

Rosen v John J. Foley Skilled Nursing Facility

2006 NY Slip Op 30448(U)

June 7, 2006

Supreme Court, Suffolk County

Docket Number: 01-21202

Judge: Robert W. Doyle

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and fell and was admitted to Southside Hospital, where he underwent a craniotomy to relieve a subdural hematoma. Following a successful recovery, plaintiff's decedent was transferred from Southside Hospital to the John J. Foley Nursing Facility, where plaintiff's mother was already a resident, and he remained a resident until his passing. Plaintiff's decedent while at defendant facility received a pacemaker and was receiving treatment for numerous medical conditions other than his Bipolar psychosis, including but not limited to anti-arrhythmic treatment, Coumadin treatment, abdominal aortic aneurysm repair, psoriasis, and coronary artery disease with bypass graft surgery. Plaintiff's decedent's physical and mental health began to deteriorate after his wife passed in 1999, and he began ambulating himself by using a wheelchair. Defendant facility then diagnosed plaintiff's decedent as being in a severely depressive state. Plaintiff's decedent began experiencing falls between April and July 2000 while attempting to ambulate by himself. The staff at defendant facility, concerned about Mr. Leibowitz' weakened state, determined that one-on-one transfer assistance was necessary whenever he wanted to leave his bed and get in his wheelchair or if he wanted to walk around the nursing facility; it also activated the alarms on his bed and fitted his wheelchair with a velcro belt. On July 1, 2000 at approximately 12:35 p.m., plaintiff's decedent, while in the dining area of the nursing facility, attempted to stand on his own but fell to the ground and sustained an injury to his forehead. Plaintiff's decedent following the fall was placed back into his wheelchair, examined by a physician and taken to the nurse's station for observation while arrangements were made for his transfer to Brookhaven Memorial Hospital Medical Center for evaluation. Plaintiff's decedent arrived at Brookhaven Memorial at approximately 1:35 p.m., where a CT scan was performed, and the results came back within a normal range; however, when a second CT scan was performed the following day, it showed the presence of a large frontal lobe parenchymal hemorrhage with a large scale bleed. Plaintiff's decedent lapsed into a coma and passed away on July 6, 2000.

Defendants now move for summary judgment on the basis that plaintiff cannot establish a prima facie case of skilled nursing facility malpractice and that defendant at all times complied with accepted medical standards in its treatment, care and assessment of Mr. Leibowitz during his tenure at the defendant facility. Defendants also assert that the care, protection and safety of Mr. Leibowitz was in accordance with 42 USC § 290ii (a)¹ and 10 NYCRR 405.7², federal and state legislation regarding the

¹42 USC § 290ii states in pertinent part:

(a) A public or private general hospital, nursing facility, intermediate care facility, or other health care facility...shall protect and promote the rights of each resident of the facility, including the right to be free from physical or mental abuse, corporal punishment, and any restraints or involuntary seclusions imposed for purposes of discipline or convenience.

(b) Restraints and seclusions may only be imposed on a resident of a facility [as described above] if

- (1) the restraints or seclusion are imposed to ensure the physical safety of the resident, a staff member, or others;
- (2) the restraints or seclusion are imposed only upon the written order of a physician, or other licensed practitioner...that specifies the duration and circumstances under which the restraints are to be used

² 10 NYCRR 405.7 states in pertinent part:

(5) limit the use of physical restraints to those patients restraints authorized in writing by a physician after a personal examination of the patient, for a specified and limited period of time to

use of restraints in patient care. In support of the motion, defendants submit the pleadings, the 50-h hearing transcript of Sara Rosen, the deposition transcripts of plaintiff, Sara Rosen, defendants' non-party witnesses, Alfred Carfora, Barbara Peate, Monika Burmann, Brian Jasaitis, and Paul Rosen, the affidavit of defendants' expert witness, Philip Sumner, M.D., the death certificate of Mr. Leibowitz and the medical records of the decedent from Brookhaven Memorial Hospital Medical Center and defendant facility.

Plaintiff opposes the instant motion on the basis that defendants had prior notice of decedent's previous history of incidences of falling and were under a duty to develop a care plan that would prevent or lessen the likelihood of such reoccurrences, which the defendants failed to provide. In opposition, plaintiff submits the affidavit of plaintiff, Sara Rosen, the affidavit of plaintiff's expert, Benjamin E. Zola, M.D., Mr. Leibowitz' certificate of death, the interim physician's notes and care plan from defendant facility, and the deposition transcripts of defendants' non-party witnesses, Barbara Peate, Monika Burmann, and Brian Jasaitis.

At her 50-h hearing plaintiff testified that decedent Bert Leibowitz was her father and he was placed in defendant facility in approximately the winter of 1996. Mrs. Rosen also testified that decedent had suffered an emotional breakdown after becoming overwhelmed with caring for her mother, who suffered from Alzheimers disease. Mrs. Rosen then testified that decedent headed to South Carolina with his wife, without informing anyone of their whereabouts, and was diagnosed as manic depressive in 1995 after being involuntarily committed to the South Carolina Psychiatric Hospital, but in 1996 he was returned to New York on the condition that he was placed in the Central Islip Psychiatric Hospital. Mrs. Rosen additionally testified that her father was later transferred to defendant facility, where he remained a resident until he passed away. Mrs. Rosen next testified that her mother and father, prior to her mother's passing in 1999, shared a room together at defendant facility. Mrs. Rosen also testified that the staff at the nursing facility was concerned about Mr. Leibowitz' moving about the nursing facility unsupervised because of falling, but he nonetheless maneuvered throughout the nursing facility as he pleased, using his wheelchair. Mrs. Rosen further testified that the nursing staff did not want Mr. Leibowitz to ambulate by himself because of his immobility due to the considerable amount of time he spent watching television in his bed and his being 6'4", 180-185 pounds. Mrs. Rosen then testified that she and her husband were also concerned about her father's continually lying in bed watching television, so they requested that her father receive physical therapy to strengthen his leg muscles but were informed that Mr. Leibowitz did not qualify for physical therapy although he was later evaluated after she continued to complain about his lack of physical therapy. Mrs. Rosen also testified that her father would sit in his wheelchair and use his legs to ambulate himself as a form of exercise prior to his start of physical therapy, which he began receiving once a week every week beginning in June of 2000. Mrs. Rosen also testified that in late June of 2000, she received a phone call from one of the nurses at the nursing facility informing her that Mr. Leibowitz had fallen and had injured himself, specifically his rib cage but nothing serious, and when she visited with him that weekend, she did not notice any type of contusions or abrasions on her father or his ribs although he was sore. Mrs. Rosen then testified that she

protect the patient from injury to himself or others.... At frequent intervals while restraints are in use the patient's physical needs, comfort and safety shall be monitored. An assessment of the patient's condition shall be made at least once every 30 minutes or more frequent interval if directed by the physician.

was informed that the alarm on her father's bed would be activated as a preventive measure to stop Mr. Leibowitz from leaving his bed unsupervised and to prevent any future falls; however, Mrs. Rosen said she was unaware of the alarm's ever being activated. Mrs. Rosen next testified that her father had a buzzer that he used to communicate with the nurses and staff and that the staff assisted him in going to the bathroom to prevent him from falling, but she was unsure whether they left him alone in the bathroom although she did not believe he needed assistance inside the bathroom. Mrs. Rosen additionally testified that later that week her father fell a second time while he was heading to the bathroom and suffered a trauma to his head, which caused the nursing facility to transfer Mr. Leibowitz to Brookhaven Memorial Hospital for evaluation and observation. Mrs. Rosen then testified that her father lapsed into a coma and the doctors at the hospital did not feel they could operate on him because there was too much damage. Mrs. Rosen further testified that her father remained in the hospital for approximately five days following his admittance and passed away in early July.

Plaintiff testified to virtually the same set of facts at her examination before trial as she did at her 50-h hearing. Mrs. Rosen testified that her father, the decedent, was admitted to defendant facility in early 1997 and remained a resident until his death in July of 2000. Mrs. Rosen also testified that her mother, who was suffering from Alzheimers was already a resident at defendant facility and she and her husband decided that defendant facility would be suitable for her father as well. Mrs. Rosen additionally testified that her father was admitted to Southside Hospital after suffering a fall, which required the performance of a craniotomy to relieve a subdural hematoma while a resident at Central Islip Psychiatric Hospital. Mrs. Rosen also testified that after the surgery and at the time of his admittance into defendant facility, her father was able to ambulate himself. Mrs. Rosen then testified that the year prior to her father's admittance into Central Islip Psychiatric Hospital, while a resident at Craft Farrell in North Carolina, her father was diagnosed with Bipolar illness and was receiving Haldol as treatment and Coumadin therapy. Mrs. Rosen next testified that while her father was a resident of defendant facility he was also diagnosed as being in a severe depressive state and the nursing facility was also concerned about Mr. Leibowitz' inactivity and continuous television watching while lying in his bed. Mrs. Rosen then testified that her father's mobility began to deteriorate and he was no longer able to ambulate himself after her mother passed away in 1999. Mrs. Rosen also testified that her father began using a wheelchair within six months after her mother's death although she did observe him walking on his own, but he was unsteady. Mrs. Rosen in addition testified that she requested that her father be given physical therapy but was later informed by defendant facility that Mr. Leibowitz did not qualify for physical therapy. Mrs. Rosen then testified that her father while walking on his own had fallen in his bathroom a few months before the fall that ultimately led to his demise, which caused some bruising to his ribs. Mrs. Rosen further testified that the staff at the nursing facility indicated that an alarm would be activated on Mr. Leibowitz' bed in order to prevent any future falls but it was not activated all the time. Mrs. Rosen also testified that she was informed by the nursing facility that her father had fallen in June, approximately one week before he expired, in the bathroom and he had been taken to Brookhaven Memorial Hospital. Mrs. Rosen then testified that her father had sustained injuries to his forehead and the doctors at the hospital did not expect him to regain consciousness. Mrs. Rosen additionally testified that she did not remember seeing any velcro belts or straps attached to her father's wheelchair while he was a resident at defendant facility.

Alfred Carfora testified on behalf of defendant John J. Foley Skilled Nursing Facility. Mr. Carfora testified that he has been employed as the assistant director of nursing at the nursing facility for

approximately three and a half (3 ½) years and prior to his current appointment, including the year 2000, he was the Registered Nurse (RN) supervisor for about twelve and a half (12 ½) years. Mr. Carfora also testified that as the nursing supervisor his duties included overseeing the nursing units, which included ensuring that the residents received the appropriate medical care and being a resource for the floor nurses. Mr. Carfora then testified that the nursing facility operated in three shifts, 7 a.m. to 3 p.m., 3 p.m. to 11 p.m. and 11 p.m. to 7 a.m. Each unit, of which there were seven units in the nursing facility, had a nursing supervisor, nurse manager, one or two licensed practical nurses (LPN) and three to six certified nursing assistants (CNAs), and there were three doctors employed by the nursing facility whose duty it was to review residents' medications and assess residents' medical needs. Mr. Carfora additionally testified that he was familiar with the decedent, Mr. Leibowitz, from the time he became a resident at the nursing facility in 1996 until he was transferred out of the nursing facility in July of 2000 because his office was on unit 4 north, the unit where Mr. Leibowitz resided and Mr. Leibowitz stopped by his office every other day to socialize with him. Mr. Carfora next testified that Mr. Leibowitz shared a room with his wife when he was first admitted to the nursing facility and he was alert, stable and cared for his wife, but after her death Mr. Leibowitz' behavior changed; he became withdrawn and would have periods of paranoia. Mr. Carfora then testified that in January and July of 2000, Mr. Leibowitz was transferred to Brookhaven Memorial Hospital due to his declining mental state for evaluation and to determine whether the Coumadin he was taking was causing him to have a high INR and to rule out temporary ischemic event. Mr. Carfora further testified that Mr. Leibowitz was able to walk for short distances but he preferred not to walk and instead used his wheelchair to ambulate. Mr. Carfora in addition testified that during the time frame of January to July 1, 2000, Mr. Leibowitz had fallen or was found on the floor a number of times at the nursing facility and that protocol was to write up an incident report, which is kept in the quality assurance department of the nursing facility. Mr. Carfora also testified that a bed alarm was ordered after Mr. Leibowitz' April 22, 2000 incident where he was found on the floor of his bathroom and sustained injuries to his elbow although the doctor examining him stated it was not an abrasion but was from his psoriasis. Mr. Carfora then testified that a velcro belt restraint was ordered on June 30, 2000 for Mr. Leibowitz, pursuant to the nurse practitioner's orders, as a reminder that Mr. Leibowitz was not to get up on his own and that he required assistance getting in and out of his wheelchair due to his increasing confusion and lethargy. Mr. Carfora additionally testified that on July 1, 2000 he was called to the nurse's station, where it was explained to him that Mr. Leibowitz, who was awaiting his lunch in the dining room, unlocked his wheelchair, unfastened his velcro belt and attempted to stand up but fell down and hit his head. Mr. Carfora also explained that Mr. Leibowitz was sent to the hospital for evaluation after the fall because of his use of Coumadin, which made his body more susceptible to bleeding and the lump that had formed on his forehead, although he never lost consciousness, his vital signs were stable and he was coherent. Mr. Carfora further explained that Mr. Leibowitz informed him that he fell because he stood up in an attempt to walk. Mr. Carfora also testified that Mr. Leibowitz' daughter, Mrs. Rosen, was informed of Mr. Leibowitz' accident as well as the nursing facility's decision to send him to the emergency room at Brookhaven Hospital.

Barbara Peate testified on behalf of defendant John J. Foley Skilled Nursing Facility. Mrs. Peate testified that she has been employed as a float LPN nurse at the nursing facility for approximately twelve (12) years and she works the 3 p.m. to 11 p.m. shift. Mrs. Peate then explained that her duties included giving out medication, staff assignments, monitoring the patients and answering the phones. Mrs. Peate also testified that she remembers Mr. Leibowitz because it is very unique to have a married couple placed in the nursing facility. Mrs. Peate next testified that she does not, however, have any

independent recollection of the care she provided to Mr. Leibowitz during his tenure at the nursing facility. Mrs. Peate in addition testified that she does not remember the type of medication that Mr. Leibowitz was prescribed or whether he was ambulatory while at the nursing facility. Mrs. Peate next testified that she did not recall if Mr. Leibowitz had a bed alarm on his bed, but she did explain that bed alarms are attached to the resident's mattress as well as the resident and the alarm will sound if the resident attempts to leave the bed unassisted. Mrs. Peate further testified that upon her arrival at work on July 1, 2000, she was informed that Mr. Leibowitz had fallen and was sent to the hospital.

Monika Burmann testified on behalf of defendant facility. Ms. Burmann testified that she has been employed at the nursing facility for nine and a half (9 ½) years as a CNA working on the 3 p.m. to 11 p.m. shift. Ms. Burmann in addition testified that every CNA at the nursing facility is provided with each resident's daily care booklet. Mrs. Burmann also testified that while Mr. and Mrs. Leibowitz were residents of the nursing facility, she provided average daily living care (ADL), which included washing, feeding, dressing and cleaning them. Mrs. Burmann then testified that she does not recall any incidents in which Mr. Leibowitz had fallen or was found on the floor prior to being informed of his fall on July 1, 2000. Mrs. Burmann next testified that she was informed of Mr. Leibowitz' incident by one of the orderlies who witnessed the fall and he explained to her that Mr. Leibowitz attempted to leave his wheelchair unassisted and fell down. Mrs. Burmann additionally testified that she never witnessed Mr. Leibowitz' being unable to stand on his own. Mrs. Burmann also testified that she was never given instructions that Mr. Leibowitz had to be restrained while in bed or in his wheelchair. Mrs. Burmann further testified that she does not recall Mr. Leibowitz' being unable to ambulate independently.

Paul Rosen testified on behalf of plaintiff Mrs. Rosen and Mr. Leibowitz. Mr. Rosen testified that he met Mr. Leibowitz in 1995 and at that time Mr. Leibowitz was depressed that his wife was dying but physically he was very strong. Mr. Rosen also testified that prior to Mr. Leibowitz' being admitted to the nursing facility, he was in Southside Hospital because he had to receive brain surgery after a fall that occurred while he was a resident at Central Islip Psychiatric Hospital. Mr. Rosen then testified that after being released from Southside Hospital, Mr. Leibowitz was transferred to defendant facility, where his wife was already a resident being treated for Alzheimers. Mr. Rosen next testified that at the time of Mr. Leibowitz' transfer to the nursing facility in 1996, Mr. Leibowitz was able to walk on his own without any assistance, but after his wife's passing, he began using a walker and then progressed to a wheelchair. Mr. Rosen in addition testified that Mr. Leibowitz' favorite pastimes were lying in his bed watching television or sleeping. Mr. Rosen also testified that he never had any discussion with any of Mr. Leibowitz' treating physicians while he was a resident of the home. Mr. Rosen further testified that during the year 2000 Mr. Leibowitz' legs were weakening and no physical therapy was being provided to him, but in April of 2000 he began receiving leg exercises after an incident in which Mr. Leibowitz was found on the floor of the bathroom and again toward the end of June 2000. Mr. Rosen additionally testified that prior to April of 2000 he was unaware of Mr. Leibowitz' having any incidents in which he fell down, but after April he recalls at least three incidences where Mr. Leibowitz fell down. Mr. Rosen also testified that after the third fall in June, he spoke with one of the nurses and explained that he was extremely concerned about his father-in-law's falling down because his health appeared to be seriously affected by the falls. Mr. Rosen then testified that the alarm on Mr. Leibowitz' bed was never activated. Mr. Rosen additionally explained that he noticed changes in Mr. Leibowitz' mental state; he appeared confused and disoriented as well as being extremely weak and pale, and he was not eating properly. Mr. Rosen further testified that on July 1, 2000 he received a phone call informing him that his father-in-law

had fallen in the nursing facility's lunchroom and had been taken to Brookhaven Hospital. Mr. Rosen in addition testified that he was informed by a nurse's aid that after Mr. Leibowitz' fall he was placed back into his wheelchair and taken to the nurse's station for observation before being transported to the hospital via ambulance. Mr. Rosen then testified that the coroner's office determined Mr. Leibowitz' cause of death was blunt force trauma. Mr. Rosen lastly testified that he does not recall Mr. Leibowitz' wheelchair having a velcro belt attached to it because he usually sat in the wheelchair when he visited with his father-in-law.

Brian Jasaitis testified on behalf of defendants. Mr. Jasaitis testified that he has been employed by Medical Staffing Incorporated as a LPN since September 2004. Mr. Jasaitis also testified that prior to accepting his new job, he was employed at the John J. Foley Skilled Nursing Facility for approximately six (6) years as a CNA and during his term of employment the Leibowitzes were residents. Mr. Jasaitis then testified that his duties included providing direct care of the residents; he assisted with their ADL as well as any other jobs the nursing staff needed help with. Mr. Jasaitis additionally testified that he provided individualized care to Mr. Leibowitz and he could be difficult at times because he did not always want to comply with the care the staff needed to provide him. Mr. Jasaitis also testified that Mr. Leibowitz would walk whenever he wanted to walk and there were many instances when the staff at the nursing facility had to catch him or hold him to prevent him from falling and place him in his wheelchair. Mr. Jasaitis in addition testified that Mr. Leibowitz' wheelchair contained a velcro seat belt to prevent him from rising unassisted but he does not recollect whether Mr. Leibowitz' bed had an active bed alarm. Mr. Jasaitis further testified that he was present in the dining room on July 1, 2000; he explained that he was tending to his resident when he heard someone's voice, and then from his peripheral vision he saw Mr. Leibowitz standing, beginning his descent downward. Mr. Jasaitis additionally testified that he attempted to catch Mr. Leibowitz by putting his arm around Mr. Leibowitz' waist before he fell, but he was unable to prevent the fall and they both fell to the floor. Mr. Jasaitis also stated that prior to the fall Mr. Leibowitz was approximately three to four feet from where he was seated. Mr. Jasaitis further testified that after the fall Mr. Leibowitz was conscious and the nursing staff tended to him immediately.

The affidavit submitted by defendants' expert, Philip Sumner, M.D., indicates that he is licensed to practice medicine in the State of New York, board certified in internal medicine and fully cognizant of the standards of practice with respect to skilled nursing home facilities. Dr. Sumner also stated that Mr. Leibowitz, who was a long-term care resident at defendant facility, was confined to the nursing facility after being hospitalized at Southside Hospital following a craniotomy, respiratory failure, reabsorption of a subdural hematoma after having been confined to a series of psychiatric hospitals both in New York and South Carolina. Dr. Sumner additionally explained that Mr. Leibowitz, while residing in defendant facility, received care and treatment from a number of physicians and nurses, including RN supervisors, LPNs and CNAs for a series of medical problems, which included psoriasis, bipolar psychosis, paranoid manifestations, Coumadin treatment and abdominal aortic aneurysm repair. Dr. Sumner then indicated that in 2000, the year after his wife died, decedent received two CT scans, one in January and another in February which showed brain atrophy with focal atrophy near the craniotomy area, which caused Mr. Leibowitz to experience organic brain damage with psychotic issues and manifestations. Dr. Sumner in addition stated that the staff's use of alarms on Mr. Leibowitz' bed and restraints on his wheelchair to prevent him from moving about unassisted was appropriate after decedent began experiencing a series of unexplained falling incidents. Dr. Sumner also explained that on July 1,

2000, when the decedent fell, the staff's decision to place Mr. Leibowitz under constant observation while waiting for the ambulance's arrival and his subsequent transfer to Brookhaven Hospital was sound medical judgment. Dr. Sumner then explained that upon arrival at the hospital, according to the hospital's medical records, Mr. Leibowitz was alert and given a CT scan and found to be within the normal limits after the accident. It was not until July 2, 2000 that the CT scan revealed the presence of a large frontal lobe parenchymal hemorrhage with a large scale bleed. Dr. Sumner further avers that in his opinion the care provided to Mr. Leibowitz fully comported with acceptable standards of practice for the care and treatment of residents of nursing home facilities and nothing that the defendants or their agents did or failed to do contributed or caused the death of Mr. Leibowitz. Dr. Sumner in addition explained that due to Mr. Leibowitz' medical condition and debilitated state, he was not an ideal candidate for physical therapy or rehabilitation and the nursing facility adequately assessed Mr. Leibowitz in its decision to use the least restrictive means of restraint to reasonably maintain him.

In her personal affidavit plaintiff asserts that she is the administratrix of her late father, Bert Leibowitz', estate. Mrs. Rosen also states that her mother and father, admitted in 1996 and 1997, respectively, were both residents of defendant facility at the same time until her mother passed away in 1999. Mrs. Rosen additionally indicates that her father was admitted to the nursing facility after he was transferred from Southside Hospital after having suffered a fall while confined to Central Islip Psychiatric Center, to which he had been admitted involuntarily. Mrs. Rosen then testified that Mr. Leibowitz sustained a brain injury that required surgery and convalescence. Mrs. Rosen next testified that her father, who had no history of mental illness prior to 1995, suffered a mental breakdown after becoming overwhelmed and depressed from caring for her mother, who was suffering from Alzheimers. Mrs. Rosen in addition indicates that she placed her parents in defendant facility because she was unable to provide the care they needed and that her father suffered at least six "falling" incidents between April 19, 2000 and July 1, 2000. Mrs. Rosen also avers that defendant facility was aware of her father's history of falls and the craniotomy that he had previously undergone; however, the first indication of a fall risk assessment in the nursing facility's medical records occurred on April 7, 2000. Mrs. Rosen further indicates she informed the nursing staff on numerous occasions during her weekly visits that the bed alarms on her father's bed were not activated.

The affidavit of plaintiff's expert, Benjamin E. Zola, M.D., indicates that he is a physician licensed to practice in the State of New York, is board certified in the fields of internal medicine and cardiology and fully familiar with the standards of practice for the treatment of residents at skilled nursing facilities. Dr. Zola avers that based upon defendants' knowledge of decedent's prior falling incidents, defendants were required to develop a plan that would seek to prevent any likelihood of future falls but to also continually assess the needs of the resident and modify the plan as warranted. Dr. Zola additionally explains that Mr. Leibowitz' falls did not occur because of his mental condition but were the result of his deteriorating physical health and being left unattended and unsupervised by the nursing facility's nursing staff against the doctors' written orders. Dr. Zola next notes that despite January, March and April ADL monthly evaluation sheets requiring decedent to receive constant one-on-one transfer assistance and walking assistance, respectively, a fall risk assessment was not performed nor was an interim care plan written until after Mr. Leibowitz' fall on April 22, 2000. Dr. Zola in addition states that even though no bruises or cuts were found and he was alert and oriented, there was no indication that the physician who examined Mr. Leibowitz after he was found on the hallway floor performed a neurological examination or checked for internal injuries to rule out bleeding or possible

concussion since he exhibited signs of sleepiness. Dr. Zola further states that it is his opinion that the care and treatment rendered to Mr. Leibowitz by defendant facility deviated from the normal standards of practice and was the proximate cause of his death.

On a motion for summary judgment the moving party bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see, *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]; *Wilder v Rensselaer Polytechnic Inst.*, 127 AD2d 534, 572 NYS2d 795 [1991]). The court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (see, *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *Rennie v Barbarosa Transport, Ltd.*, 151 AD2d 379, 543 NYS2d 429 [1989]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

In general, an action against a skilled nursing facility may be premised based upon either negligence or medical malpractice, depending on the nature of the conduct involved (see, *Evangelista v Zolan*, 247 AD2d 508, 669 NYS2d 325 [1998]; *Smee v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966, 620 NYS2d 685 [1994]). Whether the action is one sounding in simple negligence or medical malpractice depends upon whether the trier of fact is able to discern if the acts or omissions complained of may be assessed on the basis of common knowledge or if professional medical skill and judgment are required (*Kerker v Hurwitz*, 163 AD2d 859, 558 NYS2d 388 [1990]; *Miller v Albany Med. Ctr. Hosp.*, 95 AD2d 977, 464 NYS2d 297 [1983]; *Zellar v Tompkins Community Hosp., Inc.*, 124 AD2d 287, 508 NYS2d 84 [1986]; cf. *White v Sheehan Memorial Hosp.*, 119 AD2d 989, 500 NYS2d 885 [1986]). Furthermore, in a medical malpractice action, it is axiomatic that a deviation or departure from accepted practice be established, as well as a sufficient nexus between the alleged malpractice committed by the defendant and the injuries sustained by the plaintiff, unless the causal relationship is readily apparent to the fact finder (*Grzelecki v Sipperly*, 2 AD3d 939, 768 NYS2d 47 [2003]; *Rossi v Arnot Ogden Med. Ctr.*, 268 AD2d 916, 702 NYS2d 451 [2000]; *Horth v Mansur*, 243 AD2d 1041, 633 NYS2d 703 [1997]; *Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 [1986]).

Plaintiffs' allegations sound in medical malpractice rather than ordinary negligence because the gravamen of plaintiffs' case challenges defendants' assessment of Mr. Leibowitz' risk for falling and its inability to adequately restrain and institute sufficient preventive measures to reduce his risk of falling; and as such, the conduct at issue constitutes an integral part of the process of rendering medical care (*Scott v Uljanov*, 74 NY2d 673, 543 NYS2d 369 [1989]; *Smee v Sisters of Charity Hosp. of Buffalo*, *supra*). Further, whether defendant's employees in its care of plaintiff's decedent deviated from the standard of care customarily exercised by skilled nursing facilities in the community cannot be determined without a "full appreciation and understanding of the operational demands and practices of a medical facility" (*Smee v Sisters of Charity Hosp. of Buffalo*, *supra*; citing, *Zellar v Tompkins Community Hosp.*, *supra*).

Here, defendants have met their prima facie showing that no material issues of fact exist as to the alleged malpractice asserted against them in the complaint (*see, Alvarez v Prospect Hosp., supra; Douglass v Gibson*, 218 AD2d 856, 630 NYS2d 401 [1995]; *Conti v Albany Med. Ctr. Hosp.*, 159 AD2d 772, 551 NYS2d 994 [1990]). Defendants facility has established that its treatment of Mr. Leibowitz was in accordance with sound medical treatment, federal and state laws regarding the regulation and usage of restraints on a patient and did not present a deviation from the standards of accepted medical practice (*see, 42 USC § 290ii (a); 10 NYCRR 405.7; Hranek v United Methodist Homes of the Wyoming Conf.*, __ AD3d __, 2006 NY Slip Op 1701; 810 NYS2d 544, 2006 NY App Lexis 2647 [2006]; *Yamin v Baghel*, 284 AD2d 778, 728 NYS2d 520 [2001]). Specifically, defendants' expert states that the nursing facility's response to decedent's falling incidents was appropriate in that it increased its supervision, ordered bed alarms, a velcro belt for his wheelchair and restrained him in such a way as to not violate federal or state law regarding patient restraints usage. Furthermore, defendants' expert states defendant facility did not deviate from acceptable medical standards by not changing Mr. Leibowitz' overall care plan after he experienced a falling incident on June 28, 2000 because he was examined by a physician as well as assessed over the next two days and found to be alert, but lethargic; he was not in any acute distress or trauma. Defendants' expert also explained that it was sound medical practice for the facility to place Mr. Leibowitz back into his wheelchair, which was placed at the nurse's station in order to observe him while awaiting the arrival of the ambulance and that a period of one hour between the time of the fall and Mr. Leibowitz' arrival at the hospital was not a deviation.

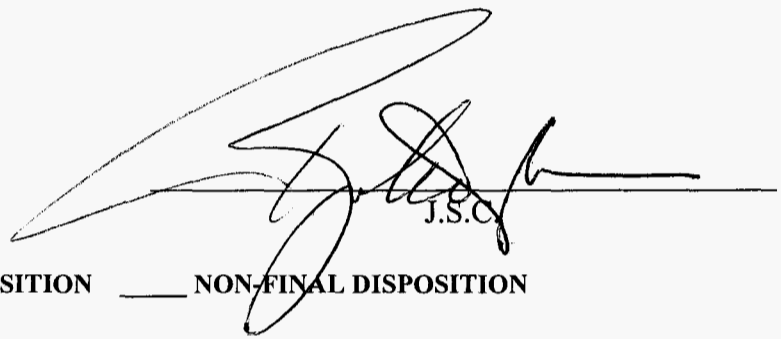
Although plaintiff asserts that defendant had clear notice of decedent's high risk for falling based upon his assessment and prior history, plaintiff, however, has not proven that defendant failed to take adequate measures to prevent the harm in order to shift the case from one of medical malpractice to that of ordinary negligence (*Kerker v Hurwitz, supra; Mossman v Albany Med. Ctr. Hosp.*, 34 AD2d 263, 311 NYS2d 131 [1970]) because prior to April of 2000 Mr. Leibowitz had not experienced any falling episodes at defendant facility and had been ambulating by himself. Additionally, defendant facility, upon realization that plaintiff's decedent was in need of restraints and written doctor's orders, instituted the use of bed alarms and side rails, as well as a velcro belt whenever Mr. Leibowitz was in his wheelchair, which was the least restrictive means of restraining plaintiff's decedent and an appropriate response considering Mr. Leibowitz' mental and physical condition. Moreover, Mr. Leibowitz never exhibited any signs of aggressive behavior toward himself or others; instead Mr. Leibowitz was actually described as being quite a pleasant resident, and thus the record does not reflect a need for a more aggressive form of restraining Mr. Leibowitz.

The burden then shifted to plaintiff to come forth with sufficient evidentiary proof to raise a triable issue of fact to demonstrate both a deviation from the standard of care and that the deviation was the proximate cause of decedent's injuries and subsequent death (*Hranek v United Methodist Homes of the Wyoming Conf., supra; Grzelecki v Sipperly, supra; Kean v Community Hosp.*, 195 AD2d 910, 610 NYS2d 27 [1993]). Plaintiffs' expert's affidavit's continual reference to Mr. Leibowitz' need for one-on-one transfer assistance is greatly misplaced, as Mr. Leibowitz' fall, which tragically resulted in his eventual demise, did not occur during any transfer of the patient from his bed to his wheelchair or vice versa and thus fails to show that defendant deviated from acceptable practice with regard to plaintiff's decedent (*see, Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 699 NYS2d 631 [1998]; *Douglass v Gibson, supra*). Moreover, the affidavit of plaintiff's expert opines in merely conclusory and speculative terms that the physicians and staff at defendant facility failed to adequately assess and

prevent Mr. Leibowitz' risk for falls. The affidavit further avers that since plaintiff was a high risk for falling, he needed restraints, and against physicians' orders for the use of restraints, plaintiff was allowed to roam around the facility unsupervised; however, these statements are unsupported by the evidence presented and fail to raise a question of fact (*Yamin v Baghel, supra; Douglass v Gibson, supra; Scott v Uljanov, supra*). The record also reveals that Mr. Leibowitz complied with the requirement to call for assistance as it was testified to by all those deposed that Mr. Leibowitz understood that he was to be supervised when attempting to ambulate and he would even use his call button for assistance; however, he would become impatient and attempt to stand on his own, which would result in his falling because of his weakened leg muscles. Therefore, the averments in the expert's affidavit lack the requisite level of proof that is necessary to defeat defendants' motion for summary judgment (*Grzelecki v Sipperly, supra; Rossi v Arnot Ogden Med. Ctr., supra*). Plaintiff has thus failed to establish the requisite nexus between the alleged malpractice and decedent's injuries (*Douglas v Gibson, supra; Amstel v Verrilli, supra*), as well as the deviation or departure from accepted medical practice (*Grzelecki v Sipperly, supra; Holbrook v United Hosp. Med. Ctr., supra*).

Accordingly, defendants' motion for summary judgment dismissing the plaintiffs' complaint against them is granted.

Dated: JUN 07 2006



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION