

Chaudhry v Brown

2011 NY Slip Op 31831(U)

May 31, 2011

Sup Ct, Suffolk County

Docket Number: 07-340

Judge: Ralph T. Gazzillo

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COPY SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 3/10/11 (#002)
MOTION DATE 3-17-11 (#003)
MOTION DATE 3-24-11 (#004)
MOTION DATE 4-1-11 (#005)
ADJ. DATE 4/7/11
Mot. Seq. # 002 - MG ✓ # 004 - MotD ✓
003 - MG ✓ # 005 - MG ✓

-----X
MOHAMMED S. CHAUDHRY, Individually and :
as the Proposed Administrator of the Estate of :
HALIMA BIBI, Deceased, :
 :
Plaintiffs, :
 :
- against - :
 :
HOWARD A. BROWN, D.O., H. BROWN, D.O., :
P.C., SOUTHSIDE HOSPITAL, PRAKASH M. :
PARIKH, M.D., SURYAKANT PARIKH, M.D., :
SURYAKANT PARIKH & PARAKASHCHANDRA :
PARIKH, PHYSICIANS, P.C., BRIAN SCOTT :
BLAUSTEIN, D.O., BRIAN S. BLAUSTEIN, D.O., :
P.C., RAKESH BALVANT BHAI PATEL, M.D., :
RAKESH B. PATEL, PHYSICIAN, P.C., RICHARD :
KEITH SCHWARTZ, D.O., ANTHONY THOMAS :
GAMBINO, M.D., ISLAND WIDE MEDICAL :
ASSOCIATES, P.C., ISLAND CARDIAC :
SPECIALISTS, P.C., FRED GARY GLASSER, M.D., :
MELISSA DAWNE COHEN, M.D., ADVANCED :
PULMONARY DIAGNOSTICS, RLLP, ANDREY :
GONCHARUK, M.D., QUEENS NASSAU :
NEPHROLOGY SERVICES, PLLC, WINTHROP :
UNIVERSITY HOSPITAL and "JOHN/JANE DOE", :
 :
Defendants. :
-----X

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Upon the following papers numbered 1 to 65 read on these motions and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 16 ; Notice of Cross Motion and supporting papers (003) 17- 34; (004) 35- 47; (005) 48-65 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ____; Other ____ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that motions (002) (003) (004) (005) by defendants herein for summary judgment dismissing the complaint as asserted against them are consolidated for one purpose of this decision; it is further

ORDERED that motion (002) by defendant Richard K. Schwartz, D.O. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as asserted against him is granted; and it is further

ORDERED that motion (003) by defendants Melissa Dawne Cohen, M.D., Fred Gary Glasser, M.D. and Advanced Pulmonary Diagnostics, RLLP, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as asserted against them is granted; and it is further

ORDERED that this motion (004) by defendant Winthrop University Hospital for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as asserted against it is granted only to the extent that it is determined that it is not vicariously liable for any alleged malpractice by the moving defendants Drs. Schwartz, Gambino, Cohen, and Glasser, and Advanced Pulmonary Diagnostics, RLLP, herein, and is denied on the issue of vicarious liability as to its other staff or employees; and it is further

ORDERED that this motion (005) by defendant Anthony Gambino, M.D. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as asserted against him is granted.

This medical malpractice action is premised upon the alleged negligence of defendants, lack of informed consent, the wrongful death of the plaintiff's decedent, Halima Bibi, and a derivative claim on behalf of the decedent's spouse, Mohammad S. Chaudhry, arising out of the care and treatment rendered to the plaintiff's decedent from about January 5, 2005 to about January 13, 2005, during a continuous course of treatment. It is claimed that the defendants negligently failed to properly and timely diagnose and treat the decedent for a cardiac condition resulting in her death on January 13, 2006. By order of the Surrogate of the County of Suffolk dated September 15, 2005, Mohammad S. Chaudhry was duly appointed as Administrator of the Estate of the decedent, Halima Bibi.

In motion (002), the defendant Richard K. Schwartz, D.O. seeks summary judgment dismissing the complaint on the bases that he fully complied with the standard of care during his treatment of Halima Bibi and that his care and treatment did not cause or contribute to the plaintiff's injuries as the plaintiff's decedent had sustained an acute myocardial infarction and was in a state of acute cardiogenic shock prior to her arrival at Winthrop University Hospital.

In motion (003), the defendants Melissa Dawne Cohen, M.D., Fred Gary Glasser, M.D., and Advanced Pulmonary Diagnostics, RLLP, seek summary judgment dismissing the complaint as asserted against them on the bases that they were involved in the plaintiff's decedent's care and treatment solely for a pulmonary/critical care consultation called by the cardiologist, Dr. Richard Schwartz, D.O., and that when the plaintiff's decedent arrived at Winthrop University Hospital, she was already suffering diabetic ketoacidosis, myocardial infarction with significant heart muscle damage, ischemic cardiomyopathy, cardiogenic shock, and was on an intra-aortic balloon pump. They assert that they did not depart from good and accepted medical practice and did not proximately cause the plaintiff's decedent's claimed injuries and death.

In motion (004), the defendant Winthrop University Hospital seeks an order dismissing the complaint as asserted against it on the bases that any care and treatment rendered to the plaintiff's decedent by its staff and employees during her admission to Winthrop University Hospital was provided under the direction of the

attending physicians and not upon the staff's or employee's own independent judgment; that the care and treatment rendered by the attending physicians did not depart from the standard of care and did not proximately cause the decedent's injuries and death, and there is no basis for vicarious liability on the part of Winthrop University Hospital as to any of the residents or physicians.

In motion (005), the defendant Anthony Gambino, M.D. seeks summary judgment dismissing the complaint asserted against him on the bases that the care and treatment rendered by him to the plaintiff's decedent did not depart from good and accepted standards of medical practice and did not proximately cause the claimed injuries or death of the plaintiff's decedent in that the decedent had, prior to her arrival to Winthrop University Hospital, sustained severe damage to her heart due to an inferior wall myocardial infarction.

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 [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[2nd Dept 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 2nd Dept 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 [2nd Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the 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 defendant's 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 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]).

The unsigned copies of the deposition transcripts submitted by the moving parties are not in admissible form as required by CPLR 3212 (see, *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), are not accompanied by an affidavit pursuant to CPLR 3116, and are not considered on this motion. The uncertified copies of the decedent's medical records are not in admissible form as required pursuant to CPLR 3212.

In support of motion (002), Richard K. Schwartz, D.O. has submitted, inter alia, his affidavit, an attorney's affidavit, copies of the summons and complaint, his answer and the plaintiff's verified bill of particulars; plaintiff's medical records; and the affirmation of the defendant's expert Philip Gelber, M.D.

Dr. Schwartz has set forth in his affidavit that he is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine, cardiovascular disease, and interventional cardiology. He was first contacted about the decedent, Halima Bibi, on January 7, 2005, by Dr. Patel from Southside Hospital, and was advised that Dr. Patel had performed a cardiac catheterization on Ms. Bibi at Southside Hospital for a subtotally occluded right coronary artery and a subtotally occluded left anterior descending artery. He was further advised that she was in cardiogenic shock, was suffering from hypotension, and had an acute myocardial infarction. Dr. Patel had also placed an intra-aortic balloon pump and was requesting that she be transferred to Winthrop University Hospital for emergent percutaneous coronary intervention. Dr. Schwarz indicates that the plaintiff's decedent, upon arrival to Winthrop University Hospital, was critically ill with a systolic blood pressure of 60, and an augmented blood pressure of 90 to 100 with intra-aortic pump support. Due to the significant cardiac damage, it was Dr. Schwartz's plan to clear the blockages in her arteries and stabilize her to a point where she could be transferred to Columbia University Hospital for a heart transplant. He continued that he performed an angioplasty with placement of drug-eluting stents in both the right coronary artery and the left anterior descending artery on the evening of January 7, 2005, reducing the occlusions to 0%. However, she remained in cardiogenic shock as a result of the significant and severe damage to her heart from the myocardial infarction sustained prior to her arrival to Winthrop University Hospital, as evidenced by the values of the cardiac enzymes obtained on blood testing.

As a result of this prior severe damage to the decedent's heart, Dr. Schwartz states that there was nothing medically that could be done to prevent an inferior wall rupture of the heart. The plan was to prevent an inferior wall rupture during the critical seven day period following the myocardial infarction. He continues that the decedent did not stabilize, and instead, desaturated on January 10, 2005 as a result of pulmonary edema which required that she be intubated for approximately 48 hours. Upon extubation, she did well and remained asymptomatic until January 13, 2005, when she suffered a cardiac arrest secondary to the prior severe left ventricular damage, and died. Dr. Schwartz states he informed the family of all the risks and benefits and alternatives of the procedure he performed and of the seriousness of her condition. It is Dr. Schwartz's opinion with a reasonable degree of medical certainty that he did not depart from good and accepted medical practices in his care and treatment of the plaintiff's decedent, that he gave proper informed consent, that he appropriately performed the necessary angioplasty and stenting procedure to stabilize her condition, and that there was nothing he did or did not do that proximately caused the claimed injuries or death of the plaintiff's decedent. He further opines that the damage to the plaintiff's decedent's heart was sustained by the decedent prior to her admission to Winthrop University Hospital.

Dr. Philip Gelber sets forth that he is a physician duly licensed to practice medicine in the State of New York and is board certified in internal medicine, cardiovascular disease, and critical care medicine. He delineates the materials he reviewed and opines with a reasonable degree of medical certainty that Dr. Schwartz

did not depart from good and accepted standards of medical care in his care and treatment of the plaintiff's decedent, and that there was nothing that he did or did not do that was the proximate cause of the decedent's claimed injuries or death. This is so, states Dr. Gelber, because prior to her presentation to Winthrop University Hospital, the plaintiff's decedent had already sustained an acute myocardial infarction, her heart had been severely damaged as confirmed by the cardiac enzyme levels, and she was in cardiogenic shock with a severely decreased ejection fraction.

Dr. Gelber sets forth the decedent's medical history and care and treatment prior to her admission to Winthrop University Hospital. Upon arrival to Winthrop University Hospital, the plaintiff's decedent was critically ill, in cardiogenic shock. Her heart had been damaged to such a degree that it was unable to adequately pump blood to the organs in her body. He continues that after Dr. Schwartz performed the angioplasty and stent placement, her blood pressure improved. She was placed in the intensive care unit, and an ICU consult with Dr. Fred Glasser, M.D. was obtained. Her development of pulmonary edema required intubation, followed by removal of the tube upon stabilization. However, on January 13, 2005, her condition deteriorated. Advanced cardiac life support was implemented to no avail. Dr. Gelber states that no autopsy was performed; however, her death certificate indicates the cause of death was cardiac arrest, myocardial infarction, and ischemic cardiomyopathy.

Based upon the foregoing, it is determined that Richard Schwartz, D.O. has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against him.

In motion (003), the defendants, Melissa Dawne Cohen, M.D., Fred Gary Glasser, M.D. and Advanced Pulmonary Diagnostics, have submitted, inter alia, their respective affidavits, an attorney's affirmation; and the expert affirmation of Alan Mensch, M.D.

Dr. Fred Glasser states in his supporting affidavit that he is duly licensed to practice medicine in the State of New York and is board certified in internal medicine and pulmonary disease. He continues that he was involved in the care and treatment of Halima Bibi during her admission of January 7, 2005 to Winthrop University Hospital in his capacity as a pulmonology/critical care consulting physician. He states that he did not render care and treatment to her prior to her admission to Winthrop University Hospital. Prior to that admission, she had been diagnosed with diabetes and diabetic ketoacidosis. She had suffered an inferior wall myocardial infarction, had undergone cardiac catheterization which revealed significant occlusions in the left anterior descending and right coronary arteries, and had significant cardiac dysfunction. An intra-aortic balloon pump had been placed. When he first saw the plaintiff's decedent, Dr. Schwartz had already performed an angiography procedure and had placed stents. The decedent was on an insulin drip for management of her diabetes. Chest x-ray revealed pulmonary vascular congestion due to cardiogenic shock. Management of this was deferred to the cardiologist as this was related to the decedent's cardiac status. He continues that plaintiff was critically ill due to her underlying cardiac issues and cardiogenic shock, but was stable from a pulmonary standpoint. She remained thus so when he saw her on January 8th and 9th. He states she was managed primarily by endocrinology for her diabetes and by cardiology for her cardiac problems. She remained on the intra-aortic balloon pump due to the cardiogenic shock. As indicated by the January 12, 2005 cardiology note, all management was to go through cardiology only. Suggestions were presented to the cardiologist who implemented the plans, as a delicate balance had to be reached in managing the patient's multiple issues.

Dr. Glasser continues that on January 10th and 11th, Dr. Cohen saw Ms. Bibi after she had gone into respiratory failure due to the severity of the underlying cardiogenic shock. Dr. Glasser states he then saw the plaintiff's decedent on January 12th, at which time she was intubated, but that she was being weaned off the

respirator in preparation for extubation. On January 13, 2005, Ms. Bibi became hypotensive, had chest discomfort, was bradycardic, and suffered another myocardial infarction. Resuscitation was to no avail. It is Dr. Glasser's opinion with a reasonable degree of medical certainty, that all the care and treatment rendered by him, Dr. Cohen and Advanced Pulmonary Diagnostics during the Winthrop University admission was appropriate and in accord with good and accepted medical practice from a pulmonary standpoint. While she may have been stable from a pulmonary standpoint, he continues, she remained extremely ill from a cardiac standpoint. He states that he did not cause or contribute in any way to her claimed injuries or death.

Dr. Cohen states in her affidavit that she is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine, pulmonary disease, and critical care. She states that she had no involvement in Ms. Bibi's care and treatment prior to her admission to Winthrop University Hospital to the service of Dr. Schwartz on January 7, 2005. She advises as to Ms. Bibi's condition upon arrival to Winthrop University Hospital and during her admission at Winthrop where she examined her on a critical care evaluation/consult upon the request of Dr. Schwartz. She sets forth her evaluation of the plaintiff's decedent's condition and agrees with the findings and events during that admission as set forth by Dr. Glasser. She states that Ms. Bibi was intubated secondary to hypoxic respiratory failure due to the severity of her underlying cardiac issues and damage to her heart suffered prior to her admission to Winthrop University Hospital. It is Dr. Cohen's opinion with a reasonable degree of medical certainty that all of the care and treatment rendered by her and Dr. Glasser and thereby by Advanced Pulmonary Diagnostics, to the plaintiff's decedent during her admission to Winthrop University Hospital was appropriate and in accord with good and accepted medical practice. She sets forth the basis for that opinion and continues that the care and treatment provided by her and Dr. Glasser did not cause or contribute to the decedent's injuries or death.

Alan Mensch, M.D asserts in his supporting expert affirmation that he is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine and pulmonary disease. He set forth the materials he reviewed and upon which he bases his opinions. He expresses his opinion with a reasonable degree of medical certainty that Dr. Glasser, Dr. Cohen and Advanced Pulmonary Diagnostics did not depart from good and accepted standards of pulmonary care and treatment. He further states that they did not cause or contribute to the decedent's injuries or death. Dr. Mensch sets forth the decedent's medical treatment and medical condition upon transfer on an emergent basis for further cardiac management from Southside Hospital to Winthrop University Hospital. He states that she was in critical condition at Southside Hospital and upon arrival at Winthrop, and that she was suffering from diabetes, diabetic ketoacidosis, myocardial infarction, ischemic cardiomyopathy, and cardiogenic shock, and had an intra-aortic balloon pump placement. After successful cardiac intervention at Winthrop, she remained very ill and was awaiting a possible transfer to Columbia Presbyterian Medical Center for a heart transplant. However, due to her severe medical issues, she required intubation for respiratory distress and was subsequently extubated. Thereafter, however, her condition continued to deteriorate and she died despite resuscitative intervention. Dr. Mensch opines that from a pulmonary standpoint, the decedent was stable, but from a cardiac standpoint, she was gravely ill, having suffered severe damage to her heart muscle and significant two vessel disease which required intervention.

Based upon the foregoing, it is determined that Dr. Glasser, Dr. Cohen and Advanced Pulmonary Diagnostics, RLLP have demonstrated prima facie entitlement to summary judgment.

Turning to cross motion (005), Anthony Gambino, M.D. seeks summary judgment dismissing the complaint as asserted against him. It is noted that the note of issue was filed with this court on November 1, 2010. CPLR 3212(a) provides in pertinent part that a motion for summary judgment shall be made no later than one hundred twenty days after the filing of the Note of Issue, except with leave of court on good cause shown.

Here, all parties stipulated that the time in which Gambino would serve his motion for summary judgment was extended until March 15, 2011. Thus, cross motion (005) is deemed to have been timely made on March 15, 2011. In support of this cross motion (005), Dr. Gambino has submitted, inter alia, his affirmation and the affirmation of Malcolm Charles Phillips, M.D.

Dr. Gambino states in his affirmation that he is licensed to practice medicine in the State of New York and is board certified in internal medicine with subcertification in cardiovascular disease and interventional cardiology. At the time of the plaintiff's decedent's admission to Winthrop University Hospital, he was an attending physician on staff. He saw Ms. Bibi on two occasions during her admission to Winthrop University Hospital. He set forth her care and treatment after her admission, and the critical condition she was in when he first saw her on January 8th and 9th after Dr. Schwartz had performed the emergent percutaneous coronary intervention. He stated she was in severe cardiogenic shock had severe left ventricular dysfunction, and had sustained severe damage to her heart muscle which impeded the heart's pumping ability and subsequent perfusion to her organs. Dr. Gambino states that on January 9, 2005, he diagnosed her with cholecystitis as a possible cause for the abdominal pain she was experiencing and requested gastroenterology and surgical consults. The consultants determined surgery was not necessary and ordered medication.

It is Dr. Gambino's opinion with a reasonable degree of medical certainty that at all times, his care and treatment of the plaintiff's decedent was in accordance with good and accepted standards of medical care, and that his care and treatment did not proximately cause or contribute to the patient's injuries or death. He continues that the myocardial infarction, which the decedent suffered prior to her admission to Winthrop University Hospital, resulted in severe and irreparable damage to her heart. All appropriate consultations with specialists were called in an effort to stabilize her multiple medical conditions. Treatment was coordinated with the input of the various consultants. It is Dr. Gambino's opinion that the decedent's death was ultimately due to the severe cardiac damage sustained with the myocardial infarction.

Malcolm Charles Phillips, M.D. states in his expert affirmation 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. He delineated the materials which he reviewed and the bases for his opinions which are set forth with a reasonable degree of medical certainty. After setting forth the decedent's medical condition upon arrival to Winthrop University Hospital, and the care and treatment rendered upon her admission, he opines that the plaintiff's decedent suffered severe damage to her heart muscle as a result of the myocardial infarction she experienced prior to her arriving at Winthrop. He states she was in cardiogenic shock upon arrival with an ejection fraction of only 10% as compared to a normal range of 50-60%. Despite the successful intervention to reduce the blockages with drug-eluting stents in each of the two affected arteries, she remained critically ill as a result of the prior cardiac damage. Bypass surgery was not recommended by the cardiothoracic surgeon as the infarct was past the point where a bypass would result in reperfusion. Therefore, she awaited a possible transfer to Columbia Presbyterian for a cardiac transplant. She suffered pulmonary vascular congestion/edema and continued to require blood pressure support.

Dr. Phillips sets forth the decedent's care and treatment during her hospitalization at Winthrop. He opines that Dr. Gambino performed appropriate examinations and considered her medical conditions and the recommendations made by the consulting physicians. He continues that the treatment plan was already in place when he first saw her on January 7th and again on January 9th. He further opines that the impressions and plan by Dr. Gambino were within good and accepted standards of care. He states the patient remained critical from a cardiac standpoint, and she desaturated on January 10th. She was successfully intubated and later extubated, but her condition deteriorated on January 13th, at which time she suffered cardiac arrest from which she could not be

resuscitated despite appropriate ACLS protocol. It is Dr. Phillips further opinion that Dr. Gambino committed no departures from good and accepted standards of medical care at any time during his care of the patient, and that his care and treatment did not proximately cause or contribute to Ms. Bibi's death or to any of the injuries alleged.

Based upon the foregoing, it is determined that Dr. Gambino has demonstrated prima facie entitlement to summary judgment dismissing the complaint of this action as asserted against him.

In motion (004), the defendant Winthrop University Hospital has submitted, inter alia, an attorney's affirmation; the affirmations of Richard K. Schwartz, D.O., Philip Gelber, M.D., and Alan Mensch, M.D; and the affidavits of Fred Glasser, M.D. and Dawne Cohen, M.D.

The plaintiff's bill of particulars claims that Winthrop University Hospital is vicariously liable for the acts and omissions of its employees and the private attending physicians. Drs. Schwartz, Cohen, Glasser and Gambino, and Advanced Diagnostic Associates have been named as individual defendants in this action. Winthrop now seeks to have the complaint dismissed against it on the bases that it is not vicariously liable for the acts or omissions of its employees and the attending physicians, and that it did not proximately cause the decedent's claimed injuries or death.

A hospital generally cannot be held liable, other than derivatively, for another's malpractice. Thus, where there is no vicarious liability, the plaintiff must establish that the hospital, through its own agents, was guilty of malpractice or other tort concurring in causing the harm (*Fiortino v Wenger*, 19 NY2d 401, 280 NYS2d 373 [1967]; *Belak-Redi v Bollengier*, 74 AD3d 1110, 903 NYS2d 508 [2nd Dept 2010]; *Welch v Scheinfeld*, 21 AD3d 802, 801 NYS2d 277 [1st Dept 2005]). While a private physician may be held vicariously liable for conduct of a resident physician where the resident is under the direct supervision and control of the private physician at the time of the conduct; the key is whether the resident exercises independent medical judgment (*Freeman v Mercy Medical Center*, 2008 NY Slip Op 31337U; 2008 Misc Lexis 10141 [Sup. Ct. of New York, Nassau County]). A resident who assists a doctor during a medical procedure, and who does not exercise independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (*Muniz v Katiowitz* 49 AD3d 511, 856 NYS2d 120 [2nd Dept 2008]). A hospital or other medical facility is liable for the negligence or malpractice of its employees (*see, Birdell Hill v St. Clare's Hospital*, 67 NY2d 72, 499 NYS2d 904 [1986]).

It has been determined that the moving defendants in motions (002), (003) and (005) have established prima facie entitlement to summary judgment dismissing the complaint on the bases that they did not depart from the appropriate standards of care and treatment in their care and treatment of the plaintiff's decedent as attending physicians, and that there is nothing that they did or did not do that was a contributing factor or proximately caused the decedent's claimed injuries and death. Here, the hospital has submitted those physicians' affidavits and affirmations in support of motion (002) and cross motions (003) and (005) in support of its own motion.

The aforementioned affirmations and affidavits established that the defendant physicians, Schwartz, Glasser, Cohen, and Gambino, and Advanced Diagnostic Associates, did not depart from the appropriate standards of care or proximately cause the decedent's injuries or death. Thus, Winthrop University Hospital has established prima facie that it is not liable for the actions of those defendants in that the defendants did not depart from the accepted standards of care and did not proximately cause the decedent's claimed injuries or

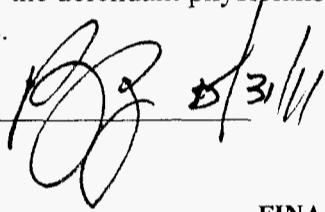
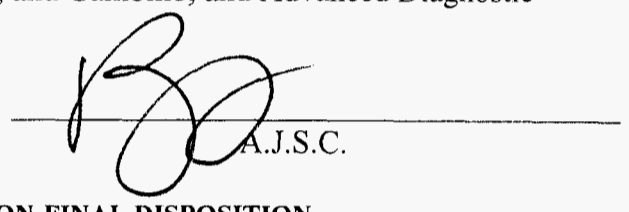
death. However, Winthrop has submitted no opinion by way of an expert affirmation or affidavit to this court to demonstrate that the hospital staff and employees followed the orders and directives of the defendants, that they did not depart from accepted standards of care, or that there was nothing that they did or did not do that proximately caused the plaintiff's decedent's injuries and death.

Based upon the foregoing, Winthrop University Hospital has demonstrated prima facie entitlement to summary judgment on the issue that it is not vicariously liable for the acts of the moving defendant physicians on its staff. However, Winthrop University Hospital has not demonstrated prima facie entitlement to summary judgment, based upon an expert's affirmation or affidavit, that its nursing staff or other employees did not depart from the accepted standards of care, and did not contribute to or cause the decedent's injuries of death.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions as such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2nd Dept 2007]; see, also, *Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624, 760 NYS2d 199 [2d Dept 2003]; *Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650, 724 NYS2d 432 [2d Dept 2001]). Here, the plaintiff has not opposed the foregoing motions for summary judgment and has not submitted any conflicting medical expert opinions or raised any factual issues to preclude summary judgment from being granted, as set forth above.

Accordingly, motions (002), (003) and (005) are granted with prejudice. Motion (004) is granted to the extent that the complaint is dismissed against Winthrop University Hospital on the issue that it is not vicariously liable as to the defendant physicians Schwartz, Glasser, Cohen, and Gambino, and Advanced Diagnostic Associates.

Dated: _____

A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION

TO:

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