

Malone v Ionescu
2012 NY Slip Op 32053(U)
July 13, 2012
Supreme Court, Suffolk County
Docket Number: 09-30137
Judge: W. Gerard Asher
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INDEX No. 09-30137
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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 1-25-12 (#001)
MOTION DATE 2-3-12 (#002)
ADJ. DATE 2-7-12
Mot. Seq. # 001 - MD
002 - MG

EDWARD MALONE, as the Administrator of the
Estate of GAIL MALONE, Deceased,

Plaintiff,

- against -

DANITA IONESCU, D.O., AMITYVILLE
FAMILY PRACTICE ASSOCIATES, P.C.,
AMITYVILLE FAMILY MEDICAL CARE
P.L.L.C., JACK MARZEC, M.D., and SOUTH
SHORE ORTHOPAEDIC ASSOCIATES, P.C.,

Defendants.

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Upon the following papers numbered 1 to 37 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 16-26; Notice of Cross Motion and supporting papers (002) 1-15; Answering Affidavits and supporting papers 27-35; Replying Affidavits and supporting papers 36-37; Other __; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that motion (001) by the defendants, James Marzec, M.D. s/h/a Jack Marzec, M.D., and South Shore Orthopaedic Associates, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against them is denied; and it is further

ORDERED that motion (002) by the defendants, Danita Ionescu, D.O., Amityville Family Practice Associates, P.C., and Amityville Family Medical Care, P.L.L.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them, is granted.

In this medical malpractice action, a cause of action sounding in negligence has been asserted against the defendants based upon the wrongful death of the plaintiff's decedent, Gail Malone, premised upon the defendants' alleged departures from good and accepted standards of medical care and treatment of the decedent, Gail Malone. It is alleged that the defendants failed to diagnose and treat the decedent for leukemia, which was permitted to progress and worsen during the delay in diagnosing and treating the decedent. It is alleged that MRI studies of April 3, 2006 and August 21, 2006 suggested hematopoietic bone abnormalities which the

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defendants failed to follow up on, and further failed to refer the decedent to appropriate specialists to determine the basis for said abnormality. It is additionally alleged that the defendants' failure to obtain proper and complete pre-surgical clearance and testing prior to the decedent's surgery of May 1, 2006, resulted in her leukemia going undiagnosed and untreated. Gail Malone died on August 28, 2007. The plaintiff, Edward Malone, was appointed Administrator of the Estate of Gail Malone, by decree of the Surrogates Court, Suffolk County, dated July 28, 2009.

The defendants, James Marzec, M.D., South Shore Orthopaedic Associates, P.C., Danita Ionescu, D.O., Amityville Family Practice Associates, P.C., and Amityville Family Medical Care, P.L.L.C., seek summary judgment dismissing the complaint on the bases that they fully complied with the standard of care during their treatment of Gail Malone, and that their care and treatment did not cause or contribute to the plaintiff's injuries or death.

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]).

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]).

In support of motion (001), the defendants James Marzec, M.D. and South Shore Orthopaedic Associates, P.C. have submitted, inter alia, an attorney's affirmation; the expert affidavit of Arthur M. Bernhang, M.D., copies of the summons and complaint, their answer and demands, and plaintiff's verified bill of particulars; copies of the transcripts of the examinations before trial of Edward Malone dated July 21, 2010; the transcript of the examination before trial of Danita Ionescu dated October 8, 2010; the transcript of the examination before trial of James L. Marzec, M.D. dated January 11, 2011; and copies of the medical records maintained by defendant Marzec.

In support of motion (002), the defendants Danita Ionescu, D.O., Amityville Family Practice Associates, P.C., and Amityville Family Medical Care, P.L.L.C. have submitted, intra alia, an attorney's affirmation; the expert affirmation of Herbert Feldman, M.D.; a copy of the summons and complaint and answers served by

Danita Ionescu and Amityville Family Practice Associates, P.C. with various discovery demands, plaintiff's verified bills of particulars for all three moving defendants; the certification by Danita Ionescu, D.O. for the copy of her office records; copy of the office records of James L. Marzec, M.D. and Steven A. Simonson, M.D. with certificate of authenticity, an uncertified copy of the Good Samaritan Hospital records, and an uncertified copy of a radiology report of Zwanger-Persiri; transcripts of the examinations before trial of Edward Malone and non-party Kelly Malone dated April 14, 2011; the transcript of the examination before trial of Danita Ionescu dated October 8, 2010; and the transcript of the examination before trial of James Marzec, M.D. dated January 11, 2011.

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, Derdarian 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]).

James Marzec, M.D. testified that he is licensed to practice medicine and surgery in New York State and that he specializes in orthopedic surgery and sports medicine. He is a shareholder in South Shore Orthopaedic Associates, P.C. with Steve A. Simonsen, M.D. He testified that he only became familiar with the term acute myeloid leukemia when he was served with the papers in this action. He did not know how to define the term "dysplasia," and stated that hematopoietic bone marrow is a benign process of bone marrow, and he did not know it to be an indication of a hematological disorder.

Dr. Marzec testified that the decedent first became his patient on January 25, 2006. Her initial intake revealed that Dr. Ionescu was her primary care physician for one year, and that her rheumatologist was Dr. Stoune. He conducted a physical examination, which was limited to orthopedics/sports medicine. He did not take any blood tests, but took x-rays. He ordered ice, Medrol, Motrin and physical therapy for the pain in her right knee. She returned on March 22, 2006, with pain in both knees, for which an MRI was ordered and which revealed degenerative joint disease of all three compartments, degeneration of the anterior and posterior horns of the medial meniscus of the right knee. He discussed arthroscopic surgery with her for a partial medial and lateral meniscus, meniscectomies and synovectomy of the right knee under local anesthesia. Surgery was performed at Good Samaritan Hospital on May 1, 2006. He stated that there were no abnormalities found in the pre-operative blood test results. After surgery, she returned to his office on June 26, 2006, and was cleared to return to work. She was seen again on July 31, 2006, at which time she complained that she still had pain in her right knee. She further advised him that she developed pain in her left knee, which condition he categorized as Ahlback-one medial gonarthrosis. He stated that this was a way of categorizing progression of osteoarthritic changes in knees. His impression was that of a tear of the posterior horn, medial meniscus left knee, based upon his examination, however, he additionally ordered an MRI of her left knee. He received the report of that MRI dated August 21, 2006,

Dr. Marzec continued that on October 23, 2006, Dennis Dillon, a physician's assistant working in his office, administered Synvisc, a visco supplementation, by injections into both knees to help with arthritis. The

injections were repeated on an additional visit when she returned to the office again on January 29, 2007. Dr. Marzec saw the decedent again on March 12, 2007 for complaints of pain in both knees, the right greater than the left. He discussed arthroplasty of the right knee and advised a surgical consult with his partner, Dr. Simonsen, whom she saw on April 9, 2007. Dr. Simonsen noted that she had no relief from the visco supplementation injections into her knees. His plan was for unicondylar total knee arthroscopy at Stony Brook University Hospital, and to consider knee replacement surgery after August 2007, upon evaluation by someone who does knee replacements. On June 18, 2007, the decedent was seen by P.A. Dillon for an injury to her right knee from banging it on a table for which he ordered bilateral knee x-rays. His impression was that of left knee contusion, possible tibial plateau occult fracture, for which he ordered an MRI, which was done on June 19, 2007. On June 27, 2007, the decedent brought her MRI films to the office, which Dr. Marzec testified showed arthritis and degenerative tear of the medial meniscus, based upon the radiologist's reading. Dr. Marzec stated that he did not make an independent reading of the MRI films. His plan was for physical therapy, ice, return to work, medication, and to see an implant specialist.

During Dr. Marzec's testimony, he was read the radiologist's impression of the MRI film of June 19, 2007, which indicated "abnormal marrow. Signal intensity may represent benign hematopoietic marrow hyperplasia which may be secondary to chronic anemia." The radiology report for the MRI also showed abnormal marrow signal of the distal femur, fibula, and to a lesser extent, the tibia. Dr. Marzec testified that her first two MRI's also revealed the consistent impression by the radiologists. The two prior MRI's were performed by Zilka Radiology, and the third MRI by Zwanger-Pesiri, however, Zwanger-Pesiri did not have the previous films to compare. Dr. Marzec testified that he concluded that there was no change in the hematopoietic bone marrow hyperplasia demonstrated in the films. Zwanger-Pesiri recommended clinical correlation and further evaluation with the June 19, 2007 MRI of the knees. He continued that the April 3, 2006 MRI report described hematopoietic bone involving the distal shaft of the femur, but nowhere else. The August 21, 2006 MRI report revealed hyperplasia in the red marrow of the distal femoral metaphysis. Dr. Marzec stated that he did not contact the decedent's primary care physician about any of the MRI results, and did not order any blood studies, as "bone marrow hyperplasia comes through my office everyday on an MRI report, and never once has a radiologist asked to send blood from these people, and that the diagnosis is made on a weekly basis." He stated that it is a "common normal diagnosis." He testified that the decedent's previous blood tests from a year prior indicated that she did not have anemia. Dr. Marzec testified that in his orthopedic opinion, bone marrow hyperplasia is a benign diagnosis. After the June 27, 2007 visit, he never saw the decedent again, and did not call Dr. Ionescu to inquire about her.

In motion (001), the defendants' expert, Arthur M. Bernhang, M.D. avers that he is licensed to practice medicine in New York and is board certified in orthopedic surgery. He set forth the records and materials which he reviewed and opined within a reasonable degree of medical certainty that the defendants, James Marzec M.D. and South Shore Orthopaedics Associates, P.C., provided medical care and treatment to Gail Malone within the standard of care that existed at the time, and that their care and treatment did not proximately cause any of the injuries claimed on behalf of the decedent.

Dr. Bernhang avers that the then 58 year old decedent began treating with Dr. Marzec on January 25, 2006 with complaints of left knee problems for over one year. She had a history of arthroscopic knee surgery in 1994. Dr. Marzec, after obtaining bilateral knee x-rays which showed no acute boney pathology, but revealed findings consistent with patellofemoral arthritis, recommended the use of ice, a Medrol pack, and Motrin. Two months later, the plaintiff's decedent returned to Dr. Marzec with continued complaints of severe right and left knee pain for which Medrol, Indocin, ice and Darvocet, and an MRI of both knees were prescribed.

Dr. Bernhang stated that the MRI was conducted at Long Island Magnetic Resonance Imaging, P.C. on April 1, 2006 and demonstrated osteoarthritis in all three compartments with advanced degeneration involving the anterior and posterior horn of the medial meniscus of the right knee. There was also medial meniscal subluxation, joint diffusion, and femoral trochlear dysplasia noted. The report further referenced hematopoietic bone. When the decedent saw Dr. Marzec on April 4, 2006, surgery was discussed because her complaints, and MRI study, were clinically positive for a torn medial meniscus. On May 1, 2006, Dr. Marzec performed a partial medial meniscectomy of the right knee with a partial lateral meniscectomy by arthroscopy, and an arthroscopic tri-compartmental major synovectomy at Good Samaritan Hospital. Dr. Bernhang avers that the preoperative blood work and clearance by the anesthesiologist revealed no abnormalities.

Thereafter, Dr. Bernhang continued, the decedent had several visits with Dr. Marzec, and on July 31, 2006, complained of pain in her right knee for which she was given Medrol. Dr. Marzec's impression was Ahlbach 1, medial gonarthrosis, degenerative tear of the posterior horn, medial meniscus left knee. An MRI of the left knee was performed at Long Island Magnetic Resonance Imaging on August 19, 2006, which report noted a tear of the posterior horn of the medial meniscus, advanced osteoarthritis of all three compartments of the knee associated with bone marrow edema in the medial femoral condyle, advanced degeneration of the anterior horn of the medial meniscus, femoral trochlear dysplasia associated with lateral patellar displacement, degeneration of the anterior and posterior horns of the lateral meniscus and small joint effusion, anterior medial and lateral soft tissue swelling, as well as red marrow hyperplasia in the distal femoral metaphysis.

Dr. Bernhang stated that the plaintiff's decedent had further visits with Marzec on September 6, 2006, December 2006, January 29, 2007, March 12, 2007, April 9, 2007, and June 18, 2007. On June 19, 2007, an MRI was conducted of the plaintiff's knees confirming tri-compartmental osteoarthritis with a tear and degeneration of the medial meniscus and referencing abnormal bone marrow signal intensity which may represent benign hematopoietic marrow hyperplasia, which may be secondary to chronic anemia, for which clinical correlation and further evaluation was recommended. The plaintiff's decedent returned to Dr. Marzec thereafter, and she was "treated symptomatically. From August 2, 2007 through August 3, 2007, the plaintiff was hospitalized at Good Samaritan Hospital and then at North Shore University Hospital from August 3, 2007, until her death on August 28, 2007. She was diagnosed with acute myeloid leukemia.

Dr. Bernhang's opinion that the radiologist is the expert making the diagnosis, and that the diagnosis set forth in the third MRI of June 19, 2007 remained the same as the two previous MRI studies was unsupported by the evidence. Dr. Bernhang opined that the radiologist did not suggest a work-up or referral to a specialist, and Dr. Marzec properly relied upon the MRI reports and the opinions of the radiologists. Dr. Bernhang's affidavit raises factual issues which preclude summary judgment. Dr. Bernhang opined that in the first two MRI reports by the radiology specialists, which reports were relied upon by Dr. Marzec, there was no recommendation for a work-up or referral to a specialist, nor was it indicated to contact Dr. Ionescu, the decedent's primary physician. However, the June 19, 2007 report of the MRI of the plaintiff's knees referenced abnormal bone marrow signal intensity, for which clinical correlation and further evaluation was recommended. Dr. Marzec testified that he did not contact Dr. Ionescu or forward any of the MRI reports to her, and did not further evaluate the plaintiff. Dr. Bernhang does not indicate the standard of care with regard to the diagnosis and the recommendation of the radiologist concerning the third MRI report of June 19, 2007. Although Dr. Bernhang opined that the work-up for the surgery a year prior was within the standard of care, he does not set forth that the care thereafter comported with the recommendation of the radiologist for clinical correlation and further evaluation of the possible chronic anemia or hematopoietic marrow hyperplasia. Thus, the moving defendants have not established prima facie entitlement to summary judgment dismissing the complaint as asserted against them.

The plaintiff has opposed motion (001) with the redacted and unredacted affirmations¹ of his expert physicians. Plaintiff's radiology expert is licensed to practice medicine in New York and affirms that he reviewed the MRIs of decedent's left knee dated August 19, 2006 and June 19, 2007, as well as the MRI imaging report of Long Island Magnetic Resonance Imaging, P.C. dated August 21, 2006, the report of Zwanger-Pesiri Radiology dated June 19, 2007, and the affirmation of Arthur Bernhang, M.D dated December 27, 2011. Plaintiff's radiological expert disagreed with Dr. Bernhang's opinion that there were no departures from good and acceptable medical practice and procedure by the defendant Dr. Marzec and South Shore Orthopaedic Associates, P.C. The plaintiff's radiological expert stated that in reviewing the MRI images of August 19, 2006, there is hematopoietic prominence seen within the posterior aspect of the distal femur, with no marrow replacement process, fracture or dislocation. With respect to the MRI of June 19, 2007, there is marked signal change within the distal femoral metaphysis with decreased fat and increased water density, consistent with an infiltrative process, and multiple circumscribed foci of altered signal within the proximal tibia and proximal fibular shaft, which would be concordant with an infiltrative marrow process. The plaintiff's radiological expert opined that the findings on the Zwanger-Pesiri study called for clinical correlation and further evaluation to rule out differential diagnosis and etiology of the abnormal findings noted on that study. The plaintiff's radiological expert opined that the differential diagnosis included lymphoma, leukemia, and metastatic disease, which required a clinical evaluation including, at a minimum, complete hematological studies, which were not done until August 2, 2007, and which, when obtained, were indicative of leukemia.

The plaintiff's radiological expert further opined that Dr. Marzec could have, and should have, requested a comparison of the MRI's, which was not done, and which represents a deviation from the standard of care. The plaintiff's radiological expert stated that including "clinical correlation and further evaluation is recommended" on the report is the universal way the radiologist alerts the referring physician of the need for investigation and diagnostic studies to rule out diseases and maladies which are suggested by, but not specifically evident, on the imaging studies. The expert continued that the radiologist does not instruct the referring physician on what and how to do the recommended follow up, as to do so would usurp the referring physician's function as the doctor for the patient who is required to be aware of the significance of "clinical correlation and further evaluation is recommended," which language is not meaningless. The plaintiff's expert further stated that Dr. Bernhang stating that the pre-operative blood work was normal for the May 2006 surgery refutes the abnormal imaging findings of chronic anemia set forth on the MRI reports. The plaintiff's radiology expert concludes that the glaring failure of Dr. Marzec and South Shore Orthopedics Associates, P.C. to refer the plaintiff for further evaluation or testing is a departure from the accepted standard of care which required that Dr. Marzec, and his corporation, do further evaluation, or refer the decedent to her primary care physician or other specialist, with transmittal of the MRIs, for an appropriate work up.

Plaintiff's second expert, a physician licensed to practice medicine in New York who is board certified in orthopedics, set forth the materials and records reviewed, which included the MRI reports, the affirmation of Arthur Bernhang, the office records of Dr. Marzec/South Shore Orthopaedic Associates, the deposition transcript of Dr. Marzec, and the affirmation of plaintiff's expert radiologist. It is the plaintiff's orthopedic expert's opinion, within a reasonable degree of medical certainty, that Dr. Marzec and South Shore Orthopaedic Associates departed from good and accepted standards of care by not clinically correlating and doing further evaluation with respect to the abnormal marrow signal of the decedent's distal femur, fibula, and tibia, as

¹ The Court has conducted an in-camera inspection of the original unredacted affirmations and finds them to be identical in every way to the redacted affirmations in plaintiff's opposition papers with the exception of the redacted experts' names. In addition, the Court has returned the unredacted affirmations to plaintiff's attorney.

recommended in the “impression” portion of the Zwanger-Pesiri report.

The plaintiff’s expert orthopedist stated that an orthopedist, like any other medical specialist, is first and foremost a physician, and cannot “close his eyes particularly to a consultant’s recommendations to areas outside his specific specialty.” The expert continued that the obvious differential diagnosis that needed evaluation was hematological disorders, including leukemias or some metastatic disease. The expert added that Dr. Marzec did not order any follow up of any kind, and did not refer the patient back to her primary care physician. He did not refer the decedent to a hematologist or other specialist, did no blood work or evaluation, did not review the MRI images himself, did not instruct the patient as to the need for further work up, and merely presumed that the abnormality was benign, or a “throw in” by the radiologist. These glaring errors, opined the plaintiff’s orthopedic expert, were deviations from good and acceptable medical practices and procedures, and any delay in diagnosis and treatment significantly reduced the chance for a favorable outcome. The plaintiff’s orthopedic expert opined that it was the duty of Dr. Marzec to follow the recommendations of the interpreting radiologist for clinical correlations and further evaluations with respect to the abnormal marrow signal of the distal femur, fibula and tibia as indicated on the MRI report of the right knee

In view of the foregoing, it is determined that the plaintiff’s experts have raised factual issues concerning whether departures from the good and accepted standards of care reduced the decedent’s chance for a favorable outcome, thus precluding summary judgment from being granted to Dr. Marzec and South Shore Orthopaedic Associates, P.C.

Accordingly, motion (001) by Marzec and South Shore Orthopaedic for summary judgment in their favor is denied.

Danita Ionescu testified to the effect that she is a shareholder in Amityville Family Practice, P.C. and has one partner, Elena Stybel, and a nurse and some physician’s assistants who are employed by the P.C. The office was equipped to do blood draws for blood testing to be tested at a laboratory, EKG’s, urine testing, and pulmonary function testing. She first saw the decedent, Gail Malone, as a patient on November 10, 2004, and remained her primary physician until August 28, 2007, when she died. Dr. Ionescu testified that upon her first visit, the decedent offered complaints of pain in her right hand, wrist, back, arm, and shoulder. She stated that she advised the plaintiff’s decedent to make an appointment for a physical, but the decedent advised her that she was busy with work and could not take the time. She recommended that the decedent have an EMG and see a neurologist, for which the decedent followed with Dr. Singh on November 16, 2004. Thereafter, on April 2, 2005, Dr. Stybel saw the decedent for her second visit to the office for complaints of left knee pain and lower leg edema for one week, and referred her to an orthopedist. Dr. Ionescu received a report from Island Orthopedic and Sports Medicine dated April 12, 2005.

The decedent was next seen for a third visit by Dr. Ionescu on June 5, 2005. Dr. Ionescu testified that although it is not documented, the decedent refused blood work and physical examination. The decedent complained of right leg pain for two weeks and advised that she still had pain in her left leg. She diagnosed the decedent with right knee arthritis. On January 10, 2006, she saw the plaintiff for right knee pain and was advised that the decedent had seen an orthopedist and received Synvisc injections into her knees two weeks prior, and was told that most probably she would need a knee replacement. Upon examination, Dr. Ionescu found that the decedent had very bad pain in both legs with swelling of the right, decreased sensation in the lower extremities, and that she could not work. Dr. Ionescu indicated that she did not know the name of the orthopedist with whom the decedent treated. She diagnosed the decedent with osteoarthritis of both knees.

Dr. Ionescu testified that the decedent was next seen again by the physician's assistant on July 31, 2007 for body aches, shortness of breath/feeling of heaviness in her chest, pain in her left side, sore throat, and no appetite. She was noted to be pale and was positive for cervical nodes, and non-tender lymph nodes on the right with increase in diameter. She was diagnosed with an upper respiratory infection and was to return to the office for a physical exam and blood work in two weeks. She made an appointment for August 2, 2007, but did not show. Dr. Ionescu continued that she did not believe that she provided pre-operative clearance for the decedent's knee surgery in 2006. Dr. Ionescu stated that she did not receive copies of the MRI reports of April 3, 2006, August 21, 2006, or June 19, 2007. She stated that she did not receive a copy of the decedent's discharge summary from Good Samaritan Hospital concerning the decedent's admission of August 2nd through 3rd, 2007. When asked about hemopoietic marrow dysplasia, she testified that it "is a change in the cells, right. It's a signal that you have to look into that. Whenever we have this dysplasia [it] can be precancer, right and...."

It is noted that the certified office record of Dr. Ionescu contains a copy of a death certificate which indicates that the plaintiff's decedent was fifty nine years of age at the time of her death. The immediate cause of death was listed as cardio-pulmonary arrest which lasted minutes from onset until death ensued; acute respiratory failure which had an interval of days from onset until her death; and acute myelogenic leukemia which had an interval of years from its onset until her death.

Dr. Ionescu and Amityville Family Practice, P.C. have submitted the affirmation of their expert, Herbert Feldman, M.D., a physician licensed to practice medicine in New York who is board certified in internal medicine. Dr. Feldman set forth that he reviewed the records of Amityville Family Practice and the records of South Shore Orthopaedic Associates, as well as the relevant deposition transcripts taken in this matter, however, he does not indicate which transcripts he considered to be relevant. It is Dr. Feldman's opinion within a reasonable degree of medical certainty that Danita Ionescu, D.O., Amityville Family Practice Associates, P.C., and Amityville Family Medical Care, P.L.L.C. did not depart from the accepted standards of medical practice in their care and treatment of the plaintiff's decedent, Gail Malone.

Dr. Feldman continued that the decedent was first treated in November 2004, by Dr. Ionescu at her medical group, Amityville Family Practice, at which time she was advised to schedule an appointment for a physical. However, he stated, although the plaintiff treated thereafter with Dr. Ionescu and others she was seen on various visits thru July 31, 2007, but did not have a "check up physical examination." When the decedent was seen for the last date at the defendant's office on July 31, 2007, she was seen by a physician's assistant and was treated appropriately and within the standard of care for an upper respiratory infection. Dr. Feldman opined that it was appropriate on that date not to have obtained blood work as her condition seemed to be a common respiratory infection. If she did not feel better, she was instructed to return to the office or to go to a hospital to be seen. Dr. Feldman further opined that even if blood work had been obtained on that date, the acute myeloid leukemia still would not have been diagnosed any earlier than it was when the decedent was admitted to Good Samaritan Hospital on August 2, 2007.

Dr. Feldman set forth that the records reflect that there was no communication between Dr. Ionescu and Dr. Marzec with regard to the decedent's care and treatment, and that the records did not indicate that the decedent advised Dr. Ionescu that she was treating with Dr. Marzec. He continued that there is nothing in the records which indicate that Dr. Ionescu was sent, or received, a copy of any of the MRI results obtained at the behest of South Shore Orthopaedic Associates. He continued that the records clearly show that at all times the decedent received proper treatment from Dr. Ionescu and Amityville Family Practice. Dr. Feldman stated that in May 2006, the decedent's blood work prior to surgery was normal and gave no indication of her future condition in that there were only insignificant decreases or increases in a few tests, but there was no anemia or

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elevated white count which would be consistent with leukemia.

Based upon the foregoing, Dr. Ionescu, D.O., Amityville Family Practice Associates, P.C., and Amityville Family Medical Care, P.L.L.C., have established prima facie entitlement to summary judgment dismissing the complaint as asserted against them. By way of the affirmation submitted by counsel for the plaintiff, the plaintiff does not oppose this application and has thus failed to raise factual issues to preclude summary judgment from being granted to these moving defendants.

Accordingly, motion (002) is granted and the complaint as asserted against Dr. Ionescu, D.O., Amityville Family Practice Associates, P.C., and Amityville Family Medical Care, P.L.L.C., is dismissed.

Dated:

July 13, 2012

W. Gerard Arler
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION