SHORT FORM ORDER

INDEX No. 05-10671
CAL. No. 10-00974MM

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. #009 -MD # 010 - MD
#011 - XMD # 012 - XMD
#013 - XMD

CORRECTED ORDER

DAMON MASSEY, as Administrator of the Estate of LYNDA MASSEY, Deceased, and DAMON MASSEY, Individually, Plaintiff, - against - SATISH ANAND, M.D., BABU THALLUR, M.D., JEFFREY SAUDERER, M.D., PHYLLIS SCHER, M.D., ROSEMARY KYRIACOU, P.A., QUEENS-LONG ISLAND MEDICAL GROUP, P.C., JEDAN PHILLIPS, M.D., FREDERICK MILLER, M.D., ELISABETH DANEELS, M.D., KHALID M. AHMAD, M.D., RICHARD KALISH, M.D., ZAHID HUSSAIN, M.D., PETER GOLDSTEIN, M.D., Defendants.	SILBERSTEIN, AWAD & MIKLOS, P.C. Attorney for Plaintiff 600 Old Country Road Garden City, New York 11530 FUREY, FUREY, LEVERAGE, MANZIONE, et al. Attorney for Defendants Anand & Thallur 600 Front Street Hempstead, New York 11550 KRAL, CLERKIN, REDMOND, RYAN, et al. Attorney for Defendants Sauderer & Scher 69 East Jericho Turnpike Mineola, New York 11501 FUMUSO, KELLY, DeVERNA, SNYDER, et al. Attorney for Defendant Kyriacou 110 Marcus Boulevard Hauppauge, New York 11788

Upon the following papers numbered 1 to 87 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (009) 81-87; Notice of Cross Motion and supporting papers (010) 1 - 8; (011) 9-26; (012) 27-43; (013) 44-47; Answering Affidavits and supporting papers 48-54; 55-63; 64-65; Replying Affidavits and supporting papers 66-73; 74-76; 77-78; Other 79-80; (~~and after hearing counsel in support and opposed to the motion~~) it is

It is,

ORDERED that the instant decision supercedes and supplants the court's decision dated February 23, 2011; and it is further

ORDERED this decision and order considers motion (009) which was not previously considered by this court; and it is further

ORDERED that motion (009) by the defendants Satish Anand, M.D. and Babu Thallur, M.D., for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as asserted against them, including those assertions based upon events occurring after June 12, 2003, is denied; and it is further

ORDERED that this motion (010) by the defendant, Queens-Long Island Medical Group, PC, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint based upon the subsequent, intervening and supervening acts of other medical providers; dismissing any claims of vicarious liability asserted against it based upon the acts or omissions of the co-defendants Satish Anand, M.D. and Babu Thallur, M.D.; and further dismissing any claims stemming from treatment and events occurring after June 12, 2003, the last date that the plaintiff's decedent was treated at Queens Long Island Medical Group, is denied; and it is further

ORDERED that this cross motion (011) by the defendant, Rosemary Kyriacou, P.A., for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint and all cross claims asserted against her is denied; and it is further

ORDERED that this cross motion (012) by the defendants, Khalid Ahmed, M.D., and Zahid Hussain, M.D., for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint and all cross claims asserted against them is denied; and it is further

ORDERED that this cross motion (013) by the plaintiff, Damon Massey, as administrator of the estate of Lynda Massey, deceased, and individually, for an order pursuant to CPLR Article 16 precluding any of the defendants remaining after determination of the preceding motions from claiming the limited liability benefits of Article 16 as to any defendant who is granted summary judgment has been rendered academic by denial of motions (010), (011), and (012) and is denied; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Calendar Department, Supreme Court, Riverhead within thirty days of the date of this order, and the Clerk is directed to set this matter down for a conference, on notice to all parties of the date, place and time for a determination with regard to sanctions or referral to the Grievance Committee.

The complaint of this action arises out of the defendants' alleged departures from good and accepted standards of medical care and treatment of the plaintiff's decedent in the defendants' alleged failure to timely and properly diagnose and treat the plaintiff. Causes of action sounding in medical malpractice for the wrongful death and conscious pain and suffering of the plaintiff's decedent who died on August 5, 2003 have been asserted.

It is claimed that the defendants failed to timely diagnose and properly treat the plaintiff's decedent for, inter alia, pemphigus vulgaris causing the condition to worsen and ultimately result in her death. The plaintiff claims that the decedent began treating at the Queens-Long Island Medical Group, PC in 2001 through and until her admission to Stony Brook University Hospital, where she died on August 5, 2003 at 51 years of age.

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 Corp., 3 NY2d 395 [1957]). The movant has the initial burden of proving

entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). 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 [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 [2d 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 [2d 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 [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[1998], app denied 92 NY2d 818 [1999]). 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 [1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [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 [1985]; Lyons v McCauley, 252 AD2d 516, app denied 92 NY2d 814 [1998]; Bloom v City of New York, 202 AD2d 465 [1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div., 7 AD3d 759 [2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [1997]). As set forth in Feinberg v Feit, 23 AD3d 517 [2005], "[s]ummary 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."

The plaintiff has submitted expert affirmations in opposition to these motions for summary judgment for this courts in camera review.[1]

MOTION (009)

In motion (009), the defendants Satish Anand, M.D. and Babu Thallur, M.D. seek summary judgment dismissing the complaint as asserted against them, inclusive of any claims stemming from treatment and events occurring after June 12, 2003. In support of this application, defendants Anand and Thallur have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answers served on behalf of the moving defendants, and plaintiff's verified and supplemental bills of particular; medical records from Queens,

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

Long Island Medical Group for Lynda Massey, copies of the transcripts of the examinations before trial of Damon Massey, Satish Anand, M.D., Babu Thallur, M.D., Phyllis Scher, M.D., Jeffrey Zauderer, M.D., Peter Goldman, M.D., Zahid Hussain, M.D., Richard Kallish, and Elizabeth Daneels, M.D.; various pathology reports and consultations; and the affirmation of the moving defendants' expert physician, Jerome Lehrfeld, M.D.

In motion (010) by Queens-Long Island Medical Group, P.C. (QLIMG), this court, in its decision and order dated February 23, 2011, previously considered the evidentiary submissions and the expert affirmation of Jerome Lehrfeld, M.D., wherein the defendant QLIMG sought dismissal of the claims asserted against it premised upon vicarious liability for the acts or omissions of co-defendants Satish Anand, M.D. and Babu Thallur, M.D. That motion was opposed by the plaintiff. It was determined that there were factual issues which precluded summary judgment specifically with regard to acts and omissions by defendants Anand and Thallur, as set forth below. Those same factual issues preclude summary judgment being granted to defendants Anand and Thallur in motion (009).

Accordingly, motion (009) by defendants Satish Anand, M.D. and Babu Thallur, M.D. for summary judgment dismissing the complaint asserted against them is denied.

MOTION (010)

In motion (010), the defendant Queens-Long Island Medical Group, P.C. (QLIMG) seeks summary judgment dismissing the complaint based upon the subsequent, intervening and supervening acts of other medical providers; dismissing any claims of vicarious liability asserted against it based upon the acts or omissions of the co-defendants Satish Anand, M.D., and Babu Thallur, M.D.; and dismissing any claims stemming from treatment and events occurring after June 12, 2003, the last date that the plaintiff's decedent was treated at Queens Long Island Medical Group. In support of this motion, the moving defendant QLIMG has submitted an attorney's affirmation; the summons and complaint; the moving defendant's answer; the plaintiff's verified bill of particulars and response to expert demand; and the affirmation of Jerome Lehrfeld, M.D.

The affidavit of Jerome Lehrfeld, M.D. has been submitted in support of this motion wherein he affirms that he is a physician currently licensed to practice medicine in the State of New York and that his practice is limited to primary care and family medicine. He does not affirm that he is board certified in any area of medicine. Dr. Lehrfeld has set forth the deposition transcripts and medical records which he reviewed and upon which he bases his opinions in this matter. He refers to those deposition transcripts and medical records in his affirmation, but those transcripts and records have not been provided to this court with the moving papers in support of his opinions (see Alvarez v Prospect Hosp., supra). Even if the moving papers were properly supported with the required submissions, it is determined that the opinions set forth by Dr. Lehrfeld in his affirmation are conclusory and unsupported by evidentiary submissions and raise factual issues. Additionally, further factual issues are raised by plaintiff's expert physician, thus precluding summary judgment.

Dr. Lehrfeld opines with a reasonable degree of medical certainty that there is no evidence in this case of any departure from accepted standards of good medical care or practice on the part of Satish Anand, M.D. or Babu Thallur, M.D., and there is nothing that these defendants did or did not do that was a substantial factor in causing the alleged injuries to the plaintiff's decedent.

Dr. Lehrfeld states that the decedent, Linda Massey, presented to Queens Long Island Medical Group in January 2002 with a history of diabetes mellitus, hypertension, migraine headache, trigeminal neuralgia and various chronic orthopedic conditions including back pain and shoulder pain. He refers to various dates of service, which he states "are or may be significant"; however, this court is unable to refer to those records due to

the failure to submit the same. Dr. Lehrfled sets forth in a conclusory manner that on various dates of treatment (January 28, 2002, March 28, 2002, and April 2, 2002) Dr. Anand saw Ms. Massey and examined her mouth and that such examination was normal. However, the method and manner of examination has not been set forth, nor has the standard of care for examination been set forth.

On April 12, 2002, when the plaintiff's decedent was seen by an ENT specialist, Dr. Zauderer, multiple mouth sores were visualized and evaluated as typical for viral ulcers along with an irritated soft palate. She was referred by Dr. Zauderer to Dr. Fantasia, an oral pathologist at Long Island Jewish Hospital. On April 29, 2002, when Dr. Anand saw the plaintiff's decedent for post-nasal drip and seasonal allergies, she made no complaints of ulcers in her mouth although he was aware of the same. On May 2, 2002, Dr. Anand did not examine the plaintiff's decedent's mouth as she presented for evaluation and treatment of trigeminal neuralgia and preoperative evaluation. On May 11, 2002, plaintiff's decedent was seen at QLIMG by Dr. Gaswany who treated her for flank pain and noted a normal examination of the head, eyes, ears, nose and throat. Dr. Anand saw her on May 16, 2002 and did not document any discussion about mouth lesions; however, on May 17, 2002, Dr. Kelsch noted the presence of oral lesions when seen at Dr. Fantasia's office. These oral lesions were treated with topical steroids. Thereafter, there were several visits with Dr. Anand on May 31, 2002, July 22, 2002, September 13, 2002 at which time he did not document mouth lesions. On September 27, 2002, Ms. Massey was seen by Dr. Anand complaining of continuing right facial pain and puffiness along the mandible. She was referred back to the neurologist. Dr. Anand noted a normal examination of her head, eyes, ears, nose and throat, which Dr. Lehrfeld states would indicate that he examined her mouth.

On October 21, 2002, Dr. Lehrfeld states that Ms. Massey was diagnosed with a small brain aneurysm for which no surgery was contemplated and that Dr. Anand did not recall if he examined her mouth. On November 1, 2002, Ms. Massey was seen by Rosemary Kyriacou, P.A., for complaints of an ulcer in her mouth for which she was referred to Dr. Scher, an ENT specialist, who, on November 6, 2002, found two areas of ulceration in her mouth, areas described as missing mucosa with a white center for which Dr. Scher did a scrape biopsy. Dr. Lehrfeld states with regard to the biopsy report, "Other than the mistaken identification of the biopsy as anal mucosa, the results are indicative of inflammation of the stratified squamous epithelium." He states that this biopsy did not diagnose pemphigus vulgaris because of inadequate depth biopsy and it is likely that the condition was not yet present.

On November 15, 2002, Dr. Anand did not see lesions when he examined the decedent's mouth. At the time she was complaining of burning and paresthesia on the right side of her mouth and tongue and pain on the right side of her head and neck. Thereafter, until May 22, 2003, Dr. Anand did not see any lesions in her mouth, but on that date saw an ulcer at the base of her tongue for which he made a diagnosis of an aphthous ulcer which he felt was due to a virus infection or her dentures. He treated her with local steroids and orabase but did not take a biopsy as he does not perform biopsies. On May 30, 2003, when Ms. Massey was seen by Dr. Thallur on an urgent visit, she complained of mouth and throat pain and a headache, had swelling of her lip, gums and inner cheek, had missing teeth, and had an ulcer at the base of her tongue for which he treated her with an antibiotic and referred her to a dentist. He did not see any physical signs such as blisters or bullae compatible with pemphigus vulgaris. On June 2, 2003, she was seen by Dr. Anand for a "sore" on her lower lip diagnosed as a herpes, which he treated with Zovirax cream locally. He considered the presence of an aphthous ulcer in her mouth compatible with a cold sore on the lip because both could be caused by a virus. On June 6, 2003, Dr. Anand found more ulcers on her right inner cheek and at the base of her tongue, which he treated with Zovirax pills for a virus. On June 12, 2003, Dr. Anand saw white patches on her tongue and buccal mucosa and diagnosed her with candidiasis (thrush) and prescribed Mycostatin. He set up an ENT appointment for the following week. Thereafter, neither Dr. Anand nor Dr. Thallur saw Ms. Massey, as she was hospitalized at Stony

Brook University Hospital from June 14, 2003 through June 28, 2003 with an admitting diagnosis of disseminated herpes simplex infection. Although the Stony Brook records have not been provided, Dr. Lehrfeld sets forth that the lesions were biopsied on June 25, 2003 indicating pemphigus vulgaris should be considered. However, she was discharged on June 28, 2003 before the physicians were apprised of the biopsy results. Due to worsening of her condition, she was readmitted to Stony Brook on July 10, 2003, at which time the diagnosis of pemphigus vulgaris was confirmed.

Dr. Lehrfeld states that it was not a departure not to refer Ms. Massey to a dermatologist as she had no skin lesions or a dermatological condition. He states pemphigus vulgaris oral lesions can, and do, precede the onset of skin lesions of the disease and they do not ordinarily regress spontaneously as they did in Ms. Massey. He opines that family practice physicians do not perform full thickness biopsies and QLIMG was not equipped to perform such biopsy, but the decedent was under the care of other physicians who were capable of performing such procedure. He states the most common cause of a mouth ulcer is either trauma, viral or aphthous ulcers. He further states that the absolute rarity of the disease makes it unlikely to be seen and that all physicians caring for this patient failed to consider pemphigus vulgaris as a differential diagnosis. He does not opine, however, whether the failure to include pemphigus vulgaris as a differential diagnosis was a departure from good and accepted standards of medical care and treatment, thus raising a factual issue to further preclude summary judgment on behalf of the defendants Dr. Anand and Dr. Thallur.

Plaintiff's expert, a physician duly licensed to practice medicine in New York State who is board certified in dermatology and has personally diagnosed and treated patients suffering from pemghigus vulgaris states familiarity with the accepted medical standards and practices in the diagnosis and treatment of the disease and indicators for referral to dermatology and other pathology specialists. The plaintiff's expert bases the opinions set forth in the affirmation upon a reasonable degree of medical certainty. It is the plaintiff's expert's opinion that the defendants Dr. Anand and Dr. Thallur are physicians responsible for making necessary referrals to specialists including dermatologists for specialized care to be provided to decedent from January 2002 through June 12, 2003. Plaintiff's expert sets forth that in 2002 and 2003 that pemphigus vulgaris was known to be a blistering disease which usually starts in the oral mucosa with blisters or bullae that rupture easily and leave open sores, but intact blisters/bullae in the mouth are rare. Other symptoms include the presence of immunoglobulin antibodies IgG1 and IgG4. The disease is typically effectively treated with high-dose oral prednisone in combination with immunosuppressants, inter alia, and successful management requires involvement of both the treating dermatologist and the patient's primary care provider at the earliest possible opportunity to achieve the best prognosis.

It is the plaintiff's expert's opinion that Dr. Anand and Dr. Thallus departed from accepted standards of care in failing to form a timely and correct diagnosis depriving the decedent of an opportunity for meaningful intervention, a significant factor in hastening the death of the decedent and contributing to her severe pain and suffering. The decedent first exhibited signs of pemphigus vulgar fifteen months prior to her death from pemphigus and thirteen months before her first hospitalization. The decedent presented to QLIMG between April 2002 and June 2003 about 25 times for various complaints including multiple presentations with ongoing complaints of mouth sores and ulcers. The plaintiff's expert states the moving defendants should have appreciated the need for the decedent to be seen by a dermatologist, dentist or oral pathologist for an incisional perilesional biopsy following her visits in April, May and November 2002 and May and June 2003. Significantly, on the November 15, 2002 office visit when the decedent presented with paresthesia in the oral cavity, Dr. Anand should have noted the significance of this complaint and undertaken further investigation and thus departed from accepted standards of medical care by failing to further investigate. On the May 30, 2003 visit when the decedent presented to Dr. Thallur with complaints of an ulcer under her tongue and swelling of the

lip/inner cheek and lips, although aware of her history, he simply ordered Tequin useful for treating a micro-organism, however, an incisional perilesional biopsy was indicated. Failure to formulate a proper differential diagnosis was a departure from the standard of care. Had Dr. Thallur referred the decedent to an oral pathologist for an incisional biopsy on this visit, and Dr. Anand considered the other conditions to formulate a proper differential diagnosis, then to a reasonable degree of medical certainty, the decedent's condition would have been diagnosed at an earlier date when she would have had a significantly better outcome.

It is the plaintiff's expert's opinion that prompt diagnosis is critical for the sake of early intervention and to allow the opportunity of alternate treatment should complications arise from standard therapy with the usual combination of steroids and immunosuppressants. Other therapies, such as plasmapheresis or intravenous immunoglobulin (IVIg) could then have been implemented. Absent a prompt diagnosis, if change in treatment becomes necessary, it may not be made early enough for the patient to receive full benefit of treatment. A delay in diagnosis of even a few weeks will have a significant impact on the possibility for successful treatment of patient with pemphigus vulgaris. Such delay will significantly worsen the prognosis. Plaintiff's expert opines with a reasonable degree of medical certainty that with proper testing the decedent's condition could have been diagnosed as early as April 12, 2002; had decedent been afforded the benefit of timely diagnosis on April 12, 2002 or any time prior to leaving the defendant's care on June 12, 2003, decedent would have had the proper treatment available to her thus providing her with a significantly better outcome; and the failure of Dr. Anand and Dr. Thallur to provide decedent with a timely and correct diagnosis was a substantial factor in denying her proper treatment thus contributing to her pain, suffering and untimely death. He states that the moving defendants' expert Lehrfeld does not consider the rarity of intact blisters or bullous lesions in the oral cavity and fails to account for these symptoms. The theory of later negligence by subsequent treaters relieves these moving defendants of liability as later negligence was not foreseeable and subsequent treaters could have intervened to reverse the decline of decedent's condition must be discredited as a delay in diagnosis of even a few weeks will have a significant impact on the success of subsequent treatment and will significantly worsen the prognosis. These departures, the expert opines, were substantial factors in causing the decedent's injuries, conscious pain and suffering and untimely death.

The plaintiff has also submitted the affirmation of an expert who is duly licensed to practice medicine in the State of New York who is board certified in internal medicine and as a medical examiner and states familiarity with the accepted standards and practices applicable to the staff at QLIMG and Dr. Anand and Dr. Thallur as Ms. Massey's internists in charge of managing, monitoring and coordinating Ms. Massey's overall health care from January 2002 until her admission to Stony Brook. The plaintiff's expert opines to a reasonable degree of medical certainty that the defendants Dr. Anand and Dr. Thallur departed from the accepted standards of medical care and practice in their care and treatment of the decedent, and that those departures were substantial factors in causing the decedent's injuries, conscious pain and suffering and untimely death on August 5, 2003. Plaintiff's expert opines that the defendants did not take into account that patients who suffer recurring ulcerative lesions in the oral cavity require tissue diagnosis by biopsy; that clinical examination is not enough; and that referral to a specialist is required for the biopsy of the oral cavity lesions. The failure to timely refer Ms. Massey for oral cavity biopsy, failure to prescribe steroids with immunosuppressants, discontinuity in the group in terms of obtaining consultation and procedure and reports, failure to act upon available consultation information, and poor communication between practitioners are each a substantial factor that caused the death of Ms. Massey.

The plaintiff's expert states that Dr. Anand testified he had access to his patient's charts and could make referrals to physicians outside the group, and had access to the notes of his colleague Dr. Zauderer from decedent's office visits on April 12, 2002 and April 26, 2002 describing the decedent's multiple mouth ulcers

and complaints of bleeding sores that prevented her from working, and access to Dr. Zauderer's plan to refer the decedent to an oral pathologist on April 26, 2002, as well as to refill Nystatin used to treat candidiasis. Dr. Anand had the duty to be aware of that care and medical condition and to appreciate the significance of the notes of the other treating physicians and the need for further testing; however, he testified that he was not aware Ms. Massey saw an oral pathologist. Dr. Anand was required to make a differential diagnosis for the recurring condition; test and eliminate, beginning with the most serious condition; and to refer her to proper-credentialed specialists. Dr. Anand's failure to refer Ms. Massey to a dentist or oral pathologist for an incisional biopsy was a departure from accepted standards of care as the biopsy would have given the decedent the benefit of early treatment and a favorable prognosis. Dr. Anand was aware that the scrape biopsy conducted by Dr. Scher on November 6, 2002 would distort the superficial epithelial layer and render it unsuitable for analysis and that perilesional biopsy would have preserved the epithelial layer making it suitable for analysis and testing. Again on May 23, 2003, when Ms. Massey presented with an ulcer at the base of her tongue, accepted standards of care again required an incisional perilesional biopsy to search for various types of ulcerative lesions relative to the recurring ulcer, but no referral for the same was made. This need was amplified on June 2 and June 6, 2003 when she presented with white patches on her tongue and buccal mucosa, but instead Dr. Anand based his assessments on clinical impressions which cannot be the basis for a definitive diagnosis. Incisional perilesional biopsy would have indicated the need for further testing by the pathologist including immunofluoresence studies to detect the presence of special autoantibodies that are found in the epithelial and epidermal intercellular substance. Once diagnosed, it is essential to treat pemphigus vulgaris with adrenocortical steroid medications and an immunosuppressant to enhance the therapeutic effect. The expert opines that these departures were each a significant factor in causing the decedent pain, suffering and untimely death.

The plaintiff's expert further opines that Dr. Thallur had the duty to appreciate the significance of the notes of the prior treating physicians in the group; the history and status of Ms. Massey's medical condition and care; the ongoing complaint of mouth ulcers, bleeding sores, and sore throat; and the need to make an urgent referral for an incisional perilesional biopsy in April 2002 and again in May 2003 when she presented with an ulcer under her tongue, swelling of her lip/inner cheek and lips, and failed to do so. Simply instructing a patient to see a specialist without a specific referral to a particular physician or dentist for a particular test was a departure from accepted standards of care and a cause of delay in diagnosing and treating Ms. Massey's condition. These failures, in addition to the failures to make a differential diagnosis and properly diagnose the decedent's condition, and to order proper treatment and medication were departures from the standard of medical care and substantial factors in causing Ms. Massey to lose an opportunity for cure, and to experience pain, suffering and untimely death.

Based upon the foregoing, there are multiple factual issues which preclude summary judgment even it the defendant would have supported the motion with proper evidentiary submissions and established prima facie entitlement to summary judgment dismissing the complaint.

Accordingly, motion (010) by the defendants Queens-Long Island Medical Group, PC is denied.

MOTION (011)

Counsel for the moving defendant has submitted an affirmation in reply to the cross motion by the co-defendant Rosemary Kyriacou, P.A., wherein she requests that should the court determine that Rosemary Kyriacou, P.A., is entitled to summary judgment based on the affirmation of Dr. Perieira, that QLIMG be granted partial summary judgment for any claims of vicarious liability with respect to Kyriacou. However, CPLR 3212 does not permit a party to incorporate by reference the evidentiary submissions of another party into their moving

papers. Further, QLIMG has not submitted an expert affirmation or affidavit in support of this un-noticed application set forth in a reply and there is no evidentiary submission by the moving defendant averring to whether or not Kyriacou was an employee, agent or representative of QLIMG.

In motion (011), Rosemary Kyriacou, P.A.. seeks summary judgment dismissing the complaint asserted against her. In support of this application, she has submitted, inter alia, an attorney's affirmation; the summons and complaint; the answer and demands served by Kyriacou; the plaintiff's verified bill of particulars; the medical records of QLIMG; an affirmation of Frederick Pereira, M.D.; a letter from Dr. Kelsch to Dr. Zauderer dated May 17, 2002 with no-show record; a biopsy report dated November 12, 2002 of Dr. Joan M. Mones, D.O; Stony Brook University Hospital records dated June 14, 2003 and July 10, 2003; an unsworn curriculum vitae of Rosemary Kyriacou; an affidavit of Rosemary Kyriacou dated September 25, 2006; and an unsigned copy of the transcript of the examination before trial of Damon Massey dated January 26, 2006. The unsigned transcript of the examination before trial is not in admissible form pursuant to CPLR 3212 nor is it accompanied by an affidavit pursuant to CPLR 3116 and is therefore not considered in this motion (see Martinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2008]; McDonald v Maus, 38 AD3d 727 [2007]; Pina v Flik Intl. Corp., 25 AD3d 772 [2006]). The curriculum vitae of Rosemary Kyriacou is not sworn to and is not in admissible form and is not considered in this motion.

In her affidavit dated September 25, 2006, Rosemary Kyriacou states she has no independent recollection of Lynda Massey or anyone regarding her. Her supervising physician at QLIMG was Stephan Simons and she does not recall speaking with him about Lynda Massey.

Frederick Pereira, M.D., sets forth in his affirmation that he is a physician duly licensed to practice medicine in the State of New York and is board certified in dermatology. He does not set forth that he has any experience in treating pemphigus vulgaris. He states that he has reviewed the bill of particulars, the relevant medical records (but does not set forth which medical records were reviewed) and the deposition testimony of the plaintiff. It is his opinion with a reasonable degree of medical certainty that Rosemary Kyriacou, P.A.. acted appropriately and did not depart from accepted standards of medical practice as a physician's assistant. It has not been established by any admissible evidence, however, that Rosemary Kyriacou was a physician's assistant, by whom she was employed, and what the standard for practice for a physician's assistant as no transcript of the examination before trial of Ms. Kyriacou has been submitted and her affidavit does not provide such information.

Dr. Pereira sets forth that prior to 2003 Ms. Massey did not suffer from any major skin conditions, but that she had hypertension, diabetes, low back syndrome, trigeminal neuralagia and recurrent URI and pharyngotonsillitis. The note of April 12, 2002 in the QLIMG record, he states, indicates Ms. Massey had sores in her mouth with bleeding, ulcers on the soft palate, probably viral ulcers, and antibiotics. A solution of Benadryl/Decadron/Mycostatin was ordered. Dr. Zauderer's note on April 26, 2002 noted multiple ulcers over the oropharangeal mucosa. In a letter dated May 17, 2002, Dr. Kelsch of the Oral Pathology Unit at the Long Island Jewish Medical Center (LIJMC) gave a diagnosis of thermal burn of the right soft palate and traumatic ulcer of the right lateral tongue. A refill was given on May 31, 2002 for Mycostatin used to treat oral fungal infections. On November 1, 2002, Rosemary Kyriacou examined Ms. Massey and found one "sore" on the right side of her mouth. The impression was that of viral syndrome, aphthous ulcer right buccal mucosa, pharyngitis, r/o strep, aphthous stomatitis. A throat culture was taken and she was prescribed Kenalog and Orabase gel mouth rinse twice daily and Biaxin twice a day. Thereafter, Dr. Pereira sketched out the remainder of the visits and Ms. Massey's admissions to Stony Brook University Hospital.

In conclusion, he states that Ms. Kyriacou had the appropriate training and expertise to practice as a

physician's assistant at the group. He states she appropriately evaluated and treated the plaintiff's decedent and prescribed appropriate medication for aphthous ulcer and viral syndrome and took a culture to rule out strep and advised her to return if she did not feel better. He sets forth the care and treatment for aphthous ulcer, but does not indicate that she made a differential diagnosis to rule in or out pemphigus vulgaris or that she ordered any other tests to confirm or rule out the same except for a throat culture. He does not indicate that she reviewed the previous and pertinent medical history.

Based upon the foregoing, it is determined that Rosemary Kyriacou, P.A., has not established prima facie entitlement to summary judgment dismissing the complaint.

Accordingly, motion (011) is denied.

MOTION (012)

In motion (012), the defendants Khalid Ahmed, M.D., and Zahid Hussain, M.D. seek summary judgment dismissing the plaintiff's complaint and all cross claims asserted against them on the basis that they were medical trainees acting under the supervision and direction of attending physicians. However, the moving defendants have not submitted copies of the answers with cross-claims which they seek to have dismissed and as required by CPLR 3212. The transcripts of the defendants' examinations before trial are not signed and are therefore not in admissible form pursuant to CPLR 3212 (see Martinez v 123-16 Liberty Ave. Realty Corp., supra; McDonald v Maus, supra; Pina v Flik Intl. Corp., supra). Additionally, the Note of Issue in this action was filed on May 12, 2010 and the last day in which to serve this cross motion was September 9, 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. This cross motion was served on September 20, 2010, beyond the statutory 120 days, and the moving defendants have made no application for leave of court on good cause shown to file this cross motion beyond the statutory period, and in fact, have not submitted any reason for the delay (see Brill v City of New York, 2 NY3d 648 [2004]; Gonzales v 98 Mag Leasing Corp., 95 NY2d 124 [2000]). Based upon the foregoing, it is determined that cross motion (012) fails to comport with the requirements of CPLR 3212 and is deemed untimely.

It is further determined that even if motion (012) were deemed timely and comported with CPLR 3212, there are factual issues which preclude summary judgment. The plaintiff's expert has raised factual issues concerning Dr. Hussain's failure to familiarize himself with the patient's Pathology Laboratory for the skin biopsy report prior to writing the discharge summary, which failure caused serious delay in properly treating the plaintiff's decedent.

Accordingly, motion (012) is denied.

By letter dated November 16, 2010, counsel for the plaintiff has apprised this court that unredacted copies of the plaintiff's expert affirmations were sent to the Court for in camera inspection and that a secretary in his office inadvertently circulated the same to all defense firms. The letter accompanying these affirmations set forth that the unredacted affirmations were confidential and to be used for the Court's purposes. Counsel for the plaintiff contends that defense counsels never notified his office that the documents were sent to them in error, and that counsel for the plaintiff was not aware of the error until it received the defendants' replies wherein the counsel for the defendants, particularly Alisa Lebensohn, Esq. from the Attorney General's Office, appearing on behalf of the defendants Khalid Ahmed, M.D., and Zahid Hussain, M.D., went so far as to rely on extensive "research" based upon this confidential document. Counsel for the plaintiff sets forth that this use of confidential information by defense counsel Lebenshon contravenes basic professional responsibility, which requires that

upon receipt of the confidential information a lawyer is prohibited from using that information (ABA Formal Opinion 05-437, and NYC Eth. Op. 2003-04, 2003 WL 23789274).

Counsel for the plaintiff has demonstrated that part of the document exchanged inadvertently in opposing the defendants' motions is protected from disclosure pursuant to CPLR 3101(d) in that the plaintiff, in opposing a motion for summary judgment in an action for medical malpractice, does not disclose the name and pertinent information identifying the plaintiff's expert. Counsel for the plaintiff has demonstrated that there was no waiver of the communicated protected material, that reasonable steps were taken immediately to notify the defendants of the inadvertent disclosure, and that Alisa R. Lebensohn, Esq., Assistant Attorney General and counsel for the defendants Dr. Zahid Hussain and Dr. Khalid Ahmed, used that information to research the plaintiff's expert and made arguments her reply affirmation based upon the fruits of her research. Lebenshon demonstrated by the information and arguments contained in her affirmation submitted in her reply that instead of notifying the plaintiff's counsel of the inadvertent disclosure of the identity of the plaintiff's expert Dr. Schwartz and further refraining from reviewing or utilizing that protected information about the plaintiff's expert, she wilfully conducted research about the plaintiff's expert and submitted arguments and legal reference (see Hussain-Ahmad Reply by Lebensohn at paras. 27-31) adverse to Dr. Schwartz in contravention of the Rules of Profession Conduct 4.4. (see New York Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis, 300 AD2d 169 [2002]).

The American Bar Association Model Rules of Professional Responsibility were amended in 2002. Model Rule 4.4 (b) provides "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender" (ABA Ethics 2000 Commission Report, issued February 5, 2002). This court further notes that both the Association of the Bar of the City of New York, in an opinion of its Committee on Professional and Judicial Ethics, opinion number 2003-04, 2004 WL837937, and the New York County Lawyers Association, in an opinion of its Committee on Professional Ethics, opinion number 730, 2992 WL 31962702, have considered the issue. Both conclude that when receiving a communication or an e-mail which the lawyer knows or should reasonably know contains privileged material, the attorney is obligated to "promptly notify the sending attorney" thereof, to refrain from further review of the communication, and to return or destroy it as requested. Counsel should be aware of their obligations in these circumstances, and promptly adhere to them in order to avoid sanctions (see Galison v Greenberg, 5 Misc3d 1025A [Sup Ct, NY County 2004]; People v Terry, 1 Misc3d 475 [Monroe County Court 2003]). As set forth in 57 Syracuse L. Rev. 1309, the Committee on Professional Ethics based its opinion on the New York Ethical Code's support for an "ethical infrastructure." For example, the New York Code requires that a law firm "make reasonable efforts" to ensure that its lawyers are complying with the Code. The Code also requires that firms supervise lawyers within the firm, and apportion responsibilities between subordinate and supervisory lawyers within a firm. 22 NYCRR 130-1.1 permits the Court to exercise its discretion to impose costs and sanctions on an errant party. Sanctions are retributive, in that they punish past conduct (Federal Home Loan Mortgage Corp. v Raia, 2010 Misc Lexis 5704 [Nassau County Dist Ct 2010]).

The Advisory Committee on Judicial Ethics has rendered opinion 10-85 dated June 10, 2010. The issue addressed is whether the Judge must report an attorney to the appropriate disciplinary authority when in the course of a proceeding, an attorney admitted to the judge that he/she improperly notarized his/her client's signature, purportedly as a matter of convenience. There was no evidence that the attorney committed this impropriety for any other reason nor on any other occasion. The opinion cited to 22 NYCRR 100.2 [A], wherein it is set forth that a judge must always act to promote public confidence in the judiciary's integrity and impartiality. Thus, if a judge received information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Rules of Professional Conduct (see 22 NYCRR Part 1200), he or she

must take appropriate action (see 22 NYCRR 100.3 [D][2]). The Committee further opined that the decision as to whether a substantial likelihood exists that an attorney committed a substantial violation of the Rules of Professional Conduct rests with the judge because he or she is in the best position to evaluate and assess all relevant, known circumstances (see Opinions 08-198; 07-129). Only in relatively few instances has the Committee advised that a judge must report a lawyer's misconduct to a disciplinary authority. In those instances, based on the facts disclosed by the respective inquiring judges, the substantial misconduct rose to such an egregious level that the conduct implicated the attorneys' honesty, trustworthiness or fitness as a lawyer (see e.g. Opinion 07-129 where attorney admitted under oath to committing perjury). The opinion also set forth that "if the misconduct is not so egregious as to implicate the lawyer's honesty, trustworthiness, or fitness to practice law, the judge need not necessarily report the lawyer to the appropriate disciplinary authority. Rather, the judge has the discretion to take less severe, appropriate measures instead or in addition, including, but not limited to, counseling and/or warning a lawyer, reporting a lawyer to his/her employer, and/or sanctioning a lawyer (cf. Opinion 91-36 [Vol VII]). Based on all the surrounding circumstances, the judge must determine whether the attorney's conduct rises to the level of egregious misconduct. Ultimately, the judge must exercise his or her discretion to determine the appropriate action to take (see Opinion 08-198; cf. Opinions 08-08; 91-36 [Vol. VII]).

Based upon the foregoing, this court will conduct a conference with all counsel on this issue and if necessary schedule a hearing to determine what remedies, if any, are appropriate, and whether, inter alia, sanctions or disqualification against attorney Alisa R. Lebensohn, Esq. are appropriate in this matter, or whether the matter shall be referred to the Grievance Committee (see Rosenman Colin Freund Lewis & Cohen v Edelman, 165 AD2d 533 [1991]; Principe v Assay Partners, 154 Misc2d 702 [Sup Ct, NY County 1992]).

Dated: May 10, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

TO: LEWIS JOHS AVALLONE AVILES, LLP
Attorney for Defendant Queens Long Island Medical Group
425 Broad Hollow Road
Melville, New York 11747-4712

YOELI & GOTTLIEB, LLP
Attorney for Defendant Goldstein
260 Madison Avenue, 18th Floor
New York, New York 10016

AARONSON, RAPPAPORT, FEINSTEIN, et al.
Attorney for Defendants Phillips, Miller, Daneels & Kalish
757 Third Avenue
New York, New York 10017

ANDREW M. CUOMO, ESQ.
Attorney for Defendants Ahmad & Hussain
120 Broadway, 23rd Floor
New York, New York 10271