Bueno v Allam
2014 NY Slip Op 32857(U)
October 27, 2014
Supreme Court, Suffolk County
Docket Number: 17009/09
Judge: Denise F. Molia
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 17009/09
CAL No. 13-02208MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 5-19-14 (#001)
MOTION DATE 5-16-14 (#002)
MOTION DATE 5-21-14 (#003)
ADJ. DATE 9-26-14
Mot. Seq. # 001 - MG
002 - MG
003 - MG

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REYNALDO BUENO, as Administrator of the Estate of LISA PEREZ, Deceased,

Plaintiffs,

- against -

MEDHAT E. ALLAM, M.D., EASTERN LONG ISLAND SURGERY, P.C., STEVEN P. OUZOUNIAN, M.D., ROSEMARIE OLIVIERI-FITT, M.D., STEVE K. GEORGOPOULOS, M.D., GASTROENTEROLOGY OF EASTERN LONG ISLAND, LLC and SOUTHAMPTON HOSPITAL ASSOCIATION,

Defendants.

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Upon the following papers numbered 1 to 62 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-25; (002) 16'28; (003) 29-52; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 53-55; Replying Affidavits and supporting papers 56-57; Other 58-62; (~~and after hearing counsel in support and opposed to the motion~~) it is,

RST

ORDERED that motion (001) by defendant Southampton Hospital Association pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted; and it is further

ORDERED that motion (002) by defendant Steven Ouzounian, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted; and it is further

ORDERED that motion (003) by defendants Rosemarie Olivieri-Fitt, M.D., Steve K. Georgopoulos, M.D., and Gastroenterology of Eastern Long Island, LLC pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted.

In this medical malpractice action, the plaintiff, Reinaldo Bueno, as administrator of the estate of Lisa Perez, seeks damages premised upon the defendants' alleged negligent departures from good and accepted standards of care and treatment, lack of informed consent, decedent's wrongful death, and additionally for negligent hiring by defendant Southampton Hospital. Plaintiff's decedent came under the care and treatment of the defendants on or about March 28, 2006 through on or about June 8, 2007. It is alleged that the defendants negligently performed a gastric bypass on the decedent, then failed to timely and properly diagnose and treat an anastomotic leak, resulting in decedent's death on June 8, 2007, at age 29. Plaintiff's decedent is survived by three minor children.

In support of motion (001) for summary judgment, defendant Southampton Hospital submitted, inter alia, an attorney's affirmation; the expert affidavit of Thomas Magnuson, M.D.; copies of the summons and complaint, answers, plaintiffs' verified bill of particulars; deposition transcripts of Reynaldo Bueno, Medhat Allam, M.D., Steven Ouzounian, M.D., Rosemarie Olivieri-Fitt, M.D., and Steve Georgopoulos, M.D.; the certified Southampton Hospital record; and compact discs which are not in admissible form pursuant to CPLR 3212 and 4518, and are not considered.

In support of motion (002) for summary judgment, defendant Steven Ouzounian, M.D. submitted, inter alia, an attorney's affirmation; affirmation of Michael Persica, M.D.; copies of the summons and complaint, his answer, and plaintiff's verified bill of particulars; certified copy of the Southampton Hospital admission record for 2-12-07 through 3-6-07; and an uncertified record from St. Charles Hospital for the admission of 5-3-07 through 6-8-07, and pathology/autopsy report which are considered, as certified copies were submitted with motion (003) pursuant to CPLR 3212 and 4518.

In support of motion (003) for summary judgment, defendants Rosemarie Olivieri-Fitt, M.D., Steve K. Georgopoulos, M.D., and Gastroenterology of Eastern Long Island, LLC submitted, inter alia, an attorney's affirmation; affirmations of Michael Goldstein, M.D., and Douglas Held, M.D.; deposition transcripts of Reynaldo Bueno, Medhat Allam, M.D., Steven Ouzounian, M.D., Rosemarie Olivieri-Fitt, M.D. and Steve Georgopoulos, M.D.; certified Southampton Hospital record; uncertified office records of Steven Georgopoulos, M.D.; certified record from St. Charles Hospital; uncertified record from Stony Brook Hospital; and an uncertified copy of plaintiff's death certificate.

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). To establish liability of a physician for medical malpractice, plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of

the plaintiff's injuries (***Fink v DeAngelis***, 117 AD3d 894, 986 NYS2d 212 [2d Dept 2014] *quoting* ***DeGeronimo v Fuchs***, 101 AD3d 933, 936, 957 NYS2d 167 [2d Dept 2012, *quoting* ***Stukas v Streiter***, 83 Ad3d 18, 23, 918 NYS2d 176 [2d Dept 2011].) " Accordingly, '[a] physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries'" (***Fink v DeAngelix***, 117 AD3d 894, *supra*, *quoting* ***Gillespie v New York Hosp. Queens***, 96 AD3d 901, 902, 947 NYS2d 148 [2d Dept 2012]). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden" (***Matos v Khan***, 119 AD3d 909, 2014 WL 3732819 [2d Dept 2014]; *see* ***Stukas v Streiter***, 83 AD3d 18 at 30, supra). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (***Fink v DeAngelis,*** 117 AD3d 894, *supra*; ***Feinberg v Feit***, 23 AD3d 517, 519, 806 NYS2d 661 [2d Dept 2005]), as "such conflicting medical opinions will raise credibility issues, which can only be resolved by a jury" (***Fink v DeAngelis***, 117 AD3d 894, *supra;* ***DeGeronimo v Fuchs***, 101 AD3d at 936, 957 NYS2d 167 [2d Dept 2012]).

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

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

In motion (001), Southampton Hospital submitted the expert affidavit of its expert, Thomas Magnuson, M.D., who is licensed to practice medicine in the State of Maryland and is board certified in surgery, and has a private practice in surgery. Based upon a review of the records, which he set forth, Dr. Magnuson opined within a reasonable degree of medical certainty that the doctors, nurses and staff at Southampton Hospital did not depart from good and accepted standards of care in the field of medicine relating to the care and treatment provided to the decedent, Lisa Perez. Dr. Magnuson also opined that the care and treatment provided by the doctors, nurses, and staff at Southampton Hospital was not the proximate cause of the decedent's injuries and death, including the anastomotic leaks, need for exploratory laparoscopy/repair of anastomotic leaks, revision of gastrojejunostomy, placement of drains, feeding tubes, duodenostomy tube, endoscopy, esophagastroduodenoscopy, need for dilation of the gastrojejunal stricture, small bowel obstruction, intra-abdominal hemorrhage/bleeding, and pain and suffering.

Dr. Magnuson set forth the decedent's care and treatment, and the bases for her qualification for Roux-en-Y bypass surgery, indicating that she was morbidly obese. He indicated that leakage from the anastomosis site is one of the potential complications of this particular procedure, and that the decedent signed two consents for the surgery, indicating she understood and accepted the possible risks of the surgery.

The decedent was admitted on an elective basis to Southampton Hospital on February 12, 2007, for the bypass procedure to be performed by Dr. Allam, a private attending physician. Prior to surgery, she received cardiology, pulmonary, endocrine, medical, and psychological clearance. Dr. Steven Ouzounian, also a private attending physician, assisted Dr. Allam with the surgery, and was responsible for operating the laparoscopic camera, providing some exposure of the operative field, and cutting some sutures tied by Dr. Allam. Dr. Magnuson described the procedure performed. No complications were noted. A NG tube was placed in the stomach pouch and a test for air leaks was conducted.

Dr. Magnuson continued that on the morning of February 13, 2007, the decedent was seen by Dr. Allam. The Jackson Pratt drain was draining serosanginous (blood tinged fluid), and the decedent was febrile. As per Dr. Allam's standard procedure, a limited upper GI study with gastrografin to test for leakage was performed on February 13, 2007, at about 10:02 a.m. The study was interpreted by radiologist, Dr. Oliveri-Fitt, an employee of North Shore Radiology, as revealing no evidence of leakage of contrast material or obstruction. Had a leak or obstruction been found, she would have notified the surgeon. A bariatric stage I diet was started. Intake and output were monitored. On February 14, 2007, Dr. Allam was notified that the decedent had a fever and an elevated white blood count of 24, which he ordered to be repeated. A CT scan of the abdomen was ordered, but cancelled when Dr. Allam went to the hospital and saw the decedent. Dr. Magnuson stated that the decedent's vital signs were indicative of a potential infection, bowel content and purulent drainage were noted in the drain, and Dr. Allam became concerned for a potential anastomotic leak for which he performed an emergency exploratory laparotomy to repair the leak. An area of leak in the left lateral/posterior area of the G-J anastomosis was found. Initial attempts to repair the leak did not control it, so surgery was converted to an open laparotomy, and the anastomosis was revised to stop the leak. Dr. Magnuson described the procedure. He stated that after the surgery, the plaintiff was placed on the ventilator and admitted to ICU, due to suspicion of respiratory failure. She was seen by a pulmonologist and started on antibiotics. He continued to set forth the decedent's condition and Dr. Allam's plan of care.

Dr. Magnuson stated that because Dr. Allam was going on vacation on February 18, 2007, Dr. Ouzounian covered for him through part of February 20, 2007. The Jackson-Pratt drain was noted not to be draining any fluid about 1:25 a.m. on February 19, so Dr. Ouzounian was made aware of the same, as well as the decedent appearing pale, and having complaints of nausea. She was sleepy but arousable. Dr. Allam called in and was made aware of the decedent's condition. He advised nursing to have Dr. Ouzounian see the decedent for a suspected bile leak. Discussions were conducted between Dr. Allam and Dr. Ouzounian, and a plan was formulated for care. Dr. Magnuson stated that the plan concerned a "controlled leak" wherein there is a leak at the anastomotic site that is adequately draining so the patient does not get sick. Dr. Ouzounian's impression was that the decedent had a controlled leak since the 17th of February. He could have performed an open or laparoscopic procedure to address the leak if he felt it was required. However, on February 19, the nursing staff advised Dr. Ouzounian that the plaintiff had a fever of 101, tachycardia, and feculent smelling discharge from the drain, which Dr. Magnuson stated was indicative that the decedent's condition was worsening. A CT scan with oral contrast only, of the abdomen and pelvis, was conducted at 5:50 p.m., with results consistent with a small bowel obstruction and suspicious for a leak. It was Dr. Ouzounian's opinion on February 20, 2007, that the decedent did not require surgery emergently, and that it would be up to Dr. Allam to take the decedent for surgery as he knew the patient and the previous surgeries. A limited gastrografin small bowel series was consistent with small obstruction of the bowel without evidence of a leak. However, leakage developed, which Dr. Allam was attributing to the obstruction.

Dr. Magnuson continued that on February 21, 2007, Dr. Allam performed surgery, assisted by Dr. Ouzounian, to lyse adhesions which were causing an almost complete blockage of the bowel. The attempt to find the leak was abandoned due to dense adhesions and difficulty reaching the area. Dr. Magnus continued to describe the decedent's care and treatment. On February 27, 207, the decedent began to vomit copious amounts of bright red blood (500cc), and was lethargic, but responding. She was placed in ICU. It was believed she had an ulcer from the NG tube or suture line. A nuclear bleeding scan on February 28, showed no active bleeding. No leakage or obstruction was noted on the upper GI study, and the CT scan of the abdomen and pelvis on March 5, 2007. She was discharged home on March 6, 2007.

Dr. Magnuson continued that on April 24, 2007, the plaintiff complained to Dr. Allam that she was vomiting solid food, so she was sent to the emergency room at Southampton Hospital for an upper endoscopy with possible dilation by Dr. Georgopoulos, upon referral by Dr. Allam. Risks, benefits, and alternatives for the esophagogastroduodenoscopy procedure were provided by Dr. Georgopoulos, who performed a dilation of a stricture with a balloon. On May 3, 2007, the decedent was seen by Dr. Georgopoulos for difficulty swallowing, nausea, vomiting, and inability to eat or drink. On May 4, 2007, the decedent was admitted to Southampton Hospital where Dr. Georgopoulos performed an esophagogastroduodenoscopy procedure wherein a small stricture was noted and dilated.

Dr. Magnuson stated that on May 23, 2007, the decedent presented to Southampton Hospital and was admitted by Dr. Georgopoulos after having been admitted to St. Charles Hospital two days earlier with hematemesis and dizziness. She was noted to have a vitamin B12 deficiency. An upper endoscopy was conducted, which revealed no GI bleeding, ulcer or erosion. Upon colonoscopy, mild diverticulitis in the sigmoid colon was noted. No diagnosis for the cause of the bleeding was made, and the decedent was referred by Dr. Georgopoulos back to Dr. Allam.

Dr. Magnuson then set forth the bases for his opinions that Southampton Hospital, by its staff and employees, timely and properly interpreted the GI series, properly and completely performed the testing, and that the study was properly interpreted by Dr. Olivieri-Fitt. He continued that the various physicians involved in the decedent's care and treatment at Southampton Hospital possessed adequate training, skills, and experience to render care and treatment to the decedent, and he set forth their respective qualifications. Thus, he continued, Southampton Hospital hired and employed and assigned skilled and experienced medical personnel to care for the decedent. Medical staff and personnel were properly supervised, and the nurses were properly trained and supervised. They possessed the skill, ability and competence, and experience commensurate with those performing the same professional function in the medical community. There was no evidence to support any claim that the hospital was not properly staffed. Services were timely provided. Nursing care was appropriate, and the staff properly reported changes in the decedent's condition to the physicians. The decedent's complaints were timely and appropriately addressed and recorded. All physician orders were properly and timely carried out. Vital signs were timely and appropriately monitored and recorded. The medical records properly set forth the decedent's history and related information. Proper rules and regulations were appropriately formulated and followed by the staff at Southampton Hospital.

Based upon the foregoing, defendant Southampton Hospital has demonstrated prima facie entitlement to summary dismissal of the complaint. Counsel for plaintiff affirms that plaintiff is not opposing the application of Southampton Hospital.

Accordingly, summary dismissal of the complaint is granted in motion (001) to Southampton Hospital.

In motion (002), Steven Ouzounian, M.D. submitted the affirmation of Michael Persico, M.D., a physician licensed to practice medicine in New York State, who is board certified in surgery. He set forth his education and training, and indicated that he is a private attending surgeon at North Shore LIJ Hospital, and is familiar with the standard of care in surgery as it existed in 2007, as he has been licensed to practice medicine for 35 years. Dr. Persico set forth the materials and records he reviewed, which have been provided with the moving papers. Based upon his training and experience, and a review of the materials, it is Dr. Persico's opinion within a reasonable degree of medical certainty that the care and treatment provided by Dr. Ouzounian was at all times in conformity with the standard of care and accepted surgical practice as it existed in 2007, and that there is nothing which Dr. Ouzounian did which was the proximate cause of the decedent's alleged injuries and death, or a delay in her care and treatment When Dr. Ouzounian assisted Dr. Allam with the surgical procedures, it was the responsibility of Dr. Allam, as surgeon, to provide informed consent to the decedent, and therefore, Dr. Ouzounian did not fail to provide informed consent.

Dr. Persico set forth that Dr. Ouzounian assisted Dr. Allan in the Roux-En-Y gastric bypass surgery on February 12, 2007. As assistant surgeon, and as testified to by Dr. Ouzounian, Dr. Ouzounian operated the laparoscopic camera, provided exposure of the surgical field for Dr. Allan, and retracted. Dr. Ouzounian did not perform dissection, test the anastomosis, or perform staple application. Dr. Persico stated that as an assistant surgeon, Dr. Ouzounian would have no role in the technical aspects of the surgery. The manner in which the surgery was performed, including the creation of the pouch and the testing of the anastomosis was the sole responsibility of surgeon Dr. Allam. The size of the pouch and the amount of tension on the anastomosis were the sole responsibility of Dr. Allam as well.

Dr. Persico continued that when Dr. Allam brought the decedent back to the operating room on February 14, 2007, Dr. Ouzounian was not his assistant for the laparoscopy and repair, revision of the gastrojejunostomy, and insertion of the feeding jejunostomy tube. Dr. Ouzounian did not provide care and treatment to the decedent until February 18, 2007, when Dr. Allam went on vacation on the evening of February 18 through the morning of February 20, 2007. On February 18, 2007, when Dr. Ouzounian wrote the order to transfer the decedent out of ICU, it was pursuant to the telephone order of Dr. Allam. Dr. Ouzounian also asked questions of the nurses prior to agreeing to the transfer to determine any changes in the decedent's condition, fever, intake and output. Therefore, opined Dr. Persico, Dr. Ouzounian's transfer of the decedent from ICU was reasonable and conformed with accepted medical practice because he spoke with Dr. Allam prior to the transfer and ascertained that the decedent was stable.

Dr. Persico indicated that on February 19, 2007, Dr. Ouzounian's assessment was that the decedent was post multiple surgeries with controlled leak, and he set forth a plan to allow the controlled, contained leak to heal. That evening, when the decedent developed tachycardia, Dr. Ouzounian ordered blood cultures and a CT scan, and gave attention to the decedent's anemia and decreased albumin, and spoke to Dr. Allam, conforming with accepted medical practice. Dr. Persico opined that it was reasonable for Dr. Ouzounian not to elect to perform an exploratory laparotomy on February 19, 2007. Based upon Dr. Ouzounian's conversation with Dr. Allam on February 20, 2007, Dr. Ouzounian ordered a gastrografin study, which was negative for a leak, but did reveal an obstruction. Dr. Allam resumed care of the decedent on February 20, 2007. Thereafter, Dr. Allam performed a third surgery on the decedent on February 21,

2007, wherein he performed a laparotomy and lysis of adhesions, with insertion of a duodenostomy tube and drain, assisted by Dr. Ouzounian. As assistant surgeon, Dr. Ouzounian conformed with accepted medical practice, provided exposure for the operative field and retracted, and all the decisions with regard to the surgery were made by Dr. Allam as surgeon. Thereafter, Dr. Ouzounian was no longer involved in the decedent's care and treatment.

Based upon the foregoing, it is determined that Steven P. Ouzounian, M.D. has established prima facie entitlement to summary dismissal of the complaint on the bases that his care and treatment at all times comported with the accepted standard of medical care, he did not proximately cause injury or death to the decedent, and he did not fail to provide informed consent. Counsel for plaintiff affirms that plaintiff is not opposing the application of Steven P. Ouzounian, M.D.

Accordingly, in motion (002), summary dismissal of the complaint is granted with prejudice to Steven Ouzounian, M.D.

Turning to that branch of motion (003), wherein Steve K. Georgopoulos, M.D. and Gastroenterology of Eastern Long Island, LLC seek summary judgment, they have submitted the expert affirmation of Michael Goldstein, M.D., a physician licensed to practice medicine in New York State, who is board certified in internal medicine with a subspecialty in gastroenterology. Dr. Goldstein set forth the materials and records which he reviewed. He did not, however, set forth his education and training to render expert medical opinion in this matter, although the plaintiff does not object to his qualifications. Dr. Goldstein set forth that Dr. Georgopoulos did not provide any care and treatment to the decedent during her admission of February 12, 2007 through March 6, 2007 at Southampton Hospital. On April 24, 2007, Dr. Georgopoulos first consulted on the decedent upon the request of Dr. Allam. He saw the decedent at Southampton Hospital's emergency department with regard to her having difficulty swallowing solids and liquids, and vomiting, and recommended that she have an EGD (esophagogastroduodensocopy or upper endoscopy). Dr. Goldstein opined that this was a proper and appropriate procedure to recommend. He continued that Dr. Georgopoulos performed a dilation or stretching to improve the difficulty swallowing. Six pictures taken during the procedure confirmed his findings. She was discharged to follow up with Dr. Allam.

Dr. Goldstein continued that Dr. Georgopoulos saw the decedent on May 3, 2007 for follow-up, at which time she complained of vomiting and nausea. He admitted her to Southampton Hospital on May 4, 2007, and upon performing an EGD, discovered a persistent stricture, so a repeat dilation was performed without complication. Dr. Goldstein opined that Dr. Georgopoulos comported with the standard of care. Dr. Georgopoulos next saw the decedent during her admission to Southampton Hospital on May 23, 2007, after she had been transferred from John T. Mather Hospital where she had been hospitalized for dizziness and hematemesis (vomiting blood). At Southampton Hospital, the decedent had no further episodes of hematemesis. Dr. Georgopoulos performed a gastroenterology evaluation and EGD which did not reveal any blood or a source of bleeding. He then appropriately performed a colonoscopy which failed to reveal rectal bleeding. The decedent was discharged on May 24, 2007, with instructions to take Protonix to reduce stomach acid. Dr. Goldstein opined that Dr. Georgopoulos's discharge of the decedent, and instructions were proper and within the standard of care based upon her clinical status and the findings on EGD and colonoscopy. Dr. Georgopoulos did not see the decedent again, but spoke with her on May 25, 2007, and advised her to go to the emergency room for complaints of dizziness and nausea.

Dr. Goldstein continued that the hospital records indicate that the plaintiff was seen the following day at Stony Brook University Hospital for another episode of vomiting blood and feeling dizzy. An EGD was performed at Stony Brook University Hospital, wherein active bleeding was noted, evaluated, and determined to be from an esophageal lesion. She was also evaluated by a surgeon who determined surgical intervention was not indicated. She was discharged from Stony Brook University Hospital on May 28, 2007. Dr. Goldstein continued that on May 31, 2007, the decedent was admitted to St. Charles Hospital for weakness and nausea, with evidence of gastrointestinal bleeding, for which surgery was performed, but complicated by deep vein thrombosis. He stated that she died on June 8, 2007, from possible pulmonary embolus, myocardial infarction, and arrythmia. He continued that the autopsy noted a marginal ulcer in the junction between the stomach and the jejunum which was eroding into an artery.

Dr. Goldstein opined that Dr. Georgopoulos appropriately and timely performed the EGDs on April 24, and May 4, 2007, and stretched the narrowed opening to improve swallowing. There were no complications with either procedure. Photographs taken during the procedures documented the absence of bleeding or lesions. There was no bleeding evidenced and no site could be evidenced. Proton pump inhibitor was appropriately ordered to reduce stomach acid. The decedent was evaluated by Dr. Allam, her bariatric surgeon, after the EGD, and he did not suggest or recommend surgery. Dr. Goldstein opined that because the plaintiff had complications at a later time, specifically bleeding, it cannot be attributed to any act or omission of Dr. Georgopoulos. When she was later admitted to Stony Brook University Hospital, she had active bleeding in the esophagus, identified with EGD. The Stony Brook physicians treated the decedent medically even when bleeding was found, and discharged her on May 29, 2007 after a surgical consultation was obtained, and no surgery was recommended.

Based upon the foregoing, Dr. Georgopoulos has demonstrated prima facie entitlement to summary dismissal of the complaint as asserted against him. In opposing this motion, the plaintiff submitted the redacted affirmation of his expert, however, he has not provided an unredacted copy of the expert affirmation to this court as required (***Marano v Mercy Hospital***, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]).

A redacted version of an expert affidavit lacks evidentiary value (***Marano v Mercy Hospital***, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]). "A party may successfully oppose a summary judgment motion without disclosing the names of the party's expert witnesses. In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an unredacted original is provided to the court for its in camera inspection" (***Marano v Mercy Hospital***, *supra*). This procedure preserves the confidentiality of the name of plaintiff's medical expert while also preserving plaintiffs' obligation in opposing defendant's motion, in that by submitting a redacted affirmation and by offering the original to the court for in camera inspection, plaintiff has opposed the motion by evidence in admissible form (***Rubenstein v Columbia Presbyterian Medical Center***, 139 Misc.2d 349, 527 NYS2d 680 [NY County 1988]). A copy of the affidavit with the expert's name and signature have not been provided to this court under separate cover. Accordingly, plaintiffs' expert affidavit is not in admissible form and is insufficient to raise a triable issues of fact as to the defendant's alleged malpractice (***Rose v Horton Medical Center***, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]). It is determined, however, that even considering plaintiffs' expert affidavit, plaintiff has failed to raise a factual issue to establish that any act or omission by the moving defendants proximately caused plaintiff's claimed injuries.

Plaintiff's expert is board certified in gastroenterology and states he is fully familiar with the use of various diagnostic testing related to evaluating patients for gastrointestinal bleeding, the available treatment modalities, and the accepted standards of care for, among other things, Roux en Y procedure, Mallory Weiss and other tears, and ulcerations. He did not set forth his education and training, or work experience, however, defendant does not object.

It has been established that Dr. Allam performed the Roux-En-Y gastric bypass surgery on February 12, 2007 on decedent. On February 14, 2007, Dr. Allam performed emergency exploratory laparotomy because he was concerned with a potential anastomotic leak. An area of leak in the left lateral/posterior area of the G-J anastomosis was found. Initial attempts to repair the leak did not control it, so surgery was converted to an open laparotomy, and the anastomosis was revised to stop the leak. On February 21, 2007, Dr. Allam performed surgery to lyse adhesions which were causing an almost complete blockage of the bowel. The attempt to find the leak was abandoned due to dense adhesions and difficulty reaching the area.

Plaintiff's expert stated that the decedent did not present to defendant Georgopoulos until April 24, 2007, upon request by Dr. Allam. Dr. Georgopoulos saw the decedent at the Southampton Hospital emergency department with regard to her having difficulty swallowing solids and liquids, and vomiting. There were no complaints of vomiting blood or passing bloody stool. He performed an EGD and dilation on April 24, 2007 to address decedent's difficulty swallowing. Dr. Georgopoulos saw the decedent on May 3, 2007 for follow-up, at which time she complained of vomiting and nausea. He admitted her to Southampton Hospital on May 4, 2007, and upon performing an EGD, discovered a persistent stricture, so a repeat dilation was performed without complication. He continued that Dr. Georgopoulos next saw the decedent during her admission to Southampton Hospital on May 23, 2007, after she had been transferred from John T. Mather Hospital by Dr. Atwa, following discussion with Dr. Allam. She had been seen at John T. Mather Hospital for dizziness and hematemesis (vomiting blood), and was diagnosed by Dr. Atwa as status post gastric bypass with postop bleed. While at Southampton Hospital during the May 23, 2007 admission, the decedent had no further episodes of hematemesis. During that May 23, 2007 admission, Dr. Georgopoulos performed a gastroenterology evaluation and EGD which did not reveal any blood or a source of bleeding. He then performed a colonoscopy which failed to reveal rectal bleeding. The decedent was discharged on May 24, 2007, with instructions to take Protonix to reduce stomach acid.

Plaintiff's expert indicated that on May 26, 2007, the decedent was subsequently admitted to Stony Brook University Hospital where Dr. Brand performed an EGD which revealed bleeding from an gastroesophageal laceration (Mallory Weiss). Plaintiff's expert stated that a Mallory Weiss laceration can occur as a result of wretching and vomiting. He stated that Dr. Brand's impression also included an anastomotic ulcer. Plaintiff's expert does not opine that either the anastomotic ulcer or the Mallory Weiss laceration were present when defendant Georgopoulos last saw the decedent, or demonstrated in photographs taken by Dr. Georgopoulos during the previous EGD procedure, and did not indicate how long such conditions were present. He indicated that the bleeding was controlled with an epi-injection and no surgical procedure was performed. Plaintiff's expert stated that there was no bleeding at the anastomosis site identified at Stony Brook Hospital, however, there was an anastomotic ulcer. Plaintiff's expert then indicated in an inconsistent statement that when the gastric pouch, both loops, and the anastomosis were examined by Dr. Brand, that "no ulcerations or active bleeding were seen." Plaintiff's expert continued that because the Mallory Weiss laceration was now identified, that defendant Georgopoulos was obligated to

assess the decedent for the ongoing problems. However, he did not state that the decedent was seen by defendant Georgopoulos after that Stony Brook Hospital admission.

Plaintiff's expert stated in a conclusory and unsupported statement that because Stony Brook Hospital physicians saw the decedent on surgical consult, it did not relieve defendant Georgopoulos from his obligation to address the source of bleeding although the decedent was stabilized and discharged. He continued that the role of the SBUH surgical consult was not to make a determination about surgical interventions to further evaluate the cause of a bleed and/or the appropriate or definitive treatment of the cause of the bleed. Plaintiff's expert does not then indicate the reason the decedent was seen on surgical consult at Stony Brook Hospital, nor does he indicate that the physicians at Stony Brook Hospital obtained the decedent's medical history, ascertained that the decedent had prior bleeding, or contacted defendant Allam or defendant Georgopoulos to notify them of this hospitalization, their findings, or plan of care. The decedent was discharged from Stony Brook University Hospital on May 28, 2007, without further work-up or surgical intervention.

Plaintiff's expert continued that, thereafter, the decedent was admitted to St. Charles Hospital on May 31, 2007, where, on June 1, 2007, Dr. Dreznik performed an upper endoscopy and applied an endo clip to a blood vessel. The bleeding source was noted to be at the anastomosis. Plaintiff's expert continued that Dr. Dreznik noted the esophagus to be normal, however, at the anastomosis, there was a small blood clot and what appeared to be a small blood vessel without active bleeding at the time of the procedure. Plaintiff's expert stated that the bleeding source all along was at the anastomotic site where the decedent had a bleeding marginal ulcer at the gastrojejunostomy pumping arterial blood. Despite the deployment of clips, the decedent continued to bleed. Plaintiff's expert continnued that Dr. Atwa brought the decedent to the operating room to conduct emergency surgery to control the hemorrhaging. He encountered extensive adhesions, and exposure was difficult. Eventually the bleeding was stopped. Fourteen liters of blood were administered, and twenty liters of packed cells. Aggressive supportive care was provided, but the decedent developed supra ventricular tachycardia and deep vein thrombosis. She developed recurrent bleeding and died on June 8, 2007, despite aggressive measures.

The plaintiff's expert set forth that the plaintiff was diagnosed with a Mallory Weiss laceration at Stony Brook Hospital by Dr. Brand, and therefore, defendant Georgopoulos needed to address the ongoing source of the bleeding. However, Dr. Georgopoulos did not see the decedent after her admission to Stony Brook Hospital. Plaintiff's expert later stated that when the plaintiff was admitted to St. Charles Hospital, that Dr. Dreznik documented "[b]leeding source noted to be at the anastomosis which would rule out Mallory Weiss tear, small blood vessels seen at the anastomosis near sutures from the patient's gastric bypass surgery."

The plaintiff's expert opined that defendant Georgopoulos' failures are not in any way altered by the fact that the decedent was admitted to Stony Brook University Hospital and treated there and provided with a surgical consult. However, plaintiff's expert's opinion is conclusory and unsupported (*see* ***Brinkley v Nassau Health Care Corporation***, 2014 NY Slip Op 06166, [2d Dept 2104]; ***Ferrara v South Shore Orthopedic Associates, P.C.***, 178 AD2d 364, 577 NYS2d 813 [1st Dept 1991]). There are certain instances where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law. Those cases generally involve independent intervening acts which operate upon but do not flow from the original negligence (***Derdiarian v Felix Contracting Corp.***, 51 Ad2d

308, 434 NYS2d 166 [1980]). Plaintiff's expert does not indicate the standard of care for those treating physicians at Stony Brook University Hospital, how they comported with such standard of care in diagnosing the decedent, that they obtained a proper and complete history, and that they comported with the standard of care in treating the decedent in that the decedent required admission to St. Charles Hospital after her discharge from Stony Brook University Hospital and required surgery. The plaintiff was evaluated and diagnosed, and it was determined that surgical intervention was not necessary. The plaintiff's expert does not set forth what defendant Georgopoulos was thereafter required to do based upon the standard of care. Plaintiff's expert did not state what defendant Georgopoulos failed to do when he did not see the decedent after her discharge from Stony Brook University Hospital. Plaintiff's expert did not opine that plaintiff's surgeon, Dr. Allam, did not have any duty of care toward the decedent either prior to or after her discharge from Stony Brook University Hospital. The plaintiff's expert affirmation raises factual issue regarding the expert's own opinion concerning proximate cause of the decedent's injuries and death due to his conclusory and unsupported opinion concerning the subsequent care and treatment rendered at Stony Brook University Hospital and any departures by defendant Georgopoulos prior to such care and treatment of the decedent at Stony Brook University Hospital, and her ultimate demise.

Moreover, plaintiff's expert failed to differentiate between the acts of the various medical providers or to explain how the patient's injuries would have been less severe had defendant Georgopoulos made an earlier diagnosis, when decedent was seen, treated, and released from Stony Brook University Hospital for the same condition defendant Georgopoulos last saw the decedent for. Plaintiff's expert failed to raise a triable issue of fact regarding the competent producing cause of the decedent's injuries (***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]). Based upon the foregoing, even if plaintiff's expert affirmation were in admissible form, plaintiff's expert has failed to raise a factual issue with regard to any alleged departures by defendant Georgopoulos being the proximate cause of the decedent's injuries and death. Plaintiff's expert, as set forth above, did not differentiate between the acts of defendant surgeon Allam, or those at Stony Brook University Hospital, to establish that defendant Georgopoulos' actions were the proximate cause of decedent's injuries and death.

Accordingly, that branch of motion (003) by Steve K. Georgopoulos, M.D., and Gastroenterology of Eastern Long Island, LLC for summary dismissal of the complaint as asserted against them is granted.

Turning to that branch of motion (003) wherein Rosemarie Olivieri-Fitt, M.D. seeks summary dismissal of the complaint as asserted against her, she submitted the affirmation of Douglas Held, M.D., a physician licensed to practice medicine in New York State and board certified in surgery. He set forth the materials and records he reviewed. It is Dr. Held's opinion within a reasonable degree of medical certainty that Dr. Olivieri-Fitt did not depart from the standard of care in interpreting the limited upper GI study of February 13, 2007, ordered by Dr. Allam, and she did not contribute to decedent's injuries and death.

Dr. Held reviewed the films concerning the study and stated that there is nothing in the upper GI study which revealed an anastomotic leak, or indicated surgery was warranted. He stated that there was nothing in the decedent's clinical picture or condition which was consistent with, or suspicious for, an anastomotic leak on that date. Dr. Held opined that even if a leak existed on February 13, 2007, on February 14, 2007, Dr. Allam took the decedent back to surgery to revise the anastomosis as she then began showing clinical signs consistent with an anastomotic leak. He continued that an upper GI study is not 100% reliable to rule out the possibility of an anastomotic leak or obstruction, and is intended to be an adjunct to the clinical picture of the patient. Once the clinical status changed, it was indicated at that point to perform

surgery, which was done on February 14, 2007. Dr. Fitt, he stated, after interpreting the GI study, had no further involvement in decedent's care and treatment.

Based upon the foregoing, Dr. Rosemarie Olivieri-Fitt established prima facie entitlement to summary judgment dismissing the complaint as asserted against her. Counsel for the plaintiff has set forth in the attorney's affirmation that Dr. Oliveri-Fitt's motions for summary judgment is not opposed.

Accordingly, that branch of motion (003) by defendant Rosemarie Olivieri-Fitt, M.D. for summary dismissal of the complaint as asserted against her is granted.

Dated: 10-27-14

Hon. Denise F. Molia
A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**