Index No. 614734/2016
Cal. No. 202000585MM

**SUPREME COURT - STATE OF NEW YORK**
**I.A.S. PART 30 - SUFFOLK COUNTY**

**PRESENT:**

Hon. **DENISE F. MOLIA**
**Justice**

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AMY QUARANTA, deceased, by BROCK QUARANTA, as Administrator, and BROCK QUARANTA, individually,

Plaintiff,

- against -

JERRY GEORGE, D.O., DAVID GALINKIN, M.D., NARADEEN MICKAIL, M.D., JONATHAN KROHN, M.D., STANLEY OSTROW, M.D., DAVID SHENOUDA, D.O., NORTH SHORE HEMATOLOGY-ONCOLOGY ASSOCIATES, P.C., THREE VILLAGE CARDIOLOGY, EASTERN INFECTIOUS DISEASE ASSOCIATES, P.C., and HARBOR VIEW MEDICAL SERVICES, P.C.,

Defendants.

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CASE DISPOSED: **NO**
MOTION R/D: **11/25/2020**
SUBMISSION DATE: **11/27/2020**
MOTION SEQUENCE NO.: **002; MG**
MOTION R/D: **11/20/2020**
SUBMISSION DATE: **11/20/2020**
MOTION SEQUENCE NO.:**003; MG**

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Upon the **E-file document list** numbered 61 to 93 read on the application of defendants David Galinkin, M.D., Naradeen Mickail, M.D., Jonathan Krohn, M.D., and Eastern Infectious Disease

Associates, P.C., for summary judgment dismissing the complaint as asserted against them and the application of Stanley Ostrow, M.D., for summary judgment dismissing the complaint as asserted against him; it is

**ORDERED** that the motion (#002) by defendants David Galinkin, M.D., Naradeen Mickail, M.D., Jonathan Krohn, M.D., and Eastern Infectious Disease Associates, P.C., and the motion (#003) by defendant Stanley Ostrow, M.D., are consolidated for the purposes of this determination; and it is further

**ORDERED** that the unopposed motion by defendants David Galinkin, M.D., Naradeen Mickail, M.D., Jonathan Krohn, M.D., and Eastern Infectious Disease Associates, P.C., for summary judgment dismissing the complaint as asserted against them is **GRANTED** for the reasons set forth herein; and it is further

**ORDERED** that the unopposed motion by Stanley Ostrow, M.D., for summary judgment dismissing the complaint as asserted against him is **GRANTED** for the reasons set forth herein.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff's wife, Amy Quaranta (decedent), by defendants Jerry George, D.O., David Shenouda, M.D, David Galinkin, M.D., Naradeen Mickail, M.D., Jonathan Krohn, M.D., Stanley Ostrow, M.D., Eastern Infectious Disease Associates, P.C. (EIDA), North Shore Hematology-Oncology Associates, P.C. (NSHOA), Three Village Cardiology, and Harbor View Medical Services, P.C. With respect to the instant motions, plaintiff alleges that the moving defendants were negligent in, *inter alia*, the management of decedent's anticoagulation therapy, treatment of her blood clots, and the treatment and management of her blood infection. Plaintiff also asserts a cause of action sounding in negligent hiring, and sues derivatively for loss of services.

The facts, as they relate to the instant motion, can be summarized as follows: In 2015, decedent was a 34-year-old woman with a history of bullous systemic lupus, and she was receiving intravenous Cytoxan via a PICC line every two weeks for treatment, as prescribed by non-party Dr. Jeffrey Vacirca. On January 26, 2015, decedent was admitted to Stony Brook University Hospital with complaints of fever, full body rash, nausea, vomiting, and abdominal pain. Decedent was admitted to the hematology/oncology service, and her care was managed by NSHOA, the same group which provided her outpatient care. On January 27, decedent was first seen by Dr. George, who was rounding for NSHOA. Dr. George testified that decedent presented with a low platelet count, an elevated INR, and a high white blood cell count. Dr. George requested a consult from infectious disease to evaluate for a potential infection. On January 29, Dr. Krohn from EIDA evaluated decedent. Dr. Krohn noted that decedent's blood cultures grew MRSA, and he recommended discontinuing her current medications, Flagyl and Zosyn, changing her current antibiotic, Vancomycin, to Daptomycin, for the hospital staff to remove decedent's PICC line, as it was likely the source of her blood infection, and for the hospital staff to perform daily blood cultures and a transesophageal echocardiogram. The same day, a chest CT scan was performed, which revealed moderately sized bilateral pleural effusions and numerous small nodular opacities scattered throughout her lungs, which were likely septic emboli.

On January 30 and February 2, Dr. Galinkin evaluated decedent for EIDA. Dr. Galinkin noted that on February 1, a culture of the tip of decedent's removed PICC line was positive for MRSA. Dr. Galinkin

testified that on February 2, he recommended that decedent's antibiotic be switched back to Vancomycin, as sensitivity test results showed the MRSA organism was sensitive to it. Dr. Galinkin also recommended continuation of daily blood cultures, and an MRI examination of decedent's back due to her complaints of back pain. On February 3, 4, 6 and 8, Dr. Mickail evaluated decedent on behalf of EIDA. Dr. Mickail noted the results of decedent's January 29 CT scan, that she was on anticoagulation therapy, and that decedent's antibiotic had not been switched the day before, per Dr. Galinkin's recommendation. Dr. Mickail performed a physical examination, and observed swelling in decedent's upper left arm, which she believed was a septic thrombophlebitis, or blood clot, caused by the PICC line. Dr. Mickail testified that she discussed decedent's case with the hospital residents, to ensure the recommendation to switch antibiotics was carried out. On the same day, an upper limb venous duplex scan was performed, which revealed a DVT in decedent's upper left arm. Dr. Mickail testified that decedent's blood cultures had been negative since January 31, which indicated that the antibiotics were working. She also testified that she recommended imaging of decedent's spine, as MRSA can lead to infection in the spine. Dr. Mickail testified that on February 5, decedent's blood work showed that her bacteremia was clearing and that her Vancomycin level was within therapeutic range. On February 8, Dr. Mickail noted that decedent's spinal MRI examination was negative for infection, and recommended a repeat chest CT scan in two weeks to evaluate the status of the septic emboli in decedent's lungs.

On February 9, Dr. Galinkin evaluated decedent. He testified at a deposition that he considered decedent to be "recovered from a high grade MRSA bacteremia," and noted that her transesophageal and transthroacic ultrasounds did not show bacterial vegetation. Dr. Galinkin testified that as of February 9, decedent was still experiencing low grade fevers, but added that he attributed them to either the presence of blood clots or to her lupus, as her blood cultures had been negative for more than one week. Dr. Galinkin recommended that daily blood cultures be discontinued, and that a urine culture and chest x-ray be performed to evaluate for alternative causes of her fevers. Dr. Galinkin also recommended a pulmonary consult, which would be ordered by the primary attending. On February 10, decedent was evaluated and physically examined by Dr. Ostrow for NSHOA. Dr. Ostrow's note indicated that decedent was clinically improving, and that he had discussed the case with the residents and Dr. George. Dr. Ostrow's note indicates that he recommended that decedent's course of care continue as prescribed, and did not recommend any new orders. On February 11, Dr. Galinkin evaluated decedent for the last time before discharge. Dr. Galinkin noted that a new PICC line had been placed by interventional radiology, and recommended that decedent continue outpatient intravenous Vancomycin for six weeks, as well as weekly Vancomycin trough level laboratory studies, and a follow up CT scan in two weeks. Dr. Galinkin testified that the prescription for decedent's Vancomycin was likely called directly to a home healthcare service, because it was not listed on her discharge summary. Decedent was discharged on February 11 by Dr. George, with orders for antibiotics, but not anticoagulants.

On February 12, decedent was readmitted to Stony Brook University Hospital with complaints of lightheadedness, palpitations, and shortness of breath with minimal exertion. She was diagnosed with bradycardia, and Dr. Ostrow was called. Dr. Jang, an emergency department physician, prescribed Lovenox, as recommended by Dr. Ostrow. A CT angiogram was negative for pulmonary embolism, but moderate bilateral plural effusions were present, and blood cultures were negative. Dr. Ostrow recommended a cardiology consult, but not an infectious disease consult. Dr. Ostrow admitted decedent to his service. On February 13, Dr. George evaluated decedent and ruled out DVT. She was discharged home with a prescription for Heparin, and instructions to see her primary care physician, NSHOA, EIDA, and a cardiologist.

On February 23, decedent followed-up with NSHOA, and reported fatigue. An upper limb venous duplex scan was performed on her left arm, which revealed acute thrombus in the basilic, axillary, subclavian, and brachiocephalic veins. On February 24, decedent was found unresponsive in her home. She was transported to St. Charles Hospital by EMS, and passed away.

Dr. Galinkin, Dr. Mickail, Dr. Krohn, and EIDA (EIDA defendants) now move for summary judgment dismissing the complaint as asserted against them. The EIDA defendants argue that they each acted in accord with good and accepted medical practice with respect to the treatment provided to decedent, and that the care and treatment they provided was not the proximate cause of decedent's injury or death. In support of their motion, the EIDA defendants submit the affirmations of Nazia Faiz-Qadir, M.D., and Dr. Krohn, decedent's medical records, and the transcripts of the deposition testimony of Dr. Galinkin, Dr. Mickail, and Dr. George. Plaintiff does not oppose the motion.

Dr. Ostrow also moves for summary judgment dismissing the complaint as asserted against him, arguing that Dr. Ostrow did not depart from good and accepted standards of care during the treatment he provided on February 10 and 12, and that the care and treatment he provided was not the proximate cause of decedent's alleged injuries or death. In support of his motion, Dr. Ostrow submits, *inter alia*, the affirmation of Bernard J. Poiesz, M.D., decedent's medical records and death certificate, and the transcripts of the depositions of plaintiff, Dr. George, Dr. Galinkin, and Dr. Mickail. Plaintiff does not oppose the motion.

A medical malpractice action, which is a type of negligence action, involves three basic duties of care owed to a patient by a professional health care provider and hospital: (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 provider 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]). As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see* ***Dupree v Giugliano***, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; ***Tracy v Vassar Bros. Hosp.***, 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015], *quoting* ***Scott v Uljanov***, 74 NY2d 673, 675, 543 NYS2d 369 [1989]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof (1) that the defendant deviated or departed from accepted standards of medical practice, and (2) that such deviation or departure was a proximate cause of his or her injury or damage (*see* ***Lowe v Japal***, 170 AD3d 701, 95 NYS3d 363 [2d Dept 2019]; ***Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.***, 157 AD3d 773, 69 NYS3d 108 [2d Dept 2018]; ***Duvidovich v George***, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]). A plaintiff must also present proof that the defendant's deviation of care was a substantial factor in bringing about his or her injury (*see* ***Wild v Catholic Health Sys.***, 21 NY3d 951, 969 NYS2d 846 [2013]; ***Zak v Brookhaven Memorial Hosp. Med. Ctr.***, 54 AD3d 852, 863 NYS2d 821 [2d Dept 2008]).

A defendant seeking summary judgment on a medical malpractice claim has the initial burden of establishing, through medical records and competent expert affidavits, the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby (*see* ***Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc.***, *supra*; ***Stucchio v Bikvan***, 155 AD3d 666, 63 NYS3d 498 [2d Dept 2017]; ***Mackauer v Parikh***, 148 AD3d 873, 49 NYS3d 488 [2d Dept 2017]; ***Feuer v Ng***, 136 AD3d 704,

24 NYS3d 198 [2d Dept 2016]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see* ***Sheppard v Brookhaven Mem. Hosp. Ctr.***, 171 AD3d 1234, 98 NYS3d 629 [2d Dept 2019]; ***Mackauer v Parikh***, *supra*). The burden is not met "if defendant's expert renders an opinion that is conclusory in nature or unsupported by competent evidence" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; *see* ***Smarkucki v Kleinman***, 171 AD3d 1118, 98 NYS3d 232 [2d Dept 2019]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]). Once this burden is satisfied, in opposition, a plaintiff must submit evidentiary proof "to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (***Stukas v Streiter***, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011], quoting ***Deutsch v Claglassian***, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]; *see* ***Wagner v Parker***, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]; ***Gray v Patel***, 171 AD3d 1141, 99 NYS3d 76 [2d Dept 2019]). The burden on the plaintiff is not to prove his or her entire case, but "merely to raise a triable issue of fact with respect to the elements or theories established by the moving party (***Stukas v Streiter***, *supra* at 25). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see* ***Lefkowitz v Kelly***, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; ***Jagenburg v Chen-Stiebel***, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; ***Leto v Feld***, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]). Although conflicting expert opinions may raise credibility issues which can only be resolved by a jury, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact in a medical malpractice action (*see* ***Wagner v Parker***, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]; ***Bowe v Brooklyn United Methodist Church Home***, 150 AD3d 1067, 1068 [2d Dept 2017]; ***Kerrins v South Nassau Communities Hosp.***, 148 AD3d 795, 796 [2d Dept 2017]).

The EIDA defendants have met their prima facie burden on the motion by submitting the affirmation of Nazia Faiz-Qadir, M.D., who avers that she is licensed to practice medicine in New York, that she is board certified in internal medicine and infectious disease, and that she is familiar with the standard of care as it existed in 2015 with respect to the role of infectious disease physicians providing consultations in hospital settings. Dr. Faiz-Qadir opines, within a reasonable degree of medical certainty, that Dr. Krohn, Dr. Galinkin, and Dr. Mickail acted in accordance with good and accepted medical practice in their treatment of decedent during her January 26 to February 11 hospitalization, and that the care and treatment provided was not a proximate cause of decedent's alleged injuries and death. Dr. Faiz-Qadir opines that the role of the EIDA defendants was to provide infectious disease consultations, and that their consultations would not include recommendations with respect to anticoagulation therapy or monitoring for blood clots. Dr. Faiz-Qadir opines that on January 29, Dr. Krohn's evaluation of decedent was appropriate, that he appropriately recommended the discontinuation of Flagyl and Zosyn, and appropriately recommended changing decedent's antibiotic from Vancomycin to Daptomycin, as they waited for sensitivity results. Dr. Faiz-Qadir opines that Dr. Krohn appropriately recommended daily blood cultures, the removal of her PICC line, as a possible source of infection, and the performance of a transesophageal echocardiogram, to evaluate for an infection around her heart. Dr. Faiz-Qadir opines that on January 30, Dr. Galinkin appropriately evaluated decedent, and appropriately recommended the continuation of Daptomycin, while the results of the sensitivities were pending. Dr. Faiz-Qadir opines that Daptomycin was an appropriate antibiotic for decedent's bacteremia; that Dr. Galinkin's evaluation of decedent on February 2 was within the standard of care; and that it was appropriate for Dr. Galinkin to recommend changing decedent's antibiotic from Daptomycin to Vancomycin, as the sensitivity results revealed that the organism causing decedent's bacteremia was sensitive to it. Dr. Faiz-Qadir further opines that it was within the standard of care for Dr. Galinkin to recommend continued daily blood cultures and an MRI examination to evaluate decedent's complaints of back pain, to rule out a spinal infection. With respect to Dr. Mickail's treatment of decedent on February 3, 4, 5, 6, and 8, Dr. Faiz-

Qadir opines that Dr. Mickail acted in accordance with the standard of care. Dr. Faiz-Qadir opines that it was appropriate for Dr. Mickail to recognize that Dr. Galinkin's recommendation to change decedent's antibiotic was not carried out the previous day, and that it was appropriate for Dr. Mickail to speak to hospital staff to ensure that the new antibiotic was ordered. Dr. Faiz-Qadir opines that decedent was clinically improving, and that it was appropriate for Dr. Mickail to recommend continued blood cultures. With respect to February 9, 10 and 11, Dr. Faiz-Qadir opines that it was within the standard of care for Dr. Galinkin to recommend that daily blood cultures be discontinued, as decedent's blood work had been negative for the previous ten days. Dr. Faiz-Qadir also opines that it was within the standard of care for Dr. Galinkin to recommend a six week course of intravenous Vancomycin, and a repeat chest CT in two weeks to rule out infection, and that these recommendations constituted appropriate follow-up care. Dr. Faiz-Qadir opines that, from an infectious disease perspective, it was appropriate for decedent to be discharged from the hospital on February 11. Dr. Faiz-Qadir notes that there was no consultation request made to EIDA, or any infectious disease specialist, during decedent's February 12 admission to Stony Brook University Hospital. Dr. Faiz-Qadir opines that based on notes from NSHOA, decedent showed no signs of infection during her February 23 appointment, as evidenced by the negative blood and urine cultures that were drawn on that day. Dr. Faiz-Qadir opines, within a reasonable degree of medical certainty, that decedent's death was not caused by an infection or an infectious process.

The EIDA defendants having met their prima facie burden on the motion, the burden now shifts to plaintiff to raise a triable issue of fact necessitating a trial (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Stiso v Berlin***, 176 AD3d 888, 110 NYS3d 139 [2d Dept 2019]; ***Wright v Morning Star Ambulette Servs., Inc.***, *supra*; ***Stukas v Streiter***, *supra*). Plaintiff fails to oppose the motion which, in effect, is a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (*see* ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC***, 178 AD3d 757, 114 NYS3d 100 [2d Dept 2019]). Therefore, the motion by Dr. Krohn, Dr. Galinkin, Dr. Mickail and EIDA for summary judgment dismissing the complaint as asserted against them is granted.

Dr. Ostrow has also established, prima facie, entitlement to summary judgment dismissing the complaint as asserted against him. Dr. Ostrow submits the affirmation of Bernard J. Poiesz, M.D., who avers that he is licensed to practice medicine in New York, and that he is board certified in internal medicine. Dr. Poiesz opines, within a reasonable degree of medical certainty, that Dr. Ostrow acted in conformity with good and accepted medical practice during his treatment of decedent on February 10 and 12, and that the care and treatment he provided, or failed to provide, was not a proximate cause of decedent's alleged injuries and death. Dr. Poiesz opines that when Dr. Ostrow first evaluated decedent on February 10, he appropriately reviewed her chart and history, performed a physical examination, and discussed her condition and prognosis with the hospital residents and decedent's attending physician, Dr. George. Dr. Poiesz opines that it was appropriate for Dr. Ostrow not to recommend any orders for decedent, as she was already on anticoagulation therapy and antibiotics, as prescribed by her attending physician. Dr. Poiesz opines that it would have been a deviation from the standard of care for Dr. Ostrow to prescribe an anticoagulant or antibiotic medication, as those categories of medications were already prescribed and administered, and therefore any medications prescribed by Dr. Ostrow would have been duplicative. Dr. Poiesz further opines that, as a consulting physician, Dr. Ostrow could not order or prescribe medication for decedent, as only her attending physician could do so. With respect to decedent's February 11 discharge, Dr. Poiesz opines that it was within the standard of care for Dr. Ostrow to rely on decedent's attending physician and the hospital staff to discharge decedent with her current medications. Dr. Poiesz opines that

Dr. Ostrow would not have needed to confirm, on the day of discharge, that decedent's discharge medications were prescribed, especially in light of the fact that Dr. Ostrow's colleague from NSHOA, Dr. Lodhi, evaluated decedent on the day of her discharge.

With respect to decedent's readmission to Stony Brook University Hospital on February 12, Dr. Poiesz opines that Dr. Ostrow did not depart from the standard of care in his treatment of decedent in the emergency department. Dr. Poiesz opines that Dr. Ostrow appropriately reviewed the notes of her emergency department admission, ensured that the appropriate studies were conducted in order to properly assess decedent's complaints and course of treatment, requested a cardiology consultation, and admitted her to the hospital. Dr. Poiesz opines that it was appropriate for Dr. Ostrow to recommend that decedent be prescribed an anticoagulation medication, an order which was entered by the emergency department attending physician, as decedent had not taken an anticoagulant medication since before her discharge the day before. Dr. Poiesz further opines that Dr. Ostrow appropriately considered that decedent's CT scan was negative for evidence of a pulmonary embolism. Dr. Poiesz notes that Dr. Ostrow was not involved with decedent's discharge on February 13. Dr. Poiesz opines that it would not have been the standard of care for Dr. Ostrow to follow up with decedent after her discharge, as her discharge instructions were to follow up with Dr. Vacirca, her treating physician from NSHOA. Dr. Poiesz opines, within a reasonable degree of medical certainty, that there is no causal connection between decedent's cause of death and the treatment provided by Dr. Ostrow. Dr. Poiesz opines that decedent's immediate cause of death, as indicated on her death certificate, was "complications of systematic lupus erthematosus including pneumonia and urosepsis," and that no other significant conditions contributing to death were listed.

Dr. Ostrow having met his prima facie burden on the motion, the burden now shifts to plaintiff to raise a triable issue of fact necessitating a trial (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Stiso v Berlin***, *supra*; ***Wright v Morning Star Ambulette Servs., Inc.***, *supra*; ***Stukas v Streiter***, *supra*). Plaintiff fails to oppose the motion which, in effect, is a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (*see* ***Kuehne & Nagel v Baiden***, *supra*; ***114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC***, *supra*). Therefore, the motion by Dr. Ostrow for summary judgment dismissing the complaint as asserted against him is granted.

The foregoing constitutes the decision and Order of this Court.

Dated: January 12, 2021

**HON. DENISE F. MOLIA A.J.S.C.**