Great American Ins. Co. v. Marian Regional Medical Center et al. Case No. 20CV02055
Hearing Date: December 19, 2023
Motion: Summary Judgment or SAI

Recommended Tentative

Factual History

The allegations in the complaint as well as facts gleaned from the medical records have been thoroughly presented in the separate statement.[1]

Adriana Velazquez was injured in a car accident on July 9, 2018 and was evaluated at approximately 3:47 p.m. in the emergency department at Marian Regional Medical Center (Marian) by physician Noah Hawthorne, M.D. CT scans were performed. At approximately 4:33 p.m., Dr. Hawthorne spoke with on-call surgeon Daniel Oh, M.D. who accepted admission.[2]

Dr. King discussed his plan to stabilize Ms. Velazquez with her at 6:20 p.m. At 7:10 p.m., she was transported to the operating room where Dr. King performed the operative procedures. Ms. Velazquez tolerated the procedure well but had pain that was difficult to control overnight. On the evening of July 9, 2018, neurosurgeon Nicholas Slimack, M.D., charted that Ms. Velazquez had nonsurgical and stable issues that did not require any specific treatment. He noted that by the time he went to see the patient she had already been taken to the operating room and was there the entire evening quite late.

On July 10, 2018, at approximately 6:50 a.m., Ms. Velazquez was administered Morphine 4mg IV push for 10 out of 10 pain. At 8:00 a.m., Tasya Gowing, R.N., noted that Ms. Velazquez' Glasgow Coma Score was 6 with spontaneous eye opening response (4 points), no motor response (1 point) and no verbal response (1 point). She was unable to assess her right and left dorsiflexion as Ms. Velazquez was unable to follow commands. At approximately 8:15 a.m., a rapid response team ("RRT") was called for change in level of consciousness.

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[1] Much of the separate statement is presented in terms of what was "charted" or "documented" in the medical records. Presenting these material facts in an attributive form is unacceptable, e.g., what any one person charted is not, as such, a material fact. It is of interest only as evidence of the fact itself. (*Reeves v. Safeway Stores, Inc*. (2004) 121 Cal.App.4th 95, 106—[". . . what Sparks (or for that matter Flagen–Spicher) might have said in deposition is not, as such, a "material fact." It is of interest only as evidence of a material fact, e.g., that plaintiff made a damaging admission about his confrontation with Juarez.") No objection was made to the separate statement and therefore the court will accept it presented].)

[2] Upon admission, Dr. Hawthorne (at Dr. King's direction) pursued transfer to Cottage Hospital for orthopedic care. At approximately 5:53 p.m., Dr. Hawthorne spoke with William Dunbar, M.D., an orthopedic surgeon at Cottage Hospital. Dr. Dunbar indicated it would be optimal to stabilize the patient at Marian Hospital and to transfer if any decompensation. He did not accept the transfer. No negligence is asserted as to this treatment decision.

Nicholas Becketti, D.O., documented that he was contacted to see the patient in consultation regarding her unresponsive status. Pursuant to stroke protocol, he ordered a stat CT evaluation of the head and neck vessels. At approximately 9:00 a.m., Ms. Velazquez underwent a CT angiogram of the head and neck. Radiologist Thomas Church, M.D., interpreted the angiogram. At approximately 10:44 a.m., Dr. Becketti ordered Ms. Velazquez transferred to the ICU.

Neurosurgeon Dr. Slimack was consulted at around 11:00 a.m. on July 10, 2018. Dr. Slimack reviewed the CT angiogram of the head and noted that his interpretation differed slightly from the radiologist's report. He noted that the findings were concerning for a possible dissection, although the overall quality of the scan through the posterior fossa and the vertebral arteries was somewhat limited. He contacted Dr. Becketti regarding the patient's CTA findings and recommended that Dr. Becketti call the office of Dr. Zauner in Santa Barbara for his opinion of the imaging and if there were any potential interventions that he could offer that could not be performed at Marian. Dr. Becketti called Dr. Zauner's office which was closed for lunch. He reached the on-call service who offered to leave a message for Dr. Zauner and Dr. Becketti gave them the patient's information and his contact information with a request to call him.

Dr. Slimack charted that he promptly communicated to neurosurgeon Alois Zauner, M.D., and requested that he review the CT angiography to give his impression on the findings. Dr. Slimack charted that Dr. Zauner immediately responded and was also sharing the same concerns that Dr. Slimack had about the vertebral artery on the left side and the basilar artery. Dr. Slimack does not recall the specific time he first reached out to Dr. Zauner, but his estimate was that the call occurred within forty-five to sixty minutes from approximately 11:00 a.m., when he had arrived at Ms. Velazquez' bedside. Dr. Zauner testified that this call occurred in the “mid-afternoon.” Dr. Slimack documented that at that time everything was set in motion to get the patient transferred down to Santa Barbara Cottage Hospital (Cottage) without delay.

At approximately 3:51 p.m., Nurse Najera-Wollerton charted that a report was given to Whitney, ER RN at Cottage Hospital and to Amy, RN at CALSTAR Air Medical Services. At approximately 4:19 p.m., dispatch at CALSTAR was notified. At approximately 4:20 p.m., a unit was dispatched. At approximately 4:32 p.m., the air transport helicopter was enroute to Marian. At approximately 4:48 p.m., the CALSTAR crew arrived at the patient. At approximately 5:28 p.m., CALSTAR departed Marian. At approximately 6:03 p.m., Ms. Velazquez arrived at the emergency department at Cottage Hospital with nursing and Dr. Zauner at bedside. At approximately 6:32 p.m., a repeat CT angiogram of the head and neck was performed She was then taken to the angiography suite for mechanical and intra-arterial thrombolysis performed by Dr. Zauner beginning at approximately 7:08 p.m.

After surgery, Ms. Velazquez was diagnosed with brainstem stroke syndrome. She was alert and able to communicate with eye blinks but had no motor function on command to all extremities. She remained "locked in" during her hospital stay. Ms. Velazquez remained hospitalized at Cottage until July 30, 2018 when she was transferred to St. John's Pleasant Valley Hospital pursuant to her insurance company's request for further care and treatment.

Procedural History

Ms. Velazquez and her spouse subsequently sued Corazon Del Campo, LLC, Lidia Bibiano, and Santa Maria Farms for motor vehicle negligence, general negligence, negligence per se, and loss of consortium. (Case No. 18CV03707, Judge Beebe.) Chubb Insurance Co., Everest Insurance Co. ("Everest"), and Great American Ins. Co. ("GAIC") provided defenses for their respective insured. On April 24, 2019, the Velazquezes resolved their claims for $20 million dollars. Pursuant to the terms of the comprehensive release negotiated between the parties, Chubb paid $3 million dollars, Everest paid $7 million dollars, and GAIC paid $10 million dollars on behalf of their insureds.

On June 11, 2020, Everest, GAIC, and Chubb Ins. Co. (plaintiffs or plaintiff insurers) filed a complaint alleging the following causes of action: (1) subrogation; (2) equitable comparative indemnity; and (3) declaratory relief. On May 15, 2023, the second cause of action for equitable indemnity was dismissed. On June 12, 2023, the court dismissed the declaratory relief cause of action. Thus, the sole remaining cause of action is for subrogation.

The remaining defendants include Marian Regional Medical Center (Dignity Health), Cottage Health, Santa Barbara Cottage Hospital, Thomas Church, MD, Victor Pulido, DO, Nicholas Slimack, MD, Nicholas King, MD, Daniel Oh, MD.[3]

On Calendar

Cottage Health and Santa Barbara Cottage Hospital (together, Cottage) move for summary judgment on the grounds that plaintiffs cannot establish any breach of the standard of care and/or any causation on its part that would make it liable for any damages claimed by the plaintiffs. Opposition was filed on December 5, 2023. Reply was filed on December 14, 2023. All filings have been considered by the court.

[3] The dismissed defendants include: William Wright, MD (dismissed 8/16/23); Anthony Minasaghanian, MD (dismissed 7/13/23); Alois Zaunder, MD (dismissed 3/16/22); and Brian Fields, D.O. (dismissed 7/23/21).

Applicable Law

The defendant moving for summary judgment/adjudication has the burden of persuasion that "one or more elements" of the "cause of action cannot be established" or that there is a "complete defense," and the burden of production to make a prima facie showing of no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal 4th 826, 850.) Once the defendant has met this burden, the burden shifts to plaintiff to show that a triable issue of material fact exists as to that cause of action or defense. (Code Civ. Proc., § 437c subd. (p)(2).)

The elements of an equitable subrogation claim are: " '(1) [t]he insured has suffered a loss for which the party to be charged is liable, either because the latter is a wrongdoer whose act or omission caused the loss or because he is legally responsible to the insured for the loss caused by the wrongdoer; (2) the insurer, in whole or in part, has compensated the insured for the same loss for which the party to be charged is liable; (3) the insured has an existing, assignable cause of action against the party to be charged, which action the insured could have asserted for his own benefit had he not been compensated for his loss by the insurer; (4) the insurer has suffered damages caused by the act or omission upon which the liability of the party to be charged depends; (5) justice requires that the loss should be entirely shifted from the insurer to the party to be charged ...; and (6) the insurer's damages are in a stated sum, usually the amount it has paid to its insured, assuming the payment was not voluntary and was reasonable.' " (*Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522-1523.)

Cottage impliedly argues the fourth element cannot be established because it was not responsible for any part of Ms. Velazquez' damages. Stated another way, it argues it was not medically negligent in its care and treatment of Ms. Velazquez.[4]

Qualified expert testimony is required to establish that a medical practitioner performed in accordance with the prevailing standard of care within the community. (*Zavala v. Board of Trustees of the Leland Stanford. Jr. University, et al.* (1993) 16 Cal.App.4th 1755, 1756; *Johnson v. Superior Court* (2006) 143 Cal.App 4th 297, 305). An expert opinion must be supported by reasons or explanations. (*Kelley v. Trunk* (1998) 66 Cal App 4th 519, 523). The plaintiff must then submit his or her own expert declaration in order to controvert defendant's expert relative to whether defendant breached the requisite duty and standard of care. (*Willard v. Hagemeister* (1981) 121 Cal.App.3d 406, 414.) Thus, to avoid summary judgment in a medical malpractice case, a plaintiff must produce expert testimony to rebut any

[4] The elements of a cause of action for medical negligence are: (1) The duty of the professional to use the skill, prudence and diligence of other members of the profession commonly possess and exercise; (2) breach of the duty; (3) proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the negligence. (*Burgess v. Superior Court of Los Angeles County* (1992) 2 Cal.4th 1064, 1077.)

defense expert who asserts the defendant acted within the standard of care. (*Jambazian v. Borden* (1994) 25 Cal.App.4th 836.) Furthermore, plaintiff must establish causation within a "reasonable medical probability" based upon competent expert testimony. (*Jones v Ortho Pharmaceutical Corp.* (1985) 163 Cal App.3d 396, 402-403; *Bromme v. Pavitt* (1992) 5 Cal App 4th 1487, 1504-1505.)

The evidence submitted in support of the motion and in opposition must be admissible evidence. (Code Civ. Proc., § 437c subd. (d).) Declarations submitted by the party opposing, once found admissible, are liberally construed, while the moving party's declarations are strictly construed (*Bozzi v. Nordstrom*, Inc. (2010) 186 Cal.App.4th 755, 761.)

Evidence

1. Cottage

Cottage offers declarations from two medical experts: Cary Alberstone, M.D., F.A.C.S., and Nerses Sanossian, M.D., F.A.H.A., F.A.A.N. Both are board certified physicians and familiar with the medical standard of care. Sanossian opines:

- " . . . the care and treatment provided to Adriana Velazquez by Cottage Hospital's employees and staff complied with the standard of care in the community." (Sanossian Decl., ¶ 5.)
- "Even if Ms. Velazquez had been transferred to Cottage Hospital earlier in the day on July 10, 2018, it would not have made any difference in her outcome. Based upon my review of the radiology studies, and with the benefit of hindsight, there was evidence of irreversible ischemic changes in the brain stem on the CT scan of the brain at approximately 9:00 a.m., on July 10, 2018." (Sanossian Decl., ¶ 7.)
- "In addition, based on Ms. Velazquez' clinical neurological presentation at approximately 8:00 a.m., on July 10, 2018, to a reasonable degree of medical probability, her mostly likely outcome would have been grave disability." (Sanossian Decl., ¶ 8.)

Alberstone opines:

- " . . . it is my opinion that the care and treatment provided to Adriana Velazquez by Cottage Hospital complied with the standard of care in the community." (Alberstone Decl., ¶ 5.)
- "The first time that anyone at Cottage Hospital was contacted about the transfer of Ms. Velazquez related to her neurological condition was on July 10, 2018, at approximately 3:51 p.m. Once notified of Ms. Velazquez' transfer on July 10, 2018, Cottage Hospital timely and efficiently worked to facilitate her transfer to there and prepare for her

arrival. There is no indication of any delay on behalf of Cottage Hospital to provide further care to Ms. Velazquez." (Alberstone Decl., ¶ 7.)

- "There was no delay as to Cottage Hospital that in anyway caused or contributed to any of her injuries. Upon notification and initiation of transfer, the team at Cottage Hospital timely administered the appropriate care and treatment to Ms. Velazquez." (Alberstone Decl., ¶ 10.)
- "Once the patient was transferred, the care rendered by the staff and employees of Cottage Hospital was appropriate and within the standard of care." (Alberstone Decl., ¶ 8.)

2. Plaintiffs' Evidence

Plaintiffs submit the declaration of Dr. Michael Gold, who has been affiliated with the UCLA Department of Neurology since 1985 and is now an Associate Clinical Professor of Neurology in the UCLA Department of Neurology. He opines that "it is my opinion that to a reasonable medical probability, had the thrombectomy been performed within approximately 5 hours of the triggering of the stroke protocol at MRMC, Ms. Velazquez would have suffered significantly less permanent brain damage and resulting physical impairment. The fact that the procedure was not undertaken for over 10 hours likely aggravated the injuries suffered by Ms. Velazquez." (Gold Decl., ¶ 6.)

Analysis

1. Duty of Care

The pleadings determine the scope of relevant issues on a summary judgment motion. (*Nieto v. Blue Shield of Calif. Life & Health Ins. Co*. (2010) 181 Cal.App.4th 60, 74.) Here, it is alleged that "Plaintiffs are informed and believe and based on such information alleged that a clot had developed in Ms. Velazquez' artery that supplied blood to the brain stem. Ms. Velazquez' doctors determined that her blood supply to the brain was "thready," but failed to move her immediately to a better-equipped regional hospital. For a period of approximately ten (10) hours after the initial call for the stroke team at MARIAN, there was no substantial action to address the clot until after she was transferred to COTTAGE HOSPITAL." (Complaint, ¶ 23, Sep. Statement, No. 12.)

It's clear from the pleadings that plaintiffs' case relies on Cottage's failure to ensure that Ms. Velazquez's transfer occurred in a timely fashion so she could receive treatment that Cottage could provide. According to the undisputed facts, Dr. Slimack spoke with Dr. Zauner at one of two times: (1) either between 11:45 a.m. and noon; or (2) mid-afternoon. (Sep. Statement, No. 37.) It is undisputed that

stroke protocol was initiated at approximately 8:15 a.m. (Sep. Statement, No. 31); that dispatch at CALSTAR Air Medical Services was contacted at approximately 4:19 p.m. (Sep. Statement, No. 40); that Ms. Velazquez arrived at the emergency department of Cottage at approximately 6:03 p.m. (Sep. Statement, No. 43); and that Dr. Zauner performed the thrombolysis beginning at approximately 7:08 p.m. (Sep. Statement, No. 44.)

Dr. Alberstone opines: "The first time that anyone at Cottage Hospital was contacted about the transfer of Ms. Velazquez related to her neurological condition was on July 10, 2018, at approximately 3:51 p.m. Once notified of Ms. Velazquez' transfer on July 10, 2018, Cottage Hospital timely and efficiently worked to facilitate her transfer to there and prepare for her arrival. There is no indication of any delay on behalf of Cottage Hospital to provide further care to Ms. Velazquez." Alberstone Decl., ¶ 7.)

There is no evidentiary basis *in the moving papers* for Alberstone's assertion that the contact at 3:51 was the "first contact." Although the record discloses that contact between Marian and Cottage was, in fact, made at 3:51 p.m., Dr. Alberstone's conclusion that this was the "first time that anyone at Cottage Hospital was contacted about the transfer of Ms. Velazquez related to her neurological condition" is unsupported by the record. Indeed, plaintiffs point out that *Dr. Zauner* had been previously contacted about her transfer and their expert, Dr. Gold, opines: "Based on [the] assumption [that Dr. Slimack's phone call to Dr. Zauner occurred around noon], it would be my opinion that Dr. Zauner, *acting for SBCH* breached the standard of care by not ensuring that the helicopter transfer occurred in a timely fashion. At the very least, when Ms. Velazquez had not arrived at SBCH within an hour or two of the phone call (i.e. by 1:00 or 2:00 pm,) a reasonably careful doctor would have raised alarms with SBCH staff, as well as the staff at MRMC, in an effort to expedite the transfer. (Of course, Dr. Zauner does not and cannot claim that he did this, having taken the position that the crucial call with Dr. Slimack occurred around 3:00 pm). On these facts, if indeed Dr. Zauner was contacted earlier, he arguably would have at least partial responsibility for the total delay." (Gold Decl., ¶ 8 [emphasis added].)

Plaintiffs do not specify under what theory Dr. Zauner's purported negligence may be imputed to Cottage. Dr. Zauner is not a defendant in this action; he was dismissed March 16, 2022. Thus, the agency allegations in the complaint are arguably inapplicable. (Complaint, ¶ 11.)[5] In reply, Cottage submits evidence that Dr. Zauner is not an employee of Cottage; he is an independent contractor. (Decl. of

[5] "Plaintiffs are informed and believe and thereon alleges that at all times mentioned herein, each and of the Defendants were the agents, servants, representatives or employees of each of the remaining Defendants and, in engaging in the acts alleged herein, were acting within the course and scope of said agency, service, representation, or employment and materially assisted the other Defendants. Plaintiffs are further informed, believe and allege that each of the Defendants ratified the acts of the remaining Defendants." (Complaint, ¶ 11.)

Edmund Wroblewski, M.D., Vice President, Medical Affairs and Chief Medical Officer for Cottage, ¶ 3.)[6] This leaves a significant gap in plaintiffs' analysis.

The trial court's consideration of additional reply "evidence is not an abuse of discretion so long as the party opposing the motion for summary judgment has notice and an opportunity to respond to the new material." (*Jacobs v. Coldwell Banker Residential Brokerage Co*. (2017) 14 Cal.App.5th 438, 449.) The court intends to take argument on additional briefing at the hearing.

Moreover, the court is concerned about the sufficiency of Dr. Gold's declaration to raise an issue of fact. He states: "On these facts, if indeed Dr. Zauner was contacted earlier, he *arguably* would have at least partial responsibility for the total delay." (Gold Decl., ¶ 8 [emphasis added].) Even acknowledging the rule of liberal construction of opposing declarations (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 761; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107), there is a decided lack of certainty to this opinion. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487—"Second, Dr. Reddy did not express his opinion with any reasonable degree of medical certainty. He merely hypothesizes that because he knows of no other probable cause for her symptoms, he "feels" that the leak of some unspecified gas is "probably" the culprit for the increase in the severity of her respiratory problems. Such speculation is insufficient to rebut the definitive testimony of PG & E's experts that exposure to methane gas could not have caused appellant's symptoms.") The court directs the parties to be prepared to address this issue at the hearing.

(b) Causation

Anticipating the dispute about the timeliness of the transfer, Cottage offers the declaration of Dr. Sanossian, who opined: "Even if Ms. Velazquez had been transferred to Cottage Hospital earlier in the day on July 10, 2018, it would not

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[6] In general, a principal is not vicariously liable for the negligent acts of an independent contractor. (*Hill Brothers Chemical Co. v. Superior Court* (2004) 123 Cal.App.4th 1001, 1008.) However, in the medical context, vicarious liability has been extended to a hospital entity under a theory of ostensible agency for the acts of non-employee physicians who perform services on hospital premises. (See, e.g., *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 507–510 [finding that the patient had presented substantial evidence of the hospital's conduct that lead the patient to reasonably believe that the doctors were ostensible agents of the hospital]; *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1453–1459 (*Mejia*) [reversing an order granting nonsuit for the hospital because the patient presented sufficient evidence to establish that radiologist was the ostensible agent of hospital].) A physician is the ostensible agent of a hospital if the hospital intentionally or negligently causes the patient to believe the physician is the hospital's agent. (*Mejia*, at p. 1453, 1456; Civ. Code, § 2300 ["An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him"]; see also Civ. Code, § 2317.) Thus, to hold a hospital liable for a physician's negligence under an ostensible agency theory, the patient must demonstrate that the hospital engaged in conduct that would cause a reasonable person to believe the physician was the hospital's agent and that the patient relied on the apparent agency relationship. (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 (*Markow*).) Neither side has addressed these principles, and it thus remains unclear how they apply where the patient was nonresponsive, as she was here.

have made any difference in her outcome. Based upon my review of the radiology studies, and with the benefit of hindsight, there was evidence of irreversible ischemic changes in the brain stem on the CT scan of the brain at approximately 9:00 a.m., on July 10, 2018." (Sanossian Decl., ¶ 7.) He finally concludes: "In addition, based on Ms. Velazquez' clinical neurological presentation at approximately 8:00 a.m., on July 10, 2018, to a reasonable degree of medical probability, her mostly likely outcome would have been grave disability." (Sanossian Decl., ¶ 8.)

However, Dr. Gold opines: "It is my opinion that to a reasonable medical probability, had the thrombectomy been performed within approximately 5 hours of the triggering of the stroke protocol at MRMC, Ms. Velazquez would have suffered significantly less permanent brain damage and resulting physical impairment. The fact that the procedure was not undertaken for over 10 hours likely aggravated the injuries suffered by Ms. Velazquez." (Gold Decl., ¶ 6.)

Dr. Gold's opinion arguably fails to establish a dispute as to causation. (See *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 ["[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value.... [Citations.]"].) CTA stroke protocol was initiated at 8:15 a.m. (Sep. Statement No. 31.) In Dr. Gold's opinion, had the thrombectomy occurred by approximately 1:15 p.m. (i.e., five hours later), Ms. Velazquez would have suffered significantly less permanent brain damage and resulting physical impairment. Following the established timeline for transfer established by the undisputed facts (1 hour and 40 minutes per Separate Statement Nos. 40-42) and assuming both that the telephone call between Dr. Slimack and Dr. Zauner occurred at 11:45 a.m. and the flight had been immediately initiated at noon, Ms. Velazquez would have arrived at Cottage at 1:40 p.m., which is outside the "approximate" five-hour window. From her arrival at Cottage, it was another hour and five minutes before the procedure was commenced because Ms. Velazquez had repeat CT angiogram of the head and neck. (Separate Statement Nos. 43-44.)[7] Thus, based on the timeline presented and factual assumptions made by Dr. Gold, the procedure would not have commenced at best until about 2:45, well past the 1:15 p.m. time frame posited by Dr. Gold.

The court directs the parties to address why it shouldn't find this a sufficient basis on which to grant the motion that moots the need to address the newly-submitted reply evidence.

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[7] Dr. Gold offers no opinion suggesting this delay was negligent.

Summary

Cottage's motion argues that "one or more elements" of the "cause of action cannot be established," specifically duty of care and causation. The court finds that Cottage has met its prima facie duty to show no duty of care and lack of causation. The court will focus preliminarily on causation. If plaintiffs can convince the court there a disputed issues of material fact as to causation, the focus will then shift to duty of care, which may require additional briefing within the court's discretion.

As to causation: the court is required to view Dr. Gold's declaration liberally, while viewing defendants' experts strictly. But even measured against these rules, there appears to be fundamental flaw in plaintiff's rebuttal showing as described above and in Cottage's reply memorandum. That is, even if the court accepts Dr. Golds factual representations as true, the earliest Cottage hospital would have received plaintiff was outside the 5-hour time window articulated and identified by Dr. Gold as the dispositive time frame, meaning defendants' omissions (assuming duty) did not cause her injuries. The parties are direct to address this issue, and if plaintiff cannot shore up the evidentiary vacuum, the court will grant summary judgment/adjudication as there are no issues of disputed fact as to causation.

Assuming that issue is satisfactorily addressed, the parties should be prepared to address the following regarding duty of care:

- By what theory Dr. Zauner's asserted negligence may be imputed to Cottage and if additional briefing is necessary on the reply evidence offered by Cottage to establish that Dr. Zauner is not an employee of Cottage.
- The court's concern whether Dr. Gold's opinion that Dr. Zauner "arguably would have at least partial responsibility for the total delay" is sufficiently certain to raise an issue of material fact.

The parties are required to appear at the hearing.