Johnson v Herman
2010 NY Slip Op 33186(U)
November 8, 2010
Supreme Court, Suffolk County
Docket Number: 07-29498
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX No. 07-29498
CAL. No. 10-00993-MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE (002) 7-9-10 (003)&(004) 8-26-10
ADJ. DATE (002) (003) (004) 10-21-10
Mot. Seq. # 002- MD
#003 - MD
#004 - MD

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ANN JOHNSON, Individually, and as the Administratrix of the Estate of MICHAEL SINCLAIR, Deceased,

Plaintiff,

- against -

AMIR HERMAN, D.O., RONALD CURTIS FAGAN, M.D., RONALD C. FAGAN, M.D., P.C., RONALD C. FAGAN, M.D., P.C., D.B.A. DOCTORS IMMEDIATE CARE, RONALD C. FAGAN, M.D., P.C., D.B.A. THE LONG ISLAND MEDICAL GROUP, THE LONG ISLAND MEDICAL GROUP, DR. RICHARD FRIEDLANDER AND DR. JAI SINGH,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause (#003) for summary judgment by Dr. Richard Frielander and supporting papers dated June 9, 2009 numbered 1-19; 47-50 ; (2) Notice of Cross Motion (003) for summary judgment by Ronald Curtis Fagan, M.D. and Ronald Curtis Fagan, M.D., P.C. dated July 21, 2010 numbered 20-29; and Notice of Cross Motion (004) for summary judgment by J. P. Singh, M.D. and supporting papers dated August 20, 2010 numbered 30-46; (3) Affirmations in Opposition numbered 51-53; 54-56; (4) Reply Affirmations numbered ; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (002) by the defendant Dr. Richard Friedlander pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint against is hereby denied; and it is further .

ORDERED that this motion (003) by the defendants Ronald Curtis Fagan, M.D. and Ronald Curtis Fagan, M.D., P.C. pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint

against is hereby denied; and it is further

ORDERED that this motion (004) by the defendants Jai P. Singh, M.D. pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint against is hereby denied.

This is an action asserted on behalf of the decedent, Michael Sinclair, for medical malpractice with causes of action for negligence, wrongful death and lack of informed consent, with a derivative claim asserted by Ann Johnson, mother of the plaintiff's decedent. It is claimed that the defendants were negligent in providing medical care and treatment to the plaintiff's decedent from about January 18, 2005 through and until Michael Sinclair's death on June 14, 2006 at age 28. It is claimed that the defendants failed to properly treat and diagnose the decent's medical condition, including, but not limited to, impending myocardial infarction and hypertension.

The defendants, by way of their respective motions (002), (003) and (004), each seek an order granting summary judgment dismissing the complaint on the basis that there was no deviation or departure from good and accepted standards of medical practice in the care and treatment each provided, and that none of the defendants proximately caused the decedent's injuries and subsequent death.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [2nd Dept 1979]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503[1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see,* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674, 638 NYS2d 700 [1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see,* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v***

City of New York, 202 AD2d 465, 465, 609 NYS2d 45 [1994]). In a medical malpractice action, the moving defendant's papers must set forth everything that the defendant does during the treatment of the patient and indicate that the treatment is not the proximate cause of the patient's complaints. A defendant meets this burden by establishing, as a matter of law, that there was no duty of care breached to the patient (***Kleinert et al v Begum,*** 144 AD2d 645, 535 NYS2d 43 [2nd Dept 1988]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see,* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.,*** 7 AD3d 759, 776 NYS2d 907 [2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.,*** 242 AD2d 282, 660 NYS2d 739 [1997]).

MOTION (002)

In support of motion (002), defendant Friedlander has submitted, inter alia, an attorney's affirmation; copies of the amended summons and amended complaint, second amended answer served by defendant, Friedlander, and answers served by defendants Fagan, M.D., Fagan M.D., P.C., Ronald C. Fagan M.D., P.C. d/b/a Doctors Immediate Care, Ronald C. Fagan M.D., P.C. d/b/aLong Island Medical Group, and defendant Herman; plaintiff's verified bill of particulars; copies of the unsigned transcripts of the examinations before trial of Ann Marie Johnson dated April 1, 2008 and September 11, 2009, Amir Herman dated July 25, 2008, Ronald Curtis Fagan, M.D. dated November 19, 2009, Richard Friedlander, M.D. dated December 7, 2009, and Jai Singh, M.D. dated December 23, 2009; copy of Doctors Immediate Care Medical Records; Certificate of Death dated June 15, 2006; copy of the autopsy report dated July 7, 2006 by Tamara Bloom, M.D.; and the affidavit of Monty M. Bodenehimer, M.D. The unsigned copies of the examinations before trial are not in admissible form as required pursuant to CPLR 3212 and are not accompanied by an affidavit or affirmation pursuant to CPLR 3116 and are thus inadmissible.

Monty M. Bodenheimer, M.D. has set forth in his affidavit submitted in support of motion (002) for summary judgment dismissing the complaint by Dr. Richard Friedlander, M.D. that he is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine with a subcertification in cardiovascular disease. He avers that he has read the medical records from Doctors Immediate Care pertaining to Michael Sinclair, as well as the deposition transcripts for Richard Friedlander, M.D. and Jai Singh, M.D. and the autopsy report for Michael Sinclair. He avers with a reasonable degree of medical certainty, based upon the review of those materials, that the medical care and treatment rendered to Michael Sinclair by Richard Friedlander, M.D. was at all time appropriate and proper and did not deviate from accepted standards of medical practice, and that there is nothing that Dr. Friedlander did that was a factor in causing any of the injuries claimed in this matter, including the death of Michael Sinclair. Dr. Bodenheimer opines that Dr. Friedlander took an appropriate history, performed an appropriate examination, recommended and interpreted diagnostic tests appropriately and properly reached reasonable and appropriate conclusions and impressions and made proper recommendations for further testing and medical care and properly prescribed medication. He states that when Dr. Friedlander saw the plaintiff's decedent on January 31, 2005, he knew that he was to return for a stress echocardiogram, and knew that he would be returning within a reasonable time, thus his care and treatment was reasonable and appropriate and within accepted standards of care and that Dr. Friedlander bears no responsibility for the patient's medical care and treatment occurring after October 17, 2005.

Dr. Bodenheimer states that Michael Sinclair was treated at Doctors Immediate Care (DIC) on a fairly

regular basis from January 18, 2005 through his last visit on June 13, 2006, and that he died on June 14, 2006. He was treated at (DIC) by doctors Herman, Fagan, Friedlander and Singh, and that Dr. Friedlander's care and treatment of the plaintiff's decedent is limited to January 31, 2005 and October 17, 2005. The plaintiff's decedent was being treated for various medical problems, including hypertension and gastrointestinal complaints. On January 18, 2005, the decedent complained of palpitations and shortness of breath. An EKG was performed on January 18, 2005, and echocardiogram on January 25, 2005, and he wore a Holter monitor from January 18, 2005 through January 19, 2005. On January 25, 2005, when he presented for care, his diagnosis included hyptertension and tachycardia for which a cardiology consultation was ordered. Dr. Friedlander saw the plaintiff's decedent on January 31, 2005 on cardiac consultation. Dr. Bodenheimer avers that the echocardiogram of January 18, 2005 showed low normal global systolic function with a low normal ejection faction. He states that the EKG was essentially within normal limits, but later states that the EKG demonstrated minor non-specific changes and that Dr. Friedlander's finding that it was within normal limits is a reasonable conclusion. Dr. Bedenheimer also later states that the EKG contained a computerized interpretation of an old infarction, but then states this is an error generated by a computer which prints out the EKG strips and that the EKG does not demonstrate an old infarction. He states that a computer read is not the final read and opines that a cardiologist must perform an independent review of the EKG, which Dr. Friedlander did. Dr. Friedlander arrived at the impression of severe hypertension. An MRI/MRA was to be performed to rule out renal artery stenosis. A stress ecocardiogram was conducted on February 12, 2005 when the plaintiff's decedent was seen by Dr. Singh.

Dr. Friedlander next saw the plaintiff's decedent on October 17, 2005 when he performed another cardiology consultation after Mr. Sinclair had been seen by Dr. Herman on October 7, 2005 and referred him back to Dr. Friedlander due to uncontrolled hypertension. On that date, Dr. Friedlander reviewed the medications Mr. Sinclair was taking and indicated some question as to the dosages of certain medications being taking by the plaintiff's decedent. Mr. Sinclair purportedly denied chest pain or shortness of breath and his blood pressure was 180/120. Dr. Friedlander reached an impression of poor compliance and poor control, and added Norvasac to the medication regime and advised him to return in one to two weeks with his medications.

Based upon the foregoing, Dr. Friedlander has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against him.

In opposing the motion by Dr. Friedlander, the plaintiff has submitted the affirmation of her expert[1] who is licensed to practice medicine in the State of New York and is board certified in medicine and cardiovascular diseases and opines with a reasonable degree of medical certainty that Dr. Friedlander departed from accepted standards of care and that those departures were substantial contributing factors in permitting this patient's cardiovascular disease to progress and his risk for cardiovascular complications to increase and each of the departures were causally related to causing and/or contributing to this patient's death.

The plaintiff's expert sets forth that Michael Sinclair was a patient of Doctor's Immediate Care from January 18, 2005 until the date of his death on June 14, 2006. This medical group was comprised of several doctors, including Dr. Friedlander, a cardiologist, who treated Mr. Sinclair on two occasions, January 31, 2005 and October 17, 2005 for cardiac consultation. Mr. Sinclair was an overweight male who smoked, had

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[1]The Court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name. In addition, the Court has returned the unredacted affirmation to plaintiff's attorney.

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hypertension and high cholesterol, all risk factors for cardiac disease. An autopsy was performed on June 15, 2005, after Mr. Sinclair's death, with the cause of death determined by the medical examiner as "Arteriosclerotic and hypertensive heart disease; and "Other Significant Conditions" as "Myocarditis."

The plaintiffs' expert set forth the standard of care for treatment of hypertension in 2005 which requires aggressive treatment to reduce morbidity and mortality in a patient who is overweight with a history of smoking and hyperlipidemia and other risk factors related to cardiac disease, and that Dr. Friedlander failed to appropriately evaluate the plaintiff's decedent to determine what changes had taken place in his cardiovascular system as a result of the hypertensive cardiovascular disease (HCVD) and to institute a proper plan for monitoring and treatment to reduce progression of the pathology seen with hypertension such as myocardial infarction or stroke. The plaintiffs' expert states that cholesterol levels, C-Reactive Proteins and homocysteine blood work conducted revealed that Mr. Sinclair was at an increased risk for cardiac complications and required that he be considered to have atherosclerotic disease until proven otherwise. It was set forth that due to Mr. Sinclair's large size, Dr. Friedlander should have performed a transthoracic echocardiogram to obtain complete and adequate study results as opposed to a transesophageal echocardiogram which was done whereby the right ventricle was not identified and the left ventricle was poorly visualized, and the two dimensional echocardiogarm was technically limited in long and short axis views.

The plaintiff's expert states that the S4 gallop, or fourth heart sound, noted by Dr. Friedlander on January 31, 2005, under Mr. Sinclair's condition, was pathological and is found in a failing left ventricle or with myocardial ischemia or restrictive cardiomyopathy, and instead of performing an EKG, relied upon the EKG's done on January 17, 2005, despite the fact that the computer generated interpretation for the twp EKG's done on January 17, 2005 were both reported as "abnormal"-specifically identifying inferior and lateral ST-T changes. These changes can be secondary to many things, including functional and pathological etiologies. When Mr. Sinclair was seen at the group on February 12, 2005, he presented with intermittent left sided chest pain not associated with activity, so a stress echo was conducted as ordered by Dr. Fagan and interpreted by Dr. Singh whose report clearly documents that the patient's ST segment changes criteria could not be properly assessed due to EKG artifact and that the study was terminated due to fatigue. On October 17, 2005, when Dr. Friedlander saw Mr. Sinclair for "uncontrolled hypertension" he thought he heard an S4 gallop again while listening to his heart, but did not conduct an EKG or other diagnostic testing, and was of the opinion that the patient had poor compliance or poor control and added Norvasc with instructions to return in 1-2 weeks with his medications.

It is the plaintiff's expert's opinion that Dr. Friedlander did not properly evaluate and treat Mr. Sinclair for his cardiac complaints and long-standing uncontrolled hypertension. There were numerous risk factors placing his cardiac status in question and the studies conducted were either inconclusive or questionably abnormal, and despite the clinical signs and symptoms accompanied by abnormal laboratory values which should have raised questions about the cardiac status of Mr. Sinclair, Dr. Friedlander did nothing and simply reiterated what was already known-that Mr. Sinclair had hypertension. When Mr. Sinclair returned for his second visit with Dr. Friedlander, the only part of the exam relative to evaluating the patient's heart was to listen to it with a stethoscope, and despite the finding of the S4 sound indicating that Mr. Sinclair likely had stiffening of the ventricles, and combined with uncontrolled hypertension and abnormal laboratory values evidencing increased cardiac risk, high cholesterol, inadequate echocardiogram, inconclusive stress test, probable obstructive sleep apnea, in conjunction with being overweight and a smoker, Dr. Friedlander did not even conduct an EKG, but added medication without conducting a further work up of the patient.

The plaintiff's expert further opines that Dr. Friedlander did not comport with the minimum requirements and basic principles of care that must be adhered to in the treatment of any physician in that he viewed the plaintiff's decedent in a vacuum of any particular complaint or problem, ignored critical factors relating to his health and failed to properly conduct diagnostic studies which may provide invaluable information about serious conditions before irreversible damage occurs. Specific departures with regard to the testing which should have been done and the care and treatment required have been set forth. These departures, including relying on inconclusive and incomplete studies and ignoring laboratory values and clinical signs and symptoms, were substantial contributing factors in permitting the plaintiff's decedent's cardiovascular disease to progress and for cardiovascular complications to increase, causing or causally related to causing and/or contributing to his death. The fact that Mr. Sinclair was seen by other physicians before and after his encounters with Dr. Friedlander was not in any way altered as Dr. Friedlander had the responsibility to provide proper care and treatment even if Mr. Sinclair was seen by another physician(s).

Based upon the foregoing, it is determined that the plaintiff's expert has raised factual issues by setting forth specific departures and opinions which conflict with the defendant's expert's opinions, thus precluding summary judgment dismissing the complaint as asserted against Dr. Friedlander.

Accordingly, motion (002) is denied.

MOTION (003)

In support of motion (003), the Fagan defendants, have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the moving defendants' answers, plaintiff's verified bill of particulars; the affidavit of Robert J. Klein, M.D.; copies of the records from Doctors Immediate Care and the emergency room record of Winthrop University Hospital; and a copy of the transcript of the examination before trial of Ronald Curtis Fagan, M.D. dated November 19, 2009. The copy of the transcript of the examination before trial of Dr. Fagan is not in admissible form as it is not signed by Dr. Fagan, and thus fails to comport with CPLR 3212. Nor is it accompanied by an affidavit pursuant to CPLR 3116 and is not considered on this motion.

By way of the attorney's affirmation, counsel sets forth that the plaintiff does not oppose the application for dismissal by Dr. Ronald Fagan. However, in that the motion by Dr. Fagan is unsupported by an expert affirmation or affidavit in admissible form or a signed copy of the transcript of the examination before trial of Dr. Fagan, the motion fails to comport with CPLR 3212. Therefore, the defendant Dr. Ronald C. Fagan, has not met his burden of establishing as a matter of law that there was no duty of care breached to Mr. Sinclair. Since Dr. Fagan has not established entitlement to summary judgment dismissing the complaint asserted against him and his professional corporation, the burden has not shifted to the plaintiff to establish that there are issues of fact to preclude summary judgment (CPLR 3212[b]; ***Zuckerman v City of New York***, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (***Krayn v Torella,*** 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]).

Accordingly, motion (003) is denied.

Motion (004)

In motion (004), the defendant Dr. Jai Singh, has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, amended verified complaint, answer and demands and second amended verified answer served by Dr. Singh, plaintiff's verified bill of particulars; unsigned copies of the transcripts of the examinations before trial of Ann Marie Johnson dated April 1, 2008 and Amir Herman dated July 25, 2008,

Richard Friedlander M.D. dated December 7, 2009, Ronald Fagan, M.D. dated November 19, 2009, and the signed transcript of Dr. Jai Singh dated December 23, 2009; uncertified copy of the medical record of Doctors Immediate Care; affidavit of Monty M. Bodenheimer, M.D. as submitted in support of Dr. Friedlander; autopsy report of plaintiff's decedent; and the affirmation of Dr. Sidney Fenig, M.D. dated August 24, 2010. The unsigned copies of the transcripts of the examinations before trials as set forth are not in admissible form as required by CPLR 3212 and are not accompanied by an affidavit pursuant to CPLR 3116, and are therefore not considered in this application.

Dr. Singh testified to the effect that when he first saw Mr. Sinclair on February 12, 2005 for cardiac consultation, he reviewed his medical record, took a history, obtained vital signs, and determined Mr. Sinclair could have a stress echocardiogram. He took an EKG and indicated a septal wall myocardial infarction-age not known, but he did not believe Mr. Sinclair had experienced the infarction. He could not see the ST portion of the testing due to artifact, but stated that there was no arrythmia. The purpose of the test was to see if the test induces any arrhythmia and if there are any ST changes, and since he could not make that determination, the test was inconclusive. After the echo, he made a diagnosis of chest pain, hyperlipidemia, high blood pressure, stress echo negative, and testified that the test was negative for significant coronary artery disease. He started Mr. Sinclair on Avalide, a low cholesterol diet, and advised him to join a gym and to walk two miles a day. Dr. Singh last saw Mr. Sinclair on June 5, 2006 on referral from Dr. Herman due to high blood pressure. On that date, it was noted he was taking all of his medications but his blood pressure has been running high-no chest pain, no shortness of breath, and no orthopnea, smoking one pack a day, no alcohol or socially. He did not know if any tests had been done previously to determine the cause of the hypertension, but he thought it might be due to obesity and diet. He discontinued the Lopressor Mr. Sinclair was taking for his blood pressure and advised Dr. Herman to prescribe Labetalol at a total dose of 600 mg a day, and described it as an alpha blocker and a beta blocker antihypertensive which lowers the heart rate and blood pressure. He did not learn if Dr. Herman lowered the dose. Dr. Herman later advised him that Mr. Sinclair died. Dr. Herman showed him Mr. Sinclair's EKG taken previously on June 13, 2006 and asked him to read it for him. After so doing, he asked Dr. Herman if he sent this patient to the emergency room and he said no, he died. Dr. Singh stated he did not see that EKG before Mr. Sinclair died.

Sidney Fenig, M.D. sets forth in his affirmation submitted in support of Dr. Singh's motion for summary judgment that he is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine with a subspecialty in cardiovascular disease. It is his opinion with a reasonable degree of medical certainty that the medical care provided by Dr. Singh to Mr. Sinclair was at all times, appropriate and in accordance with accepted standards of medical care and there was no act or omission by Dr. Singh that was the proximate cause of any injuries allegedly sustained by Mr. Sinclair.

Dr. Fenig states that Dr. Singh was a cardiologist affiliated with DICC whose records confirm that Dr. Singh's care and treatment of Mr. Sinclair was limited to office visits on February 12, 2005 and June 5, 2006. When Mr. Sinclair presented on February 12, 2005, he gave a history of chest pain, shortness of breath and palpitations, Dr. Singh reviewed the echocardiogram report of January 25, 2005 as interpreted by Dr. Friedlander as normal, with no valvular disorders. The next visit with Dr. Singh was on June 5, 2006. He agrees with Dr. Singh that the stress echo provided normal findings and his impression was uncontrolled high blood pressure, hyperlipidemia, obesity and sleep apnea. The plan of care included adjustment of medications (Lopressor, Accuretic, Tricor and Norvasc), replacing the Lopressor with Labetalol. He further states that the Labetalol did not cause and/or contribute to the death of Michael Sinclair. While the autopsy report sets forth that the cause of Michael Sinclair's death is arteriosclerotic and hypertensive heart disease, Dr. Fenig states the

cause of death was actually from a cardiac arrythmia.

Dr. Fenig raises a factual issue as to the cause of Mr. Sinclair's death as he states that the sudden death was related to cardiac arrythmia, but does not opine whether or not the cardiac arrythmia was caused by or related to the arteriosclerotic and hypertensive heart disease as set forth in the autopsy report. Based upon the foregoing, it is determined that Dr. Fenig's affirmation is somewhat conclusory and he does not support his conclusion as to the cause of Mr. Sinclair's death. In any event, the plaintiff, by way of her expert's affirmation, raises factual issues which preclude summary judgment.

The plaintiff's expert[2] is a physician duly licensed to practice medicine and is board certified in internal medicine and cardiovascular diseases. The plaintiff's expert opines with a reasonable degree of medical certainty that Dr. Singh departed from the prevailing standards of care with regard to his treatment of Michael Sinclair during the care and treatment rendered in the years 2005 and 2006, and that the departures were a substantial contributing factor in permitting Mr. Sinclair's cardiovascular disease to progress and his risk for cardiovascular complications to increase, causally relating to his death and/or contributing to his death.

It is the plaintiff's expert opinion that Dr. Singh failed to properly evaluate Mr. Sinclair's condition and failed to conduct or order appropriate studies which should have included a follow-up stress echo, an angiogram, proper nuclear studies and a transesophageal echocardiogram, which would have led to the placement of stents and Mr. Sinclair would still be alive. The transthoracic echocardiogram was inadequate for a large patient such as Mr. Sinclair. Dr. Singh, it is opined, relied upon, inter alia, an inconclusive stress test which did not permit visualization of the ST segments which would be critical in making a diagnosis of ischemia. The echocardiogram could not be fully and properly read and the laboratory values were ignored which indicated an increased risk of cardiac complications. The S4 sound which indicated left ventricular stiffening, the abnormal EKG and high cholesterol were not addressed. The fact that Mr. Sinclair was seen by other physicians before and after his encounters with Dr. Singh was not in any way altered as Dr. Singh had the responsibility to provide proper care and treatment even if Mr. Sinclair was seen by another physician(s). Pheochromocytoma and renal artery stenosis were not ruled out and Dr. Singh did not know the cause of the hypertension. When Dr. Singh performed the stress echocardiogram, and his report indicated that the ST segment changes criteria could not be properly assessed due to EKG artifact and the study was terminated due to patient fatigue. However, Dr. Singh did not order and/or perform a follow-up stress echo, an angiogram, proper nuclear studies, or a tranasesophageal echocardiogram which, within a reasonable degree of medical certainty, would have led to the placement of stents.

When Mr. Sinclair was seen on June 5, 2006 on a cardiac consultation request by Dr. Herman due to Mr. Sinclair's uncontrolled hypertension, Dr. Singh did not order and/or perform a follow-up stress echocardiogram, an angiogram, proper nuclear studies, or a transesophegal echocardiogram, and merely discontinued Lopressor and started him on Labetelol 300 mg two times per day. Plaintiff's expert states that the autopsy report shows the heart was 740 grams while the normal heart would be about 450 grams, and all four chambers were dilated. It additionally showed there was severe obstructive coronary artery disease in both the left circumflex and diagonal branch of the left anterior descending arteries. These conditions were undiagnosed due to the failure to conduct proper and indicated studies. The plaintiff's expert opines that Mr. Sinclair's death was caused by the

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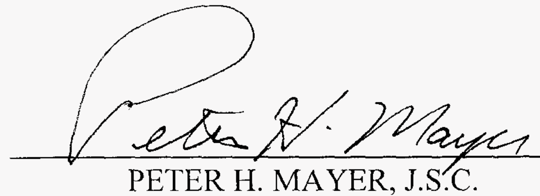
[2]The Court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name. In addition, the Court has returned the unredacted affirmation to plaintiff's attorney.

atherosclerotic disease which resulted in his untimely death.

Based upon the foregoing, it is determined that the plaintiff's expert has raised factual issues by setting forth specific departures and opinions which conflict with the defendant's expert's opinions, thus precluding summary judgment dismissing the complaint as asserted against Dr. Singh.

Accordingly, motion (004) is denied.

Dated: 11/8/10



PETER H. MAYER, J.S.C.