SHORT FORM ORDER

INDEX No. 09-44842
CAL. No. 10-02687 MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-28-11 (004 & 005)
MOTION DATE 5-12-11 (006)
ADJ. DATE 7-28-11
Mot. Seq. # 004 - MG Mot. Seq. # 006 - MD
Mot. Seq. # 005 - MD

ELAINE R. MEYBURG, as Executrix of the Estate of BENT R. THOMSEN, Deceased, Plaintiff, - against - ERNEST VOMERO, M.D., ROBERT McCALLION, ANP, MARCO PAPALEO, M.D., BERNARDINI, VOMERO, ANSELMI & ANWAR, M.D., P.C., and THE HUNTINGTON HEART CENTER, Defendants.	BAUMAN & KUNKIS, P.C. Attorney for Plaintiff 225 West 34th Street New York, New York 10122 KRAL CLERKIN REDMOND RYAN, et al. Attorney for Defendants Ernest Vomero, Anselmi & Anwar, M.D., P.C. & Bernardini Vomero 538 Broad Hollow Road Melville, New York 11747 ALBANESE & ALBANESE, LLP Attorney for Defendants Marco Papaleo, M.D. & The Huntington Heart Center 1050 Franklin Avenue Garden City, New York 11530 CATALANO GALLARDO & PETROPOULOS Attorney for Defendant Robert McCallion, M.D. 100 Jericho Quadrangle, Suite 214 Jericho, New York 11753

Upon the following papers numbered 1 to 50 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 9; Notice of Cross Motion and supporting papers (005) 10-22, (006) 23-39; Answering Affidavits and supporting papers 40-42; Replying Affidavits and supporting papers 43-44; 45-47; 48-50; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by defendants Marco Papaleo, M.D. and Rajeswara Rao Patcha, M.D., d/b/a The Huntington Heart Center pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted and the complaint is dismissed with prejudice; and it is further

ORDERED that motion (005) by defendant Robert McCallion, ANP for summary judgment dismissing the complaint as asserted against him is denied without prejudice to renewal upon submission of proper papers within thirty days of the date of this order; and it is further

ORDERED that motion (006) by defendants Bernardini, Vomero, Anselmi & Anwar, M.D.,P.C. and Ernest Vomero, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is denied without prejudice to renewal upon submission of proper papers within thirty days of the date of this order.

This is a medical malpractice action brought by plaintiff Elaine Meyburg, the daughter of the decedent and executrix of the decedent's estate, with causes of action for negligence and the failure to provide informed consent to the decedent, Bent. R. Thomsen. It is claimed that the defendants negligently departed from good and accepted standards of care, and failed to properly inform the decedent of the risks and alternatives associated with the care and treatment provided to the decedent for, among other things, the use of the drug Plavix, and in causing the plaintiff's decedent to undergo a second angioplasty and coronary stent placement in the right coronary artery. It is alleged that the claimed negligent departures commenced on or about November 28, 2007 and continued until the decedent's death on February 21, 2009.

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 (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***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 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 [2d Dept 1981]).

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[2d 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 2d 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 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2d 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 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (***Bengston v Wang,*** 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]).

MOTION (004)

In motion (004), the defendants Marco Papaleo, M.D. and Rajeswara Rao Patcha, M.D., d/b/a The Huntington Heart Center seek summary judgment dismissing the complaint on the bases that on August 29, 2007, the decedent underwent stent placement and removal of calcified plaque which was causing narrowing inside the proximal right coronary artery, and that on September 2, 2008, the decedent underwent stent placement and removal of calcified plaque in the distal right coronary artery, and, thus, there was not a recurrence, but a progression of his severe atherosclerotic heart disease; that discontinuing Plavix did not cause his atherosclerosis to progress; that they did not depart from the good and accepted standards of care and treatment, and that they did not proximately cause the decedent's alleged injuries.

In support of motion (004), Marco Papaleo, M.D. and Rajeswara Rao Patcha, M.D., d/b/a The Huntington Heart Center have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the answer served by defendant Papaleo, plaintiff's verified bill of particulars as to defendant Papaleo; unsigned copies of the examination before trial of Marco Papaleo, M.D. dated October 7, 2010; copies of the decedent's medical records; and the affirmation of Andrew Goldfarb, M.D. The unsigned copy of the deposition transcript of defendant Papaleo is not in admissible form as required by CPLR 3212 (see ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), and is not accompanied by an affidavit pursuant to CPLR 3116. However, while the deposition transcript of defendant Papaleo is unsigned, it is considered by this court as adopted as accurate by the moving defendant (see ***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). Although this motion has been brought, in part, on behalf of Rajeswara Rao Patcha, M.D. d/b/a/ The Huntington Heart Center, it is noted that Rajeswara Rao Patcha, M.D. has not been named in his individual capacity and no answer has been provided on behalf of the Huntington Heart Center as required by CPLR 3212. However, in searching the record, a copy of the answer served by Rajeswara Rao Patcha, M.D., P.C. d/b/a/ The Huntington Heart Center has been included with motion (006).

Marco Papaleo, M.D. testified at his examination before trial to the effect that he is licensed to practice medicine in New York and Connecticut. He maintains an office in Huntington, New York and is a stockholder in, and the treasurer of, the medical group known as The Huntington Heart Center. Bent R. Thomsen was seen by Dr. Singh on August 23, 2007, on consultation requested by Dr. Vomero, while the decedent was a patient at Huntington Hospital. Mr. Thomsen was 75 years of age at the time. He had been admitted to North Shore Hospital in Manhasset, and had been transferred to Huntington Hospital after a cardiac catheterization and rotational atherectomy and placement of a temporary pacemaker had been performed by Dr. Lawrence Ong. He described an atherectomy as a "Roto-Rooter, where there is a heavily calcified lesion and a burr, spinning at a very high velocity it cuts through the lesion, so that a stent can be placed." He continued that a stent, described as a three millimeter by thirty millimeter driver bare-metal stent (as opposed to a drug-eluting stent), was placed. He continued that there may have been two stents placed in the ostium, which is the "take off of the right coronary artery," then stated that there were two stents placed tandem or connected, almost back to back.

Dr. Papaleo stated that a bare-metal stent has a higher incident of instant re-stenosis because the vessel tries to heal itself after it gets injured by the opening of the stent. The healing can cause scarring within the stent, which can obstruct the stent, which can lead to a second procedure within the same stent. The drug-eluting stents are coated with the material that will prevent this scar tissue from occurring and will decrease the incident of instant re-stenosis at the expense of a longer period before the stent becomes endothelialized and then can thrombus. He continued that Mr. Thomsen had been placed on Ecotrin (generic coated aspirin) and Plavix to prevent instant thrombosis (both characterized as anti-platelet agents), Cardizem for atrial fibrillation, and Zocor to lower lipids. He was also placed on Coumadin, a blood thinner used to prevent strokes in patients with fibrillation, and Spiriva for COPD or asthma, Centrum Silver multivitamins, Chantix as a smoking sensation aid, and Mobic for pain. Dr. Papaleo continued that the anti-platelet therapy was prescribed to keep the coronary stents from occluding and more specifically, eluting with thrombus or an acute blood clot.

Dr. Papaleo continued that Mr. Thomsen was seen on October 11, 2007 by Dr. Singh who recommended a repeat cardiogram as she had seen a change on the EKG and wanted to make sure that he did not have some form of interval myocardial infarction. His prior EKG showed that there was evidence of diastolic dysfunction as his injection faction was 54 %, meaning that although the muscle wall was contracting well, it was not relaxing well. He next saw Mr. Thomsen on October 25, 2007 after he had undergone pacemaker placement on September 16, 2007. He had been on antibiotic therapy for two weeks for what was thought to be an infection in the pocket where the pacemaker was located. He had burning in his chest and burping. Dr. Papaleo stated he thought it could be a new blockage but also thought it was atypical since it was not associated with exertion. He therefore started him on Nexium for possible inflammation of his stomach. He also scheduled a nuclear stress test for November 1, 2007. That test was negative and indicated that the stent was still open. He continued that the test picks up anything over 70% blockage. There was no ischemia. Dr. Papaleo testified that Dr. Gennaro, a vascular surgeon, sent him a report dated December 4, 2007, which indicated that, pursuant to a doppler study, Mr. Thomsen had 16 to 49% occlusion of both internal carotid arteries, but the results did not require follow-up.

Dr. Papaleo continued that there was no record indicating that he had prescribed the Plavix for Mr. Thomsen, and that Mr. Thomsen was still on Plavix in December 2007. He had no documentation or recollection of speaking with any other physicians or Robert McCallion, the physician's assistant, concerning whether Mr. Thomsen was to remain on Plavix or to be taken off. However, he noted at the next visit of April 28, 2008, that Mr. Thomsen had been taking Plavix but was taken off because he developed rectal bleeding. He additionally noted that the neurological report of March 5, 2008 indicated that he was no longer taking Plavix. Dr. Papaleo stated that he did not order or discontinue the Plavix, but given the history, stated that it would not have been unreasonable to discontinue it. He was stable from a cardiac viewpoint, was still taking aspirin and Coumadin, and was instructed to report any new symptoms of chest pains and shortness of breath and to return in six months. He advised Dr. Vomero concerning Mr. Thomsen being off Plavix.

On August 27, 2008, a partner in his practice, Dr. Salvatore Trazzera, saw Mr. Thomsen on a hospital consult concerning his complaints of shortness of breath and chest discomfort. A chest x-ray showed a little fluid on the left, his injection faction was normal, his cardiac enzymes were checked, a BNP level and echo were done, and he was started on Protonix and an inhaled bronchial dilator. An ischemic work up was considered to include either a repeat stress test or cardiac catheterization. Dr. Papaleo continued that either an angiogram or catheterization was done on September 2, 2008, which he thought might have been abnormal as he was sent to North Shore Hospital where Dr. Ong, on September 3, 2008, performed a stent of the iliac of his leg, and right carotid, and a repeat intervention on the right coronary artery, which Dr. Papaleo stated was at a different place at the distal right coronary artery, due to worsening of the peripheral vascular disease. He was again placed on Plavix, Coumadin, and aspirin to prevent thrombosis to the newly placed stents. On December 24, 2008, while Mr. Thomsen was at St. Johnland Nursing Home, he was on Plavix and Coumadin, but was no longer on aspirin. Dr. Papaleo stated he does not go to rehabilitation centers, so he would not have seen him at St. Johnland, and thought he saw Mr. Thomsen within a month of his being placed on hospice at home.

Dr. Papaleo stated that after one month of a bare-metal stent being placed, that there is probably, in this case, more risk to be kept on Plavix than for it to be discontinued. He continued that despite the guidelines, there is always a risk of in-stent thrombosis or MI after discontinuing Plavix. He discussed with Mr. Thomsen why he needed to be on Plavix after a stent and the reason for being on Plavix, aspirin, and Coumadin due to the risk of in-stent thrombosis, but he did not document it anywhere.

Andrew Goldfarb, M.D. set forth in his affirmation, submitted in support of Dr. Papaleo's motion for summary judgment, that he is a physician licensed to practice medicine in New York and is board certified in cardiovascular medicine. He set forth the materials and medical records which he reviewed and set forth his opinion with a reasonable degree of medical certainty. It is Dr. Goldfarb's opinion that the care and treatment rendered to Mr. Thomsen by Marco Papaleo, M.D. and The Huntington Heart Center was proper and met the standards of good and accepted cardiology practice.

Dr. Goldfarb set forth Mr. Thomsen's medical and surgical history, and stated that on August 23, 2007, Mr. Thomsen was admitted to Huntington Hospital for syncopal episodes and dizziness. A Persantine

nuclear stress test on August 28, 2007 revealed moderate to severe ischemia of the mid to apical segments of the inferior wall of the heart. Cardiac catheterization on August 29, 2007 by Dr. Patcha, director of the catheterization laboratory at Huntington Hospital, and a member of The Huntington Heart Center, revealed a severe ostial right coronary artery stenosis and diffuse irregularity of the circumflex and left anterior descending arteries. Dr. Goldfarb states that this meant that Mr. Thomsen had a severe narrowing of one of the major blood vessels to the heart (right coronary artery), and that he required an invasive cardiac procedure to open up the narrowing to improve blood flow through the artery. Mr. Thomsen was then transferred to North Shore University Hospital, Manhasset, for coronary intervention by Dr. Lawrence Ong. A rotoblater atherectomy was used to shave down the calcified plaque in the proximal right coronary artery and two bare-metal stents were placed with excellent results.

Dr. Goldfarb continues that post-procedure, while Mr. Thomsen was still hospitalized, he was placed on Cardizem for rate control for atrial fibrillation (abnormal rapid irregular heartbeat); Plavix 75 mg (an anti-platelet drug that prevents clot formation in arteries or stented portions of arteries); aspirin 325 mg (an anti-platelet drug); Coumadin (an anti-coagulant drug to prevent intra-cardiac clot formation secondary to atrial fibrillation, and which is without therapeutic value to keeping the stent patent); and Zocar (for high cholesterol). Mr. Thomsen was advised to follow up with Dr. Papaleo after discharge, and was seen by Dr. Papaleo on September 7, 2007, for placement of a pacemaker and recommendation to keep Mr. Thomsen's INR (measurement of anti-clotting effect of Coumadin) between 2 and 2.5, the lower therapeutic range, since he was on Coumadin, Plavix and Ecotrin (aspirin), all of which reduce the ability to clot and which promote a tendency to bleed.

Dr. Goldfarb further states that on September 16, 2007, Mr. Thomsen presented to Huntington Hospital emergency department with gross hematuria (blood in his urine). On September 19, 2007, Mr. Thomsen had a permanent pacemaker implanted for treatment of tachybrady syndrome (fast and slow heart rhythm). On October 4, 2007, Mr. Thomsen presented to Huntington Hospital emergency department with a nose bleed and was discharged with instructions not to take the aspirin and Plavix for one day. On October 11, 2007, Mr. Thomsen was seen at The Huntington Heart Center by Dr. Balveen Singh who noted that Mr. Thomsen continued to have intermittent rectal bleeding. His aspirin dose was decreased to 81 mg. On October 25, 2007, when Mr. Thomsen was seen by Dr. Papaleo after his pacemaker insertion, he complained of burning for which Nexium, an antacid, was prescribed. Dr. Goldfarb states that on November 28, 2007, according to the records, that Plavix was discontinued due to rectal bleeding and hematuria. He further states that whether or not Dr. Papaleo was involved in the decision to discontinue Plavix is irrelevant, because it was the proper decision to discontinue the Plavix at this time. To have continued the Plavix, would have put Mr. Thomsen at continued increased risk of bleeding, including life- threatening hemorrhage. On April 18, 2008, when Dr. Papaleo saw Mr. Thomsen, he noted that Mr. Thomsen was no longer taking Plavix and that Dr. Papaleo was first notified of this in a consultation report from a neurologist in March 2008.

Dr. Goldfarb continues that on August 27, 2008, Mr. Thomsen presented to Dr. Vomero's office with shortness of breath associated with exertion, and also complained of a squeezing sensation in the mid chest/epigastrium area. Dr. Patcha performed cardiac catheterization on September 2, 2008, as an angiogram

demonstrated 90% stenosis of the distal portion of the right coronary artery. He was transferred to North Shore on September 2, 2008 where Dr. Ong performed a right external iliac artery stent that same day, followed by a rotational atherectomy of the distal lesion in the right coronary artery with placement of four bare-metal stents on September 3, 2008. He was discharged on Plavix daily to prevent clot formation. Dr. Goldfarb continues that dual anti-platelet therapy with Plavix and aspirin after coronary stent insertion is used to prevent subacute (less than one month) and late (greater than one month) stent thrombosis, as, when the metal stent is exposed to platelets and clotting factors circulating in the blood, it promotes the thrombosis formation. He states that this is a separate phenomenon from stent re-stenosis in which fibrous tissue forms that can gradually occlude the stent lumen, and is also a separate process from the natural progression of the atherosclerosis which neither Plavix nor aspirin can prevent. Dr. Goldfarb explains that when endothelial cells grow and cover the exposed metal portion of the stent, they simulate the native artery whose lumen is lined with endothelial cells. Once the artery, or stented portion of the artery, is endothelialized, it is no longer significantly at risk of thrombosis or clot formation which would occlude the stent. For bare-metal stents, which take less time to endothelialize than other types of stents, the recommended duration of anti-platelet (Plavix/aspirin) therapy is a minimum of one month after full dose aspirin of 325 mg and Plavix 75 mg regimen. Dr. Goldfarb adds that the anti-platelet drugs are also beneficial in preventing myocardial infarction, but the anti-platelet agents do not influence or impede the development or progression of atherosclerosis.

Dr. Goldfarb continues that Mr. Thomsen did not develop re-stenosis of the two stents placed in 2007, nor did he suffer a myocardial infarction, instead, he had progression of his atherosclerotic disease. The discontinuance of Plavix in or about November 2007 did not lead to the need for the right external iliac artery stent on September 2, 2008, or the distal right coronary artery stent on September 3, 2008. He continues that progression in the severity of coronary artery disease is by no means unexpected in a vasculopath with risk factors. Mr. Thomsen had risk factors consisting of hypertension, cigarette abuse, subsequent development of diabetes, and known pre-existing diffuse atherosclerosis of various vascular beds. The diffuse atherosclerosis was evidenced by mesenteric artery disease requiring stents in 2003, carotid artery disease diagnosed by ultrasound in 2004, and lower extremity peripheral artery disease noted by the vascular surgeon, Dr. Gennaro, in 2003, when he performed an examination and noted absent distal pulses. Dr. Goldfarb stated that the regimen of stopping the Plavix and continuing the aspirin was the appropriate course of treatment for Mr. Thomsen as it reduced the risk of bleeding while Mr. Thomsen was being treated with Coumadin for his atrial fibrillation. Dr. Goldfarb states that the progression of atherosclerosis is unaffected by the use of, or withdrawal of, Plavix, as anti-platelet agents do not influence or impede the development or progression of atherosclerosis. He continued that Mr. Thomsen's diffuse atherosclerotic disease was destined to progress as it did, with or without Plavix and aspirin, which are only intended to prevent blood clots, which Mr. Thomsen did not suffer.

Based upon the foregoing, the defendants have demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against them.

The plaintiff's expert, a physician licensed to practice medicine in New York and board certified in internal medicine with a subcertification in cardiovascular disease, set forth the materials reviewed and stated his opinions with a reasonable degree of medical certainty. It is the plaintiff's expert's opinion that

the defendants departed from good and acceptable medical practice in the community at the time of the treatment, proximately causing the serious and permanent injuries sustained by Mr. Thomsen.

The plaintiff's expert set forth the decedent's medical history and indicates that on August 29, 2007, balloon angioplasty was performed and bare-metal stents were placed in the proximal right coronary artery after the nuclear stress test and cardiac catheterization revealed 85% stenosis in the right coronary artery, proximally. He states that there was no evidence of any other significant lesions seen in the right coronary artery. Prior to discharge, Mr. Thomsen suffered a bout of atrial fibrillation and was placed on a temporary pacemaker and treated with long-term Coumadin. He was also discharged home on aspirin and Plavix. During Mr. Thomsen's September 16, 2007 admission to Huntington Hospital, a permanent pacemaker was placed, and a cystoscopy was ordered relating to his presentation with hematuria. He thereafter experienced a nosebleed in October 2007, as well as gastrointestinal bleeding, and his Coumadin dosage was adjusted. Plavix was discontinued on November 28, 2007 due to the recurrence of minor bleeding episodes. On August 27, 2008, nine months later, Mr. Thomsen developed shortness of breath and a squeezing sensation in his chest. After evaluation, cardiac catheterization was performed on September 2, 2008. revealing 70% stenosis of the proximal right coronary artery, 99% stenosis of the mid portion of the right coronary artery, an 80% stenosis of the distal right coronary artery. Rotational atherectomy and bare-metal stent placements were performed, and Plavix and aspirin were reinstituted.

The plaintiff's expert continues to set forth the remaining medical conditions and occurrences in November 2008, including treatment with antibiotics for concerns of bacterial infection in the pacemaker wires or endocarditis. On December 5, 2008, Mr. Thomsen entered Carillon Rehabilitation Institute and began physical medicine and rehabilitation and intravenous antibiotic administration. On December 11, 2008, Mr. Thomsen was discharged to St. Johnland Nursing Home. Hospice care was initiated on February 19, 2009. Mr Thomsen died on February 23, 2009.

It is the plaintiff's expert's opinion that once a stent has been placed, it is necessary to maintain the patient on anti-platelet agents, such as aspirin and Plavix, to minimize the incidence of stent thrombosis, myocardial infarction, and death, and that such administration should be continued for up to twelve months. The leading adverse event associated with early antiplatelet discontinuance is stent thrombosis which can lead to acute myocardial infarction or death. The decision to discontinue these agents was originally made by Robert McCallion, R.N., A.N.P. of Bernardini & Vomero, M.D., P.C., after purportedly discussing the patient's clinical course with Marco Papaleo, M.D. The previous bouts of hematuria, nosebleeds and GI bleeding, states the plaintiff's expert, were associated with elevations of Mr. Thomsen's INR level which was increased due to the Coumadin level being too high, unrelated to the antiplatelet agents. Thus, states the plaintiff's expert, the decision to discontinue the Plavix was an unreasonable intervention, as this permitted the thrombosis within the right coronary artery to rapidly progress, which lead to a re-stenosis of the coronary artery and the need for a second stent placement. The plaintiff's expert then states that the debility associated with the surgery, in conjunction with Mr. Thomsen's other medical conditions, resulted in the progressive weakness and worsening of the other medical conditions, resulting in the development of pneumonia, pressure ulcers, endocarditis, pacemaker wire infection, in-patient nursing care and rehabilitation, and death.

Based upon the foregoing, it is determined that the plaintiff's expert has failed to raise a material triable issue of fact to preclude summary judgment being granted to Dr. Papaleo and The Huntington Heart Center. The plaintiff's expert does not support his conclusory opinion that the blockage was a thrombus or blood clot which caused occlusion of the coronary artery, or that Mr. Thomsen suffered a myocardial infarction or death proximately caused by the second atherectomy and stenting procedure. The medical records presented with the moving papers reveal no evidence of a thrombosis or blood clot of the right coronary artery, but, instead, reveal atherosclerotic plaque in the distal portion of the right coronary artery necessitating a rotational atherectomy and stent placement in the distal portion of the coronary artery, separate and apart from the re-stenosis in the proximal portion of the right coronary artery. The plaintiff's expert does not refer to any portion of the post-procedure dictations, or hospital records, or office records, which indicate there was a thrombus or blood clot at the first surgical site, and does not contend that the medical records were incorrect. Additionally, while the plaintiff's expert states that it is necessary to maintain the patient on anti-platelet agents, such as aspirin and Plavix, for up to twelve months, the plaintiff's expert does not set forth the authority upon which this conclusory opinion is based, and does not offer an opinion based upon the plaintiff's decedent's clinical presentation. This is especially so, in light of the fact that Mr. Thomsen had experienced rectal bleeding prior to being started on Coumadin, aspirin, and Plaxil, and thereafter, having additional hematuria and epistaxis. Nor does the plaintiff's expert opine that the second surgery would not have been necessary had the Plavix been continued.

Accordingly, motion (004) is granted and the complaint as asserted against Marco Papaleo, M.D. and The Huntington Heart Center is dismissed with prejudice.

MOTION (005)

In motion (005), Robert McCallion, A.N.P seeks summary judgment dismissing the complaint on the bases that he did not make the decision to stop and/or discontinue Plavix from Mr. Thomsen's medication regime, that there is nothing to show that had the Plavix been continued that Mr. Thomsen would not have needed the further stent replacement in September 2008, and that his subsequent deterioration was the result of the natural progression of his underlying atherosclerotic disease and not as a result of the stoppage of Plavix. This application is supported with, inter alia, an attorney's affirmation; copies of the pleadings; copy of the defendants' office records; the unsigned and uncertified copies of the transcripts of the examination before trial of Elaine R. Meyburg, dated July 29, 2010, and Robert Paul McCallion, ANP dated September 16, 2010; and the "attestation" of Melvin Holden, M.D. pursuant to CPLR 2106. The attestation of McCallion's expert physician is not in admissible form pursuant to CPLR 3212 which requires an affirmation or affidavit in support of the application. The attestations have not been affirmed under the penalties of perjury, and, therefore, do not constitute competent evidence (***Parisi v Levine***, 246 AD2d 583, 667 NYS2d 283 [2d Dept 1998]; ***Moore v Tappen***, 242 AD2d 526, 661 NYS2d 665 [2d Dept 1997]).

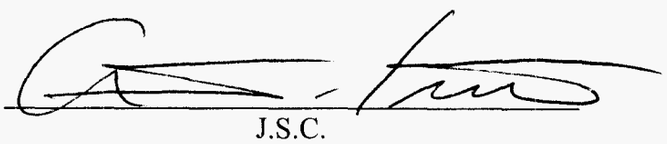
Accordingly, motion (005) is denied without prejudice to renewal upon submission of proper papers within thirty days of the date of this order.

MOTION (006)

In motion (006), Bernardini, Vomero, Anselmi & Anwar, M.D.,P.C. and Ernest Vomero, M.D. seek summary judgment dismissing the complaint on the bases that they did not depart from the standards of ordinary and reasonable care and did not proximately caused the decedent's claimed injuries. In support of this application, the moving defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answer and plaintiff's verified bill of particulars; several pages of the transcript of the examination before trial of the plaintiff, with the signed correction sheet; signed copies of the examinations before trial of Ernest Vomero, M.D dated September 8, 2010, and Robert Paul McCallion dated September 16, 2010; an unsigned copy of the transcript of the examination before trial of Marco Papaleo, M.D.; copies of the plaintiff's medical records maintained by the moving defendants; and the attestations of Andrew Goldfarb, M.D. and Melvin Holden, M.D. The aforementioned attestations are not in admissible form pursuant to CPLR 3212 which requires an affirmation or affidavit in support of the application. The attestations have not been affirmed under the penalties of perjury, and, therefore, do not constitute competent evidence (***Parisi v Levine***, *supra*; ***Moore v Tappen***, *supra*).

Accordingly, motion (006) is denied without prejudice to renewal upon submission of proper papers within thirty days of the date of this order.

Dated: September 6, 2011



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION