SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

EDWIN DAVIS and DIANNA DAVIS,

Plaintiffs,

- against -

SOUTH NASSAU COMMUNITIES HOSPITAL, REGINA E. HAMMOCK, DO, CHRISTINE DeLUCA, RPA-C and ISLAND MEDICAL PHYSICIANS, P.C.,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 1834/11
Motion Seq. Nos.: 01, 02, 03
Motion Dates: 02/14/12
02/14/12
03/13/12

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The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits	2
Affirmation in Opposition to Motion Seq. No. 01 and Seq. No. 02	3
Notice of Cross-Motion (Seq. No. 03), Affirmation and Exhibits	4
Affirmation in Opposition to Cross-Motion Seq. No. 03	5
Affirmation in Opposition to Cross-Motion Seq. No. 03	6
Reply Affirmation	7

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants Regina E. Hammock, DO ("Hammock"), Christine DeLuca, PA s/h/a/ Christine DeLuca, RPA-C ("DeLuca") and Island Medical Physicians, P.C. ("Island") move (Seq. No. 01), pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiffs' Verified Complaint with prejudice as said Verified Complaint fails to state a cause of action. Plaintiffs

oppose the motion.

Defendant South Nassau Communities Hospital ("South Nassau") cross-moves (Seq. No. 02), pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiffs' Verified Complaint with prejudice as said Verified Complaint fails to state a cause of action. Plaintiffs oppose the motion.

Plaintiffs cross-move (Seq. No. 03), pursuant to CPLR §§ 601, 602 and 1002, for an order consolidating the instant action, Action #3, with Action #1[1], filed by plaintiffs against Lorraine Walsh under Index No. 8405/09, and with the two actions filed by Lorraine Walsh, consolidated under Index No. 23966/09; and cross-move, pursuant to CPLR § 3025(b) for an order granting them leave to serve an amended complaint *nunc pro tunc* against the defendants in the instant action adding a cause of action for negligence. Defendants oppose the motion.

This action arises from medical care provided to non-party Lorraine A. Walsh at the emergency department of defendant South Nassau on March 4, 2009. Shortly after her discharge from the emergency department, after being treated with what plaintiffs characterize as potent narcotic medications, Ms. Walsh was involved in a motor vehicle accident with plaintiff Edwin Davis who was severely injured when the school bus he was operating was demolished in a head-on collision with the Walsh vehicle.

Plaintiffs allege that, immediately prior to the accident, Ms. Walsh was treated at defendant South Nassau's emergency room by defendants Hammock and DeLuca who

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[1]Action #1 was commenced by plaintiff against Lorraine A. Walsh, under Index No. 8405/09, on or about May 1, 2009. On or about November 16, 2009, Lorraine Walsh-Roman commenced an action against Regina E. Hammock, M.D., Robert Dean, M.D., Christine DeLuca, P.A., and South Nassau Communities Hospital under Index No. 23966/09. A separate action commenced by Lorraine Walsh-Roman against Island Medical Physicians in or about February 2011, under Index No. 2540/11, was consolidated with the prior Walsh-Roman action under Index No. 23966/09 by Order of the Hon. Steven M. Jaeger dated June 29, 2011.

administered Toradel 30 mg IV, Dilaudid .5mg IV and Ativan 15mg IV to the patient. According to plaintiffs, the emergency room record indicates that Ms. Walsh was given no warnings about operating a motor vehicle prior to her discharge. Nineteen minutes after her discharge from defendant South Nassau, Ms. Walsh, while allegedly cognitively impaired, drove her 2003 Ford automobile across the double yellow lines of West Merrick Road into the opposite lane of traffic and collided head on with the school bus operated by plaintiff Edwin Davis.

Plaintiffs allege that they were injured due to the malpractice of defendants in releasing Ms. Walsh from the emergency room of defendant South Nassau in an impaired and diminished cognitive and physical state caused by defendants' treatment, without allowing or permitting the effects of the medications administered to abate and without instructing the patient on the dangers of operating an automobile and/or without arranging a safe method of transportation for her. Plaintiffs argue that "no person given the medications that Ms. Walsh was administered can be allowed to blindly have her keys, get into a motor vehicle and operate same on a public roadway."

In the related consolidated action commenced by Lorraine Walsh against defendants herein, bearing Index No. 03966/09 (Action #2), Ms. Walsh alleges that defendants committed medical malpractice by 1) releasing her from defendant South Nassau in an impaired and drugged state; 2) failing to warn her of the driving related effects of the medication that had been administered to her and the foreseeable risks of operating a vehicle under the influence of said medications; and 3) failing to evaluate her ability to drive after she had received potent narcotic medications.

Defendants seek dismissal of the Verified Complaint, pursuant to CPLR § 3211(a)(7)

predicated on the grounds that, in the absence of a physician/patient relationship between plaintiffs and defendants, a cause of action for medical malpractice cannot be sustained. Moreover, in the absence of any duty owed by defendants to plaintiffs, a claim for negligent hiring against defendant Island [2] is not viable.

In assessing the adequacy of a complaint in light of a CPLR § 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept allegations as true and provide plaintiff with the benefit of every possible favorable inference. *See Landon v. Kroll Lab. Specialists, Inc.*, 91 A.D.3d 79, 934 N.Y.S.2d 183 (2d Dept. 2011).

In opposition to defendants' motion and cross-motion to dismiss the Verified Complaint, plaintiffs argue that a physician's duty of care is extended to third parties where the physician's services implicate the protection of identified persons foreseeably at risk. *See Tenuto v. Lederle Labs., Div. of Am. Cyanamid Co.,* 90 N.Y.2d 606, 665 N.Y.S.2d 17 (1997). Inasmuch as defendants allegedly transformed Ms. Walsh, the offending tortfeasor, into a cognitively and physically impaired individual and released her from defendant South Nassau without warning her of the driving related effects of the medication administered to her, plaintiffs argue that defendants breached a duty owed to the driving public. In short, plaintiffs contend that defendants are liable for the accident because they discharged Lorraine Walsh from defendant South Nassau in an impaired/diminished cognitive condition and failed to warn her of the hazards of driving in such condition.

Plaintiffs assert that a physician who administers or prescribes an intoxicating drug to a patient and is aware of its effects has a duty to the traveling public to warn the patient not to

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[2]Defendants DeLuca and Hammock were employed by defendant Island on the date in question.

drive while under the influence of the drug and not to discharge the patient without properly evaluating her ability to drive.

Under the circumstances of this case, the absence of a doctor/patient relationship between plaintiffs and defendants precludes a cause of action based on medical malpractice. The *sine qua non* of a medical malpractice claim is the existence of a doctor/patient relationship. It is this relationship which gives rise to the duty imposed on a doctor to properly treat his or her patient. In the absence of a doctor/patient relationship, plaintiffs' claim against defendants sounding in medical malpractice is legally insufficient. *See Fox v. Marshall*, 88 A.D.3d 131, 928 N.Y.S.2d 317 (2d Dept. 2011).

Plaintiffs have cross-moved to amend the Verified Complaint to add a cause of action sounding in common law/simple negligence.

The critical factor in distinguishing whether conduct may be deemed malpractice or negligence is the nature of the duty owed to plaintiff that the defendant is alleged to have breached. *See Spiegel v. Goldfarb*, 66 A.D.3d 873, 889 N.Y.S.2d 45 (2d Dept. 2009) *lv to appeal denied* 15 N.Y.3d 711, 910 N.Y.S.2d 36 (2010). A negligent act or omission by a health care provider that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes medical malpractice. *See Dupree v. Giugliano,* 87 A.D.3d 975, 929 N.Y.S.2d 305 (2d Dept. 2011). Where the gravamen of a complaint is not in negligence in furnishing medical treatment to a patient but in failing to fulfill a different duty, the claim sounds in negligence. *See Weiner v. Lenox Hill Hosp.*, 88 N.Y.2d 784, 650 N.Y.S.2d 629 (1996).

As an initial matter, the Court notes that leave to amend a pleading should be freely given absent prejudice or surprise resulting from the delay. *See* CPLR § 3025(b). While the decision to

grant or deny the requested relief is left to the sound discretion of the court (*see Gitlin v. Chirinkin*, 60 A.D.3d 901, 875 N.Y.S.2d 585 (2d Dept. 2009)), the relief need not be granted where the proposed amendment is palpably lacking in merit. *See Jenal v. Brown*, 80 A.D.3d 727, 916 N.Y.S.2d 780 (2d Dept. 2011). In considering a motion for leave to amend, it is incumbent on the court to examine the sufficiency and merits of the proposed amendment. *See Moyse v. Wagner*, 66 A.D.3d 976, 888 N.Y.S.2d 148 (2d Dept. 2009).

To sustain a cause of action alleging negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty and that the breach of such duty was a proximate cause of plaintiff's injuries. *See Mojica v. Gannett Co., Inc.*, 71 A.D.3d 963, 897 N.Y.S.2d 212 (2d Dept. 2010). Absent a duty of care, there is no breach and no liability. *See Schindler v. Ahearn*, 69 A.D.3d 837, 894 N.Y.S.2d 462 (2d Dept. 2010).

The threshold question in tort cases in determining liability is, therefore, whether the alleged tortfeasor owed a duty of care to the injured party. *See Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002). That question is a legal one for the court to resolve. Foreseeability of injury does not determine the existence of duty. *See Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 492 N.Y.S.2d 555 (1985). Questions about legal duty are resolved by resorting to "concepts of morality, logic and consideration of the social consequences of imposing the duty." *See Tenuto v. Lederle Laboratories, supra* at 612.

Assuming for present purposes that the allegations of the Verified Complaint are true and defendants should have advised Lorraine Walsh not to drive immediately upon her discharge from the hospital, not *all* mistakes result in liability (emphasis added). The crucial issue is whether the defendants owed plaintiffs a duty of care. Here, in the absence of a physician/patient relationship between plaintiffs and defendant health care providers, plaintiffs propose an

expansion of the concept of the duty owed by a physician arising from the physician/patient relationship to encompass a new category which is the protection of third parties.

With respect to the proposed negligence claims, plaintiffs argue that Ms. Walsh's operation of an automobile while impaired presented a foreseeable risk of harm to travelers on the road. For the most part, there is no duty in tort law to control the conduct of a third person so as to prevent them from causing physical harm to another even where, as practical matter, the defendant could have exercised such control. *See Citera v. County of Suffolk*, 95 A.D.3d 1255, 945 N.Y.S.2d 375 (2d Dept. 2012).

As a general matter, a doctor only owes a duty of care to his or her patients. Courts have been reluctant to expand the duty owed by a doctor to his or her patient to encompass non-patients. To do so would render doctors potentially liable to a prohibitive member of possible plaintiffs. *See McNulty v. City of New York*, 100 N.Y.2d 227, 762 N.Y.S.2d 12 (2003). A doctor's duty can, however, in limited circumstances, encompass non-patients who have a special relationship with either the physician or patient. *See Klein v. Bialer*, 72 A.D.3d 744, 899 N.Y.S.2d 297 (2d Dept. 2010).

Plaintiffs aver that defendants created a special relationship between themselves and plaintiffs by causing Lorriaine Walsh's medical intoxication and recklessly discharging her without warning her of the danger of driving in her impaired condition.

The Court finds no special relationship here that would warrant extending to non-patient plaintiffs the duty owed by defendants to their patient, Lorraine Walsh. Plaintiffs have failed to raise a triable issue of fact as to the duty owed by defendants to plaintiffs or whether a special relationship existed between them. In the absence of duty, there is no breach and, therefore, no liability in negligence.

As recognized by the Court of Appeals in *Tenuto v. Lederle Labs., Div. of Am. Cyanamid Co., supra*, the question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is a question of law for the courts. Where there is a relationship between a defendant and a third person whose actions expose plaintiff to harm, such as would require the defendant to attempt to control the third person's conduct, a defendant would have a duty to protect the plaintiff. *See Purdy v. Public Adm'r of County of Westchester*, 72 N.Y.2d 1, 530 N.Y.S.2d 513 (1988). While the Court in *Tenuto* found, under the circumstances of that case, that a duty of reasonable care extended to the parents of an infant to whom oral polio vaccine was administered, despite the absence of a doctor/patient treatment relationship between the parents[3] and defendant pediatrician, no such special or familial relationship exists here on which to ground liability.

In the absence of a special relationship between plaintiffs and defendants and no direct duty owed by defendants to plaintiffs, there is no basis to amend the Verified Complaint to add a cause of action for negligence. "A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." *See DeAngelis v. Lutheran Med. Ctr.*, 58 N.Y.2d 1053, 462 N.Y.S.2d 626 (1983). Although, in limited circumstances, a physician's duty of care has been extended to a patient's family members, courts have been extremely circumspect even in so doing.

Accordingly, defendants Hammock, DeLuca, and Island's motion (Seq. No. 01), pursuant

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[3]In caring for his infant daughter following elective surgery, plaintiff father was exposed to virulent polio viruses and contracted the disease. Defendant physician had failed to warn plaintiff parents of the dangers of the vaccine as recommended by the manufacturer and government officials.

to CPLR § 3211(a)(7), for an order dismissing plaintiffs' Verified Complaint with prejudice as said Verified Complaint fails to state a cause of action is hereby **GRANTED**.

Defendant South Nassau's cross-motion (Seq. No. 02), pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiffs' Verified Complaint with prejudice as said Verified Complaint fails to state a cause of action is also hereby **GRANTED**.

Plaintiffs' cross-motion (Seq. No. 03), pursuant to CPLR §§ 601, 602 and 1002, for an order consolidating the instant action, Action #3, with Action #1, filed by plaintiffs against Lorraine Walsh under Index No. 8405/09, and with the two actions filed by Lorraine Walsh, consolidated under Index No. 23966/09; and cross-motion, pursuant to CPLR § 3025(b) for an order granting plaintiffs leave to serve an amended complaint *nunc pro tunc* against the defendants in the instant action adding a cause of action for negligence is hereby **DENIED**.

This constitutes the Decision and Order of the Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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ENTERED
JUL 12 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
July 10, 2012