At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of July 2008.

P R E S E N T:

HON. GLORIA M. DABIRI

Justice.

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SHAVON ELLIS, INDIVIDUALLY and AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL ELLIS, DECEASED,

Plaintiff,

INDEX NO. 13209/05

- against -

KENNETH ENG, M.D., DELPHIC SURGICAL ASSOCIATES, P.C., NEW YORK UNIVERSITY MEDICAL CENTER, GEORGE GUSSET, M.D., BETH ISRAEL MEDICAL CENTER, CONTINUUM HEALTH PARTNERS, INC., JOHN PROVET, M.D., JED KAMINETSKY, M.D., UNIVERSITY UROLOGY ASSOCIATES, INC., JOHN AMES, M.D. and LONG ISLAND RADIATION THERAPY, P.C.,

Defendants.

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The following papers numbered 1 to 7 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed	1-2, 3-5
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	6, 7
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, in this action for medical malpractice and wrongful death, defendants Kenneth Eng, M.D., Delphic Surgical Associates, P.C. (Delphic), NYU Hospitals Center (s/h/a New York University Medical Center) and Jed Kaminetsky, M.D. (collectively,

the Eng defendants) seek summary judgment dismissing plaintiff's action against them(CPLR 3212). Defendant George Gusset, M.D. cross-moves for similar relief.

Background Facts and Procedural History

On April 8, 2002 plaintiff's decedent, Samuel Ellis age 47, presented to Maimonides Medical Center (Maimonides) with complaints of pain in his left groin. Mr. Ellis was diagnosed with a bladder tumor and underwent a resection of the bladder. A pathology report indicated that the tumor was non-cancerous. A CT scan, performed on April 18, 2002, disclosed a large mass in the sigmoid colon with possible extension into the mescenteric fat and bladder.

On April 23, 2002, Mr. Ellis presented to defendant Beth Israel Medical Center (Beth Israel) with complaints of diarrhea and blood in his stool, for which he consulted with defendant George Gusset, M.D. Blood testing on April 26, 2002 indicated a carcino-embyonic antigen level of 29, consistent with cancer. On May 1, 2002 Dr. Gusset performed a colonoscopy which showed a nodular, friable circumferential lesion from the anus, diverticuli in the colon and a sessile polyp in the ascending colon. A biopsy of colon tissue showed evidence of invasive, moderately differentiated, adenocarcinoma. Dr. Gusset referred decedent to Dr. Eng for a surgical consultation, which occurred on May 16, 2002 at the offices of defendant Delphic Surgical Associates, P.C. (Delphic).[1] Dr. Eng agreed to

[1]Delphic, an entity with which Dr. Eng was affiliated, is no longer in existence.

surgically remove the diseased tissue in the decedent's colon and bladder.

On May 21, 2002 at defendant NYU Hospitals Center (NYU), Dr. Eng performed a resection of the colon tumor and partial cystectomy. Part of the dome of the bladder, the portion of the colon containing the circumferential lesion, including 23 pericolonic lymph nodes and the decedent's appendix, were removed. Analysis of the resected tissue revealed that the surgical margins of the resected colon and bladder were free of cancer. The 23 lymph nodes were also free of disease. However, because the decedent's cancer had spread through the colon wall into bladder tissue, the cancer was classified as "Stage 2B" adenocarcinoma of the colon. The decedent had a post-operative leakage of urine from the suture line where the bladder had been resected, for which a urology consult was obtained from defendant John Provert, M.D. Mr. Ellis was discharged from the hospital on June 1, 2002.

Dr. Eng, by letter of June 7, 2002 to Dr. Gusset, indicated that he had performed what he considered to be a "curative" resection, that the decedent had a reasonably good prognosis and that Mr. Ellis would not require adjuvant therapy (chemotherapy and radiation treatment). Dr. Eng indicated that he would continue to see Mr. Ellis for routine follow-up care. On that day, Dr. Eng saw Mr. Ellis for his first post-operative visit. Dr. Eng also saw Mr. Ellis for follow-up visits on June 21, July 8 and August 9, 2002, and February 10, August 14 and November 18, 2003. Dr. Eng's note for November 18, 2003 indicates that decedent remained well with no rectal bleeding, and that he had normal bowel movements and good

urinary function.[2] Dr. Eng testified, when deposed, that the primary purpose of these visits was to make sure the surgical wounds were healing properly, to check for infections and hernias, to make sure there were no bowel problems, and to check for palpable masses which might indicate a recurrence of the cancer.

Dr. Gusset also saw Mr. Ellis on several occasions following the surgery. Dr. Gusset testified that Mr. Ellis visited him for "clinical follow-up," "to make sure [he] didn't have a recurrent polyp." Dr. Gusset testified that his plan was to perform a colonoscopy, CT scan study of the abdomen and pelvis, chest X-ray and blood work approximately one year after the surgery so as to monitor Mr. Ellis for the recurrence of cancer. Dr. Gusset also planned to perform blood work, within less than a year after surgery, if "patient's symptoms" necessitated such work.

During an August 1, 2002 visit, Mr. Ellis complained to Dr. Gusset of weakness, fatigue and slight constipation. Dr. Gusset testified that he instructed Mr. Ellis that these complaints were common after a colon resection, and advised him of Dr. Eng's opinion that he did not require chemotherapy. An abdominal exam performed that day was negative. Dr. Gusset ordered blood tests, told Mr. Ellis to drink prune juice and eat pitted prunes to alleviate the constipation and proceeded with his plan to "clinically observe" decedent. Dr. Gusset also extended Mr. Ellis' disability leave from work for two months.

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[2]Decedent missed scheduled appointments with Dr. Eng on November 11, 2002 and May 12, 2003.

On his September 3, 2002 visit the decedent complained to Dr. Gusset of upper abdominal pain, generalized weakness and malaise. Blood tests (which were performed on August 19, 2002) had revealed a slightly low blood count. Dr. Gusset noted that decedent reported normal bowel movements, no blood in the stool, no vomiting and a good appetite. His abdominal exam was negative. Dr. Gusset concluded that decedent was well-developed, well-nourished and not in distress, and advised decedent to take an iron supplement to increase his blood count.

On September 20, 2002, decedent visited Dr. Gusset again with complaints of a swollen right testicle. An antibiotic was prescribed and decedent was referred to a urologist. On October 3, 2002, decedent reported that the testicular swelling had receded, that he had no abdominal pain, nausea or vomiting, that his bowel movements were normal and that his appetite was good.

On October 8, 2002, Dr. Gusset approved Mr. Ellis' return to work. According to Dr. Gusset, this angered decedent inasmuch as he felt that he should remain on disability. On December 7, 2002 and December 27, 2002, decedent failed to appear for scheduled appointments with Dr. Gusset.

Decedent next visited Dr. Gusset on December 1, 2003, with complaints of mild constipation and occasional abdominal discomfort on his left side. A stool hemocult was positive for blood. A CT scan performed on December 8, 2003 revealed an 8 cm soft tissue mass in the pelvis, destruction of the aneterior sacrum, obstruction of the left urethra,

moderate left hydronephrosis left hydroureter and seven metastatic-appearing nodules within the liver. A chest X-ray showed increased density over the overlying thoracic body. On December 19, 2003, a colonoscopy was performed which revealed a tumor 20 cm from the anal verge and a polypoid mass in the ascending colon. The pathology report indicated necrotic adenocarcinoma.

During a December 23, 2003 visit, Dr. Gusset recommended a Doppler study, CT and bone scans, and referred decedent to an oncologist and urologist. On December 27, 2003, Dr. Gusset saw decedent after Mr. Ellis presented to the emergency room at Beth Israel. During this admission Dr. Gusset performed an upper gastroscopy and a urologist used stents to relieve a urethral obstruction. On January 13, 2004, decedent visited Dr. Gusset with complaints of right hip pain, swelling and rectal bleeding. Decedent was referred to Dr. Steven Lichter, an oncologist. When Dr. Gusset saw the decedent on February 24, 2004, he reported that he was receiving oral chemotherapy and that he had received intravenous chemotherapy. Mr. Ellis died on May 4, 2004 at Coney Island Hospital.

By summons and complaint filed April 28, 2005, plaintiff, as Administratrix of decedent's estate and individually, commenced this action for medical malpractice, lack of informed consent, negligent hiring and wrongful death against Dr. Gusset, Dr. Eng, NYU, Beth Israel Medical Center and others. Plaintiff alleges that Dr. Eng departed from accepted standards of medical care by failing to recommend that decedent receive adjuvant therapy following his surgery, failing to discuss with decedent the possible benefits of such therapy,

failing to refer decedent to an oncologist after the surgery, and failing to properly monitor decedent for the recurrence of cancer, including failing to order appropriate diagnostic tests. Plaintiff alleges that, in his treatment of decedent following the operation, Dr. Gusset departed from accepted standards of care in failing to recognize symptoms which were consistent with a recurrence of cancer, failing to order appropriate diagnostic tests to check for the recurrence of cancer, including CEA testing and CT scans, and failing to recommend postoperative chemotherapy.

Issue was joined by all defendants, except for Continuum Health Partners, Inc., University Urology Associates, Inc. and Long Island Radiation Therapy, P.C., which were not served with process and have not appeared. The action has been discontinued against John Ames, M.D., Long Island Radiation Therapy, P.C. and John Provet, M.D. By stipulation of April 14, 2007 all parties, except for Beth Israel Medical Center, agreed to discontinue the action against Jed Kaminetsky, M.D. Plaintiff filed a Note of Issue and Certificate of Readiness on June 29, 2007 and defendants moved in the Central Compliance Part to vacate the Note of Issue.[3] The instant motion and cross-motion for summary judgment are now before this court.

The Eng Defendants' Motion for Summary Judgment

Dr. Eng, NYU, Delphic and Dr. Kaminetsky seek dismissal of the complaint as

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[3]Those motions, apparently, are still pending. The parties have since agreed to dismissal of the action against Dr. Kaminetsky.

asserted against them. These defendants argue that the care rendered by Dr. Eng to decedent, prior to, during and after the May 21, 2002 surgery, was in accordance with accepted standards. In addition, they maintain, Dr. Kaminetsky did not render any care to decedent and, therefore, the claims against him must be dismissed.

In support of their motion, the Eng defendants submit the affirmation of Marvin L. Corman, M.D., a physician board-certified in surgery and in colon and rectal surgery. Dr. Corman, having reviewed the decedent's medical records and the deposition testimony of Dr. Eng and Dr. Gusset, affirms that the conduct of Dr. Eng in connection with the May 21, 2002 surgery and of the employees of NYU were in accord with the accepted standards of care.

Dr. Corman opines that Dr. Eng's decision not to recommend that decedent receive adjuvant therapy was appropriate since the decedent had a Stage II B tumor removed from his colon with no evidence of metastasis or spread of the cancer from the colon to the lymph nodes. Dr. Corman avers that in 2002, and at present, radiation therapy was not used to treat primary colon cancer as there is no reliable evidence as to its efficacy. Dr. Corman states:

> "While chemotherapy for Stage III colon cancers that had spread to the lymph nodes was the standard of care in 2002, chemotherapy was not the standard of care for Stage II colon cancers in 2002. There was no reliable investigational evidence in 2002 that the prognosis for Stage II tumors was enhanced by the administration of chemotherapy, and there is no such reliable evidence today. Some oncologists in 2002 and 2003 were classifying Stage II colon cancer into Stage II a and Stage II b colon cancers, with II b cancers thought to have features that suggested increased risk of recurrence despite 'curative' resection with no detectable residual cancer. While some advocated giving chemotherapy to patients with Stage II b colon

> cancer, there was no consensus and no standard of care that chemotherapy should be administered to either Stage II a or Stage II b colon cancers in 2002 or 2003 through the period of Dr. Eng's care of [decedent]. Despite an incidence of recurrent colon cancer in patients who had a 'curative' resection with cancer-free surgical margins and no evident spread of cancer of approximately 30%, there was no reliable direct evidence that chemotherapy had a prognostic or survival benefit, and adjuvant therapy for primary Stage II colon cancer, whether Stage II a or Stage II b, was not the standard of care in 2002 or 2003."

Dr. Corman avers that Dr. Eng's decision to refer decedent back to Dr. Gusset, an internist/gastroenternologist, rather than to an oncologist, for surveillance for the recurrence of cancer was in accord with accepted standards. In addition, while Dr. Eng testified that he would take note of any mass or abnormality he detected while performing his post-surgical exams, Dr. Corman draws a distinction between this care and the recurrence surveillance undertaken by Dr. Gusset. In this regard, he notes that Dr. Gusset's plan for monitoring the decedent included blood testing, a colonoscopy, CT scans and chest X-rays.[4] It is argued that to the extent that these tests were inadequate or were not timely performed, Dr. Eng is without responsibility.

The Eng defendants also submit the affirmation of Lionel Grossbard, M.D., a physician board-certified in internal medicine, hematology and oncology. Dr. Grossbard opines that the care rendered by Dr. Eng and NYU was within accepted standards in all

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[4]Dr. Gusset testified that he planned to order diagnostic tests to monitor decedent for the recurrence of cancer, one year after the May 2002 surgery. However, inasmuch as decedent failed to keep appointments with Dr. Gusset after October 2002, these tests were not ordered until December 2003 when decedent next visited Dr. Gusset.

respects and that the injuries alleged by plaintiff were not the result of any alleged departure. Dr. Grossbard also opines that Dr. Eng's decision to not recommend chemotherapy was proper inasmuch as "chemotherapy was not the standard of care for Stage II colon cancers in 2002 or during Dr. Eng's care of [decedent] . . . [and] [t]here was no scientifically reliable evidence in 2002 or 2003 that the prognosis for Stage II tumors was enhanced by the administration of chemotherapy, and there is no such reliable direct evidence today." Dr. Grossbard states that it was not until 2004 that there was a consensus that chemotherapy might even be considered for the treatment of Stage II b colon cancer. In addition, Dr. Grossbard maintains that it was within accepted standards for Dr. Eng to continue routine surgical follow-up and to refer decedent to Dr. Gusset for cancer recurrence surveillance. Dr. Grossbard avers: "colo-rectal surgeons most often do not follow surgical patients for colon cancer recurrence surveillance if another appropriate physician is doing so, and that this is a task properly and commonly undertaken by an internist/gastroenternologist like Dr. Gusset or an oncologist or other appropriate physician."

In support of that branch of the motion as seeks dismissal of the complaint against him, Dr. Kaminetsky avers that decedent was not his patient and that he rendered no care to decedent. Dr. Kaminetsky states that his review of his office records at University Urology Associates reveals that the only physician from his office who saw decedent was Dr. John Provet.

Finally, movants argue that plaintiff's lack of informed consent claim must be

dismissed in that this claim is based upon Dr. Eng's alleged failure to discuss with the deceased the risk and benefits of adjuvant care. Movants maintain that as there was no invasion of the decedent's physical integrity, any failure to discuss the risks or benefits of adjuvant therapy is merely a component of plaintiff's malpractice claim.

Dr. Gusset's Cross-Motion for Summary Judgment

Dr. Gusset, in support of his cross-motion for summary judgment, argues that his decision to follow Dr. Eng's recommendation that decedent forego chemotherapy and radiation therapy was within accepted medical standards for a patient with Stage II b colon cancer. In support of this argument, Dr. Gusset relies upon the affirmations of Drs. Corman and Grossbard.

Dr. Gusset maintains that his post operative care also was within accepted medical standards. In this regard, he supplies the affirmation of Thomas Fabry, M.D., a gastroenternologist with 16 years of experience in treating patients with colon cancer, pre- and post-operatively. Dr. Fabry avers that Dr. Gusset's care of decedent was within accepted medical standards and that decedent's death was not caused by any alleged departure by Dr. Gusset. Specifically, Dr. Fabry points out that decedent failed to return to see Dr. Gusset in December 2002, following his October 3, 2002 visit, and that when the decedent returned to Dr. Gusset in December 2003 (14 months later) his recurrent cancer was incurable. Accordingly, Dr. Fabry avers, Dr. Gusset is not responsible for the delay in detecting the recurrence of decedent's cancer. In addition, Dr. Fabry states that Dr. Gusset's

plan to wait until one year after the surgery before ordering diagnostic tests was reasonable and proper. In his view the failure to order these tests prior to October 2002 is not malpractice since "[t]here was no established standard in 2002 as to the indicated timing of these tests after a curative resection of Stage II colon cancer." Dr. Fabry states:

> "It is also my opinion that even serial CEAs would not have benefitted this patient given the widespread nature of the recurrence. This test generally has a limited value, but sometimes might help where an elevated result shows a recurrence limited to a few small isolated lesions in the liver that can be addressed surgically or via chemotherapy. In this case, the metastasis was so widespread that the only option would have been palliative care without hope of cure."

As a final matter, Dr. Gusset argues that, inasmuch as plaintiff failed to specifically allege in her pleadings that he was negligent in failing to order a CEA test, she should be precluded from doing so for the first time in opposition to his summary judgment motion.

Plaintiff's Opposition

In opposition to the Eng defendants' motion and Dr. Gusset's cross-motion, plaintiff argues that there are issues of fact as to whether Dr. Eng and Delphic failed to obtain decedent's informed consent prior to the surgery and failed to inform decedent of the benefits and risks of post-operative adjuvant therapy. Plaintiff further argues that there are issues of fact as to whether Dr. Eng, Delphic and Dr. Gusset departed from accepted standards in failing to recommend that decedent receive postoperative adjuvant therapy and in failing to refer decedent to an oncologist following the surgery. According to plaintiff, these

departures led to decedent's death. In addition, plaintiff maintains that there are factual issues regarding whether Dr. Eng, Delphic and Dr. Gusset did not provide proper follow-up postoperative care, including ordering appropriate diagnostic tests, which resulted in the failure to timely diagnose the decedent's recurrent metastatic cancer.

In support of these arguments, plaintiff submits an affirmation by a licensed physician who specializes in laparoscopic, trauma and general surgery, and who has reviewed, *inter alia*, decedent's medical records and the deposition testimony of Dr. Eng and Dr. Gusset.[5] According to plaintiff's expert, Dr. Eng, Delphic, NYU, Dr. Gusset, Beth Israel and Dr. Kaminetsky each departed from good and accepted standards of medical care in treating decedent and each departure was a substantial factor in causing decedent's metastatic colon cancer and death. Plaintiff's expert opines that in 2002, ASCO guidelines "strongly recommended . . . adjuvant therapy" following curative surgery for patients diagnosed with Stage II b colon cancer. Thus, Dr. Eng and Dr. Gusset should have recommended that decedent receive chemotherapy following the May 2002 surgery. Plaintiff's expert maintains that this departure was a proximate cause of the recurrence and spread of decedent's cancer inasmuch as "disease recurrence is thought to derive from clinically occult micro-metastases that are present at the time of surgery. The goal of postoperative (adjuvant) therapy is to eradicate these micro-metastases, thereby decreasing the likelihood of relapse and increasing the cure rate."

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[5]The court was provided with a copy of the affirmation containing the affiant's name.

Plaintiff's surgical expert further opines that Dr. Eng and Dr. Gusset departed from accepted standards in their postoperative care of decedent by failing to properly monitor decedent for recurrence of cancer. In this regard, the expert states:

> "ASCO guidelines recommend annual computed tomography of the chest and abdomen for 3 years after primary therapy and carcino-embryonic antigen testing every 3 months postoperatively for 3 years. History and physical exam every 3 months for 2 years, then every 6 months for a total of 5 years. A colonoscopy should be performed 1 year after surgery. If polyps are found then a follow up colonoscopy would be required within 1 year. If no polyps are found, a colonoscopy should be repeated every 2-3 years."

Neither Dr. Eng nor Dr. Gusset ordered any of these tests until December 2003, some 19 months post-surgery, by which time decedent was diagnosed with metastatic colon cancer. The expert maintains that this departure was a proximate cause of decedent's injuries inasmuch as it resulted in the failure to diagnose the recurrence of decedent's cancer until it was too late to cure the disease.

In addition, plaintiff's surgical expert argues that Dr. Gusset departed from accepted standards when he examined plaintiff on several occasions between the surgery and December 2003. Specifically, the expert maintains that Dr. Gusset failed to recognize the significance of decedent's symptoms when he presented to Dr. Gusset on August 1, 2002 with complaints of feeling weak, being easily fatigued and having mild constipation. While Dr. Gusset ordered blood testing, according to plaintiff's expert, he should have also ordered carcino-embryonic antigen testing. In addition, when the blood tests revealed an elevation in erythrocyte sedimentation rate and decedent presented on September 3, 2002 complaining

of upper abdominal pain, generalized weakness and malaise, Dr. Gusset should have performed CEA testing and a CT scan to rule out recurrence and metastasis. Specifically, the expert avers, "[e]levation of the ESR and anemia are strongly associated with serious underlying disease, most often infection, collegen vascular disease or metastatic malignancy. At this point a complete history, physical exam, carcino-embryonic and a CT was required to rule out recurrence and metastasis." Plaintiff's expert opines that this failure was a substantial factor in decedent's development of end-stage metastatic colon cancer inasmuch as it resulted in a significant delay in diagnosis, which significantly altered decedent's prognosis and it is more probable than not that this cost decedent "his best chance of survival."

Finally, plaintiff's expert argues that Dr. Eng departed from accepted standards in failing to refer decedent to an oncologist after the surgery. According to the expert, this was a proximate cause of decedent's injuries inasmuch as "referral to a specialist in oncology would have permitted proper evaluation as well as offering potential adjuvant therapies and survival outcomes."

In addition, plaintiff supplies the affirmation of a physician board-certified in oncology, internal medicine and palliative care, who examined the relevant records and deposition testimony.[6] According to plaintiff's oncologist, Dr. Eng, Delphic, NYU, Dr. Gusset, Beth Israel and Dr. Kaminetsky departed from good and accepted standards of care, as they existed in 2002, and such departures were a substantial factor in causing decedent's

[6]The court was provided with a copy of this affirmation containing the affiant's name.

metastatic cancer.

Plaintiff's oncology expert notes that from June 7, 2002 to November 18, 2003 decedent had 11 post-operative visits with Dr. Eng at Delphic. During this time Dr. Eng failed to perform, or to order, imaging tests, an endoscopy, blood work or other tests in order to determine if there was any changes in decedent's health which might indicate recurrence or metastasis of the malignancy. Plaintiff's oncologist opines that this was a departure from the standard of care for post-operative patients with Type II b colon cancer as such patients, who are a high risk of relapse, should be clinically assessed "when symptoms occur, or at least every six months for three years, and then yearly for at least five years. During those visits patients may have blood carcinoembryonic antigen [tests], chest x-rays, and a liver ultrasound." According to plaintiff's expert, this departure was a proximate cause of decedent's injuries inasmuch as it "contributed to [decedent's] rapid progression to terminal metastatic colon cancer."

Plaintiff's oncology expert also concludes that Dr. Eng failed to "appropriately refer" decedent to an oncologist following the surgery, which "resulted in a significant delay in diagnosis of metastatic colon cancer of nineteen months without any treatment from May 2002 to December 2003." The expert also maintains that Dr. Eng departed from good and accepted standards "by failing to recognize the treatment benefit of adjuvant therapy in Stage II B, T4NOMX adenocarcinoma of the colon." The expert states that 2002 colorectal cancer guidelines from the American Cancer Association indicate "there is at least equal the benefit to provide adjuvant therapy in high-risk Stage II cancers, like [decedent's] cancer, as with

Stage III colon cancers."

Plaintiff's oncology expert further opines that Dr. Gusset departed from good and accepted standards with regard to his post-operative treatment of decedent. Specifically, the expert maintains that Dr. Gusset should have ordered CEA tests to rule out a possible recurrence of cancer when decedent presented to him on August 1, 2002, complaining of fatigue, weakness and constipation. Similarly, plaintiff's oncologist states that Dr. Gusset should have conducted a complete physical exam and ordered CEA tests, liver-functioning tests, fecal occult-blood tests and possibly a CT scan to rule out recurrence and metastasis of the primary cancer. This was indicated in view of the fact that: (a) blood tests indicated that decedent was anemic with an elevation in ESR rate, and (b) decedent presented on September 3, 2002 with complaints of upper abdominal pain and weakness and malaise. According to plaintiff's expert, these departures "were . . . substantial factors in [decedent's] development of end stage metastatic colon cancer." Plaintiff's expert states that "it is more probable than not that [decedent] lost his best chance of survival as his prognosis was significantly altered due to the failure of Dr. George Gusset to provide a timely oncology referral, monitor appropriately, and timely and appropriately recognize the significance of [decedent's] presenting symptomatology."

Reply Papers

In reply, Dr. Eng, NYU, Delphic and Dr. Kaminetsky, initially, advise the court that the parties have agreed to discontinuance the action as to Dr. Kaminetsky. These defendants

also note that there is nothing in the record or in plaintiff's expert affirmations which indicates any departure by NYU or its employees. Consequently, they maintain, the complaint as to NYU must be dismissed.

As to Dr. Eng and Delphic, it is argued that plaintiff's experts fail to demonstrate that Dr. Eng departed from accepted medical standards as they existed in 2002 in not recommending that decedent receive postoperative chemotherapy. They maintain that the claim by plaintiff's surgical expert that 2002 ASCO guidelines "strongly recommended . . . adjuvant therapy following curative surgery for patients diagnosed with Stage II b colon cancer" is simply untrue. They supply a copy of ASCO guidelines for Stage II colon cancer, issued in 2004, which states in relevant part:

> "The routine use of adjuvant chemotherapy for medically fit patients with stage II colon cancer is *not* recommended. However, there are populations of patients with stage II disease that could be considered for adjuvant therapy, including patients with inadequately sampled nodes, T4 lesions, perforation, or poorly differentiated histology. Direct evidence from randomized control trials does *not* support the routine use of adjuvant chemotherapy for patients with stage II colon cancer. Patients and oncologists who accept the relative benefit in stage III disease as adequate *indirect* evidence of benefit for stage II disease are justified in *considering* the use of adjuvant chemotherapy, particularly for those patients with high-risk stage II disease." [emphasis supplied]

Thus, the Eng defendants conclude, it was not until after decedent's death that ASCO guidelines even provided for the consideration of adjuvant therapy for patients with Stage II colon cancer. Nor did the 2004 guidelines establish as a standard of care that chemotherapy be used to treat patients with a history of Stage II b colon cancer. Indeed, the

ASCO guidelines state that "direct evidence from randomized controlled trials does not support the use of adjuvant chemotherapy, even for patients with high-risk Stage II colon cancer." In addition, the Eng defendants argue, even if chemotherapy was the standard for treatment of the decedent, such departure was not a proximate cause of a decrease in his chance of survival or his life-span. In this regard, defendants submit a further affirmation by Dr. Grossbard who avers: "it cannot be said to a reasonable degree of medical certainty that chemotherapy would have been a benefit to [decedent] as there are no proven indicators of which patients will respond favorably to chemotherapy."

With respect to the claim made by plaintiff's oncology expert regarding American Cancer Association guidelines, the Eng defendants point out that plaintiff does not attach a copy of these guidelines to her motion papers, and that the defendants themselves have been unable to locate any guidelines by any entity called the "American Cancer Association." In addition, inasmuch as plaintiff's oncology expert merely states that the purported guidelines indicate that chemotherapy should be "considered" as the standard of care for Stage II colon cancer, and since this guideline directly conflicts with the ASCO, the leading professional organization for oncologists in the nation, the Eng defendants maintain that, at best, this alleged "ACA guideline" constitutes an opinion, not a standard of care.

The Eng defendants further argue that plaintiff's papers are insufficient to raise a triable issue of fact as to whether Dr. Eng deviated from accepted standards of care in his postoperative treatment of decedent inasmuch as the opposition papers simply ignore the fact that Dr. Eng did not undertake the responsibility for cancer recurrence surveillance. Instead,

as Dr. Gusset testified, it was he who was responsible for monitoring decedent for the recurrence of cancer, including ordering appropriate diagnostic tests.

In his reply, Dr. Gusset argues that plaintiff has failed to raise a triable issue of fact as to whether he departed from accepted medical standards and as to whether any departure was a proximate cause of the decedent's injuries. Dr. Gusset maintains that the Eng defendants' papers definitively disprove plaintiff's allegations that the failure to recommend chemotherapy was a departure from accepted standards. In addition, Dr. Gusset argues, plaintiff simply ignores the fact that decedent failed to keep appointments between October 2002 and December 2003. Dr. Gusset argues that plaintiff's allegations regarding the inadequacy of his care during this time period, therefore, are without basis. Dr. Gusset further argues that, to the extent that plaintiff claims that he deviated from accepted standards by failing to order CEA testing on August 1 and October 3, 2002, this allegation is not set forth in plaintiff's bill of particulars and therefore cannot be raised for the first time in opposition to summary judgment motion.

Analysis and Findings

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted medical practice and evidence that such departure was a proximate cause of plaintiff's injuries (*Wiands v Albany Med. Ctr.*, 29 AD3d 982, 983 [2006]; *Furey v Kraft*, 27 AD3d 416, 417-418 [2006]). Once a defendant makes such a *prima facie*

showing of entitlement to summary judgment, the burden shifts to the party opposing summary judgment to "submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury" (*Domaradzki v Glen Cove Ob/Gyn Assocs.*, 242 AD2d 282 [1997]). Conclusory and unsupported allegations contained in an expert's affidavit in opposition do not provide a basis for denying a summary judgment motion (*Micciola v Sacchi*, 36 AD3d 869 [2007]; *Cai Qiang Li v Yang*, 36 AD3d 642 [2007]).

Turning first to plaintiff's claims against the Eng defendants, there is no basis for plaintiff's claims against NYU whose only connection with this matter is that the May 21, 2002 surgery performed by Dr. Eng took place at its hospital. Assuming, *arguendo*, that NYU could be held liable for the conduct of Dr. Eng, his expert affirms that the surgery was performed entirely within accepted standards. Furthermore, plaintiff's experts fail to allege any deviation from accepted standards during the surgery. Accordingly, plaintiff's claims against NYU are dismissed.

With respect to Dr. Eng, plaintiff alleges that Dr. Eng departed from accepted standards (1) in failing to recommend, or otherwise discuss with decedent, the possibility of chemotherapy following the surgery, (2) in referring decedent back to Dr. Gusset rather than to an oncologist, and (3) in failing to properly monitor decedent for recurrence of cancer. These claims will be, separately, addressed.

The Eng defendants make a *prima facie* showing that Dr. Eng acted appropriately in not recommending postoperative chemotherapy and in the advice given to the decedent regarding post-operative treatment. The affirmations of Drs. Corman and Grossbard analyze ASCO standards and guidelines and demonstrate that between 2002 and 2003 there was no consensus within the medical community that chemotherapy be administered following curative surgery for Stage II b colon cancer or that the "survival benefit" for patients with Stage II colon cancer would be enhanced by chemotherapy. Defendants' experts affirm that it was not until 2004 that ASCO guidelines even addressed the question of whether doctors might discuss the possibility of chemotherapy with patients diagnosed with Stage II b colon cancer, and that this only amounted to an advisory guideline, not an established standard of care. Accordingly, the burden shifts to plaintiff to submit expert affidavits which indicate that the failure to recommend chemotherapy was a departure from accepted standards and was a proximate cause of decedent's injury.

Plaintiff relies upon the affidavit of a surgeon who affirms that "ASCO guidelines since the year 2000, strongly recommend a course of 5-FU based adjuvant chemotherapy for stage II patients with at least one poor prognostic indicator." However, the opinion of this expert, who specializes in "laparoscopic trauma and general surgery" is outside of his/her area of expertise and the expert fails to lay a foundation tending to support the reliability of the opinion (*Mustello v Berg*, 44 AD3d 1018, 1019 [2007]). The surgical expert does not indicate what, if any, familiarity he/she has with protocols for adjuvant therapy or with the post-operative care of patients with a history of colon cancer. This lack of

foundation is especially significant in that the expert offers an opinion in direct conflict with ASCO guidelines offered by defendants (*Hernandez-Vega v Zwanger-Pesiri Radiology Grp.*, 39 AD3d 710, 711-712 [2007]). Nor, does plaintiff provide copies of guidelines relied upon by her experts. As noted above, ASCO guidelines published two years after decedent's surgery, and supplied by defendants, state merely that doctors treating patients with Stage II b colon cancer may be "justified in considering" the use of chemotherapy but that "direct evidence from randomized controlled trials does not support the use of adjuvant chemotherapy, even for patients with high-risk Stage II colon cancer." Moreover, plaintiff's own oncology expert does not opine that ASCO guidelines recommended chemotherapy for patients with Stage II b colon cancer. Under these circumstances, the claim by plaintiff's surgical expert regarding adjuvant care for patients with Stage II b colon cancer lacks probative value (*Behar v Coren*, 21 AD3d 1045, 1046-1047 [2005]).

However, the affidavit of plaintiff's oncology expert is sufficient to raise a triable issue of fact as to whether Dr. Eng departed from accepted standards in not recommending chemotherapy. In particular, this expert opines that Dr. Eng "departed from good and accepted standards of medical and surgical practice in 2002 by failing to recognize the treatment benefit of adjuvant therapy in Stage II B [cancer] of the colon." In support of this claim, the expert cites 2002 guidelines by the American Cancer Association which indicate that "there is at least equal the benefit to provide adjuvant therapy in high-risk stage II cancers," such as decedent, and concludes that "chemotherapy also should be considered as the standard of care for Stage II colon cancer patients." In addition, the expert affidavit

raises a triable issue of fact as to whether this alleged deviation was a proximate cause of reducing decedent's chances for survival and/or his life span inasmuch as according to 2002 American Cancer Association guidelines, chemotherapy has at least equal the benefit in high-risk Stage II colon cancer patients, such as Mr. Ellis, as with Stage III cancer. The Eng defendant's concede that chemotherapy has been found to improve the prognosis for patients with Stage III colon cancer. Although defendants discount the opinion of plaintiff's oncology expert due to his/her reliance on American Cancer Association guidelines, the conflicting opinions merely raise issues of fact "properly left to a jury for resolution" (*Monsels v Sinclair*, __AD3d__, 2008 NY Slip Op 05057 [2d Dept. 2008]).[7]

Turning next to plaintiff's claim that Dr. Eng deviated from accepted standards by failing to refer decedent to an oncologist, the Eng defendants make a *prima facie* showing that Dr. Eng's referral of decedent to Dr. Gusset was within accepted standards. Dr. Corman affirms that it "was in accord with accepted standards of care for Dr. Eng to refer [decedent] back to Dr. Gusset for surveillance and management or further referral and not to make a direct referral to an oncologist." Dr. Grossbard affirms "it was common in 2002 and 2003, and still is common, that colo-rectal surgeons most often do not follow surgical patients for colon cancer recurrence surveillance if another appropriate physician is doing so, and that this is a task properly and commonly undertaken by an internist/gastroenternologist like Dr. Gusset." Accordingly, the burden shifts to plaintiff to raise a triable issue of fact in this

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[7]In seeking dismissal of plaintiff's claims against Delphic, the Eng defendants note that plaintiffs seek to hold it vicariously liable for the actions of Dr. Eng. Thus, the Eng defendants argue that, inasmuch as there is no basis for plaintiff's claims against Dr. Eng, the complaint must be dismissed against Delphic as well.

regard.

Plaintiff has not met this burden. Although plaintiff's experts maintain that "a referral to a specialist in oncology would have permitted proper evaluation," the experts do not cite to any evidence that referral to a gastroenternologist like Dr. Gusset, with significant experience in treating patients with colon cancer both before and after surgery, would not have allowed for the appropriate monitoring and evaluation. Nor do plaintiff's experts point to any specific studies or guidelines in support of their opinion. Further, the contention of plaintiff's experts that referral to an oncologist would have resulted in proper diagnostic testing, which would have led to earlier detection of the metastasis, is based upon "assumptions not supported by facts in the record" (*Shahid v New York City Health & Hosp. Corp.*, 47 AD3d 800 [2008]). Accordingly, plaintiff fails to raise an issue of fact regarding whether Dr. Eng departed from appropriate standards of care by referring decedent to Dr. Gusset rather than to an oncologist.[8]

Finally, plaintiff claims that Dr. Eng deviated from accepted standards of care in his postoperative treatment of decedent. Drs. Grossbard and Corman affirm that decedent's follow-up visits with Dr. Eng were unremarkable and that Dr. Eng was not required to order or to perform diagnostic testing. Drs. Grossbard and Corman also indicate that it was proper and within accepted medical standards for Dr. Eng to merely check that decedent's surgical

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[8]In so ruling, the court concludes that plaintiff has not demonstrated that the failure to refer decedent to an oncologist, in and of itself, constitutes a departure from accepted standards. However, there remains an issue of fact as to whether Dr. Eng should have recommended chemotherapy. Thus, to the extent that chemotherapy would have been performed by an oncologist, the failure to refer decedent to an oncologist is intertwined with plaintiff's claim regarding the failure to recommend postoperative chemotherapy.

wounds were healing and to feel for any mass or abnormality, in that Dr. Gusset had undertaken responsibility for postoperative monitoring for cancer recurrence. Accordingly, the burden shifts to plaintiff to raise a triable issue of fact regarding Dr. Eng's post-operative care.

Plaintiff fails to meet this burden. While plaintiff's experts focus upon the fact that Dr. Eng did not order diagnostic tests to monitor for recurrence of cancer, they ignore the fact that Dr. Gusset had assumed responsibility for performing these tests and for monitoring the decedent. Indeed, Dr. Gusset testified accordingly. It is well-settled that a physician may not be held liable for failing to fulfill a duty of care which he or she did not assume in the first instance (*Yasin v Manhattan Eye, Ear & Throat Hosp.*, 254 AD2d 281, 282 [1998]). Moreover, there is no evidence that Dr. Eng and Dr. Gusset assumed joint responsibility for diagnostic testing (*cf. Mandel v New York County Pub. Admin.*, 29 AD3d 869, 871 [2006]). Finally, Dr. Eng's uncontroverted deposition testimony indicates that he was not advised by decedent or Dr. Gusset that decedent did not keep his appointments with Dr. Gusset (after October 2002).

Finally, with respect to plaintiff's lack of informed consent cause of action, it is claimed that Dr. Eng failed to discuss the benefits of adjuvant therapy with decedent. However, a lack of informed consent claim is premised upon a physician performing a medical procedure upon a patient without first disclosing the material risks, benefits and alternatives to the contemplated operation or procedure, and obtaining the patient's informed consent (*Rodriguez v New York City Health & Hosp. Corp.*, 50 AD3d 464 [2008]). Here, the

procedure in question - *to wit,* chemotherapy - was never performed. Thus, there is no basis for plaintiff's lack of informed consent claim (*see* Pub. Health L. §2805-d; *Hecht v Kaplan*, 221 AD2d 100, 103 [1996]). Moreover, "some unconsented – to affirmative violation of plaintiff's physical integrity" is required (*id.*).

The claims against Dr. Gusset are similar to those asserted against the Eng defendants. In particular, plaintiff alleges that Dr. Gusset deviated from accepted standards in failing to (1) recommend that decedent receive post-operative chemotherapy, (2) refer decedent to an oncologist, and (3) adequately monitor decedent for the recurrence of cancer, including ordering appropriate diagnostic tests.

With respect to plaintiff's claim that Dr. Gusset should have recommended that decedent receive chemotherapy, Dr. Gusset relies upon the expert affirmations offered by the Eng defendants. Accordingly, dismissal of this claim is denied for the reasons set forth with respect to Dr. Eng.

As to plaintiff's claim that Dr. Gusset failed to properly monitor decedent for the recurrence of cancer, Dr. Gusset has failed to make a *prima facie* showing that his treatment in this regard was within accepted medical standards or that any deviation was not a proximate cause of decedent's injuries. Dr. Gusset relies upon the decedent's failure to keep appointments beginning approximately five months following the operation, and his return visit to Dr. Gusset once his cancer had reoccurred and was incurable. With respect to the initial five months following the operation, Dr. Gusset relies upon the affirmation of Dr. Fabry who states:

> "I do not believe that Dr. Gusset was negligent in failing to order a blood test known as a CEA or in not performing a repeat colonoscopy within the first five (5) months after the resection. There was no established standard in 2002 as to the indicated timing of these tests after a curative resection of Stage II colon cancer. However, Dr. Gusset's plan, as stated at his deposition, was to obtain them one (1) year after the resection was reasonable and proper."

However, when deposed Dr. Gusset testified that depending on the patient's symptoms diagnostic testing, including blood tests, CT scans and colonoscopies, might need to be performed earlier than one year post-surgery. Dr. Fabry renders no opinion as to whether decedent's reported symptoms on August 1, 2002 (weakness and constipation), September 3, 2002 (abdominal pain and weakness) and/or September 20, 2002 (swollen right testicle) required evaluation in advance of one year.

In any event, plaintiff's submissions raise issues of fact in this regard. Plaintiff's oncologist affirms that:

> "On September 3, 2002, [decedent] presented to Dr. Gusset's office with complaints of upper abdominal pain, generalized weakness and malaise. Additionally, blood studies showed him to be anemic with an elevation in his erythrocyte sedimentation rate (ESR). Elevation of the ESR and anemia are strongly associated with serious underlying disease, most often infection, collagen vascular disease or metastatic malignancy. At this point a complete history, physical exam, CEA, liver-function test, fecal occult-blood tests and possibly a CT scan was required to rule out recurrence and metastasis of the primary cancer."

Thus, the trier of fact could conclude that Dr. Gusset's failure to order diagnostic testing, given plaintiff's symptoms, was a departure from accepted standards (*Schaub v Cooper*, 34

AD3d 268, 271 [2006]).[9] In addition, plaintiff's oncologist affirms that this departure was a proximate cause of injury to decedent in that it delayed diagnosis of decedent's cancer until it was at its terminal stage. The expert avers that "[decedent] lost his best chance of survival as his prognosis was significantly altered."

Finally, to the extent that plaintiff maintains that Dr. Gusset departed by failing to refer decedent to an oncologist and by failing to obtain decedent's informed consent, these claims are dismissed for the reasons stated with respect to Dr. Eng. Accordingly, it is

ORDERED, that (1) the branch of the Eng defendant's motion for summary judgment as seeks dismissal of plaintiff's complaint against NYU is granted; (2) that branch of the motion which seeks dismissal of plaintiff's malpractice action against Dr. Eng and Delphic is granted to the extent that the action is based upon (a) the failure to refer decedent to an oncologist, (b) the failure to properly monitor decedent for the recurrence of cancer, and (c) the failure to obtain the decedent's informed consent; and (3) that branch of the motion which seeks dismissal of plaintiff's malpractice action against Dr. Eng and Delphic is denied to the extent that the action is based upon the failure to recommend that decedent undergo postoperative chemotherapy; and (4) the motion is otherwise denied; and it is further

ORDERED, that (1) the branch of the cross-motion of Dr. Gusset for summary judgment as seeks dismissal of plaintiff's malpractice action against him is granted to the extent that the action is based upon (a) the failure to refer decedent to an oncologist and

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[9]There is no merit to Dr. Gusset's claim that, inasmuch as plaintiff's bill of particulars failed to specifically identify the CEA test as one of the diagnostic tests Dr. Gusset should have performed, she is precluded from raising this test in her opposition papers.

(b) the failure to obtain the decedent's informed consent; and (2) the cross-motion is denied to the extent that it is based upon (a) the failure to recommend that decedent undergo postoperative chemotherapy and (b) the failure to properly monitor decedent for the recurrence of cancer; and it is further

ORDERED, that the caption is amended to read as follows:[10]

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SHAVON ELLIS, INDIVIDUALLY and AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL ELLIS, DECEASED,

Plaintiff,

INDEX NO. 13209/05

- against -

KENNETH ENG, M.D., DELPHIC SURGICAL ASSOCIATES, P.C., GEORGE GUSSET, M.D., and UNIVERSITY UROLOGY ASSOCIATES, INC.,

Defendants.

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; and it is further

ORDERED, that the parties are to appear in the Central Compliance Part on October 20, 2008 at 9:30 a.m., at which time a Note of Issue date will be scheduled.

E N T E R,

J. S. C.

HON. GLORIA DABIRI

[10]Stipulations of discontinuance, with prejudice, as to defendants Beth Israel Medical Center and Continuum Health Partners, Inc., dated September 28, 2007, were filed with the court on October 22, 2007.