

Bellafiore v Ricotta

2009 NY Slip Op 33372(U)

August 21, 2009

Supreme Court, Suffolk County

Docket Number: 03-21074

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 12-17-08 (#003 & #004)

MOTION DATE 12-23-08 (#005)

ADJ. DATE 6-24-09

Mot. Seq. # 003 - MG

004 - MG

005 - MotD

-----X
KAREN BELLAFFIORE, as Administratrix of the :
Estate of DOMINIC BELLAFFIORE, deceased, :
and KAREN BELLAFFIORE, individually, :
: :
Plaintiff, :
: :
- against - :
: :
JOHN JOSEPH RICOTTA, M.D., UNIVERSITY :
PHYSICIANS AT STONY BROOK, P.C., STONY :
BROOK SURGICAL ASSOCIATES, P.C., :
DANIEL JAY CHAR, M.D., DENISE ORTEGA, :
M.D., RISHIMANI S. ADSUMELLI, M.D., PAUL :
HENRY WILLOUGHBY, M.D., MOHAMMED :
ALAM, M.D., JUNGYOP KIM, M.D., ROBERT :
G. PEYSTER, M.D., and MICHAEL B. :
WEISSMAN, M.D., :
Defendants. :
-----X

KRAMER, DILLOF, LIVINGSTON, et al.

Attorneys for Plaintiff

217 Broadway, 10th Floor

New York, New York 10007

BROWN & TARANTINO, LLC

Attorneys for Defendants Ricotta, University

Physicians at Stony Brook, Stony Brook Surgical

Associates, Adsumelli, Willoughby, Peyster & Kim

White Plains Plaza, One North Broadway, 10th Floor

White Plains, New York 10601

ANDREW CUOMO, ESQ., Attorney General

By: Bridget E. Farrell, Esq.

Attorneys for Defendants Char, Ortega & Alam

120 Broadway

New York, New York 10271

GEISLER & GABRIELE, LLP

Attorneys for Defendant Weissman

10 Quentin Roosevelt Blvd., P.O. Box 8022

Garden City, New York 11530

Upon the following papers numbered 1 to 33 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6; 7 - 10; 11 - 18; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 19 - 21; Replying Affidavits and supporting papers 22 - 26; 27 - 28; 29 - 30; 31 - 33; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (003) by defendants Daniel Jay Char, M.D., Denise Ortega-Sanderson, M.D, s/h/a Denise Ortega, M.D., and Mohammed Alam, M.D., for an order granting summary judgment dismissing the action is granted; and it is further

ORDERED that the motion (004) by Michael Weissman, M.D. for an order granting summary judgment dismissing the action is granted; and it is further

ORDERED that the motion (005) by John Joseph Ricotta, M.D., University Physicians at Stony Brook P.C., Stony Brook Surgical Associates, P.C., Rishimani S. Adsumelli, M.D., Paul Henry Willoughby, M.D., Robert G. Peyster, M.D. and Jungyop Kim, M.D. for an order granting summary judgment dismissing the action is granted to the extent that the action is dismissed as against defendants Peyster and Kim.

In this medical malpractice and wrongful death action, plaintiff, Karen Bellafigliore, as administratrix of the estate of Dominic Bellafigliore, deceased, and individually, alleges that defendants departed from accepted standards of medical care of the decedent during 2001 and 2002. The gravamen of the complaint is that defendants departed from accepted standards of medical care by their failure to timely diagnose a pituitary tumor. Plaintiff alleges that as a result of the alleged malpractice that her decedent sustained adult respiratory distress syndrome ("ARDS"), pulmonary edema, sepsis, respiratory failure, fluid overload, shock, prolonged mechanical ventilation, multiple organ failure, pain and suffering, and death.

In the bill of particulars, plaintiff alleges that defendants failed to take a proper history, failed to review prior diagnostic films and become aware of a mass in decedent's brain on a chromotomographic ("CT") scan performed in March, 2001, failed to appreciate the significance of a post operative infection, improperly caused decedent to suffer from ARDS, failed to treat ARDS, failed to properly diagnose a massive fluid overload, and failed to properly measure and document changes in decedent's weight, input and output. Defendants, Daniel Jay Char, M.D., Denise Ortega-Sanderson, M.D., and Mohammed Alam, M.D., move for summary judgment. Defendant Michael Weissman, M.D. also moves for summary judgment dismissing the complaint. Defendants John Joseph Ricotta, M.D., University Physicians at Stony Brook, P.C., Stony Brook Surgical Associates, P.C., Rishimani S. Adsumelli, M.D., Paul Henry Willoughby, M.D., Robert G. Peyster, M.D., and Jungyop Kim, M.D. (hereinafter referred to as "the Ricotta defendants") also move for summary judgment dismissing the action.

The record reveals that decedent presented to his internist, defendant Weissman in March, 2001 with high blood pressure. On March 22, 2001, decedent was admitted to Stony Brook University Medical Center ("Stony Brook"). Defendants Kim, an internal medicine specialist, and Peyster, a radiologist, provided decedent's care and interpreted several radiological studies. Upon discharge on March 25, 2001, decedent was instructed to return to the Stony Brook clinic, however, decedent instead returned to defendant Weissman. Plaintiff presented to non-party Dr. Ralph Barbato, a nephrologist, and defendant Ricotta, a surgeon, who diagnosed decedent with impeded vascular flow of blood to the kidneys and advised a renal artery bypass. The surgery took place on February 13, 2002 and was performed by defendant Ricotta, who was assisted by defendants Char and Ortega. Defendant Adsumelli was the anesthesiologist during the surgery. A second surgery also took place on the same day to investigate signs of bleeding, which was performed by defendant Ricotta, who was assisted by defendant Char. Defendant Willoughby was the anesthesiologist.

The record further reveals that while in the Anesthesia Intensive Care Unit ("AICU"), also known as the recovery room, both defendants Adsumelli and Willoughby managed decedent's care. On February 14, decedent was transferred from the AICU to the surgical intensive care unit ("SICU") and on February 24,

decedent was transferred from SICU to the medical intensive care unit ("MICU"). The decedent developed an infection and was seen by defendant Alam and non-party Dr. Jack Fuhrer. In addition, chest x-rays revealed diffuse patchy densities throughout both lungs, consistent with ARDS. Further CT and magnetic resonance imaging ("MRI") studies performed in May, 2002, revealed a pituitary gland tumor. Decedent remained on the ventilator from the second surgery until his death on May 16, 2002.

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]; *De Stefano v Immerman*, 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]). The issue of the duty owed as between physicians, and, ultimately, to the patient, is a question of law (*Lipton by Lipton v Kaye*, 214 AD2d 319, 624 NYS2d 590 [1st Dept 1995]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v N.Y. University Medical Center*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 165 NYS2d 498 [1957]). A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (*Soto v Andaz*, 8 AD3d 470, 779 NYS2d 104 [2d Dept 2004]).

Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v New York, supra*). In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (*Fileccia v Massapequa General Hospital*, 63 NY2d 639, 479 NYS2d 520 [1984]; *Neuman v Greenstein*, 99 AD2d 1018, 473 NYS2d 806 [1st Dept 1984]). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]).

In support of their motion for summary judgment, defenants Char, Ortega, and Alam submit, inter alia, the pleadings, bill of particulars, the deposition transcripts of defendants Ricotta, Char, Ortega, and Alam, and affirmations by Larry A. Scher, M.D. and Bruce Ferederick Farber, M.D. Defendants contend that they did not depart from accepted standards of medical care inasmuch as they were residents in training at Stony Brook and did not make independent decisions regarding decedent's care.

Defendant Ricotta testified that he is licensed to practice medicine in the State of New York and is the Chair of the Department of Surgery at Stony Brook. He is board certified in surgery and vascular surgery. He stated that he is employed by the State of New York and is employed by the professional corporation of the faculty, the Stony Brook Surgical Associates, P.C., which includes all full-time members of the faculty in the department. He performed the surgery on February 13, 2002. He stated that decedent had significant hypertension of relatively recent onset. He stated that decedent's blood pressure could be

controlled with a bypass from the aorta to the left renal artery, which would also improve renal function. During the surgery, defendant Ricotta found dissection of the layers of the walls of the artery, making it unstable. He repaired the abnormality by placing a piece of saphenous vein from the aorta to the renal artery distal to the abnormality to reestablish a normal blood flow to the kidney.

Defendant Ricotta stated that he was willing to perform the surgery because decedent appeared to be in good health. The reason for the surgery was to preserve the function of the left kidney. A renal scan showed 80% of the blood flow to the right kidney and only 20% to the left kidney. His diagnosis of the cause for the high blood pressure was left renal artery stenosis and fibromuscular dysplasia. Defendant stated that he did not know that decedent had a pituitary adenoma at the time of the surgery. He further stated that decedent had a difficult post operative course due to respiratory problems which could not be reversed, however, the kidneys functioned well after surgery. He stated that defendants Char and Ortega worked under his supervision and made no independent decisions regarding decedent's care. After decedent was transferred to MICU, he and his team acted as surgical consultants inasmuch as decedent was surgically cleared.

Defendant Char testified that he is licensed to practice medicine in the State of New York. At the time that decedent was a patient at Stony Brook he was a fellow in vascular surgery. He is board certified in general and vascular surgery. During both of decedent's surgeries he was the assistant surgeon and he was responsible for exposing, retracting, cutting, suturing, and suctioning at the instruction of the chief surgeon, defendant Ricotta. He did not see decedent after he transferred to MICU.

Defendant Ortega testified that she is licensed to practice medicine in the State of New York. In 2002, she was a surgical resident at Stony Brook. She was the second assisting surgeon during decedent's first surgery on February 13, 2002. She was responsible for retraction during the operation under the supervision of defendant Ricotta. The notes that she wrote in decedent's hospital chart were obtained from the vascular surgery team's assessments. She did not make independent decisions for the decedent's care. She was unaware that decedent had a pituitary lesion.

Defendant Alam testified that he is licensed to practice medicine in the State of New York. He was an infectious disease fellow in 2002 at the time of decedent's admission to Stony Brook. He is board certified in internal medicine. He stated that he was under the supervision of the attending physician and in a training program. Whatever he ordered or performed he discussed first with his supervising attending physician and made no independent decisions for decedent's care.

In support of the request for summary judgment by defendants Char and Ortega, Dr. Scher avers that he is licensed to practice medicine in the State of New York. He is board certified in surgery and vascular surgery. He opines that the care rendered by defendants Char and Ortega was within good and accepted standards of medicine and surgery. He further states that defendants Char and Ortega made no independent decisions and at all times were supervised by attending physicians and those physicians directed the care and treatment of the decedent. Dr. Scher noted from the medical record that none of the defendants saw decedent during the first hospitalization in 2001. He noted that defendant Char did not see the decedent after February 28, 2002. In addition, he stated that defendants Char and Ortega never saw the decedent outside the presence of the attending physicians. Defendants could suggest treatment but could not order the treatment because the SICU and MICU teams made all the ultimate decisions and defendants acted as

consultants.

In support of defendant Alam's motion for summary judgment, Dr. Farber avers that he is a physician licensed to practice medicine in the State of New York. He is board certified in internal medicine and infectious diseases. It is his opinion that the care rendered by defendant Alam was within good and standard practice of medicine. The medical record revealed that defendant Alam was a physician in training as a first year fellow in the sub-specialty of internal medicine known as infectious diseases. All of defendant Alam's proposed treatment of any patient was directly supervised by various attending physicians. No independent decisions were made by Alam. When called for a consultation, both defendant Alam and the attending physician responded and made suggestions to the MICU staff. The infectious disease team was consulted at a point when decedent was critically ill and consistently looked for sources of infections, reviewed the antibiotic coverage, checked the cultures and monitored the intravenous lines to stem the infections. Dr. Farber opines that decedent did not die as a result of any infectious disease team failures but rather of multi-organ failure which was unrelated to the infectious disease team's involvement in decedent's care. Dr. Farber also opined to a reasonable degree of medical certainty that there was no evidence that defendant Alam committed any independent acts of negligence at any time and that his conduct fully comported with accepted standards of medical care.

In support of his motion for summary judgment, defendant Weissman submits, among other things, the bill of particulars, his deposition transcript and the affirmation of Lionel P. Barrau, M.D. By way of the bill of particulars, plaintiff alleges that defendant Weissman departed from accepted standards of medical care between March 22, 2001 and February 12, 2002, by his failure to take a proper history, his failure to timely and properly appreciate the decedent's complaints of headaches and his elevated prolactin level which plaintiff alleges is indicative of a pituitary problem, his failure to properly communicate with radiologists or other specialists in the reading, analyzing and interpreting on pertinent diagnostic tests and his failure to request a re-interpretation of the head CT scan, and in causing a delay in the diagnosis and treatment of decedent's renal artery stenosis.

Defendant Weissman testified that he is licensed in the State of New York. He stated that he treated decedent from 1999 through 2001. He did not treat decedent while he was a patient in Stony Brook. He treated decedent for high blood pressure. He was unaware that decedent was later diagnosed with a pituitary tumor and, if he had known, he would have referred decedent to an endocrinologist.

Dr. Barrau avers that he is licensed to practice medicine in the State of New York. He is board certified in internal medicine and nephrology. It is his opinion that defendant Weissman did not depart from accepted standards of medical care in the treatment rendered to plaintiff's decedent and that the care and treatment rendered by defendant Weissman was not the proximate cause of any injuries allegedly sustained by decedent. Although plaintiff alleges that defendant failed to timely diagnose a prolactinoma, a tumor of the pituitary gland that produces a hormone called prolactin, during the treatment provided by defendant, decedent showed no manifestation of elevated prolactin levels, such as enlarged breasts, prolactin secretion from the nipples, or visual disturbances. None of these symptoms were reported in defendant's office chart. In addition, with regard to plaintiff's allegation that decedent's complaints of headaches were linked to a pituitary tumor, Dr. Barrau opines that headaches are usually associated with hypertension and not with a pituitary tumor. The expert also states that defendant was not negligent in failing to request a re-interpretation of the CT scan of the head performed in March 2001, inasmuch as the

standard of care is for defendant to rely upon the expert opinion of the radiologist who interpreted the scan, which was negative. In addition, defendant Weissman did not participate in decedent's treatment while he was a patient in Stony Brook.

In support of their motion for summary judgment, the Ricotta defendants submit, inter alia, an affirmation by Jeffrey Spencer, M.D., and affidavits of defendants Ricotta, Kim, and Peyster. Dr. Spencer avers that he is duly licensed to practice medicine in the State of New York and is board certified in anesthesiology. It is his opinion that defendants Adsumelli and Willoughby acted in accord with good and accepted anesthesiology practice in their care and treatment of decedent and that the medical condition/complications sustained by decedent were not caused by medical negligence by any of the defendant physicians or medical groups. He states that defendants properly informed decedent regarding the risks of surgery. They also properly obtained a history from decedent to determine that he was a good candidate for anesthesia. He states that at no time prior to the surgery of February 13, 2002 was a diagnosis of a pituitary adenoma made available to any of the medical providers including defendants Adsumelli and Willoughby. Regardless, it is his opinion that the pituitary adenoma in no way contributed to the acute events of February 13, 2002, and thereafter, during which time decedent developed ARDS.

Dr. Spencer states that fluid overload does not cause ARDS. In addition, there is an insensible fluid loss which occurs during surgery through the open abdomen which is determined by a mathematical formula. However, the administration of blood products in response to decreased hemoglobin and hematocrit may have caused decedent to react to the blood, thereby contributing to an injury to the lungs resulting in ARDS. In addition, a systemic inflammation may have caused ARDS. Thus, Dr. Spencer opines that decedent sustained an unintended and unavoidable complication in the administration of the blood or inflammation, which resulted in ARDS. He opined that defendants Adsumelli and Willoughby did not depart from accepted standards of anesthesiologic care during the surgeries on February 13, 2002, in AICU and in SICU.

Defendant Ricotta, in his personal affidavit, avers that he is a physician duly licensed to practice medicine in the State of New York and is board certified in general surgery and vascular surgery. He concurs with the above opinion of Dr. Spencer. He states that decedent was referred to him by his nephrologist, Dr. Barbato. After reviewing scans of the kidneys, defendant advised a renal artery bypass to increase the blood flow to the left kidney which would reduce the blood pressure and improve the flow of blood to the kidney. Decedent consented to the procedure and was admitted to Stony Brook for a pre-surgical evaluation and was cleared for surgery. He states that the surgery was performed appropriately and without complication. He inspected the bypass and found no bleeding prior to closing the abdomen. He saw decedent in AICU, and worked with defendants Adsumelli and Willoughby in decedent's post operative care. After noting a decreased blood count, Ricotta discussed the need for exploratory surgery with decedent and with his consent, he returned decedent to the operating room to assess new bleeding, and found none.

Defendant Ricotta opines that decedent did not sustain a lung injury as a result of the amount of fluid administered to him. Once decedent was transferred to SICU, and subsequently transferred to MICU, he and his surgical team acted as consultants. Decedent's fluid management was primarily a function of the SICU attending physician and nursing staff. He disagrees that the fluid management in the SICU was a departure from good and accepted medical practice. He further states that prior to the surgery he was not

aware that there was a consideration of a pituitary adenoma. Nevertheless, it is his opinion that the pituitary adenoma was not a substantial factor in the development of ARDS which led to the death of decedent. In fact, even after diagnosing the adenoma while decedent was a patient in the MICU, the Stony Brook attending physicians did not address this condition with any type of medical intervention.

Defendant Kim avers in his personal affidavit that he is a physician duly licensed to practice medicine in the State of New York. He is board certified in internal medicine and is an attending physician at Stony Brook. Defendant saw decedent when he presented to the emergency room at Stony Brook in hypertensive crisis. Decedent was appropriately treated in the hospital with anti-hypertensive medications, other medications were discontinued as the possible causes for the acute hypertensive crisis, the blood pressure responded to the interventions, the appropriate consults and tests were ordered, and the decedent was discharged with the appropriate instructions for follow-up care regarding his condition. At the time of his discharge, decedent was stable and certain radiological studies were still pending. Also at the time of discharge, there was no indication that decedent had any abnormality of the brain, including any condition of the pituitary gland. Appointments were made for decedent to follow-up in the clinic, which he did not attend. Therefore, defendant avers that the care and treatment by defendant was in accord with good and accepted standards of internal medicine/hospital practice.

Defendant Peyster avers in his personal affidavit that he is duly licensed to practice medicine in the State of New York and is board certified in radiology and neuroradiology. He states that he interpreted the radiology studies taken of decedent while he was a patient in Stony Brook on or about March 24, 2001. It is his opinion that he acted in accord with good and accepted neuroradiographic practice in his interpretations of the MRI and MRA studies. He opines that the studies did not reveal a pituitary gland mass, adenoma, tumor, or any other lesion at the time.

Based on the above submissions, defendants have made a *prima facie* showing sufficient to warrant judgment in their favor as a matter of law by establishing that they did not depart from accepted standards of medical care, shifting the burden to plaintiff to demonstrate the existence of a triable issue of fact (*see, Baez v Lockridge*, 259 AD2d 573, 686 NYS2d 496 [2d Dept 1999]).

In opposition, plaintiff submits an affirmation of three medical experts, whose names have been redacted in accordance with *Carrasquillo v Rosencrans*, 208 AD2d 488, 617 NYS2d 51 (2d Dept 1994)¹. The court notes that plaintiff and her attorney are not qualified to render medical opinions (*see, Armstrong v Wolfe*, 133 AD2d 957, 520 NYS2d 466 [3d Dept 1987]). Therefore, said statements have no probative value.

The first expert avers by affidavit that he/she is duly licensed to practice medicine in the State of Connecticut and is board certified in internal medicine with a subspecialty in pulmonary medicine. He/she

¹ The Court has conducted an in-camera inspection of the original unredacted affidavits. The court finds the two affidavits to be identical in every way to the redacted affidavits in plaintiff's opposition papers with the exception of the redacted experts' names. However, the Court finds that the third expert opinion of a radiologist, in affirmation form, is not identical in every way. The court has considered the affirmation nevertheless inasmuch as the opinion is essentially unchanged, however, certain words and sentences have been altered in comparison to the redacted affirmation. The Court has returned the unredacted affidavits and affirmation to the plaintiff's attorney.

states that defendants Kim and Weissman departed from good and accepted medical standards by their failure to timely refer decedent to a nephrologist sooner than November, 2001. He/she states that defendants Ricotta, Char, Ortega, Adsumelli, Willoughby and Alam departed from good and accepted medical practice in the diagnosis, care and treatment they rendered to decedent and that those departures were substantial contributing factors to the injuries sustained by the decedent and to his death. He opines that after the second surgery, decedent was overloaded with fluid as a result of significant blood loss. He states that defendants departed from good and accepted medical care in their failure to take proper steps to withdraw excess fluid from decedent's body causing pulmonary vascular congestion. This congestion led to a staph epidermis infection in the lungs and to toxicity caused by the prolonged exposure to oxygen-rich ventilation. In addition, an abdominal CT scan which indicated the presence of a collection at the abdominal surgical site, was not sufficiently acted on. The expert disagrees with defendants and their experts where they state that it is universally accepted that ARDS is not caused by fluid overload.

The second expert avers by affidavit that he/she is duly licensed to practice medicine in the State of Connecticut and is board certified in general surgery. He/she states that defendants Ricotta, Char and Ortega departed from accepted standards of surgical practice in their post-operative fluid management of the decedent within the SICU. The expert states that defendants failed to anticipate the likelihood of bleeding post-operatively and to properly check the abdomen before closing the original procedure. At the re-exploration, defendants failed to accurately record and state the amount of blood which was lost following the initial renal bypass procedure. Additionally, defendants failed to fully evacuate the hematoma and any additional blood during the second surgery. Finally, all of the surgical defendants departed from good and accepted practice by failing to timely and properly respond to the radiological findings of February 21, 2002, which indicated an additional blood collection at the original surgical site. These departures were substantial contributing factors to decedent's downhill post operative course and death.

The third expert affirms that he/she is duly licensed to practice medicine in the State of New York and is board certified in radiology. He/she states that defendant Peyster departed from accepted standards of radiologic care to decedent which contributed to the delay in diagnosis of decedent's pituitary gland tumor. He disagrees with defendant Peyster's interpretation of the March 24, 2001, MRI scan and opines that there is a pituitary lesion. He further opines that defendant Peyster departed from good and accepted practice by failing to request that the patient be re-scanned so that a series of coronal images could be obtained to better evaluate the area in which he stated that there was asymmetry.

The court finds that plaintiff has raised an issue of fact regarding whether defendants Ricotta, Adsumelli and Willoughby departed from accepted standards of medical care in their management of decedent's post operative course in AICU and SICU. The conflicting opinion by the expert precludes a finding of summary judgment (*Viti v Franklin General Hospital*, 190 AD2d 790, 593 NYS2d 840 [2d Dept 1993]). However, the court finds that plaintiff failed to raise an issue of fact regarding the care and treatment rendered by defendant Alam and Char, in their capacities as fellows, and defendant Ortega in her capacity as a surgical resident (*Soto v Andaz*, 8 AD3d 470, *supra*). The record reveals that no independent decisions were made by defendants Alam, Char or Ortega.

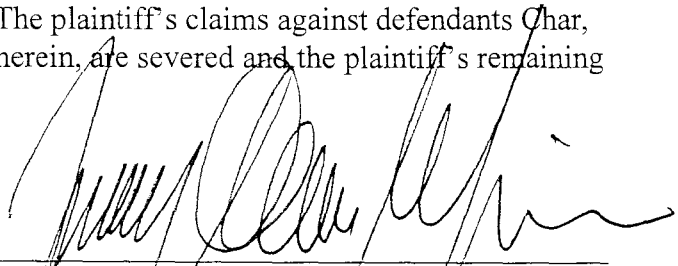
Moreover, although conflicting opinions may raise a question of fact, neither the affirmation of plaintiff's experts nor any other evidence in the record before this court supplies the requisite nexus

Bellafiore v Ricotta
Index No. 03-21074
Page No. 9

between the malpractice allegedly committed by defendants Kim and Weissman and the demise of plaintiff's decedent (*Ferrara v South Shore Orthopedic Assoc., P.C.*, 178 AD2d 364, 577 NYS2d 813 [1st Dept 1991]). Plaintiff offered no evidence that an earlier referral to a nephrologist would have changed the course of events. In addition, no mention is made by the plaintiff's experts of the effect of the subsequent diagnosis of a pituitary tumor upon decedent's condition, thus the negative findings by defendant Peyster in March, 2001 and subsequent diagnosis one year later did not substantially cause the decedent's injuries or death. Moreover, even after the discovery of the tumor, the record reveals that no medical intervention was ordered.

Accordingly, the motion by defendants Char, Ortega and Alam is granted. The motion by the Ricotta defendants is granted to the extent that the action is dismissed as against defendants Peyster and Kim. The motion by defendant Weissman is granted. The plaintiff's claims against defendants Char, Ortega, Alam, Peyster, Kim and Weissman, dismissed herein, are severed and the plaintiff's remaining claims shall continue.

Dated: AUG 21 2009



J.S.C.
HON. JEFFREY ARLEN SPINNER

AUG 21 2009 FINAL DISPOSITION NON-FINAL DISPOSITION