SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

GARY DAVIS, as Executor of the Estate of WILLIAM GRAHAM, Deceased, and as Executor of the Estate of GEORGIA GRAHAM, Deceased,

Plaintiff(s),

- against -

CARDIOVASCULAR CONSULTANTS OF LONG ISLAND, P.C., ALAN B. COHEN, MD, BRUCE M. DECTER, MD, DAVID A. HESS, MD, THE INTERVENTIONAL HEART GROUP, RICHARD A. SHLOFMITZ, MD and THEOFANIS TSIAMTSIOURUS, MD,

Defendant(s).

TRIAL/IAS PART 8

INDEX NO. 15626/04

MOTION SEQUENCE NO. 3 & 4 & 5 & 6

MOTION SUBMISSION DATE: April 17, 2009

The following papers read on this motion:

Notice of Motion	**XXXX**
Affirmation in Opposition	**X**
Reply	**X**

Upon the foregoing papers, this motion by defendant Alan B. Cohen, M.D. for an Order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him is **granted** without opposition.

This cross-motion by defendant David A. Hess, M.D. for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him, is **granted**.

This cross-motion by defendant Bruce M. Decter, M.D. for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him, is **denied**.

This cross-motion by defendant Cardiovascular Consultants of Long Island, P.C., for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it. is **denied**.

This is an action to recover damages for medical malpractice and wrongful death. Succinctly put, the plaintiff alleges that the defendants acted negligently in discontinuing Plavix in response to the decedent

William Graham's rash which caused Graham to suffer a heart attack. All of the defendants seek summary judgment dismissing the complaint.

"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, 521 (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 the injury." **Hernandez v Hochman**, 56 AD3d 427, 428 (2nd Dept. 2008) citing **Roca v Perel**, 51 AD3d 757 (2008); **DiMitri v Monsouri**, 302 AD2d 420, 421 (2003). "In a medical malpractice action, a plaintiff must prove that there was a deviation or a departure from good and accepted practice and that such departure or deviation was a proximate cause of injury or damage." **Luu v Paskowski**, 57 AD3d 856 (2nd Dept. 2008), citing **Myers v Ferrara**, 56 AD3d 78 (2nd Dept. 2008). In contrast, "[o]n a motion for summary judgment dismissing the complaint, a defendant physician has the burden of establishing the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby." **LUU v Paskowski**, supra, citing **Rebozo v Willen**, 41 AD3d 457, 458 (2nd Dept. 2007); **Thompson v Orner**, 36 AD3d 791, 791-792 (2nd Dept. 2007); **Taylor Nyack Hosp.**, 18 AD3d 537, 538 (2nd Dept. 2005); **Alvarez v Prospect Hosp.**, 68 NY2d 320, 324 (1986). If the defendant meets his burden, "a plaintiff must submit the affidavit of a physician attesting to a departure from good and accepted practice, and stating the physician's opinion that the alleged departure was a competent producing cause of the plaintiff's injuries." **Luu v Paskowski**, supra, citing **Rebozo v Wilen**, supra, at p. 458; **Thompson v Orner**, supra, at p. 792; **Taylor v Nyack Hosp.**, supra, at p. 538; **Domaradzki v Glen Cove Ob/Gyn Assoc.**, 242 AD2d 282 (2nd Dept. 1997). "[A]n expert's affidavit containing general allegations of medical malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical malpractice" does not suffice. **Luu v Paskowski**, supra, citing **Alvarez v Prospect Hosp.**, supra, at p. 324-325; **Rebozo v Wilen,** supra, at p. 458-459; **Thompson v Orner**, supra, at p. 792; **Furey v Kraft**, 27 AD3d 416, 418 (2nd Dept. 2006), lv den., 7 NY3d 703 (2006); **Taylor v Nyack Hosp.**, supra, at p. 538.

"To establish proximate cause, the plaintiff must present 'sufficient evidence from which a reasonable person might conclude that it was more probable than not that' the defendant's deviation was a substantial factor in causing the injury." **Alicea v Liguori**, 54 AD3d 784, 785 (2nd Dept. 2008), quoting., 21 AD3d 881, 883 (2nd Dept. 2005); citing **Holton v Sprain Brook Manor Nursing Home**, 253 AD2d 852 (2nd Dept. 1998), lv to app den. 92 NY2d 818 (1999). "Consequently, on a motion for summary judgment in a medical malpractice case, the defendant physician must come forward with evidence in admissible form establishing, prima facie, either that he or she did not deviate from good and accepted medical practice, or that, if there was such a departure, it was not a proximate cause of the plaintiff's injuries." **Myers v Ferrara**, supra, at p. 83, citing **Germaine v Yu**, 49 AD3d 685, 686 (2nd Dept. 2008); **Rebozo v Wilen**, supra, at p. 458; **Williams v Sahay**, 12 AD3d 366, 368 (2nd Dept. 2004). In evaluating whether proximate cause has been established, " '[t]he plaintiff's evidence may be deemed legally sufficient even if his expert cannot quantify the extent to

which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased [the] injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury.' " **Alicea v Liguori**, supra, at p. 786, quoting **Flaherty v Fromberg**, 46 AD3d 743, 743 (2nd Dept. 2007); citing **Barbuto v Winthrop University Hosp.**, 305 AD2d 623, 624 (2nd Dept. 2003); **Wong v Tang**, 2 AD3d 840, 841 (2nd Dept. 2003); **Jump v Facelle**, 275 AD2d 345, 346 (2nd Dept. 2000), lv dism., 95 NY2d 931 (2000), lv den., 98 NY2d 612 (2002).

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions . . . . Such credibility issues can only be resolved by a jury." **Feinberg v Feit**, 23 AD3d 517, 519 (2nd Dept. 2005), citing **Shields v Baktidy**, 11 AD3d 671 (2nd Dept. 2004); **Barbuto v Winthrop University Hosp.**, supra; **Halkias v Otolaryngology-Facial Plastic Surgery Assoc.**, 282 AD2d 650 (2nd Dept. 2001); see also, **Roca v Perel**, supra; **Graham v Mitchell**, 37 AD3d 408 (2nd Dept. 2007).

The pertinent facts are as follows:

Graham was treated at Cardiovascular Consultants from 1992 on, primarily by Dr. Cohen and Dr. Hess, board certified internists and cardiovascular doctors . During that time, Graham suffered from hypertension, diabetes, elevated cholesterol, a myocardial infarction in 1992, coronary artery bypass grafts in 1992 and transient ischemic attacks in 1997. Graham was admitted to St. Francis Hospital on April 15, 2003 following his second heart attack where he was cared for by Dr. Shlofmitz, an Interventional Cardiologist. Graham underwent cardiac catheterization, angioplasty and insertion of coronary artery stents, for which Dr. Shlofmitz prescribed the antiplatelet medication Plavix which is administered to reduce the risk of coronary artery stent occlusion. While at St. Francis, Graham received 300 milligrams of Plavix on April 16, 2003 and 75 milligrams on April 17th and April 18th, on which day he was discharged. On April 19th, Graham took his prescribed medications including Plavix at about 6:00 AM. He or his wife spoke with defendant Dr. Hess on the telephone later that day and related that Graham was suffering from a rash. Dr. Hess instructed him to take Benadryl but to continue taking the Plavix each day, which he did. On April 22nd, Graham's rash was not improving and so that morning, he did not take his medications and he went to see the defendant Dr. Dechter at Cardiovascular Consultant's office at about 10:00 AM. Dr. Decter believed that the Plavix was causing Graham's rash and so he instructed him to stop taking it. Graham went home and took all of his medications–except Plavix. Later that day at approximately 9:30 PM, Graham was admitted to New Island Hospital and transferred to St. Francis Hospital having suffered another heart attack at approximately 9:00 PM.

In support of his motion, the defendant Dr. Cohen affirms that he was away on a family vacation from April 16, 2003 until April 29, 2003, and so he did not treat Graham at all during that time. In fact, he had no contact with anyone from Cardiovascular Consultants and played no role in Graham's administration or discontinuance of Plavix. Dr. Cohen has established his entitlement to summary judgment thereby shifting the burden to plaintiff to establish the existence of a material issue of fact. The plaintiff has not opposed Dr. Cohen's application. Dr. Cohen is granted summary judgment and the complaint against him, is **dismissed**.

The defendant Dr. Hess affirms and it is not disputed that Dr. Shlofmitz prescribed Plavix and ordered it continued upon Graham's discharge from St. Francis on April 18, 2003. Dr. Hess affirms that he was the covering doctor for Cardiovascular Consultants the weekend following Graham's discharge and that when he spoke with the Grahams via telephone on April 19, 2003 and was told about Graham's rash, he was told that Graham was not suffering from a swollen tongue, breathing problems or chest pains and so he instructed him to take Benadryl and to go to the emergency room if his rash got worse or he experienced

any of those exacerbating conditions. Dr. Hess also instructed Graham to come to Cardiovascular Consultant's office on Monday, April 21st, to be examined. Dr. Hess acknowledges that he did put a note in Graham's file to consider discontinuing Plavix because he believed that Plavix was the most likely offending agent in the development of Graham's rash. Dr. Hess affirms that it is his medical opinion that Plavix should not be discontinued unless the patient is examined by a doctor and that his prescription of Benadryl and continuance of Plavix was medically appropriate under the circumstances. Dr. Hess also notes that Graham in fact took Plavix on April 19th, 20th and 21st, and that it was Dr. Decter that discontinued Graham's Plavix. Dr. Hess has also established his entitlement to summary judgment thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact.

The plaintiff has not met his burden. While his attorney alleges that Dr. Hess should have advised Graham "to go to the hospital immediately so that his condition could be assessed, especially given the fact that he was just discharged from the hospital," his attorney's affirmation cannot be relied upon to establish the existence of a material issue of fact as to whether Dr. Hess committed medical malpractice. **Zuckerman v City of New York**, 49 NY2d 557 (1980). Dr. Hess' motion for summary judgment dismissing the complaint against him, is **granted**.

In support of his motion, Dr. Decter, a board certified cardiovascular doctor and nuclear cardiologist, acknowledges that his examination of Graham led him to believe that the Plavix was causing his rash, that Benadryl had not provided him any relief and so he advised him to discontinue Plavix. Dr. Decter explains that he "was concerned about the lack of improvement in Mr. Graham's severe skin rash despite the Benadryl [because] [a] severe skin rash like the one Mr. Graham had can lead to a number of serious conditions such as swelling of the tongue, difficulty breathing, anaphylactic shock and death." Dr. Decter opines that since Graham suffered a heart attack at about 9:00 PM on April 22, 2003, the date he discontinued Plavix, theoretically, Graham could still have taken Plavix that day because three hours remained and so he opines that the discontinuance of Plavix, standing alone, did not cause Graham's heart attack. Dr. Decter further opines that since Graham had taken Plavix for six days prior to his heart attack, he still had a significant antiplatelet effect and so "it is very unlikely that the taking of one additional dose of Plavix on April 22, 2003 would have prevented the heart attack on April 22, 2003." Dr. Decter further opines that "it is absolute speculation to say that 1 additional dose of Plavix on [April 22, 2005] prior to 9 PM would have prevented the . . . heart attack" and that "it is speculation to say that a 7th dose of Plavix would have prevented the 4/22/03 heart attack while 6 doses could not." Dr. Decter further explains that stent occlusion does not occur from only platelet aggregation; stents can occlude even when Plavix is taken. He concludes "[i]t is very unlikely that Mr. Graham's failure to take one daily dose of Plavix in the morning or afternoon of Tuesday April 22, 2003 was a substantial factor in causing Mr. Graham's coronary artery stent occlusion and heart attack on the evening of April 22, 2003."

Dr. Decter has not met his burden of establishing his entitlement to summary judgment. Not only has Dr. Decter failed to establish that his discontinuance of Plavix was medically appropriate under the circumstances, his conclusory assertion that it is "very unlikely" that the discontinuance of Plavix was the proximate cause of Graham's heart attack does not as a matter of law establish the lack of proximate cause. See, **Francis v Mishra**, 60 AD3d 806 (2nd Dept. 2009); see also, **Stilloe v Contini**, 213 AD2d 815 (3rd Dept. 1995). Furthermore, Dr. Decter has premised his opinion on the fact that Graham could still have taken his Plavix later that day. Dr. Decter has in fact failed to address the fact that Graham typically took his medications at 6:00 AM; therefore, he had not simply delayed a dose of Plavix but had gone without it for some 39 hours from approximately 6:00 AM on April 21st until approximately 9:00 PM on April 22nd when he suffered his third heart attack. Dr. Decter's failure to address that pivotal fact is fatal. See, **Larsen v Loychusuk**, 55 AD3d 560 (2nd Dept. 2008); **Kuri v Phattacharya**, 44 AD3d 718 (2nd Dept. 2007).

In view of its vicarious liability for the acts of its employees, Cardiovascular Consultant's motion for summary judgment must also be denied. Lopez v Master, 60 AD3d 425 (1st Dept. 2009), citing **Magriz v St. Barnabas Hosp.**, 43 AD3d 331 (1st Dept. 2007); lv den. 10 NY3d 790 (2008); **Bertini v Columbia Presbyt. Med. Ctr.**, 279 AD2d 492 (2nd Dept. 2001).

SO ORDERED.

DATED: 5/4/2009

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J.S.C.

ENTERED

MAY 07 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE