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SHORT FORM ORDER

COPY

INDEX No. 09-38346
CAL. No. 10-02157MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-31-11 (#006, #009)
MOTION DATE 7-19-11 (#007, #008)
ADJ. DATE 8-9-11
Mot. Seq. # 006 - MG; # 007 - MotD
008 - XMD; # 009 - MG; CASEDISP

SHU YING LEE, as Administratrix of the Estate of KITMAN LEE and SHU YING LEE, Individually,

Plaintiffs,

- against -

KIMBERLY FENTON, M.D., MARY ANDRIOLA, M.D., SALMA SYED, M.D., ROBERT SEMLEAR, M.D., NYU MEDICAL CENTER, NYU SCHOOL OF MEDICINE NORMAN PFLASTER, M.D., DANIEL SLONIEWSKY, M.D. and SOUTHAMPTON HOSPITAL,

Defendants.

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Upon the following papers numbered 1 to 28 read on these motions for summary judgment and cross motion for leave to amend the pleadings ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3, 4 - 8, 11 - 14 ; Notice of Cross Motion and supporting papers 9 - 19 ; Answering Affidavits and supporting papers 15 - 22 ; Replying Affidavits and supporting papers 23 - 24, 25 - 26, 27 - 28 ; Other joint exhibits A - WWWW ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions and cross motion are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (006) by defendants Kimberly Fenton, M.D., Salma Syed, D.O., sued herein as Salma Syed, M.D., and Daniel Sloniewsky, M.D. for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the branch of the motion (007) by defendant Mary Andriola, M.D. for summary judgment dismissing the complaint is granted, and the remainder of the motion is denied as academic; and it is further

ORDERED that the cross motion (008) by plaintiffs for leave to amend the pleadings is denied; and it is further

ORDERED that the motion (009) by defendants NYU School of Medicine and NYU Hospitals Center, sued herein as NYU Medical Center for summary judgment dismissing the complaint is granted.

In this wrongful death action, plaintiff Shu Ying Lee, as Administratrix of the Estate of Kitman Lee, deceased, and individually, seeks damages for injuries sustained by the decedent Kitman Lee ("the recipient plaintiff") as a result of the care and treatment the recipient plaintiff received from March 31, 2007 through July 25, 2007. The recipient underwent liver transplant surgery. Plaintiff alleges, *inter alia*, that defendants Kimberly Fenton, M.D., Mary Andriola, M.D., Salma Syed, D.O., sued herein as Salma Syed, M.D., and Daniel Sloniewsky, M.D., who were the physicians caring for a pediatric patient ("the donor") whose organs were donated for transplantation, departed from accepted medical standards when they failed to diagnose cancer in the donor while the donor was a patient at non-party Stony Brook University Hospital ("Stony Brook") from March 13, 2007 through March 30, 2007. Plaintiff alleges, *inter alia*, that defendants New York University School of Medicine ("NYU") and NYU Hospitals Center ("NYUHC"), s/h/a NYU Medical Center ("the NYU defendants") negligently rendered medical care to the recipient plaintiff.

By order dated June 18, 2009 (Cohen, J.), the Court directed that this action, Action #4, be tried jointly with six related actions.[1] By order dated October 5, 2009 (Victor, J.), the Court so-ordered a stipulation discontinuing the within action as asserted against defendant Southampton Hospital. By order dated April 20, 2010 (Cohen, J.), the action was also discontinued as against Robert Semlear, M.D. and Norman Pflaster, M.D. By order dated October 26, 2010 (Cohen, J.), the Court directed the parties to submit a single set of joint exhibits for all summary judgment motions, consisting of, *inter alia*, the

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[1] The six related actions are as follows:
Kelly v Fenton, Index No. 33833/08, Action #1
Kelly v New York Organ Donor Network, Index No. 12211/09, Action #2
Trueba v Diflo, Index No. 49098/09, Action #3
Lee v New York Organ Donor Network, Index No. 38345/09, Action #5
Shierts v New York Organ Donor Network, Index No. 12212/09, Action #6
Shierts v Fenton, Index No. 45614/08, Action #7

pleadings, bills of particulars, deposition testimonies of the parties, the donor's medical records from Southampton Hospital and Stony Brook University Medical Center, the recipient's medical records from NYUHC, and the New York Organ Donor Network ("NYODN") donor packet. By stipulation dated July 27, 2011, plaintiff discontinued the action as against defendant Mary Andriola, M.D.; however, it was not executed by all parties.

The record reveals that the recipient plaintiff received a liver transplant from the donor, who had died of bacterial meningitis on March 30, 2007 at Stony Brook. Thomas Diflo, M.D. performed the transplant procedure at NYUHC on March 30, 2007.[2] Dr. Diflo is a non-party in the instant action and is a defendant in the action entitled *Trueba v Diflo* (Action #3). The donor had been ill since March 3, 2007. He was treated at Southampton Hospital intermittently. During his last admission at Southampton Hospital, a lumbar puncture revealed no bacteria in the cerebral spinal fluid ("CSF") despite symptoms appearing to be bacterial meningitis, such as severe headaches, vomiting and fainting. His doctors prescribed antibiotics and antiviral medications. His final diagnosis at Southampton Hospital was viral meningitis or encephalitis.

The donor was transferred to Stony Brook on March 13, 2007. Another spinal tap was performed, and, again revealed no bacteria in the cerebral spinal fluid. Further lab tests revealed no viral pathogens either. His attending physician, defendant Fenton, a pediatric intensivist, diagnosed the donor with presumed, partially treated bacterial meningitis. By March 14, 2007, the donor became unresponsive and required assisted ventilation. The donor's Stony Brook medical record revealed that, on March 29, 2007, he had lost all cerebral autoregulation despite maximal medical management and had not improved after a lumbar drain was placed to reduce the intracerebral pressure. Dr. Fenton advised the donor's parents, who agreed that no resuscitation should be initiated. In addition, the parents requested organ donation. Dr. Fenton called NYODN, and gave the basic demographic information, as well as her diagnosis of presumed partially treated bacterial meningitis. On March 30, 2007, the NYODN staff placed calls to multiple transplant centers to place four of the donor's organs. Later that evening, NYODN staff offered the donor's liver to a transplant coordinator at NYU. After reviewing the donor chart provided by NYODN, non-party Glyn Morgan, M.D. accepted the donor's liver for the recipient plaintiff. Upon reviewing the NYODN chart, which included Southampton Hospital medical records revealing a diagnosis of viral meningitis, Diflo testified that he was comfortable with Morgan's determination.

Plaintiff testified that the recipient plaintiff had a history of liver disease, cirrhosis and hepatitis B. She stated that the liver transplant surgery was a success and his post-operative recovery was uneventful. On May 3, 2007, an autopsy of the donor's brain revealed that he died of a rare form of T-cell lymphoma in his leptomeninges. Plaintiff stated that she and the recipient plaintiff were notified that he had been exposed to cancer due to the donor's cause of death and chemotherapy was begun one

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[2] The donor's parents authorized the donation of four organs. In addition to the donor's liver, which was donated to the recipient plaintiff in the instant action, the donor's pancreas was donated to Jodie Lynn Shierts, one of the donor's kidneys was donated to Gerard Trueba, and the donor's other kidney was donated to James D. Kelly.

week later. They also learned that he was not a candidate for another transplant. The recipient plaintiff developed the same symptoms as the donor and died on July 25, 2007 of lymphoma.

Defendants Fenton, Syed, and Sloniewsky now move (006) for summary judgment dismissing the complaint. Defendant Andriola moves (007) to dismiss the complaint pursuant to CPLR 3211 (a) (7), or, in the alternative, for summary judgment dismissing the complaint. Plaintiff cross-moves (008) for leave to amend the complaint to add a cause of action for lack of informed consent on the ground that Dr. Diflo should have disclosed to the recipient plaintiff the possibility that the donor's liver might have a viral disease prior to accepting the liver. The NYU defendants move (009) for summary judgment dismissing the complaint.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***Stewart Title Ins. Co. v Equitable Land Servs.***, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***De Stefano v Immerman,*** 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992];***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***Amsler v Verrilli***, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (***Williams v Sahay***, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]).

A physician owes a patient three basic duties of care: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the physician practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Pike v Honsinger***, 155 NY 201, 155 NY (NYS) 201 [1898]). Significantly, the rule requiring a physician to use his or her best judgment "does not hold him [or her] liable for a mere error in judgment, provided he [or she] does what he [or she] thinks is best after careful examination" (***Pike v Honsinger***, *supra* at 210; *see* ***Davis v Patel***, 287 AD2d 479, 731 NYS2d 204 [2d Dept 2001]).

The threshold question in determining liability is whether the defendants owed plaintiff a duty of care (***McNulty v City of New York***, 100 NY2d 227, 762 NYS2d 12 [2003]). Generally, a doctor only owes a duty of care to his or her patient. The courts have been reluctant to expand a doctor's duty of care to a patient to encompass nonpatients (*see* ***Eiseman v State***, 70 NY2d 175, 518 NYS2d 608 [1987]). Liability may not be imposed in the absence of a physician-patient relationship (***Levy v Nassau Health Care Corp.***, 40 AD3d 591, 833 NYS2d 403 [2d Dept 2007]). An extension of the duty is

warranted in cases where the service performed on behalf of the patient necessarily implicates protection of household members (***Tenuto v Lederle Lab.***, 90 NY2d 606, 665 NYS2d 17 [1997]). Liability does not arise until a duty is found (***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***De Angelis v Lutheran Medical Center***, 84 AD2d 17, 445 NYS2d 188 [2d Dept 1981]).

A plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (***Alvarez v Prospect Hosp.***, *supra*; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). 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***, *supra*).

The Court will consider the motions by Fenton, Syed, Sloniewsky (006), and Andriola (007) together. The evidence submitted by defendants Fenton, Syed, Sloniewsky, and Andriola was sufficient to meet their burden of establishing, as a matter of law, that they did not depart from good and accepted medical practice inasmuch as they had no duty to the recipient plaintiff, and that the treatment they rendered to the donor was not a proximate cause of the recipient plaintiff's alleged injuries (***Eiseman v State***, *supra*; ***McNulty v City of New York***, *supra*). In support of their motions, defendants submit, *inter alia*, their deposition testimonies and the joint exhibits. In the bill of particulars, plaintiff alleges that Fenton, Syed, Sloniewsky, and Andriola departed from accepted medical practice by diagnosing the donor with bacterial meningitis rather than T-cell lymphoma, thereby causing injury to the recipient plaintiff by the subsequent transplantation of the donor's diseased liver.

The record reveals that Fenton was the attending pediatric intensivist caring for the donor at Stony Brook when the donor was admitted on March 13, 2007, and oversaw his care until March 19, 2007, and resumed the donor's care on March 29, 2007 until March 30, 2007. Thereafter, the staff from the NYODN supervised the organ donation process and Fenton withdrew from the case. Fenton testified that she had no role in determining whether the donor's organs were suitable for transplantation. In addition, she had no contact with any of the transplant centers, and had no knowledge of the recipient plaintiffs' identities. Likewise, Sloniewsky, also an attending pediatric intensivist, testified that he took over the donor's care until March 29, 2007, upon Fenton's return. He stated that his care and treatment of the donor ended before a request was made to donate his organs, and that he had no contact with NYODN, the transplant centers, or the recipients. He also had no involvement in the organ donation process. Syed, a pediatric infectious disease attending, testified that she was called for a consult on the first day of the donor's admission. She stated that the last day she had contact with the donor was on March 22, 2007. She had no reason to believe that he was suffering from a malignancy, inasmuch as his presentation was consistent with meningitis. She further testified that she had no contact with NYODN, the transplant centers, or the recipients. Andriola testified that she evaluated the donor on March 14, 15, and 16, 2007. On March 20, 2007, she performed an electroencephalogram ("EEG"). She also stated that she had no contact with NYODN, the transplant centers or the recipients. In addition, she had no involvement in determining the suitability of the donor's organs for transplantation.

As the moving defendants made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Murray v Hirsch***, 58 AD3d 701, 871 NYS2d 673 [2d Dept 2009], *lv den* 12 NY3d 709, 88 NYS2d 18 [2009]). The plaintiff failed to meet this burden. In opposition, plaintiff submitted the affidavits of Paul W. Nelson, M.D. and Arnold N. Weinberg, M.D. Dr. Nelson avers that he is licensed to practice medicine in the States of Missouri and Indiana. He is a transplant surgeon and is board certified in surgery. Dr. Weinberg avers that he is a physician duly licensed to practice medicine in the State of Massachusetts and is board certified in internal medicine. These affidavits, however, have no probative value inasmuch as neither expert addresses the alleged departures of the moving defendants. Moreover, there is no legal support for plaintiff's theory that a special relationship arose between the moving defendants and the recipient plaintiff once the recipient plaintiff was identified as a match to the donor's kidney. There was no physician-patient relationship creating a duty, and there were no special circumstances which related the care they provided to the donor with the recipient plaintiff, of whom they had no knowledge. Therefore, the Court declines to extend the common law to create a remedy for the plaintiff (***McNulty v City of New York***, *supra*; ***Eiseman v State***, *supra*; ***Pulka v Edelman***, *supra*). In addition, the attorney's affirmation is not probative on a motion for summary judgment since he has no personal knowledge of the incident (*see* ***Zuckerman v New York***, *supra*). Accordingly, based on the foregoing, the motion for summary judgment by Fenton, Syed, and Sloniewsky is granted. The branch of the motion for summary judgment by Andriola is granted, and the remainder of the motion is denied as academic.

Plaintiff's cross motion (008) for leave to amend the pleadings is denied. It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise (CPLR 3025 [b]; ***Thomas Crimmins Contracting Co. v New York***, 74 NY2d 166, 544 NYS2d 580 [1989]; ***McCaskey, Davies & Associates, Inc. v New York City Health & Hospitals Corp.***, 59 NY2d 755, 463 NYS2d 434 [1983]. "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (***G.K. Alan Assoc., Inc. v Lazzari***, 44 AD3d 95, 99, 840 NYS2d 378 [2d Dept 2007]; ***Trataros Constr., Inc. v New York City Hous. Auth.***, 34 AD3d 451, 452-453, 823 NYS2d 534 [2d Dept 2006]; ***Norman v Ferrara***, 107 AD2d 739, 484 NYS2d 600 [2d Dept 1985]). Here, the proposed claim is palpably insufficient and has no merit. The record reveals that the recipient plaintiff executed a presurgical consent for the transplant procedure. The recipient plaintiff's claim that his transplant surgeon, defendant Diflo, should have disclosed the risk of transplanting an organ that might have been exposed to viral meningitis or viral encephalitis is belied by the medical records which reveal that viral studies were performed and were negative, and that the donor did not die of a viral disease. Therefore, the viral meningitis diagnosis, which was relayed to Morgan by NYODN, was of no consequence.

In any event, plaintiff's application was made two years after the action was commenced and eight months after the note of issue was filed. "[W]here a party is guilty of extended delay in moving to amend, the court should insure that the amendment procedure is not abused by requiring a reasonable excuse for the delay and an affidavit of merit" (***Gallo v Aiello***, 139 AD2d 490, 490-91, 526 NYS2d 593 [2d Dept 1988] [emphasis added]; *see also* ***Alexander v Seligman***, 131 AD2d 528, 516 NYS2d 260 [2d Dept 1987]; ***Bertan v Richmond Mem. Hosp. & Health Ctr.***; 106 AD2d 362, 482 NYS2d 492 [2d Dept 1984]), neither of which have been submitted here. "The fact that an informed consent claim necessarily depends on the recollections of the parties which unavoidably diminish over time," the longer the delay

in asserting such a claim, the more it stands to reason that the opposing party will be prejudiced (***Evans v Kringstein***, 193 AD2d 714, 715, 598 NYS2d 64, 65 [2d Dept 1993]). Accordingly, the cross motion by the plaintiff is denied.

The evidence submitted by the NYU defendants in their motion (009) was also sufficient to meet their burden of establishing, as a matter of law, that they did not depart from good and accepted medical practice (***Starr v Rogers***, *supra*; ***Whalen v Victory Memorial Hosp.***, *supra*), and that they used their best judgment in accepting the liver on behalf of the recipient plaintiff (***Pike v Honsinger***, *supra*; ***Davis v Patel***, *supra*). In support of the motion, the NYU defendants submit, *inter alia*, the joint exhibits, and the affidavit of their expert, Benjamin Philosophe, M.D. In the bill of particulars, plaintiffs allege that the NYU defendants were negligent in failing to be aware that the organ being transplanted into the recipient plaintiff was cancerous, make proper inquiries as to the cause of death of the donor, require proper validation of the donor's cause of death, require proof or medical support as to the diagnosis of meningitis as the cause of death of the donor, and inform the recipient plaintiff of the risk of having a cancerous kidney transplanted into him, causing him to undergo chemotherapy, and his eventual death.

Dr. Philosophe avers that he is duly licensed to practice medicine in the State of Maryland and the State of Virginia. He is board certified in general surgery. He currently is the head of the Division of Transplantation and Director of Liver Transplantation and Hepato-Biliary Surgery at the University of Maryland Medical System. He opines, to a reasonable degree of medical certainty, that the NYU defendants did not depart from accepted medical standards in the care and treatment of the plaintiff recipient. He states that the donor was diagnosed by his treating physicians at Stony Brook Hospital as having partially treated bacterial meningitis. In addition, bacterial meningitis was listed as the donor's cause of death in the Donor Summary available to the potential recipient/transplant hospitals on DonorNet, the online system where recipient/transplant hospitals can view relevant data of the potential donor. Defendants were advised by the treating physicians at Stony Brook via the NYODN that the diagnosis of partially treated bacterial meningitis was based upon a negative CSF culture. They were further informed via NYODN that the CSF culture was negative because the donor had received antibiotics before the culture was performed. In any event, it is within the standard of care to accept for transplantation an organ from a donor with the clinical signs of bacterial meningitis. Dr. Philosophe states that although it was unclear whether the donor had a viral illness prior to his death, the record reveals that subsequent testing on the donor and recipients proved, beyond a doubt, that neither the donor nor the recipients ever had a viral illness. In addition, there was no reason for the transplant surgeons to suspect or diagnose cancer, inasmuch as they did not treat the donor prior to his death. In fact, the donor's treating physicians at Stony Brook never suspected or diagnosed the donor with cancer. Therefore, it is Dr. Philosophe's opinion, within a reasonable degree of medical certainty, that the NYU defendants at all times provided proper and appropriate care and treatment to the recipient plaintiff, and that the treatment rendered was well within accepted standards of care at that time. It is also his opinion that there is nothing that the NYU defendants did or did not do that was the direct cause of any of the alleged injuries claimed by the recipient plaintiff.

Dr. Diflo testified that he is duly licensed to practice medicine in the State of New York and is board certified in surgical critical care. He has been employed with the NYUHC in the transplant department since 1992 and his expertise is in the transplantation of livers and kidneys. He performed the liver transplant for the plaintiff recipient. He stated that he relied upon the decision of his colleague,

Glyn Morgan, M.D., who accepted the donor's liver for the recipient plaintiff, and had made an extensive inquiry about the medical history. He also stated that there were no gross abnormalities in the liver when he transplanted it into the plaintiff recipient. The plaintiff recipient's surgery and recovery were unremarkable. When the donor's cause of death was relayed to him, he immediately called the plaintiff recipient to return to the hospital for tests and chemotherapy.

Eugenia Maybalgov testified that she is a transplant coordinator at NYUHC and that Dr. Morgan and Diflo made several inquiries related to the donor's liver to clarify the diagnosis. Her testimony supports Diflo's testimony. In addition, defendants Fenton, Sayed, Andriola, and Sloniewsky consistently testified that it did not occur to them during their treatment of the donor that he could have had cancer, and thus, that they never included cancer in the medical record as a diagnosis.

The burden then shifted to plaintiff to respond with rebutting medical evidence demonstrating a departure from accepted medical procedures to raise an issue of fact as to whether defendants departed from good and accepted medical practice, and if so, whether such departure was a proximate cause of the injuries alleged (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Breland v Jamaica Hospital Med. Ctr.***, 49 AD3d 789, 854 NYS2d 209 [2d Dept 2008]; ***Baez v Lockridge***, 259 AD2d 573, 686 NYS2d 496 [2d Dept 1999]). In opposition, plaintiff submits the affidavits of Paul W. Nelson, M.D., and Arnold N. Weinberg, M.D. Dr. Nelson states that the NYU defendants departed from good and accepted medical standards in failing to confirm the diagnosis of bacterial meningitis prior to accepting the liver without a positive culture, and failing to obtain and review the donor's Southampton Hospital chart, which diagnosed the donor with viral meningitis. It is Dr. Nelson's opinion that transplant surgeons are ultimately responsible for the decision to accept or reject donated organs. He states that the NYU defendants should have rejected the liver, as other recipient transplant centers had done.

Dr. Weinberg opines, within a reasonable degree of medical certainty, that the NYU defendants' decision to accept the liver constituted a departure from good and accepted standards of medical care. He bases this opinion on the donor's negative cerebral spinal fluid test results, coupled with the length of his hospital course, and the diagnosis of viral encephalitis made at Southampton Hospital which was posted on DonorNet. Dr. Weinberg opines that defendants relied upon an inadequate explanation for ruling out the prior viral diagnosis. According to Dr. Weinberg, all of the factors should have led the transplant surgeons to conclude that the donor's diagnosis of bacterial meningitis was not accurate.

In reply, the NYU defendants contend that several inquiries were made to NYODN to confirm the donor's diagnosis, the Southampton Hospital cultures were provided to Dr. Morgan upon request, and the Southampton Hospital medical record was reviewed in the donor packet by Diflo prior to the liver transplant. In addition, contrary to plaintiff's experts' opinions, the suspicion by other prospective transplant centers that the donor might have a viral illness was contraindicated by the fact that the donor's physicians at Stony Brook ruled out the viral diseases. In any event, defendants point out that neither of plaintiff's experts opined that it was a departure from the standard of care to accept an organ from a patient diagnosed with presumed bacterial meningitis without a positive culture.

The Court finds that plaintiff failed to raise a triable issue of fact, inasmuch as the there was no evidence in the record that the donor had cancer which caused the recipient plaintiff's injuries. Therefore, it was not foreseeable that the recipient plaintiff would be injured by the transplant surgery

(*see* ***Moore v Shah***, 90 AD2d 389, 458 NYS2d 33 [3d Dept 1982]). In this regard, the plaintiff's experts speculate that defendants should have rejected the liver based on the suspicion of a viral illness which never materialized.

The Court acknowledges the tragic circumstances which led to the commencement of the instant action, and extends its sympathy for everyone involved, including the donor and his parents, the medical providers, the NYODN staff, the recipient plaintiff and his family. In addition, the Court notes that the donor's parents willingly waived HIPAA[3] restrictions (*see* ***Liew v New York University Medical Center***, 55 AD3d 566, 865 NYS2d 278 [2d Dept 2008]), openly provided their son's confidential medical records, and disclosed his ultimate diagnosis in order to help the recipient plaintiff. The Court finds that all parties acted responsibly by notifying the recipient plaintiff as soon as it was known that the donor had cancer, affording the recipient plaintiff all possible care and treatment possible. Unfortunately, inasmuch as it is not the standard of care to perform a biopsy upon a donor organ prior to transplantation, it was not foreseeable that the donor could have had cancer, this Court is constrained by the law to render this determination.

Accordingly, the motion by the NYU defendants for summary judgment dismissing the complaint as asserted against them is granted.

Dated: March 30, 2012

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

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[3] HIPAA is the Health Insurance Portability and Accountability Act of 1996 (see Pub L 104-191, 110 U.S. Sat 1936).

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