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SHORT FORM ORDER

COPY

INDEX No. 07-36337
CAL. No. 11-00501MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 7-13-11 (#004)
MOTION DATE 8-23-11 (#005)
MOTION DATE 8-12-11 (#006)
ADJ. DATE 11-15-11
Mot. Seq. # 004 - MG
005 - XMG
006 - XMD; ~~CASEDISP~~

JOSEPH FORTE, Individually, and as the Executor of the Estate of CONCETTA FORTE, Deceased,

Plaintiff,

- against -

DANIEL HAROLD YELLON, M.D., QUEENS-LONG ISLAND MEDICAL GROUP, P.C., ASHFAQ SWAPAN HUSSAIN, M.D., LONG ISLAND NEPHROLOGY CONSULTANT, P.C., NAND KISHORE WADHWA, M.D., ROBERT C. REILLY, M.D., JAMES PENNA, M.D., YEN-YING WU, M.D. and WILLIAMS CLEAVER, M.D,

Defendants.

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Upon the following papers numbered 1 to 74 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 46; 67 - 74; Notice of Cross Motion and supporting papers 47 - 54; Answering Affidavits and supporting papers 55 - 59; Replying Affidavits and supporting papers 60 - 61; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by the defendants Daniel Yellon, M.D., Nand Wadhwa, M.D., Robert Reilly, M.D., and James Penna, M.D., seeking summary judgment dismissing the complaint, the cross motion (#005) by the defendants William Cleaver, M..D., and Yen-Ying Wu, M.D., seeking summary

judgment dismissing the complaint, and the motion (#006) by the defendants Ashfaq Hussain, M.D., and Long Island Nephrology Consultant, P.C., seeking summary judgment dismissing the complaint hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by the defendants Nand Wadhwa, M.D., Robert Reilly, M.D., and James Penna, M.D., seeking summary judgment dismissing the complaint is granted; and it is

ORDERED that the cross motion by the defendant William Cleaver, M..D., and Yen-Ying Wu, M.D., seeking summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion by the defendants Ashfaq Hussain, M.D., and Long Island Nephrology Consultant, P.C., seeking summary judgment dismissing the complaint is granted and it is further

ORDERED that the motion by David Yellon, M.D., seeking summary judgment dismissing the complaint is denied.

The plaintiff Joseph Forte, individually and as Executor of the Estate of Concetta Forte, commenced this action against the defendants Daniel Yellon, M.D., Queens-Long Island Medical Group, P.C., Ashfaq Hussain, M.D., Long Island Nephrology Consultants, P.C., Nand Wadhwa, M.D., Robert Reilly, M.D., James Penna, M.D., Yen-Ying Wu, M.D., and William Cleaver, M.D., to recover damages for medical malpractice, lack of informed consent and wrongful death.[1] The plaintiff alleges that the defendants failed to properly diagnose and timely treat the decedent's acute renal failure and respiratory failure; failed to timely perform the appropriate diagnostic studies; and failed to properly prevent the decedent from suffering a cardiopulmonary arrest. The plaintiff also alleges that the defendants failed to obtain informed consent prior to rendering treatment or performing procedures on the decedent.

On January 19, 2007, plaintiff's decedent, Concetta Forte, was admitted into Stony Brook University Hospital (hereinafter referred to as "Stony Brook") and underwent elective left shoulder arthroplasty surgery, performed by Dr. Penna. Her medical history was significant for hypertension, chronic obstructive pulmonary disease ("COPD"), anxiety and pain medication addiction. During the surgery, Mrs. Forte became hypotensive and oliguric, and required the intravenous administration of Neo-Synephrine. Following the procedure, Mrs. Forte was transferred in stable condition to the care of the orthopedic service for further monitoring and treatment. On January 20, 2007, Mrs. Forte began experiencing shortness of breath, which resulted in her status being closely monitored and the discontinuation of a patient controlled pain ("PCP") medication pump. As a result, Dr. Penna requested consults from the medical and nephrology departments.

On January 21, 2007, Dr. Reilly performed a medical consult, and noticed that Mrs. Forte showed signs of renal failure. As a result of his observations, Dr. Reilly indicated in his consultation report that Mrs. Forte required close monitoring, that she was experiencing a transient ischemic insult, which had occurred during the operation, and that she probably was experiencing acute tubular necrosis ("ATN"). On January 22, 2007, Dr. Wadhwa examined Mrs. Forte as a nephrology consult to the orthopedic service, and

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[1] The action against defendant Queens-Long Island Medical Group, P.C., was discontinued by a stipulation of discontinuance dated August 31, 2009.

he diagnosed Mrs. Forte as suffering from acute renal failure secondary to possible prerenal azotemia, ATN, obstruction of the urinary tract, and hyponatremia. Dr. Wadhwa ordered normal saline intravenous ("IV") fluids, restricted Mrs. Forte's fluid intake, especially water, and optimized her diet, including adding sodium to her diet. Dr. Wadhwa also ordered laboratory tests, including metabolic panels and urinalysis, and monitoring of her input and output. On January 23, 2007, Dr. Wadhwa examined Mrs. Forte once again, and determined that her ATN had not resolved, although her hyponatremia was resolved, and that she was euvolemic and ischemic. Dr. Wadhwa noted that even though Mrs. Forte's urine output was normal, she was exhibiting signs of anemia. Therefore, he recommended the performance of a guaiac stool test to check for "occult blood" and rule out gastrointestinal bleeding. Thereafter, Mrs. Forte's family requested a second opinion from Dr. Hussain, a private nephrologist.

Later that day, Mrs. Forte was examined by Dr. Hussain. At the time of the examination, Mrs. Forte only complained of shoulder pain. Dr. Hussain noted that Mrs. Forte was a smoker, and had a history of hypertension, acute renal failure, hysterectomy, cholecystectomy, spinal surgery, and COPD. Dr. Hussain observed that she was alert, with a normal blood pressure, heart rate, and temperature. He diagnosed her as suffering from acute renal failure most likely due to ATN, and determined that her hyponatremia most likely was related to hypotonic IV fluids. He also observed that the renal failure was causing metabolic acidosis, but that dialysis was not required. Dr. Hussain recommended avoidance of medications that would exacerbate the condition, monitoring her intake and output, check spot urine for sodium and creatinine to rule out prerenal azotemia as the cause of her acute renal failure, and the consideration of a blood transfusion if the anemia worsened.

On January 24, 2007, Mrs. Forte was transferred from the orthopedic service to Medical Team G for continued treatment of her acute renal failure. Dr. Yellon was the attending physician for Team G, which also included Dr. Cleaver, a first-year daytime resident, Dr. Wu, a first-year nighttime resident, and Dr. Dmitry Ilyevsky, a senior resident. Upon her transfer to Team G, Dr. Yellon performed a physical examination of Mrs. Forte and obtained her medical history. After Dr. Cleaver consulted with Dr. Yellon, he wrote orders for a tap water enema and stool softeners to treat Mrs. Forte's constipation. Thereafter, at approximately 2:00 p.m., Dr. Hussain examined Mrs. Forte and observed that she had some abdominal distention, even though her renal function was stable. Dr. Hussain then ordered that her IV fluids be reduced and, if needed, a daily low-dose calcium channel blocker be administered to treat her hypertension. Dr. Hussain also recommended an abdominal x-ray and surgical evaluation be considered if Mrs. Forte did not have a bowel movement and her distention worsened. At approximately 3:30 p.m., Mrs. Forte's heart rate and blood pressure were observed to be elevated, and Dr. Yellon ordered the administration of Clonidine and Lopressor to treat those conditions. Dr. Yellon left the hospital between 5:30 p.m. and 6:00 p.m., and was not notified of any significant change in Mrs. Forte's condition or any difficulty in managing her care.

At approximately 7:00 p.m., Dr. Cleaver's shift ended, but prior to leaving he wrote an order for a stool guaiac test. After his shift ended, Dr. Cleaver did not have any further contact with Mrs. Forte. At approximately 9:26 p.m., Dr. Wu and a third-year resident, Dr. Mary Allison, conducted a history and physical examination of Mrs. Forte. Dr. Wu and Dr. Allison observed that Mrs. Forte's shoulder pain was causing her to take shallow breaths and that it was possibly having an affect on her respiratory status. As a result of the examination, Dr. Allison ordered a work-up to rule out myocardial infarction and pulmonary embolism, and prescribed Lopressor, Albuterol and Atrovent every four hours or as needed, and a

nitroglycerine patch. Dr. Wu drafted the orders for the tests and the medications. A chest x-ray revealed that there was some fluid congestion, atelectasis and air entrapment, and resulted in Dr. Allison prescribing Morphine and Haldol to treat Mrs. Forte's anxiety. The results of the cardiac enzyme test, Troponin I, and the electrocardiogram ("EKG") were negative, and did not reveal any evidence of cardiac muscle damage consistent with a heart attack. In addition, the results of the arterial blood gas ("ABG") test revealed that despite Mrs. Forte's tachypnea, she did not have severe respiratory acidosis or dysfunction. However, the ABG did show that she had metabolic acidosis.

On January 25, 2007, at approximately 12:30 a.m., a respiratory treatment was administered to treat Mrs. Forte's shortness of breath. At approximately 1:17 a.m., an abdominal x-ray demonstrated that Mrs. Forte had a nonspecific finding of gas distending her abdomen, colon and small bowel, but was not suggestive of an obstruction. As a result of these findings, Dr. Wu wrote orders for additional laboratory testing to be performed later that morning. At approximately 2:20 a.m., Mrs. Forte suffered a sudden cardiac event, and after unsuccessful resuscitation efforts, she passed away.

Later that day, Dr. Yuri Takhalov performed a postmortem autopsy on Mrs. Forte at Stony Brook. The autopsy concluded that Mrs. Forte's cause of death was cardiac arrhythmia and no anatomic evidence related to the cause of death was identified. The report also stated that there was no atheromatous change or thrombi in the coronary arteries; that there was no thrombi in the pulmonary artery or intrapulmonary vessels; that the kidneys showed mild arteriolar nephrosclerosis; and that there was no evidence of acute tubular necrosis.

Drs. Daniel Yellon, Nand Wadhwa, Robert Reilly, and James Penna (hereinafter collectively referred to as the "Yellon defendants") now move for summary judgment in their favor, arguing that the plaintiff is unable to establish a prima facie case that they departed from accepted standards of medical care in their treatment of the decedent, and that their treatment proximately caused the decedent's injuries. In support of the motion, the Yellon defendants submit copies of the pleadings, their own affidavits, and uncertified copies of the decedent's medical records. Ashfaq Hussain, M.D., Long Island Nephrology Consultants, P.C. (hereinafter collectively referred to as the "Hussain defendants") also move for summary judgment on the grounds that they did not depart from acceptable medical practice in their treatment of the decedent, and that their treatment of the plaintiff's decedent was not a proximate cause of her injuries. In support of their motion, the Hussain defendants submit copies of the pleadings, the affirmation of their expert, Lionel Barrau, M.D., uncertified copies of the plaintiff's decedent's medical records, and the parties' deposition transcripts. Dr. Cleaver and Dr. Wu (hereinafter referred to as the "Cleaver defendants") cross-move for summary on the bases that as first-year resident physicians they did not make any independent medical decisions regarding the treatment and care of the plaintiff's decedent, and that they were not required to intervene, because their supervising physicians' treatment plans were appropriate and within accepted medical practice. In support of their cross motion, the Cleaver defendants submit copies of the pleadings, the parties' deposition transcripts, their own affidavits, and the affidavit of their expert, Gerald Bahr, M.D. The Cleaver defendants also submit uncertified copies of the plaintiff's decedent's medical records and the autopsy report.

The plaintiff does not oppose the motions made by the Hussain defendants or the Cleaver defendants. He also does not oppose the application for summary judgment in favor of Drs. Wadhwa, Reilly and Penna. The plaintiff, however, opposes the branch of the motion by the Yellon defendants

seeking summary judgment in favor of Dr. Yellon on the grounds that there are triable issues of fact as to whether Dr. Yellon deviated from the applicable medical standard of care in rendering treatment to the plaintiff's decedent, and whether that deviation was the proximate cause of her death. In opposition to the motion, the plaintiff submits the redacted and unsigned affidavit of his expert, the certified medical records of the plaintiff's decedent, and Dr. Yellon's deposition transcript.

A physician owes a duty of reasonable care to his patients and will generally be insulated from liability where there is evidence that he conformed to the acceptable standard of care and practice (*see* ***Spensieri v Lasky***, 94 NY2d 231, 701 NYS2d 689 [1999]; ***Barrett v Hudson Valley Cardiovascular Assoc., P.C.***, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]). However, a doctor is not a guarantor of a correct diagnosis or a successful treatment, nor is a doctor liable for a mere error in judgment if he or she has considered the patient's best interest after careful evaluation (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Oelsner v State of New York***, 66 NY2d 636, 495 NYS2d 359 [1985]; ***Bernard v Block***, 176 AD2d 843, 575 NYS2d 506 [2d Dept 1991]). To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant's treatment of the patient and that the defendant was not the proximate cause of the plaintiff's injuries (*see* ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***Deutsch v Chaglassian***, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; ***Plato v Guneratne***, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; ***Jones v Ricciardelli***, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; ***Mendez v City of New York***, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). Where the defendant has met that burden, the plaintiff, in opposition, must submit a physician's affidavit of merit attesting to a departure or deviation from acceptable medical practice and attesting to the fact that the departure or deviation was a competent cause of the injuries sustained by the plaintiff (*see* ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; ***Arkin v Resnick***, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]; ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; ***Johnson v Queens-Long Is. Group***, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]; ***Dellacone v Dorf***, 5 AD3d 625, 774 NYS2d 776 [2d Dept 2005]; ***Domaradzki v Glen Cove Ob/Gyn Assoc.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (*see* ***Arkin v Resnick***, *supra*; ***Dolan v Halpern***, 73 AD3d 1117, 902 NYS2d 585 [2d Dept 2010]; ***Holbrook v United Hosp. Med. Ctr.***, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

Additionally, to succeed on a cause of action based on lack of informed consent, a plaintiff must establish that the doctor failed to disclose the reasonably foreseeable risks, benefits, and alternatives to the surgery that a doctor in a similar circumstance would have disclosed; that a reasonably prudent person in the plaintiff's position would not have undergone the surgery if he or she had been fully informed of the reasonable foreseeable risks, benefits, and alternatives to the surgery; and that the lack of informed consent is a proximate cause of the injury sustained (*see* Public Health Law § 2805-d; ***James v Greenberg***, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]; ***Innucci v Bauersachs***, 201 AD2d 460, 607 NYS2d 130 [2d Dept 1994]).

In his affidavit, Dr. Yellon asserts that he is a board certified physician in internal medicine and an

assistant professor in clinical medicine at Stony Brook. He states that in January 2007, he was the attending physician on Team G, and that his team was called in to render care to Concetta Forte on January 24, 2007, five days after a recent surgery. Dr. Yellon states that he was advised the patient was being transferred to his team for continued care for acute renal failure, that she had a history of COPD and anxiety disorder, and that she was "being followed by a private nephrology service." Dr. Yellon asserts that he initially examined the patient at approximately 3:00 p.m., and that the resident on his team, Dr. Cleaver, wrote an acceptance note following the physical examination, but that he was unable to attest to the note, because he left the hospital before the note was written. Dr. Yellon asserts that the nursing staff, at approximately 3:30 p.m., informed him that the patient's blood pressure and heart rate were elevated. In response, he states that he ordered Clonidine and Lopressor stat to lower her blood pressure and heart rate. He states that he understood that Lopressor was contraindicated for a person with COPD, but that under the circumstances it was the best medication for her at the time. Dr. Yellon states that he did not have any additional contact with Mrs. Forte prior to her passing away, because he left the hospital between 5:30 p.m. and 6:00 p.m. Dr. Yellon states that on January 25, 2007, he received a phone call from Dr. Cleaver informing him that Mrs. Forte had a sudden cardiac arrest, and that attempts to resuscitate her were unsuccessful. According to Dr. Yellon, following his departure from the hospital, Mrs. Forte's signs, symptoms, and complaints were all appropriately monitored and addressed via medication, and that if there were any concerns regarding Mrs. Forte's respiratory status, the nursing staff would have informed him. Dr. Yellon states that when he examined Mrs. Forte, her respiratory rate was 20, which was within normal limits, especially since she was anxious, and that intubation was not necessary. According to Dr. Yellon, Mrs. Forte's diuretic concerns were to be determined by her private nephrologist, but that her input and output were properly monitored and treated. Dr. Yellon concludes that while Mrs. Forte was under his care, all appropriate and necessary lab tests were ordered and interpreted, that the care and treatment that he rendered to Mrs. Forte was at all times within the applicable standard of care, and that he did not depart or deviate from said standard of care.

In his affidavit, Dr. Wadhwa states that he is board certified in internal medicine and nephrology, and that he is a professor of medicine and Director of Dialysis at Stony Brook. Dr. Wadhwa states, within a reasonable degree of medical certainty, that the care and treatment that he rendered to the plaintiff's decedent did not depart from good and acceptable medical standard of care, and that his actions were not the proximate cause of Mrs. Forte's death. Dr. Wadhwa states that he initially treated Mrs. Forte as a nephrology consult to the orthopedic service on January 22, 2007, and that she was suffering from acute renal failure and hyponatremia. Dr. Wadhwa states that he reviewed her charts, signs and symptoms, and lab results, and formulated a differential diagnosis, which included acute renal failure secondary to possible prerenal azotemia, ATN, and obstruction to urinary tract. Dr. Wadhwa opines that he ordered IV fluids and optimized her diet, since she was hyponatremic, and that he ordered the appropriate laboratory tests, including metabolic panels and urinalysis. Dr. Wadhwa states that when he treated Mrs. Forte the following day, he believed she had become euvolemic and recommended the placement of a catheter. However, after assessing her urine output, he decided against inserting a Foley catheter. He also observed that her hyponatremia had resolved. Dr. Wadhwa explained that he did not treat Mrs. Forte after January 24th, because her family requested the services of a private nephrologist, Dr. Hussain. Dr. Wadhwa opines that during the course of his treatment of the plaintiff's decedent, he properly examined her medical chart and patient history, monitored and treated her complaints, and documented his care and treatment.

In his affidavit, Dr. Penna states that he is an orthopedist, and that he is the residency program

director in the Department of Orthopedics and an assistant professor of orthopedics at Stony Brook. Dr. Penna states that he is fully familiar with the applicable medical standard of care, and that in his opinion, within in a reasonable degree of medical certainty, the care he rendered to the plaintiff's decedent met the applicable standard of care. Dr. Penna states that on January 19, 2007, he performed a left shoulder resurfacing procedure with lateral meniscal allograft for glenoid on the decedent. He explains that prior to the surgery Mrs. Forte was medically cleared and specifically was warned about all risks associated with the surgery, including bleeding, scarring, anesthetic complications, and death. Dr. Penna states that Mrs. Forte became hypotensive during the surgery and Neo-Synephrine was administered. He states that the surgery was uneventful, and that following the surgery Mrs. Forte was awake, alert and stable. Dr. Penna states that she was transferred to a medical team in stable condition for further monitoring and treatment, and that he followed up with her the next day and reviewed her plan of care. Dr. Penna asserts that during his follow-up, Mrs. Forte was stable, and her pain was noted to be between 0-3 on a 10-point scale. However, later that day, her pain worsened, and other medical providers were called in to address her increased pain. Dr. Penna opines that the plaintiff's decedent was appropriately monitored and treated for her complaints during and after the surgery, and that he wrote appropriate notes detailing the medical care he provided to her, including the operative report. Dr. Penna states that Mrs. Forte was properly assessed and cleared one month before the surgery, and that prior to the surgery she was re-examined and monitored. Dr. Penna explains that prior to the surgery all risks were made known to the patient, that she was informed of alternative treatments, and that a properly executed consent form was obtained prior to the surgery. Dr. Penna further states that the plaintiff's decedent was properly monitored by medical consults and the medical team that treated her post-operative hypertensive crisis. Dr. Penna concludes that all signs and symptoms of the plaintiff's decedent's decrease in sodium protein and potassium levels were appropriately monitored and addressed, and that she was timely transferred from his care following the surgery and placed in the care of a medical team.

In his affidavit, Dr. Reilly states that he is board certified in internal medicine, and that he is the associate director of the Internal Medicine Residency Program at Stony Brook. Dr. Reilly states that based upon his review of the materials and his personal experience, in his opinion, within a reasonable degree of medical certainty, that the care and treatment that he rendered to the plaintiff's decedent met the applicable medical standard of care and was not a proximate cause of her death. Dr. Reilly states that he was the attending physician on a medical consult for Mrs. Forte on January 21, 2007, which occurred approximately two days after her surgery. He states that Mrs. Forte exhibited signs of renal failure, and that medical and nephrology consults were called. Dr. Reilly states that he noted Mrs. Forte needed to be closely monitored in order to assess her signs and symptoms, and that his involvement with her treatment ended on January 24, 2007, when he spoke with Dr. Yellon during her transfer to Medical Team G. Dr. Reilly states that he performed a proper history and physical examination of the patient when he conducted his medical consult, and that she was properly monitored and treated for her complaints. Dr. Reilly further states that he wrote appropriate notes in Mrs. Forte's chart, detailing the medical care that he rendered to her, that he formulated a differential diagnosis of acute renal failure, and that he properly addressed her signs and symptoms. Dr. Reilly opines that Mrs. Forte's vitals signs were regularly monitored, and that during his treatment of her, her blood pressure was within normal range. Dr. Reilly concludes that the plaintiff's decedent, in accordance with his recommendation, was timely transferred to a medical team when her renal failure did not improve.

Here, the defendants Wadhwa, Penna and Reilly have established their prima facie burden of

entitlement to judgment as a matter of law by proffering their own deposition testimonies and their own affidavits, in which they opined, to a reasonable degree of medical certainty, that the care and treatment that each provided to the plaintiff's decedent did not depart from good and accepted medical practice (*see* ***Belak-Redl v Bollengier***, 74 AD3d 1110, 903 NYS2d 508 [2d Dept 2010]; ***Tuorto v Jadali***, 62 AD3d 784, 878 NYS2d 457 [2d Dept 2009]). The testimony of an interested defendant justifying his own conduct naturally carries less weight than an independent expert's opinion that the conduct was reasonable (*see* ***Gallo v Linkow***, 255 AD2d 113, 679 NYS2d 377 [1st Dept 1998]). However, where a defendant physician's affidavit is detailed, specific and factual in nature, and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care, it may be sufficient to establish summary judgment in favor of such physician (*see* ***Toomey v Adirondack Surgical Assoc.***, 280 AD2d 754, 720 NYS2d 229 [3d Dept 2001]). In this instance, each defendant's affidavit was detailed, specific, and factual in nature indicating that their treatment of the plaintiff's decedent did not depart from good and accepted medical practice, and that their treatment was not a proximate cause of the plaintiff decedent's death (*see e.g.* ***Ramirez v Cruz***, 92 AD3d 533, 938 NYS2d 540 [1st Dept 2012]; ***Joyner-Pack v Sykes***, 54 AD3d 727, 729, 864 NYS2d 447 [2d Dept 2008]; ***Thomas v Richie***, 8 AD3d 363, 364, 777 NYS2d 758 [2d Dept 2004]).

Likewise, the Hussain defendants have established their prima facie entitlement to judgment as a matter of law by submitting an affidavit from Dr. Lionel Barrau, a board certified nephrologist and internist, which demonstrated that the care and treatment rendered to the plaintiff's decedent did not deviate or depart from good and acceptable medical care, and that their treatment of the plaintiff's decedent was not the proximate cause of her death (*see* ***Muniz v Mount Sinai Hosp. of Queens***, 91 AD3d 612 [2d Dept 2012]; ***Ellis v Eng***, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]; ***Adjetey v New York City Health & Hosps. Corp.***, 63 AD3d 865, 881 NYS2d 472 [2d Dept 2009]). Dr. Barrau states that in his opinion, within a reasonable degree of medical certainty, the Hussain defendants, at all times, acted within the appropriate standard of care in providing care and treatment to the plaintiff's decedent, and that no act or omission on the Hussain defendants' behalf contributed or proximately caused the plaintiff's decedent's injuries. Dr. Barrau further states that at no point during the Hussain defendants' treatment of Mrs. Forte was there ever a need for dialysis, since she never became uremic, and her electrolytes were properly and promptly corrected. Dr. Barrau explains that Dr. Hussain was not consulted to manage the patient's hypertensive condition or her difficulty breathing, which was handled by the orthopedic group and Medical Team G, and that Dr. Hussain was not contacted by any nurse or physician regarding Mrs. Forte's hypertensive condition or breathing difficulty. Dr. Barrau concludes that Dr. Hussain provided the plaintiff's decedent with appropriate and proper renal care after he was requested to provide a nephrology consult for post-operative acute renal failure with hyponatremia.

In addition, the Cleaver defendants have met their prima facie burden establishing their entitlement to judgment as a matter of law by demonstrating that at the time of the plaintiff's decedent's hospitalization and subsequent passing, they were first-year residents working at Stony Brook on Medical Team G (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d [1986]). When supervised medical personnel are not exercising their independent medical judgment, they cannot be held liable for medical malpractice unless the directions from the supervising superior or doctor so greatly deviates from normal medical practice that they should be held liable for failing to intervene (***Bellafiore v Ricotta***, 83 AD3d 632, 633, 920 NYS2d 373 [2d Dept 2011]; *see* ***Crawford v Sorkin***, 41 AD3d 278, 839 NYS2d 40 [1st Dept 2007]; ***Soto v Andaz***, 8 AD3d 470, 779 NYS2d 104 [2d Dept 2004]). The Cleaver defendants proffered evidence showing that they

implemented treatment plans created by their attending physician and senior residents that were not "'so clearly contraindicated by normal practice that ordinary prudence require[d] inquiry into these plans' 'correctness'" (***Costello v Kirmani***, 54 AD3d 656, 657, 863 NYS2d 262 [2d Dept 2008], *quoting* ***Cook v Reisner***, 295 AD2d 466, 467, 744 NYS2d 426 [2d Dept 2002]; *see* ***Bellafiore v Ricotta***, *supra*; ***Muniz v Katlowitz***, 49 AD3d 511, 856 NYS2d 120 [2d Dept 2008]; ***Velez v Goldenberg***, 29 AD3d 780, 815 NYS2d 205 [2d Dept 2006]; ***Roseingrave v Massapequa Gen. Hosp.***, 298 AD2d 377, 751 NYS2d 218 [2d Dept 2002]; *cf.* ***Pearce v Klein***, 293 AD2d 593, 741 NYS2d 89 [2d Dept 2002]). Furthermore, in his affidavit, Dr. Gerald Bahr states that he is board certified in internal medicine and critical care medicine, and that in his opinion, within a reasonable degree of medical certainty, Dr. Cleaver and Dr. Wu, while working under the supervision and direction of senior residents and attending physicians, provided good and proper medical care to the plaintiff's decedent, and that neither physician made any independent decisions concerning the plaintiff's decedent's medical care that resulted in her injury or death (*see* ***Welch v Scheinfeld***, 21 AD3d 802, 801 NYS2d 277 [1st Dept 2005]).

As mentioned above, the plaintiff did not oppose either of the motions made by the Hussain defendants or the Cleaver defendants, nor did he oppose the application for summary judgment in favor of Drs. Wadhwa, Reilly and Penna. Therefore, the plaintiff failed to raise a triable issue of fact as to whether these doctors deviated from the applicable standard of care in their treatment of his decedent and whether such deviation was a proximate cause of the decedent's injuries (*see* ***Moore v St. Luke's Roosevelt Hosp. Ctr.***, 60 AD3d 828, 874 NYS2d 389 [2d Dept 2009]; *see also* ***Groeger v Col-Les Orthopedic Assoc., P.C.***, 149 AD2d 973, 540 NYS2d 109 [4th Dept 1989]). Therefore, the application for summary judgment in favor of Doctors Wadhwa, Reilly, Penna, Hussain, the Long Island Nephrology Consultant, P.C., and Doctors Cleaver and Wu is granted.

Plaintiff does oppose the application for summary judgment in favor of Dr. Yellon. Dr. Yellon relies on his own affidavit and does not present an independent expert's opinion. Plaintiff, in opposition to Dr. Yellon's motion submits a board certified expert's opinion that Dr. Yellon did deviate from acceptable standard of medical care in rendering treatment to plaintiff's decedent. Defendant Yellon makes no complaint or issue of the fact that the plaintiff's expert's signature has been redacted and the expert's opinion is not notarized. Therefore, the Court considers the opposition papers as presented by the plaintiff. An issue of fact has been raised by the plaintiff. "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," Feinberg v Feit, 23 AD3d 517, 519 [2005] [citation omitted]; *(see* ***Graham v Mitchell***, 37 AD3d 408, 409 [2007]). The Court concludes that the plaintiff has responded to the defendant Yellon's request for summary judgment. An issue of fact exists that can only be determined by a jury.

Therefore, the application for summary judgment in favor of Dr. Yellon is denied.

Dated: July 13, 2012

W. Gerard Asher
J.S.C.

___ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**