

Gyani v Great Neck Med. Group

2011 NY Slip Op 30849(U)

April 4, 2011

Sup Ct, Nassau County

Docket Number: 16302/04

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

GUPREET GYANI and RAMINDER S. OBEROI,

TRIAL/IAS PART 6

Plaintiff(s),

INDEX NO. 16302/04

- against -

MOTION SEQUENCE
NO. 4 & 5 & 6 & 7

GREAT NECK MEDICAL GROUP, LORI COHEN, MD,
NORTH SHORE UNIVERSITY HOSPITAL-MANHASSET,
BRADLEY J. COHEN, DO, NILAYA BHAWSAR, DO,
EFRAN HUSSAIN, MD, GARY P. KAPLAN, MD, NEW
YORK NEUROLOGIC ASSOCIATES, SLAVINA GARDELLA, MD,
JOHN CHELICO, MD and CHRISTINE NAPOLITANO, DO,

MOTION SUBMISSION
DATE: November 29, 2010

Defendant(s).

The following papers read on this motion:

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

Upon the foregoing papers, this motion by the defendant Bradley J. Cohen, D.O. (sequence No. 4), for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him, is **granted**.

This cross-motion by the defendant Great Neck Medical Group and Lori Cohen, M.D. (sequence No. 5), for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them, is **granted**.

The motion by the defendants North Shore University Hospital-Manhasset ("the hospital"), Nilaya Bhawsar, D.O., Dana Leifer, M.D., Efran Hussain, M.D., Gary P. Kaplan, M.D., John Chelico, M.D., and Christine Napolitano, D.O. (sequence No. 6), for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them is granted to the extent that the complaint against the defendants Dana Leifer, M.D., Efran Hussain, M.D., Gary P. Kaplan, M.D., John Chelico, M.D. and Christine Napolitano, D.O., is **dismissed**.

This motion by the defendants New York Neurological Associates and Slavina Gardella, M.D. (sequence No. 7), for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them, is **denied**.

In this action, the plaintiffs seek to recover damages for medical malpractice and lack of informed consent. They allege that the defendants were negligent in failing to timely diagnose and treat the plaintiff Gupreet Gyani's ("Gyani's") stroke symptoms as a result of which she suffered a stroke which has left her with permanent "locked-in" syndrome, a condition which renders her unable to speak or to move below the neck. The defendants seek summary judgment dismissing the complaint. They maintain that when they treated her, Gyani did not present with stroke symptoms which are required before the drug tissue Plasminogen Activator ("t-PA") can be administered intravenously and that by the time that her stroke was diagnosed, the three-hour window of time in which that drug could have been given expired. In addition, a number of the defendants allege that they had no contact with Gyani until after the three-hour window for the administration of t-PA expired, thus requiring dismissal of the complaint against them. As for their failure to administer the drug t-PA intra-arterially which has a six-hour window for its administration, the defendants maintain that that drug was experimental and had not been approved by the Federal Drug Administration and accordingly, their failure to administer it cannot serve as grounds for a finding of malpractice.

The plaintiffs maintain that the defendants unreasonably delayed in diagnosing her stroke in light of which the time in which both intravenous as well as intra-arterial t-PA could be administered expired with devastating consequences. The plaintiffs also maintain that the hospital, per the defendant Dr. Leifer, failed to establish appropriate protocols and procedures for caring for a patient who presents with possible stroke symptoms and that the hospital also failed to enforce them which contributed to their failure to timely diagnose and treat Gyani.

The facts pertinent to the determination of these applications are as follows:

The defendant Dr. Lori Cohen, an internist at the defendant Great Neck Medical Group, first saw Gyani on August 18, 2003. She treated her primarily for hypertension. At her examination-before-trial, Dr. Lori Cohen testified that she routinely asks patients about what pills or medications they take and that Gyani never told her that she was taking Ephedra. She testified that if Gyani had done so, she would have documented it in her chart and counseled her not to take it because it contributes to high blood pressure. On November 18, 2003, when Gyani presented at Great Neck Medical Group with complaints of tingling and head heaviness, Dr. Spivak of Great Neck Medical Group immediately referred Gyani to neurologist Dr. Gardella.

Dr. Gardella first saw Gyani, at the time a 29 year-old nursing student, on November 18, 2003. Gyani complained of numbness in her right hand and right leg. Gyani was noted to have high blood pressure as well as having had a miscarriage and hypertension. Dr. Gardella testified at her examination-before-trial that she suspected transient ischemic attack ("TIA") and so she ordered an MRI of the brain, a carotid Doppler study, a hypercoagulable workup and an EMG of the upper extremities to rule out carpal tunnel syndrome. Dr. Gardella forwarded a letter to Great Neck Medical Group advising that she would follow up with the plaintiff regarding her neurological complaints. The results of the tests ordered by Dr. Gardella were normal, however, Gyani's blood test results which were received by New York Neurological Associates on December 8, 2003 showed elevated homocysteine levels. Based on that, Gyani was immediately contacted and an office visit was scheduled that day. At her examination-before-trial, Dr. Gardella originally testified that when she saw Gyani on December 8, 2003, her symptoms had completely resolved which led her to conclude that Gyani was post-questionable TIA. However, when Dr. Gardella was shown Gyani's chart entries which had been made by her assistant that day which reflected that Gyani had complained of

headache, numbness, tingling, weakness, paresthesia and pain in her right lower leg which prompted Dr Gardella to prescribe Ultram, Dr. Gardella admitted that she would not have prescribed that drug absent complaints of pain.

Gyani's husband, the plaintiff Raminder S. Oberoi, testified at his examination-before-trial that four days later, on December 12, 2003, at approximately 11:30 AM, Gyani complained of a strange sensation on her face, her speech became garbled and her arm and leg became completely extended. She collapsed and she also experienced involuntary movements and erratic breathing. Oberoi testified that he called for an ambulance and two responded within 15 minutes. Gyani's blood pressure readings procured by both ambulance crews revealed that she was severely hypertensive, with readings of 240/120, 200/110, 210/90 and 200/100. She was also tachycardic and unresponsive. The FDNY ambulance report notes that Gyani had a history of headaches and collapse and was found non-verbal. The presumptive diagnosis is listed as "CVA," cerebro-vascular accident, commonly known as stroke. The other ambulance report reflects Gyani displayed seizure-like activity and had vomit on her clothes, and exhibited decerbrate posturing. Gyani was brought to defendant North Shore University Hospital-Manhasset ("hospital").

On arrival at the hospital, the triage nurse obtained history that Gyani had collapsed with left sided weakness. She was recorded as alert but non-verbal with pale skin and diaphoresis. She was tachycardic (elevated pulse) and her blood pressure was 240/140 but declined to 169/109 at 12:15 PM and 156/109 at 12:45 PM. She was moving her left side and then her right without purpose. Gyani was seen by a triage nurse, an Emergency Room attending and resident, and a second year neurology resident, Dr. Bhawsar who the chief Neurology resident Dr. Zitser assigned to oversee Gyani's care despite the fact that the hospital guidelines required notification of a stroke team STAT when handling the case of any "possible acute stroke patient." Mr. Oberoi, in fact, testified that he repeatedly asked for a neurologist.

The sequence of events preceding her arriving at the hospital revealed a history of hypertension for which she was taking Atenolol. She was reported to have collapsed at 11:30 AM and speaking with a thick voice with her eyes averting to the left. She arrived semi-comatose – alert but non-verbal and confused. She had a right sided hemiparesis, her skin was pale and diaphoretic and she was hypertensive and tachycardic. Seizure-like activity was reported to have been observed in the Emergency Room. She awoke in the Emergency Room. Her chart indicates that she was in a post-ictal state which indicated that she had experienced a generalized seizure. She was responsive to voice commands and her pupils were equal and reacted to light but she was not moving her right arm. A neurology consult was requested at 12:20 PM. Her grasp was equal. The record reflects that Gyani's internist, the defendant Dr. Lori Cohen, was notified via telephone. At 1:10 PM, the chart indicates that Gyani was becoming more alert. She then became verbal and responsive, albeit with slurred speech. She was sent for an MRI following a neurologic evaluation by Dr. Bhawsar.

At her examination-before-trial, Dr. Bhawsar admitted that immediately upon seeing Gyani, she knew that Gyani might be having a stroke in the brain stem based upon her "abnormal vital signs, altered mentation, neurological signs" and that t-PA may be needed which would have to be started by 2:30 PM given the onset of stroke symptoms at 11:30 AM. A note in Gyani's chart made by Dr. Bhawsar at around 2:00 PM and co-signed by defendant Dr. Bradley Cohen notes that Gyani had been experiencing left temporal headaches and right leg numbness for two weeks prior and that a CT Scan and MRI done on an out-patient basis were only positive for a possible pineal cyst or calcification. Dr. Bhawsar learned that around 11:30 AM that morning, Gyani had complained of a headache and that she went to the bathroom and collapsed, possibly losing consciousness. Dr. Bhawsar noted that Gyani was observed at home stiff in all four extremities and with foaming at her mouth, but no definite convulsions or incontinence were observed. At 2:01, Gyani was admitted under her neurologist Dr. Gardella's care, who had been notified of Gyani's status via telephone. Dr. Bhawsar's chart note reflects that Dr. Bhawsar's examination of Gyani

revealed that she was vastly improving, however her mental status was "waxing and waning." While she was diaphoretic and drowsy with slurred speech, she was fully oriented and her comprehension was intact. She could say long and short sentences, perform calculations and had short and long term recall. Her pupils were reactive with a right lateral gaze. She had no facial asymmetry and her motor function and coordination were intact but she had decreased range of motion on the left. All four of Gyani's extremities became stiff, she did not have convulsions, she was positive clonus, and she had brisk reflexes. The exam, however, was noted to be unreliable and questionable. Bilateral lower extremity dysmetria was noted.

According to Dr. Bhawsar's progress note, a CT Scan ordered upon Gyani's arrival and performed between 1:00 PM and 4:00 PM revealed a subtle left sided lucency in the parietal region. The official CT Scan report indicates "subtle left parietal cortical lucency" which the radiologist Dr. Axelrod described as a "likely artifact." The CT Scan found no evidence of acute infarction or hemorrhage and no cause of seizures were identified. The radiologist recommended an MRI to better define the left parietal artifact and to rule out ischemia or source of seizure.

An MRI with Diffused Weighted Imaging ("DWI") of the brain found "no focal infarcts" which indicates that the lucency in the left parietal region "may represent a space occupying mass such as low grade neoplasm or a focus of previous ischemia in view of [Gyani's] history of hypertension." However, the radiologist Dr. Black indicated in her report that "an MRI with spectroscopy and contrast may be helpful for further evaluation." While Dr. Bhawsar testified at her examination-before-trial that Dr. Black told her that the MRI was negative for evidence of a stroke, Dr. Black denied doing so and in fact testified that an MRI is not a diagnostic study of the brain. She also testified that she saw bilateral hypertensities on the pons which could have been evidence of a stroke in its early stages and that is why she recommended further study. Gyani's chart note indicates that when she returned from her MRI she "again became obtunded and started exhibiting toxic contractions of her right upper and lower extremities." She was given Ativan and Cerebryx despite which she became unconscious and exhibited signs of decerebrate posturing (arms and legs held straight out), consistent with cerebral or brain stem dysfunction. She experienced disconjugate eye movements, also a possible sign of brain stem damage. Dr. Bhawsar's note indicates that she discussed all of this with Gyani's neurologist, defendant Dr. Gardella before 2:00 PM. At their examinations-before-trial neither could recall the specifics. They ordered an electroencephalography, an EEG and planned admission to the Intensive Care Unit for a toxicology screen, prolactin level test, a lumbar puncture, consults with a rheumatologist and infectious disease specialist, and blood work.

At his examination-before-trial, Dr. Zitser testified that he went to the Emergency Room when called by Dr. Bhawsar for assistance. He could not recall when though. He observed Gyani unconscious on a stretcher. He testified that he asked her husband and two people who were with him if Gyani was taking any drugs and they flat out denied it. He observed Gyani to be extensor posturing which he admitted can be seen in a stroke, as it points to the brain stem or exterior part of the brain. However, Dr. Zitser testified that extensor posturing is also consistent with traumatic infections, thrombotic immunogenic and drug overdose. Dr. Zitser testified that he left when an "attending doctor" whose name he could not recall took over the case. Gyani was started on Rocephin. An EEG performed between 3:30 PM and 4:05 PM revealed only background activity interpreted as a likely resulting from medications administered prior to the EEG.

Dr. Bradley Cohen testified that on the afternoon of December 12, 2003, while he and his associate at defendant New York Neurological Associates, defendant Dr. Gardella, were working at their office, she asked him to go see Gyani at the hospital because he was the doctor on call that weekend and the neurology resident Dr. Bhawsar who had examined Gyani had indicated to her that the hospital staff was uncertain about what was going on. He testified that he told Dr. Gardella that he would go over to the hospital when he finished up and that no time limit or sense of urgency was conveyed by Dr. Gardella. In fact, he testified that Dr. Gardella told him that the brain MRI had come back "unremarkable." It is unclear

precisely when Dr. Bradley Cohen arrived at the hospital. His note indicates that it was 3:30 PM. Nevertheless, he proceeded to the Emergency Room and was told that Gyani was in the EEG suite. He testified that he was told that a CT Scan, MRI and blood work were negative for a bleed or stroke. However, Dr. Black testified that she had told Dr. Kaplan that the MRI was inconclusive, non-diagnostic and that a further study was recommended. Dr. Bradley Cohen authored a note regarding his exam of Gyani at 4:05 PM and at his examination-before-trial, he testified that he had examined Gyani within 30-60 minutes of making that entry. His note indicates that he concluded that Gyani was post-ictal (altered state of consciousness post-seizure) and that the MRI of her brain had been negative. Gyani's pupillary and corneal reflexes were intact, she did not demonstrate spontaneous movements and she withdrew from noxious stimuli bilaterally. She had a positive Babinski sign. At his examination-before-trial, he testified that t-PA was not in order because she may have had a seizure and she presented with high blood pressure. Due to the results of the toxicology report, he testified that he decided against a further, more complete MRI. Dr. Bradley Cohen suggested that Gyani's condition was either vasculitic or infectious and like Dr. Bhawsar, directed that a toxicology screen which had been ordered be checked and that Gyani undergo a lumbar puncture.

Dr. Kaplan, a neurologist and director of EEG at the hospital, saw Gyani around the same time as Dr. Bradley Cohen. He had been called by a resident who related that Gyani's attending doctor had requested a second opinion from him due to questionable seizure activity and a possible brain stem malfunction. He noted that Gyani had had a tooth extracted about a week earlier as well as intermittent brief fevers, followed by an AM headache and then unconsciousness. While he testified at his examination-before-trial that Dr. Black, the radiologist, told him that there was nothing of concern on the MRI, Dr. Black testified at her examination-before-trial that she told him about signal hypertensities on the pons on the MRI. In light of the "unremarkable" results of Gyani's EEG and MRI, Dr. Kaplan concurred in Dr. Bradley Cohen's assessment of an infectious or toxic cause for her encephalopathy. He started Gyania's prophylactic antibiotics. He performed the lumbar puncture with Dr. Napolitano's assistance, which was negative. Dr. Kaplan admitted at his examination-before-trial that ordinarily a "brain imaging study to confirm or not whether or not there is any evidence of brain stem stroke is required."

Blood and urine samples were drawn at 5:55 PM. At 6:15 PM. Gyani was admitted to the ICU with a diagnosis of encephalopathy of unknown origin. Heparin was ordered. Gyani's toxicology report indicated that she tested positive for amphetamines, opiates and benzodiazepine. A note indicates that in light of the negative CT Scan, MRI and EEG, Gyani's condition was suspected to be the result of viral meningitis.

Dr. Lori Cohen testified at her examination-before-trial that upon arriving at the hospital in the evening, Dr. Lori Cohen accessed the reports on the hospital's computer. The toxicology report timed 17:55 PM (5:55 PM) revealed to her that Gyani had tested positive for amphetamines. At her examination-before-trial, Dr. Lori Cohen testified that she spoke with Gyani's husband, the plaintiff Oberoi, in the ICU where Gyani had been admitted. When confronted with the results of the toxicology report, Oberoi told Dr. Lori Cohen that after Gyani collapsed, he went through her drawers and found Ephedra and that he had previously cautioned her to stop taking it. While Dr. Lori Cohen testified at her examination-before-trial that she not only verbally conveyed this information to the hospital's house doctors but also authored a progress note reflecting this discussion with Oberoi, that note was never located in the hospital's records.

Gyani's chart indicated that resident V.H. Patel, M.D., observed her at 7:50 AM on December 13th and found her to be sedated with decerebrated posturing and myoclonic movements were present. She was non-responsive.

Both Dr. Kaplan and Dr. Bradley Cohen saw Gyani again on the morning of December 13, 2003 in the ICU. Dr. Bradley Cohen and Dr. Kaplan found Gyani to be somewhat improved. She was able to move

her extremities and responded to noxious stimuli. Although lethargic, she opened her eyes to voice but was non-verbal. Her pupillary and corneal reflexes were intact. She demonstrated positive Babinski signs. They learned that the toxicology report revealed that opiates and amphetamines were present prompting treatment for an opiate overdose but the lumbar puncture was unremarkable as was the other neurological workup. The rheumatology and infectious disease workups had not yet been completed. Dr. Bradley Cohen concluded his neurologic exam was essentially negative and that no further neurological workup was required. He recommended a consult with Gyani's private doctor, defendant Lori Cohen, M.D. Dr. Bradley Cohen's impression was "encephalopathy of unknown origin." Dr. Kaplan suspected a slowly resolving opiate overdose in light of the toxicology report. Ultimately, neither the rheumatology report nor the infectious disease report were able to identify the cause of Gyani's condition.

An MRI with DWI performed on December 14, 2003 revealed an acute pontine (brain stem) infarct and an infarction involving the left inferolateral cerebellum. A CT Scan done that day revealed lucency had developed in the pons, consistent with the MRI findings. An MRA done later that day of Gyani's head revealed an irregularity and narrowing of the mid and distal basilar artery and an MRA of Gyani's brain revealed left vertebral artery disease and an occlusion with pontine stroke. Though consideration was given to intra-arterial t-PA, the risk was deemed too high.

Dr. Leifer was not called to see and did not see Gyani until after she was diagnosed with a stroke. Dr. Leifer testified at his examination-before-trial that he reviewed the case on December 15, 2003 and reviewing the December 12th MRI found "bilateral pontine area of mildly increased DWI" and later admitted that that can be indicative of a stroke. Dr. Leifer testified that he was not aware of the hospital's stroke protocol. Gyani was initially put on a ventilator and subsequently was transferred to the Respiratory Care Unit on December 30th. She underwent a tracheostomy and PEG placement. She was transferred to the Helen Hays Rehabilitation Center on January 21, 2004.

In their complaint and Verified Bills of Particulars, the plaintiffs fault the defendants for failing to be aware of or recommend that Gyani discontinue Ephedra; failing to recognize the significance of her heaviness and tingling; failing to refer Gyani to an appropriate specialist; failing to obtain a complete history regarding the onset of her symptoms; failing to appreciate the significance of blood pressure readings and the toxicology report; and, failing to timely diagnose her stroke and to administer t-PA. On their Amended Bill of Particulars, the plaintiffs fault the defendants for not following Dr. Black's recommendations, failing to order further diagnostic tests, attributing the plaintiff's condition to a drug overdose and failing to obtain appropriate consults by specialists. The plaintiffs also allege that Dr. Black failed to diagnose a stroke on the December 12, 2003 MRI/DWI. The plaintiffs also fault Dr. Leifer and the hospital for not establishing and/or following appropriate standards and protocols for treating patients with stroke symptoms.

"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 (2nd Dept. 2006), *citing Secof v Greens Condominium*, 158 AD2d 591 (2nd Dept. 1990).

" 'The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury (citations omitted).' " Wexelbaum v Jean, 80 AD3d 756 (2nd Dept. 2011), quoting DiMitri v Monsouri, 302 AD2d 420, 421 (2nd Dept. 2003). "Thus on a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (citations omitted)." Wexelbaum v Jean, *supra*.

Pursuant to New York Public Health Law § 2805-d, a cause of action for lack of informed consent is limited to cases involving non-emergency treatment, procedure or surgery or a diagnostic procedure involving an invasion or disruption of the patient's body. Thus, the "plaintiff must allege that the wrong complained of arose out of some affirmative violation of plaintiff's physical integrity." Iazzetta v Vicenzi, 200 AD2d 209, 213 (3rd Dept. 1994), *lv den.*, 85 NY2d 857 (1995); *see also*, Flanagan v Catskill Regional Medical Center, 65 AD3d 563, 566-567 (2nd Dept. 2009): Public Health Law § 2805-d(3) provides that "[f]or a cause of action 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) (citations omitted)." Ellis v Eng, *supra* at p. 892.

If the moving defendant only establishes that he did not commit medical malpractice, in opposing the motion, the plaintiff must establish the existence of a material issue of fact with respect to only that issue. Stukas v Streiter, ___AD2d ____, 2011 WL833959 (2nd Dept. 2011). Similarly, if the moving defendant establishes a lack of proximate course, the plaintiff need establish only the existence of a material issue of fact with respect to that issue. Stukas v Streiter, *supra*. However, if the moving defendants establishes both a lack of negligence as well as proximate cause, in opposing the motion, the plaintiff must establish an issue of fact as to both of those issues. Stukas v Streiter, *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 (citations omitted). Shectman v Wilson, 68 AD3d 848 (2nd Dept. 2009); *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 and explain how they were departed from. Geffner v North Shore University Hosp., 57 AD3d 839, 842 (2nd Dept. 2008) (citations omitted). 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) (citations omitted). "An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion (citations omitted)." Rosato v 2550 Corp., 70 AD3d 803 (2nd Dept. 2010); *see also*, Cassano v Hagstrom, 5 NY2d 646 (1959); Hamsch v New York City Tr. Auth., 63 NY2d 723, 725 (1984). "[H]indsight reasoning . . . is insufficient to defeat summary judgment (citations omitted)." Miccola v Sacchi, *supra* at p. 871.

"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 (citations omitted)." Alicea v Liguori, 54 AD3d 784, 785 (2nd Dept. 2008), quoting Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 (2nd Dept. 2005). 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

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defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury (citations omitted).'" Alicea v Liguori, supra, at p. 786, quoting Flaherty v Fromberg, 46 AD3d 743 (2nd Dept. 2007). However, the defendant may establish a lack of proximate cause if she/he establishes an "intervening act [which is] extraordinary under the circumstances [and] not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct . . . which may well be a superseding act which breaks the causal nexus (citations omitted).'" Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315 (1980), see also, Restatement, Torts 2d §§ 443, 440; Prosser and Keeton, Torts § 44.

"In general, a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee, and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of the same. (citations omitted)." Toth v Bloshinsky, 39 AD3d 848 (2nd Dept. 2007). Where, however, there is evidence that allegedly negligent medical decisions were made by a hospital's employee, both may be liable. Cerny v Williams, 32 AD3d 881 (2nd Dept. 2006). Indeed, a hospital may be held liable for punitive damages when a plaintiff establishes that it failed to have an attending physician with adequate experience to address the serious nature of a critically ill patient's condition evaluate and treat him/her in a timely fashion and for failing to provide proper supervision to the attending resident. Deane v Mount Sinai Hosp. 25 Misc3d 1121(A) (Supreme Court New York County 2009).

Where a general physician refers a patient to a specialist for treatment of a specific condition and is led to believe that that expert has assumed such care, the general physician is absolved of liability. Wasserman v Staten Island Radiological Associates, 2 AD3d 713, 714 (2nd Dept. 2003); Bellino v Spatz, 233 AD2d 355 (2nd Dept. 1996).

Finally, "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 (citations omitted)." Feinberg v Feit, 23 AD3d 517, 519 (2nd Dept. 2005).

The plaintiffs' claim for lack of informed consent pursuant to Public Health Law § 2805-d(2) is dismissed. The emergent circumstances here preclude such a claim. Connelly v Warner, 248 AD2d 941 (4th Dept. 1998).

This court will not consider the plaintiffs' claims that any of the defendants acted negligently in not administering intra-arterial t-PA. Suffice it to say, it is not disputed that in 2003 that drug was experimental and not approved by the Federal Drug Administration. Accordingly, it was not a generally accepted treatment in the medical community and a doctor's failure to use it simply may not be considered negligent and serve as grounds for a finding of medical malpractice. See Wexelbaum v Jean, supra (defendants met their initial burden of demonstrating entitlement to summary judgment via expert's affirmation's conclusion that "only approved treatment for this type of stroke" had to be administered within three hours of onset of symptoms . . ."); see also, Singh v Rosenberg, 32 AD3d 840 (2nd Dept. 2006), Vesperman v Wormser, 283 AD2d 637 (2nd Dept. 2001); Scharfman by Scharfman v National Jewish Hosp. and Research Center, 122 AD2d 939 (2nd Dept. 1986). Not only has this court been unable to unearth a case allowing the failure to employ experimental drugs or procedures to serve as the basis for a finding of negligence, curiously, the cases which have addressed this issue have found, *inter alia*, issues of fact as to whether the use of experimental drugs or procedures was negligent.

In support of his motion, the defendant Dr. Bradley Cohen has submitted the affidavit of Roger Bonomo, M.D., who is Board Certified in Internal Medicine, Neurology and Vascular Neurology. He is the

Director of Stroke Care at Lenox Hill Hospital. The defendants Dr. Lori Cohen and Great Neck Medical Group have also relied on Dr. Bonomo's affidavit.

Dr. Bonomo explains that in 2003, treatment with intravenous t-PA was used for people with signs and symptoms of ischemic stroke to reduce its effects by preserving and salvaging the brain which was at risk. He explains that t-PA promotes the dissolution of a blood clot where it is preventing blood flow into an area of the brain and causing it to become ischemic. Dr. Bonomo explains that it is limited in its use because of its risk of causing symptomatic hemorrhaging. Therefore, it is only given where there is a history and physical signs of an ischemic stroke that began no more than 180 minutes before treatment with t-PA is begun. He explains that a deficit measurable on the National Institutes of Health Stroke Scale and a baseline CT Scan demonstrating the absence of a hemorrhage or maturing infarct are required before administering t-PA. He opines that not only did Gyani not meet these criteria, over 180 minutes had expired before Dr. Bradley Cohen saw Gyani.

More specifically, Dr. Bonomo opines that certain criteria precluded the administration of t-PA to Gyani. They are systolic blood pressure of 185 or diastolic blood pressure of 110; seizure at onset of stroke; and, history and findings consistent with subarachnoid hemorrhage. He notes that Gyani's blood pressure as reflected in the ambulance reports was 240/120 and 220/110, over the level permitted for the administration of t-PA. In addition, the records indicate that Gyani had displayed seizure-like activity before Dr. Bradley Cohen saw her. An ambulance report notes "seizure-like" activity; Oberoi had described her as "stiff and foaming at the mouth" at home; and, tonic contractions were observed in the Emergency Room. In addition, Dr. Bonomo notes that when Dr. Bradley Cohen saw Gyani, her records indicated that she had headaches, loss of consciousness, elevated blood pressure and seizure-like foaming at the mouth, symptoms Dr. Bonomo concludes are consistent with subarachnoid bleed. Finally, Dr. Bonomo notes that a diagnosis of ischemic stroke which is required for t-PA had not yet been made when Dr. Bradley Cohen saw Gyani. There were no focal signs of brain stem or cerebral dysfunction, only signs of diffuse bilateral dysfunction consistent with encephalopathy. And, the CT Scan and EEG were negative for focal ischemia and Dr. Bradley Cohen was told that the MRI was, too. Dr. Bonomo opines that the MRI with DWI was the gold standard for diagnosing an acute ischemic stroke in 2003, the results of which as related were rightfully relied on by Dr. Bradley Cohen. He also emphatically notes that the three hour time limit for t-PA to be administered had expired when Dr. Bradley Cohen saw Gyani.

The evidence clearly indicates that the defendant Bradley Cohen did not see Gyani before 3:00 PM at which time the window of time in which t-PA could be administered had closed. Accordingly, any actions or inactions taken by Dr. Bradley Cohen were not the proximate cause of the defendants' failure to timely diagnose Gyani's stroke and treat her with t-PA. The defendant Bradley Cohen has established his entitlement to summary judgment thereby shifting the burden to the plaintiffs to establish the existence of a material issue of fact.

The evidence clearly established that Great Neck Medical Group made a prompt referral to New York Neurological Associates and Dr. Gardella upon Gyani's presentation with neurological complaints on November 18th. Under the circumstances, that referral absolves Dr. Lori Cohen and Great Neck Medical Group of any responsibility for any failure to properly respond to Gyani's neurological complaints. See Bellino v Spatz, supra; see also Wasserman v Staten Island Radiological Associates, supra. The evidence also clearly establishes that Dr. Lori Cohen only learned of Gyani's use of Ephedra over six hours after her stroke symptoms began. The evidence also indicates that Dr. Lori Cohen shared this information with the hospital and there is no evidence to the contrary. In any event, the timing of events renders Dr. Lori Cohen's acquisition of this information irrelevant and her alleged failure to adequately convey it to the treating doctors of no consequence. Furthermore, given the timing of Dr. Lori Cohen's involvement on December 12th, Dr. Lori Cohen cannot be liable for the failure to timely diagnose Gyani's stroke and to administer t-PA. Not only

was Gyani being treated by more qualified specialists, the windows of time in which t-PA could be administered had long since closed when Dr. Lori Cohen saw Gyani on December 12th. Finally, assuming, *arguendo*, any of Dr. Lori Cohen's acts or omissions in her treatment of Gyani were negligent, under the circumstances, the care rendered by the defendant hospital and the attending doctors as well as Dr. Gardella and New York Neurological Associates constituted an intervening cause. See, Lynch v Bay Ridge Obstetrical & Gynecological Associates, P.C., 72 NY2d 632 636-637 (1988). The defendant Dr. Lori Cohen has established her 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 North Shore University Hospital-Manhasset ("the hospital"), Nilaya Bhawsar, D.O., Dana Leifer, M.D., Efran Hussain, M.D., Gary P. Kaplan, M.D., John Chelico, M.D., and Christine Napolitano, D.O. have submitted the affirmation of Suja Johnkutty, a Board Certified Neurologist. Dr. Johnkutty, like Dr. Bonomo, opines that t-PA was contraindicated for Gyani because she did not meet the inclusion criteria, she met the exclusionary criteria and the window of time expired before the propriety of t-PA was established. She opines that there was no confirmed diagnosis of stroke during the three hour period as Gyani's condition intermittently improved in the Emergency Room. Like Dr. Bonomo, she opines that t-PA was contraindicated because Gyani's blood pressure readings were in excess of 185 systolic and 110 diastolic as well as due to her seizure-like activity when her stroke symptoms began as well as in the Emergency Room. She opines that Gyani's eventual diagnosis of vertebral artery dissection also militated against t-PA because it can cause extensive bleeding and hemorrhaging, possibly leading to death. Like Dr. Bonomo, Dr. Johnkutty notes that intra-arterial was experimental and not the standard of care in 2003, which means a failure to use it cannot equate with medical malpractice.

Dr. Johnkutty seeks dismissal of the complaint against Dr. Bhawsar and the hospital vicariously on the grounds that Dr. Bhawsar was a resident working under the direction and supervision of attending doctors. Dr. Johnkutty opines that Dr. Gardella was consulted with and directed Gyani's care and that Dr. Bhawsar never exercised independent judgment which is necessary to hold her concomitantly the hospital responsible. Dr. Johnkutty has not established Dr. Bhawsar and concomitantly the hospital's entitlement to summary judgment on the grounds that Dr. Bhawsar was a resident. While it is unusual to impose liability on a resident doctor at a hospital, the circumstances here give rise to an issue of fact concerning Dr. Bhawsar's liability and as a result the hospital as his employer. The circumstances surrounding Gyani's treatment at the Emergency Room clearly gave rise to the possibility of an ongoing stroke and Dr. Bhawsar, who was the attending resident doctor during the time in which t-PA could be administered may have in fact exercised independent judgment in failing to procure adequate timely review, consultation and treatment by a qualified neurologist and/or questioning the actions of those involved which negligence may have resulted in the delayed stroke diagnosis and expiration of time in which t-PA could be administered. See, Deane v Mount Sinai Hosp., supra.

There is an issue of fact as to whether Dr. Bhawsar's communications via telephone with defendant Dr. Gardella sufficed. While Dr. Johnkutty attributes the decision not to administer t-PA to the attending doctors Gardella and Bradley Cohen, that decision had to be made within three hours. It is far from clear that Dr. Bradley Cohen was meaningfully consulted regarding Gyani and he did not examine her in that time period so Bhawsar's reliance on him may have been inappropriate. Similarly, Dr. Gardella did not see Gyani in that period either and the extent of her communications with Dr. Bhawsar and whether he was justified on relying on her is also far from clear.

Nevertheless, Dr. Johnkutty establishment that Gyani was not a candidate for t-PA, establishes a lack of proximate cause between any possible negligence by Dr. Bhawsar and Gyani's injuries. The defendant Dr. Bhawsar and the hospital insofar as it could be held vicariously liable for his acts have accordingly established their entitlement to summary judgment thereby shifting the burden to the plaintiffs

to establish the existence of a material issue of fact.

Dr. Johnkutty seeks dismissal of the complaint against Dr. Napolitano, the first year intensive care unit fellow whose only involvement with Gyani was assisting Dr. Kaplan with the lumbar puncture. Dr. Johnkutty has established Dr. Napolitano's entitlement to summary judgment. Dr. Napolitano did not play a critical role in Gyani's care and treatment nor is there any causative link between his assistance with Gyani's care and her injuries.

Dr. Johnkutty seeks dismissal of the complaint against the defendant John Chelico, M.D. on the grounds that he was an intern acting under the supervision of attending doctors' orders. All that Dr. Chelico did was record notes in Gyani's chart, nearly always at the direction of doctors. None of Dr. Chelico's chart entries are alleged to have been in error let alone to have caused any damage. Dr. Johnkutty has established Dr. Chelico's entitlement to summary judgment thereby shifting the burden to the plaintiffs to establish the existence of a material issue of fact.

Dr. Johnkutty seeks dismissal of the complaint against Efran Hussain, M.D. on the ground that his treatment of Gyani at all times conformed to the generally accepted standards of care and did not proximately cause her injuries. Dr. Hussain was an attending doctor in the ICU whose only contact with Gyani was limited to an evaluation as to whether she was an appropriate candidate for admission to the ICU and whether she was stable for transportation the evening of December 12th. Dr. Johnkutty established Dr. Hussain's entitlement to summary judgment thereby shifting the burden to the plaintiffs to establish the existence of a material issue of fact.

Dr. Johnkutty seeks dismissal of the complaint against Dr. Kaplan on the ground that his treatment of Gyani conformed with the generally accepted standards of care. Dr. Johnkutty opines that since there had not been a diagnosis of stroke when Dr. Kaplan first saw Gyani, t-PA was not appropriate. Dr. Johnkutty has established Dr. Kaplan's entitlement to summary judgment thereby shifting the burden to the plaintiffs to establish the existence of a material issue of fact. The court further notes that the evidence indicates that the time in which t-PA could be administered had expired when Dr. Kaplan first saw Gyani providing further grounds for dismissing the complaint against him.

Dr. Johnkutty seeks dismissal of the complaint against Dr. Leifer. He opines that not only did Dr. Leifer's treatment of Gyani conform with generally accepted standards of care, but when he first saw her on December 14, 2003, she had already been diagnosed with a stroke and the time in which t-PA could be administered had long expired. Dr. Leifer has established his entitlement to summary judgment dismissing the plaintiffs' claims of medical malpractice insofar as his care of Gyani is involved, thereby shifting the burden of the plaintiffs to establish the existence of a material issue of fact.

As for Dr. Leifer's alleged failure to formulate and establish protocols and procedures for treating patients who present with stroke symptoms, Dr. Johnkutty opines that that is irrelevant because Gyani was not diagnosed with a stroke on December 12, 2003. This argument fails as it rests on a gross misinterpretation of the plaintiffs' position. It is Dr. Leifer's alleged failure to formulate appropriate protocols and a procedure for dealing with patients exhibiting symptoms of a possible stroke that plaintiffs' fault. Nevertheless, because there is a lack of evidence that Dr. Leifer was personally responsible for establishing such protocols and procedures, he has established his entitlement to summary judgment dismissing that claim against him, too, thereby shifting the burden to the plaintiffs to establish the existence of a material issue of fact.

Dr. Johnkutty seeks dismissal of the complaint against the hospital. He notes that to the extent only vicarious liability is alleged, the claims against its employees should be dismissed thereby absolving the

hospital of vicarious liability. Dr. Johnkuty further opines the hospital's stroke protocols in effect in 2003 "are consistent with medical literature and available information regarding the treatment of stroke and administration of t-PA" and that they were consistent with other area hospital's stroke protocols as well. The hospital has not established via Dr. Johnkuty's conclusory affidavit its entitlement to summary judgment dismissing the plaintiffs' claims regarding a lack of an established procedure and protocol for effectively dealing with patients presenting with stroke symptoms including the hospital's alleged failure to educate its staff and the attending doctors and to enforce it. The hospital's motion for summary judgment, is denied.

In support of their motion, Slavina Gardella, M.D. and New York Neurological Associates have submitted the affirmation of Jesse Weinberger, M.D., a Board Certified Neurologist. He opines that following her examination of Gyani on November 18, 2003, Dr. Gardella appropriately ordered tests comprised of a complete workup for TIA. Dr. Weinberger further opines that Dr. Gardella's follow-up examination and assessment of Gyani on December 12, 2003 was in accordance with medical standards. He opines that Gyani's signs and symptoms were not indicative of vertebral artery dissection. He further opines that even had Dr. Gardella made a diagnosis of vertebral artery dissection before Gyani's stroke on December 12, 2003, the treatment for it would have been aspirin or Heparin, most likely aspirin in view of Gyani's mild transient symptoms. And, he notes there is no medical evidence that either of those drugs prevent strokes or minimizes their effects. Thus, he opines that there is no causal relationship between Dr. Gardella's alleged failure to diagnose a vertebral artery dissection and Gyani's injuries. Dr. Weinberger further opines that assuming, *arguendo*, that Dr. Gardella became involved with Gyani's care in the Emergency Room at the hospital, "the event had already occurred some unknown number of hours earlier." He opines that the administration of t-PA under those circumstances was contraindicated pursuant to the prevailing medical standards of care. He further opines that the use of t-PA was not indicated based on Gyani's presentation which included seizure, stupor and coma. He opines to a reasonable degree of medical certainty that nothing Dr. Gardella did or failed to do caused or contributed to Gyani's injury.

The defendant Gardella and New York Neurological Associates have established their entitlement to summary judgment dismissing the complaint against them. They have established that the care Dr. Gardella rendered to Gyani on December 8, 2003 conformed with prevailing standards and that her failure to diagnose a vertebral artery dissection was not a proximate cause of Gyani's stroke and ensuing injuries. While they have not established that their involvement with Gyani on December 12th was outside of the window of time in which t-PA could have been administered, they have also established that their role in caring for Gyani on December 12, 2003, even if negligent was not a proximate cause of her injuries because Gyani was not a candidate for t-PA. The burden accordingly shifts to the plaintiffs to establish the existence of a material issue of fact.

The plaintiffs have not opposed the defendants Dr. Napolitano, Dr. Chelico and Dr. Hussain's motion. The complaint against them is dismissed.

In opposition, the plaintiffs have submitted an affidavit of a Board Certified neurologist ("the plaintiffs' expert"). Again, the court notes that it has held that the plaintiffs' expert opinion that the administration of intra-arterial t-PA which has a six-hour window was an option in treating Gyani on December 12th because it "was in general use in December 2003, including at [the hospital] . . ." will not be considered (see, supra).

The plaintiffs' expert faults Dr. Gardella for not performing an MRA following Gyani's earlier MRI in November because she was a young woman with stroke symptoms and while an MRI was adequate to check for a structural process, an MRA should have been done to check for a vascular process which s/he opines "would be a likely source of symptoms in a young person." The plaintiffs' expert opines that Dr. Gardella's failure to perform this test allowed Gyani's condition to go undiagnosed and untreated and led

to her stroke because had the testing been done, a vertebral artery dissection would have been diagnosed and treated with possible Heparin and an endovascular procedure thereby reducing the likelihood of a stroke. S/he opines that even if that treatment had not prevented the stroke, the very diagnosis would have led to a far more focused and tailored response to Gyani's symptoms on December 12, 2003, thereby raising a real possibility that t-PA would have been timely administered thereby sparing her the severe consequences of her untreated stroke.

As for December 12th, the plaintiffs' expert further opines that brain stem stroke must be placed at the top of any differential diagnosis and investigated STAT in light of the time limitations for the administration of t-PA. S/he opines that Gyani's case was not handled that way. S/he opines that the CT Scan, MRI and EEG all should have been done before 1:30 PM, which the EEG clearly was not. S/he also opines that Gyani met the National Institute of Health Stroke Scale due to her abnormal level of consciousness, leg drift, extensor posturing and slurred speech. S/he opines that with that presentation, Gyani's brain stem stroke should have been diagnosed via a mandatory STAT workup within the time allowed for t-PA administration. S/he opines that the defendants' failure to confirm Gyani's stroke is not a defense because that was the result of their failure to fully appreciate her signs and symptoms; their misunderstanding of the significance of the MRI; and, their own failure to perform necessary tests in a timely manner that led to their failure to diagnose her stroke. S/he explains that all efforts must be made to rule in a brain stem stroke until conclusively ruled out, which was not done here. S/he notes that an EEG was not done to rule out seizures until after 3:00 PM and that the results of the MRI of December 12th which showed bilateral signal hypertensities and/or bilateral changes on the pons clarified the diagnosis and called out for further testing. S/he opines that Gyani's developments – waxing and waning of symptoms – should have led the defendants to conclusively rule out drug overdose, infection and subarachnoid hemorrhage. The plaintiffs' expert notes the fact that Gyani's signs of stroke may have alternately improved and became worse but they never resolved and they became significantly worse after her MRI. S/he notes that the time of onset was clearly 11:30 AM and that Gyani was over 18 years of age, thereby satisfying the criteria for t-PA administration.

The plaintiffs' expert faults the defendants for using the MRI to rule out stroke because it is a non-diagnostic test for strokes. S/he notes that the MRI/DWI displayed the possibility of a stroke and a diagnostic MRI should have been done. Indeed, further testing was recommended by Dr. Black.

The plaintiffs' expert opines that Gyani's blood pressure readings did not preclude the use of t-PA because only the patient's blood pressure at the time that the t-PA is administered is relevant and her readings fell within acceptable parameters within the time needed. As for Gyani's seizures allegedly eliminating the availability of t-PA, s/he notes that neither "seizure activity" nor "seizure-like activity" is grounds for not administering t-PA where, like here, the EEG clearly rules out seizures. Again, had the EEG been done STAT, this would have been known. S/he also opines that an EEG cannot be relied upon to rule out focal ischemia as Dr. Bonomo erroneously did. In fact, s/he opines that the results of the EEG showed bilateral slowing which is consistent with a brain stem pathology like an ongoing stroke. As for a subarachnoid hemorrhage, the plaintiffs' expert notes that Gyani's symptoms would not have waxed and waned and the CT Scan ruled that out, too. S/he further opines that vertebral dissection does not contraindicate t-PA use and that t-PA is in fact used for it because a vertebral artery dissection can cause a clot in the blood vessel leading to the brain stem.

The plaintiffs' expert opines that the defendants' reliance on the second year resident Dr. Bhawsar to manage Gyani's neurological workup departed from medical standards: Timely hands-on treatment by an experienced neurologist who could administer t-PA was called for. S/he notes that not only did Dr. Bhawsar fail to timely call for help as needed, he did not order tests STAT.

The plaintiff's expert criticizes the defendants for diagnosing a drug overdose. S/he notes that the only way to definitively do that is to determine blood levels which was never done. S/he also notes that Gyani's condition waxed and waned and her MRI had visible bilateral changes on the pons, which are not indicative of a drug overdose. The plaintiffs' expert also opines that there was no basis for considering an infection in light of the sudden dramatic onset of symptoms including altered consciousness, extensor posturing and other neurological signs.

The plaintiffs' expert faults Dr. Leifer for not educating the staff on how to handle someone who presents with stroke symptoms since Dr. Kaplan identified him at his examination-before-trial as the head stroke neurologist. S/he also notes that neither the CT Scan, the MRI or the EEG alone or in combination ruled out a stroke. And, the plaintiffs' expert attributes responsibility for the manner in which the MRI results were erroneously dispersed to the treating doctors to the hospital since Dr. Black was its employee.

The plaintiffs' expert ultimately opines that the failure to administer t-PA allowed Gyani's stroke to go untreated and progress to the point of her being locked-in permanently which would not have happened had t-PA been administered.

Succinctly put, the plaintiffs' expert faults Dr. Bhawsar (and concomitantly the hospital as his employer) for not working up Gyani's case fast enough; not conveying the emergent situation accurately enough to Dr. Gardella (and others), thereby contributing to the delay; and, for failing to realize and act on the case as required.

S/he faults the hospital for Dr. Black's possible failure to accurately communicate the MRI results, which misinformation materially misled the neurologists to erroneously rule out stroke. S/he also faults the hospital for its employees' failure to recognize the level of care needed here, which he maintains is contrary to medical standards. More specifically, s/he faults Dr. Kaplan for not working up Gyani's case for stroke diagnosis quickly enough, i.e., for not ordering a CT Scan and EEG STAT and not involving a stroke neurologist in Gyani's case -- like Dr. Leifer -- who, she maintains, would have recognized the significance of the bilateral changes on the pons on the MRI. S/he also faults Dr. Kaplan for improperly relying on the MRI to rule out stroke. S/he opines that had Dr. Kaplan been familiar with the standards of care in dealing with a possible acute stroke patient and acted in accordance therewith by procuring an expeditious workup, a timely diagnosis and the administration of t-PA, Gyani's injuries could have been avoided.

The plaintiffs' expert faults Dr. Gardella and New York Neurological Associates for failing to recognize the need for and put in place STAT management of Gyani's case and the need for an expeditious workup and failing to convey that to Dr. Bradley Cohen. The plaintiffs' expert faults Dr. Gardella regardless of the information or lack thereof that Dr. Bhawsar communicated to her because given Gyani's history, pertinent revealing inquires should have been made even had necessary information not been volunteered to her. S/he further faults her for not knowing and following the hospital's guidelines for dealing with a patient presenting with stroke symptoms.

The plaintiffs' expert faults Dr. Bradley Cohen for diagnosing Gyani with a drug overdose because her symptoms did not warrant it. He, too, is faulted for not being familiar with and following the hospital's guidelines for treating a possible acute stroke patient. The plaintiffs' expert also faults Dr. Bradley Cohen for not involving a stroke neurologist in the management of Gyani's case.

The plaintiffs' expert faults Dr. Lori Cohen for failing to recognize that Gyani was having a stroke and not imparting that to others and involving stroke doctors.

The plaintiffs' expert faults Dr. Leifer for not developing and implementing stroke guidelines on the

grounds that Dr. Kaplan identified him as head of stroke neurology. S/he notes that Dr. Leifer testified that he did not know whether stroke protocols even existed and that a stroke team did not exist, which was called for "in the protocols" and "required by the standard of care of a hospital that administers t-PA."

The plaintiffs' attempt to establish Dr. Bradley Cohen's presence at the hospital sooner fails because it is purely speculative. That a bearded man spoke with Gyani's mother in the Emergency Room at approximately 1:30 PM and Dr. Bradley Cohen wore a beard hardly establishes that it was him with whom she spoke. And, even assuming that it was, that did not establish that he was able to see Gyani then or that he did so. Furthermore, it is clear that Dr. Bradley Cohen's failure to get to the hospital sooner was not his fault. Whether Dr. Bhawsar imparted the urgency to Dr. Gardella is unclear but there is no evidence that Dr. Gardella imparted any urgency to Dr. Bradley Cohen.

The allegations against Dr. Leifer fail because there is no evidence that he was individually responsible for the hospital's stroke guidelines and their enforcement. Assuming, *arguendo*, he was the head of stroke neurology, it has not been established that he would have had those responsibilities.

In view of the defendants Dr. Bradley Cohen, Dr. Kaplan, Dr. Leifer and Dr. Lori Cohen's involvement with Gyani's case after the three-hour window for the administration of t-PA expired, their actions or inactions could not have proximately caused Gyani's alleged injuries. The complaint against them is dismissed.

The plaintiffs have raised a material issue of fact with respect to Drs. Gardella and Bhawsar, as well as the hospital's liability for Gyani's alleged injuries. There is also an issue of fact as to whether the administration of t-PA was contraindicated by Gyani's condition. See, *Wexelbaum v Jean*, supra. Both Drs. Gardella and Bhawsar were involved in Gyani's care during the critical three-hour window. There is an issue of fact as to whether Dr. Gardella was negligent in her advising Dr. Bhawsar and implementing proper treatment for Gyani (see, *Graham v Columbia-Presbyterian Medical Center*, 185 AD2d 753 [1st Dept. 1992]); whether Dr. Bhawsar exercised independent judgment in not securing timely test results and/or attending qualified doctors' input (*Deane v Mount Sinai Hospital*, supra); and, whether the hospital was negligent in leaving a resident doctor alone to care for Gyani, a critically ill young woman, when time was of the essence.

Nevertheless, Dr. Gardella's failure to perform an MRA on December 8, 2003 cannot serve as grounds for negligence as it was not set forth in the plaintiffs' Bills of Particulars. See, *Ryan v St. Francis Hospital*, 62 AD3d 857 (2nd Dept. 2009), *lv den.*, 13 NY3d 708 (2009). And, new theories of liability may not be relied on to defeat a summary judgment motion. *Winters v St. Vincent's Medical Center of Richmond, H.B.B.A., Inc.*, 273 AD2d 465 (2nd Dept. 2000). In any event, the conclusions relied upon by the plaintiffs' expert are entirely speculative, i.e., that an MRA would have shown a vertebral artery dissection and treatment thereof could have prevented or mitigated Gyani's injuries. See, *Diaz v New York Downtown Hospital*, supra, citing *Romano v Stanley*, supra; *Amatulli by Amatulli v Delhi Constr. Corp.*, supra; *Rosato v 2250 Corp.*, supra.

SO ORDERED.

DATED:

4/4/2011

Roy S. Mahon
.....
J.S.C.

ENTERED

APR 06 2011

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