

**Hayes v Tala**

2007 NY Slip Op 32175(U)

July 17, 2007

Supreme Court, Suffolk County

Docket Number: 0003229/2005

Judge: Robert W. Doyle

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 1-11-07  
ADJ. DATE 6-7-07  
Mot. Seq. # 001 - MD  
002 - MD

-----X		
EDMUND M. HAYES, as Administrator of the	:	BIRZON, STRANG BAZARSKY
Estate of CAROL NANCY HAYES	:	Attorneys for Plaintiff
BUSCARENO,	:	222 East Main Street, Suite 212
	:	Smithtown, New York 11787
	:	
Plaintiff,	:	
	:	KRAL, CLERKIN, REDMOND, RYAN, et al.
- against -	:	Attorneys for Defendant Tala
	:	69 East Jericho Turnpike
	:	Mineola, New York 11501
	:	
LEA L. TALA, M.D. and EDWIN GRESMANN,	:	GEISLER & GABRIELE, LLP
D.O.	:	Attorneys for Defendant Gresmann
	:	100 Quentin Roosevelt Blvd., P.O. Box 8022
Defendants.	:	Garden City, New York 11530
-----X		

Upon the following papers numbered 1 to 49 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers) 1-19 ; Notice of Cross Motion and supporting papers 20-39 ; Answering Affidavits and supporting papers 40-42; 43-45 ; Replying Affidavits and supporting papers 46-47; 48-49 ; Other     ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (001) by defendant Lea L. Tala, M.D. for an order pursuant to CPLR 3212 granting summary judgment, opposed by plaintiff, is denied.

**ORDERED** that this motion (002) by defendant Edmond D. Grasmann, D.O. for an order pursuant to CPLR 3212 granting summary judgment, opposed by plaintiff, is denied.

This is an action brought by Edmund M. Hayes as Administrator of the Estate of Carol Nancy Hayes Buscareno, decedent, premised upon the alleged medical malpractice by defendants in the failure to properly diagnose and treat plaintiff for thrombotic thrombocytopenia purpura. Plaintiff asserts that his sister, decedent, died due to the delay in diagnosing her condition. Plaintiff's decedent first presented to Dr. Tala on March 23, 1999 at the walk in clinic known as Community Medical Care, Centereach, New York. She died on March 24, 1999 at the Emergency Room of Mather Memorial Hospital at 52 years of age as a result of cardiac arrest. The complaint sets forth causes of action sounding in medical malpractice and wrongful death.

Defendants seek an order granting summary judgment, arguing they were not negligent in their care and treatment of plaintiff, and that the treatment rendered was not the proximate cause of plaintiff's injuries.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home et al*, 253 AD2d 852, 678 NYS2d 503 [2<sup>nd</sup> Dept 1998]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (see, *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2<sup>nd</sup> Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see, *Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [3<sup>rd</sup> Dept 1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375, *app denied* 92 NY2d 814, 681 NYS2d 475 [2<sup>nd</sup> Dept 1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2<sup>nd</sup> Dept 1994]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [2<sup>nd</sup> Dept 1979]).

In motion (001), defendant Dr. Tala seeks an order granting summary judgment on the issue of liability, arguing there are no triable issues of fact, and there is no proximate cause of plaintiff's injuries. In support of the application, defendant has submitted, *inter alia*, an attorney's affirmation; copy of the Letters of Administration; copies of the summons and complaint; answer of defendant Tala; copy of the verified bill of particulars; an unsigned and unsworn copy of the transcripts of the examinations before trial of plaintiff Edmund Hayes and defendant Edwin Grasman, M.D.; signed and sworn copy of the transcript of the examination before trial Lea Tala, M.D.; uncertified copies of the records of Dr. Tala, Dr. Grasmann, Mather Memorial Hospital Emergency Department; uncertified copy of the Autopsy Report; and the affirmation of Dr. Andrew M. Freeman, D.O.

In support of motion (002) defendant Dr. Grasmann seeks an order granting summary judgment on the issue of liability, arguing there are no triable issues of fact and there is no proximate cause of plaintiff's injuries. In support of this motion, defendant Grasmann has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint; answer of defendant Grasmann; copy of the verified bill of particulars; copies of the signed and sworn transcripts of the examinations before trial Lea Tala, M.D. and Edwin Grasmann, M.D.; uncertified copies of the records of Dr. Grasmann, Mather Memorial Hospital Emergency Department; an unsigned and unsworn copy of the transcripts of the examination before trial of Edmund Hayes; uncertified copy of the Autopsy Report; the affirmation of Dr. Perry Berg, M.D.; and a signed but unsworn copy of the affidavit of defendant Grasmann.

Plaintiff Edmund Hayes testified that he is the brother of Carol Nancy Hayes and has no other siblings. He has a doctorate degree in Pharmacy and is employed by the State University of New York at Stony Brook as the assistant director of pharmacy. He stated that Carol Nancy Hayes, who is divorced from her husband, had a college degree from Stony Brook University, which he assumed was in education as she was a teacher. She had more than enough credits to get a Master's degree. She has worked as a Spanish teacher in the Middle County School District since about 1970.

Mr. Hayes testified his sister had been under the care of Dr. Grasmann, her primary care physician. Dr. Grasmann had prescribed Prempro for his sister but he was not aware of any other medications she was taking. She had been hospitalized for polio as a child about age six, seven or eight, but was not left with any deficits. About ten or fifteen years ago she had been treated for alcohol abuse at Brunswick Hospital, and never had any relapses. Dr. Grasmann prescribed Vicodin for his sister for pain.

Mr. Hayes testified that one or two days before her death, his sister told him she saw Dr. Tala at the walk in clinic for extreme pain in her abdomen. She presented to the walk in clinic because Dr. Grasmann was not able to see her. Dr. Tala told her she had hemorrhagic cystitis and prescribed the antibiotic Cipro. When she called Dr. Grasmann's office the next day as she had been instructed the day before by his office nurse, her pain was getting worse. Another prescription, Macrobid, was called in for her as Dr. Grasmann thought she was having an allergic reaction to the Cipro and that's why the pain was worse. Mr. Hayes said they told her to call back again the next day. Her friend Rachel was visiting her, called Mr. Hayes and said she was getting worse, her urine was the color of cranberry juice and she was bleeding rectally and vaginally. Mr. Hayes had last spoken to his sister the day she died and told her to go to another doctor. His sister's friend called him and told him his sister was extremely ill, she wasn't coherent, she was in excruciating pain, and she was taken to the hospital. When he arrived at Mather Memorial Hospital to see his sister, they were resuscitating her. Dr. Yen, a cardiologist and a personal friend of Mr. Hayes, was at the hospital and told him he tried to save his sister, but she passed away. Dr. Yen did not know why she died. An autopsy was ordered.

Mr. Hayes testified that the day after his sister died, he was at his sister's house when Dr. Grasmann called. Dr. Grasmann said he already knew of his sister's death, told him he did not know what happened, and would get back to him as soon as he found out as he was going to call the medical examiner's office. Dr. Grasmann reminded Mr. Hayes that his sister owed him \$75.00. Mr. Hayes said Dr. Grasmann never called him back.

Dr. Tala testified at her examination before trial that she worked at Mather Memorial Hospital as an emergency room doctor since 1975. In 1999, she worked there 72 hours per two weeks on ten to twelve hour shifts. She also worked in private practice at Community Medical Care in 1999 which was T & S Community Care Services d/b/a Community Medical Care, a professional corporation in which she is a shareholder along with Dr. Siante. It is a walk in clinic which has been open since 1990. They maintain a general practice, do not provide primary care or specialized care, but she does take pediatric patients. Her hours were 9:30 to 6:30. She took her boards in emergency medicine, and at the time of the deposition, was awaiting the results. She is also board eligible in pediatrics.

Dr. Tala testified she had no independent recollection of decedent, referred to as Carol Buscareno. Before March 1999, she had never seen a case of thrombotic thrombocytopenic purpura or diagnosed it, but did have classes on disseminated intravascular coagulopathy. Dr. Tala's office record concerning Carol Buscareno's office visit had a typewritten pedigree information at the top of the chart which was prepared by her secretary who is no longer employed there. There was also a handwritten entry written by the secretary which reads "complaints of diarrhea and blood in the urine." Below that, in her office nurse's handwriting, was an entry that reads "chronic back pain, post polio." It also reveals a past history of two anal fistula repairs, ovarian cyst, Prempro. Vicodin one or two a day and Buspar 20 mg. was also written in, but Dr. Tala did not know whose handwriting that was. She gave a history of being allergic to nonsteroidal antiinflammatory drugs.

Dr. Tala wrote on the chart "complained of blood in the urine since this morning. Complains of chills. Afebrile, no CVA tenderness. Suprapubic tenderness. Impression, Diagnosis, hemorrhagic cystitis." Dr. Tala ordered a urine culture and sensitivity and prescribed Cipro 500 mg. twice a day for ten days. Dr. Tala testified that people with urine infections have complaints of chills. She considered plaintiff's temperature of 97.9 as normal for this patient. She stated the finding of suprapubic tenderness was consistent with urinary tract infection in that the bladder is over the suprapubic area. She did not perform a vaginal or rectal examination. It was her impression that this was a hemorrhagic cystitis as she saw the urine tests, and there were no leukocytes, only blood, as is usually the case with hemorrhagic cystitis, which she testified is an inflammation of the bladder. The urine was tested with a dipstick which revealed protein of 4+, which Dr. Tala said people who have some kind of urine infection usually have a protein spilling in their urine too. The dip stick test also revealed a large result for blood, which Dr. Tala attributed to hemorrhagic cystitis. The urine dipstick was negative for ketones, bilirubin and glucose. The specific gravity was 1.015 which had no special significance to her. There was no microscopic examination done.

Dr. Tala testified that on March 23, 1999, she felt that all the clinical data pointed toward hemorrhagic cystitis as a diagnosis, which is why she did not engage in a differential diagnosis. Dr. Tala did not recall any mention of vaginal or rectal bleeding, and did not recall discussing diarrhea, frank blood, color or consistency with her. She did not remember considering screening for occult blood. She did not note any abnormal affect in the patient. Dr. Tala testified it is not her routine to order any blood tests on a suspected urine infection. It is also normal for her office to tell a patient to follow up with their doctor if they are no better in two days or go to the emergency room if she felt worse. The laboratory slip for the urine culture came back March 25, 1999 and revealed there was no growth. This, stated Dr. Tala, did not cause her to reevaluate or alter her original diagnosis. After that office visit, Dr. Tala stated she did not have any further contact with plaintiff in person, by telephone or in writing.

Dr. Grasmann testified at his examination before trial on February 21, 2006 that he attended an osteopathic medical school, New York College of Osteopathic Medicine and is board certified in family practice. However, at the time of his deposition, his license to practice medicine had been suspended, and he was working as an attorney, but had not been admitted to the bar.

Dr. Grasmann testified Carol Buscareno first became his patient February 20, 1997. He took a history from her wherein she complained of lower thoracic pain T-4 to T-10. She was taking no medication. His assessment and plan was thoracic back pain, chest x-ray, thoracic spine x-ray, Vicodin ES number 60, with no refill. He then saw her on March 3, 1997 and indicated there was a negative workup, including alkaline phosphatase, chest and lumbosacral spine x-rays and ESR. Her back was noted to be very tight in the approximate T-8 to T-12 levels on the left, which Dr. Grasmann felt was probably muscle related. He prescribed Somma, one or two QHS, and physical therapy three times a week for one month.

Thereafter, Ms. Buscareno was seen on multiple occasions wherein he prescribed various medications for depression, pain and sleeping difficulties. When she returned on February 22, 1999, Ms. Buscareno complained of chronic pain in the shoulders and arms. She had a normal exam. He ordered a Lyme by Elizer and Western Blot, full thyroid function study, CBC, SMAC, lipids, sed. rate, ANA and rheumatoid factor. He gave her Vicodin 60 one Q8H prn. Thereafter, the Lyme titre came back at 0.731 and he testified that 1.20 or greater is positive. When asked if any of the titres were positive, he testified that it has been a number of years since he interpreted Lyme titres. The IGGs were all normal. One out of the three IGMs was positive. He did not feel she had Lyme disease. The MCV was slightly elevated at 100 for which he planned to check the anemia profile on the next visit or have her come in for labs which was contained in a note entered March 1, 1999 to himself.

Plaintiff's decedent next presented to his office on March 12, 1999. His note indicated she had an elevated MCV so he wanted to check serum iron, TIBC, B-12, Folate, Ferritin and a CBC to screen for anemia. Her throat was red and her lungs had a few rhonchi. She was diagnosed with bronchitis for which he ordered Dynocin 100 mg. number 20, Hycotuss with Alurnt. Vicodin ES number 60 was also prescribed. Dr. Grasmann testified that the lab reports did not demonstrate anything clinically significant. The lab report showed the MCV and MCH still above the reference range, but Dr. Grasmann testified he considered this clinically insignificant in this patient.

Dr. Grasmann testified that he did not recall having telephone contact with Ms. Buscareno on March 23, 1999. He did not recognize the handwriting for the entry made on March 24, 1999, which he stated was made by a member of his office. His office was only staffed on the days he was in the office. The note indicated, "Urinary tract infection. Saw doctor at walk in. Put on Cipro. Called today. Very nauseous. Crippling pain in stomach. Dr. Grasmann discontinued Cipro, put on Macrobid 100 mg. number 10 one BID with food, use Tums or over the counter Zantac, push fluids. See on March 25 if not better." Dr. Grasmann testified he did not remember any conversations taking place on March 24, 1999 between himself and whoever made the note in the chart. He stated he was aware that Cipro causes nausea. He was not sure if Macrobid 100 mg provided the same pathogen coverage as the Cipro as he it has been a number of years since he prescribed Macrobid or Cipro. He testified that the note of March 24, 1999 accurately reflected treatment decisions and prescriptions that he made with regard to Ms. Buscareno based upon what the patient told the staff or complained of.

Dr. Grasmann made an entry on March 26, 1999 indicating there was a "phone call from brother Ed Hayes. Patient expired at Mather emergency room late on March 24 or very early March 25. The case went to the medical examiner. Cause of death unknown at this point. Questionable DIC." He testified that the note about question mark DIC was more likely than not derived from the laboratory reports from Mather Hospital, as indicated by the platelet count of 38,000 and the schistocytes on the differential. He did not recall making any other differential at that time other than DIC.

On March 27, 1999, he made a note in decedent's record indicating he spoke with the physician's assistant from the medical examiner's office. He reviewed the ER result, and per the physicians in the emergency room, the patient had platelets of 34,000 with increased amylase and lipase. He suggested she died from DIC secondary to acute pancreatitis.

On April 7, 1999 Dr. Grasmann made a note in the chart indicating he spoke with Dr. Horowitz, whom he believed was a member of the medical examiners staff, and wrote "? thrombotic thrombocytopenic purpura." He believed Dr. Horowitz initiated the phone call and that Dr. Horowitz was discussing thrombotic thrombocytopenic purpura. He had no independent recollection of that phone call with Dr. Horowitz.

Dr. Grasmann did not recall any conversations with friends or family of Ms. Buscareno subsequent to March 26, 1999. Dr. Grasmann said he liked Ms. Buscareno a lot, and she was a lovely, nice person, one of his favorite patients. He remembers he was very upset when she died. She was articulate, intelligent, and he trusted what she said.

Dr. Grasmann testified that between March 24, 1999 and April 7, 1999, he never received any information from any source that this patient had experienced vaginal bleeding within 48 hours prior to her death, or urethral bleeding or rectal bleeding. He had no discussion with Dr. Tala about this case. None of the doctors who covered for him ever reported to him that they had received a message from this patient or spoken with her or had any communication with her at all.

The autopsy report records the cause of death of Carol Buscareno as thrombotic thrombocytopenic purpura on March 25, 1999 at 9:15 a.m.

The affidavit of Dr. Andrew Freeman, D.O. has also been submitted in support of Dr. Tala's motion for summary judgment. He sets forth that he is a physician licensed to practice medicine in the State of New York and is board certified in Family Practice since 1995 and reviewed the records maintained by Dr. Tala, the pertinent medical and hospital records of plaintiff's decedent and the transcripts of the examinations before trial of all the parties. Based upon the review of those materials, he concludes with a reasonable degree of medical certainty that the care rendered to Carol Hayes Buscareno by Lea L. Tala, M.D. on March 23, 1999, did not deviate in any way from the acceptable standards of care of the medical community and that no causal relationship exists between the care rendered to Ms. Buscareno by Dr. Tala on March 23, 1999 and Ms. Buscareno's death on March 24, 1999 as a result of the thrombotic thrombocytopenia purpura.

Dr. Freeman sets forth that thrombotic thrombocytopenia purpura is an extremely rare, acute disorder of the blood coagulation system, in which loose strands of fibrin are deposited in multiple small blood vessels, causing damage to the platelets and red blood cells, resulting in thrombocytopenia or the

destruction of platelets and microangiopathic hemolytic anemia caused by the breakdown of red blood cells.

Dr. Freeman states there is nothing in the transcript which indicates Ms. Buscareno made complaints to Dr. Tala of extreme and increasing abdominal pain for more than a day on March 23, 1999. He states that Ms. Buscareno reported to Dr. Tala that she had diarrhea and blood in the urine since that morning and a history of chronic back pain relating to a childhood history of polio, and past surgical history of two prior repairs of an anal fistula and surgery for an ovarian cyst. Dr. Tala's finding during physical examination of Ms. Buscareno of subrapubic tenderness, given the anatomical position of the bladder, is consistent with Dr. Tala's suspicion that Ms. Buscareno had then been experiencing some sort of urinary problem. Ms. Buscareno was alert and oriented, her temperature was normal and all vital signs were well within the normal ranges. Dr. Freeman states that stable vital signs would have been physiologically inconsistent if the patient had been in a state of extremis, experiencing severe abdominal pain, for more than a day, as well as rectal and vaginal bleeding and set forth the changes that would be noted if there was copious rectal and vaginal bleeding. Ms. Buscareno did not have rigidity of her abdomen which could have been indicative of any internal bleeding.

Dr. Freeman opines with a reasonable degree of medical certainty that on March 23, 1999, Carol Hayes Buscareno presented to Dr. Lea Tala with signs, symptoms and laboratory findings (in her urine) that had been consistent with hemorrhagic cystitis.

Dr. Freeman also sets forth that Ms. Buscareno did not present or claim any of the external manifestations of thrombocytopenia, such as visible petichiae (small purplish hemorrhagic spots on the skin), purpura (red to purple hemorrhagic blotches of the skin), bruises or any other dermatological manifestations that would have served to suggest that the patient might have been suffering from a coagulation disorder.

Based upon the foregoing, it is determined that Dr. Tala has demonstrated prima facie entitlement to summary judgment on the issue of liability and proximate cause of plaintiff's claimed injuries.

Defendant Grasmann has set forth in his supporting affidavit that all the care and treatment he rendered to Ms. Buscareno comported with the acceptable standard of care, and nothing he did or failed to do proximately caused her death. He states Ms. Buscareno contacted his office while he was present on Wednesday, March 24, 1999. Dr. Grasmann states a member of his staff took the telephone call from Ms. Buscareno and relayed her complaints of a urinary tract infection, nausea and abdominal pain. He discontinued the Cipro she had been prescribed at a walk-in clinic and ordered Macrobid.

Defendant Grasmann has also submitted the affidavit of Perry Berg, M.D. in support of this motion for summary judgment. Dr. Berg states that after having reviewed the records and testimony, and based upon his knowledge and experience as an internist, that he states with reasonable medical certainty that the defendant, Edwin Grasmann, D.O., did not depart from good and accepted medical practice and that nothing he did or failed to do proximately caused the injuries of which plaintiff complains. Dr. Berg sets forth that Dr. Grasmann gave proper advice and instruction to decedent, and his treatment was proper under the circumstances and at all times in accordance with acceptable medical practice.

On March 24, 1999, when decedent called Dr. Grasmann's office and spoke to a member of his office staff, Dr. Berg states that decedent informed the staff member she had been diagnosed with a urinary tract infection and had been given Cipro, that she complained of gripping stomach pain and nausea, so he switched the Cipro to Macrobid and advised her to take Zantac OTC. He also advised her to push fluids and to follow up with him the following day if her condition worsened. However, on March 24, 1999 at 10:23 p.m., Ms. Buscareno presented to Mather Memorial Hospital with complaints of generalized abdominal pain for one day, nausea and diarrhea, and gave a history of a bladder infection and diarrhea and noted bright red blood from her rectum. She was noted to have slight pallor. Within twenty minutes, she became restless and complained of gripping abdominal pain, her respirations decreased and she stopped breathing. A code was called and CPR begun. Ms. Buscareno was pronounced at 11:50 p.m.

Dr. Berg indicates that although there were petechial hemorrhages of the heart, adrenals, pituitary and colonic mucosa, at the time of the autopsy, there were no petechial hemorrhages of the skin or mucous membrane. Even at this point, TTP was not recognized as it required completion of autopsy with microscopic examination of the organs before a definitive diagnosis could be made.

Dr. Berg sets forth that TTP is a rare disease, and is even rarer when only history and physical examination will cause it to be part of a differential diagnosis. The decedent's atypical presentation of this rare disease made it nearly impossible to reach a diagnosis. A diagnosis of TTP is based on five signs and symptoms, including moderate to severe thrombocytopenia, severe microangiopathic hemolytic anemia, mild kidney disease, fever and disruption of the nervous system evidenced by agitation, headache and/or disorientation, and is capable of progressing explosively to coma and death. TTP involves the von Willebrand factor, a key protein in blood coagulation. The diagnostic feature of thrombocytopenia is petechiae (pinpoint hemorrhages) which can appear in either the skin, mucous membranes and/or internal organs. Purpura, commonly referred to as bruising, can also occur, though it is not diagnostic as purpura develops in many other traumatic circumstances.

Dr. Berg further sets forth that hemolytic anemia is a condition in which red blood cells are badly damaged and fragmented and are called shistocytes or helmet cells, and can be identified on a blood smear. Hemolytic anemia is characterized by elevated levels of lactic dehydrogenase, an enzyme liberated by red blood cell destruction. Dr. Berg says Dr. Grasmann was never made aware of any such symptoms on the part of the decedent.

Dr. Berg further sets forth that the sudden onset of a stomach ache is compatible with an adverse reaction to Cipro and that Dr. Grasmann appropriately discontinued the Cipro and changed the medication to Macrobid. There was nothing to warrant an immediate physical examination of the decedent or referral to the emergency room. Dr. Berg also states that it is customary for an internist to discontinue medication over the telephone after learning that a patient's stomach ache coincides with a new course of treatment known to cause abdominal pain. Therefore, the record is devoid of any support to plaintiff's claim that Dr. Grasmann departed from acceptable standards of care.

Dr. Berg also opines that there is no proximate cause between Dr. Grasmann's treatment of decedent and decedent's ultimate demise due to TTP as the records indicate the decedent manifested none of the diagnostic pentad associated with TTP. There is no indication a physical examination of decedent by Dr. Grasmann would have altered the decedent's course of treatment.

When Ms. Buscareno presented to the emergency room, she was noted to have pallor, but did not have fever, neurological signs or symptoms, or petechiae. Even if the medical staff at the hospital considered TTP as a possible diagnosis, the results of the subsequent laboratory testing would not have been definitive as decedent's anemia was mild and her red blood cell count was 3.99 against a lower limit of normal of 4.2. Hemoglobin and hematocrit values were within normal limits, so she would not have been diagnosed with severe anemia. As such, the biochemical results that showed acidosis, impaired renal function and a leak into the circulation of pancreatic enzymes could only be considered consistent with pancreatitis for which the treatment is entirely different from that required to treat TTP.

Dr. Berg states the only effective treatment for TTP is plasma exchange to replace the von Willebrand factor in the plasma. Bone marrow aspiration or biopsy could have determined the diagnosis of TTP, and a consult with a hematologist would have been necessary. All this, from start to finish, could not have been arranged in less than twelve hours. The clots in her heart and pancreas accelerated her death, rendering plasma exchange fruitless. Even if diagnosis could have been made in the hospital when plaintiff presented, she would not have been salvageable.

Based upon the foregoing, it is determined that Dr. Grasmann has demonstrated prima facie entitlement to an order granting summary judgment.

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2<sup>nd</sup> Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat the summary judgment motion made by defendant physician (*Fileccia v Massapequa Gen. Hosp.* 63 NY2d 639, 479 NYS2d 520 [1978]); *Alvarez v Prospect Hosp.* 68 NY2d 320, 508 NYS2d 923 [1986]); *Bustamonte v Koval*, 98 AD2d 739, 469 NYS2d 441 [2<sup>nd</sup> Dept 1983]).

In opposition to this motion, plaintiff has submitted an attorney's affirmation and the affirmation of plaintiff's expert, which affirmation provided to this court has the physician's name and signature affixed.

Plaintiff's expert sets forth that he/she reviewed the medical records relative to the late Carol Hayes Buscareno as maintained by Dr. Tala, Dr. Grasmann and Mather Memorial Hospital, and the autopsy report. When plaintiff presented to Dr. Tala on March 23, 1999, she was told that she likely had a hemorrhagic cystitis for which she was prescribed Cipro, a broad spectrum antibiotic. On March 24, 1999, the patient called and sought a consultation with her usual primary care physician, Dr. Grasmann, for the same condition which was now accompanied by nausea and gripping abdominal pain. Dr. Grasmann elected not to see the patient, apparently presumed that Dr. Tala's diagnosis was correct, that Ms. Buscareno was simply experiencing an adverse reaction to Cipro, and elected to switch the antibiotic coverage to Macrobid.

The evening of March 24, 1999, Ms. Buscareno became even more profoundly ill and was brought to the emergency department at Mather Memorial Hospital. During the course of an initial evaluation, she

Hayes v Tala  
 Index No. 05-3229  
 Page No. 10

suffered a cardio-respiratory arrest from which she could not be resuscitated. Her time of death was officially noted to be 11:50 p.m. on March 24, 1999.

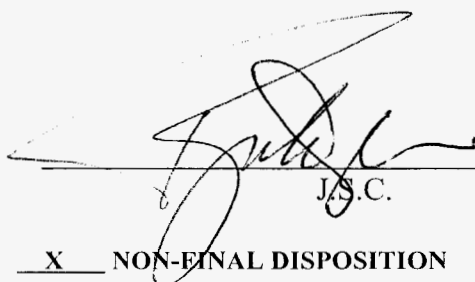
Plaintiff's expert states the autopsy demonstrates definitively that the patient's cause of death was undiagnosed and untreated thrombotic thrombocytopenic purpura (TTP), a relatively uncommon blood disorder which provokes spontaneous internal hemorrhages, and is usually diagnosed with a combination of clinical information derived from a history and physical examination, and laboratory data in the form of a complete blood count. Assuming timely diagnosis, emergency treatment in the form of plasma replacement results in a cure in over 90% of the cases.

Having reviewed the records maintained by defendants, plaintiff's expert states it is his/her opinion that the approach to Ms. Buscareno's care failed to demonstrate an appropriate level of thoroughness or urgency. The historical information reported by decedent was distinctly abnormal and warranted much more intensive investigation than the urinalysis ordered by Dr. Tala. Dr. Grasmann performed no investigation of the patient's symptoms. It is plaintiff's expert's opinion that if defendants' lacked the facilities or inclination to test the patient further, then she should have been directed to a local emergency department for a complete blood count and further evaluation and observation. Earlier intervention by Dr. Tala or Dr. Grasmann would have had a high probability of altering the tragic outcome, as by the time the emergency staff at Mather Memorial initiated their evaluation, the patient was already in the midst of a catastrophe and was likely irretrievably compromised by the time she presented there.

Based upon the foregoing, it is determined plaintiff has raised factual issues to preclude an order granting summary judgment. These factual issues concern whether Dr. Tala appropriately evaluated and investigated plaintiff's condition when she presented at her office based upon the symptoms complained of. There are factual issues concerning whether Dr. Grasmann should have examined and evaluated plaintiff on March 24, 1999 when she called his office complaining of nausea and gripping stomach pain in conjunction with her complaints of bloody urine, instead of diagnosing and treating over the telephone. There are factual issues concerning whether both Dr. Tala and Dr. Grasmann should have performed additional diagnostic testing, evaluation and screening, or whether they should have referred Ms. Buscareno elsewhere for a complete blood count and further evaluation and observation. There are factual issues concerning whether earlier intervention by Dr. Tala or Dr. Grasmann would have altered what is referred to by plaintiff's expert as a tragic outcome. Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. Where, as here, medical experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution (*Feinberg v Feti*, 23 AD3d 517, 806 NYS2d 661 [2<sup>nd</sup> Dept 2005]; *Dandrea v Hertz*, 23 AD2d 332, 804 NYS2d 106 [2<sup>nd</sup> Dept 2005]; *Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2<sup>nd</sup> Dept 2004]).

Accordingly, motions (001) and (002) by defendants Lea Tala M.D., and Edwin Grasmann, D.O. for summary judgment are denied.

Date:                     JUL 17 2007                    

  
 \_\_\_\_\_  
 J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION