ORIGINAL

SHORT FORM ORDER

PUBLISH

INDEX No. 03-8496
CAL. No. 06-02600-MM

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

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 3-30-07
ADJ. DATE 5-30-07
Mot. Seq. # 002 - MotD

DONNA FLOBECK, as Administratrix of the Estate of RUSSELL FLOBECK and DONNA FLOBECK, individually,	TORGAN & COOPER, P.C. Attorneys for Plaintiff 140 Broadway, 36th Floor New York, New York 10005
Plaintiff,	LEWIS JOHS AVALLONE AVILES, et al. Attorneys for Defendants Davis & Smouha 425 Broad Hollow Road Melville, New York 11747
- against -	FUREY FUREY LEVERAGE, et al. Attorneys for Defendant Durand 600 Front Street Hempstead, New York 11550-4494
STONY BROOK SURGICAL ASSOCIATES, P.C., ERIC EZRA SMOUHA, M.D., GHASSAN JOS SAMARA, M.D., RAFAEL P. DAVIS, M.D., And DAVID B. DURAND, M.D.,	FELDMAN KIEFFER & HERMAN, LLP Attys for Defts Stony Brook Surgical & Samara 110 Pearl Street, Suite 400 Buffalo, New York 14202
Defendants.	OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK By: Ross N. Herman, Asst. Attorney General New York State Law Department Claims Bureau, 120 Broadway, 25th Floor New York, New York 10271

Upon the following papers numbered 1 to 35 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 19-32; Replying Affidavits and supporting papers 33-35; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Eric Ezra Smouha, M.D. and Rafael P. Davis, M.D. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is determined herein.

This is an action to recover damages for medical malpractice and the wrongful death of plaintiff's spouse, Russell Flobeck, allegedly as a result of defendants' negligent misdiagnosis as and treatment of

recurring sphenoid sinus[1] mucocele[2] and lack of informed consent from May 1997 through March 2002. Plaintiff's decedent died on April 5, 2002 at the age of 35 years due to complications following a procedure at Sloan Kettering Memorial Hospital to remove a myxoma[3] of the sphenoid sinus that was infiltrating the bone and involved both internal carotid arteries and extended up to the dura of the brainstem.

In the summer of 1997, plaintiff's decedent, who was a landscaper, complained of severe headaches and visual disturbances to his primary care physician, non-party Louis Greenblatt, M.D. (Dr. Greenblatt). Dr. Greenblatt ordered a CT scan and MRI of the brain the results of which indicated a large lobulated mass in the sphenoid sinus. Dr. Greenblatt referred plaintiff's decedent to Rafael P. Davis, M.D. (Dr. Davis), a board certified neurosurgeon, who ordered a CT scan of plaintiff's decedent's orbits[4] which was performed on August 18, 1997. The impression from said CT scan was a large sphenoid sinus mucocele extending through the floor of the sella and elevating the pituitary gland as well as sinus disease with evidence of acute sinusitis in the left maxillary sinus. Dr. Davis referred plaintiff's decedent to Eric Ezra Smouha, M.D. (Dr. Smouha), a board certified otolaryngologist employed by defendant Stony Brook Surgical Associates, P.C. whose office was located at 37 Research Way in East Setauket, New York, for evaluation. Dr. Smouha then sent plaintiff's decedent for an opthalmology consultation with another physician who found a normal ocular examination. On August 20, 1997, Dr. Davis discussed his proposed surgical procedure, endoscopic sphenoidectomy, a transnasal drainage of the sphenoid sinus mucocele with plaintiff's decedent. Plaintiff's decedent signed a consent form for a transphenoidal excision of mass lesion, fat graft and lumbar drain to diagnose and remove cystic lesion of sphenoid sinus and sella.

On August 26, 1997, Dr. Davis and Dr. Smouha performed the endoscopic sphenoidectomy for excision of mucocele at Stony Brook University Medical Center (Stony Brook University Hospital). Following the procedure, plaintiff's decedent continued to complain of headaches but no visual problems. When Dr. Davis saw plaintiff's decedent one and two days after the procedure, and when he was discharged plaintiff's decedent was still complaining of headaches which were controlled by Demerol and Percocet. Plaintiff's decedent was discharged on August 28, 1997 with instructions to make follow-up appointments with Dr. Smouha in one to two weeks and with Dr. Davis in three weeks. A pathology report dated August 29, 1997 concerning specimens received from the procedure three days prior indicated that the "sphenoid sinus cyst wall" biopsy had fibrous tissue with marked edematous and

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[1] Sphenoidal sinus is defined as one of a pair of paranasal sinuses in the body of the sphenoid bone communicating with the upper posterior nasal cavity or sphenoethmoidal recess (Stedman's Medical Dictionary 1645 [27th ed 2000]).

[2] Mucocele is a retention cyst of the salivary gland, lacrimal sac, paranasal sinuses, appendix, gallbladder or other site (Stedman's Medical Dictionary 1136 [27th ed 2000]).

[3] Myxoma is defined as a benign neoplasm (tumor) derived from connective tissue, consisting chiefly of polyhedral stellate cells that are loosely embedded in a soft mucoid matrix, thereby resembling primitive mesenchymal tissue (Stedman's Medical Dictionary 1178, 1893 [27th ed 2000]).

[4] Orbit is defined as the bony cavity containing the eyeball and its accessory structures and is formed of parts of seven bones: the frontal, maxillary, sphenoid, lacrimal, zygomatic, ethmoid and palatine bones (Stedman's Medical Dictionary 29,1271 [27th ed 2000]).

myxoid[5] change and that no cyst wall seen.

Dr. Davis indicated in a note dated October 10, 1997 that plaintiff's decedent was status post excision of sphenoid mucocele, that plaintiff's decedent was doing extremely well with almost complete resolution of his headaches, and that Dr. Davis had discharged him from his care. He added that plaintiff's decedent would see Dr. Smouha for one additional follow-up visit.

Plaintiff's decedent had post-operative visits with Dr. Smouha on September 5, 1997, September 16, 1997 and on October 28, 1997. In a letter dated October 28, 1997 to Dr. Davis , Dr. Smouha indicated that plaintiff's decedent's headaches were gone, his allergic symptoms and nasal mucosal swelling were improved, and that he had requested that plaintiff's decedent return in three months. Dr. Smouha added that he planned to obtain a CT scan "down the road."

Plaintiff's decedent returned to see Dr. Smouha on January 14, 2000 at which time he complained of recurrent left-sided headaches for several months and loss of vision. During said visit, Dr. Smouha noted an MRI showing a large mass in the right sphenoid sinus crossing over to the left side and his impression following the examination was chronic sinusitis, acute exacerbation as well as possible recurrence of sphenoid sinus mucocele. Dr. Smouha testified that he ordered a CT scan of the sinuses which was performed on January 24, 2000 and that the results showed a mucocele of the sphenoid sinus as well as mucocele disease in the ethmoid sinus. On February 10, 2000 plaintiff's decedent was hospitalized for a second surgery performed by Dr. Smouha, bilateral endoscopic sphenoidectomies with excision of tissue and mucocele and a left endoscopic ethmoidectomy. The pathology report following this procedure indicated respiratory mucosa with mild and severe chronic inflammation. Plaintiff's decedent was discharged on February 11, 2000. He then returned for a follow up visit with Dr. Smouha still complaining of chronic headaches. According to Dr. Smouha, plaintiff's decedent was doing well and the treatment plan was to resume Flonase, complete antibiotics, saline lavage twice a day, and to return in two weeks.

Plaintiff filled out a Neurology Adult Outpatient Questionnaire dated February 4, 2001 on behalf of plaintiff's decedent indicating that her husband was still complaining of headaches, dizziness, light sensitivity and pressure.

Then, on January 15, 2002, plaintiff's decedent had seizures and lost consciousness and was taken to the emergency room of Stony Brook University Hospital and was seen by Ghassan Samara, M.D. (Dr. Samara), an otololaryngologist, and then admitted to the Hospital. The report of a CT scan performed on January 16, 2002 indicated a soft tissue density occupying the sphenoid sinus and that sinus disease was noted on the left. On January 18, 2002 plaintiff's decedent was discharged with a diagnosis of new onset seizure, sphenoid sinusitis, maxillary sinusitis and deviated nasal septum.

On January 21, 2002 Dr. Samara performed surgical procedures that included nasal septoplasty, transseptal sphenoidotomy with removal of tissue from the sphenoid sinus, and bilateral nasal sinus endoscopy. Dr. Samara post-operatively diagnosed sphenoid mucocele with erosion of the superior, posterior and lateral walls and chronic pansinusitis bilaterally. The pathology report of said date

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[5] Myxoid is defined as resembling mucous (Stedman's Medical Dictionary 1178 [27th ed 2000]).

indicated that the left sphenoid sinus contained myxomatous neoplasm.

Dr. Davis saw plaintiff's decedent on February 14, 2002 for a follow-up visit and wrote to Dr. Samara that he had spoken briefly to Dr. Smouha about surgical intervention and understood that plaintiff's decedent again underwent "resection of what was thought to be sphenoid mucocele," that the pathology report was "consistent with myxoma" and that he "must admit I have very little clinical expertise with this clinical diagnosis." In said letter dated February 14, 2002, Dr. Davis indicated that plaintiff's decedent was concerned and that based on the pathology report there was a concern about recurrence and that "[t]his has been the case over the last five years." He added that plaintiff's decedent was going to see a head and neck surgeon at Sloan-Kettering Memorial Hospital and that plaintiff's decedent "continues to have intractable headaches which quite frankly I do not have a good answer for in terms of treatment." Dr. Davis stated that since plaintiff's decedent had been seen by another physician from a neurologic standpoint, (non-party Philippe Vaillancourt, M.D. also of Stony Brook University Hospital's neurology department), he had asked that plaintiff's decedent be re-evaluated by that physician. A CT scan of face sinuses was performed on February 18, 2002 at the request of Dr. Davis, who wrote a prescription for the CT scan on February 14, 2002, which scan was interpreted by radiology in comparison with a prior study of January 16, 2002 and the report indicated that the left maxillary sinus was now, after the sphenoidotomy of January 21, 2002, essentially free of disease. Then, on February 26, 2002, plaintiff's decedent was seen again by Dr. Samara and diagnosed with chronic sinusitis and instructed to follow up with Dr. Samara in one week.

By her complaint, plaintiff alleges a first cause of action for medical malpractice based on negligence; a second cause of action for medical malpractice based on lack of informed consent; a third cause of action for wrongful death to recover funeral expenses; and a fourth cause of action for wrongful death claiming loss of support; and a fifth cause of action for loss of services. Defendants Dr. Smouha and Dr. Davis assert affirmative defenses in their answers that plaintiff failed to commence the action within the applicable Statute of Limitations. The summons and complaint were filed with the Suffolk County Clerk on March 28, 2003. The Court's computer records indicate that the note of issue in this action was filed on November 6, 2006.

By her bill of particulars, plaintiff alleges that defendants were negligent in, among other things, failing to understand the nature of plaintiff's decedent's complaints and failing to refer him to appropriate specialists; failing to conduct a complete and adequate examination of plaintiff's decedent; failing to seek consultation from appropriate knowledgeable experts; failing to order and perform appropriate film tests and studies; failing to recognize plaintiff's decedent's recurring and continuing symptoms despite the various surgeries performed on him by the defendants; and failing to arrive at a correct diagnoses of plaintiff's decedent's brain tumor.

Defendants Dr. Smouha and Dr. Davis now move for summary judgment dismissing the complaint as against them on the grounds that the action against them is without merit and is time barred. Defendants argue that any allegations of medical malpractice with respect to treatment rendered by Dr. Davis in 1997 are time barred pursuant to CPLR 214-a inasmuch as plaintiff commenced her action against Dr. Davis on March 28, 2003 and the continuous treatment doctrine is inapplicable inasmuch as there was an almost four and a half year gap in treatment between his discharge from care on October 10, 1997 and February 15, 2002. They add that the brief encounter in January and February 2002 does not

constitute continuous treatment and that Dr. Davis' treatment was at all times within good and accepted medical practice. With respect to Dr. Smouha, defendants assert that any allegations of medical malpractice concerning treatment that he rendered in 1997 are time barred pursuant to CPLR 214-a inasmuch as plaintiff commenced her action against Dr. Smouha on March 28, 2003 and that the treatment that Dr. Smouha rendered from January 14, 2000 through October 4, 2000 and on January 15, 2002 was within accepted standards of medical care. In addition, defendants assert that plaintiff's wrongful death claims as against Drs. Davis and Smouha must be dismissed as untimely pursuant to EPTL § 5-4.1 and for lack of a viable and timely underlying cause of action relating to her husband's death. Drs. Davis and Smouha rely on the opinions of their respective experts Mihai Dimancescu, M.D., a neurosurgeon, and Michael Setzen, M.D. an otolaryngologist, to demonstrate that their treatment of plaintiff's decedent was at all times within accepted standards of medical practice and that they did not depart from accepted standards of medical care.

In support of the motion, defendants Dr. Smouha and Dr. Davis submit, among other things, the summons and complaint; the answers of Dr. Smouha and Dr. Davis; plaintiff's bills of particulars with respect to Drs. Smouha and Davis; plaintiff's decedent's medical records from the offices of Dr. Smouha and Dr. Davis and from Stony Brook University Hospital; the deposition transcripts of Dr. Davis and plaintiff, and the two deposition transcripts of Dr. Smouha from April 18, 2005 and November 22, 2005; and the unsworn affirmations of defendants' experts Mihai Dimancescu, M.D., a neurosurgeon, and Michael Setzen, M.D. an otolaryngologist.

In opposition to the motion, plaintiff contends that the instant action was timely commenced inasmuch as the continuous treatment of plaintiff's husband by defendant Drs. Davis and Smouha tolled the Statute of Limitations until their last treatment in 2002 and that defendants' departures from accepted medical practice were a substantial factor in causing the death of plaintiff's husband. In addition, plaintiff contends that although the tumor was benign, four and a half years of misdiagnosis had allowed the mass to grow to such an extent that its removal was extremely risky. Plaintiff points to the results of the CT scan of the brain performed on August 7, 1997 and the MRI of the brain performed on August 12, 1997 at the request of plaintiff's decedent's primary care physician, Dr. Greenblatt, to show that the possibility of a large sphenoid sinus tumor was raised prior to plaintiff's decedent's first visit to Dr. Davis. Plaintiff relies on the deposition testimony of a radiologist who reviewed said films and opined that the vascularity of the mass was not consistent with a mucocele. In addition, plaintiff points out that Dr. Davis' initial records indicated a diagnosis of sphenoid sinus tumor. Moreover, plaintiff claims that Dr. Smouha's treatment was continuous since her husband would periodically stop by Dr. Smouha's office.

In support of her opposition to the motion, plaintiff submits her own affidavit dated May 17, 2007; the redacted affidavits, characterized as affirmations, of plaintiff's expert otolaryngologist dated May 14, 2007 and neuroradiologist dated May 16, 2007, and semi-redacted purported affirmation of plaintiff's expert neurosurgeon[6]; the report dated August 7, 1997 of the CT scan of plaintiff's decedent's brain and

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[6]Plaintiff's experts' submissions are entitled "affirmations" without containing the actual affirmation "to be true under the penalties of perjury" as required by CPLR 2106 such that to be admissible the submissions must instead be in affidavit form, that is, notarized (*see*, CPLR 2106). The submission by plaintiff of an affidavit from an unidentified expert is permissible with the proviso that the Court may require submission of an unredacted copy of the affidavit for an in camera inspection (*see*, ***Marano v Mercy Hosp.***, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; ***McCarty v Community Hosp.***, 203 AD2d 432, 610 NYS2d 588 [2d Dept 1994]).

the report dated August 12, 1997 of the MRI of plaintiff's decedent's brain, both by non-party Albert S. Trachtenberg, M.D. (Dr. Trachtenberg); a portion of the deposition transcript of Dr. Trachtenberg; the records of Drs. Davis and Smouha relating to plaintiff's decedent; a portion of the deposition transcript of non-party Carmen Tornos, M.D.; and a print out from Stony Brook University Hospital Department of Surgery web site.

In reply, defendant Drs. Smouha and Davis contend that plaintiff's opposition papers should not be considered by the Court since plaintiff failed to timely submit a complete set of opposition papers and abide by the parties' stipulation dated April 27, 2007 that the papers be received by counsel for said defendants on or before May 15, 2007 and instead did so on the evening of May 18, 2007. They also reject plaintiff's characterization that they were "a team" jointly treating plaintiff's decedent between 1997 and 2002, based on the correspondence between the two physicians. They argue that being part of a team treating a patient requires direct involvement in the patient's care or at least participating in the decision making process concerning the patient's care and that Dr. Davis did neither.

Pursuant to CPLR 214-a, "[a]n action for medical malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure."

Under the continuous treatment doctrine, the two and one-half-year Statute of Limitations for a medical malpractice action (see, CPLR 214-a) is tolled until after a plaintiff's last treatment "'when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint'"(***McDermott v Torre***, 56 NY2d 399, 405, 452 NYS2d 351 [1982], quoting ***Borgia v City of New York***, 12 NY2d 151, 155, 237 NYS2d 319 [1962], *affd* 15 NY2d 665, 255 NYS2d 878 [1964]; *see*, ***Young v New York City Health & Hosps. Corp.***, 91 NY2d 291, 296, 670 NYS2d 169 [1998]; ***Allende v New York City Health & Hosps. Corp.***, 90 NY2d 333, 338, 660 NYS2d 695 [1997]). Said doctrine is based on the premise that "[i]t would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent or by filing a notice of claim in the case of a city hospital" (***Borgia v City of New York***, 12 NY2d at 156). There is the added premise that "the trust and confidence that marks the physician-patient relationship puts the patient at a disadvantage to question the doctor's techniques * * * and gives the patient the right to rely upon the doctor's professional skill without the necessity of interrupting a continuing course of treatment by instituting suit" (***Barrella v Richmond Mem. Hosp.***, 88 AD2d 379, 383, 453 NYS2d 444 [2d Dept 1982]; *see also*, ***McDermott v Torre***, 56 NY2d at 408; ***Watkins v Fromm***, 108 AD2d 233, 238, 488 NYS2d 768 [2d Dept 1985]).

As explained in ***Nielson v Perconte***, 254 AD2d 264, 265, 680 NYS2d 105, 106 [2d Dept 1998] *lv denied* 92 NY2d 818,685 NYS2d 420 [1999], necessary to the application of the doctrine is that a course of treatment has been established with respect to the condition that gives rise to the lawsuit (*see*, ***Nykorchuck v Henriques***, 78 NY2d 255, 258-259, 573 NYS2d 434 [1991]). "[N]either the mere 'continuing relation between physician and patient' nor 'the continuing nature of a diagnosis' is sufficient to satisfy the requirements of the doctrine" (***Nykorchuck v Henriques***, 78 NY2d at 259, quoting ***McDermott v Torre***, 56 NY2d at 405, 406; *see also*, ***Massie v Crawford***, 78 NY2d 516, 519-520, 577 NYS2d 223 [1991]). Moreover, "continuous treatment does not contemplate circumstances where a

patient initiates return visits merely to have his or her condition checked" (***McDermott v Torre***, 56 NY2d at 405). Treatment in this context does not necessarily terminate upon a patient's last visit to the doctor if further care or monitoring of the original condition is "explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with the periodic appointments which characterized the treatment in the past" (*see*, ***Richardson v Orentreich***, 64 NY2d 896, 898-899, 487 NYS2d 731[1985]).

The continuous treatment doctrine "does not contemplate intermittent treatment where substantial gaps of time exist between consultations" (***Curcio v Ippolito***, 97 AD2d 497, 467 NYS2d 692 [2d Dept 1983], *affd* 63 NY2d 967, 483 NYS2d 989 [1984]). Once the provider of medical services considers the patient's treatment to have been completed and does not contemplate further examinations or treatments, the Statute of Limitations (and the time for service of a notice of claim) may begin to run, although a complete discharge of the patient will not preclude the application of the doctrine where the patient timely returns to the hospital or physician to complain and seek further treatment of the same condition for which treatment had initially been rendered (***McDermott v Torre***, 56 NY2d at 405-406; *see also*, ***Richardson v Orentreich***, *supra*; ***Gudmundson v Axelrod***, 57 NY2d 930, 457 NYS2d 223 [1982]). In the absence of such a timely return, i.e., soon after the initial treatment (***McDermott v Torre***, 56 NY2d at 406), subsequent visits may be viewed as "intermittent rather than continuous medical services" (***Davis v City of New York***, 38 NY2d 257, 260, 379 NYS2d 721 [1975]). The existence of substantial temporal gaps between visits or treatments serve to break the continuity which is essential for the application of the doctrine; each such medical service may be deemed to be discrete and complete (*see*, ***Davis v City of New York***, 38 NY2d at 260; ***Barrella v Richmond Mem. Hosp.***, 88 AD2d at 384), and the latter visit may be viewed as a resumption of treatment rather than a continuation of the prior treatment (*see*, ***Grellet v City of New York***, 118 AD2d 141, 504 NYS2d 671 [2d Dept 1986]; ***Sherry v Queens Kidney Ctr.***,117 AD2d 663,498 NYS2d 401 [2d Dept 1986]; *cf.* ***Levy v Schnader***, 96 AD2d 854, 465 NYS2d 767 [2d Dept 1983]). Moreover, where the gap between visits or treatments "exceed[s] the applicable Statute of Limitations period, the continuity of treatment [is] broken," and the continuous treatment doctrine does not apply (***Bulger v Nassau County Med. Ctr.***, 266 AD2d 212, 697 NYS2d 345[2d Dept 1999] quoting ***Michaels-Dailey v Shamoian***, 245 AD2d 430, 431, 666 NYS2d 199 [2d Dept 1997]; ***Concha v Local 1115 Empls. Union Welfare Trust Fund***, 216 AD2d 348, 350, 628 NYS2d 172 [2d Dept 1995]; ***Arias v Southside Hosp.***, 203 AD2d 220, 612 NYS2d 884 [2d Dept 1994]).

Where a patient is deceased, Estates, Powers and Trusts Law § 5-4.1 (1) provides that "[t]he personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death; ..." (*see,* EPTL § 5-4.1). Said two-year Statute of Limitations is not tolled during the pendency of the application for letters of administration (*see*, ***Public Adm'r of Kings County v. Canada Dry Bottling Co. of New York***, 16 AD3d 397, 790 NYS2d 711 [2d Dept 2005]). In addition, the existence of timely medical malpractice causes of action with their two and a half year Statute of Limitations pursuant to CPLR 214-a does not toll or extend the two year Statute of Limitations under EPTL 5-4.1 for wrongful death causes of action (*see generally*, ***Burwell v Yonkers Gen. Hosp.***, 6 AD3d 478, 776 NYS2d 569 [2d Dept 2004]). Moreover, if the Statute of Limitations has expired on the underlying cause of action to recover damages for personal injuries or medical malpractice, the wrongful

death cause of action is also time-barred (*see*, ***Lanni v Sekar***, 249 AD2d 515, 515-516, 672 NYS2d 113 [2d Dept 1998] citing ***Phelps v Greco***, 177 AD2d 559, 560, 576 NYS2d 158 [2d Dept 1991]).

Initially, the Court notes that in response to the contentions contained in the reply papers, inasmuch as the moving defendants were able to submit reply papers, the Court will exercise its discretion by considering the papers submitted by plaintiff in opposition to their motion, even though they were untimely served pursuant to CPLR 2214 (b) (*see*, ***Kavakis v Total Care Systems***, 209 AD2d 480, 619 NYS2d 634 [2d Dept 1994]).

Next, the Court notes that although the submissions of defendant Drs. Davis and Smouha indicate that their diagnosis of plaintiff's decedent's condition was sphenoid sinus mucocele from August 1997 through about January 2002, plaintiff has demonstrated that said defendants were aware prior to the initial surgery of an MRI report by non-party Dr. Trachtenberg of an MRI of the brain performed on August 12, 1997, prior to plaintiff's decedent's initial visit to either defendant, that indicated "a large lobulated mass occupying the sphenoid sinus with extension into the clivus and the sella turcica," and included as a differential diagnosis "a large sphenoid sinus tumor."

Here, two and a half years prior to the date of commencement of March 28, 2003 would be September 28, 2000. Defendants have demonstrated through their submitted medical records of plaintiff's decedent that plaintiff's decedent did not return to see or have treatment with Dr. Davis from October 10, 1997 until February 14, 2002 and did not return to see or have treatment with Dr. Smouha from October 28, 1997 until January 14, 2000. Plaintiff testified at her deposition that she did not have any health insurance coverage between 1998 and 2001; that as far as she knew her husband's headaches were less severe in 1998 than they had been before surgery in 1997; and that she could not remember if her husband treated with any physicians for his headaches in 1998. In addition, plaintiff testified that her husband's headaches were basically the same in 1999; that she thought it was possible that her husband treated with physicians late in 1999, perhaps Dr. Greenblatt; that she could not remember if her husband was taking any medication for headaches in 1999; and that her husband's headaches were more severe in 2000. When specifically asked at the deposition when was the first time after 1997 that her husband sought medical treatment for his headaches, plaintiff responded that she accompanied her husband when he went to see Dr. Smouha in 2000 but that she was not sure whether her husband had seen Dr. Smouha in the intervening years and whether he had seen Dr. Greenblatt in 1999. Plaintiff stated that she did not believe that Dr. Davis was involved in the 2000 surgery and did not recall her husband seeing Dr. Davis in 2000 but recalled seeing Dr. Davis in the emergency room in 2002.

Regarding Dr. Smouha, defendants demonstrated that plaintiff's decedent's return visit to see Dr. Smouha on January 14, 2000, two years and almost three months after his last visit with Dr. Smouha on October 28, 1997, cannot be characterized as "timely" such that the return visit on January 14, 2000 constituted a "resumption of treatment rather than a continuation of treatment" (*see*, ***Coyne v Besser***, 165 AD2d 857, 858-859, 560 NYS2d 322 [2d Dept 1990], *lv denied* 77 NY2d 808, 570 NYS2d 489 [1991]). In addition, inasmuch as plaintiff's decedent did not return for his scheduled follow-up appointment or thereafter until more than two years had passed, the circumstances cannot be characterized as one where both the physician and the patient reasonably intended the patient's uninterrupted reliance upon the physician's observation, direction, concern and responsibility for overseeing the patient's progress so as to satisfy the continuous treatment doctrine (*cf.* ***Richardson v Orentreich***, *supra*).

However, plaintiff in opposition raised issues of fact as to whether her husband sought and received treatment, not merely check-ups or monitoring, for the tumor in his sphenoid sinus from Dr. Smouha in the interim between October 28, 1997 and January 14, 2000, particularly in early 1999, such that the Statute of Limitations was tolled by the continuous treatment doctrine. Plaintiff testified at her deposition that her husband worked in the area where Dr. Smouha's offices were and that she believed that she remembered him telling her that he would "go run in to speak to Dr. Smouha" but she did not "know when that was exactly." By her affidavit, plaintiff added that on occasion her husband would stop by Dr. Smouha's office to speak with him about his headaches and that despite the lack of health insurance coverage, Dr. Smouha would examine plaintiff's decedent by placing a scope up his nose. Plaintiff also stated in her affidavit that although these visits were made without appointment, Dr. Smouha's denial of any contact with plaintiff's decedent from October 28, 1997 through January 14, 2000 is untrue. Plaintiff submitted a telephone message form from Dr. Smouha's office records dated March 6, 1999 about which Dr. Smouha was questioned during his deposition. During his deposition on April 18, 2005, Dr. Smouha testified that if a patient called to leave him a telephone message during working hours, the receptionist would transfer the call to the secretary who would take the message and then give the message to a nurse and that the nurse would give the message to Dr. Smouha, usually in the same day. With respect to the message dated March 6, 1999 received by "Lou Ellen," Dr. Smouha read it during the deposition in that it indicated that plaintiff had called on behalf of her husband and that the message read: "[i]n on Friday. Scope up nostril. Now in severe pain. Headaches. Couldn't go to work. Okay Friday but Saturday, Sunday, Monday. Surgery, sinus cavity, to brain, removed mucous. Three weeks since surgery." Then, Dr. Smouha read the instructions to patient section of the form, "call [sic][7] patient, per Fran. Go to ER and have ENT paged and they can do evaluation of situation." Dr. Smouha noted that the instruction section was signed "H" which he surmised was one of the nurses. Dr. Smouha testified that he could not specifically recall a conversation with any of the nurses regarding this telephone message or anything in general about it. Nevertheless, the contents of said telephone message raise questions of fact as to whether plaintiff's decedent was still suffering from the same symptoms, headaches, from 1997 and whether prior to February 1999 and thereafter plaintiff's decedent was visiting Dr. Smouha's office to actually receive treatment, not just evaluation, for the tumor in his sphenoid sinus from Dr. Smouha and said visits were not being documented by the office. Thus, plaintiff has raised triable issues of fact concerning the applicability of the continuous treatment doctrine to treatment rendered by Dr. Smouha to plaintiff's decedent from 1997 through January 14, 2000 such that Dr. Smouha is not entitled to summary judgment dismissing any allegations of medical malpractice concerning treatment that he rendered in 1997 as time barred pursuant to CPLR 214-a (*see*, ***Connors v Eng***, 2007 NY App Div LEXIS 8769, 2007 NY Slip Op 6217 [NY App Div 2d Dept July 24, 2007]).

With respect to Dr. Davis, there is no evidence of any scheduled follow-up visits between plaintiff's decedent's discharge on October 10, 1997 or that either plaintiff's decedent or Dr. Davis contemplated that plaintiff's decedent would return to Dr. Davis for continuing treatment relating to the initial surgery or that he actually went to see Dr. Davis at any time between October 10, 1997 and February 14, 2002. Therefore, defendants have met their burden of demonstrating that any allegations of medical malpractice for the year 1997 as against Dr. Davis are time-barred. In addition, defendants demonstrated that the gap in treatment with Dr. Davis from October 10, 1997 until February 14, 2002 of four years and four months, exceeded the applicable Statute of Limitations period by one year and 10

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[7]The instructions indicate "Per Fran ... called patient."

months, and did not constitute a "timely return visit" thus breaking the continuity of treatment (*see*, ***Michaels-Dailey v Shamoian***, 245 AD2d 430, *supra*).

In opposition, plaintiff contends that Dr. Davis was involved in the treatment that plaintiff's decedent was receiving from Dr. Smouha after 1997 and submits correspondence from Dr. Smouha to Dr. Davis dated October 28, 1997, January 14, 2000 and March 3, 2000. All three letters provide information concerning plaintiff's decedent's complaints, treatment plaintiff's decedent was receiving from Dr. Smouha, and end with Dr. Smouha thanking Dr. Davis for referring plaintiff's decedent to see him in consultation. At his deposition, Dr. Davis testified that he did not see plaintiff's decedent from October 10, 1997 to the end of 1997 nor in 1998, 1999 or 2000. In addition, Dr. Davis testified that he did not receive a letter from any doctor with regard to plaintiff's decedent in 1998 or 1999 but that he did receive a letter in January 2000 from Dr. Smouha because Dr. Smouha had seen plaintiff's decedent at Dr. Davis' request initially in 1997. According to Dr. Davis, he did not call Dr. Smouha to discuss the contents of said letter nor did he recall discussing plaintiff's decedent case in conference. Both Dr. Davis and Dr. Smouha testified that Dr. Davis was not involved in the 2000 surgery because they considered it an ENT problem rather than a neurosurgery problem. Also, Dr. Davis testified that he probably did not even read Dr. Smouha's letter dated January 14, 2000 because his office's procedure was that letters from other physicians relating to a patient who was no longer an "active patient" of his, that is, had not been seen in or around that time, would be filed to the chart without coming to his desk. The print out from Stony Brook University Hospital's website concerning departmental news from the Department of Surgery and stating that Dr. Smouha and Dr. Davis are "teaming up to perform skull base surgery" and "are working closely together to provide treatment for diseases that previously were debilitating or fatal" lacks probative value and is far too vague to imply that the two physicians were continuously involved together in plaintiff's decedent's treatment after the initial surgery (*see generally* , ***Diaz v New York Downtown Hosp.***, 99 NY2d 542, 754 NYS2d 195 [2002]; ***McDonald v Sunstone Associates***, 39 AD3d 603, 837 NYS2d 157 [2d Dept 2007]). Thus, said letters and the print out from Stony Brook University Hospital's website by themselves, without more, fail to raise an issue of fact concerning whether Dr. Davis was involved in any treatment of plaintiff's decedent from October 10, 1997 until February 14, 2002 so as to toll the Statute of Limitations under the continuous treatment doctrine. Therefore, the motion is granted to the extent that any claims of medical malpractice by Dr. Davis in 1997 are time-barred pursuant to CPLR 214-a and are dismissed. As a result of the above determination, plaintiff's medical malpractice claims based on negligence as against Dr. Davis are dismissed under CPLR 214-a with regard to said defendant's 1997 treatment of plaintiff's decedent. In addition, plaintiff's medical malpractice claims based on negligence as against Dr. Smouha remain at this juncture.

With respect to plaintiff's medical malpractice claims based on negligence that remain, the requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted standards of medical practice, and (2) evidence that such a departure was a proximate cause of the plaintiff's injury (*see*, ***Bloom v City of New York***, 202 AD2d 465, 609 NYS2d 45 [2d Dept 1994]). "On a motion for summary judgment, a defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (***Williams v Sahay***, 12 AD3d 366, 368, 783 NYS2d 664 [2d Dept 2004]). In order to make a prima facie showing of entitlement to judgment as a matter of law in an action to recover damages for medical malpractice, a defendant hospital or physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant's treatment of the plaintiff (*see*, ***Mendez v City of New York***, 295 AD2d 487, 744 NYS2d 847

[2d Dept 2002]).

A party seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

The Court notes that the purported affirmations of defendants' experts are not properly affirmed "to be true under the penalties of perjury" pursuant to CPLR 2106 nor are they notarized so as to be considered affidavits and thus both unsworn statements are in inadmissible form and cannot be considered in support of the motion for summary judgment (*see*, CPLR 2106; CPLR 3212 [b]; ***Borgella v D & L Taxi Corp.***, 38 AD3d 701, 834NYS2d 199 [2d Dept 2007]; ***Loadholt v New York City Trans. Auth.***, 12 AD3d 352, 783 NYS2d 660 [2d Dept 2004]; *see also*, ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]). In a medical malpractice action, the physician's burden on a motion for summary judgment can be met by the submission of affidavits and/or deposition testimony and medical records which rebut plaintiff's claim of malpractice with factual proof (*see*, ***Conti v Albany Med. Ctr. Hosp.***, 159 AD2d 772, 774, 551 NYS2d 994 [3d Dept 1990], *lv denied* 76 NY2d 702, 559 NYS2d 239 [1990] cited by ***Horth v Mansur***, 243 AD2d 1041, 663 NYS2d 703 [3d Dept 1997]). Here, the deposition testimony of both Dr. Smouha and Dr. Davis together with plaintiff's decedent's medical records are insufficient to establish their entitlement to judgment as a matter of law (*see*, ***Cicolello v Limb***, 216 AD2d 434, 628 NYS2d 369 [2d Dept 1995]; ***S'Doia v Dhabhar***, 261 AD2d 968, 690 NYS2d 378 [4th Dept 1999]; *compare*, ***Whalen v Victory Mem. Hosp.***, 187 AD2d 503, 589 NYS2d 590 [2d Dept 1992]). Inasmuch as the moving defendants failed to meet their burden, the Court need not consider the sufficiency of plaintiff's opposition papers and that portion of the motion seeking summary judgment dismissing the claims alleging medical malpractice based on negligence that were not time barred is denied.

With respect to plaintiff's claims of medical malpractice based on lack of informed consent, defendant Drs. Smouha and Davis established their prima facie entitlement to summary judgment by demonstrating that plaintiff's decedent signed consent forms after being informed of the risks, benefits and alternatives of the procedures he underwent (*see*, ***Bengston v Wang***, 41 AD3d 625[2d Dept 2007]; ***Ericson v Palleschi***, 23 AD3d 608, 806 NYS2d 667 [2d Dept 2005]). The Court notes that neither plaintiff nor her experts address in the opposition papers her lack of informed consent claims and thus failed to refute defendants' showing and raise a triable issue of fact with respect to those claims (*see*, *id.*). Therefore, that portion of the motion for summary judgment dismissing the second cause of action for medical malpractice based on the lack of informed consent as against defendant Drs. Smouha and Davis is granted.

Finally, the moving defendants failed to demonstrate that all of plaintiff's wrongful death claims were time-barred by the two-year Statute of Limitations which ran from the death of plaintiff's decedent on April 5, 2002 (*see*, EPTL § 5-4.1). As noted above, the instant action was commenced on March 28, 2003. Inasmuch as the Court has determined that plaintiff's claims to recover damages for medical malpractice based on negligence with respect to Dr. Davis' treatment in the year 1997 were no longer viable when the plaintiff's decedent died, the wrongful death claims solely with respect to those underlying claims are time barred as well (*see*, ***Phelps v Greco***, *supra*).

Accordingly, the instant motion is granted solely with respect to the dismissal of the claims of medical malpractice based on negligence and wrongful death as against Dr. Davis for the year 1997 as time-barred and dismissal of the second cause of action for medical malpractice based on lack of informed consent as against Dr. Davis and Dr. Smouha.

Dated: 9/20/07

Emily Pines
J.S.C.

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