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SHORT FORM ORDER

INDEX No. 08-42124
CAL. NO. 11-01187MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 14 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 10-20-11
ADJ. DATE 1-18-12
Mot. Seq. # 003 - MD

BRUCE A. PIZIRUSSO, as Executor of the Estate of ROSEMARY PIZIRUSSO, decedent, Plaintiff, - against - JEFFREY L. MARGULIES, M.D., GOOD SAMARITAN HOSPITAL MEDICAL CENTER and DOUGLAS W. SILFEN, M.D., Defendants.	SHAYNE, DACHS, CORKER, SAUER & DACHS, LLP Attorney for Plaintiff 114 Old Country Road, Suite 410 Mineola, New York 11501-4410 BARTLETT, McDONOUGH & MONAGHAN, LLP Attorney for Defendants Margulies & Good Samaritan Hospital Medical Center 670 Main Street Islip, New York 11751

Upon the following papers numbered 1 to 38 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 21; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 22-30; Replying Affidavits and supporting papers 31-33; Other 34-36; 37-38 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by the defendants, Jeffrey L. Margulies, M.D. and Good Samaritan Hospital Medical Center, pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint, is denied.

In this action premised upon the alleged medical malpractice of the defendants, and the wrongful death of the plaintiff's decedent, Rosemary Pizirusso, the plaintiff, Bruce A. Pizirusso, alleges that the defendants negligently departed from good and accepted standards of medical care and treatment of the plaintiff's decedent, failed to properly provide informed consent to the decedent, and that the defendant, Good Samaritan Hospital Medical Center, negligently hired unqualified personnel to treat and examine the plaintiff's decedent, causing the decedent to suffer personal injury and death. The plaintiff seeks damages personally and derivatively arising out of the defendants' alleged failure to properly and timely treat the plaintiff's decedent for pulmonary emboli, resulting in her death on January 11, 2007, at age 77.

Jeffrey Margulies, M.D. and Good Samaritan Hospital Medical Center seek summary judgment dismissing the complaint on the bases that Dr. Margulies and doctors, nurses and staff at Good

Samaritan Hospital Medical Center, provided appropriate care and treatment to the plaintiff's decedent, and that the care and treatment provided by them did not proximately cause the injuries or death of the plaintiff's decedent.

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]).

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* ***Derdiarian 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]).

In support of this motion (001), the moving defendants have submitted, inter alia, an attorney's affirmation; the affidavits of their expert physicians, Timothy G. Haydock, M.D. and Jerome Weiner, M.D; copies of the summons and complaint, defendant hospital's and Douglas W. Silfen, M.D.'s answers, various discovery demands, and plaintiff's verified bill of particulars; stipulation of discontinuance of the action with prejudice as against Douglas W. Silfen, M.D., which is not signed by all parties and filed with the Clerk of the County (*see* CPLR 3217); the unsigned but certified copy of the transcript of the examinations before trial of Bruce A. Pizirusso dated August 18, 2009, plaintiff's daughter, non-party Patricia Cardillo dated August 18, 2009, Jeffrey Margulies, M.D. dated February 25, 2010, Joseph Terranova, D.O. dated September 13, 2010, and Douglas Silfen, M.D. dated April 13, 2010; the signed and certified copy of the transcript of the non-party witness Ernest Pizirusso dated April 4, 2010; the unsigned and uncertified transcript of the examination before trial of Vinod Khanijo, M.D.

dated April 8, 2011; an uncertified copy of the decedent's medical record from Good Samaritan Hospital Medical Center; and an uncertified copy of the Administrative Policy of the Emergency Department.

The unsigned but certified copies of the transcript of the examinations before trial of Bruce A. Pizirusso, plaintiff's daughter, Patricia Cardillo, Joseph Terranova, D.O., and Douglas Silfen, M.D., although objected to by the plaintiff, have not been set forth as being inaccurate by the plaintiffs and are thus considered (*see* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]. The unsigned and uncertified copy of the transcript of Vinod Khanijo, M.D. objected to by the plaintiff, is not in admissible form pursuant to CPLR 3212, is not accompanied by proof of service pursuant to CPLR 3116, and is not considered (see ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]). The unsigned transcript of Jeffrey L. Marguiles, M.D., although objected to by the plaintiff, is deemed adopted as accurate by the moving party and is thus considered (*see* ***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). The uncertified copy of the decedent's hospital records, and the uncertified copy of the Administrative Policy of the Emergency Department are not in admissible form pursuant to CPLR 3212 (*see* ***Friends of Animals v Associated Fur Mfrs.***, supra). Expert testimony is limited to facts in evidence; and the inadmissible records and policy are not in evidence as they are not in admissible form (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]).

The moving defendants have attempted to correct some of these deficiencies in their reply, but the purpose of the reply is not for the purpose of providing evidentiary submissions in admissible form as the moving papers should have been sufficient on their face (CPLR 3212). Based upon the inadmissibility of the aforementioned transcripts of the examinations before trial, plaintiff's medical records, and the Administrative Policy of the Emergency Department, it is determined that the moving defendants' expert's opinions are not based on facts which are all in evidence. Even if the aforementioned evidentiary documents were in admissible form, it is determined that the moving defendants have not established prima facie entitlement to summary judgment dismissing the complaint as asserted against them.

Bruce Pizirusso testified that he saw his mother almost every day, and when he saw her on January 9, 2007, she had no complaints. When he spoke to his mother on January 10, 2007, she told him she was not feeling well and was going to stay with his sister, Patricia Cardillo. On January 11, 2007, he received a telephone call from his sister advising him that their mother was having a hard time breathing. An ambulance was called, and she was taken to the Good Samaritan Hospital emergency room.

Patricia Cardillo testified to the extent that her mother still worked as a counselor with children at Our Lady of Grace Church, five and one-half hours a day, five days a week. Prior to that, her mother worked for about twenty years for BOCES as a teacher's aide. She had a history of high blood pressure and was treated by Dr. Mazzeo, whom she saw about three weeks prior to her death for swelling and redness in her ankles. She testified about her mother's care and treatment at Good Samaritan when she

was admitted on January 11, 2007, and the fact that she was transferred to North Shore Hospital for surgery. About one half hour after they arrived at North Shore Hospital, they were seen by the surgeon who was to perform the procedure on her mother. He asked "Where have you been since 2:00?" He then told her that he expected her mother at 2:00 p.m. and that he was sorry she passed away. Thereafter, she spoke to someone from administration at Good Samaritan Hospital and asked for an investigation concerning this issue, but was never contacted by anyone.

Ernest Pizirusso testified to the extent that the cardiologist examined his mother when she was in the emergency department, and after the examination, he overhead a discussion by the cardiologist with Dr. Margulies wherein the cardiologist wanted to know why he was being called when she was showing signs positive for an embolism and needed a pulmonologist. He then expressed that the decedent needed the CT scan. Radiology was contacted and after some discussion and direction from the cardiologist, the radiologist agreed to do the CT scan. Ernest Pizirusso stated that earlier he had been advised that the CT scan was not done due to her allergy to shellfish, but that she had been given medication to counteract the possibility of an allergic reaction. The CT scan was done, and he was advised by Dr. Margulies that his mother had two embolisms, one in each lung. He was further advised that his mother was being admitted to ICU and would be given Heparin to dissolve the clots. At 7:00 p.m., the pulmonologist approached him and asked him if he wanted to give his mother a chance to survive, and to do so, they would have to transfer her to another hospital. Within about 10 to 15 minutes, the ambulance from North Shore Hospital arrived, and she was transferred to North Shore Hospital. Shortly after her arrival, he and his family were advised that their mother had passed. He stated that the doctor who spoke to them advised that he had been waiting for the decedent since 2:30 p.m.

Vinod Khanijo, M.D. testified that he is licensed to practice medicine in New York and is board certified in internal medicine and pulmonary diseases or disorders of the lungs. He has had attending privileges at Good Samaritan Hospital since 2005, and had some recollection of the decedent. On January 11, 20007, his service advised him that a request was made from the emergency room to conduct a pulmonary consult on the decedent. Usually, he stated, with an emergency room patient, he would see the patient as soon as possible, or call the emergency room physician to help determine how urgently he needed to be there. He believed he arrived about 1:00 p.m. and was apprised that the patient had shortness of breath and was hypoxic, and that pulmonary embolism was one of the diagnoses to be considered. He was also advised that the mediastinum appeared wide on one of the chest x-rays, and therefore, there was concern that there might be vascular bleeding in the nature of an aortic aneurysm, which needed to be ruled out. He continued that a pulmonary embolism is a blood clot in the pulmonary vasculature and is a potentially life threatening condition.

Dr. Khanijo indicated that the decedent was not a candidate for a CT angiogram with contrast due to the abnormal creatinine level and the high risk of kidney damage. He spoke to the radiologist, Dr. Pallen, and was advised by him that the risk to the kidneys from the contrast would be fairly high given the age of the patient and the creatinine level. He continued that Dr. Pallen suggested that they proceed with other tests, such as the VQ scan and MRI. Dr. Khanijo testified that his plan was to obtain a D-dimer, duplex of the left leg, and a VQ scan. He further stated that an MRI would be helpful to rule out an aortic aneurysm. He could not order Heparin at this time due to the bleeding concerns associated with an aortic aneurysm. He conveyed his plan to Dr. Margulies whose concern was that it would take

too much time to do those tests, and questioned whether the radiologist could be convinced to do a CT scan of the chest with contrast, as it is always a question of balancing the risks or advantages. He felt that a possible allergic reaction to the contrast could be managed with steroids and other things, in light of her shellfish allergy. Thereafter, he went to his office about 2:15-2:30 p.m. Before he left, he told the resident rotating with his group that the patient was critical, to keep a watch on things, and if anything changed, to let him know. Other than antibiotics and fluids, no other treatment was ordered at that time. He called North Shore Hospital from his office at about 4:00-5:00 p.m. concerning having an embolectomy performed on the decedent as a viable option, as the decedent was so dyspneic and tachycardic from a massive pulmonary embolism and right ventricular dysfunction. He felt that if he could get her there, she would have her best chance. Between 5:00 and 6:00 p.m., he returned to the hospital ICU where the decedent had been transferred. She was quite hypoxic and her PO2 was in the 50's. He spoke with the family and had the decedent transferred to North Shore to the service of Dr. Bronsky. She had already been started on Heparin and was administered tPA.

Jeffrey Margulies, M.D. testified that he has been employed full-time with Good Samaritan Hospital as an attending physician in emergency medicine since 2001, and as vice-chair of emergency medicine since 2007. He was board certified in internal medicine in 1978 and in emergency medicine in 1995. He remembered the decedent arriving at the emergency room at Good Samaritan on the morning of January 11, 2007. She was having difficulty breathing and he knew she would have to be admitted. Dr. Justin Greene, D.O., a resident who was working at the emergency room that day under his supervision, also examined the decedent. Dr. Margulies described his examination of the decedent, and set forth his findings and the treatment initiated at 9:45 a.m. He called her private attending physician, Dr. Mazzeo, at about 10:32 a.m., and received a call back about 10:50 a.m. from Dr. Joseph Terranova, to whom he recommended that the decedent be admitted. She was noted to have a history of allergy to shellfish and penicillin. She suffered from hypertension and anemia, and had been diagnosed with acute coronary syndrome. She also had cyanosis of her toes and fingers, along with labored breathing for about two months prior to this admission. Various blood work, a portable chest x-ray, EKG, and blood cultures, were obtained. A second chest x-ray was obtained at 10:42 a.m. and revealed a large hiatal hernia, but no evidence of infiltrates.

Dr. Margulies continued that once he discussed the patient with the attending, and the initial work-up has been agreed to, the attending has accepted the patient. If the patient is relatively stable and comfortable, then further evaluation and management of the patient is deferred to the attending., However, if the patient deteriorates dramatically, the patient is managed and observed by nursing, and is continued to be monitored. The monitor is watched by the monitor technician who informs nursing if there is any significant change. Since this was a monitored admission, it was his expectation that Dr. Terranova would be there within an hour. Two hours is the outside expectation. If the attending does not arrive within the hour, hospitalists are offered, consulting physicians are sought, or the chain of command to the chief of service is notified.

Dr. Margulies testified that he put another call out for Dr. Terranova at 12:30 p.m., as he had not come to see the decedent. Dr. Margulies continued that he advised Dr. Terranova at 12:58 that the decedent's lab tests were particularly abnormal, especially the kidney function tests, which presented difficulty proceeding with the CT scan. He further advised him of the possible need for a

renal/nephrology consult due to the danger of damage to the kidneys with the CT contrast. He stated that the CT scan protocol required that prior to administering an IV contrast during CT study, that an assessment must be conducted for renal function. Due to an elevation in creatinine and BUN levels, Dr. Margulies determined that the decedent was not to have the CT scan with contrast. He testified that if the patient is very unstable and rapidly deteriorating, he had the authority to make the decision of whether or not to have the CT with contrast conducted, using a risk/benefit assessment. He also had the authority to order the alternative testing, such as the MRI, VQ, doppler and D-dimer, which tests did not have risks, but were peripheral at best. He stated, however, those tests were not ordered until 2:14 p.m., after the consultants arrived. He continued that an MRI can establish the presence of an aneurysm or embolism, but a VQ scan cannot.

With regard to treatment for pulmonary embolism, Dr. Margulies testified that treatment can begin when there is a diagnosis. He continued that they did not have a diagnosis, and some things in the differential diagnosis, such as an aortic aneurysm, contraindicated the use of Heparin, as it would present bleeding concerns. He continued that a bedside echocardiogram is not considered an emergency department stat test and that it requires a cardiologist to request it; thus it was not ordered prior to the cardiologist seeing the decedent. When the cardiologist, Dr. Cokinos, conducted the echocardiogram at about 2:00 or 3:00 p.m., it steered the diagnosis as more probably pulmonary embolism rather than congestive failure. The cardiologist spoke with the radiologist and advised that the CT with contrast should be done. Heparin was thereafter started at 4:00 p.m. as the aneurysm was excluded at 3:40 p.m. with the CT with contrast. Dr. Margulies testified that prior to 4:00 p.m., there was nothing given that would help break up, mitigate, remove, or prevent the consequences of a pulmonary embolism, and the Heparin could not have been given earlier until the aneurysm was excluded. The decedent was transferred out of the emergency room to CCU at 16:51.

Douglas Silfen, M.D. testified to the extent that he is an interventional radiologist who performs various procedures using imaging guidance, but does not perform embolectomies. In 2007, he was employed by Good Samaritan Hospital as an attending radiologist. He was working during the day on January 11, 2007 while the decedent was a patient in the emergency room and the hospital. He was aware that she had a CT scan, but he did not interpret the images. After the CT scan was completed, he was asked by Dr. Margulies to perform an angio-type procedure known as an Angiojet, in the pulmonary artery, as the patient had a pulmonary emoblism. The hospital had the equipment to perform the procedure, but he did not have the training to perform the procedure in the pulmonary arteries. He had no conversation about the decedent with Dr. Terranova, or Dr. Cokinos, but did speak to Dr. Khanijo, the pulmonologist, and also advised him that he did not perform the Angiojet procedure. He did not speak with the patient's family and did not physically see the decedent.

Defendants' expert, Jerome Weiner, M.D. avers that he is chief medical officer at Good Samaritan Hospital Medical Center, where Rosemary Pizirusso was a patient on January 11, 2007. On that date, Dr. Terranova, Dr. Vinod Khanijo, and Dr. Cokinos were private attending physicians with privileges to admit patients to Good Samaritan Hospital. They were expected to follow the policies and procedures promulgated by Good Samaritan Hospital in connection with the care and treatment they each rendered to patients admitted there. He continued that Good Samaritan Hospital does not impose any control over the diagnosis, care, or treatment rendered by these physicians to their patients while

they are admitted to Good Samaritan Hospital. He did not opine as to whether each of the attending physicians acted in accordance with the accepted standard of care, or if they followed those policies and procedures promulgated by Good Samaritan Hospital.

Timothy Haydock, M.D. avers that he is a physician licensed to practice medicine in New York and is board certified in emergency medicine. He set forth his hospital affiliations and work experience, and the materials and records which he reviewed, and opines within a reasonable degree of medical certainty that Jeffrey Margulies, M.D. and Good Samaritan Hospital Medical Center, by its staff and employees, did not deviate from the accepted standard of care in the field of medicine in connection with the care and treatment rendered to the decedent, Rosemary Pizirusso.

Dr. Haydock set forth the decedent's history, and the fact that she was under the care of Dr. Mazzeo for routine medical treatment for over twenty years, and had last seen him about one month prior to her passing. She arrived by ambulance to Good Samaritan Hospital emergency room on January 11, 2007 at 9:44 a.m., and was seen by Dr. Greene at 10:25 a.m. Dr. Joseph Terranova, D.O. was covering for Dr. Mazzeo, the decedent's private attending physician, and agreed to admit the decedent as a monitored admission, meaning that she would require telemetry or ICU placement. He continued that the decedent continued to be monitored and observed while awaiting arrival of Dr. Terranova to the emergency department. Dr. Greene ordered an intravenous bolus of 500 ml normal saline to increase her cardiac output, and Albuterol was ordered in nebulizer form for three doses for her labored breathing. At 10:54 a.m., Dr. Jeffrey Margulies examined the decedent and noted her to be sitting in moderate respiratory distress. His differential diagnosis at 11:03 a.m. included anemia, aneurysm, acute coronary syndrome, congestive heart failure, cancer, hypothyroidism, chest mass, COPD/emphysema, and pulmonary embolism. Dr. Haydock stated that Dr. Terranova admitted the decedent to telemetry at 11:04 a.m, and pulmonary, cardiology, and vascular surgery consults were ordered by him, however, the decedent was not transferred to telemetry at that time. Dr. Cokinos was the cardiologist, and Dr. Khanijo was the pulmonologist.

Dr. Haydock opined within a reasonable degree of medical certainty that Dr. Margulies and the staff at Good Samaritan Hospital obtained an adequate, proper, and thorough history of the patient, as documented in the medical records and as testified to by the parties. Upon the decedent's arrival at Good Samaritan emergency room, the decedent's shortness of breath and tachypnea were appreciated, and she was promptly and properly diagnosed as having a pulmonary embolism. Proper steps were taken to address the shortness of breath via the administration of intravenous fluids, oxygen, Albuterol nebulizer, and testing and monitoring were conducted and documented. Dr. Haydock continued that Dr. Margulies and the hospital staff timely appreciated the blood gas testing results at 10:08 a.m., for which oxygen, IV fluids, and Abuterol were administered, and proper testing was ordered. Dr. Margulies timely called the decedent's primary care physician, Dr. Terranova at 10:50 a.m. at the request of the decedent's family. At that time, the diagnosis of pulmonary embolism or emboli had already been included in the differential diagnosis by Dr. Greene and Dr. Margulies, and that impression was conveyed to Dr. Terranova, who was then responsible for the overall management and care of the decedent.

Dr. Haydock opined that timely consultations with cardiology, internal medicine, radiology, and pulmonology were obtained, and the diagnosis of pulmonary embolism was timely made within one hour

of the decedent's arrival at Good Samaritan. However, Heparin was not administered at that time to treat the pulmonary emboli. Dr. Haydock continued that the ideal time to begin Heparin anticoagulation therapy is when the diagnosis of pulmonary embolism has been made, but the use of an anticoagulant was problematic in this instance because it was suspected that the decedent had an aortic aneurysm with a leak. Therefore, if she had a leaking aortic aneurysm, such anticoagulation would kill her. He continued that although Heparin was not given, proper supportive treatment was provided, the private attending was timely called and took over care and treatment of the decedent by 11:34 a.m., and the determination of how to proceed with treatment of the pulmonary embolism was in the hands of the private attending physician at that time.

Dr. Haydock opined that Dr. Margulies properly and timely ordered a CT scan with contrast to rule in or rule out pulmonary emboli, but the test was held pursuant to good and accepted medical practice pending blood test results for creatinine and BUN, and due to the advanced age of the decedent. Dr. Haydock continued that the plan was to obtain a D-dimer and duplex of the decedent's left leg, a VQ scan, and an MRI of the aorta, however, Dr. Margulies was concerned that performing these tests would take too much time, so he attempted to convince the radiologist to conduct the CT scan with contrast. Such testing with contrast material was additionally risky in that the decedent was not only allergic to shellfish, but also had elevated kidney function tests and the contrast could cause kidney damage. He continued that diagnostic imaging was suggestive of a possible aortic aneurysm and/or bleed, and Heparin or tPA, or other anticoagulant therapy was appropriately withheld until an aortic aneurysm was ruled out in that it could cause bleeding and death. When Dr. Cokinos saw the decedent on cardiology consult and ordered an echocardiogram, which was suggestive of pulmonary embolism, the diagnosis of pulmonary embolism moved up on the differential diagnosis possibilities, so the benefit of performing the CT scan of the chest with contrast outweighed the potential risk of kidney damage or failure from the contrast material used with the CT scan. Thus, stated Dr. Haydock, the CT scan with contrast was ordered after the proper examinations and diagnostic testing was done. Heparin therapy was then started after the aortic aneurysm was ruled out by the CT scan.

Dr. Haydock continued that when Dr. Khanijo, acting in conjunction with Dr. Terranova, arranged for transfer of the decedent, she was intubated and transported, and thus it cannot be said that Dr. Margulies and Good Samaritan Hospital did not fail to arrange for surgical evaluation for embolectomy and/or transferring her to another facility for treatment. Dr. Haydock opined that there is nothing that Dr. Margulies and Good Samaritan Hospital did or did not do that was a proximate cause of the decedent's death, and at all times, they acted within good and accepted standards of care.

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 opposing this motion, the plaintiff has submitted, inter alia, an attorney's affirmation; the affidavits of Bruce Pizirusso, Patricia Cardillo, Ernest Pizirusso, and plaintiff's expert. Ernest Pizirusso, Patricia Cardillo, and Bruce Pizirusso aver they first became aware that Dr. Terranova was treating their mother on January 11, 2007 at about 7:00 p.m., just prior to transferring her to North Shore University Hospital. Prior to that time, Dr. Margulies had been apprising them of their mother's care and treatment.

The plaintiff's expert, avers that he/she is licensed to practice medicine in Pennsylvania and is board certified in internal medicine, critical care, and pulmonology, and reviewed the hospital chart concerning the decedent's admission to Good Samaritan Hospital on January 11, 2007, as well as the affidavits of the moving defendants' experts. It is plaintiff's expert opinion based upon a reasonable degree of medical certainty that Dr. Margulies and the staff at Good Samaritan Hospital deviated from the accepted standards of care in connection with the care and treatment rendered to Rosemary Pizirusso while she was a patient in the hospital on January 11, 2007, and that the delay in diagnosing and timely treating her pulmonary embolism was a substantial contributing cause of her death.

The plaintiff's expert continues that upon the decedent's arrival at the emergency department at Good Samaritan Hospital, she was triaged, and was found to have difficulty breathing and a rapid heart beat. After having been seen and evaluated by Dr. Margulies and Dr. Greene, a treatment plan was formulated which included a chest x-ray, EKG, blood work, and arterial blood gases. Oxygen therapy was started. Dr. Margulies entertained a differential diagnosis which included, among other things, pulmonary embolism, which plaintiff's expert avers is a life-threatening condition which is required to be ruled in or out, immediately. The plaintiff's expert continued that time is of the essence, and the longer the delay in instituting treatment to either break up an existing clot or to prevent further clots from propagating, the more difficult the condition is to treat, and the more potentially life-threatening it becomes for the patient.

The plaintiff's expert opines that once Dr. Margulies evaluated the patient and considered and concluded a pulmonary embolism, the appropriate standard of care required an immediate CT scan with contrast, which should have been performed within the first hour of the decedent being evaluated by Dr. Margulies. The plaintiff's expert continued that in a situation as presented by the decedent, wherein she had an elevated BUN and creatinine, the risk of potential damage to her kidneys caused by the contrast material has to be weighed against the high probability of death in the event that the study is not undertaken. The CT with contrast was not performed on the decedent until 3:04 p.m., although she was admitted at 9:36 a.m. to the emergency room and Dr. Margulies had spoken with the attending, Dr. Terranova at 10:50 a.m. The delay in performing the CT with contrast represents a departure from the accepted standard of care and deprived the decedent of the reasonable opportunity to survive.

The plaintiff's expert further opines that there were other studies immediately available which could have, and should have, been performed which would have provided sufficient information leading to the diagnosis of a pulmonary embolism so that timely treatment could have been provided. Such treatment included a V-Q scan which has a high degree of sensitivity and specificity for pulmonary embolism, and D-dimer studies and duplex scanner, which can be performed without risk to the patient's kidneys. When these tests were recommended that morning by the radiologist, Dr. Pallen, they were not immediately performed or ordered by Dr. Margulies. The delays in ordering and/or performing any of these available diagnostic procedures denied the patient the opportunity to receive lytic or anticoagulant

treatment sooner. The plaintiff's expert further opines that only Dr. Cokinos, the cardiologist, recognized the severity of the patient's condition when he saw her at 2:26 p.m. and concluded that the decedent needed the CT scan with contrast immediately. The CT report indicated that Dr. Margulies was notified that the decedent had pulmonary emboli at 3:14 p.m., but there was then another delay of forty-five minutes by the hospital in administering Heparin, which delay was also a departure from the accepted standard of care.

The plaintiff's expert also stated that Dr. Margulies ordered Mucomyst orally for the decedent, which is evidence that he was still attending the decedent. At 4:00 p.m., Dr. Silfen advised Dr. Margulies that he was not trained to perform an angiojet procedure to dislodge the clot, and that it would have to be done at another facility. It was at that time that the patient should have been transferred to North Shore University Hospital if she was to have any hope of surviving, however, the hospital staff made no arrangements for transporting the decedent, and it was not until 6:55 p.m. that hospital staff called for an ambulance to effectuate transfer. The plaintiff's expert stated that the failure of the hospital to timely effectuate this transfer was a departure from the accepted standards of care. The decedent was pronounced dead shortly after arrival at North Shore University Hospital.

The plaintiff's expert concludes that in a medical emergency, such as was presented by the decedent, where a differential diagnosis of a life-threatening pulmonary embolism was made, all doctors treating the patient had a concurrent responsibility to ensure that the patient received appropriately timely care, even more so when the outside attending physician does not come to the hospital to attend the patient. It is apparent that Dr. Margulies was involved in many of the critical decisions during the decedent's stay in the emergency room, and his direct departures from accepted standards of care significantly contributed to the patient's likely preventable death, continued the plaintiff's expert. It is additionally averred by the plaintiff's expert that there were delays in instituting needed treatment, such as Heparin, tPA. If the patient does not respond to medical treatment, then surgical intervention is required. The aforementioned departures, stated the plaintiff's expert, deprived the decedent of a reasonable opportunity of survival.

Based upon the foregoing, it is determined that even if the defendants' evidentiary submissions were in admissible form, the plaintiff has raised factual issues which preclude summary judgment. The plaintiff's expert has clearly set forth departures from the accepted medical standards by the moving defendants and opines that such departures have deprived the decedent of a reasonable opportunity of survival.

Accordingly, motion (003) by defendants for summary judgment dismissing the complaint is denied.

Dated: March 13, 2012

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION

HON. JERRY GARGUILO