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SHORT FORM ORDER

INDEX No. 99-14222

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 18 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT WEBSTER OLIVER
Justice of the Supreme Court

MOTION DATE 7/30/04
ADJ. DATE 11/18/04
Mot. Seq. # 015 - MotD

JOE DRAGOTTA and MICHAEL FASANO, co-executors of the goods, chattels and credits which were of FRANCIS J. DRAGOTTA, deceased,	SHANDELL BLITZ BLITZ & BOOKSON Attorneys for Plaintiffs 150 Broadway, 14th Floor New York, New York 10038
Plaintiffs,	BARTLETT McDONOUGH BASTONE, et al. Attorneys for Deft. Southampton Hospital 300 Old Country Road, Suite 301 Mineola, New York 11501
- against -	LEWIS JOHS AVALLONE AVILES, et al. Attorneys for Deft. Israel 425 Broad Hollow Road Melville, New York 11747
SOUTHAMPTON HOSPITAL, MICHAEL B. ISRAEL, LEONARD LEONARDI, JUAN GARGIULO, FRANK CONTURSI, VIDA RASHIDFAROK YASMIN and PETER SHELTON,	VARDARO & HELWIG Attys. for Defts. Leonardi, Contursi & Shelton 732 Smithtown Bypass Smithtown, New York 11787
Defendants.	CALLAN REGENSTREICH KOSTER & BRADY Attorneys for Defts. Gargiulo & Yasmin One Whitehall Street, 10th Floor New York, New York 10004

Upon the following papers numbered 1 to 69 read on this motion for summary judgment and relief pursuant to CPLR 3212(g); Notice of Motion and supporting papers 1 - 19; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 20 - 39; Replying Affidavits and supporting papers 40-61; 62-63; Other 64-67; 68-69; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Southampton Hospital (Hospital) for summary judgment is granted to the extent that the causes of action, wherein plaintiffs have alleged that Hospital is vicariously liable for the alleged negligent conduct of co-defendants Michael B. Israel, Leonard Leonardi and Peter Shelton, are dismissed, and is otherwise denied.

This wrongful death action arises out of alleged medical malpractice concerning the care and treatment received by plaintiffs' decedent when he was admitted to Hospital on August 15, 1997. Hospital now moves for summary judgment and for an order pursuant to CPLR 3212 [g] "precluding plaintiff from offering evidence in support of the complaint at the time of trial which were not raised in opposition to the hospital's motion for Summary Judgment" (Hospital's Notice of Motion, page 2). Hospital submits in support of the motion, *inter alia*, the verified complaint, Hospital's verified answer, verified bill of particulars, an amended supplemental bill of particulars, the affirmation of Hospital's attorney and the affidavit of its expert, Garet Gordon, M.D. (Gordon).

In the first cause of action of the complaint, sounding in a claim for wrongful death, plaintiffs allege that they were appointed co-executors in 1997 of the estate of Francis J. Dragotta (Dragotta). On August 15, 1997 Dragotta came under the care and treatment of the defendants. The plaintiffs ascribe to the defendants various acts of malpractice which they allege resulted in Dragotta's death on August 15, 1997. The plaintiffs further allege in the complaint that Hospital is vicariously liable for the negligence of co-defendants Michael B. Israel (Israel), Leonard Leonardi (Leonardi), Juan Gargiulo (Gargiulo), Frank Contursi (Contursi), Vida Rashidfarok Yasmin (Yasmin) and Peter Shelton (Shelton) in that they were physicians,[1] who at the time of the alleged malpractice, were employed by Hospital and acting in the scope of that employment. The second and third causes of action assert claims arising from Dragotta's conscious pain and suffering and lack of informed consent, respectively. The bill of particulars served on the Hospital sets forth numerous and specific acts of malpractice.

Tina Scognamillo avers that she is the attorney for Hospital. Dragotta was a private patient of Leonardi who had been treating Dragotta for an existing knee condition. Leonardi performed knee surgery on Dragotta on January 20, 1995, June 16, 1995 and again on January 19, 1996 when he performed a total replacement for the left knee. On August 15, 1997 Dragotta was admitted to Hospital as Leonardi's private patient with a diagnosis of "loosening of the left total knee prosthesis" (Notice of Motion, Scognamillo affirmation, para. 8). On that day Leonardi performed a revision surgery of the left total knee replacement. Medical clearance for this surgery was performed by Israel, Dragotta's private medical doctor. Yasmin and Gargiulo were the anesthesiologists for the surgery. At the time of the surgery neither Yasmin nor Gargiulo were employed by Hospital, but Yasmin was employed by the East End Anesthesia Group (East End) and Gargiulo was a partner of East End. Scognamillo further avers that the patients who received their services were billed directly by East End.

Scognamillo also avers that the revision surgery started at 12:25 p.m. and ended at 3:45 p.m. at which time Dragotta was transferred to the "PACU Unit" ([hereinafter PACU], Notice of Motion, Scognamillo affirmation, para. 12). Following the surgery, Yasmin prescribed Demerol as the post-operative PCA[2] pain medication. While Dragotta was still in PACU, PCA Demerol was prescribed by "the co-defendant attending anesthesiologist" (Notice of Motion, Scognamillo affirmation, para. 13). At 5:20 p.m. Dragotta was transferred from PACU to a room on the orthopedic floor of Hospital at which

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[1] The plaintiffs allege alternatively that Shelton was a physician's assistant.

[2] PCA appears to be a reference to "patient controlled analgesia" (Notice of Motion, Scognamillo affirmation, para. 26).

time he was accompanied by a friend, Rhonda Cunha (Cunha). Hospital's records reflect that at the time Dragotta arrived at the orthopedic floor, he was alert and complained of moderate pain in his left knee. Dragotta continued to receive 10 milligrams of PCA Demerol with a "lockout interval" of ten minutes.[3] At 6:30 p.m. Cunha noticed that Dragotta was having difficulty breathing and went to the nurses' station. "A code was called and administered" (Notice of Motion, Scognamillo affirmation, para. 16). Dragotta was "intubated" by Contursi and given medications related to a code status. Scognamillo further avers that Dragotta was pronounced dead at 7:15 p.m. by Contursi.

Scognamillo summarizes the negligent acts alleged in the bill of particulars by dividing them into seven separate categories of malpractice. Scognamillo further contends that the plaintiffs assert that Gargiulo and Yasmin were negligent in prescribing Demerol as a post-operative PCA pain medication when Dragotta had a prior history of an allergic reaction to Morphine. Scognamillo concludes that Hospital is not vicariously liable for conduct of its co-defendants, who are not employees of Hospital, and that, in any event, the conduct of Yasmin, Gargiulo and Hospital's staff did not constitute malpractice.

Gordon avers that he is duly licensed to practice medicine in the State of New York and that he is board certified in the field of Internal Medicine and Cardiovascular Disease. He is a full-time Attending Cardiologist at Montefiore Hospital Medical Center and an Associate Professor at Albert Einstein College of Medicine. His opinions and conclusions are based on his review of pertinent legal and medical documents including Hospital's records and depositions of the parties and non-parties. Pre-operative clearance was provided by Israel, Dragotta's private physician. Anesthesia services were provided by Yasmin and Gargiulo, Dragotta's private attending physicians. Yasmin and Gargiulo made all decisions regarding the administration of anesthesia both during and after the surgery. Dragotta was admitted to PACU following surgery and was continuously monitored by PACU nursing staff. At 4:18 p.m., while still in PACU, a PCA Demerol IV line was started at the direction of Yasmin. The PCA line had a ten-minute "lockout" period during which time Dragotta could not administer to himself additional Demerol. In addition, Yasmin ordered a "continuous drip rate of 10mg per hour" (Notice of Motion, Gordon affidavit, para. 8). Because Dragotta's pain remained unrelieved, the levels of Demerol were increased and administered in accordance with Yasmin's orders. During this time PACU nurses continued to monitor Dragotta's vital signs, which remained stable and within normal limits. Dragotta's Aldrette score[4] was also monitored, recorded and remained high up to the time of discharge from PACU. Gordon further avers that at the time of this discharge Dragotta was in satisfactory condition.

Gordon also avers that at 5:20 p.m. Dragotta was transferred from PACU to the orthopedic floor of Hospital, where, pursuant to Yasmin's orders he continued to receive PCA Demerol for pain management. During the first hour in the room on the orthopedic floor Dragotta's vital signs were appropriately taken and monitored. His vital signs were within normal limits, and his mental status was

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[3] It appears that during the "lockout interval" the patient is prevented from receiving additional medication (Notice of Motion, Scognamillo affirmation, para. 26).

[4] This appears to be a reference to the Aldrete or postanesthesia recovery score. Gordon averred that the "Aldrette" score measured four parameters of the patient's condition: activities, respiration, consciousness and color.

noted as alert and oriented. According to Cunha, Dragotta used PCA two or three times after he was transferred to the orthopedic floor. At 6:30 p.m. Cunha alerted the nurses that Dragotta was having difficulty breathing. A code was called to which Contursi responded. Cunha described the rapid response of the nurses and code team when the alarm sounded. After Dragotta developed shortness of breath, Hospital's staff responded promptly and properly. Gordon concludes that Hospital's staff appropriately carried out its duties and responsibilities, did not deviate from good and accepted standards of medical care and did not cause or contribute to Dragotta's death.

Turning to that part of the complaint in which plaintiffs have alleged that Hospital is vicariously liable for the alleged acts of malpractice of its co-defendants, the general rule of liability that applies here provides "Where a professional person provided (employed) by the hospital commits an act of malpractice the hospital may be liable derivatively under the doctrine of respondeat superior (Bing v. Thunig, 2 N.Y.2d 656, 666, 163 N.Y.S.2d 3, 10, 143 N.E.2d 3, 9). But this doctrine, of course, does not apply where the malpractice is performed by a physician retained by the patient himself (ibid.; 2B Warren, Negligence (3d ed., 1966), s 1.04). Where the treatment is provided by independent physicians, the hospital, and this is especially true of private proprietary hospitals, serves the function only of a specialized facility, not a direct service healing institution (Goldwater v. Citizens Cas. Co., Mun.Ct., 7 N.Y.S.2d 242, affd. 36 N.Y.S.2d 413 (App.Term); Wetzel v. Omaha Maternity & Gen. Hosp. Assn., 96 Neb. 636, 643, 148 N.W. 582 (dis. opn.); Hayt, Hayt and Groeschel, Law of Hospital, Physician and Patient (2d ed., 1952), p. 202)"(***Fiorentino v Wenger***, 19 NY2d 407, 414, 280 NYS2d 373, 378 [1967]). Affiliation of a doctor with a hospital, not amounting to employment, is not sufficient, by itself, to impute the doctor's malpractice to the hospital (***Hill v St. Clare's Hospital,*** 67 NY2d 72, 499 NYS2d 904 [1986]).

Although Hospital in support of this motion has submitted the affirmation of its attorney which has no evidentiary value, the Court may consider the admissible documentary evidence tendered therewith to determine whether Hospital has met its prima facie burden of demonstrating that the co-defendants were not employees of Hospital and that members of Hospital's staff were not negligent (***Adam v Cutner & Rathkopf,*** 238 AD2d 234, 656 NYS2d 753 [1997]). A review of Leonardi's responses to interrogatories (Notice of Motion, Exhibit D), the deposition testimony of Israel on May 2, 2001and consultation report of Israel, dated August 11, 1997 (Notice of Motion, Exhibit F), the deposition testimony of Yasmin on February 25, 2003 (Notice of Motion, Exhibit G) and the deposition testimony of Gargiulo on July 1, 2002 (Notice of Motion, Exhibit H) reveals Hospital's evidence is sufficient to demonstrate, prima facie, that co-defendants Shelton, Leonardi, Yasmin, Gargiulo and Israel were not employees of Hospital at the time of this incident and that Hospital was not vicariously liable for their actions on this basis (***Dolan v Jaeger***, 285 AD2d 844, 727 NYS2d 784 [2001]). Although the Hospital has submitted proof that the action has been discontinued against Contursi, it cannot establish on that ground alone-that it is not vicariously liable for Contursi's alleged malpractice (***Pace v Hazel Towers, Inc.,*** 183 AD2d 588, 584 NYS2d 22 [1992]; ***Nobel v Ambrosio,*** 120 AD2d 715, 502 NYS2d 511 [1986]). Accordingly, that part of Hospital's motion for summary judgment dismissing the plaintiffs' claim that Hospital is vicariously liable for the negligent conduct of Contursi, is denied.

Turning to Hospital's contention that the plaintiff cannot establish a claim of malpractice against members of its staff, the Court notes that Gordon's affidavit failed to address, or address with the requisite specificity, those categories of malpractice framed by Scognamillo wherein it is alleged that

Hospital negligently and carelessly permitted unqualified personnel to medically treat the patient, negligently and carelessly rendered pre-operative care, negligently and carelessly failed to re-evaluate the patient's cardiac disease, negligently and carelessly failed to "timely intubate, ventilate, and resuscitate the patient" and negligently and carelessly failed "to admit the patient to the ICU from the Operating Room and/or from the Recovery Room" (Notice of Motion, Scognamillo affirmation, paragraph 17). The failure of Hospital's expert to address these claims, and thereby failing to meets its prima facie burden, precludes dismissal of the claims of negligence asserted directly against Hospital's staff (***Christine S v Community Hosp.,*** 202 AD2d 567, 609 NYS2d 78 [1994]). Gordon's affidavit was sufficient, however, to demonstrate, prima facie, that the administration of Demerol was not contraindicated.

The plaintiffs contend in opposition that Hospital is vicariously liable for the alleged negligence of Yasmin and Gargiulo and that there are triable issues of fact as to whether their prescription of Demerol was contraindicated and whether Hospital's staff was negligent. The plaintiffs submit in opposition to Hospital's motion, *inter alia*, the affirmation of their attorney, the affidavit of Laurence J. Krenis, M.D. (Krenis) and the deposition testimony of Gargiulo, Yasmin, Cunha and Shelton.

Initially, the plaintiffs' attorney contends that Hospital is vicariously liable for the negligence of Doctors Levitsky[5], Gargiulo and Yasmin notwithstanding that they were not employees of Hospital. The plaintiffs' attorney further contends that since Gargiulo and Yasmin were never employed by Dragotta but rather were selected by Hospital to provide anesthesia care to the patients coming to Hospital for treatment, Hospital remains vicariously liable for their malpractice. Yasmin testified in her deposition that on the day of the surgery she was "on call" and took over Dragotta's care from another anesthesiologist while Dragotta was in the operating room. Gargiulo testified in his deposition that he first saw Dragotta when Dragotta was in the "'holding area'" of Hospital (Affirmation in Opposition, Exhibit A, page 14). Gargiulo described the holding area "as where the patients come in before going into the operating room where we usually interview the patient" (Affirmation in Opposition, Exhibit A, page 14). Cunha testified in her deposition that she and Dragotta met with an anesthesiologist at some point to discuss "pre-op testing," that she did not know who the anesthesiologist was that met with Dragotta and that the conversation between the anesthesiologist and Dragotta was confined to Dragotta's heart condition (Notice of Motion, Exhibit K, pages 79-80). Cunha further stated in this deposition that she did not know who Doctors Yasmin or Gargiulo were. The plaintiffs also submit a copy of part of Hospital's website in which Hospital states "The Hospital offers a full continuum of inpatient and outpatient services [and] *staffed* by over 200 physicians and allied health professionals...." (Affirmation in Opposition, Exhibit D [emphasis and bracketed material added]). In reply Hospital has tendered evidence that East End assigned its anesthesiologists to the patients and that East End also directly billed the patients. Hospital also tenders in reply a pre-operative patient education form signed by Dragotta.

It is well established that even where a hospital may not be held vicariously liable for the negligent conduct of a physician who was not an employee of the hospital, but one of a group of

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[5] Since Dr. Levitsky is not a party to this action and the complaint does not allege that Hospital is vicariously liable for the conduct of Dr. Levitsky, the Court will not consider this contention as to him.

independent contractors, vicarious liability may also be imposed where the physician acted as an agent of the hospital or if the hospital exercised control over the physician or where the injured patient is able to demonstrate under a theory of ostensible or apparent agency that the patient reasonably believed that the physicians treating him were provided by the hospital or were acting on the hospital's behalf (***Hill v St. Clare's Hospital,*** *supra*; ***Mduba v Benedictine Hospital,*** 52 AD2d 450, 384 NYS2d 527 [1976]; *see*, ***Dolan v Jaeger***, *supra*). In such cases the hospital is estopped from asserting that it is responsible for only its own torts (***Hannon v Siegel-Cooper Co.,*** 167 NY 244, 5 Bedell 244, 60 NE 597 [1901]; ***Lanza v Parkeast Hospital,*** 102 AD2d 741, 476 NYS2d 576 [1984]).

In the case at bar the plaintiffs have submitted evidence in opposition to the motion that neither Yasmin nor Gargiulo were privately retained by Dragotta, but rather were assigned to Dragotta immediately prior to surgery. Although Hospital has tendered evidence that East End assigned its anesthesiologists to the patients, the plaintiffs have raised issues as to whether Dragotta reasonably believed that Doctors Yasmin and Gargiulo were provided by Hospital or were acting on Hospital's behalf.[6] The evidence tendered by Hospital in reply also supports this finding. The pre-operative patient education form executed by Dragotta, which is on Hospital's letterhead, indicated that Dragotta would be interviewed by an anesthesiologist upon entering either the Holding Area or the Operating Room and that either his surgeon or anesthesiologist would prescribe pain medication. Here this is an issue which must be determined by the trier of facts (***Nobel v Ambrosio,*** *supra*; ***Duncan v Mount St. Mary's Hosp.,*** 176 Misc2d 201, 672 NYS2d 657 [1998]).[7] Since the plaintiffs have not submitted evidence in opposition to that part of Hospital's motion claiming that it is not vicariously liable for the alleged negligent conduct of Israel, Leonardi and Shelton, Hospital's motion for summary judgment is granted to the extent that the causes of action, wherein the plaintiffs have alleged that Hospital is vicariously liable for their conduct, are dismissed. That part of Hospital's motion seeking summary judgment dismissing plaintiffs' claims that it is vicariously liable for the alleged negligent conduct of Yasmin and Gargiulo, is denied.

Secondly, the plaintiffs contend that there are triable issues of fact as to whether the prescription of Demerol was contraindicated. Krenis avers in his affidavit that he is licensed to practice medicine in several states including the State of New York and that he is a board-certified anesthesiologist. He avers that Dragotta's death was caused by "a relative overdose of Demerol given to a patient whose respiratory and cardiac status were compromised" (Affirmation in Opposition, Krenis affidavit, para. 3). Demerol, an opiate narcotic analgesic, is a respiratory depressant which has a depressing central effect

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[6] Cunha's deposition testimony in support of Hospital's motion does not support Scognamillo's assertions in her reply affirmation that Cunha stated in that testimony that Dragotta met with an anesthesiologist from East End for a pre-operative consultation at the anesthesiologist's office on August 7, 1997.

[7] Although, in reply, Hospital heavily relied on ***Klippel v Rubinstein*** (300 AD2d 448, 751 NYS2d 553 [2002], *lv app den* 100 NY2d 508, 764 NYS2d 385), the Court notes that the decision by the Appellate Division followed a jury verdict in the nisi prius court. The Court also acknowledges the recent decision of ***Christopherson v Queens-Long Island Medical Group*** (17 AD3d 393, 792 NYS2d 608, Appellate Division, Second Dept., April 11, 2005). ***Christopherson*** is distinguishable from the instant case in that there was insufficient evidence to raise a triable issue of fact as to whether the plaintiff reasonably believed that the treating on-call obstetrician was an employee of the hospital.

on the brain. Dragotta was given a large dose of Demerol postoperatively which, combined with Dragotta's chronic obstructive lung disease, caused his death. Krenis further avers that the reports of Dr. Steven Gulotta, a cardiologist, combined with Dragotta's complaints of shortness of breath established with reasonable medical certainty that Dragotta had chronic obstructive pulmonary disease.

Krenis also avers that following surgery on January 19, 1996, Dragotta was given Morphine PCA for postoperative pain relief. The day after the surgery Dragotta developed respiratory distress. A pulmonologist called in for a pulmonary consult concluded that Dragotta's condition was caused by a combination of chronic obstructive pulmonary disease and narcotic-related respiratory depression. Leonardi, in his discharge summary noted that the final diagnosis of Dragotta's condition was respiratory depression secondary to the use of Morphine. Krenis also alleges that although Gordon, Hospital's expert, was correct in concluding that Dragotta did not previously have an allergic reaction to Morphine, Dragotta's previous condition was caused by a combination of the use of Morphine in the presence of chronic obstructive pulmonary disease. It was a departure from accepted practice for Yasmin to have ordered Demerol as a replacement for Morphine. It was also a departure from accepted practice for Yasmin and Gargiulo to have prescribed Demerol PCA which has the same respiratory depressant effect as Morphine. Dragotta's death was caused by respiratory depression secondary to the use of Demerol. Krenis notes that this was confirmed by Cunha's testimony, who noted that following the last PCA dose of Demerol, Dragotta fell asleep and, within ten to fifteen minutes, began breathing heavily.

Krenis further alleges that, contrary to Gordon's assertions, the dosage of Demerol prescribed could have caused Dragotta's respiratory distress given variability in response among patients to a given dosage of any drug and considering his chronic lung disease and prior difficulties with Morphine. Shelton testified in his deposition that he assumed that Dragotta was still suffering from chronic obstructive pulmonary disease in August of 1997. This evidence is sufficient to raise a triable issue of fact as to whether the prescription of Demerol was contraindicated (*see,* ***Mertsaris v 73rd Corp.,*** 105 AD2d 67, 482 NYS2d 792 [1984]).

Third, the plaintiffs contend in opposition that there are triable issues of fact as to whether members of Hospital's staff were negligent. Krenis also avers in his affidavit that surveillance of Dragotta by Hospital's staff following his transfer from PACU was inadequate and led to his death. Although Dragotta was receiving increasing doses of dangerous narcotics at the time of his transfer from PACU, with the possibility that Dragotta could self-administer at least 50 grams or more over the next twenty minutes, there was only one brief visit by a nurse during the period from his arrival in the room on the orthopedic floor to when the code was called. The failure of Hospital's staff to use devices and hospital settings for monitored respiratory care and to check Dragotta's status every fifteen minutes were departures from accepted practice which led to his death.

Finally, Krenis avers that Hospital's staff also departed from accepted practice by allowing Dragotta to be brought into a surgical suite without a complete preanesthesia evaluation recorded in the chart, failing to make the old chart available with the patient, failing to properly label charts with a warning of a previous reaction to Morphine, failing to make the chart available in the Operating Room and removing Dragotta from the Recovery Room to an ordinary hospital room without the order of a

physician.[8] Cunha testified in her deposition that only once did a nurse come in to see Dragotta during the two-hour period he was in the room on the orthopedic floor. This evidence presents triable issues of fact as to Hospital's direct negligence (***Johanessen v Singh,*** 259 AD2d 670, 686 NYS2d 830 [1999]), which, in addition to Hospital's failure to meet its initial burden of demonstrating the absence of its negligence as a matter of law, precludes summary judgment dismissing the complaint.

That part of Hospital's motion wherein it seeks an order pursuant to CPLR 3212[g] is denied. This CPLR section allows the Court, if practicable, to ascertain on a motion for summary judgment what facts are uncontroverted and issue an order specifying those facts. Under the circumstances of this case the Court's exercise of authority under CPLR 3212[g] is neither warranted nor practicable (***Orensky v Faim Information Services, Inc.,*** 43 AD2d 973, 352 NYS2d 496 [1974]).

Dated: 7-6-05

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

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[8] Contrary to Hospital's contentions in reply that the plaintiffs' bill of particulars did not contain allegations which pertained to certain of Krenis's assertions of negligence by Hospital's staff, the plaintiffs do allege in the bill of particulars that members of Hospital's staff were negligent and careless in "failing to treat and care for decedent in accordance with approved methods in general use...failing to take proper examinations...failing to administer appropriate and proper procedures...failing to take a proper history of decedent prior to the commencement of treatment...performing surgery without proper clearance" (Notice of Motion, Exhibit B).