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SHORT FORM ORDER

COPY

INDEX No. 09-49098
CAL. No. 10-02158MM

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 5-31-11 (#005)
MOTION DATE 7-19-11 (#006, #004)
MOTION DATE 9-21-11 (#007)
ADJ. DATE 8-9-11 (#001, #002, & #003)
ADJ. DATE 8-9-11 (#004, #005 & #006)
Mot. Seq. # 001 - MG # 005 - MG; CASEDISP
002 - MG # 006 - MotD
003 - MD # 007 - MD
004 - XMD

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GERARDO TRUEBA and JYSEEL E. TRUEBA,

Plaintiffs,

- against -

THOMAS DIFLO, M.D., NYU HOSPITALS CENTER, NEW YORK ORGAN DONOR NETWORK, INC., NEW YORK TRANSPLANT SURGERY, P.C., KIMBERLY FENTON, M.D., MARY ANDRIOLA, M.D., SALMA SYED, M.D., ROBERT SEMLEAR, M.D., NORMAN PFLASTER M.D., SOUTHAMPTON HOSPITAL AND DANIEL SLONIEWSKY, M.D.,

Defendants.

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DANKNER & MILSTEIN, P.C.
Attorney for Plaintiffs
41 East 57th Street
New York, New York 10022

AARONSON, RAPPAPORT, FEINSTEIN & DEUTSCH, LLP
Attorney for Defendants DiFlo, NYU and New York Transplant Surgery
600 Third Avenue
New York, New York 10016

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorney for Defendant New York Organ Donor
150 East 42nd Street
New York, New York 10017

Upon the following papers numbered 1 to 56 read on these motions for summary judgment, and for leave to amend the pleadings ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4, 5 - 13, 17 - 19, 20 - 22, 23 - 25, 26 - 30 ; Notice of Cross Motion and supporting papers 14 - 16 ; Answering Affidavits and supporting papers 31 - 38, 39 - 40 ; Replying Affidavits and supporting papers 41 - 43,44 - 45,46 - 47,48 - 56 ; Other joint exhibits A - WWWW ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions and cross motion are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (001) by defendants NYU Hospitals Center, Thomas Diflo, M.D. and New York Transplant Surgery, P.C., for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion (002) by the New York Organ Donor Network, Inc. for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion (003) by defendants NYU School of Medicine, NYU Hospitals Center, s/h/a NYU Medical Center, Thomas Diflo, M.D. and New York Transplant Surgery, P.C., for summary judgment dismissing the complaint in Lee v Fenton, et al, Index No. 38346/09 (Action #4), is denied as academic; and it is further

ORDERED that the cross motion (004) by plaintiffs for leave to amend the pleadings to add a cause of action for lack of informed consent is denied; and it is further

ORDERED that the motion (005) by defendants Kimberly Fenton, M.D., Salma Syed, D.O., sued herein as Salma Syed, M.D., and Daniel Sloniewsky, M.D. for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the branch of the motion (006) by defendant Mary Andriola, M.D. for summary judgment dismissing the complaint is granted, and the remainder of the motion is denied as academic; and it is further

ORDERED that the motion (007) by defendant Mary Andriola, M.D. for an order discontinuing the action as asserted against her pursuant to CPLR 3217 is denied as moot.

In this medical malpractice action, plaintiffs seek damages, personally and derivatively, for injuries allegedly sustained by plaintiff Gerardo Trueba ("the recipient plaintiff") as a result of the care and treatment he received from March 30, 2007 through May 17, 2007. The recipient plaintiff underwent a kidney transplant on March 30, 3007. Plaintiffs allege, *inter alia*, that defendants Thomas Diflo, M.D., New York Transplant Surgery, P.C., and New York University Hospitals Center ("NYUHC") departed from accepted medical standards in the recipient plaintiff's care and treatment. Plaintiffs further allege, *inter alia*, that defendants Kimberly Fenton, M.D., Mary Andriola, M.D., Salma Syed, D.O., sued herein as Salma Syed, M.D., and Daniel Sloniewsky, M.D., who were the physicians caring for a pediatric patient ("the donor") whose organs were donated for transplantation, departed from accepted medical standards when they failed to diagnose cancer in the donor while he was a patient at non-party Stony Brook University Hospital ("Stony Brook") from March 13, 2007 through March 30, 2007. Plaintiffs further allege, *inter alia*, that the New York Organ Donor Network, Inc. ("NYODN") was negligent in failing to properly evaluate the suitability of the donor's organs for transplantation.

The record reveals that the recipient plaintiff received a kidney transplant from the donor, who had died of bacterial meningitis on March 30, 2007 at Stony Brook. The kidney transplant was

performed by defendant Diflo at defendant NYUHC on March 30, 2007.[1] The donor had been ill since March 3, 2007. He was treated at Southampton Hospital intermittently. During his final admission to Southampton Hospital, a lumbar puncture revealed no bacteria in the cerebral spinal fluid ("CSF") despite symptoms which appeared to be bacterial meningitis, such as severe headaches, vomiting, and fainting. His doctors prescribed antibiotics and antiviral medications. His final diagnosis at Southampton Hospital was viral meningitis or encephalitis.

The donor was transferred to Stony Brook on March 13, 2007. Another spinal tap was performed, and, again revealed no bacteria in the cerebral spinal fluid. Further lab tests revealed no viral pathogens either. His attending physician, Dr. Fenton, a pediatric intensivist, diagnosed the donor with presumed, partially treated bacterial meningitis. By March 14, 2007, the donor became unresponsive and required assisted ventilation. The donor's Stony Brook medical record revealed that, on March 29, 2007, he had lost all cerebral autoregulation despite maximal medical management and had not improved after a lumbar drain was placed to reduce the intracerebral pressure. Dr. Fenton advised the donor's parents, who agreed that no resuscitation should be initiated. In addition, the parents requested organ donation. Dr. Fenton called NYODN, and provided the basic demographic information, as well as her diagnosis of presumed partially treated bacterial meningitis. On March 30, 2007, the NYODN staff placed calls to multiple transplant centers to place four of the donor's organs. Later that evening, NYODN organ placement coordinator David O'Hara offered the donor's left kidney to a transplant coordinator at NYUHC. After reviewing the donor chart provided by NYODN, Dr. Diflo accepted the donor's left kidney for the recipient plaintiff. The NYODN chart included Southampton Hospital medical records which revealed a diagnosis of viral meningitis.

The recipient plaintiff testified that he had end stage renal disease and had been on kidney dialysis since 1998. He stated that his transplant surgery was a success and his post-operative recovery was uneventful. On May 3, 2007, an autopsy of the donor's brain revealed that he died of a rare form of T-cell lymphoma in his leptomeninges. The recipient plaintiff stated that he was notified that he had been exposed to cancer due to the donor's cause of death, and was encouraged by Dr. Diflo to have the kidney removed. After the nephrectomy was performed on May 15, 2007, the recipient plaintiff resumed kidney dialysis three times per week. A biopsy of the diseased kidney revealed anaplastic large cell lymphoma; however, PET scans of the recipient plaintiff's organs found no trace of cancer. Prophylactic chemotherapy began in June, 2007, and was completed in October, 2008. He was not diagnosed with bacterial or viral meningitis, and never developed cancer. The recipient plaintiff stated that he is currently on the transplant list for another kidney.

By order dated October 5, 2009 (Victor, J.), the Court so-ordered a stipulation discontinuing the within action as asserted against defendant Southampton Hospital. By order dated June 18, 2009

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[1] The donor's parents authorized the donation of four organs. In addition to one of the donor's kidneys, which was donated to the recipient plaintiff in the instant action, the donor's liver was donated to Kitman Lee, the donor's pancreas was donated to Jodie Lynn Shierts, and the donor's other kidney was donated to James D. Kelly.

(Cohen, J.), the Court directed that this action would be tried jointly with six related actions.[2] By order dated April 20, 2010 (Cohen, J.), the action was also discontinued as against Robert Semlear, M.D. and Norman Pflaster, M.D. By order dated October 26, 2010 (Cohen, J.), the Court directed the parties to submit a single set of joint exhibits for all summary judgment motions, consisting of the pleadings, bills of particulars, deposition testimonies of the parties, the donor's medical records from Southampton Hospital and Stony Brook, the recipient's medical records from NYUHC, and the NYODN donor packet. By stipulation dated July 27, 2011, plaintiff discontinued the action as asserted against Andriola; however, it was not executed by all parties.

Defendants NYUHC, Thomas Diflo, M.D., and New York Transplant Surgery, P.C. ("the NYU defendants") now move (001) for summary judgment dismissing the complaint. NYODN moves (002) for summary judgment dismissing the complaint. The NYU defendants also move (003) for summary judgment dismissing the complaint in a separate action entitled *Lee v Fenton*, Index No. 38346/09. Plaintiffs cross-move (004) for leave to amend the complaint to add a cause of action for lack of informed consent. Defendants Fenton, Syed, and Sloniewsky move (005) for summary judgment dismissing the complaint. Defendant Andriola moves (006) to dismiss the complaint pursuant to CPLR 3211 (a) (7), or, in the alternative, for summary judgment dismissing the complaint as asserted against her. Andriola also moves (007) to discontinue the action as asserted against her pursuant to CPLR 3217.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***Stewart Title Ins. Co. v Equitable Land Servs.***, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

A physician owes a patient three basic duties of care: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the physician practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Pike v Honsinger***, 155 NY 201, 49 NE 760 [1898]). Significantly, the rule requiring a physician to use his or

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[2] The six related actions are as follows:
Kelly v Fenton, Index No. 33833/08, Action #1
Kelly v New York Organ Donor Network, Index No. 12211/09, Action #2
Lee v Fenton, Index No. 38346/09, Action #4
Lee v New York Organ Donor Network, Index No. 38345/09, Action #5
Shierts v New York Organ Donor Network, Index No. 12212/09, Action #6
Shierts v Fenton, Index No. 45614/08, Action #7

her best judgment "does not hold him [or her] liable for a mere error in judgment, provided he [or she] does what he [or she] thinks is best after careful examination" (***Pike v Honsinger***, *supra* at 210; *see* ***Davis v Patel***, 287 AD2d 479, 731 NYS2d 204 [2d Dept 2001]).

The threshold question in determining liability is whether the defendants owed plaintiffs a duty of care (***McNulty v City of New York***, 100 NY2d 227, 762 NYS2d 12 [2003]). Generally, a doctor only owes a duty of care to his or her patient. The courts have been reluctant to expand a doctor's duty of care to a patient to encompass nonpatients (*see* ***Eiseman v State***, 70 NY2d 175, 518 NYS2d 608 [1987]). A critical concern underlying this reluctance is the danger that a recognition of a duty would render doctors liable to a prohibitive number of possible patients (***McNulty v City of New York***, *supra*; ***Eiseman v State***, *supra*; ***Purdy v Public Adm'r of County of Westchester***, 72 NY 2d 1, 530 NYS2d 513 [1988]). Liability may not be imposed in the absence of a physician-patient relationship (***Levy v Nassau Health Care Corp.***, 40 AD3d 591, 833 NYS2d 403 [2d Dept 2007]). An extension of the duty is warranted in cases where the service performed on behalf of the patient necessarily implicates protection of household members (***Tenuto v Lederle Lab.***, 90 NY2d 606, 665 NYS2d 17 [1997]). Liability does not arise until a duty is found (***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Unlike foreseeability and causation, both generally factual issues to be resolved on a case-by-case basis by the fact finder, the duty owed by one member of society to another is a legal issue for the courts (***De Angelis v Lutheran Medical Center***, 84 AD2d 17, 445 NYS2d 188 [2d Dept 1981]).

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***De Stefano v Immerman,*** 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]; ***Amsler v Verrilli***, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (***Williams v Sahay***, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]). Because an organ donor network does not provide medical services by a licensed physician, the gravamen of the complaint as asserted against defendant NYODN sounds in negligence, and not medical malpractice (*see* ***Rodriguez v Saal***, 43 AD3d 272, 841 NYS2d 232 [1st Dept 2007], *see also* ***Bleiler v Bodnar***, 65 NY2d 65, 489 NYS2d 885 [1985]; ***Boothe v Lawrence Hospital***, 188 AD2d 435, 591 NYS2d 412 [1st Dept 1992]).

A plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (***Alvarez v Prospect Hosp.***, *supra*; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). 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, 675 NYS2d 375 [2d Dept 1998], *lv den*, 92 NY2d 814, 681 NYS2d 475 [1998]).

The NYU defendants demonstrated their prima facie entitlement to judgment as a matter of law by demonstrating that they did not depart from accepted standards of medicine in their care and

treatment of the recipient plaintiff (***Starr v Rogers***, 44 AD3d 646, 843 NYS2d 371 [2d Dept 2007]; ***Whalen v Victory Memorial Hosp.***, 187 AD2d 503, 589 NYS2d 590 [2d Dept 1992]). In support of the motion (001), defendants submit, *inter alia*, the joint exhibits and the affidavit of their expert, Benjamin Philosophe, M.D. In the bill of particulars, plaintiffs allege that the NYU defendants were negligent in failing to be aware that the organ being transplanted into the recipient plaintiff was cancerous, make proper inquiries as to the cause of death of the donor, require proper validation of the cause of death of the donor, require proof or medical support as to the diagnosis of meningitis as the cause of death of the donor, and inform the recipient plaintiff of the risk of having a cancerous kidney transplanted into him, causing him to undergo chemotherapy and a nephrectomy.

Dr. Philosophe avers that he is duly licensed to practice medicine in the State of Maryland and the State of Virginia. He is board certified in general surgery. He currently is the head of the Division of Transplantation and Director of Liver Transplantation and Hepato-Biliary Surgery at the University of Maryland Medical System. He opines, to a reasonable degree of medical certainty, that the NYU defendants did not depart from accepted medical standards in the care and treatment of the plaintiff recipient. He states that the donor was diagnosed by his treating physicians at Stony Brook as having partially treated bacterial meningitis. In addition, bacterial meningitis was listed as the donor's cause of death in the Donor Summary available to the potential recipient/transplant hospitals on DonorNet, the online system where recipient/transplant hospitals can view relevant data of the potential donor. Defendants were advised by the treating physicians at Stony Brook via the NYODN that the diagnosis of partially treated bacterial meningitis was based upon a negative CSF. They were further informed via NYODN that the CSF culture was negative because the donor had received antibiotics before the culture was performed. In any event, it is within the standard of care to accept for transplantation an organ from a donor with the clinical signs of bacterial meningitis. Dr. Philosophe states that although it was unclear whether the donor had a viral illness prior to his death, the record reveals that subsequent testing on the donor and recipients proved beyond a doubt that neither the donor nor the recipients ever had a viral illness. In addition, there was no reason for the transplant surgeons to suspect or diagnose cancer, inasmuch as they did not treat the donor prior to his death. In fact, the donor's treating physicians at Stony Brook never suspected or diagnosed the donor with cancer. Therefore, it is Dr. Philosophe's opinion, within a reasonable degree of medical certainty, that the NYU defendants at all times provided proper and appropriate care and treatment to the recipient plaintiff, and that the treatment rendered was well within accepted standards of care at that time. It is also his opinion that there is nothing that the NYU defendants did or did not do that was the direct cause of any of the alleged injuries claimed by the recipient plaintiff.

Defendant Diflo testified that he is duly licensed to practice medicine in the State of New York and is board certified in surgical critical care. He has been employed with the NYUHC in the transplant department since 1992 and his expertise is in the transplantation of livers and kidneys. He performed the kidney transplant for the plaintiff recipient. He was notified by the NYU transplant coordinator of a possible kidney donation for the plaintiff recipient, and relied on protocols that were prepared for accepting organs which are required by the Center for Medicare-Medicaid Services. He further stated that the guidelines in existence in 2007 at NYU did not relate to any form of meningitis. When he made the decision to accept the organ, he felt he had sufficient information confirming that the donor had bacterial meningitis. In addition, he relied upon the decision of his colleague, Glyn Morgan, M.D., who

had just accepted the liver of this donor and had made an extensive inquiry about the medical history. When the kidney was delivered to him for surgery, he read the donor packet, which included the medical records from Southampton Hospital, and felt that there were no new facts that would contraindicate the procedure for the plaintiff recipient. He also stated that there were no gross abnormalities in the kidney when he transplanted it into the plaintiff recipient. The plaintiff recipient's initial transplant surgery and recovery were unremarkable. When the donor's cause of death was relayed to him, he immediately called the plaintiff recipient to return to the hospital for tests. He recalled speaking to the plaintiff recipient and stating that he and his colleagues felt that this kidney was initially a good match for him until he learned of the cancer. The plaintiff recipient's second surgery to remove the kidney was also unremarkable.

Eugenia Maybalgov testified that she is a transplant coordinator at NYUHC and that Morgan and Diflo made several inquiries related to the donor's liver to clarify the diagnosis. Her testimony supports Diflo's testimony. In addition, defendants Fenton, Sayed, Andriola, and Sloniewsky consistently testified that it did not occur to them during their treatment of the donor that he could have had cancer, and thus, that they never included cancer in the medical record as a diagnosis.

The NYU defendants, having made a prima facie showing of their entitlement to judgment as a matter of law, the burden then shifted to plaintiffs to respond with rebutting medical evidence demonstrating a departure from accepted medical procedures to raise an issue of fact as to whether the NYU defendants departed from good and accepted medical practice, and if so, whether such departure was a proximate cause of the injuries alleged (*see* ***Breland v Jamaica Hospital Med. Ctr.***, 49 AD3d 789, 854 NYS2d 209 [2d Dept 2008]; ***Baez v Lockridge***, 259 AD2d 573, 686 NYS2d 496 [2d Dept 1999]; ***Alvarez v Prospect Hosp.***, *supra*). Plaintiffs failed to meet this burden. In opposition, plaintiffs submit the affidavits of Paul W. Nelson, M.D., and Arnold N. Weinberg, M.D. Dr. Nelson avers that he is licensed to practice medicine in the States of Missouri and Indiana. He is a transplant surgeon and is board certified in surgery. He states that the NYU defendants departed from good and accepted medical standards in failing to confirm the diagnosis of bacterial meningitis prior to accepting the organ without a positive culture, and failing to obtain and review the donor's Southampton Hospital chart, which diagnosed the donor with viral meningitis. It is Dr. Nelson's opinion that transplant surgeons are ultimately responsible for the decision to accept or reject donated organs. He states that the NYU defendants should have rejected the kidney, as other recipient transplant centers had done.

Dr. Weinberg avers that he is a physician duly licensed to practice medicine in the State of Massachusetts. He is board certified in internal medicine. He opines, within a reasonable degree of medical certainty, that the NYU defendants' decision to accept the kidney constituted a departure from good and accepted standards of medical care. He bases this opinion on the donor's negative cerebral spinal fluid test results, coupled with the length of his hospital course, and the diagnosis of viral encephalitis made at Southampton Hospital which was posted on DonorNet. Dr. Weinberg opines that the NYU defendants relied upon an inadequate explanation for ruling out the prior viral diagnosis. According to Dr. Weinberg, all of the factors should have led the transplant surgeons to conclude that the donor's diagnosis of bacterial meningitis was not accurate.

In reply, the NYU defendants contend that several inquiries were made to NYODN to confirm the donor's diagnosis, the Southampton Hospital cultures were provided to Dr. Morgan upon request, and the Southampton Hospital medical record was reviewed in the donor packet by Diflo prior to the kidney transplant. In addition, contrary to plaintiffs' experts' opinions, the suspicion by other prospective transplant centers that the donor might have a viral illness was contraindicated by the fact that the donor's physicians at Stony Brook ruled out the viral diseases. In any event, defendants point out that neither of plaintiffs' experts opined that it was a departure from the standard of care to accept an organ from a patient diagnosed with presumed bacterial meningitis without a positive culture.

The Court finds that plaintiffs failed to raise a triable issue of fact, inasmuch as the there was no evidence in the record that the donor had cancer which caused the recipient plaintiff's injuries. In this regard, the plaintiffs' experts speculate that defendants should have rejected the kidney based on the suspicion of viral illness which never materialized. Accordingly, the motion by the NYU defendants for summary judgment dismissing the complaint as asserted against them is granted.

Turning to the motion (002) for summary judgment by NYODN, this defendant has also made a prima facie showing of its entitlement to judgment as a matter of law (***Starr v Rogers***, *supra*; ***Whalen v Victory Memorial Hosp.***, *supra*). Plaintiffs allege, in the bill of particulars, that NYODN was negligent in failing to properly evaluate the suitability of the donor's organs for transplantation, failing to promptly review the donor's medical records before approving transplantation of his organs, approving and facilitating the harvesting of cancerous and diseased organs for transplantation into the recipients' bodies, accepting organs from a donor with reported bacterial meningitis without identifying the organism or verifying the diagnosis, and in failing to learn the true cause of death before the donation occurred. In support of the motion, NYODN submits the joint exhibits, United Network of Organ Sharing ("UNOS") policies, and the affidavits of Richard D. Hasz, Jr. and Robert S. Gaston, M.D.

The record reveals that Suzanne Kontak, a clinical manager employed by NYODN, received a call from Kimberly Fenton, M.D. at Stony Brook about the donor's imminent death on March 29, 2007. Kontak stated that she completed a master's degree in adult health nursing, a bachelor's degree in nursing, and training in critical care nursing. Kontak obtained the donor's general demographic information and the diagnosis from Fenton, which she testified, did not screen out the donor's organs as unsuitable for transplantation. If she had been told by Fenton that the donor had lymphoma, the donor's organs would not have been considered as suitable, and Kontak would have closed the case with regard to solid organ donation. Kontak and a colleague went to Stony Brook to gather information about the donor, approach the family and obtain their consent to offer the donor's organs for transplantation. She testified that she was in contact, with the administrator on-call throughout the evening, and provided her with the donor's history and routine updates. She drew blood for infectious disease tests to determine whether the donor had HIV, which would automatically rule out the donor. Kontak testified that she collected the information that the hospital had maintained on the donor and entered it into a computerized form used by NYODN employees. In addition, the information was entered into DonorNet, which the transplant centers could access. Kontak stated that she does not make decisions on behalf of the transplant centers and does not act as a diagnostician. Kontak stated that she spoke to non-party Josh Schiller, M.D. and defendant Fenton, the donor's physicians. The record reveals that on March 30, 2007, NYODN organ placement coordinators notified potential transplant centers that the

donor's organs were going to be available for transplantation. She stated that several questions from the transplant centers were relayed to her regarding the donor's diagnosis by the organ placement coordinators. Each time, she consulted the donor's treating physicians and reviewed the hospital records and provided the answers to the organ placement coordinators, who, in turn, responded to the transplant centers. She stated that she was unaware that some of the transplant centers rejected the organs. Kontak testified that the decision to accept an organ of a patient who may have meningitis would be based solely on the protocols of the individual transplant center. Dr. Diflo testified that he determined that the donor's kidney was suitable for transplantation.

Eric Francisco testified that he was employed by NYODN as a transplant placement coordinator. He worked at the NYODN office in Manhattan on March 30, 2007, from 7:00 p.m. to 7:00 a.m., and worked with Sue Kontak, the on-site coordinator. He stated that his duty was to contact the transplant centers who determined whether or not they would accept a potential organ. If a recipient center rejects the organ, a code is entered into the computerized record. He stated that some of the rejections related to the recipient's condition, and some rejections related to the donor's organ. He stated that several centers rejected this donor's organs; however, this was not an unusual occurrence. He recalled speaking to Dr. Scott Ames, a transplant surgeon at Mount Sinai Hospital, who requested more information about the donor's cultures, and told him that there was no positive culture, and he declined the organs. Francisco stated that if a transplant surgeon or transplant center staff member calls with a question, he calls the on-site coordinator, Sue Kontak, and asks the question, and relays the answer back to the transplant surgeon/center.

David O'Hara testified that he was also employed by NYODN as a transplant placement coordinator, worked on March 30, 2007 and March 31, 2007, and made contact with the transplant centers to offer the donor's pancreas. O'Hara recalled speaking with Dr. Lloyd Ratner, a transplant surgeon at New York Presbyterian/Columbia Hospital who also questioned the donor's culture results, and eventually declined the organ. O'Hara's testimony supported that of Kontak and Francisco. O'Hara also stated that it was not his practice to tell transplant surgeons why other surgeons declined an organ.

The UNOS guidelines reveal that the National Organ Transplant Act of 1984 called for an organ procurement and transplantation network ("OPTN") to be created and run by a private, non-profit organization under federal contract. UNOS was first awarded the national OPTN contract in 1986 by the U.S. Department of Health and Human Services, and is the only organization ever to operate the OPTN. UNOS established an organ sharing system that maximizes the efficient use of deceased organs through equitable and timely allocation, and established a system to collect, store, analyze and publish data pertaining to the patient waiting list, organ matching and transplants. UNOS has also provided information, consultation and guidance to persons and organizations concerned with human organ transplantation in order to increase the number of organs available for transplantation. UNOS relies upon federal guidelines to govern NYODN's actions.

Richard D. Hasz avers that he is the vice president of clinical services at an Organ Procurement Organization ("OPO") in the northeastern United States, and has been certified as a procurement transplant coordinator by the American Board for Transplant Certification. It is his opinion that the actions of NYODN, in connection with the donation of the donor's organs, conformed to the standard of

care pursuant to UNOS guideline 4.6.2, which was in effect in 2007.[3] In addition, he states that there are strict limitations on transplant coordinators' involvement in the donation process. The coordinator is not a physician and is not qualified to render medical opinions. The coordinator's job is to gather clinical data from the donor hospital and transmit the information to the potential transplant centers. He states that NYODN did not depart from the 2007 standards of the donation community in connection with the donation of organs from the donor. NYODN was required to offer the donor's organs inasmuch as the cause of death was identified by Stony Brook physicians as bacterial meningitis and organs of such donors must be offered to the transplant centers. NYODN reported the clinical information that the donor had been diagnosed with viral meningitis at Southampton, he was diagnosed with bacterial meningitis at Stony Brook, and none of his cultures were positive. Even if the diagnosis was viral meningitis, UNOS guidelines permit an OPO to offer the donor's organs for transplant. Mr. Hasz opines, that, because the UNOS guidelines permitted the organ offer despite the diagnoses of bacterial meningitis and viral meningitis, NYODN did not depart from the standard of care as set by UNOS.

Dr. Gaston states that he is a physician duly licensed to practice medicine in the State of Alabama and is board certified in internal medicine and nephrology. He states that NYODN, an OPO, must initially determine whether the donor is believed by his treating physicians to have an illness that would automatically disqualify the potential donor's organs from transplantation, such as HIV. If not, then the OPO must offer the organs to the transplant centers. The secondary screening is performed by the transplant centers and their surgeons to determine ultimate suitability, since they are in a position to make the necessary clinical judgments about the ultimate suitability of the organs and are also the ones who have access to the condition of the potential recipient. The surgeons go through a risk-benefit analysis for each recipient, and, as non-party Dr. Ty Dunn, a transplant surgeon, testified in her deposition, that they consider the relative life-saving potential of the organ and how the potential recipient patient is doing. Some patients' extreme need for organs can change the risk-benefit analysis. In the past, donors' organs diagnosed with bacterial meningitis, without positive cultures, have been offered for transplantation. It is up to the transplant surgeons to determine whether to accept the donor hospital's diagnosis and take the organs as well as the risks. Dr. Gaston states that the donor was misdiagnosed by Stony Brook with bacterial meningitis; however, it was still the duty of NYODN to report that diagnosis. The contract between NYODN and NYUHC reveals that the hospital has the sole discretion and responsibility to determine whether the offered organs are usable and suitable for the transplantation candidates.

NYODN, having made a prima facie showing of its entitlement to judgment as a matter of law, the burden then shifted to plaintiffs to respond with rebutting medical evidence demonstrating a departure from accepted medical practice to raise an issue of fact as to whether NYODN was negligent (***Alvarez v Prospect Hosp.***, *supra*). Plaintiffs failed to meet this burden. In opposition, plaintiffs submit the aforementioned affidavits of Dr. Nelson and Dr. Weinberg. Dr. Nelson states that NYODN breached

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[3] UNOS guideline 4.6.2, Screening Potential Organ Donors For Transmission of Diseases or Medical Conditions, Including Malignancies, provides, in part, that known conditions that may be transmitted by the donor organ must be communicated to the transplant centers, including, in particular, unknown infection of the central nervous system (encephalitis, meningitis), suspected encephalitis, [and other diseases].

its duty to plaintiffs. He concedes that the donor's rare cancer was not diagnosed, or apparently considered in the differential diagnosis, by the medical teams taking care of him. He states, however, that the diagnosis of bacterial meningitis was never substantiated or confirmed, and concludes that the donor had viral meningitis, which would have made the organs unsuitable for transplantation.

Dr. Nelson further states that Kontak, the NYODN transplant coordinator, should have involved her medical director in deciding whether the donor's organs were suitable for transplant in light of conversations had between the organ placement coordinators and transplant surgeons who rejected the organs. Although he states that the Southampton Hospital medical record was not uploaded to DonorNet, he concedes later in his affidavit that the records were uploaded. He also states that NYODN cannot merely sit back and shirk all responsibility for offering cancerous organs simply because a transplant surgeon ultimately accepted them. Dr. Weinberg concurs with Dr. Nelson, and also states that factors which contradicted a specific diagnosis of bacterial meningitis should have alerted NYODN to find the organs unsuitable for transplant, and that NYODN staff should have informed Dr. Diflo about the discussions they had with transplant surgeons who rejected the organs. In addition, Dr. Weinberg opines that, although the diagnosis of a viral process ultimately was incorrect, it would have been a strong contraindication to transplantation given the donor's course prior to his death.

In reply, NYODN contends that the medical director, Eric B. Grossman, M.D., was aware of the issues related to the donor's diagnosis. Dr. Grossman states in his personal affidavit that he was extensively involved in NYODN's offer of the donor's organs. After several conversations with NYODN staff while the organs were being evaluated and offered for transplantation, he stated that he directed NYODN staff to include in its records the Stony Brook physicians' justification for making the bacterial meningitis diagnosis, the facts on which they relied in making this diagnosis, and the consultation note of their infectious disease consultant. He further stated that it would have been in the transplant surgeons' discretion to exercise their clinical judgment about whether they wished to accept the donor's organs in view of the information conveyed to them by NYODN about the two diagnoses at the two hospitals where the donor was admitted during his last illness and the individual medical condition of their recipient patient.

Plaintiffs have failed to raise an issue of fact inasmuch as their experts did not address the UNOS guidelines which govern the donation of organs. In addition, plaintiffs' experts speculate that Dr. Diflo would have decided differently if he was told about the conversations between other transplant surgeons who rejected the organs and NYODN staff (***Zuckerman v New York***, *supra*). Moreover, the experts' opinions regarding the diagnosis of viral meningitis are not supported by the evidence in the record, inasmuch as all viral tests conducted at Stony Brook were negative (*see* ***Alvarez v Prospect Hosp.***, *supra*). Accordingly, NYODN's motion for summary judgment dismissing the complaint as asserted against it is granted.

The motion ((003) by the NYU defendants for summary judgment dismissing the complaint in *Lee v Fenton*, Index No. 38346/09 (Action #4) was not filed in the proper action. The Court notes that because these actions are to be tried jointly, they retain their individual identities and index numbers (CPLR 602[a]). Consequently, the parties must move for separate relief in each action. Since the instant motion was submitted under Index Number 49098/09 (Action #3), the court shall consider the relief

requested only as to Action #3. In any event, the Court has considered this motion under Action #4 contemporaneously herein, and denies the instant motion as academic.

Plaintiffs' cross motion (004) for leave to amend the pleadings is denied. It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise (CPLR 3025 [b]; ***Thomas Crimmins Contracting Co. v New York***, 74 NY2d 166, 544 NYS2d 580 [1989]; ***McCaskey, Davies & Associates, Inc. v New York City Health & Hospitals Corp.***, 59 NY2d 755, 463 NYS2d 434 [1983]. "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (***G.K. Alan Assoc., Inc. v Lazzari***, 44 AD3d 95, 99, 840 NYS2d 378 [2d Dept 2007]; ***Trataros Constr., Inc. v New York City Hous. Auth.***, 34 AD3d 451, 452-453, 823 NYS2d 534 [2d Dept 2006]; ***Norman v Ferrara***, 107 AD2d 739, 484 NYS2d 600 [2d Dept 1985]). Here, the proposed claim is palpably insufficient and has no merit. The record reveals that the recipient plaintiff executed a presurgical consent for the transplant procedure. The recipient plaintiff's claim that his transplant surgeon, defendant Diflo, should have disclosed the risk of transplanting an organ that might have been exposed to viral meningitis or viral encephalitis is belied by the medical records which reveal that viral studies were performed and were negative, and the donor did not die of a viral disease. Therefore, the viral meningitis diagnosis which was relayed to Diflo by NYODN was of no consequence.

In any event, plaintiff's application was made two years after the action was commenced and eight months after the note of issue was filed. "[W]here a party is guilty of extended delay in moving to amend, the court should insure that the amendment procedure is not abused by requiring a reasonable excuse for the delay and an affidavit of merit" (***Gallo v Aiello***, 139 AD2d 490, 490-91, 526 NYS2d 593 [2d Dept 1988] [emphasis added]; *see also* ***Alexander v Seligman***, 131 AD2d 528, 516 NYS2d 260 [2d Dept 1987]; ***Bertan v Richmond Memorial Hosp. & Health Center***, 106 AD2d 362, 482 NYS2d 492 [2d Dept 1984]), neither of which have been submitted here. "The fact that an informed consent claim necessarily depends on the recollections of the parties which unavoidably diminish over time," the longer the delay in asserting such a claim, the more it stands to reason that the opposing party will be prejudiced (***Evans v Kringstein***, 193 AD2d 714, 715, 598 NYS2d 64, 65 [2d Dept 1993]). Accordingly, the cross motion is denied.

The evidence submitted by defendants Fenton, Syed, Sloniewsky, and Andriola was sufficient to meet their burden of establishing, as a matter of law, that they did not depart from good and accepted medical practice inasmuch as they had no duty to the recipient plaintiff, and that the treatment they rendered to the donor was not a proximate cause of the recipient plaintiff's alleged injuries (***Eiseman v State***, *supra*; ***McNulty v City of New York***, *supra*). In support of their motions (005, 006), defendants submit, *inter alia*, their deposition testimonies, and the joint exhibits. In the bill of particulars, plaintiff alleges that Fenton, Syed, Sloniewsky, and Andriola departed from accepted medical practice by diagnosing the donor with bacterial meningitis rather than T-cell lymphoma.

The record reveals that Fenton was the attending pediatric intensivist caring for the donor at Stony Brook when the donor was admitted on March 13, 2007, and oversaw his care until March 19, 2007, and resumed the donor's care on March 29, 2007 until March 30, 2007. Thereafter, the staff from the NYODN supervised the organ donation process and Fenton withdrew from the case. Fenton testified

that she had no role in determining whether the donor's organs were suitable for transplantation. In addition, she had no contact with any of the transplant centers, and had no knowledge of the recipient plaintiffs' identities. Likewise, Sloniewsky, also an attending pediatric intensivist, testified that he took over the donor's care until March 29, 2007, upon Fenton's return. He stated that his care and treatment of the donor ended before a request was made to donate his organs, and that he had no contact with NYODN, the transplant centers, or the recipients. He also had no involvement in the organ donation process. Syed, a pediatric infectious disease attending, testified that she was called for a consult on the first day of the donor's admission. She stated that the last day she had contact with the donor was on March 22, 2007. She had no reason to believe that he was suffering from a malignancy, inasmuch as his presentation was consistent with meningitis. She further testified that she had no contact with NYODN, the transplant centers, or the recipients. Andriola testified that she evaluated the donor on March 14, 15, and 16, 2007. On March 20, 2007, she performed an electroencephalogram ("EEG"). She also stated that she had no contact with NYODN, the transplant centers or the recipients. In addition, she had no involvement in determining the suitability of the donor's organs for transplantation.

As the moving defendants made a *prima facie* showing of entitlement to summary judgment, the burden shifted to the plaintiff to demonstrate the existence of a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Murray v Hirsch***, 58 AD3d 701, 871 NYS2d 673, [2d Dept 2009], *lv den* 12 NY3d 709, 881 NYS2d 18 [2009]). Plaintiffs failed to meet this burden. In opposition, plaintiffs submitted the affidavits of Paul W. Nelson, M.D. and Arnold N. Weinberg, M.D. These affidavits have no probative value inasmuch as neither expert addresses the alleged departures of the moving defendants. Moreover, there is no legal support for plaintiff's theory that a special relationship arose between the moving defendants and the recipient plaintiff once the recipient plaintiff was identified as a match to the donor's kidney. There was no physician-patient relationship creating a duty, and there were no special circumstances which related the care they provided to the donor with the recipient plaintiff, of whom they had no knowledge. Therefore, the Court declines to extend the common law to create a remedy for the plaintiffs (***McNulty v City of New York***, *supra*; ***Eiseman v State***, *supra*; ***Pulka v Edelman***, *supra*). Accordingly, based on the foregoing, the motion for summary judgment by Fenton, Syed, and Sloniewsky is granted. The branch of the motion for summary judgment by Andriola is granted, and the remainder of the motion is denied as academic. The subsequent motion by Andriola is denied as moot.

The Court acknowledges the tragic circumstances which led to the commencement of the instant action, and extends its sympathy for everyone involved, including the donor and his parents, the medical providers, the NYODN staff, the recipient plaintiff and his family. In addition, the Court notes that the donor's parents willingly waived HIPAA[4] restrictions (*see* ***Liew v New York University Medical Center***, 55 AD3d 566, 865 NYS2d 278 [2d Dept 2008]), openly provided their son's confidential medical records, and disclosed his ultimate diagnosis in order to help save the recipient plaintiff who obtained further treatment and is alive today as a result. The Court finds that all parties acted responsibly by notifying the recipient plaintiff as soon as it was known that the donor had cancer, affording the recipient plaintiff all possible care and treatment possible to reverse the unfortunate

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[4] HIPAA is the Health Insurance Portability and Accountability Act of 1996 (see Pub L 104-191, 110 U.S. Sat 1936).

circumstances. Unfortunately, inasmuch as it is not the standard of care to perform a biopsy upon a donor organ prior to transplantation, it was not foreseeable that the donor could have had cancer, this Court is constrained by the law to render this determination.

Accordingly, under the circumstances presented herein and the prevailing law, the complaint is dismissed. Consequently, the derivative cause of action on behalf of the recipient plaintiff's wife must also be dismissed (*see* ***Cabri v Park***, 260 AD2d 525, 688 NYS2d 248 [2d Dept 1999]).

Dated: March 30, 2012

W. Gerard Asher
J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

TO: KELLY, RODE & KELLY, LLP
Attorney for Defendant Fenton, Syed and Sloniewsky
330 Old Country Road, Suite 305
Mineola, New York 11501

FUREY, KERLEY, WALSH, MATERA and CINQUEMANI, P.C.
Attorney for Defendant Andriola
2174 Jackson Avenue
Seaford, New York 11783

MITCHELL J. ANGEL, PLLC
Attorney for Defendants Semlear and Pflaster
170 Old Country Road
Mineola, New York 11501

BARTLETT, MCDONOUGH, BASTONE & MONAGHAN, LLP
Attorney for Defendant Southampton Hospital
670 Main Street
Islip, New York 11751