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| Raynor v St. Vincent's Hospital and Medical Center |
| 2004 NY Slip Op 30258(U) |
| May 19, 2004 |
| Supreme Court, New York County |
| Docket Number: 122405/01 |
| Judge: Eileen Bransten |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN
J.S.C.
Justice

PART 6

0122405/2001

RAYNOR, LAUREN
vs
ST. VINCENT'S HOSPITAL

SEQ

Off

5

INDEX NO. 122405/01

MOTION DATE 2/1/04

MOTION SEQ. NO. 04

MOTION CAL. NO. _____

Motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1,2

3

4,5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM

FILED

JUN - 2 2004

CLERK
OFFICE

Dated: 5-19-04

EILEEN BRANSTEN
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
LAUREN RAYNOR, Individually and as Administratrix
of the Estate of GREGORY K. RAYNOR, a/k/a
GREGORY RAYNOR, deceased,

Plaintiff,

-against-

Index No. 122405/01
Motion Dates: 2/11/04
Motion Seq. Nos.: 04, 05

ST. VINCENT'S HOSPITAL AND MEDICAL
CENTER, MICHAEL J. BLECKER, M.D., NINA
S. FALICK, M.D., ALICE C. FURMAN, M.D.,
HUNG-SAM LEE, D.O., GENE R. PESOLA, M.D.,
CRAIG TENENBAUM, M.D., ASSOCIATES IN
INTERNAL MEDICINE, P.C., MANHATTAN
PRIMARY CARE, BIGELOW PHARMACY CO.,
INC. BIGELOW CHEMISTS, INC. and JOHN
DOE DOCTORS 1-5 (fictitious names),

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.

In the interests of efficiency and judicial economy, motions sequence number 04 and 05 are consolidated for disposition.

In motion sequence number 04, defendants Nina S. Fallick, M.D. ("Dr. Fallick"), Alice C. Furman, M.D. ("Dr. Furman") and Associates in Internal Medicine, P.C. (collectively the "Associates Defendants") move, pursuant to CPLR 3212, for summary judgment dismissal of the complaint brought by plaintiff Lauren Raynor, as Administratrix of the Estate of Gregory K. Raynor a/k/a Gregory Raynor, deceased and Lauren Raynor, Individually.

Defendants Saint Vincent's Catholic Medical Centers of New York s/h/a St. Vincent's Hospital and Medical Center ("St. Vincent's"), Hung-Sam Lee, D.O. ("Dr. Lee") and Gene R. Pesola, M.D. ("Dr. Pesola") (collectively the "St. Vincent's Defendants"), cross-move, pursuant to CPLR 3212, for the same relief.

In motion sequence number 05, defendants C.O. Bigelow Chemists, Inc., s/h/a Bigelow Pharmacy Co., Inc. and Bigelow Chemists, Inc. (collectively, "Bigelow") move, pursuant to CPLR 3212, for summary judgment dismissal of all claims brought against them.

Background

Thirty year-old Gregory K. Raynor ("Mr. Raynor") suffered from asthma. On July 28, 1998, he presented at Dr. Fallick's office, complaining of epigastric pain. He also reported having had an asthma attack on an airplane because a dog, to which he was allergic, was in the cabin. Dr. Fallick concluded that Mr. Raynor had a gastric condition and allergic asthma that was stable. She prescribed Pepcid for the epigastric pain, Claritan with or without Sudafed for allergies, Vanceril double strength twice a day as a maintenance medication and Albuterol. Affirmation in Support of the Associates Defendants' Motion for Summary Judgment ("Assocs. Supp"), at ¶ 15. Several refills of Albuterol were provided as well. *Id.*, at ¶ 16. Dr. Fallick also allegedly instructed Mr. Raynor to return to her office in a year for a routine physical. *Id.*, at ¶ 19.

Through the end of 1998, the Albuterol prescription from Dr. Fallick was filled six times at Bigelow. *See*, Affirmation in Opposition (“Opp.”), Ex. B.

On January 4, 1999, Mr. Raynor presented at St. Vincent’s emergency room, complaining of acute asthma symptoms. Albuterol nebulizer treatments, among other things, were administered and he was discharged. At the emergency room, Mr. Raynor was given a prescription for Albuterol, which he filled at Bigelow on January 25, 1999.

On February 17, 1999, Dr. Furman, who works together with Dr. Fallick, renewed Mr. Raynor’s prescriptions for Pepcid, Claritan D 24, Vanceril and Albuterol. *Assoc. Supp.*, at ¶ 23. Several refills of the Albuterol were provided as well. Dr. Furnian allegedly told Mr. Raynor to return to the office when the medication was reviewed. *Id.*, at ¶ 23. Renewal of the medication is not noted in Mr. Raynor’s chart.

Between February 17, 1999, and August 19, 1999, Mr. Raynor filled the prescription for Albuterol at Bigelow a total of 9 times. *Opp.*, Ex. B On August 19, 1999.

Bigelow records reflect that Dr. Furnian issued another prescription for Albuterol on August 19, 1999, which was filled and then refilled once. Dr. Furman’s office records do not reflect that the prescription was issued.

According to Bigelow’s records, on September 24, 1999, Dr. Furman again issued an Albuterol prescription. This renewal is recorded in Mr. Raynor’s medical records

maintained by the Associates Defendants. Mr. Raynor filled the prescription and its refills a total of six times.

In sum, the Bigelow records reflect that between February 17, 1999 and November 23, 1999, Mr. Raynor filled prescriptions for Albuterol issued by Dr. Furman 17 times. Opp., Ex. B. During that time Bigelow also filled a prescription for Albuterol issued by a different physician as well.

On November 5, 1999, Mr. Raynor went to St. Vincent's emergency room, again complaining because of his asthma. Dr. Lee treated Mr. Raynor. Among other things, Dr. Lee administered Albuterol nebulizer treatments. Mr. Raynor was discharged with a prescription for liquid Albuterol to be used with a nebulizer at home. He was instructed to continue with the Albuterol and follow up with his physician. Opp., at ¶ 22.

Mr. Raynor filled the Albuterol prescription but returned to St. Vincent's emergency room--only two days later--on November 7, 1999. He was treated by Dr. Pesola and was again discharged with instructions to follow up with his physician.

Although his condition had improved, Mr. Raynor returned to the St. Vincent's emergency room a few weeks later on November 24, 1999. Dr. Pesola again attended to Mr. Raynor. After rendering treatment, Dr. Pesola provided new prescriptions for, among other things, liquid Albuterol. Mr. Raynor filled the prescriptions that very day.

According to Mr. Raynor's wife, Mr. Raynor's condition did not improve significantly after the November 24, 1999 emergency room visit. Opp., at ¶ 25.

On December 2, 1999, Mr. Raynor filled the prescriptions given to him by Dr. Pesola. He was scheduled to meet his wife for dinner after work. After Mr. Raynor failed to appear at the arranged time, Mrs. Raynor returned home and found her husband dead on the apartment floor. Opp., at ¶ 25. An autopsy revealed that the cause of Mr. Raynor's death was acute and chronic bronchial asthma. *Id.*, at ¶ 26.

In November 2001, plaintiff commenced this medical malpractice and wrongful death action. Plaintiff asserts that all of the defendants committed malpractice by, among other things, failing to properly evaluate, diagnose and treat Mr. Raynor, as well as repeatedly and excessively renewing prescriptions for Albuterol. Plaintiff alleges that these departures from accepted medical and pharmacological practice caused Mr. Raynor injury and ultimately death.

Bigelow has asserted cross-claims against all of the defendants. The Associates Defendants asserted cross-claim against Bigelow. Assoc. Supp., at ¶ 4.

Summary Judgment Motions

Associates Defendants

The Associates Defendants now move for summary judgment dismissal of the complaint against them. They argue that the care and treatment rendered by Dr. Fallick and

Dr. Furman was entirely appropriate. In support of their motion, they rely on an expert affidavit submitted by Ian H. Newmark, M.D. ("Dr. Newmark"), a physician specializing in internal medicine, pulmonary disease medicine and critical care medicine and a Diplomate of the American Boards of Internal Medicine, Pulmonary Disease, and Critical Care Medicine. Assocs. Supp., Expert Affidavit. Dr. Newmark opines--based on review of, among other things, the bills of particulars, medical and pharmacy records and autopsy report--that:

"it is my opinion within a reasonable degree of medical certainty the defendants provided the plaintiff medical care and treatment well within the good and accepted standard of medical practice as existed at the time in the community. It is further my opinion, within a reasonable degree of medical certainty, nothing the physicians did or didn't do in any way caused or contributed to the plaintiffs alleged injuries and death.

* * *

"it is my opinion within a reasonable degree of medical certainty Dr. Fallick appropriately and properly elicited and documented a complete medical history, and did so commendably.

* * *

"It is my opinion within a reasonable degree of medical certainty the assessment plan by this physician was entirely appropriate and proper; moreover, each medication was prescribed well within the standard of care and was appropriate and proper for each condition. Specifically, it is my opinion within a reasonable degree of medical certainty the prescription for Albutrol * * * was absolutely appropriate in this patient; especially in light of his history of having taken these medications with apparent and reported effectiveness, as well as his normal lung exam and the history of no recent

complaints of uncontrolled asthma while on these medications. Additionally, it is my opinion within a reasonable degree of medical certainty providing multiple refills along with the prescription was not only good practice, but also necessary to ensure the continuous access to the medications needed by this patient.

Id., at ¶¶ 5, 10, 14.

Dr. Newmark further states “within a reasonable degree of medical certainty” that Dr. Fallick appropriately discussed the medications with Mr. Raynor and properly informed him to return for further evaluation if his Albuterol use increased. *Id.*, at ¶ 15.

With respect to Dr. Furman, Dr. Newmark maintains that “she properly reviewed the patient’s chart and provided renewed prescriptions for medications by telephone.” *Id.*, at ¶ 21. Dr. Newmark concludes that at all times Dr. Furman’s prescription of and Mr. Raynor’s usage of Albuterol was in no way excessive. *Id.*, at ¶¶ 23, 27, 29.

Dr. Newmark further points out that despite advice to the contrary, Mr. Raynor never returned to the Associates Defendants for follow-up evaluation. He also asserts that had the Associates Defendants refused to renew the potentially life saving medicine and had the patient failed to follow-up, an asthma attack and death may have resulted. *Id.*, at ¶ 32. Dr. Newmark also points out that Mr. Raynor was treated in the emergency room of St. Vincent’s on numerous occasions; yet, he never informed the Associates Defendants of his problems. Dr. Newmark concludes that “it is impossible for physicians to properly evaluate

a patient and assist the patient in controlling his asthma if the patient is unwilling to participate in the care and treatment.” *Id.*, at ¶ 37.

Finally, Dr. Newmark opines that the Associates Defendants are not at fault for Mr. Raynor’s injuries or death because Mr. Raynor did not have dangerous levels of Albuterol at his death and “there is no way to correlate any of the care and treatment provided by the medical defendants with the claimed injuries and death of the patient.” *Id.*, at ¶ 49.

Plaintiff vehemently opposes the Associates Defendants’ motion and argues that there are questions of fact as to whether these physicians departed from accepted standards of medical practice. Plaintiff supports her opposition with a 14-page expert affidavit from David P. Skoner, M.D. (“Dr. Skoner”), a physician board certified by the American Board of Allergy and Immunology and by the American Board of Pediatrics. *Opp.*, **Ex. 1**, at ¶ 1. Based on, among other things, Mr. Raynor’s medical records, the autopsy report and the deposition testimony, Dr. Skoner opines:

“within a reasonable degree of medical certainty, that * * * Dr. Fallick, Dr. Furman, and Dr. Pesola, deviated from accepted standards of medical practice in their care and treatment of the decedent, Gregory Raynor, and it further is my opinion, within a reasonable degree of medical certainty, that the deviations from accepted standards of medical care by each of the above named physicians contributed to and resulted in the death of the decedent, Gregory Raynor.” *Id.*, at ¶ 4.

Dr. Skoner believes that during the last year of Mr. Raynor’s life, his asthma was worsening and “spiraling out of control.” *Id.*, at ¶ 20. Dr. Skoner explains that:

excessive "use of Albuterol by a patient is a clear indicator that the patient's asthma is not well controlled and requires additional medical therapy * * * . For adult patients whose asthma is well controlled, the use of an Albuterol inhaler should be only occasional, and not on a daily basis. * * * However, in situations where a patient's usage of Albuterol increases to the point where an Albuterol inhaler is not even lasting for one (1) month, there is a clear signal to the physician that the patient's asthma is not under control. * * * Unfortunately, none of the physicians involved in Mr. Raynor's care recognized the life threatening severity of his asthma, nor did the physicians undertake the appropriate measures to bring his asthma under some reasonable control." *Id.*, at ¶ 20.

Dr. Skoner maintains that Dr. Fallick failed to properly chart follow up instructions in Mr. Raynor's chart, which is a deviation from accepted standards of medical care. Dr. Skoner asserts that because there were no instructions about follow-up in Mr. Raynor's chart, Dr. Furman would not have been aware of the follow-up plan when Mr. Raynor called asking for a refill of the Albuterol. According to Dr. Skoner, presumably "if Dr. Furman was aware of the follow-up plan, she would have told Mr. Raynor, when he called, that he was overdue for follow-up, and that he should come in for an office visit for further evaluation, given the large amount of Albuterol he was using." *Id.*, at ¶ 22.

Dr. Skoner further states that the record reflects that Dr. Furman prescribed Albuterol (and refills of Albuterol) three times; yet, Mr. Raynor's office chart "makes no reference at all" to two of the prescriptions. *Id.*, at ¶ 23. The chart further does not indicate that there were any conversations with Mr. Raynor when the prescriptions were issued. *Id.* Dr. Skoner opines that "had Dr. Furman questioned Mr. Raynor regarding the frequency of his

usage of the Albuterol inhaler, she would have determined that Mr. Raynor's use of the Albuterol inhaler was excessive, and she would have, or should have, recognized that Mr. Raynor's asthma was not controlled and required additional therapy * * *.” *Id.* Dr. Skoner further asserts that:

“Accepted standards of medical practice require that physicians chart all medications which they prescribe to patients. Charting medications allows a physician to, among other things, ascertain whether a patient is overusing a medication. In this case, Dr. Furman failed to chart the Albuterol renewals with refills which she provided to Mr. Raynor in February 1999. Therefore, when Mr. Raynor requested another renewal in August 1999, Dr. Furnian was not aware of how much Albuterol Mr. Raynor was using in the preceding months. Likewise, when Mr. Raynor called Dr. Furnian for yet another renewal in September 1999, there was no record in her chart of the renewals in February and August of that year. As far as the chart showed at that time, Mr. Raynor had not been provided an Albuterol prescription since he first saw Dr. Fallick in July 1998. Dr. Furman's failure to chart her February and August Albuterol renewals clearly contributed to her lack of knowledge regarding Mr. Raynor's overusage of Albuterol, and in my opinion, her failure to chart these Albuterol renewals was a deviation from accepted standards of medical practice.

* * * [R]epeated renewals of Mr. Raynor's Albuterol inhaler prescriptions * * * without ascertaining any information regarding Mr. Raynor's Albuterol inhaler usage, without requiring Mr. Raynor to come into the office for further evaluation, without determining whether Mr. Raynor's asthma was under control, and without appropriately charting the Albuterol prescriptions she provided, were clear deviations from accepted standards of medical care, which permitted Mr. Raynor's asthma to remain out of control and worsen to the point where death resulted on December 2, 1999.” *Id.*, at ¶¶ 25-26.

On reply, the Associates Defendants assert that Dr. Skoner's opinion is inconsistent with the evidence. They also disagree with the expert's conclusions. They maintain that

plaintiff's expert's affidavit is conclusory and that the expert's opinions were not made with a reasonable degree of medical certainty.

St. Vincent's Defendants

The St. Vincent's Defendants also seek summary judgment dismissal of all claims asserted against them. They argue that there were no departures from accepted standards of medical care in connection with treatment provided to Mr. Raynor.

In support of the motion, the St. Vincent's Defendants rely on an affidavit from Dr. Pesola, who is board certified in internal medicine, pulmonary medicine, and critical care medicine, and an affirmation from C. Reddington Barrett, Jr., M.D. ("Dr. Barrett"), a physician board certified in internal medicine, critical care medicine and pulmonary medicine. *See*, Affirmation in Support of Cross-Motion ("St. Vincent's Supp."), Exs. K and L.

Dr. Pesola states that he properly treated Mr. Raynor both on November 7, 1999 and November 24, 1999. He opines that at no time was any hospitalization warranted. *St. Vincent's Supp.*, Ex. K, at 2.

Dr. Barrett further opines, based on review of relevant records, transcripts and pleadings, that there were no departures from accepted medical practice in connection with any of the hospitalizations at St. Vincent's. He states, "to a reasonable degree of medical certainty, that the care and treatment rendered by St. Vincent's, Dr. Pesola and Dr. Lee to

Mr. Raynor was, at all times, within good and accepted standards of medical practice.” St. Vincent’s Supp., **Ex. L**, at ¶ 9. Dr. Barrett explains that hospitalization was not required after any of the St. Vincent’s visits and that Mr. Raynor failed to treat with his primary care physicians.

In opposition to the St. Vincent’s Defendants’ motion, plaintiff again relies on Dr. Skoner’s affidavit. Dr. Skoner candidly states that he cannot “find a deviation from accepted standards of medical practice on the part of Dr. Lee.” Opp., Ex. 1, at ¶ 27. He opines, however, that Dr. Pesola should have hospitalized Mr. Raynor on November 24, 1999. Dr. Skoner explains that Dr. Pesola had seen Mr. Raynor before and it “should have been apparent [to him] that Mr. Raynor’s asthma was completely out of control, and in fact, was life threatening.” *Id.*, at ¶ 28. This failure to recognize and respond to Mr. Raynor’s condition, according to Dr. Skoner, was a deviation from accepted standards of medical practice. Additionally, it is Dr. Skoner’s expert opinion that other departures included the failure to admit Mr. Raynor for further testing and therapy, the failure to question him about his Albutrol use, and the failure to advise him of the life threatening nature of his asthma. Dr. Skoner concludes that these deviations proximately caused Mr. Raynor’s death. *Id.*, at ¶ 29.

On reply, the St. Vincent’s defendants argue that Dr. Skoner’s expert opinion is conclusory. St. Vincent’s Reply, at ¶ 6. They further argue that the record establishes that

Mr. Raynor did not follow the instructions of his physicians as he never followed **up** with doctors as directed, did not avoid smoke and did not get rid of his cat. *Id.*, at ¶ 10. They further assert that a causal connection between the alleged departures and Mr. Raynor's death has not been established.

Bigelow

Bigelow also moves for summary judgment dismissal of all claims asserted against it. In support of the motion, it relies on an affirmation from Steven S. Gross, Ph.D., a professor of pharmacology ("Dr. Gross"). Dr. Gross concludes that Mr. Raynor was not caused to die by an excess of Albuterol. Affirmation in Support of Bigelow's Motion for Summary Judgment ("Bigelow Supp."), Affirmation of Dr. Gross, at ¶ 9.

In response to Bigelow's motion for summary judgment, plaintiff relies on an affidavit submitted by George Kowalski, a registered pharmacist. Opp., Ex. 2. Based on, among other things, review of the pharmacy records and the deposition testimony of Joel Eichel, a pharmacist at Bigelow, Mr. Kowalski opines:

"it is my opinion, within a reasonable degree of pharmacological certainty, that Bigelow Pharmacy repeatedly and persistently deviated from accepted standards of pharmacy care in filling new and refilling prescriptions for Albuterol, during a period of approximately eleven (11) months immediately prior to Mr. Raynor's death, which substantially contributed to inadequate management of Mr. Raynor's asthma condition and ultimately resulted in his premature death on December 2, 1999," *Id.*, at ¶ 5.

According to Mr. Kowlaski, the instructions for the Albuterol prescriptions here were ambiguous, and a reasonable and prudent pharmacist would contact the prescribing physician to establish a maximum daily usage amount. *Id.*, at ¶¶ 10, 22, 24, 25, 34, 37. Mr. Kowalski further opines, among other things, that Bigelow erroneously recorded the days-supply for the Albuterol prescriptions. *See, e.g., id.*, at ¶¶ 20, 24, 25, 34. Mr. Kowalski believes that Bigelow failed to recognize an obvious pattern of gross overuse of Albuterol by Mr. Raynor, “which amounted to a serious deviation from accepted standards of pharmacy practice, substantially contributing to the mismanagement of Mr. Raynor’s asthma condition, and eventually contributing to Mr. Raynor’s untimely death.” *Id.*, at ¶ 45.

Mr. Kowalski further states that a reasonable pharmacist would and should have refused to fill the prescriptions. *Id.*, at ¶ 47. He states that Bigelow had a professional responsibility to notify all prescribing physicians of Mr. Raynor’s desire to obtain early refills and that “Bigelow Pharmacy clearly deviated from accepted standards of pharmacy practice by accepting and dispensing prescription orders for Albuterol written with ambiguous directions for usage that did not comply with accepted dosing protocols.” *Id.*, at ¶¶ 47, 52.

Mr. Kowlaski further asserts that there were several other departures from accepted pharmacological practice, such as, failure to properly counsel the customer as well. *See, e.g., id.* at ¶ 54.

Both Mr. Kowlaski and Dr. Skoner opine that overuse of Albuterol played a role in Mr. Raynor's death because the overuse of Albuterol contributed to the ineffective management and control of Mr. Raynor's condition, which ultimately allegedly resulted in Mr. Raynor's death. Opp., Ex. 1, at ¶¶ 20, 25, 26; Opp., Ex. 2, at ¶ 55.

On reply, Bigelow relies on an affidavit from one of its pharmacists. The pharmacist states that it is not his role to second guess doctors. Bigelow Reply, Ginsberg Aff., at ¶ 3. The pharmacist entirely disagrees with Mr. Kowalski's opinion, including the opinion that Mr. Raynor overused Albuterol and that there was any deviation from accepted practice. The pharmacist explains that package inserts were always included with Albuterol to guide its users. *Id.*, at ¶ 16. The pharmacist states that when "all is said and done, it is clear that Mr. Raynor didn't die from an excess of Albuterol and that nothing the Bigelow pharmacy did, or didn't do, contributed to his death from acute asthma." *Id.*, at ¶ 21.

Relying on cases such as *Bichler v. Willing*, 58 A.D.2d 331 (1st Dep't 1977) and *Mutter. of New York County Diet Drug Litig.*, 262 A.D.2d 132 (1st Dep't 1999) (additional procedural history omitted), Bigelow further contends that, as a matter of law, there is no liability on the part of a pharmacist who accurately fills prescriptions as written. Bigelow Reply, at ¶ 12.

Analysis

Summary Judgment

Summary judgment is a “drastic remedy” that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also, Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dep’t 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dep’t 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted where an issue of fact is even “arguable.” *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep’t 1991). Further, “on a defendant’s motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff’s pleadings, as true, and [its] decision ‘must be made on the version of the facts most favorable to [plaintiff].’” *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dep’t 1991).

The proponent of a summary judgment motion at the outset has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Id.* If, for example, the nonmovant submits an affidavit from a competent expert showing the existence of a triable issue of fact as to whether defendants were negligent, the summary judgment motion must be denied. *See,*

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Cooper v. St. Vincent's Hosp., 290 A.D.2d 358 (1st Dep't 2002); *Dellert v. Kramer*, 280 A.D.2d 438 (1st Dep't 2001); *Morrison v. Altman*, 278 A.D.2d 135 (1st Dep't 2000); *Avacato v. Mount Siriai Medical Center*, 277 A.D.2d 32 (1st Dep't 2000).

General allegations of medical malpractice, however, that are unsupported by competent medical evidencce tending to establish the essential elements of the causes of action, are insufficient to defeat a motion for summary judgment. *Mendez v. City of New York*, 295 A.D.2d 487 (2d Dep't 2002); *Neuman v. Greenstein*, 99 A.D.2d 1018 (1st Dep't 1984) ("At least some statement of medical expertise in rebuttal was required in order to defeat defendant's motion for summary judgment"). Thus, on a motion for summary judgment where a medical malpractice defendant demonstrates that treatment was provided in accordance with accepted standards of medical practice, the plaintiff must respond with medical evidencce establishing a departure from accepted medical procedure. *Alvarez v. Prospect Hosp., supra*, 68 N.Y.2d, at 327; *see also, Whalen v. Victory Memorial Hosp.*, 187 A.D.2d 503, 503 (2d Dep't 1992); *Echeverri v. Flushing Hosp. & Medical Center*, 123 A.D.2d 818, 818-19 (2d Dep't 1986).

Because this case presents a classic case of conflicting experts--with the exception of Dr. Lee's substantively unopposed cross-motion for summary judgment--the contested summary judgment motions must be denied. *See, e.g., Santiago v. Brandeis*, 309 A.D.2d 621, 622 (1st Dep't 2003) (summary judgment inappropriate where there is a "conflict

between experts"). Plaintiff has established through sufficient medical evidence that there are questions of fact as to whether the defendants departed from accepted practice and caused Mr. Raynor injury (including contributing to his death).

At the outset, plaintiffs experts' lengthy affidavits are not conclusory. They refer to facts in the record and the experts' conclusions are drawn from those facts. It is not for the Court to interpret the facts or assess their weight. Nor is it for the Court to credit one particular expert and his interpretation and analysis. These are all matters for the jury to address after hearing the evidence.

Plaintiff has established questions of fact as to whether the Associates Defendants committed medical malpractice. Dr. Skoner, a medical expert, opines that Dr. Fallick and Dr. Furman failed to properly chart their medical advice and renewals of prescriptions. These departures, he opines, constituted mismanagement of the patient's health care that prevented him from obtaining appropriate treatment. Dr. Skoner, moreover, states at the very outset that his conclusions are made "within a reasonable degree of medical certainty." Opp., Ex. 1, at ¶ 4.

Likewise, Dr. Skoner opines that Dr. Pesola departed from accepted standards of medical practice in failing to hospitalize Mr. Raynor on November 24, 1999, and failing to properly treat his asthma. Medical experts conflict in interpreting Dr. Pesola's conduct and

whether he played a role in Mr. Raynor's injuries; thus, Dr. Pesola's cross-motion for summary judgment must be denied as well.

Dr. Lee, by contrast, has established entitlement to judgment as a matter of law. The unrefuted medical evidence demonstrates that Dr. Lee complied with accepted standards of medical practice and did not deviate from accepted standards of medical practice in any manner. Thus, plaintiff has not established that there is any question of fact as to Dr. Lee's liability and all claims against Dr. Lee must be dismissed.

St. Vincent's Hospital's cross-motion for summary judgment, however, must be denied. St. Vincent's Hospital does not establish that regardless of Dr. Pesola's potential liability, the Hospital cannot be held liable. Thus, the hospital has not made its threshold showing of entitlement to judgment as a matter of law.

Bigelow's motion for summary judgment must be denied as well. Experts in the pharmaceutical industry disagree on whether Bigelow departed from accepted medical practice and whether such departure caused Mr. Raynor injury. Significantly, the parties are in complete agreement that Mr. Raynor's death was not caused by high levels of Albuterol. Plaintiff, however, alleges and sets forth evidence showing that Bigelow departed from accepted practice in repeatedly filling the prescriptions of Albuterol without contacting any of the physicians and deviated from accepted practice in the manner in which it filled the prescriptions.

The cases cited by Bigelow are completely inapposite. Unlike the cases Bigelow cited, this is not a products liability action where a plaintiff seeks to hold the pharmacist liable for an alleged defect in the design of a certain drug. *Contrast, Matter of New York County Diet Drug Litig.*, 262 A.D.2d 132 (1st Dep't 1999) (additional procedural history omitted); *Bichler v. Willing*, 58 A.D.2d 331 (1st Dep't 1977). Here, plaintiff is asserting that Bigelow did not comport with accepted professional industry standards for dispensing drugs. Whether Bigelow actually departed from such professional standards is a question for the jury to resolve. Contrary to Bigelow's argument, however, plaintiff's evidence asserts more than mere ethical violations.

Plaintiff has further established--through expert evidence--the existence of a question of fact as to whether these defendants' departures caused or contributed to Mr. Raynor's injuries and demise.

Perhaps defendants are correct and Mr. Raynor's injuries and ultimate death resulted from his failure to follow his physicians' directions. Perhaps plaintiff's expert is correct and Mr. Raynor's death resulted from defendants' alleged mistakes. These questions are for the jury to confront after hearing all of the evidence. Summary disposition, on this record, is entirely inappropriate.

Accordingly, it is

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ORDERED that the Associates Defendants' motion for summary judgment is DENIED; it is further

ORDERED that the cross-motion for summary judgment by Dr. Pcsola and St. Vincent's Hospital is denied; it is further

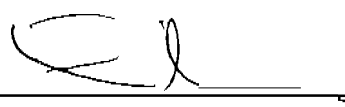
ORDERED that Dr. Lee's cross-motion for summary judgment dismissal of the complaint against him is GRANTED and the Clerk of the Court is respectfully directed to enter judgment in his favor; and it is further

ORDERED that Bigelow's motion for summary judgment is DENIED.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
May 19, 2004

ENTER



Hon. Eileen Bransten

FILED
JUN - 2 2004
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