their

reliance on CPLR 3212(a) freed them to disregard the Preliminary Conference Order (R. 421-422). (CPLR 3212(a) gives the court explicit authority to set a deadline for dispositive motions, “provided, however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of a note of issue.” Defense counsel concedes that the note of issue herein was filed on approximately July 1, 1999. (R. 421) Plaintiffs’ file shows that Note of Issue was sent to the Court on *June* 1, 1999, not *July* 1, 1999 as defense counsel contends. But it makes little difference, because using either date to start the 30-day clock running, the defendant’s motion was still late. Thus, the defendant’s reliance on CPLR 3212(a), as an excuse for their disregard of the Preliminary Conference Order, is misplaced. Since the defendant’s motion wasn’t made until September 22, 1999, it was untimely either way.

The defendant’s argument would be more persuasive if the shorter deadline in the Preliminary Conference Order were not written into the order form *in defense counsel’s handwriting*. We find it incongruous that an attorney who herself writes a deadline into a court order, argues that she is free to disregard that deadline because it varies from a statute. We respectfully suggest that defense counsel is estopped from contesting the deadline in the Preliminary Conference Order, having written the deadline herself.

CPLR 3212(a) expressly provides for relief from the late filing of a dispositive motion only by “leave of court for good cause shown.” DR. TANG has utterly failed to show good cause for her lateness. Certainly reliance on the statute, in derogation of “the law of the case,” is not “good cause” where the defendant is late according to the statutory deadline, too.

As the defendant's motion below was in direct violation of the clear deadline in the Preliminary Conference Order, and also is violative of the statutory deadline in CPLR 3212(a) on which the defendant claims to have relied in lieu of the Preliminary Conference Order, it should have been denied without bothering to consider the alleged merits.

POINT IV

THE PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED

A. DR. TANG'S AFFIDAVIT DENYING MALPRACTICE SHOULD NOT HAVE BEEN CONSIDERED:

In support of her motion for dismissal/summary judgment, DR. TANG supplied her own self-serving and conclusory Affidavit, in which she denied committing malpractice. Plaintiff contends that DR. TANG's Affidavit does not meet the standards of the "Winegrad test," and should have been disregarded in its entirety.

DR. TANG states, and her attorney argued, that because her hospital chart entries do not document the patient's injury, therefore, there was no malpractice:

"The entire Mt. Vernon Hospital anesthesia record ... is devoid of any indication whatsoever that there was any complication with the administration of IV anesthesia... At no time during the plaintiff's admission was I ever advised by the plaintiff or any other individual that the plaintiff was experiencing any pain or other symptomatology with regard to her upper extremities. My care and treatment of the plaintiff was, at all times, in accord with good and accepted standards of medical practice. At no time during my care and treatment of the plaintiff did I deviate from good and accepted standards of medical practice." (R. 32)

The law preventing a defendant doctor's from winning summary judgment in a malpractice case by conclusorily denying his/her own liability, was established by the Court of Appeals fifteen years ago, in Winegrad et al vs. N.Y.U. Medical Center et al, 480 N.Y.S.2d 472 (First Dept., 1984); *reversed* 476 N.E.2d 642, 64 N.Y.2d 851 (1985). In *Winegrad*, as herein, each defendant doctor submitted his/her own self-serving affidavit stating that he (or she) was a physician licensed to practice, that he (or she) reviewed the relevant records (including his/her

own records), and that he/she did not deviate from good and accepted practice and did nothing to cause the plaintiff's injuries. The Court of Appeals held:

[T]he bare conclusory assertions echoed by all three defendants that they did not deviate from good and accepted medical practices, with no factual relationship to the alleged injury, do not establish that the cause of action has no merit so as to entitle defendants to summary judgment (CPLR 3212 [b]; cf. Neuman v Greenstein, 99 A.D.2d 1018, and Pan v Coburn, 95 A.D.2d 670). Defendants' cross motion for summary judgment should therefore have been denied.

The "Winegrad test" for the adequacy of defendant doctor's self-serving denials of liability in malpractice cases is controlling law throughout the state. **"Bare conclusory denials of malpractice without any factual relationship to the alleged injury are insufficient to establish that a defendant is entitled to summary judgment** (see, Winegrad v. New York Univ. Med. Center, *supra*; Ferretti v Town of Greenburgh, 191 A.D.2d 608, 595 N.Y.S.2d 494; Montalbano v North Shore Univ. Hosp., 154 A.D.2d 579, 546 N.Y.S.2d 408)." Also *see*, for instance, Muscattello v. City of New York, 627 N.Y.S.2d 567, 215 A.D.2d 463 (Second Dept., 1995). Also *see* Bower, "Defending Motions for Summary Judgment in Malpractice," 17 *Trial Lawyers Quarterly* 1 at 30-35 (1985).

DR. TANG'S self-serving affirmation is indistinguishable from those that the Court of Appeals found inadequate in *Winegrad*, and which the other courts found inadequate in the subsequent cases. DR. TANG *admitted* that she has no recollection whatsoever of this patient's care (R. 36), and having no independent knowledge to add, all she could do is rely on the contents of the MT. VERNON HOSPITAL chart (R. 31.) However, DR. TANG's record-keeping in the

chart is conspicuously unilluminating and inadequate. DR. TANG *admitted* that she used the plaintiff's intravenous line for anesthesia, but cannot say whether it was in the left or right arm, because her record-keeping was so scant (R. 268-269). She further *admitted* that she only documents "abnormalities" rather than significant medical events (R. 31, 270), and arrogantly concludes that the absence of *any* note describing the patient's condition (whether good or ill) proves that all was well. Such a self-serving conclusion is akin to the bare conclusory allegations that were inadequate in *Winegrad*.

As such, DR. TANG's self-serving and conclusory affirmation was without evidentiary weight, thereby effectively leaving the Affirmation of plaintiff's expert unopposed.

DR. TANG appended a complete copy of the hospital chart to her motion, and her counsel argues (without any expert support) that the absence of any contemporaneous documentation of the patient's injury is exculpatory. DR. TANG's argument is illogical, circular reasoning. The failure to promptly recognize and document the injury cannot possibly be exculpatory. On the contrary, it is additional negligence. DR. TANG's attorney quoted from the plaintiff's deposition that the patient didn't tell "any *other* nurse" about the injury during her initial hospitalization (R. 456), but selectively omitted plaintiff's key, relevant testimony, so that DR. TANG's conclusion is misleading and illogical. The patient testified that she complained of the injury at the moment it happened, and that the person who inserted

the needle couldn't find a vein, withdrew the needle, apologized, wiped away the blood from her hand, and then re-inserted the needle on the opposite limb.⁵

Thus, there was both contemporaneous *actual notice* of the injury, and contemporaneous *acknowledgment* of it. That this wasn't documented by the person who (mis)placed the needle is *inculpatory*, not *exculpatory*, and defense counsel's inference that one should either "blame the victim" for not complaining more aggressively, or that the injury wasn't brought to DR. TANG's attention, must fail. As attested by plaintiff's expert, *infra*,

⁵ The plaintiff's testimony (R. 95-98) is clear:

"A. She [the person who inserted the needle] said she couldn't find a vein, and so she was trying to do it over here (indicating.)

Q. You indicated that upon removal of your needle, the right wrist was bleeding?

A.. Yes.

* * * * *

"Q. At the time the nurse was apparently inserting the needle into your right wrist, did you feel pain as a result of that insertion?

A. Yes.

Q. Was the pain immediate?

A. Yes.

Q. Can you describe for me the type of pain that you were feeling in your right wrist at the time?

A. Like a piercing – like a needle stick.

* * * * *

Q. Now, you stated that the nurse indicated that she was sorry. Can you tell me specifically what she said?

A. She said, 'I'm sorry,' and she pulled the needle out."

Note: Although the questions referred to the person who inserted the needle as a "nurse", the plaintiff had no idea whether the person was a nurse, doctor, resident, intern, or otherwise. Accordingly, it could just as well have been anesthesiologist DR. TANG, who easily matches the physical description given by the plaintiff at R. 91-92.

DR. TANG'S failure to find, document, and treat the injury, was itself malpractice. The defendant should not be heard to argue that the superficiality of her examination and inadequate record-keeping prove the *absence* of liability. Instead, they prove the *presence* of liability.

B. PLAINTIFF'S MEDICAL EXPERT ATTESTED TO DEPARTURES WHICH THE DEFENDANT DID NOT ADDRESS, THEREBY CONSTITUTING UNCONTROVERTED PROOF OF MALPRACTICE:

Plaintiff's Cross-Motion included an Affirmation of Merit by a board-certified surgeon of more than 50 years' experience. Our expert attested that he has the experience, background, training, and credentials to address the medical issues before the Court, and reviewed the relevant medical records and deposition testimony, and is familiar with the issues herein.

Dr. Davidson flatly disputed DR. TANG's self-serving and conclusory denial that the plaintiff was injured by DR. TANG's intravenous "needle stick." The plaintiff's sworn deposition testimony demonstrates unequivocally that the injury occurred at the time the intravenous needle was inserted (R. 96-98.) Causal connection is demonstrated by Dr. Davidson, who ascribes the mechanism of the injury to the inadequate and faulty technique used to open the intravenous line. Thus, a deviation and departure from good practice, and causal relationship to the injury, is proved by a competent expert affidavit..

To the extent that DR. TANG self-servingly denied causing the injury and the expert affirmations of the plaintiff's and defendant's medical experts contradict one another, a

question of fact and credibility arises which precludes the granting of summary judgment to either side. Accordingly, the defendant's motion must be denied.

However, Dr. Davidson's affirmation went beyond DR. TANG's self-serving denials, and detailed additional malpractice that DR. TANG did not address, far less deny. DR. TANG *admitted* that she didn't find the injury in her routine peri-operative and post-operative examinations. Dr. Davidson attests that *DR. TANG's failure to detect and treat the injury was a separate and addition act of malpractice*, distinct from causing the injury in the first place (R. 449-451). Even the defendants' physical examinations - their so-called "I.M.E.'s" - recognized that the injury occurred, although they naturally downplayed the severity. The "I.M.E." by neurologist Dr. Sheldon Wasserman for the defense, stated that the patient "was able to give a lucid report of her problem" and "that she was immediately aware of the pain at the site of the needle stick." (R. 449). Had DR. TANG promptly detected the injury, immediate treatment could and would have minimized the harm to the patient (R. 450.) Thus, DR. TANG's *admitted* failure to recognize and diagnose the injury resulted in a deprivation of a substantial chance of cure or palliation (R. 449-451). DR. TANG's Affirmation *conceded* the facts which give rise to this avenue of liability.

As plaintiff's medical expert demonstrated an aspect of medical malpractice by DR. TANG which the defendant did not and could not deny, summary judgment on the cross-motion should have been granted to the plaintiff.

CONCLUSION

MT. VERNON HOSPITAL is vicariously liable for the malpractice of DR. TANG. Because of the vicarious liability, there is a “unity of interest” as a matter of law. Because of the “unity of interest,” the timely service of process on MT. VERNON HOSPITAL tolled the statute of limitations as to DR. TANG, and deprived DR. TANG of the statute of limitations defense.

Since DR. TANG’s statute of limitations defense was invalid, the Court below should have resolved the motion and cross-motion on the merits. To the extent that the contradictory affidavits of the defendant and of plaintiff’s experts raised opposing conclusions, these factual disputes require a jury trial for resolution, and neither party should receive summary judgment. However, insofar as plaintiff’s expert attested to acts of malpractice which DR. TANG did not deny - indeed, did not even address - that uncontroverted proof of malpractice deserved summary judgment on the merits.

Accordingly, the decision dismissing the case on the basis of the expiration of the statute of limitations was in error, and should be reversed. The failure to address the uncontroverted proof of malpractice in DR. TANG’s failure to recognize and diagnose the injury at an early stage, when prompt intervention could have made a significant difference to the patient, was error. The decision should be vacated entirely, and partial summary judgment granted to the plaintiff.

Respectfully submitted,

Mark R. Bower
Attorney for Plaintiff-Appellant