At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 31st day of January 2022.

P R E S E N T:
HON. PAMELA L. FISHER,
J.S.C.

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ANTONIO PACHECO, as Attorney in Fact of CONSUELO PACHECO,

Plaintiff,

- against -

ENRICO ASCHER, M.D., NATALIE MARKS, M.D., VASCULAR INSTITUTE OF NEW YORK, and TOTAL VASCULAR CARE, PLLC,

Defendants.

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DECISION/ORDER

Index No: 514328/2019

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	1, 2, 3-4
Opposing Affidavits (Affirmations)	5, 6
Reply Affidavits (Affirmations)	7, 8

Upon the foregoing papers in this medical malpractice action, defendant, Natalie Marks, M.D., moves, pursuant to CPLR § 3212, for summary judgment, dismissing plaintiff's complaint and all cross-claims against her with prejudice, and directing the Clerk of the Court to enter judgment accordingly. Defendant also moves to amend the caption to reflect her dismissal from the action.

Plaintiff commenced this action by filing a summons and complaint on June 28, 2019 (Defendant's Affirmation in Support ¶ 4; Summons & Complaint, annexed as Exhibit A to defendant's motion papers). Issue was joined by defendant, Natalie Marks, M.D., on July 31, 2019, and by defendants, Enrico Ascher, M.D. and Total Vascular Care, PLLC, on July 19, 2019 (Defendant's Affirmation in Support ¶ 4; Dr. Marks' Answer, annexed as Exhibit B to defendant's motion papers; Answers of Dr. Ascher and Total Vascular Care, PLLC, annexed as Exhibit C to defendant's motion

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papers). Plaintiff served a verified bill of particulars upon defendant, Natalie Marks, M.D., on or about September 9, 2019 (Defendant's Affirmation in Support ¶ 5; Verified Bill of Particulars as to Defendant Natalie Marks, M.D., annexed as Exhibit E to defendant's motion papers). In her complaint and bill of particulars, plaintiff alleges that Dr. Marks departed from good and acceptable medical practice in her treatment of the plaintiff from August 9, 2017 through May 28, 2018 by "negligently" "prescribing" "Plavix 75 mg/day, on or about November 16, 2017," "failing to coordinate plaintiff's anticoagulation therapy with plaintiff's other treating providers," "failing to adequately document visits with plaintiff, including the reason" "Plavix was prescribed," and neglecting to "perform lab work" "to monitor plaintiff's coagulation levels" (Complaint ¶ 30; Verified Bill of Particulars as to Defendant Natalie Marks, M.D. ¶ 3). As a result of defendant's alleged malpractice, plaintiff is claiming to have sustained the following injuries: "[a]cute large left temporal hemorrhage with midline shift and small uncal herniation," "[r]ight hemiparesis," "[c]oagulopathy," "[i]nability to use right hand or arm," "[i]nability to walk," "[i]nability to talk," "[v]isual disturbances of the right eye," "[l]eft gaze preference," "[r]ight-sided weakness," incontinence, "[a]phasia," "[a]ltered diet," "[d]ifficulty eating," "[n]ausea," "[v]omiting," "[s]peech deficits," "[c]ommunication limited to blinking," "[l]ethargy," "[d]iaper rash," [m]emory deficits," "[c]hange in mental status," "[p]eriods of confusion," inability "to read," inability "to write," "[w]eight loss," "[l]oss of independence," and "[c]onscious pain and suffering" (*Id.* at ¶ 19).

The following facts are not in dispute. On July 25, 2014, plaintiff's primary care physician, "Dr. Filipova referred plaintiff to Dr. Marks at the Vascular Clinic at Adult Specialty Clinic at New York University Hospital-Lutheran ("Vascular Clinic") to evaluate for venous insufficiency due to bilateral lower extremity swelling and heaviness, and prominent varicose veins, with insufficient response to compression stockings" (Statement of Uncontested Material Facts ¶ 7). Dr. Marks was employed by Total Vascular Care (TVC), "a practice owned by co-defendant," Dr. Ascher (*Id.* at ¶ 1).

On August 7, 2014, plaintiff presented to Lutheran Medical Center, where she "underwent a bilateral lower extremity venous duplex mapping study," which was "interpreted by Dr. Ascher" (*Id.* at ¶ 8). On August 12, 2014, plaintiff returned to the Vascular Clinic, and saw Dr. Marks (*Id.* at ¶ 9). She "complain[ed] of bilateral leg edema, pain, hyperpigmentation, dryness, reticular veins and burning," and "Dr. Marks' impression was venous insufficiency and varicose veins" (*Id.* at ¶¶ 9, 12). Dr. Marks "recommended conservative care, consisting of compression stockings, leg elevation, [and] weight loss" (*Id.* at ¶ 12). She directed plaintiff to return for a follow-up appointment in three months (*Id.*). Plaintiff did not return for a follow-up appointment (*Id.* at ¶ 13).

On September 12, 2016, plaintiff arrived at Dr. Filipova's office "with complaints of bilateral lower extremity chronic venous insufficiency and heaviness," and "increased swelling and pain above [the] left ankle area for a few days" (*Id.* at ¶ 14). Dr. Filipova "referred plaintiff to vascular surgery for [e]valuation" on November 22, 2016 (*Id.* at ¶ 15). On November 29, 2016, she "underwent an ultrasound Doppler arterial PVR upper multiple levels at the referral of Dr. Filipova," which was "interpreted by Dr. Anil Hingorani" (*Id.* at ¶ 16). Plaintiff presented to Dr. Filipova on January 5, 2017, February 2, 2017, and April 4, 2017, and her "assessment included venous insufficiency" on these dates (*Id.* at ¶ 17). Her "assessment included venous insufficiency" again on July 14, 2017, and "she referred plaintiff to vascular surgery" (*Id.* at ¶ 18). On August 1, 2017, plaintiff returned to the Vascular Clinic, and saw Dr. Marks (*Id.* at ¶ 19). At this appointment, plaintiff "was using a cane," "reported being unsteady, and complained of varicose veins, with a history of severe bilateral leg edema, heaviness, and tiredness" (*Id.*). The chart states that "plaintiff's home medications were Losartan, Chlorthalidone, Pravastatin, and aspirin" (*Id.* at ¶ 20). At this visit, "Dr. Marks obtained a medical history and review of systems, and conducted a physical examination and evaluation," which "reveal[ed] 3+ leg edema and skin hyperpigmentation" (*Id.* at ¶ 21). She "recommended bilateral

saphenous vein thermal ablation procedures, with possible iliac venogram and venoplasty" (*Id.* at ¶ 22).

On August 9, 2017, "plaintiff first presented to TVC, and was seen by Dr. Marks" (*Id.* at ¶ 23). At this appointment, plaintiff "complained of bilateral lower extremities swelling and pain for the prior five months" (*Id.* at ¶ 24). The chart states that her "current home medications" were "Cozaar, Furosemide, Pravastatin, and aspirin" (*Id.*). Dr. Marks "obtained a medical history and review of systems, and performed a physical examination" (*Id.* at ¶ 25). She "recommended bilateral thermal ablation to decrease edema," and obtained plaintiff's informed consent prior to performing the procedure (*Id.* at ¶ 26). She then "performed a left great saphenous laser ablation" "without complication" (*Id.*). Plaintiff returned to TVC on August 14, 2017, and "was seen by vascular surgeon, Dr. Sheila Blumberg" (*Id.* at ¶ 27). At this visit, plaintiff "reported doing well following the ablation, but" indicated that she had "persistent lower extremity swelling, with heaviness, achiness, and itchiness" (*Id.*). On August 18, 2017, plaintiff presented to Dr. Filipova, and her chart "references leg swelling [and] well-controlled hypertension," and that "she reported feeling well with" "no specific complaints" (*Id.* at ¶ 28; Plaintiff's Response to Defendant's Statement of Material Facts Pursuant to Uniform Civil Rules Section 202.8-g ¶ 28). Dr. Filipova prescribed Calcium-Vitamin D for osteopenia (*Id.* at ¶ 30). The chart also states that "Dr. Marks' recommendations were appreciated, that plaintiff underwent a left ablation procedure, and the right ablation procedure was scheduled for the following week" (Statement of Uncontested Material Facts ¶ 29). Dr. Filipova recorded that she "obtained a thorough medication history, reconciliation was performed and discussed with plaintiff, plaintiff understood the medication regimen, a medication list was provided to plaintiff, and she was advised to carry it" (*Id.* at ¶ 30). Dr. Filipova noted that the "plan included Complete Blood Count and Comprehensive Metabolic Panel" (*Id.*).

On September 6, 2017, plaintiff arrived at TVC for the "right great saphenous laser ablation, [which was] performed by Dr. Marks, after obtaining informed consent" (*Id.* at ¶ 31). There were "no complications, and plaintiff was instructed to return in one week" (*Id.*). Plaintiff returned to TVC a few days later on September 11, 2017 for a follow-up appointment, and she was seen by Dr. Ascher (*Id.* at ¶ 32; TVC records at 13, annexed as Exhibit P to defendant's motion papers). She had no complaints at this visit (Statement of Uncontested Material Facts ¶ 32). The chart states that the plaintiff was taking the following medications: "aspirin," "Cozaar," "erythromycin," "furosemide," and "pravastatin" (TVC records at 13). The ultrasound from this date "revealed the targeted great saphenous vein was corrected and closed" (Statement of Uncontested Material Facts ¶ 33). On November 16, 2017, plaintiff returned to TVC, and was seen by Dr. Marks, who "obtained a medical history and conducted an examination" (*Id.* at ¶ 34). The chart states that the plaintiff "[w]ould benefit from left GSV leg, left SSV thermal ablations, [and] bilateral thigh and legs foam ablations," and that she would "come back" "after [the] holidays" "to schedule" (TVC records at 18). There is also an instruction form for an "iliac venogram procedure" in plaintiff's chart, signed by plaintiff on November 16, 2017 at 1:05 PM (*Id.* at 54). Dr. Marks gave the plaintiff a prescription for 30 pills of "Plavix on November 16, 2017, with no refills, and the written patient instructions directed plaintiff to take one tablet the night before the procedure" (Statement of Uncontested Material Facts ¶ 39; Counterstatement / Additional Facts Which Demonstrate Existence of Genuine Issues To Be Tried ¶ 13). Although Dr. Marks testified that she did not prescribe plaintiff any additional Plavix after the November 16, 2017 appointment, the TVC chart and Rite-Aid records document that Dr. Marks refilled plaintiff's Plavix prescription on December 5, 2017, January 7, 2018, and February 10, 2018 (Dr. Marks' EBT tr. 96, lines 4-25; at 97, lines 1-25; at 98, lines 1-6, annexed as Exhibit L to defendant's motion papers; Counterstatement/Additional Facts Which Demonstrate Existence of Genuine Issues To Be Tried ¶¶ 9-11). The Rite Aid records indicate that Dr. Ascher wrote plaintiff a prescription for Plavix on March 12, 2018 (Statement of Uncontested

Material Facts ¶ 48). On April 9, 2018 and May 9, 2018, Dr. Ascher refilled plaintiff's Plavix prescription (*Id.*). Plaintiff did not return to TVC until May 11, 2018 (*Id.* at ¶ 54).

On January 23, 2018, plaintiff returned to Dr. Filipova's office, and "Plavix was not listed as a medication" in her chart (*Id.* at ¶ 49). On April 11, 2018, plaintiff had an appointment with Dr. Yevegeniy Borshchecko, and "there is no reference in his note to plaintiff taking Plavix" (*Id.* at ¶ 50). She returned to Dr. Filipova again on April 19, 2018, complaining of "increased leg pain and swelling, right greater than left, with indurated hyperpigmented skin above right calf" (*Id.* at ¶ 51). The chart states that "Dr. Filipova obtained a thorough medication history" on this date, and "Plavix was not listed as a medication" (*Id.* at ¶ 52). On May 11, 2018, plaintiff presented to TVC, and "was seen by Dr. Marks" (*Id.* at ¶ 54). She was "walking with a cane," and complained of "knee pain, bilateral lower extremity cramps, [and] discoloration and swelling" (*Id.* at ¶ 55). Dr. Marks performed "a physical examination, which revealed, in part, a right lower extremity calf ulcer" (*Id.* at ¶ 58). Dr. Marks applied an Unna Boot to treat plaintiff's ulcer (*Id.* at ¶ 59). She also "recommended further ablations and instructed plaintiff to return in one week for an iliac venous duplex and arterial duplex, and right venogram planning due to ulcer development" (*Id.* at ¶ 60). Plaintiff returned a few days later, on May 15, 2018, with complaints of "slight pain and burning sensation to both legs," and "discoloration and a blister on the right leg" (*Id.* at ¶ 61). At this visit, "Dr. Marks conducted an examination, which revealed in part, venous right lower extremity brown discoloration, weeping skin, edema and a chronic ulcer of the right calf" (*Id.* at ¶ 64). The chart states that the plaintiff would "try xeroform for the ulcer, and come back in 3 days for [Unna Boot]" (Plaintiff's Response to Defendant's Statement of Material Facts Pursuant to Uniform Civil Rules § 202.8-g ¶ 65). Dr. Marks "referred plaintiff to Dr. Filipova" for bloodwork (*Id.* at ¶ 66).

On May 18, 2018, plaintiff had an appointment at TVC, and she "was seen by nurse practitioner Eleanora Iadgarova" (Statement of Uncontested Material Facts ¶ 69). Ms. Iadgarova

"documented the home medications as Pravastatin and aspirin, with Plavix not listed" (*Id.*). At this visit, "nurse practitioner Iadgarova applied an Unna Boot" (*Id.* at ¶ 70). Plaintiff returned to TVC on May 23, 2018, and she "was seen by vascular surgeon, Dr. Hingorani" (*Id.* at ¶ 71). The chart states that the home medications were "Pravastatin and aspirin" on this date (*Id.*). On May 28, 2018, plaintiff arrived at TVC for a venogram and venoplasty, performed by Dr. Ascher (*Id.* at ¶¶ 72, 75). He "conducted a preoperative examination and evaluation of plaintiff, which revealed" that she took "Plavix and aspirin the day prior to the procedure, [and] had bilateral lower extremity pain and swelling," as well as "right painful ulcers" (*Id.* at ¶ 74). Dr. Ascher's "impression was chronic venous disease, extreme symptoms, skin falling apart, inability to walk well, and pain and swelling" (*Id.*). Dr. Ascher proceeded with the venogram and venoplasty on May 28, 2018, and "Dr. Marks had no involvement in the performance of these procedures" (*Id.* at ¶ 76). On May 29, 2018, plaintiff "woke up with nausea and vomiting," and "subsequently developed right-sided weakness and slurred speech" (Counterstatement / Additional Facts Which Demonstrate Existence of Genuine Issues To Be Tried ¶ 19). She was taken via ambulance to NYU Lutheran Hospital (*Id.*). The chart indicates that "Ms. Pacheco was given Aspirin, Plavix, and about 100 units of diluted Heparin during the procedure" on May 28, 2018 (*Id.*). A CT scan was performed, revealing a "large left temporal hemorrhage with midline shift and small uncal herniation" (*Id.*). Plaintiff was admitted to the "neurological intensive care unit for close neurological monitoring and stroke management" (*Id.*). Plaintiff "remained at NYU until June 22, 2018, when she was transferred to Boro Park for rehabilitation" (*Id.* at ¶ 20). She was discharged from Boro Park in September 2018 (*Id.*).

In support of her motion for summary judgment, defendant submits expert affirmations from Nicholas J. Morrissey, M.D., a physician board certified in surgery with a "sub-certification in vascular surgery," and Babak Navi, M.D., a physician board certified in neurology and vascular neurology (Morrissey Expert Affirmation ¶ 3, annexed as Exhibit S to defendant's motion papers; Navi Expert

Affirmation ¶ 3, annexed as Exhibit T to defendant's motion papers). They contend that Dr. Marks did not depart from acceptable medical practice during her treatment of the plaintiff, and that no act or omission of hers proximately caused the plaintiff's injuries (Morrissey Expert Affirmation ¶ 7; Navi Expert Affirmation ¶ 7). Their opinions are based on review of the bills of particulars, deposition transcripts, medical records, as well as their education, training, and experience (Morrissey Expert Affirmation ¶ 8; Navi Expert Affirmation ¶ 8). Dr. Morrissey opines that Dr. Marks adhered to the standard of care by "obtain[ing] a complete, proper, and pertinent medical history at each [visit]" (Morrissey Expert Affirmation ¶ 12). Dr. Morrissey has reviewed plaintiff's chart, which documents her medical conditions, medication list, past "surgical history, allergies," "present illness/complaints, and review of systems," and maintains that there "was no additional information Dr. Marks should have obtained" (*Id.* at ¶¶ 12-19). Dr. Morrissey claims that Dr. Marks did not improperly prescribe Plavix on November 16, 2017, as this medication was "prescribed in anticipation of plaintiff scheduling a venogram, with the potential for a venoplasty, after the holidays" (*Id.* at ¶ 20). Dr. Morrissey provides pertinent background information about the venogram and venoplasty procedures (*Id.*). He explains that a "venogram is an invasive procedure where a catheter is inserted into a vein and contrast dye is injected to show the inside of the vein under fluoroscopic" "x-ray guidance" (*Id.*). He states that a "venoplasty or venous angioplasty is when the physician identifies an area of narrowing within a vein during venography and attempts to treat that narrowing by using a strong balloon to dilate the narrow segment of the vein" (*Id.*). Dr. Morrissey affirms that a "stent, or flexible metal tube" "is [often] inserted into the narrow segment of the vein to keep it open and prevent failure of the venous angioplasty" (*Id.*). Dr. Morrissey alleges that Plavix is necessary to "prevent clotting on the surface of the stent," and that "Plavix is much more effective in preventing stent clotting than aspirin alone" (*Id.*). Dr. Morrissey argues that Dr. Marks' decision to prescribe "Plavix 75 mg, with no refills, in advance of the procedure" was appropriate, as she "complied with" "[t]he protocol at TVC,

developed by Dr. Enrico Ascher," which "was for patients to take one Plavix 75 mg dose the day prior to the procedure and, with a stent placed, to take Plavix for three months thereafter" (*Id.* at ¶ 21). Further, Dr. Morrissey maintains that Dr. Marks "properly deferred to the expertise of Dr. Ascher," as Dr. Marks is not a vascular surgeon (*Id.*). Dr. Morrissey suggests that Dr. Marks gave appropriate instructions with the prescription, based on Dr. Marks' testimony that "she provided plaintiff with verbal and written instructions to take one tablet the day prior to the procedure," even though the "actual prescription" contained "instructions to take one tablet daily, one tablet the day before the procedure" (*Id.* at ¶ 22).

Dr. Morrissey opines that Dr. Marks did not deviate from the standard of care by "[f]ail[ing] to coordinate anticoagulation therapy with other providers, [or by failing to] communicate with [plaintiff's] primary care provider prior to prescribing Plavix" (*Id.* at ¶ 31). He contends that "[t]here was nothing in plaintiff's medical or medication history necessitating or requiring Dr. Marks to coordinate with other providers or communicate with plaintiff's primary care physician prior to prescribing [Plavix]" (*Id.*). Further, Dr. Marks did notify Dr. Filipova, plaintiff's primary care physician, of the Plavix prescription by sending her a consultation report for the November 16, 2017 appointment, and she never "advised Dr. Marks" of any issues with the prescription (*Id.* at ¶ 32). Dr. Morrissey claims that Dr. Marks did not depart from acceptable medical practice by failing to list the reason Plavix was prescribed in the chart, as it was "TVC protocol" to prescribe this medication "in advance of a venogram/venoplasty" (*Id.* at ¶ 35). He indicates that Dr. Marks was not required to order bloodwork or preoperative lab work prior to the surgery, as this was the responsibility of the surgeon, Dr. Ascher (*Id.* at ¶¶ 37, 39). He affirms that Dr. Marks was also not required to "communicate with Dr. Ascher" prior to the procedure, as "Dr. Marks' progress notes and imaging study reports provide all necessary communication regarding plaintiff's condition" (*Id.* at ¶ 42). Dr. Morrissey alleges that certain allegations in the bill of particulars should not be applied to Dr. Marks, as they relate to the

procedure performed by Dr. Ascher on May 28, 2018, and Dr. Marks did not participate in the procedure (*Id.* at ¶¶ 45, 47, 49, 52, 55). These include "fail[ure] to communicate with [plaintiff's] family regarding Heparin, [and/or] communicate with plaintiff's primary care physician prior to administering heparin," "fail[ure to recommend [a] hold on anticoagulant regimen prior to [the] subject procedure," "fail[ure] to communicate with plaintiff's treating physicians regarding preoperative clearance, secure preoperative clearance, and refer to specialists," failure to obtain plaintiff's informed consent prior to the procedure on May 28, 2018, and "fail[ure] to provide proper post-procedure instructions to plaintiff and [her] family, and keep plaintiff for observation following the subject procedure" (*Id.* at ¶¶ 45, 47, 49, 52, 55).

Dr. Morrissey concludes that plaintiff's injuries were not proximately caused by any act or omission on Dr. Marks' part (*Id.* at ¶ 27). Dr. Morrissey acknowledges that the pharmacy records "list Dr. Marks' name as a prescribing physician for Plavix on December 8, 2017, with two refills on January 7 and February 10, 2018" (*Id.* at ¶ 23). However, she "testified [that] she did not write or authorize [these] prescriptions" (*Id.*). The pharmacy records also document a Plavix prescription by Dr. Ascher, "filled on March 12, 2018, with two refills on April 9, 2018 and May 9, 2018" (*Id.* at ¶ 24). Dr. Morrissey suggests that even if plaintiff took all of the prescribed Plavix, the Plavix that was prescribed by Dr. Marks could not have caused plaintiff's hemorrhage, as "the last date plaintiff may have taken Plavix with Dr. Marks as the prescriber would have been March 12, 2018" (*Id.* at ¶¶ 25, 27, 30). Further, Dr. Morrissey indicates that that Plavix would have been cleared from the plaintiff's body one day later on March 13, 2018, and "complete platelet function would have occurred no later than March 19, 2018," more than two months prior to the procedure on May 28, 2018 (*Id.* at ¶ 25). Dr. Morrissey maintains that Dr. Marks is not responsible for any of the Plavix prescriptions written by Dr. Ascher (*Id.* at ¶ 24).

Dr. Navi concurs with Dr. Morrissey's opinions regarding Dr. Marks' alleged departures from the standard of care, and mostly comments on causation (Navi Expert Affirmation ¶¶ 11, 24, 25, 32, 33). He agrees with Dr. Morrissey's contention that the Plavix prescribed by Dr. Marks did not proximately cause plaintiff's hemorrhage (*Id.* at ¶ 26). Dr. Navi explains that "Plavix is cleared from the body approximately 33 hours after it is last taken, and its antiplatelet effects completely cease within seven days after it is last taken" (*Id.* at ¶ 24). The pharmacy records indicate that a second prescription bearing Dr. Marks' name "was filled on December 8, 2017," and there were two refills on January 7, 2018 and February 10, 2018 (*Id.* at ¶ 27). Based on these records, Dr. Navi opines that if the plaintiff was taking the medication daily, she would have last taken it on March 12, 2018 (*Id.*). Therefore, the Plavix would have "cleared from [her] body by March 13, 2018, and all the effects of Plavix would have ceased no later than March 19, 2018" (*Id.*). Since plaintiff did not "sustain a bleed or hemorrhage," or "any of the other claimed injuries," during this time period, Dr. Navi concludes that the Plavix prescribed by Dr. Marks did not result in her injuries (*Id.*). Dr. Navi alleges that plaintiff's "hemorrhagic stroke" "was caused by cerebral amyloid angiopathy ("CAA")," "a cerebrovascular disorder, caused by the accumulation of abnormal protein deposits (amyloid beta-peptide) within, and surrounding, cerebral arteries and veins" (*Id.* at ¶ 41). Dr. Navi states that "[t]hese proteins weaken blood vessel walls, making them prone to bleeding, which often manifests in intracerebral hemorrhage, particularly in the lobar region, with some extension into the subarachnoid and subdural spaces" (*Id.*). He indicates that CAA is "one of the leading causes of non-traumatic intracerebral hemorrhage" in "patients over age 75" (*Id.*). Dr. Navi concludes that plaintiff's stroke was caused by CAA, based on the location of the hemorrhage in the lobar region, and the fact that she was over 80 years old (*Id.* at ¶¶ 12, 41). Further, he maintains that CAA "is not caused by the use of Plavix and/or aspirin" (*Id.* at ¶ 42). Dr. Navi disagrees with plaintiff's claims that "Dr. Marks' care and treatment" "created coagulopathy," and points out that "[t]here is no test or study result establishing that coagulopathy

occurred" (*Id.* at ¶ 43). He suggests that functional bleeding tests, such as thromboelastography or platelet function assays, would be required to confirm that coagulopathy occurred (*Id.*).

In opposition, plaintiff submits a redacted expert affidavit from a physician who is licensed in New Jersey and Pennsylvania, and board certified in surgery "with a Certification in vascular surgery," and a redacted expert affirmation from a physician board certified in psychiatry and neurology (Plaintiff's Vascular Surgery Expert Affidavit ¶ 1, annexed as Exhibit 1 to plaintiff's opposition papers; Plaintiff's Neurology Expert Affirmation ¶ 1, annexed as Exhibit 2 to plaintiff's opposition papers). They opine that Dr. Marks departed from the standard of care during her treatment of the plaintiff, and that these departures proximately caused plaintiff's injuries (Plaintiff's Vascular Surgery Expert Affidavit ¶ 25; Plaintiff's Neurology Expert Affirmation ¶ 25). Their opinions are based on review of the bills of particulars, medical records, studies, the photographs of pill bottles, deposition transcripts, and defendant's expert affirmations (Plaintiff's Vascular Surgery Expert Affidavit ¶ 3; Plaintiff's Neurology Expert Affirmation ¶ 3).[1] Plaintiff's vascular surgery expert disputes Dr. Morrissey's contention that Dr. Marks did not deviate from the standard of care by prescribing Plavix to plaintiff on November 16, 2017 (Plaintiff's Vascular Surgery Expert Affidavit ¶ 27). He/she maintains that Dr. Marks' actions were improper, as "there was no medical reason for Ms. Pacheco to be on Plavix for more than one pill the day before the procedure," and Dr. Marks gave the plaintiff a prescription for 30 pills without a scheduled stenting procedure (*Id.* at ¶¶ 13, 27). Plaintiff's vascular surgery expert indicates that Dr. Marks even testified that "it is a departure from good and accepted medical practice to give a patient a prescription that the patient does not require" (*Id.* at ¶ 27). Further, plaintiff's vascular surgery expert contends that Dr. Marks departed from acceptable medical practice by "failing to document the reason she prescribed Plavix," and her instructions regarding how often this medication should be taken, in plaintiff's chart (*Id.* at ¶ 28). He/she alleges that since no stenting

[1] Plaintiff's vascular surgery expert has only reviewed Dr. Morrissey's expert affirmation, and plaintiff's neurology expert has only reviewed Dr. Navi's expert affirmation.

procedure was scheduled, "[s]ubsequent TVC providers, including whoever might have been handling prescription refill requests, would not have known why Dr. Marks put Ms. Pacheco on Plavix, or how often Dr. Marks intended for Ms. Pacheco to take the Plavix" (*Id.*). Plaintiff's vascular surgery expert claims that Dr. Marks' instructions to the patient were unclear, in that he prescribed 30 pills on November 16, 2017, and the instructions on the prescription bottle said "to take one pill daily and to take one pill the day prior to the procedure" (*Id.* at ¶¶ 29-31). According to plaintiff's vascular surgery expert, these instructions, along with the pill amount, implied that Dr. Marks wanted plaintiff to take one pill daily, as opposed to just one pill the day before the procedure (*Id.* at ¶¶ 29-31). Further, he/she suggests that Dr. Marks' written instructions signed by plaintiff on November 16, 2017, are also confusing and do not clarify this matter (*Id.* at ¶ 31). He/she points out that instruction # 5 states that "[i]f you are on Plavix and/or Aspirin, you may continue it," and instruction # 11 states that "[y]ou will be given a prescription for Plavix pill to prevent the blood clot formation in the stent if it is placed. Please take one pill the night before procedure" (*Id.*). Based on these instructions, plaintiff's vascular surgery expert opines that it was "reasonable" for the plaintiff to have taken one pill daily, since the instructions did not state to only take one pill the night before the procedure (*Id.*). Based on the empty Plavix prescription pill bottles produced by the plaintiff, the expert concludes that she took the prescription daily for months (*Id.* at ¶¶ 32, 35).

Plaintiff's expert affirms that Dr. Marks further deviated from the standard of care by refilling plaintiff's Plavix prescription multiple times, as she was "continuing to prescribe" "a medication which [plaintiff] did not require" (*Id.* at ¶ 33). He/she maintains that "even if Dr. Marks did not prescribe the Plavix refills, Dr. Marks still departed from good and accepted medical practice in failing to review Ms. Pacheco's chart in May 2018, to apprise herself of the Plavix refills called in for Ms. Pacheco" (*Id.* at ¶ 34). If she "[h]ad" "reviewed" this information, "she would have been aware that Ms. Pacheco was regularly receiving refills of the Plavix that Dr. Marks initially prescribed," and "could have intervened

by instructing Ms. Pacheco to stop taking the Plavix until the night before the procedure" (*Id.*). Plaintiff's vascular surgery expert concludes that "Dr. Marks' departures from good and accepted practice, contributed [to] Ms. Pacheco's coagulopathy, which caused her hemorrhagic stroke," but "defer[s] to plaintiff's neurology expert to discuss the specifics of this causal relationship" (*Id.* at ¶ 37).

Plaintiff's neurology expert "defer[s]" to plaintiff's vascular surgery expert's opinion as to the deviations from the standard of care in this case, and mostly comments on causation (Plaintiff's Neurology Expert Affirmation ¶¶ 26, 27). Plaintiff's neurology expert concludes that "the Plavix and aspirin taken daily since November 2017, proximately caused Ms. Pacheco's increased risk of a brain bleed" (*Id.* at ¶ 28). He/she explains that "Aspirin and Plavix work to decrease the blood's ability to clot, by blocking the [platelets'] ability to stick together" (*Id.*). He/she indicates that "Plavix, when taken regularly, has a cumulative effect," and "the longer a patient takes Plavix, the less the platelets are going to be able to stick together and help with blood clotting" (*Id.*). Plaintiff's neurology expert suggests that the fact that the plaintiff had normal platelet counts in this case does not mean that she was not in a "state of coagulopathy," as "coagulopathy" occurs when "the functioning of the platelets decreases" (*Id.*). Further he/she maintains that "Ms. Pacheco was at an extremely elevated risk of a brain bleed due to her old age and the fact that she was taking Plavix and Aspirin for six months" (*Id.* at ¶ 29). Plaintiff's neurology expert alleges that "[t]he trauma of the vein stent placement on May 28, 2018, caused a tear in a vessel in her brain, which then hemorrhaged, because her blood was unable to clot due to the prolonged dual antiplatelet therapy" (*Id.*). This conclusion is based on the timing of the bleed within 24 hours of the stenting procedure, and the absence of head trauma in this case (*Id.*). Plaintiff's expert disagrees with Dr. Navi's conclusion that the bleed was caused by a "cerebral amyloid angiopathy" (CAA), as this condition is "most typically seen in elderly individuals with dementia, which Ms. Pacheco was not documented to have" (*Id.* at ¶ 30). Further, plaintiff's expert maintains that CAA does not cause a bleed itself; it merely increases the risk of bleeding (*Id.*).

In reply, defendant reiterates that she did not deviate from acceptable medical practice during her treatment of the plaintiff, and that she did not proximately cause the plaintiff's injuries (Affidavit in Reply ¶ 11). Defendant argues that certain claims from the bill of particulars that were not addressed by plaintiff's experts must be dismissed, including Dr. Marks' alleged "fail[ure] to coordinate anticoagulation therapy with other treating providers," "fail[ure] to document physical examination findings," "fail[ure] to ensure platelet levels were stable," "fail[ure] to perform lab work and repeat lab work to monitor coagulation levels and to perform preoperative lab work and obtain anticoagulation levels prior to the subject procedure," "[negligent] communicat[ion] with Dr. Ascher prior to the subject procedure," "fail[ure] to communicate with plaintiff's primary care physician regarding Heparin prior to administering it during the subject procedure," "fail[ure] to recognize further anticoagulation would result in a catastrophic outcome," "fail[ure] to recommend a hold on the anticoagulant regimen prior to the subject procedure," "fail[ure] to communicate with plaintiff's other physicians regarding preoperative clearance, and to secure preoperative clearance," "fail[ure] to advise plaintiff's family of [the] risks of the subject procedure in light of plaintiff's anticoagulant therapy, and to advise plaintiff of [the] risks, alternatives, or benefits of treatment plaintiff received, including risk of intracerebral hemorrhage," "fail[ure] to provide proper post-procedure instructions to plaintiff/plaintiff's family," and "fail[ure] to keep plaintiff for observation following the subject procedure" (*Id.* at ¶ 8). Defendant contends that plaintiff has failed to create a triable issue of fact to defeat defendant's motion for summary judgment, and claims that plaintiff's experts' opinions are conclusory, not based on facts in the record, and do not "refute the causation arguments raised by defendant's expert neurologist" (*Id.* at ¶¶ 12, 16, 17, 23, 28).

To prevail on a cause of action for medical malpractice, the plaintiff must prove that defendant "deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Stukas v. Streiter*, 83 AD3d 18, 23 [2d. Dept. 2011]). On a

motion for summary judgment, defendant must "make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Iulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697 [2d. Dept. 2013]). Once the defendant meets its burden, the burden then shifts to the plaintiff to "raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Stukas*, 83 AD3d at 24). If the defendant "makes only a prima facie showing that he or she did not deviate or depart from accepted medical practice, the plaintiff, in order to defeat summary judgment, need only raise a triable issue of fact as to the alleged deviation or departure, and need not address the issue of proximate cause" (*Hayden v. Gordon*, 91 AD3d 819, 821 [2d. Dept. 2012]). Conclusory allegations that are "unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat defendant physician's summary judgment motion" (*Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d. Dept. 2010]). Where the parties have submitted conflicting expert reports, summary judgment should not be granted; "[s]uch credibility issues can only be resolved by a jury" (*Id.*).

Here, defendant met her prima facie burden. Defendant's experts, Dr. Morrissey and Dr. Navi, affirmed that Dr. Marks did not deviate from acceptable standards of medical practice, and that no act or omission of hers proximately caused any injury to the plaintiff. Dr. Morrissey maintains that Dr. Marks properly prescribed Plavix on November 16, 2017 pursuant to office protocol in advance of a venogram/venoplasty procedure, and gave her sufficient instructions to take one pill the night before the procedure. Dr. Navi contends that even if plaintiff took all of the Plavix allegedly prescribed by Dr. Marks, it was no longer in her system as of March 13, 2018, and therefore, could not have caused her hemorrhage two and a half months later. Dr. Navi claims that plaintiff's hemorrhage was caused by cerebral amyloid angiopathy ("CAA"). Their opinions constitute competent evidence, in that they are

based on the bills of particulars, deposition transcripts, medical records, and their own training and experience.

In opposition, plaintiff produced affidavits of merit from a board-certified vascular surgeon and neurologist, attesting to departures from accepted standards of medical practice, and that these departures were a competent producing cause of the plaintiff's injuries. Plaintiff's expert opinions, based on review of the bills of particulars, medical records, studies, the photographs of pill bottles, deposition transcripts, and defendant's expert affirmations, raise triable issues of fact. Due to the conflicting expert reports, defendant's motion for summary judgment is denied as to the cause of action for medical malpractice (*See Deutsch*, 71 AD3d at 719). As plaintiff has failed to oppose Dr. Marks' motion for summary judgment as to the cause of action for lack of informed consent, the second cause of action alleging lack of informed consent is hereby dismissed against Dr. Marks. Further, the claims from the bill of particulars that were not addressed by plaintiff's experts are hereby dismissed, including "fail[ure] to document physical examination findings," "fail[ure] to ensure platelet levels were stable," "fail[ure] to perform lab work and repeat lab work to monitor coagulation levels and to perform preoperative lab work and obtain anticoagulation levels prior to the subject procedure," "fail[ure] to communicate with plaintiff's primary care physician regarding Heparin prior to administering it during the subject procedure," "fail[ure] to advise plaintiff/plaintiff's family of the risks of the subject procedure in light of plaintiff's anticoagulant therapy, and to advise plaintiff of [the] risks, alternatives, or benefits of treatment plaintiff received, including risk of intracerebral hemorrhage," and "fail[ure] to keep plaintiff for observation following the subject procedure" (Reply Affidavit ¶ 8; Verified Bill of Particulars as to Defendant Natalie Marks, M.D. ¶ 3). Accordingly, defendant's motion for summary judgment is granted in part and denied in part.

This constitutes the decision and order of the Court.

ENTER:

Hon. Pamela L. Fisher, J.S.C.

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