SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

SCAN

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

MARIAN ARKIN, as executrix of the Estate of CAROL ABEL, deceased

Plaintiff,

-against-

SYVIL RESNICK, M.D., VIKTOR SMIRNOV, M.D., DR. DUMICZ, DR. DUPRES, DR. WILLETT, PATRICIA D. TAFURO, M.D., NASSAU ANESTHESIA ASSOCIATES, KERI-ANN KIERNAN, R.N., DR. KRUGLOV, BENNY WONG, M.D., CYNTHIA MAZER, M.D., THOMAS RUBINS, M.D., DANIEL RUBIN, M.D., LOUIS SAFFRAN, M.D., and WINTHROP UNIVERSITY HOSPITAL,

Defendants.

MOTION DATE: 09/27/02

MOTION SEQ. NO.: 006
INDEX NO.: 012506/02

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition to Motion for Summary Judgment.....2
Reply Affirmation.....3

This motion by defendants Dr. Dumicz, Dr. Dupres, Dr. Willett, Keri-Ann Widden, R.N. s/h/a Kerri-Ann Kiernan, R.N., Dr. Kruglov and Winthrop University Hospital for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and any and all cross-claims against them is **denied.**

This is an action to recover damages for medical malpractice. Succinctly stated, plaintiff, as the administratrix of Carol Abel's estate, maintains that the defendants were negligent in their care of the decedent during her hospitalization

at Winthrop University Hospital from February 1, 2000 through March 15, 2000. More specifically, plaintiff faults defendants for their failure to prevent the decedent's extubation, and more importantly, their failure to adequately monitor her oxygen levels and to timely and appropriately make sure that they were being met following her extubation, thereby leading to anoxia and significant brain damage. Some of the defendants seek summary judgment dismissing the compliant and any and all cross-claims against them.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damages. Ramsay v Good Samaritan Hosp., 24

AD3d 645 (2d Dept. 2005); see also, Thomason v Orner, 36 AD3d 791 (2nd Dept. 2007); DiMitri v Monsouri, 302 AD2d 420, 421 (2d Dept. 2003); Holbrook v United Hospital Medical Center, 248 AD2d 358, 359 (2d Dept. 1998). "In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician [and/or hospital] were negligent." Taylor v Nyack Hospital, 18 AD3d 537 (2d Dept. 2005) citing Alvarez v Prospect Hospital, supra. Thus, a moving defendant doctor or hospital has "the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the plaintiff was injured thereby." Chance v Felder, 33 AD3d 645 (2nd Dept. 2006) quoting Williams v Sahay, 12 AD3d 366, 368 (2d Dept. 2004), citing Alvarez v Prospect Hosp., supra; Johnson v Queens-Long Island Medical Group, P.C., 23 AD3d 525, 526 (2nd Dept. 2005); Taylor v Nyack Hospital, supra; see also, Thompson v Orner, supra. "While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in the field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable." Postlethwaite v United Health Servs. Hosps., Inc., 5 AD3d 892, 895 (3rd Dept. 2004); see also, LaMarque v North Shore Univ. Hosp., 227 AD2d 594 (2nd Dept. 1996); Enu v Sobol, 171 AD2d 302 (3rd Dept. 1991); Joswick v Lenox Hill Hosp., 161 AD2d 352, 355 (1st Dept. 1990); see also, McCormick, Evidence [2d ed.], § 13; § 10 Wigmore Evidence, vol. 2, § § 556-567; vol. 7, § § 197-1929; Richardson, Evidence [10th ed–Prince], § § 366-368.

In support of their motion, the defendants have submitted the "Affirmation"

of Dr. Alan Mensch, M.D., a doctor Board Certified in Internal Medicine with a Subspecialty in Pulmonary Medicine. In his "Affirmation," Dr. Mensch states that he is "duly sworn, deposes and says," however, his "Affirmation" is not notarized. It does not comply with the requirements of CPLR 2106 or 2309. The defendants have failed to meet their burden of proof as they have failed to proffer evidence in admissible form, requiring the denial of their motion.

The Court notes that had defendants met their burden of proof thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact, the plaintiff would not have met her burden. Despite the plaintiff's expert's meticulous assessment of the defendants' care of the decedent as well as their mistakes, the plaintiff's expert has failed to establish his own qualifications.

This constitutes the Order of the Court.

Dated: 12/30/07

ENTER:

J.S.C.