SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

LESLIE A. SAUL and IRMA SAUL,

Plaintiff(s),

-against-

NORTHSHORE UNIVERSITY HOSPITAL,
DONNA MARCHANT, M.D.,
JASON R. BOGLIOLI, M.D.,
LAWRENCE ONG, M.D.,
RAM JADONATH, M.D.,
WILLIAM ROSS, M.D., and
NECESSITIES DRUG CENTER,

Defendant(s).

ORIGINAL RETURN DATE:07/23/10
SUBMISSION DATE: 07/23/10
INDEX No.: 021622/08

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1,2
Affirmation in Partial Support.....	3

This unopposed motion by defendant William Ross, M.D. ("Dr. Ross"), for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him is granted.

This unopposed motion by defendant Necessities Drug Center for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it is granted.

Plaintiffs in this action seek to recover for medical malpractice, lack of informed consent and loss of consortium. They allege that defendants acted negligently by prescribing Amiodarone to plaintiff Leslie Saul ("Mr. Saul"); that it was dispensed in the incorrect amount; and that its toxicity caused Mr. Saul injuries. Defendants Dr. Ross and Necessities Drug Center 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*, 10 AD3d at 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.*, 68 NY2d at 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 [2d Dept. 2009], citing *Novik v Godec*, 58 AD3d 703 [2d Dept. 2009]; *Monroy v Glavas*, 57 AD3d 631 [2d Dept. 2008]; *Rabinowitz v Elimian*, 55 AD3d 813 [2d Dept. 2008]; see also, *Castro v New York City Health and Hospitals Corp.*, 74 AD3d 1005 [2d Dept. 2010]; *Ellis v Eng*, 70 AD3d 887 [2d 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 [2d Dept. 2009], citing *Murray v Hirsch*, 58 AD3d 701 [2d Dept. 2009], lv den., 12 NY3d 709 [2009]; *Shahid v New York City Health & Hospitals Corp.*, 47 AD3d 800 [2d 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 [2d Dept. 2009], citing *Berkey v Emma*, 291 AD2d 517, 518 [2d Dept. 2002]; *Drago v Chung Ho King*, 283 AD2d 603, 603-604 [2d Dept. 2001]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept. 2007]; *Kuri v Bhattacharya*, 44 AD3d 718 [2d 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 [2d 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]. 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 [2d Dept. 2008], *citing Mustello v Berg*, 44 AD3d 1018, 1019 [2d Dept. 2007], lv den., 10 NY3d 711 [2008]; *Behar v Coren*, 21 AD3d 1045, 1047 [2d Dept. 2005], lv den., 6 NY3d 705 [2006]; *LaMarque v North Shore University Hosp.*, 227 AD2d 594, 594-595 [2d Dept. 1996]. And, plaintiff's expert must address all of the key facts relied on by defendant's expert. See, *Kaplan v Hamilton Medical Associates, P.C.*, 262 AD2d 609 [2d Dept. 1999]; see also, *Geffner v North Shore University Hosp., supra*; *Rebozo v Wilen*, 41 AD3d 457 [2d 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 [2d Dept. 2007], citing *Schroder v Sunnyside Corp.*, 297 AD2d 369, 371 [2d Dept. 2002], lv dism., 100 NY2d 553 [2003], citing *Fhima v Maimonides Medical Center*, 269 AD2d 559 [2d Dept. 2000]. Simply put, "hindsight reasoning . . . is insufficient to defeat summary judgment." *Miccola v Sacchi*, 36 AD2d at 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 [2d Dept. 2008], quoting *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 [2d Dept. 2005], citing *Sprain Brook Manor Nursing Home*, 253 AD2d 852 [2d Dept. 1998], lv den., 92 NY2d 818 [1999]. 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 defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury.' " *Alicea v Liguori*, 54 AD3d at 786, quoting *Flaherty v Fromberg*, 46 AD3d 743 [2d Dept. 2007], citing *Barbuto v Winthrop University Hosp.*, 305 AD2d 623, 624 [2d Dept. 2003]; *Wong v Tang*, 2 AD3d 840, 841 [2d Dept. 2003].

"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 [2d Dept. 2005], citing *Shields v Baktidy*, 11 AD3d 671 [2d Dept. 2004]; *Barbuto v Winthrop University Hosp., supra*; *Halkias v Otolaryngology-Facial Plastic Surgery Associates, P.C.*, 282 AD2d 650 [2d Dept. 2001]; see also, *Roca v Perel*, 51 AD3d 757, 759 [2d Dept. 2008]; *Graham v Mitchell*, 37 AD3d 408 [2d 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*, 70 AD3d at 892, citing *Hecht v Kaplan*, 221 AD2d 100, 103 [2d 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*, 70 AD3d at 892; *Jaycox v Reid*, 5 AD3d 994, 995 [4th Dept. 2004], rearg den. 8 AD3d 1132 [4th Dept. 2004].

The facts pertinent to the determination of this motion are as follows:

On July 3, 2006, plaintiff Mr. Saul presented at Northshore University's emergency room with complaints of heart palpitations. He was treated by defendants Donna Marchant, M.D. ("Dr. Marchant") and Jason R. Boglioli, M.D. ("Dr. Boglioli"). He was diagnosed with atrial fibrillation and treated with Amiodarone to restore his heart's normal sinus rhythm. Dr. Marchant discharged him on July 4, 2006. Upon his discharge, Dr. Boglioli gave him a prescription for Amiodarone, 400 mg three times a day. His discharge papers reflected the prescription which was given as a loading dose and instructions to follow up with his cardiologist Dr. Ong within one week. At his examination before trial, Dr. Boglioli testified that Mr. Saul was prescribed 1200 mg a day of Amiodarone until he reached a 5 gm loading dose to achieve a therapeutic level and that he would then be put on a maintenance dose of 200 mg per day. The prescription was filled by Mr. Saul's daughter at defendant Necessities Drug Center. Ninety tablets of 400 mg of Amiodarone was dispensed.

Dr. Ross, who had been treating Mr. Saul for hypertension, hypercholesterolemia, diabetes and sleep apnea as a primary care physician, played no role in Mr. Saul's hospitalization or the original prescription of Amiodarone. Dr. Ross saw Mr. Saul at his office on July 17, 2006, to draw blood to monitor his coumadin level. At that visit, Mr. Saul told Dr. Ross about his recent hospitalization as well as his Amiodarone prescription. Dr. Ross told Mr. Saul that, in his opinion, the dosage was high and that he should follow up with his cardiologist. Dr. Ross testified at his examination before trial that he so instructed Mr. Saul in a pointed fashion and trusted that he would follow up on his advice. In fact, Dr. Ross testified at his examination before trial that he recalled Mr. Saul telephoning him to thank him for his advice and to tell him that his Amiodarone prescription had in fact been lowered. By letter dated July 27, 2006, Dr. Ross was advised by defendant Ram Jadonath, M.D. that Mr. Saul's Amiodarone prescription had been reduced to 100 mg per day and that the possible side effects had been discussed with him and his wife. Mr. Saul's medical record indicates that he thereafter remained on that maintenance dose.

Dr. Ross acknowledged at his examination before trial that Necessities Drug Center telephoned him on October 18, 2006 requesting a renewal of Mr. Saul's Amiodarone prescription of 100 mg per day and he obliged as a courtesy, but without refills. He opined that it was likely that Mr. Saul ran out of his medicine and that he was unable to get the prescription from his cardiologist and so he filled it for him that one time.

Mr. Saul was seen by Dr. Ross without incident on February 1, 2007, but on March 26, 2007, Mr. Saul presented with complaints of shortness of breath and tiredness on exertion. Dr. Ross referred him to a pulmonologist, Dr. Orshan. Dr. Ross received correspondence from Dr. Orshan dated May 25, 2007, which indicated that Amiodarone toxicity was a consideration in regard to

Mr. Saul's pulmonary problem and that he would pursue that with Mr. Saul's cardiologist. By correspondence dated June 6, 2007, Dr. Orshan opined that it would be in Mr. Saul's best interest to discontinue Amiodarone if possible from a cardiac standpoint. As of mid-June 2007, Mr. Saul's Amiodarone had been discontinued.

In support of his motion, Dr. Ross has submitted the affirmation of Vincent P. Garbitelli, M.D., who is Board Certified in Internal Medicine. Having reviewed the pertinent medical records and examination before trial testimony, he opines to a reasonable degree of medical certainty that the care and treatment rendered by Dr. Ross to Mr. Saul was in accord with good and accepted medical standards. Dr. Garbitelli notes that Dr. Ross played no part in the initial prescription of Amiodarone. He in fact played an advisory role in having the dose reduced and as for his courtesy prescription of October 18, 2006, Dr. Garbitelli opines that Dr. Ross acted in accordance with good and accepted practice: It was for the same dosage he had been on and any alteration of his prescription would be done by his cardiologist.

Dr. Ross has established his entitlement to summary judgment dismissing the complaint against him thereby shifting the burden to plaintiff to establish the existence of a material issue of fact.

In support of the motion, defendant Necessities Drug Center has established that the prescription was filled as written and that the pharmacy was justified in relying on the prescribing doctor. "There being no allegation that the [defendant pharmacy] did any compounding, added to or took from the product as it had been prepared by the manufacturer, or that [it] did anything to change the prescription furnished [it]; or that [it] adopted or represented the product as [its] own, [defendant], as a matter of law, cannot be said to have been negligent . . ." *Bichler v Willing*, 58 AD2d 331, 333 [1st Dept. 1977], citing *Commissioners of State Ins. Fund v City Chemical Corp.*, 290 N.Y. 64, 69 [1993]; see also, *Farkas v Saary*, 191 AD2d 178 [1st Dept. 1993]; *Ullman v Grant*, 114 Misc.2d 220 [Sup. Ct. Kings Co. 1982]. The pharmacy did not have a duty to warn. *Negrin v Alza Corp.*, 1999 WL 144507 [S.D.N.Y. 1999]; *Bichler v Willing*, *supra*; *Ullman v Grant, supra*. And, no facts are alleged that would heighten the pharmacy's duty to Mr. Saul. Compare, *Hand v Krakowski*, 89 AD2d 650 [3d Dept. 1982] (finding a duty when pharmacy failed to warn the customer of the drug's adverse interaction with alcohol where the customer was known by pharmacist to be an alcoholic).

The caption of this action is amended to read as follows:

"LESLIE A. SAUL and IRMA SAUL,

Plaintiffs,

-against-

NORTHSHORE UNIVERSITY HOSPITAL,
DONNA MARCHANT, M.D.,
JASON R. BOGLIOLI, M.D.,
LAWRENCE ONG, M.D. and
RAM JADONATH, M.D.,

Defendants."

This decision constitutes the order of the court.

HON THOMAS P. PHELAN

J.S.C.

Dated: 9-7-10

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