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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

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PALMA GIAMBONA, Individually and as the Executrix of the Estate of GIROLAMO GIAMBONA, Deceased,

INDEX NO. 007819/07

Seq. # 05, 06,07

Plaintiff,

-against-

GEORGE L. HINES, M.D., WINTHROP CARDIOVASCULAR & THORACIC SURGERY, P.C., NICHOLAS RAIO, M.D., ANTHONY T. ARCATI, M.D., BARRETT DONALD SKLAR, M.D. BETHPAGE PRIMARY MEDICAL CARE, P.C. JACK W. GEFFKEN, D.O., JOHN SALVATORE BOCCIO, M.D. and WINTHROP-UNIVERSITY HOSPITAL ASSOCIATION

Defendants.

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Notice of Motion, Affs. & Exs.....1

Notice of Cross Motion, Affs. & Exs.....2

Memorandum.....3

This motion by the defendants Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D., for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them or in the alternative, an order pursuant to CPLR 214-a, 3212 and Public Health Law § 2805-d granting them partial summary judgment dismissing any claims based upon events that occurred prior to November 25, 2004 as well as the claim for lack of informed consent is granted as provided herein.

This motion by the defendants George L. Hines, M.D. and Winthrop Cardiovascular Thoracic Surgery, P.C. for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them is granted.

This cross motion by the defendant Winthrop University Hospital Association ("Winthrop Hospital") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it is granted to the extend provided herein.

The plaintiffs in this medical malpractice action seek to recover of the defendants for their alleged failure to monitor and treat the decedent Girolamo Giambona's ("Mr. Giambona") expanding abdominal thoracic aortic aneurysm which, the plaintiffs allege, resulted in its rupture and Mr. Giambona's death.

With the exception of defendant Nicholas Raio, M.D., all of the defendants seek summary judgment dismissing the complaint against them.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

"To establish a *prima facie* case of liability for medical malpractice, a plaintiff must prove that the defendant deviated from accepted practice, and that such deviation proximately caused his or her injuries." Dehaarte v Ramenovsky, 67 AD3d 724, 725 (2nd Dept. 2009), citing Novik v Godec, 58 AD3d 703 (2nd Dept. 2009); Monroy v Glavas, 57 AD3d 631 (2nd Dept. 2008); Rabinowitz v Elimian, 55 AD3d 813 (2nd Dept. 2008); see also, Castro v N ew York City Health and Hospitals Corp., 74 AD3d 1005 (2nd Dept. 2010); Ellis v Eng, 70 AD3d 887 (2nd Dept. 2010). "On a motion for summary judgment dismissing the complaint in a medical malpractice action, a defendant physician has the burden of establishing the absence of any departure from good and accepted medical practice, or, if there was a departure, that the plaintiff was not injured thereby." Shectman v Wilson, 68 AD3d 848, 849 (2nd Dept. 2009), citing Murray v Hirsch, 58 AD3d 701 (2nd Dept. 2009), lv den., 12 NY3d 709 (2009); Shahid v New York City Health & Hospitals Corp., 47 AD3d 800 (2nd Dept. 2008); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); see also, Castro v New York City Health and Hospitals Corporation, supra; Ellis v Eng, supra. "[B]are allegations which do not refute the specific factual allegations of medical malpractice in the bill of particulars are insufficient to establish entitlement to judgment as a matter of law." Grant v Hudson Valley Hosp. Center, 55 AD3d 874 (2nd Dept. 2009), citing Berkey v Emma, 291 AD2d 517, 518 (2nd Dept. 2002); Drago v Chung Ho King, 283 AD2d 603, 603-604 (2nd Dept. 2001); Terranova v Finklea, 45 AD3d 572 (2nd Dept. 2007); Kuri v Bhattacharya, 44 AD3d 718 (2nd Dept. 2007).

If the moving defendant meets his burden, "[i]n opposition, 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." Shectman v Wilson, supra, citing Sweezey v Montague Rehab & Pain Management, P.C., 59 AD3d 431 (2nd Dept. 2009); Murray v Hirsch, supra; Shahid v New York City Health & Hospitals Corp., supra; see also, Ellis v Eng, supra. "[G]eneral allegations of medical malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical malpractice" do not suffice. Shectman v Wilson, supra, citing Alvarez v Prospect Hosp., supra; Shahid v New York City Health & Hospitals Corp., supra; see also, Diaz v New York Downtown Hosp., 99 NY2d 542 (2002); Romano v Stanley, 90 NY2d 444 (1997); Amatulli by Amatulli v Delhi Const. Corp., 77 NY2d 525 (1991). The plaintiff's expert must set forth the medically accepted standards of care or protocol and explain how it was departed from. Geffner v North Shore University Hosp., 57 AD3d 839, 842 (2nd Dept. 2008), citing Mustello v Berg, 44 AD3d 1018, 1019 (2nd Dept. 2007), lv den., 10 NY3d 711 (2008); Behar v Coren, 21 AD3d 1045, 1047 (2nd Dept. 2005), lv den., 6 NY3d 705 (2006); LaMarque v North Shore University Hosp., 227 AD2d 594, 594-595 (2nd Dept. 1996). And, the plaintiff's expert must

address all of the key facts relied on by the defendant's expert. See, Kaplan v Hamilton Medical Associates, P.C., 262 AD2d 609 (2nd Dept. 1999); see also, Geffner v North Shore University Hosp., supra; Rebozo v Wilen, 41 AD3d 457 (2nd Dept. 2007).

An expert's affidavit which lacks evidentiary support in the record or is contradicted thereby is not sufficient to raise a triable issue of fact. Micciola v Sacchi, 36 AD3d 869, 871 (2nd Dept. 2007), citing Schroder v Sunnyside Corp., 297 AD2d 369, 371 (2nd Dept. 2002), lv dism., 100 NY2d 553 (2003), citing Fhima v Maimonides Medical Center, 269 AD2d 559 (2nd Dept. 2000). Simply put, "hindsight reasoning . . . is insufficient to defeat summary judgment." Miccola v Sacchi, supra at p. 871, citing Zawadzki v Knight, 76 NY2d 898 (1990).

"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 Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 (2nd Dept. 2005), citing Sprain Brook Manor Nursing Home, 253 AD2d 852 (2nd Dept. 1998), lv den., 92 NY2d 818 (1999). The plaintiff's expert need not quantify " 'the extent to which the defendant's act or omission decreased the plaintiff's chance of 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 (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).

" 'Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient.' " Dockery v Sprecher, 68 AD3d 1043 (2nd Dept. 2009), quoting Chulla v DiStefano, 242 AD2d 657, 658 (2nd Dept. 1997), lv dism. 91 NY2d 921 (1998); Markley by Markley v Albany Med. Ctr. Hosp., 163 AD2d 639 (3rd Dept. 1990); see also, Wasserman v Staten Island Radiological Associates, 2 AD3d 713 (2nd Dept. 2003). "Although there is case law to the effect that joint liability may be imposed upon the referring physician where 'the referring physician was involved in decisions regarding diagnosis and treatment to such an extent as to make them his or he own negligent acts,' " (Ellis v Eng, supra at p. 892, quoting Mandel v New York County Public Adm'r., 29 AD3d 869 [2nd Dept. 2006], citing Reyz v Khelemsky, 44 AD3d 640 643 [2nd Dept. 2007]), it is not a departure from standards of practice where referrals are made to qualified specialists who themselves undertake the task of monitoring and treating within their speciality. Ellis v Eng, supra, at p. 892.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting 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 Associates, P.C., 282 AD2d 650 (2nd Dept. 2001); see also, Roca v Perel, 51 AD3d 757, 759 (2nd Dept. 2008); Graham v Mitchell, 37 AD3d 408 (2nd Dept. 2007).

"[A]n element of a cause of action based upon lack of informed consent is 'some unconsented-to affirmative violation of the plaintiff's physical integrity.' " Ellis v Eng, supra, at p. 892, citing Hecht v Kaplan, 221 AD2d 100, 103 (2nd Dept. 1996). Public Health Law § 2805-d(3) provides that "[f]or a cause of action therefore it must . . . be established that a reasonably prudent person in the patient's position *would not* have undergone the treatment or diagnosis if he had been fully informed (emphasis added). Lack of informed consent does not apply where . . . injuries allegedly resulted from a failure to undertake a procedure or a postponing of a procedure." Ellis v Eng, supra at p. 892; Jaycox v Reid, 5 AD3d 994, 995 (4th Dept. 2004), rearg den. 8 AD3d 1132 (4th Dept. 2004).

"[A]n untimely motion or cross-motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds." Grande v Peteroy, 39 AD3d 590 (2nd Dept. 2007), citing Bressingham v Jamaica Hosp. Medical Ctr., 17 AD3d 496, 497 (2nd Dept. 2005); Boehme v A.P.P.L.E., 298 AD2d 540 (2nd Dept. 2002); Miranda v Devlin, 260 AD2d 451 (2nd Dept. 1999). In view of Winthrop Hospital's potential liability here being purely vicarious, its delay in seeking summary judgment is excusable.

In support of their motion, the defendants Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D. have submitted the affirmation of Dr. John David Cahill who is Board Certified in Family Practice. Having reviewed Mr. Giambona's medical records, the plaintiff's allegations and the testimony given by the parties and non-parties at their examinations-before-trial, he opines that those defendants properly fulfilled their roles as primary care physicians in their specialities of Family Medicine and Internal Medicine. He opines that these defendants fulfilled their duties to the plaintiff by recommending that he continue to see the vascular surgeon who had been treating him and on whom they were totally justified in deferring to and relying on.

While not relevant to the allegations against them, Dr. Cahill recites Mr. Giambona's health history because it is significant and played a role in these defendants' care of Mr. Giambona: Prior to undergoing care for his abdominal thoracic aortic aneurysm, Mr. Giambona suffered from heart disease,

peripheral vascular disease, lung disease and kidney disease, which Dr. Cahill explains, all had to be considered and played a role in these defendants' care of Mr. Giambona. Dr. Cahill notes that Mr. Giambona first presented to Dr. Arcati on October 12, 1994 at which time he was already under the care of a vascular surgeon. In fact, on November 12, 1994 he was referred to a vascular surgeon for treatment of an aneurysm involving his iliac arteries. On August 12, 1996, Dr. Arcati referred Mr. Giambona to defendant Dr. Hines and the following year he was referred to cardiac specialists for treatment of his congestive heart failure. Dr. Cahill notes that defendant Dr. Geffken first saw Mr. Giambona on June 20, 1997 to clear him for surgery by Dr. Hines to repair an infraenal abdominal aortic aneurysm on June 23, 1997. Dr. Cahill notes that all of the defendants at Bethpage Primary Medical Care fulfilled their duties by making referrals to vascular surgeons on whom they were entitled to rely and defer to make decisions of this sort because physicians like these defendants simply did not perform these surgical evaluations let alone the surgeries themselves.

Dr. Cahill notes that Mr. Giambona saw Dr. Arcati on May 15, 2000 complaining of lumbosacral back pain of four to six weeks in duration. Mr. Giambona was urged to do a repeat abdominal CT in which areas of aneurysmal dilation were in fact revealed. Mr. Giambona was urged to follow up with the vascular doctor, Dr. Hines.

Dr. Cahill notes that Mr. Giambona was treated at Winthrop Hospital by cardiologists for congestive heart failure from December 7 through December 12, 2000, at which time Dr. Hines stented a renal artery. Mr. Giambona had an automatic internal cardio defibrillator implanted at Winthrop Hospital on April 8, 2003 and was seen there on November 2, 2003 because of its failure. He underwent coronary artery catherization at New Island Hospital on November 23, 2003.

As for the failure to act on the August 6, 2004 CT scan, Dr. Cahill notes that it was not ordered by these defendants nor reported to them nor should it have been. Dr. Hines ordered that CT scan and Dr. Cahill opines that it was his responsibility as the treating specialist to follow up on it. Indeed, in his August 18, 2004 letter to Bethpage Primary Medical Care, Dr. Hines makes clear his knowledge of the dilation of Mr. Giambona's thoracic aorta as well as his plan to continue to monitor it as it had been there since May 31, 2000. At that time, Dr. Hines planned surgery to repair an aneurysm in Mr. Giambona's left renal iliac artery for which Dr. Cahill opines Dr. Arcati properly provided surgical clearance on September 25, 2004, along with a consultation with nephrologist Dr. Fishbone who had been treating Mr. Giambona. Dr. Cahill opines that Dr. Arcati had no cause to question Dr. Hines' decisions to operate on Mr. Giambona's iliac artery and to monitor his aneurysmal dilation in his aorta. The surgery was performed by Dr. Hines at Winthrop Hospital on September 30, 2004. Mr. Giambona developed

complications necessitating a colostomy which was later surgically reversed. Mr. Giambona was discharged on October 28, 2004.

Dr. Cahill notes that following this, Mr. Giambona was cared for by cardiologist Dr. Gambino who performed a cardiac artery catherization, however this did not involve Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., or John Salvatore Boccio, M.D. Mr. Giambona was seen by Dr. Arcati for routine matters on December 2nd , 2004, January 4th , 2005, March 1st, 2005 and March 14th, 2005, on which date Dr. Arcati cleared Mr. Giambona for surgery by Dr. Simirov to reverse the colostomy. Mr. Giambona was in Winthrop Hospital for that procedure form March 15th through March 25th during which time he did not see Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., or John Salvatore Boccio, M.D. Dr. Arcati made house calls on October 7th, 2005, November 10th, 2005 and March 20th, 2005.

Dr. Cahill notes that Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Jack W. Geffken, D.O., and John Salvatore Boccio, M.D. did not see Mr. Giambona during his hospitalization at Winthrop Hospital in April 2005, either. On April 24, 2005, Mr. Giambona presented at the emergency room there complaining of acute onset of leg and back pain, specifically thigh and lower back pain with difficulty walking. He was cared for by Dr. Hines and other specialists, including a neurologist Dr. Savella and cardiologist Dr. Snow to monitor his implanted cardiac defibrillator. Dr. Savella diagnosed Mr. Giambona as suffering from siatica which he attributed to lombosacral stenosis and disc disease, and he so advised the defendants Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D.

On June 1, 2005, Mr. Giambona saw Dr. Geffken at which time he complained of his continued back pain which radiated to his buttocks and leg and related the history thereof. Dr. Geffken urged Mr. Giambona to resume his blood pressure medications. Dr. Geffken found Mr. Giambona's symptoms to be consistent with Dr. Savella's diagnosis of sciatica which, Dr. Cahill opines, was appropriate as Mr. Giambona had no signs of infection, abdominal ischemia, diverticulitis, a vascular issue or a kidney infection. Mr. Giambona's pain medication was changed and he was to see Dr. Savella the next day. Subsequently, Dr. Savella continued to advise the doctors at Bethpage Primary Medical Care that Mr. Giambona's pain was being caused by lumbar radioculopathy based upon EMG and nerve conduction studies as well as a CT report. Dr. Cahill opines that the defendants Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D. were justified in relying on Dr. Savella as the neurologist to make these determinations.

Mr. Giambona was admitted to the emergency room of Winthrop Hospital from June 7, 2005 to June 11, 2005 again for severe lower back pain. Dr. Cahill opines that Dr. Arcati's name on the addressograph is of no import: That alone does not reflect his involvement in treating Mr. Giombona during that stay. In fact, Dr. Arcati did not see Mr. Giambona during that stay nor was he asked to. Dr. Boccio in fact discussed Mr. Giambona's treatment plan with the physician's assistant and his orders were later signed by Dr. Sklar. Dr. Boccio requested cardiology and orthopedic consults and examined Mr. Giambona in the morning of June 8th, finding lumbar pain in the L4-S1 region upon palpatation. Dr. Baccio spoke with orthopedist Dr. Grossman, who recommended that Mr. Giambona be seen by a spinal specialist, Dr. Cataletto. Mr. Giambona was transferred to the chest pain unit where he was seen by defendant Dr. Raio. Dr. Cahill opines that Dr. Baccio's handling of Mr. Giambona that day was entirely appropriate as there was nothing which gave rise to suspicion of an aortic aneurysm.

Dr. Cahill notes that Dr. Sklar saw Mr. Giambona on June 9, 2005 and found that he was experiencing pain relief from his new medicine. Dr. Geffken saw Mr. Giambona on June 10th and noted that he had pneumonia and back pain and he agreed with the treating neurologist that he should be discharged the next day. Dr. Cahill opines that Dr. Geffken's differential diagnosis of sciatica and spinal stenosis along with right lobe pneumonia, mild dehydration and renal insufficiency was entirely appropriate as was his discharge plan. Mr. Giambona's back pain was responding to the medication and bed rest and there was no indication for further cardiac monitoring or intervention. In addition, Dr. Cahill opines that Dr. Boccio, Dr. Geffken and Dr. Sklar's deferral to the neurologist and pain management specialist was entirely appropriate. Mr. Giambona was discharged on June 11, 2005 and instructed to follow up with pain management specialist Dr. Ynan and in fact did so at Winthrop Hospital on June 20, 2005 when he received an epidural steroid injection.

Dr. Geffken saw Mr. Giambona on June 27, 2005 at which time he noted that he continued to be cared for by the pain management specialist and intended to get another epidural injection. While his pneumonia had resolved, anemia had become a concern because Mr. Giambona was not eating well. Dr. Geffken instructed Mr. Giambona to return after he received the epidural injection however Dr. Geffken did not see him again.

Dr. Cahill notes that Mr. Giambona did not have any further contact with the doctors from Bethpage Primary Medical Care until July 2, 2005 when he was brought to New Island Hospital suffering from respiratory distress and bilaterial lower extremity paralysis. He was transferred to Winthrop Hospital where he remained until July 25th during which time he was never seen by the doctors from Bethpage Primary Medical Care. While there, Mr. Giambona was diagnosed with a dissecting aorta

which defendant Dr. Hines and Dr. Goncalves surgically repaired. He was discharged to St. Charles Rehab and then transferred to Sands Point Center for Health Rehabilitation. Dr. Arcati made some house calls and Dr. Boccio communicated with Mr. Giambona's family regarding his refusal to have blood work done despite dangerously low hemoglobin levels.

As for their alleged failure to conduct tests, perform physical examinations and/or monitor Mr. Giambona's aortic aneurysm, Dr. Cahill opines that as primary care doctors, defendants Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D., all were entitled to rely upon and defer to expert doctors, in particular the vascular surgeon's expertise. As for their alleged failure to order cardiac tests, Dr. Cahill similarly opines that they were entitled to rely on the expert cardiologists treating Mr. Giambona.

As far as Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D.'s failure to detect clinical changes, Dr. Cahill opines there were no changes or other indications of clinical significance indicating a problem with Mr. Giambona's aortic aneurysm. He notes that Mr. Giambona was not in respiratory distress prior to his admittance to New Island Hospital. As for his back pain, Dr. Cahill notes that Mr. Giambona had been under treatment for back pain for years with known degenerative spinal conditions and a diagnosis by specialists of sciatica. He had complained of back pain for several years with a history of a lumbar disc injury prior to his coming under the care of Bethpage Primary Medical Care, for instance, when he complained of pain in his lower back to the groin area in 1994; when he reported back pain going into his leg and abdomen that was severe enough to cause vomiting in 1995; and, when he complained of back pain in the lumbosacal area and his physical exam also found tenderness in the rib cage in 2000. He further notes that Mr. Giambona "did not exhibit the kind of 'back pain' known to be associated with a dissecting aorta which is characterized by sudden intense pain through from the chest to the back. Rather, the records and testimony indicate that [he] suffered some respiratory symptoms before losing the ability to move his legs on July 2nd at a time when the physicians at Bethpage Primary Medical Care [were] not involved in his care . . . ."

Dr. Cahill notes that plaintiffs complain that Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D. were not responsive to Mr. Giambona's complaint of dizziness but no such complaint was ever made. As for Mr. Giambona's complaints of "weakness" and "fatigue," he notes Dr. Geffken did tests on June 27, 2005 to evaluate Mr. Giambona for anemia.

As for the plaintiffs' allegation that Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D,

Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D. failed to adequately monitor Mr. Giambona's vital signs, Dr. Cahill opines that claim is belied by his records. Mr. Giambona's vital signs were always monitored and he was told to check in for blood pressure checks as well as to continue with his blood pressure medication.

Again, Dr. Cahill conclusively opines that exploring surgical options and making recommendations simply were not Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D.'s roles in caring for Mr. Giambona. They appropriately deferred to Dr. Hines, the vascular surgeon and did not cause Mr. Giambona's thoracic aortic aneurysm. Similarly, they played no part in obtaining or failing to obtain his informed consent. And, as for their alleged failure to render appropriate cardio care, Mr. Giambona's chest pain resolved prior to his June discharge from Withrop Hospital and deference to the cardiologist Dr. Raio was appropriate.

More importantly, Dr. Cahill furthermore opines:

> There is no such evidence that the thoracic aortic aneurysm actually "ruptured." On the contrary, the medical records and imaging study reports, and testimony by Dr. Hines establish that the decedent suffered a sudden and catastrophic condition known as a dissecting aorta where an opening occurs in the innermost layer of the blood vessel and the blood creates a false lumen in between the layers of the aortic wall. This is separate and apart from an aneurysm, and there is no rupture per se in that there is no bleeding outside the aorta. Not only was the dissecting aorta a different condition than the aneurysm, it was a different location. [Thus,] it is [his] opinion with a reasonable degree of medical certainty that plaintiff's paralysis and prolonged hospitalization beginning July 2, 2005 was the result of a sudden and unavoidable event outside the control of the defendants [Bethpage Primary Medical Care] and was not the result of any act or omission on their part. Since the thoracic aneurysm did not rupture, there is no merit to the claim that the defendants failed to "anticipate likely complications such as rupture of the thoracic aortic aneurysm." In any event, this would again be entirely within the purview of the specialist in vascular surgery, and the primary care physicians had no duty or obligation to discuss surgical options or

conservative management belong making the referral to the specialist as they had already done years before.

In conclusion, Dr. Cahill affirms that he is able to state with a reasonable degree of medical certainty that the care and treatment by Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D. and Bethpage Primary Medical Care, P.C. to Mr. Giambona was at all times within acceptable standards of medical care and that the care and treatment by these defendants was in no way a cause of the injuries which the plaintiff alleges.

The defendants Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D. have established their entitlement to summary judgment thereby shifting the burden to the plaintiffs to establish the existence of a material issue of fact.

In support of their motion, the defendants George L. Hines, M.D. and Winthrop Cardiovascular & Thoracic Surgery, P.C. have submitted the affirmation of a Board certified vascular surgeon, Dr. Nicholas J. Morrissey. Having reviewed the pleadings, the Bill of Particulars and Mr. Giambona's medical records and the testimony given by the defendants at their examinations before trial, he opines to a reasonable degree of medical certainty that the care and treatment Dr. Hines and Winthrop Cardiovascular & Thoracic Surgery rendered to Mr. Giambona was within the standard of good and accepted medical and surgical practice and in any event, Mr. Giambona's injuries were not related to their care of him. Dr. Morrissey notes that the death certificate identifies the cause of death as cardiopulmonary arrest and acute heart failure within minutes of death and a 15 year history of arteriosclerosis. Like Dr. Cahill, Dr. Morrissey notes that prior to any of the alleged acts of malpractice, Mr. Giambona had coronary heart disease, significant ischemic cardiomyopathy, myocardial infarctions in 1988 and 1996, an implanted automatic defibrillator for ventricular tachyarrhythmia in 2003, hypertension, pulmonary hypertension, angina, osteoarthritis, congestive heart failure, pulmonary edema, peripheral vascular disease, chronic obstructive pulmonary disease, a repair of infra renal abdominal aortic aneurysm in 1997, hypercholestrolemia, an atrophic kidney, left renal artery angioplasty and stent placement in 2000, osteoarthritis, unstable angina, pectoris, severe claudication absent puliteral, dorsalis pedis and post tribal pulses bilaterally in legs and feet in June 2004, a total occlusion of the superficial femoral artery and chronic renal insufficiency. That is, he had long-standing heart disease, peripheral vascular disease, lung disease and kidney disease which comorbid diseases Dr. Morrissey opines weighed heavily in his mortality.

Dr. Morrissey opines that while the CT scan done in August 2004 showed a tortuous and dilated thoracic aorta, an increase in the size of the lower thoracic aorta from 3.9 X 3.7 cm to 4.6 X 5 cm, and an increase in size of the left iliac artery aneurysm from 2.5 X 3.2 to 2.7 X 3.9, only the ilic artery met the criteria for surgery and was appropriately operated on by Dr. Hines on September 30, 2004. He opines that the thoracic aortic aneurysm was not a candidate for surgery because it did not meet the criteria. Therefore, Dr. Hines' decision not to operate on it was medically correct. He notes that Mr. Giambona was carefully followed by Dr. Hines during this surgical admission and that Dr. Simirov's colostomy surgery of October 9th was appropriate. While Mr. Giambona had chest pain on October 3rd, cardiac enzymes were negative with no evidence of myocardial infarction. Dr. Morrissey reviews and agrees with all of Mr. Giambona's medications as well as Dr. Hines signing off on his care because the iliac artery repair was successful. Mr. Giambona's remaining stay at Winthrop did not involve any care by Dr. Hines. Dr. Morrissey opines that during that stay at Winthrop Hospital, Mr. Giambona's care by Dr. Hines was within acceptable medical standards. Dr. Morrissey notes that Dr. Hines was not involved in Mr. Giambona's admission for the reversal of his colostomy in March, 2005.

As for Mr. Giambona's April 2005 admission to Winthrop Hospital, Dr. Morrissey notes that he was admitted with complaints of right thigh pain, posterior and above the pupliteal fossa radiating superiorly to the right thigh with constant pain and fever. Dr. Morrissey opines that "proper diagnostic testing was performed including lower arterial plethysmography, lower venous duplex imaging and doppler, CT of the chest, abdomen, and lumbar spine [which] was consistent with moderate arterial occlusive disease of the right lower extremity that originated from the aorto-iliac level and no thrombus." Dr. Morrissey notes that that CT scan of Mr. Giamboma's abdomen revealed the thoracic aneurysm only increased minimally in size to 5.1 cm from the 4.6 X 5 cm six months previously. Dr. Morrissey opines that Dr. Hines reacted appropraitely to that CT scan and that "[i]ntervening in April 2005 would have been inappropriate based upon the radiological and clinical findings and the patient's multiple co-morbid conditions."

Dr. Morrissey notes that Dr. Hines did not care for Mr. Giambona during his admission to Winthrop Hospital from June 7-11, 2005, when he was diagnosed with "spinal stenosis, pneumonia, congestive heart failure, degeneration of the lumbar and lumbosacral intravetebral disc, hypertension, hypercholesterolomia, peripheral vascular disease, coronary athlerosclerosis, s/p, and percutaneous translumiral coronary angioplasty."

As for Mr. Giambona's July 2, 2005 admission, Dr. Morrissey notes that Dr. Hines responded promptly. He opines that the CT scan revealed "a 3 cm pseudoaneurysm along the right lateral aspect of

the patient's abdominal aorta without evidence of active leak at [that] time." Like Dr. Cahill, he opines that "[a]s Dr. Hines testified, this was a new development in a critically ill gentlemen. This pseudo aneurysm was separate and distinct from any previously noted abnormality of the aorta. [It] was in the abdominal aorta opposite the left renal artery." He notes that by the time Dr. Hines became involved, Mr. Giambona has been paralyzed for seven to eight hours and it was permanent. He opines that Dr. Hines properly stabilized Mr. Giambona before operating and allowed his kidney to recover from the dye load. As for the cause, he notes that Dr. Hines had opined that it was probably caused by one of Mr. Giambona's spinal arteries being closed off possibly related to the intimal tear of his artery. Regardless, nothing could be done to reverse the paralysis and the risk of death from surgery was very high. Dr. Morrissey notes that "the operative report of July 4, 2005 states that there was an emergent repair of ruptured extent II thoracoabdominal aneurysm using left femoral vein to left femoral artery." He opines that "there was never a free rupture of any aneurysm but rather a contained subintimal bleed or intra wall hemorrhage" and that "Dr. Hines and his team performed very skilled surgery and, despite the odds pulled this patient through."

Dr. Morrissey opines that a reasonable person would have undergone the surgery on July 4, 2005 and that Mr. Giambona's informed consent was appropriately procured. Dr. Morrissey notes that many post surgical complications developed including renal failure, pulmonary insufficiency, urinary tract infection, pneumonia, artrial fibrillation, ventricular tachycardia, mood disorder-depression, anemia and depressed platelets. Mr. Giambona accordingly was attended to by many specialists including an internist, neurosurgeon, physical medicine and rehabilitation doctor, a psychiatrist and an infectious disease doctor. Dr. Morrissey opines that Dr. Hines demonstrated good and sound medical judgment in his care of Mr. Giambona during that hospitalization. Dr. Morrissey notes that Mr. Giambona underwent care at St. Charles Rehabilitation and Sands Point Center for Health and Rehabilitation until September 21, 2005 when he was discharged home where he expired on May 25, 2006.

In conclusion, Dr. Morrissey opines that Dr. Hines' care and treatment of Mr. Giambona was always consistent with accepted standards of medical care and did not proximately cause his injuries. Dr. Hines has also established his entitlement to summary judgment dismissing the complaint against him thereby shifting the burden to the plaintiffs to establish the existence of a material issue of fact.

Winthrop Hospital has demonstrated good cause for the lateness of its motion. It's liability is purely vicarious and there was no ground for a motion by it until the moving defendants interposed their motion CPLR 3212(a).

Winthrop Hospital is correct that it is entitled to summary judgment dismissing any claims

predicated upon its vicarious liability for the negligence of Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., John Salvatore Boccio, M.D. and Dr. Hines and his employer Winthrop Cardiovascular & Thoracic Surgery, P.C. It has also established that Dr. Shah's alleged negligence in reading and reporting Mr. Giambona's CT scan of April 2005 is of no relevance since Dr. Hines testified that he reviewed the films himself and was personally aware of the change in the size of Mr. Giambona's thoracic aortic aneurysm from October, 2004. However, as for its liability predicated on the alleged negligence of the defendant Dr. Raio, while it has established that it did not employ him, it has not established the complete absence of a possibility of its liability for his alleged negligence. The absence of apparant or ostensible agency between Winthrop Hospital and Dr. Raio and Mr. Giambona's reliance on it has not been established. See, Salvatore v Winthrop University Medical Center, 36 AD3d 887 (2nd Dept. 2007), citing Johnson v Jamaica Hosp. Medical Center, 21 AD3d 881, 883 (2nd Dept. 2005); Orgovan v Bloom, 7 AD3d 770, 770-771 (2nd Dept. 2004). Accordingly, Winthrop Hospital has established its entitlement to partial summary judgment dismissing the claims for liability against it predicated on defendants Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D., Dr. Hines, Winthrop Cardiovascular & Thoracic Surgery, P.C. and Dr. Shah's negligence, thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact.

In opposition, the plaintiffs have submitted the affirmation of a Board certified thoracic and cardiovascular surgeon. He attests to having reviewed Mr. Giambona's medical records, the parties' testimony at their examinations before trial and the affirmations of Drs. Cahill and Morrissey. He opines to a reasonable degree of medical certainty that Dr. Hines deviated and departed from accepted medical standards by failing to timely diagnose and treat Mr. Giambona's expanding thoracic aortic aneurysm. He explains as follows: An August 6, 2004 CT of Mr. Giambona's chest/abdominal pelvis revealed that "dilation and tortuosity of the lower thoracic aorta [was] again noted, [and] the aorta increased in size" from the earlier study and "there [was] also [an] interval increase in size of the descending thoracic aorta." Dr. Hines was made aware of this and notified Bethpage Primary Medical Care by letter dated August 18, 2004 that Mr. Giambona's "suprarenal aorta (a/k/a "thoracic abdominal aorta") had expanded and [was] about 5 cm in size." He notes that then, in April 2005, Dr. Hines reviewed a CT of Mr. Giambona's pelvis which showed his lower thoracic aorta was larger than 5 cm but took no action. The plaintiff's expert opines that "[w]ith a suparenal aorta that has expanded to size larger than 5 cm, monitoring is necessary, and periodic diagnostic studies must be performed to closely monitor the size and dilation of the aorta. When the aorta dilates in size, the aorta is at an increased risk for rupture, tear

and dissection." Thus, he faults Dr. Hines for not ordering a chest x-ray, CT scan of Mr. Giambona's chest, abdomen or pelvis, an echocardiogram, an abdominal ultrasound or an angiogram to monitor this aneurysm, particularly in response to Mr. Giambona's complaints of back and chest pain. No studies were done to monitor Mr. Giambona's thoracic abdominal aortic dilation and aneurysm after April 24, 2005, which plaintiffs' expert opines resulted in it growing to 8-9 cm and bursting. He opines that surgery should have been done.

As for Dr. Geffken, the plaintiffs' expert opines that he departed from good and accepted standards of medical care by not ordering a chest x-ray, CT scan of Mr. Giambona's chest, abdomen and/or pelvis, an echocardiogram, an abdominal ultrasound and an angiogram when he treated him at Winthrop Hospital on June 10, 2005 for back and chest pain. He opines that such tests would have confirmed the existence of a lower aortic aneurysm in excess of 5 cm, as was evidenced on Mr. Giambona's CT of April 25, 2005. The plaintiffs' expert similarly faults Dr. Boccio, the admitting doctor on June 8, 2005, for not ordering those tests and not considering an aortic aneurysm in his differential diagnosis. He opines "[b]ased on Mr. Gimbona's presenting signs and symptoms of chest pain, worsening severe lower back pain over the course of four weeks, difficulty ambulating, further diagnostic testing was necessary to determine the source of the extreme pain. No diagnostic testing was ordered by Dr. Boccio" and that his "failure to include a thoracic aneurysm, or any aneurysm with his differential diagnosis based on Mr. Giambona's signs and symptoms was a departure from the standard of care [because] aortic aneurysms manifest themselves with signs of chest pain and back pain."

As for Dr. Raio, the plaintiffs' expert opines that he failed to perform a proper cardiac consult when he saw Mr. Giambona at Winthrop Hospital on June 8, 2005. He faults him, too, for not ordering appropriate diagnostic tests in light of Mr. Giambona's complaints of severe [lower back pain] and chest discomfort of four weeks duration. The plaintiffs' expert opines that Mr. Giambona presented with signs of an aortic aneurysm but Dr. Raio failed to consider it in his differential diagnosis. He notes that an EKG would not detect that.

As for Dr. Sklar, the plaintiffs' expert opines that when he treated Mr. Giambona on June 9, 2005, his complaints of continuing lower back pain and severe right leg pain were consistent with thoracic-abdominal aneurysm and should have been immediately addressed. The plaintiffs' expert opines that Dr. Sklar also failed to order the proper tests and had they been performed, "the expanding aneurysm could have been treated in a timely fashion and avoided having it grow to 8-9 cm and rupture." The plaintiffs' expert opines that Dr. Sklar inappropriately discharged Mr. Giambona on June 11, 2005 with lower back pain and chest pain for which no tests were done.

In conclusion, the plaintiffs' expert opines that "George L. Hines, M.D. and Winthrop Cardiovascular & Thoracic Surgery, P.C., Bethpage Primary Medical Care, P.C., Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D., Jack W. Gerfken, D.O., and John Salvatore Boccio, M.D. deviated and departed from accepted standards of care by failing to consider that Mr. Giambona's complaints were of a cardiac nature, specifically an expanding aortic aneurysm" and that it is his opinion with a reasonable degree of medical certainty that "a proper work-up in these circumstances would have revealed an increase size and abnormal shape of Mr. Giambona's thoracic abdominal aneurysm, which would have allowed for the timely treatment of the said aneurysm before it expanded to 8-9 cm, as evidenced by the July 4, 2005 operative report." He further opines that "at a minimum, Mr. Giambona should have at least been informed of his options at the time he was making his complaint [of] severe lower back pain and chest pain, rather [than] being presented with the circumstances he was presented – a situation where he presented with an aneurysm measuring 8-9 cm." It is his opinion that "the aforementioned departures from accepted standards of care by the defendants were substantial contributing factors in causing pain of suffering to Mr. Giambona, and his ultimate death."

The plaintiffs have not addressed the defendants Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D.'s justifiable reliance on the specialists who cared for Mr. Giambona. They have accordingly failed to establish the existence of a material issue of fact. Anthony T. Arcati, M.D., Barrett Donald Sklar, M.D, Bethpage Primary Medical Care, P.C., Jack W. Geffken, D.O., and John Salvatore Boccio, M.D.'s motion for summary judgment is granted and the complaint against them is dismissed.

Furthermore, the plaintiffs' expert's conclusion that the thoracic aorta which measured 5.5 cm in April 2005 burst because it went untreated is refuted by the record which required that defendants' motions be granted. See Hernandez-Vega v Zwanger-Pesiri Radiology Group, 39 AD3d 710 (2nd Dept. 2007); Micciola v Sacchi, supra. The operative report of non-party Dr. Goncalves makes abundantly clear that the pseudonaneurysm was at the level of the renal artery far down from Mr. Giambona's chest **NOT** where the mid-descending thoracic aorta which measured 5.5 cm in the April 2005 CT scan. This is buttressed by Dr. Hines' testimony at his examination before trial regarding the site of his July 2005 repair surgery and was in fact meticulously spelled out by defendants' experts Dr. Cahill and Dr. Morrissey in their affirmations. Accordingly, even assuming that there is an issue of fact as to whether the moving defendants acted in complete accord with good and accepted standards of medical practice, no casual relationship has been established.

With the exception of Winthrop Hospital's possible liability premised upon the alleged negligence of Dr. Raio, all of the moving defendants' motions are granted and the complaint against them is dismissed.

Dated: August 20, 2010

Anthony L. Parga, J.S.C.