SHORT FORM ORDER

INDEX No. 03-1542
CAL. No. 06-00468-MM

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

***PRESENT:***

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-18-07 (006,007,008,009,010)
5-18-07 (011, 012, 013)
ADJ. DATE 7-13-07
Mot. Seq. # 006 - MG 009 - XMD 012 - XMD
007 - XMD 010 - XMD 013 - XMG
008 - XMD 011 - MG

ALEXANDER W. POLAK, as Administrator of the Estate of LISA MARIE POLAK,

Plaintiff,

- against -

SCOTT HOLMES, as Administrator of the Goods Chattels and Credits of B.C. HENDRICKSON, JR., deceased, EILEEN M. SCOTT, DYNAMIC DESIGNS CONCEPTS, INC., RICHARD S. OBEDIAN, M.D., IRA ROSENBLUM, M.D., HOWARD HEIMOWITZ, M.D., JOSEPH PERROTTA, M.D. FLORANTE MELCHOR, M.D., IAN H. NEWMARK, M.D., NORTH SHORE UNIVERSITY HOSPITAL AT SYOSSET and ORTHOPAEDIC AND SPORTS ASSOCIATES OF LONG ISLAND, P.C.,

Defendants.

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Upon the following papers numbered 1 to 127 read on these motions and cross motions for summary judgment; this motion to reargue; and this motion to amend pleadings ; Notice of Motion/ Order to Show Cause and supporting papers 1- 31 ; Notice of Cross Motion and supporting papers ) 32-35; 48-50;51-53; 58-60; 61-82; 90-95; 96-105; Answering Affidavits and supporting papers 36-42; 54-55; 83-87; 106-108; 111-112; 113-114; 115-117 ; Replying Affidavits and supporting papers 43-44; 56-57; 88-89; 118-119; 120-121; 122-125; 126-127 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is.

***ORDERED*** that this motion (006) by defendants Eileen Scott and National Sales Company LLC

d/b/a Dynamic Design pursuant to CPLR 3212 granting summary judgment and dismissing the complaint and all cross claims against them is granted; and it is further

***ORDERED*** that this motion (007) by defendant Joseph Perrotta, M.D. pursuant to CPLR 3212 granting summary judgment dismissing the wrongful death cause of action against him is denied; and it is further

***ORDERED*** that this motion (008) by defendant Ian H. Newmark, M.D. pursuant to CPLR 3212 for partial summary judgment on the wrongful death cause of action is denied; and it is further

***ORDERED*** that this motion (009) by defendant Scott Holmes as Administrator of the Goods Chattels and Credits of B.C. Hendrickson, Jr., deceased, for summary judgment dismissing the complaint on the wrongful death and survival causes of action and all cross claims of the co-defendants against him, is denied; and it is further

***ORDERED*** that this motion (010) by defendant Florante P. Melchor, M.D. pursuant to CPLR 3212 granting partial summary judgment dismissing plaintiff's cause of action for wrongful death is denied; and it is further

***ORDERED*** that this motion (011) by defendant Ira Rosenblum, M.D, pursuant to CPLR 2221(e)(1)(2) to renew defendant's prior motion for granting summary judgment dismissing the complaint on the wrongful death cause of action and all cross claims asserted against him is granted as to renewal and denied on the merits; and it is further

***ORDERED*** that this motion (012) by defendants Howard Heimowitz, M.D. and North Shore University Hospital pursuant to CPLR 3212 for summary judgment dismissing the complaint on the wrongful death cause of action, is denied; it is further

***ORDERED*** that this motion (013) by plaintiff pursuant to CPLR 3212 for summary judgment on the issue of liability against Scott Holmes as Administrator of the Goods Chattels and Credits of B.C. Hendrickson, Jr., deceased, is granted.

The Note of Issue in this action was filed February 27, 2006, but thereafter, this matter was stayed by order, dated August 4, 2006 (Doyle, J.) because, on July 3, 2006, defendant B.C. Hendrickson, Jr. died. Accordingly, the summary judgment motions then pending, (motion (002) by defendant Ira Rosenblum, M.D.; motion (003) by defendants Eileen Scott and National Sales Company, LLC; and motion (004) by defendants North Shore University Hospital and Howard Heimowitz, M.D., were denied without prejudice to renew. By order, dated February 15, 2007, (Baisley, J.), Scott Holmes was substituted as Administrator of the goods, chattel and credits of B.C. Hendrickson, Jr., having been granted Letters of Administration by Suffolk County Surrogate's Court on August 6, 2006 and having been substituted in the place of decedent Hendrickson. The stay of this action was then lifted.

This action has been brought by plaintiff Alexander W. Polak, in his capacity as Administrator of the Estate of Lisa Marie Polak, having been appointed November 20, 2006, due to the death of his

daughter, Lisa Marie Polak on June 7, 2002 at 27 years of age. The complaint of this action sets forth causes of action sounding in negligence, medical malpractice, wrongful death, and lack of informed consent for which plaintiff seeks compensation for the past and future loss of services, the past and future loss of earnings, the personal injury, and the pain and suffering of Lisa Marie Polak.

On February 2, 2002, at approximately 11:07 a.m. on Jericho Turnpike, 1000 feet east of its intersection with Dix Hills Road, Town of Huntington, New York, plaintiff's decedent was involved in an automobile accident. While operating her vehicle, there was a contact between her vehicle and the vehicles owned or operated by defendants Eileen M. Scott, Dynamic Designs Concepts, Inc, and B.C. Hendrickson, Jr. Decedent's vehicle was struck in the rear by the vehicle operated by B.C. Hendrickson, Jr. Plaintiff's vehicle came into contact with the vehicle in front of her operated by defendant Eileen M. Scott and owned by Dynamic Designs Concepts, Inc. These events give rise to the causes of action for negligence and wrongful death of plaintiff's decedent.

Following the automobile accident of February 2, 2002, plaintiff's decedent sought and received medical care and treatment with the remaining defendants, giving rise to the causes of action for medical malpractice, lack of informed consent and the wrongful death of plaintiff's decedent.

The bill of particulars claims plaintiff suffered from the following injuries and conditions, inter alia: death; L4-5 right parasagittal disc herniation effacing the ventral aspect of the thecal sac; C5-6 central disc herniation effacing the ventral aspect of the thecal sac; C6-7 disc bulge; epidural steroid injection, epidurogram, fluoroscopy, bilateral facet joint blocks at S1 and L1-L5, bilateral S1 joint block and arthogram, and bilateral sciatic nerve block on 3/8/02, 4/19/02; cortisone injection over the posterior tibialis tendon sheath on 5/3/02; exploration of the left posterior tibial tendon and partial synovectomy of the posterior tibial tendon on 5/21/02; superficial soft tissue edema anteromedially and overlying the Achilles tendon within the distal leg; possible partial tearing or tendinosis of the distal tibialis posterior tendon; left posterior tibial tendinitis; cervical radiculitis; lumbar radiculitis; pain in legs, arms, neck, left ankle, left hip, limitation in range of motion of back; and loss of enjoyment of life. The autopsy report indicates plaintiff's decedent died from a pulmonary embolus secondary to a deep venous thrombosis following a left tibial tenosynovectomy for crush injuries to the left ankle. The manner of death was listed as accidental

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 [2nd 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 [2nd Dept 1979]).

NEGLIGENCE

Turning to the issue of liability in this action arising out of the motor vehicle accident, in motion (013) Alexander W. Polak, as Administrator of the Estate of Lisa Marie Polak seeks summary judgment as to liability against defendant Scott Holmes as Administrator of the Goods, Chattels, and Credits of B.C. Hendrickson, Jr. This motion is opposed by defendant Holmes. In support of the motion, plaintiff has submitted an attorney's affirmation, copy of the autopsy report, copy of the pleadings and verified bill of particulars, and a copy of the transcript of the examination before trial of decedent B.C. Hendrickson, Jr.

Prior to his death, Mr. B.C. Hendrickson, Jr. testified at his examination before trial that he was operating his 2001 BMW in the eastbound left lane on Jericho Turnpike at about 40 miles an hour when, from about four car lengths behind plaintiff's vehicle, he saw her vehicle coming to a rapid stop. He described the roadway where the accident occurred as past the intersection of Jericho with Dix Hills Road, and straight and level. He testified that about one second before he observed the vehicle ahead of him slowing down, that he was looking at his dashboard for about one and a half seconds as an alarm bell went off on the dashboard. A digital readout appeared on the dashboard indicating he was low on fuel. During that one and a half seconds that he was observing his dashboard, his vehicle was accelerating as traffic had been proceeding very slowly after the light turned green at the intersection of Dix Hills Road, but when the road began to incline, traffic opened up, the cars in front of him began to accelerate, and he began to accelerate Prior to his looking at the dashboard, he stated the car ahead of him was accelerating.

When he saw plaintiff's vehicle ahead of him coming to a rapid stop, he had been traveling about thirty miles an hour, he applied his brakes and felt his vehicle slow down rapidly. About two to three seconds lapsed, and his vehicle traveled between thirty five and forty feet, when the front of his vehicle impacted the rear of plaintiff's vehicle ahead. He described the impact as light. He testified he was traveling about five miles an hour at the time of impact. He stated that he had seen the vehicle ahead of plaintiff's vehicle come to an abrupt halt. That vehicle was struck by plaintiff's vehicle, but he did not know if that contact occurred before or after the contact with his vehicle and plaintiff's. He described the damage to plaintiff's vehicle from his impact with her car as causing the trunk to be slightly raised and buckled, and there was a compression of the back of her car, perhaps her fender. There was damage to the lower grille section on the front of his car.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306

AD2d 235, 762 NYS2d 95 [2nd Dept 2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [2nd Dept 1999]; *see also,* Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see,* ***Rainford v Han,*** 18 AD3d 638, 795 NYS2d 645 [2nd Dept 2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2nd Dept 2005]; ***Power v Hupart,*** *supra*).

It is clearly adduced from the testimony of defendant Hendrickson that he was not watching the roadway or the vehicles ahead of him before his vehicle struck plaintiff's vehicle.

Based upon the testimony presented by decedent B.C. Hendrickson, Jr., it is determined plaintiff has demonstrated prima facie entitlement to an order granting summary judgment.

In opposition to this motion, defendant has submitted an attorney's affirmation, and a copy of the transcript of the examination before trial of defendant Eileen M. Scott.

The court concludes that counsel for defendant Holmes' claim that there are factual issues to preclude summary judgment is conclusory and speculative at best, and unsupported by any admissible evidence. Eileen Scott testified that she was driving on Jericho Turnpike in the left lane. Someone in front of her was making a left hand turn with their turn signal on. She was coming to a stop or already stopped, and was hit from behind by plaintiff's vehicle. Scott did not strike the vehicle in front of her which was making the turn, either before or after being struck in the rear. Although she did not know the number of impacts to the rear of her car she described only one good impact, heavy. She did not see an impact between two other vehicles before the impact to her vehicle. She did not remember hearing an impact after the impact to her vehicle.

The MV 104 Report and party statements contained in defendant's Sur-Reply do not raise any triable issues of fact as defendant Hendrickson does not set forth a reasonable explanation for his not timely stopping to avoid striking plaintiff's vehicle. The affidavit of a respondent driver which states his vehicle struck appellant's vehicle after an abrupt stop in heavy traffic is insufficient to raise a triable fact issue (***Cacace v DiStefano,*** 276 AD2d 457, 713 NYS2d 758 [2nd Dept 2000]). Accordingly, no factual issue has been raised in the party statements submitted on behalf of B.C. Hendrickson, Jr.

The court concludes that defendant Holmes, on behalf of decedent Hendrickson, has failed to raise any triable issues of fact which would preclude summary judgment. He has failed to come forward with a non-negligent or reasonable explanation for the happening of the accident (*see,* ***Rainford v Han,*** supra; ***Thoman v Rivera***, supra; ***Power v Hupart,*** *supra*), and has in fact admitted to not watching the roadway or vehicle in front of him within seconds of the accident by looking at his dashboard while driving and accelerating, thus becoming distracted and not avoiding plaintiff's stopping vehicle. He was under a duty to maintain a safe distance between his vehicle and plaintiff's vehicle (*See*, Vehicle and Traffic Law §1129(a)) and the failure to do so, in the absence of an adequate, nonnegligent explanation, constitutes

negligence as a matter of law (***Silberman v. Surrey Cadillac Limousine Service, Inc.,*** 100 AD2d 833, 486 NYS2d 357 [2nd Dept 1985]; ***DiLeo v Greenstein,*** 281 AD2d 586, 722 NYS2d 259 [2nd Dept 2001])). Moreover, drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Fillippazzo v Santiago,*** 277 AD2d 419, 716 NYS2d 710 [2nd Dept 2000]). Although defendant Hendrickson claims that defendant Scott, and the car in front of her stopped abruptly, such claim, standing alone, is insufficient to rebut the presumption of negligence (***Montefusco v KPH Mechanical, Inc.*** 2007 NY Misc LEXIS 4750, 237 NYLJ 122 [Suffolk County 2007]). Counsel's claim that there are factual issues to preclude summary judgment are speculative and unsupported by the record.

Accordingly, motion (013) for an order granting summary judgment against defendant Hendrickson on the issue of liability is granted.

In motion (006) defendants Eileen M. Scott and National Sales Company LLC d/b/a Dynamic Design Concepts (hereinafter National) seek summary judgment dismissing plaintiff's complaint and all cross claims asserted against Scott and National and have submitted the complete motion for summary judgment previously filed as motion (003) which was denied without prejudice to renew. Defendants Scott and National argue entitlement to summary judgment on the issues of liability. They also argue entitlement to summary judgment on the issue of serious injury and seek dismissal of the wrongful death cause of action asserting plaintiff's decedent has incurred no pecuniary damages and the car accident was not the proximate cause of her death as she died due to the medical malpractice of the co-defendants Obedian and Rosenblum. This motion is opposed by plaintiff, and is partially opposed by defendants Richard Obedian M.D. and Orthopaedic and Sports Associates of Long Island, P.C. to the extent that the cross motion seeks dismissal of defendants Obedian's and Orthopaedic Sports' cross claims against them.

In support of this motion, defendants Scott and National have submitted, inter alia, an attorney's affirmation; copies of the pleadings, copies of the answers of defendants Scott and National, and defendant Hendrickson; various medical records; copy of the transcripts of the examinations before trial of defendants Scott, Obedian and Rosenblum, and plaintiff Alexander Polak; an uncertified copy of the MV 104 Police Accident report; various hospital, medical, physical therapy and operative records; and the affirmations of Aaron A Sporn, M.D. and Michael Gottesman, M.D.

Eileen Scott testified at her examination before trial that she was driving on Jericho Turnpike in the left lane, operating a vehicle owned by defendant National. Someone in front of her was making a left hand turn with their turn signal on. She was coming to a stop or already stopped, and was hit from behind. She did not know the number of impacts to the rear of her car. The impact that she felt was described as a good impact, heavy. She did not describe more than one impact. She did not see an impact between two other vehicles before the impact to her vehicle. She did not remember hearing an impact after the impact to her vehicle. She did not at any time strike the vehicle in front of her which was making the turn.

Based upon the foregoing, defendant Scott has demonstrated prima facie entitlement to summary judgment on liability.

Plaintiff opposes this motion and argues that the statement provided by defendant Scott at the time of the accident is in direct contradiction to the testimony given at her examination before trial. That statement made by defendant Scott immediately after the accident sets forth that as she was driving east on Jericho Turnpike, a driver of a white vehicle was in the left lane with no signal on. As she stopped for the white vehicle, she was hit from behind. However, Eileen Scott testified at her examination before trial that she was driving on Jericho Turnpike in the left lane when someone in front of her was making a left hand turn with their turn signal on. She was coming to a stop or already stopped, and was hit from behind. The apparent inconsistency as to whether or not the left turn signal was on does not create a material issue of fact under the circumstances as defendant Scott timely stopped and avoided striking that vehicle in either case. It wasn't until after she stopped or almost stopped, that she felt one impact to the rear of her vehicle from plaintiff's vehicle. There has been no testimony that defendant Scott's brake lights were not operating at the time to give warning of her stopping. There has been no admissible proof submitted to demonstrate negligence by defendant Scott (*see,* ***Montefusco v KPH Mechanical, Inc.,*** supra). Nor has there been testimony or admissible proof submitted to demonstrate that plaintiff struck defendant Scott's vehicle prior to being struck by defendant Hendrickson. No factual issues have been raised. Plaintiff has only asserted speculative, unsupported claims of negligence without articulating one specific negligent act on behalf of defendant Scott. Plaintiff has offered no evidence as to whether or not that turning vehicle had its turn signal on and how it would have made a difference since defendant Scott timely stopped and avoided striking that vehicle before she was struck from the rear.

Here the adduced testimony reveals defendant Scott saw the vehicle ahead of her making a left turn with the turn signal on and that she stopped abruptly and did not strike that vehicle. "A sudden and unexplained stop in the roadway without giving a proper signal may, under limited circumstances, defeat a motion for summary judgment (*see,* ***Purcell v Axelsen,*** 286 AD2d 379, 729 NYS2d 495). However, the rules of the road require "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway: (Vehicle and Traffic Law §1129[a]; *see,* ***Carjuauano v J&R Hacking,*** 28 AD3d 413, 813 NYS2d 162, ***David v New York City Bd of Educ.,*** 19 AD3d 639, 797 NYS2d 294). The lead vehicle has a duty "not to stop suddenly or slow down without proper signaling so as to avoid a collision" (***Montefusco v KPH Mechanical, Inc.,*** supra). Plaintiff has not come forward with any testimony or admissible evidence to raise a factual issue concerning whether defendant Scott gave proper signal of slowing down, ie, that the brake lights on the Scott vehicle were not properly functioning. Accordingly, plaintiff's argument about whether or not the vehicle which was making a left hand turn had its directional on does not raise a factual issue as to defendant Scott. It is undisputed that defendant Scott avoided striking the vehicle in front of her when it was making a left hand turn. This does not demonstrate prima facie that she was negligent in the operation of her motor vehicle and does not raise a factual issue.

Accordingly, motion (006) by defendants Scott and National is granted and the complaint and cross claims asserted against them are hereby dismissed. Accordingly, this Court will not address the issue of proximate cause, serious injury and assertions of medical malpractice made by Scott and National against the remaining co-defendants.

WRONGFUL DEATH CAUSE OF ACTION

Cross motion (007) by defendant Joseph Perrotta, M.D. seeks summary judgment on the wrongful death cause of action and is supported by an attorney's affirmation which states the affirmation is submitted in support of co-defendants Eileen Scott's and National's motion. Counsel sets forth that he is adopting that part of defendants Scott and National's Notice of Motion section II for dismissal of the wrongful death cause of action and its relevant supporting exhibits, and the arguments and assertions set forth by Matthew M. Cordrey, Esq. .

Cross motion (008) by defendant Ian H. Newmark, M.D. seeks partial summary judgment on the wrongful death cause of action and is supported by an attorney's affirmation wherein it is stated that defendant adopts and incorporates by reference the arguments and assertions set forth by Matthew M. Cordrey, Esq. in support of the motion for summary judgment on behalf of defendants Scott and National. Defendant argues decedent's death did not cause any pecuniary damages to her father or anyone else and therefore, there is no basis for the wrongful death cause of action.

In motion (009) defendant Scott Holmes, as Administrator of the good, Chattels and Credits of B.C. Hendrickson, Jr., deceased, seeks summary judgment dismissing the complaint and all cross claims of co-defendants and refers this courts to Parts II and III of the motions submitted by defendants Scott and National wherein the parties request summary judgment arguing that no proper wrongful death or survival action can lie as against the operators and owners of the motor vehicles involved in the occurrence.

In cross motion (010) defendant Florante P. Melchor, M.D. seeks summary judgment dismissing the wrongful death cause of action asserting plaintiff has not exhibited damages, and as such, all the elements of a wrongful death cause of action have not been satisfied. Defendant adopts and incorporates by reference the arguments and assertions set forth by Matthew M. Cordrey, Esq. in the motion by defendants Scott and National.

In that the above motions all seek dismissal of the cause of action for wrongful death asserting plaintiff has not exhibited damages, and are all based upon the submissions by defendants Scott and National in motion (006), this court will consider all the motions together concerning the respective applications. This court determines that these respective motions are procedurally defective in that the pleadings submitted with another party's motion or cross motion cannot be incorporated by reference (*see,* CPLR 3212[b]). Nevertheless, this court searches the record pursuant to CPLR 3212(b) and considers the totality of the evidence submitted.

EPTL §5-4.3(a) provides the damages awarded to the plaintiff may be such sum as the jury, or where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total

sum awarded.

"The pecuniary loss in an action for wrongful death may be composed of very different elements. It may consist of special damages, that is of an actual, definite loss, capable of proof and measurement with approximate accuracy; and also of prospective and general damages, incapable of precise and accurate estimate because of the contingencies of the unknown future. The damages to the next of kin in that respect are necessarily indefinite, prospective and contingent. They cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded" (***Horton v State of New York,*** 50 Misc2d 1017, 272 NYS2d 312 [Court of Claims 1966]). Damages in an action for wrongful death are the fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought (***Brooks v. Siegel,*** 52 AD2d 1003, 383 NYS2d 439 [3rd Dept 1976]). The pecuniary injuries caused by a wage earner's death may be calculated, in part, from factors relevant to the decedent's earning potential, such as present and future earnings, potential for advancement and probability of means to support heirs, as well as factors pertaining to the decedent's age, character and condition, and the circumstances of the distributees (***Gonzales v New York City Housing Authority,*** 77 NY2d 663, 569 NYS2d 915 [1991]). Damages for "pecuniary injuries" can be awarded for funeral expenses (***Erbstein v Savasatit,*** 274 AD2d 445, 711 NYS2d 458 [2nd Dept 2000]) and medical expenses incidental to the death (***Regan v Long Island Raid Road Company,*** 128 AD2d 511, 512 NYS2d 443 [2nd Dept 1987]). The determination of pecuniary damages in a wrongful death action is peculiarly within the province of the jury (*see,* ***Parilis v Feinstein,*** 49 NYS2d 984) and may include consideration of decedent's age, character, earning capacity, life expectancy, health and intelligence and the circumstances of her distributee (***Facilla v New York City Health and Hospitals Corporation,*** 221 AD2d 498, 634 NYS2d 397 [2nd Dept 1995]; ***Lanera v Hertz Corporation,*** 161 AD2d 183, 554 NYS2d 570 [1st Dept 1990]).

In the verified bill of particulars, plaintiff has set forth damages for hospital expenses, physicians expenses and funeral expenses. Defendants have not demonstrated that plaintiff did not incur these expenses and the transcript of the examination before trial of plaintiff does not eliminate factual issues concerning these claims. Mr. Polak testified he paid the funeral expenses for his daughter's funeral. Clearly, this is a recoverable pecuniary damage which precludes dismissal of the wrongful death cause of action. Therefore, defendants' argument that the wrongful death cause of action must be dismissed is without basis.

Accordingly, those parts of motions (006) , (007), (008), (009), and (010) which seek dismissal of the wrongful death cause of action for lack of pecuniary damages is denied.

PROXIMATE CAUSE AND DEATH

Defendant Holmes in motion (006) also seeks dismissal of the wrongful death cause of action arguing that plaintiff did not sustain a serious injury and that the automobile accident was not the proximate cause of plaintiff's decedent's death. In support of these claims, defendants rely upon, inter alia, the affirmations of Dr. Sporn, Dr. Gottesman and the deposition transcript of defendant Dr. Obedian and adopt the arguments set forth in the attorney's affirmation submitted with motion (006).

The thrust of the affirmations submitted by Dr. Aaron Sporn and Dr. Malcolm Gottesman in motion (006) turns on their opinions that plaintiff did not sustain a serious injury, she was not rendered incapable of performing her usual activities of daily living as a result of the injuries sustained in the accident, and that the injury to plaintiff's ankle and her death were not proximately caused by the accident of February 2, 2002 as she made no complaints of pain or problems in her left ankle until more than two months after the accident. Dr. Sporn opines with a reasonable degree of medical certainty that Lisa Polak's cause of death was due to the medical malpractice of defendants Obedian and Rosenblum in their care and treatment of plaintiff and the failure to diagnose and treat deep vein thrombosis which caused her to die from a pulmonary embolism. Therefore, defendants argue, plaintiff's claim that the injury to decedent's ankle, and the ensuing conditions she suffered, were not proximately caused by the accident, she did not suffer serious injury and the cause of action for wrongful death arising out of the car accident must be dismissed.

Although defendants' experts opine that plaintiff did not make complaints of injury or pain to her left ankle for more than two months after the automobile accident and therefore that condition complained of was not related to the accident of February 2, 2002, the testimony set forth in Dr. Obedian's examination before trial submitted in support of their motion raises factual issues in that regard.

According to Dr. Obedian's testimony, Ms. Polak complained of pain in her left lower extremity on February 17, 2002 when he first examined her after the accident. Initially he thought the pain might be related to lumbar radiculopathy. However, on April 12th, he noted specifically complaints with regard to her left ankle with a history that she had persistent pain into her left ankle since the motor vehicle accident of February 2, 2002. Upon examination, he found she had tenderness along the medial aspect of the left ankle at the level of the deltoid ligament, with some swelling, but was neurologically intact. His impression was chronic ankle sprain, that it was most likely related to her car accident two months prior. He ordered an MRI of her ankle which revealed soft tissue edema anterior medially and overlying the Achilles tendon correlating within the distal leg, which he then correlated clinically for possible partial tearing of or tendinosis of the distal tibialis posterior tendon. It is noted that Dr. Sporn set forth in his affirmation that a tendinosis or tendinitis can be attributable to numerous different factors or causes, including physical therapy. He also indicated plaintiff was receiving ongoing physical therapy after the accident.

Based upon the foregoing and review of the submissions, defendants have not demonstrated prima facie entitlement to an order granting summary judgment on the issue of proximate cause as their submissions have raised multiple factual issues concerning the cause of plaintiff's decedent's death, as set forth, which preclude summary judgment. Therefore, this court will not address the remainder of any claim that plaintiff's decedent did not suffer a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment in that it is a factual issue whether plaintiff's death was caused by the alleged negligence of defendants. Pursuant to CPLR §5102(d) serious injury includes death.

Accordingly, that part of defendant 's motions (009) which seek dismissal of the wrongful death cause of action on the issue of proximate cause, serious injury and death is denied.

In cross motion (011) defendant Ira Rosenblum, M.D seeks summary judgment on the issue of liability and dismissing the complaint on the wrongful death cause of action on the issue of proximate cause and all cross claims asserted against him. In support of this motion, defendant Rosenblum has submitted an affidavit of David Rosenthal, M.D.; copies of the pleadings, defendant's answers; bill of particulars; and various medical records relating to decedent's medical condition and hospitalization.

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 [2nd 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 [2nd 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 [3rd Dept 1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375, *app denied* 92 NY2d 814, 681 NYS2d 475 [2nd Dept 1998]; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

It was previously determined that there are factual issues precluding summary judgment concerning whether or not plaintiff's decedent sustained injury to her ankle at the time of the accident and whether or not the subsequent treatment for that injury proximately caused her death from complications.

Dr. David Rosenthal, sets forth in his affidavit that he is board certified in internal medicine and endocrinology and it is his opinion with a reasonable degree of medical certainty that the treatment rendered by Dr. Rosenblum did not proximately cause any damage or the death of Lisa Marie Polak.

Dr. Rosenthal set forth plaintiff's treatment after the accident and indicates plaintiff was treated for neck pain and back pain radiating to the legs. On March 26, 2002, decedent complained to Dr. Obedian of severe left leg pain. She was placed on Neurontin and scheduled for more steroid injections which had been previously started. On April 12, 2002, when she returned to Dr. Obedian, she reported persistent pain down her left leg since her motor vehicle accident and also had pain and swelling in her left ankle. An MRI was ordered. Dr. Obedian diagnosed her with a left chronic ankle sprain and chronic lower back strain and referred her to a neurosurgeon, Dr. Epstein. Dr. Epstein's impression concerning decedent's left lower leg was that of possible deep vein thrombosis due to exquisite discomfort and positive Homan's sign. A Doppler study to rule out DVT was negative and she was diagnosed at North Shore University Hospital as having a reflex sympathetic dystrophy. Upon being seen again by defendant Obedian, she was administered a cortisone injection into her ankle and diagnosed with left ankle posterior

tendinitis/partial tear. On May 21, 2002, an exploration of the left posterior tibial tendon and partial synovectomy of the posterior tibial tendon was performed by Dr. Obedian.

Plaintiff presented to her primary care physician, defendant Rosenblum, on May 31, 2002 with complaints of epigastric pain and burning in her chest for the past week. He diagnosed her with gastritis or esophagitis and prescribed Aciphex for heartburn and acid reflux. On June 5, 2002, she spoke to Dr. Alexander, Dr. Rosenblum's partner, complaining of having trouble taking deep breaths and pain on the left side of her chest on inspiration since the prior day. She was offered an immediate appointment, but declined as she wanted to speak to the doctor. She then returned to Dr. Obedian.

It is Dr. Rosenthal's opinion within a reasonable degree of medical certainty that Dr. Rosenblum properly and appropriately treated Ms. Polak when she presented to his office on May 31, 2002 as she presented with GI complaints, of which she had a history and for which she had been previously treated by Dr. Rosenblum. Dr. Rosenthal states Dr. Rosenblum appropriately examined plaintiff's abdomen for related GI complaints and appropriately addressed the GI complaints with a prescription for Aciphex.

Dr. Rosenthal states that Dr. Rosenblum properly assessed that Ms. Polak had either gastritis or esophagitis, appropriately instructed her not to take any non-steroidal anti-inflammatory drugs or alcohol and to call if she was not improving. He also states there was no indication for Dr. Rosenblum to refer decedent to any specialists or to order any diagnostic studies following the office visit on May 31, 2002. Dr. Rosenblum's office records indicate there was no complaint of shortness of breath on May 31, 2002, and it was not until June 5, 2002 that she first complained of shortness of breath when she called his office, but declined coming into the office and was seen by Dr. Obedian that same day. Dr. Obedian instructed her to go the Emergency Department where she was admitted at North Shore University Hospital where she was followed by the co-defendant physicians.

Dr. Rosenthal also opines that Dr. Rosenblum's records do not indicate Ms. Polak made any complaints concerning her lower extremity at the time of the May 31, 2002 visit, having had surgery ten days prior by Dr. Obedian. Dr. Rosenthal states she presumably had bandages and a supportive device on her left lower extremity. Dr. Rosenthal states it would not have been appropriate for Dr. Rosenblum to remove any bandages or a supportive device and he would defer to the orthopedist regarding necessary follow up care and assessment for the recent surgery. A few days later when Ms. Polak saw Dr. Obedian, there were no clinical signs or symptoms of a DVT noted, but only after the examination when she complained of difficulty breathing that she was sent to the hospital.

Dr. Rosenthal states that Ms. Polak's shortness of breath did not manifest itself until several days after she was seen by Dr. Rosenblum. It is his opinion that Ms. Polak's condition stabilized after she was admitted to North Shore Hospital, but does not state the basis for that opinion. He further opines that there is no connection between the treatment rendered by Dr. Rosenblum and the decedent's alleged injuries or death in this matter.

Dr. Rosenblum testified at his examination before trial that his first entry in Lisa Polak's record

was in 1993 and he continued to treat her through 2002. He stated that Ms. Polak had a chronic gynecological condition, but he was not the treating physician for that. She was also obese. She had no other chronic conditions. In the past, she had been treated at his off by either himself or Dr. Alexander for sunburn, upper respiratory infection, insomnia, migraine headache, sore throat and nasal and chest congestion, clearance for carpal tunnel surgery, high lipids and cholesterol levels, tonsillitis, and upper respiratory infection.

It was on April 25, 2002 that Dr. Alexander received a telephone call from Dr. Nancy Epstein advising she found plaintiff had a swollen, tender red hot left lower extremity with a positive Homan's sign and was sent to North Shore Manhasset Emergency Room for evaluation. Dr. Rosenblum described the Homan test as a very inaccurate maneuver used as part of the determination for deep vein thrombosis. He did not have a recollection that Dr. Alexander communicated the substance of this phone call with him, but said he would have read Dr. Alexander's note when he saw Ms. Polak on May 31, 2002.

Dr. Rosenblum stated his office note indicated Ms. Polak complained of one week post prandial epigastric pain and burning in her chest, and she was taking Elavil, an oral contraceptive pill, and Vicodin. She denied blood in her stool, black stool, vomiting, dysphagia and weight loss. He described her a not ill-appearing, her abdomen was non-distended, with mild epigastric tenderness, no guarding. His assessment was clinically, gastritis or esophagitis. She was given Asafex (sp) and instructed not to take any non-steroidal anti-inflammatory drugs or alcohol, and call if not improving, vomiting increase pain or melena. He stated there was nothing in his note about any visit to North Shore Hospital in April. He had no independent recollection of speaking to her about that visit. He did not note any interim history or surgery. He did not have a recollection of her having any appliances on her lower extremity, a boot, or if she was using crutches, and did not have any recollection of learning she had a surgery a couple of weeks before. He stated his examination consisted of observing the patient and focused on her abdominal area. He did not perform any examination of her lower extremities. She did not complain of shortness of breath. He testified in the circumstances of Ms. Polak's presenting complaint, it would not necessarily be his custom and practice to examine a patient's lower extremity. He stated his record did not indicate she had been involved in a motor vehicle accident in February, 2002. He stated he did not recall if he inquired whey she was taking Vicodin. The May 31, 2002 visit was her last visit with him.

Based upon the foregoing, it is determined defendant Dr. Rosenblum has not demonstrated prima facie entitlement to an order granting summary judgment.

Dr. Rosenthal set forth his opinion within a reasonable degree of medical certainty that Dr. Rosenblum properly and appropriately treated Ms. Polak when she presented to his office on May 31, 2002 as she presented with GI complaints, of which she had a history and for which she had been previously treated by Dr. Rosenblum. Dr. Rosenthal states Dr. Rosenblum appropriately examined plaintiff's abdomen for related GI complaints and appropriately addressed the GI complaints with a prescription for Aciphex. However, Dr. Rosenblum did not testify that Ms. Polak had ever before been treated for GI complaints, a history of GI problems, and was not on any medication for the same. This raises a factual issue which precludes summary judgment.

Dr Rosenthal states it would not have been appropriate for Dr. Rosenblum to remove any bandages or a supportive device to examine plaintiff's leg and he would defer to the orthopedist regarding necessary follow up care and assessment for the recent surgery. However, Dr. Rosenblum testified there was nothing in his note about any visit to North Shore Hospital in April. He had no independent recollection of speaking to her about that visit. He did not note any interim history or surgery. He did not have a recollection of her having any appliances on her lower extremity, a boot, or if she was using crutches, and did not have any recollection of learning she had a surgery a couple of weeks before. He testified in the circumstances of Ms. Polak's presenting complaint, it would not necessarily be his custom and practice to examine a patient's lower extremity. He stated his examination consisted of observing the patient and he focused on her abdominal area. He did not perform any examination of her lower extremities. He stated his record did not indicate she had been involved in a motor vehicle accident in February, 2002. He stated he did not recall if he inquired why she was taking Vicodin. Based upon the foregoing, there is a factual issue concerning whether or not there was a dressing or device in place which would have prevented Dr. Rosenblum from examining Ms. Polak's leg for deep vein thrombosis, or if he even knew she had surgery or previous injury or why she was taking Vicodin.

Although Dr. Rosenthal states Dr. Rosenblum appropriately examined plaintiff's abdomen for complaints of epigastric pain, he does not set forth the appropriate standard for examining a patient with complaints of burning in the chest area which plaintiff's decedent complained of when she presented to Dr. Rosenblum's office. Dr. Rosenthal does not comment on whether any examination of plaintiff's chest was performed by Dr. Rosenblum, and his office record does not indicate that he examined decedent's chest. Dr. Rosenthal testified he focused on observation of Ms. Polak and examination of her abdomen. In that Dr. Rosenthal has just set forth conclusory statements unsupported with a basis for his opinion, and has not set forth the proper medical standards of care for a complaint of burning in the chest in a patient following leg surgery, Dr. Rosenblum has failed to eliminate factual issues concerning whether her complaint of burning in her chest was properly evaluated and treated and whether or not Fr. Rosenblum departed from accepted standards of care. Further, Dr. Rosenthal's opining that plaintiff's decedent did not have symptoms and complaint suggestive of pulmonary embolism or DVT is conclusory and unsupported with medical testimony concerning the signs and symptoms of pulmonary embolism and DVT. Dr Rosenthal also opines there was no indication for Dr. Rosenblum to refer decedent to any specialists or to order any diagnostic studies following the May 31, 2002. This however, is also conclusory and unsupported with the medical basis for his opinion.

It is determined by this Court that the affidavit of Dr. Rosenthal is conclusory in that it does no more than simply state Dr. Rosenblum's actions and imply that he acted in conformity with the appropriate standard of care (*see,* ***Mahac v Anderson,*** 261 AD2d 811, 690 NYS2d 762 [3rd Dept 1999]).

Accordingly, motion (011) by defendant Rosenblum for summary judgment on liability is denied.

Lastly, this court turns its attention to motion (012) wherein defendants Howard Heimowitz and North Shore University Hospital seek summary judgment dismissing the complaint on the medical

malpractice and on the wrongful death causes of action.

In support of this motion, defendants have submitted a copy of the previous motion for summary judgment which includes, inter alia, copies of the pleadings; verified bill of particulars; copies of the transcripts of the examinations before trial of Alexander Polk, decedent B.C. Hendrickson, Eileen Scott, Ira Rosenblum, Howard Heimowitz, Ian Newmark; the record for plaintiff's decedent's hospital admission to North Shore University Hospital; and the affirmation of Alvin Chisolm, M.D.

Dr. Alvin Chisolm, a board certified radiologist licensed to practice medicine in New York State, opines within a reasonable degree of medical certainty that Dr. Heimowitz did not depart from good and accepted medical practice in reading the venous Doppler images studies of April 25, 2002 as the films do not demonstrate evidence of a deep vein thrombosis consistent with the findings announced in the corresponding radiological report of Dr. Heimowitz.

Dr. Alvin Chisolm also opines within a reasonable degree of medical certainty that Dr. Heimowitz did not depart from good and accepted medical practice in reading the venous Doppler images studies of June 6, 2002 as he appropriately reported that the venous Doppler study of the lower extremities revealed a deep vein thrombosis localized to the left popliteal vein and veins of the left calf.

Dr. Alvin Chisolm also opines within a reasonable degree of medical certainty that the treatment rendered by Dr. Heimowitz did not proximately cause or contribute to plaintiff's decedents alleged injuries.

Dr. Heimowitz testified at his examination before trial that in April, 2002, he was not an employee of North Shore University Hospital but instead was part of a professional corporation, Syosset Radiologists, P.L.L.C., which was contracted by the hospital. Dr. Heimowitz testified that any diagnostic evaluation of Ms. Polak was done as part of his duties pursuant to the contract between the professional corporation and the hospital. A medical facility can be held vicariously liable for the negligence and/or malpractice of its employees (***O'Regan v Lundie,*** 299 AD2d 531 [2nd Dept 2002]). Under the doctrine of respondeat superior, a corporation, including a professional corporation, is liable for a tort committed by its employees acting within the scope of their employment ***(Yaniv v Taub,*** 256 AD2d 273, 683 NYS2d 34 [1st Dept 1998], Cf., ***Beauchamp v City of New York,*** 3 AD3d 465, 771 NYS2d 129 [2nd Dept 2004]). However, in that defendant Heimowitz has demonstrated prima facie entitlement to summary judgment, the hospital is also entitled to the same.

Based upon the foregoing, it is determined that defendants Howard Heimowitz and North Shore University Hospital have demonstrated prima facie entitlement to summary judgment.

Plaintiff takes no position with respect to the movant's entitlement to the relief sought, but

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[1] Defendants have not properly tabbed this motion.

requests that either defendants make a prima facie showing as to the malpractice of defendant Heimowitz or be precluded from asserting their rights under Article 16 at the time of trial.

The court concludes that none of the co-defendants, nor plaintiff, have demonstrated prima facie showing as to the malpractice of defendant Heimowitz or North Shore University Hospital as no expert has come forward to refute the opinions offer by Dr. Alvin Chisolm. In that no negligence has been demonstrated against defendant Heimowitz, any claim of negligence against defendant North Shore University Hospital as it relates to defendant Heimowitz must fail as the complaint of the action asserts that defendant Heimowitz was working within the course of his employment with defendant North Shore University Hospital.

Article 16 of the CPLR provides for several liability for non-economic loss when the liability of a joint tortfeasor is found to be fifty percent or less of the total liability assigned to all persons liable, subject to specified exceptions (*see,* CPLR 1601; ***Maria E. v West Associates,*** 188 Misc 2d 119, 726 NYS2d 237 [Sup Ct, Bronx County, 2001]). In ***Yanatos v Pogo*** et al, (Spinola, J.) (Sup Ct Nassau, April 25, 2006), the court set forth that since a motion for summary judgment is the functional equivalent of a trial, it follows therefrom that any defendant intending to obtain the limited liability benefits of Article 16 of the CPLR must, under penalty of forfeiture, adduce proof on point in admissible form in response to the prima facie case presented (citing ***Drooker v South Nassau Communities Hospital***, 175 Misc2d 181, 669 NYS2d 169 [NY Sup. Ct. 1998]). In ***Drooker***, supra, following the granting of summary judgment in favor of a physician in a medical malpractice case, the remaining defendants who failed to oppose said physician's prima facie showing of entitlement to summary judgment and failed to make any evidentiary showing regarding that physician's responsibility for plaintiff's injury, thereby forfeited their opportunity to limit their liability with respect to that physician's acts or omissions under Article 16 of the CPLR.

There is no requirement in Article 16 that defendants disclose prior to trial the persons whose joint liability will be invoked (***Rodi v Landau,*** 170 Misc.2d 180, 650 NYS2d 514[NY Sup Ct 1996]). This application for summary judgment, however, is the procedural equivalent of a trial. It therefore follows that any defendant intending to obtain the limited liability benefits of Article 16 of the CPLR must, under penalty of forfeiture, adduce proof on point in admissible form in response to the prima facie case presented In that no co-defendant has demonstrated prima facie entitlement to an order granting summary judgment, and no co-defendant has come forward opposing motion (012) by defendants Heimowitz and North Shore University Hospital, it is determined that the co-defendants have failed to satisfy this evidentiary burden that shifted upon the movant's prima facie showing of entitlement to an order granting summary judgment, and have forfeited the opportunity to limit their liability with respect to the acts or omissions of Dr. Howard Heimowitz, M.D. or to North Shore University Hospital pursuant to its contract with Syosset Radiologists, P.L.L.C. However, any claims asserted in the complaint against North Shore University Hospital with regard to plaintiff's claims of medical malpractice as against the remaining co-defendants are not determined in this motion

Accordingly, this action is severed and continued as against the remaining defendants who have

forfeited the opportunity to limit their liability with respect to the acts or omissions of Dr. Howard Heimowitz and North Shore University Hospital as to any claims arising out of North Shore University's contract with Syosset Radiology in this action. The remaining defendants are not foreclosed from asserting any CPLR Article 16 defenses as against any potential defendants or non-parties to the action at trial

Dated: AUG 0 6 2007

J.S.C.

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

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