

**Vaynberg v St. Vincents Catholic Med. Ctrs. of N.Y.**

2009 NY Slip Op 32371(U)

October 14, 2009

Supreme Court, Kings County

Docket Number: 37727/06

Judge: Gerard H. Rosenberg

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At an IAS Term, Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14<sup>h</sup> day of October, 2009

P R E S E N T:

HON. GERARD H. ROSENBERG,  
Justice.

-----X  
ALEKSANDR VAYNBERG, as an Administrator of  
the estate of deceased MIKHAIL VAYNBERG,

Plaintiff,

- against -

Index No. 37727/06

SAINT VINCENTS CATHOLIC MEDICAL CENTERS OF  
NEW YORK, D/B/A ST. ELIZABETH ANN'S HEALTH &  
REHABILITATION CENTER, et ano.,

Motion Seq. No. 003

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 2
Opposing Affidavits (Affirmations) _____	3
Reply Affidavits (Affirmations) _____	4
Sur Reply Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, St. Elizabeth Ann's Health Care & Rehabilitation Center, s/h/a Saint Vincents Catholic Medical Centers of New York d/b/a St. Elizabeth Ann's Health Care & Rehabilitation Center (St. Elizabeth) and Jenny Stay Machuca, M.D., move for an

order: (1) pursuant to CPLR 3212, granting them partial summary judgment dismissing the claims of plaintiff Aleksandr Vaynberg, as Administrator of the estate of deceased Mikhail Vaynberg (decedent), for punitive damages as set forth in the sixth cause of action; (2) dismissing all claims asserted pursuant to Public Health Law § 2801-d regarding care rendered before December 8, 2003 as time-barred; (3) dismissing all claims relating to negligent hiring and supervision as asserted in the second cause of action; and (4) dismissing all claims relating to lack of informed consent as asserted in the third cause of action.

### ***Procedural Background***

On December 8, 2006, plaintiff commenced the instant action seeking to recover damages premised upon claims of medical malpractice, lack of informed consent, negligent hiring, wrongful death and violations of Public Health Law § 2801-d. Briefly stated, plaintiff alleges that as a result of defendants' alleged failure to prevent and properly care for his skin, decedent suffered from bedsores requiring surgical intervention and hip debridement, osteomyelitis, exacerbation of stroke conditions, contusions, soft tissue injuries, limited motion, atrophy, anxiety, mental anguish, and pain and stiffness; he ultimately became septic and malnourished, contracted cellulitis, pneumonia and gangrene and died on March 20, 2005.

Prior to commencing this action, decedent had commenced an earlier action on October 5, 2004, bearing index number 31504/04, alleging medical malpractice, lack of informed consent and negligent hiring (the 2004 Action). After decedent died, the action was

stayed until his son was appointed the administrator of the estate on July 1, 2005. By decision dated September 8, 2005, a motion seeking to amend the caption to substitute Aleksandr Vaynberg, as Administrator of the Estate of Mikhail Vaynberg, as plaintiff, was granted and plaintiff was directed to settle an order; no order was settled due to inadvertence. On April 11, 2006, plaintiff filed a second motion seeking to amend the caption to substitute the Administrator as plaintiff and to amend the complaint to add causes of action for wrongful death and violations of Public Health Law §§ 2801-d, 2803(c) and 10 NYCRR §415.12. By decision and order dated May 25, 2006, that portion of the motion seeking to substitute the Administrator as plaintiff was granted and all other branches were denied, with the court noting that plaintiff failed to demonstrate an acceptable excuse for failing to interpose the proposed allegations in the original complaint, failed to submit competent medical proof to support a causal connection between the alleged wrongdoing and decedent's death, and failed to establish that the claims were meritorious.

Thereafter, plaintiff commenced the instant action. Defendants filed a motion to dismiss, which was denied by decision dated March 20, 2007. In that decision, the court permitted the instant action to continue, including the claims premised upon violations of the Public Health Law and wrongful death, and directed plaintiff to discontinue the 2004 Action.

### ***Defendants' Statement of Facts***

In reliance upon decedent's medical records, defendants allege that decedent was 72 years old when he was transferred to St. Elizabeth for ventilatory management and tube

feedings on October 30, 2003, following a hospital stay at Lutheran Medical Center from October 4, 2003 to October 30, 2003 for a massive hemorrhagic stroke. While at the hospital, decedent underwent a right parieto-occipital craniotomy on October 4, 2003; because he remained ventilator dependent after the surgery, a tracheostomy was performed on October 13, 2003 and on October 17, 2003, a percutaneous endoscopic gastrostomy (PEG) feeding tube was placed. On October 21, 2003, decedent tested positive for vancomycin resistant enterococci and was placed on contact isolation.

Defendants further aver that St. Elizabeth's records reveal that when decedent was admitted, his skin was intact, with the exception of a rash on his lower back and redness of the sacrum.<sup>1</sup> He was classified as being at high risk for skin breakdown and required preventative measures, such as lotion, pillows, turning and positioning every two hours. Thereafter, commencing on November 6, 2003, decedent began to suffer from skin breakdowns that increased in number and severity and caused numerous infections. The medical records indicate that decedent was periodically evaluated and orders were written for his wounds to be changed twice daily or every shift, and treatments including the use of saline washes, bacitracin, silvadene cream, Ultec dressings, granulex, betadine, DermaSyn hydrogel, accuzyme and zinc oxide were ordered. In addition, various antibiotics were prescribed to treat his infections and on June 30, 2004, a PICC tube was placed because of

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<sup>1</sup> The report signed by the attending physician, Jenny Guo, and dated October 30, 2003 states that decedent's skin was "intact, no rash, no breakdown," although a skin assessment notes the presence of a rash and redness.

his need for antibiotics. The ulcers on his right hip were debrided on February 25, 2004 and the wound on his left hip was debrided on March 8, 2004; both wounds were again debrided on March 31, 2004. A specialty mattress was ordered on March 10, 2004. By August 27, 2004, decedent had Stage I skin ulcers on the right foot, a Stage IV lesion on the right hip, six small Stage II blisters on the right buttock, a Stage IV lesion on the left hip, three Stage II blisters on the left buttock and a Stage III sacral wound.

Decedent was also admitted to various hospitals for treatment during his stay at St. Elizabeth; defendants allege that decedent's skin wounds generally increased in number and severity when he was hospitalized. More specifically, from December 7, 2003 to December 29, 2003, decedent was admitted to St. Vincent's Hospital for sepsis; he returned to St. Elizabeth and was then readmitted to the Hospital from January 3, 2004 to January 9, 2004 to rule out gastrointestinal bleeding, when he tested positive for MRSA. From April 19, 2004 to April 23, 2004, decedent was hospitalized at Lutheran Hospital for the placement of a shunt to address hydrocephalus. From June 12, 2004 to June 17, 2004, he was again transferred to St. Vincent's Hospital to rule out renal failure. On August 30, 2004 to September 29, 2004, decedent was admitted to New York Community Hospital, at his family's request; he was then transferred to Haym Solomon Home for Nursing & Rehabilitation, where he remained until November 27, 2004, except for a brief stay at New York Community Hospital between October 17 and 21, 2004. Decedent was then hospitalized at the Hematological Centre of the Russian Academy of Medical Science, where

he remained from November 28, 2004 until his death on March 20, 2005.

### *Statute of Limitations*

#### *Defendants' Contentions*

In support of the branch of their motion seeking dismissal of a portion of plaintiff's claims for violation of Public Health Law § 2801-d as time barred, defendants argue that inasmuch as the Statute of Limitations on the claims is three years, all claims accruing prior to December 2, 2003, or three years prior to the filing of the complaint, should be dismissed.

#### *Plaintiff's Contentions*

In opposition to this demand for dismissal, plaintiff alleges that he filed a motion seeking to add causes of action premised upon violations of the Public Health Law on April 21, 2006, the motion was decided on June 13, 2006 and he was served with notice of entry on June 16, 2006. Plaintiff accordingly argues that all of the claims that are interposed in the complaint are timely pursuant to *Perez v Paramount Communications* (92 NY2d 749, 756 [1999]), which holds that the filing of a motion seeking to amend a complaint to add a third-party defendant, with a copy of the proposed amended complaint annexed, tolls the Statute of Limitations until entry of the order deciding the motion. Plaintiff thus concludes that the Statute of Limitations was tolled from April 21, 2006 to June 6, 2006, or for a period of 56 days, which is greater than the 40 day period that defendants seek to exclude.

#### *Defendants' Reply*

In reply, defendants argue that *Perez* is distinguishable, since plaintiff herein moved

to amend the complaint in the 2004 Action, not in the instant action, and that motion was denied; he then commenced this action seeking to circumvent the adverse determination denying leave to add causes of action premised upon violations of the Public Health Law and for wrongful death. Moreover, five months remained before the Statute of Limitations expired after the court rendered its decision denying leave to amend the complaint in the 2004 Action, so that plaintiff had the opportunity to commence a second, timely action, after the decision was rendered, but declined to do so. From this it follows that plaintiff was not prejudiced by the court's delay in rendering its decision on his motion.

### ***The Law***

A claim premised upon violations of Public Health Law § 2801-d is subject to a three-year Statute of Limitations (*see* CPLR 214(2); *Leclair v Fort Hudson Nursing Home*, 52 AD3d 1101, 1102 [2008]; *see also Zeides v Hebrew Home for the Aged*, 300 AD2d 178, 179 [2002], *appeal withdrawn* 1 NY3d 623 [2004] [as a liability “created or imposed by statute,” plaintiff's statutory cause of action pursuant to Article 28 of the Public Health Law was governed by the three-year period of limitations of CPLR 214(2)]). Further, as argued by plaintiff, the Statute of Limitations is tolled from the time a plaintiff files a motion for leave to amend until the court decides the motion, provided that a copy of the proposed supplemental summons and amended complaint is annexed to the motion (*see e.g. Long v Sowande*, 27 AD3d 247, 247 [2006], citing *Perez*, 92 NY2d 749). As explained by the Court of Appeals in *Perez*:

“As a party has no control over when a court renders its decision regarding the proposed amended complaint, the submission of a motion for leave to amend, properly accompanied by the proposed amended complaint that provides notice of the substance of those amendments, tolls the statute of limitations, even though technically the amended complaint will not be filed until the court rules on the motion’ (*Moore v State of Indiana*, 999 F2d 1125, 1131 [7th Cir 1993], *supra*).”

(*Perez*, 92 NY2d at 755).

### ***Discussion***

Herein, it is not disputed that the Statute of Limitations for asserting a claim for a violation of the Public Health Law is three years. It is also not disputed that the instant action was commenced December 8, 2006. Accordingly, the court finds that plaintiff’s claims for violations of the Public Health Law § 2801-d are time barred with regard to all care rendered to decedent before December 8, 2003.

In so holding, the court rejects plaintiff’s claim that the Statute of Limitations was tolled between April 21, 2006, when he made his motion seeking leave to amend the complaint, until June 16, 2006, when the decision was rendered, since the facts of this case are distinguishable from *Perez*. Significantly, plaintiff’s motion to amend was not made in the instant action. Moreover, the motion was denied. Further, as was noted by defendants, the Statute of Limitations had not yet expired when the decision denying leave to amend was issued, so that plaintiff was not prejudiced by the delay in rendering the decision, since he could still commence a timely second action. Accordingly, on the facts herein, there is no basis upon to premise a finding that the Statute of Limitations was tolled for any period of

time.

### ***Punitive Damages***

#### ***Defendants' Contentions***

Defendants argue that plaintiff's demand for punitive damages should be dismissed on the ground that Public Health Law § 2801-d(2) only permits an award of such damages against a residential health care facility for injuries caused by deprivation of "rights or benefits" that are committed willfully or in reckless disregard of such rights. Defendants contend that the record is devoid of any evidence that their conduct rose to this level.

#### ***Plaintiff's Contentions***

Plaintiff first argues that defendants fail to make an evidentiary showing entitling them to summary judgment as a matter of law. More specifically, plaintiff argues that defendants' failure to annex an affidavit of a medical expert is fatal to their demand for summary judgment. In addition, plaintiff alleges that in their moving affirmation, defendants admit that when decedent was admitted to St. Elizabeth, his skin was intact, with the exception of a rash on his back; that he was at high risk for bed sores; and that while he was at St. Elizabeth, he developed the bedsores that eventually infected and caused his death. Plaintiff also notes that decedent did not develop any skin breakdowns during the four weeks that he was in Lutheran Hospital, before being admitted to St. Elizabeth.

Plaintiff further argues that Dr. Machuca's testimony establishes that although she recognized that decedent's skin was turning black and brown as early as December 3, 2003,

and that his wounds had to be surgically debrided on January 9, 2004,<sup>2</sup> she did not order a specialty mattress for decedent until March 10, 2004, six months after he was admitted to St. Elizabeth and long after he began to develop bed sores and pressure wounds, which plaintiff contends violates St. Elizabeth's own policy with regard to evaluating the need for a ROHO mattress. Moreover, plaintiff asserts that Dr. Machuca's testimony that she could not have ordered a specialty mattress because it was the customary practice of St. Elizabeth to order a ROHO mattress only after a patient developed Stage III and IV bed sores evidences a reckless and conscious disregard for patient care. Plaintiff alleges that this testimony compels the finding that St. Elizabeth intentionally waited for its patients to develop bed sores before providing mattresses that would prevent the wounds, which policy was responsible for decedent developing the wounds that infected, led to sepsis and eventually caused his death. This argument is corroborated by plaintiff's deposition testimony, which establishes that he repeatedly requested that his father be given an air mattress and that he had numerous discussions with staff about his father's worsening condition and wounds.

### ***Defendants' Reply***

In reply, defendants argue that plaintiff fails to demonstrate how his claim for punitive damages is so inextricably intertwined with his claim of violations of Public Health Law § 2801-d that the claim should not be summarily dismissed. Defendants also argue that they need not support their motion with an affirmation from an expert and that in opposing the

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<sup>2</sup> Defendants fail to make reference to this earlier alleged procedure in their moving papers.

motion, plaintiff misrepresents the facts. More specifically, they assert that plaintiff fails to recognize that decedent's wounds worsened while he was hospitalized. In addition, defendants argue that plaintiff's contention that defendants failed to properly turn or position decedent must fail because he does not offer any evidence of the facility's regulations with regard to same. Defendants further contend that even if plaintiff could establish that there were deficiencies in turning and positioning decedent, plaintiff fails to establish that such failures were intentional or reckless.

Defendants also argue that plaintiff's allegations with regard to St. Elizabeth's failure to provide decedent with a specialty mattress are specious, since Dr. Machuca testified that all of the patients on the floor to which decedent was admitted had pressure relieving mattresses. Further, Dr. Machuca's testimony establishes that a specialty mattress was obtained for decedent on March 10, 2004. Defendants also note that since their "Policy, Procedures and Information" provide that a ROHO mattress could be utilized to treat Stage III and IV pressure sores, primarily of the sacral and coccygeal origin, decedent first exhibited a coccygeal ulcer on March 12, 2004, after he was provided with a specialty mattress. Defendants contend that plaintiff's argument also fails to recognize that a ROHO mattress may only be appropriate for use in the treatment of Stage III and IV wounds. In addition, defendants argue that plaintiff fails to address the issue of decedent's "multiple comorbidities, including his rapidly deteriorating medical condition and how such contributed to the development and worsening of his skin lesions." In this regard, defendants also assert

that plaintiff deliberately ignores the wound care treatment and monitoring that decedent received, as is established by their Statement of Facts. Finally, defendants aver that plaintiff's counsel is unqualified to render opinions with regard to what constitutes "willful, wanton or reckless disregard of patient care."

### *The Law*

Preliminarily, the court notes that it is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party moving for summary judgment "bears the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law" (*Holtz v Niagara Mohawk Power*, 147 AD2d 857, 858 [1989]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 874 [2008], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once such a showing has been established, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusory allegations, unsubstantiated assertions, or speculation may not defeat a motion for summary judgment (*see e.g. DePodwin & Murphy v Fonvil*, 38 AD3d 827, 827 [2007]; *Carleton Studio v MONY Life Ins. Co.*, 18 AD3d 491, 492 [2005]). On such a motion, the court is not to determine credibility, but whether a

factual issue exists (*Capelin Assoc. v Globe Mfg.*, 34 NY2d 338 [1973]).

As is also relevant herein, Public Health Law § 2801-d(1)<sup>3</sup> confers a private right of action on a patient in a nursing home for injuries sustained as the result of the deprivation of specified rights (*Zeides*, 300 AD2d at 179). It has been held that relief may be predicated on Public Health Law § 2803-c(3)(e),<sup>4</sup> specifically the deprivation of the right to receive

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<sup>3</sup> Public Health Law § 2801-d(1), private actions by patients of residential health care facilities, provides that:

“Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation, except as hereinafter provided. For purposes of this section a ‘right or benefit’ of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority. No person who pleads and proves, as an affirmative defense, that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted shall be liable under this section. For the purposes of this section, ‘injury’ shall include, but not be limited to, physical harm to a patient; emotional harm to a patient; death of a patient; and financial loss to a patient.”

<sup>4</sup> Public Health Law § 2803-c(3)(e) provides that the statement of the rights and responsibilities of the patients who are receiving care in such facilities that is required to be promulgated pursuant to § 2803-c(2) shall include a statement that:

“Every patient shall have the right to receive adequate and appropriate medical care, to be fully informed of his or her medical condition and proposed treatment unless medically contraindicated, and to refuse medication and treatment after being fully informed of and understanding the consequences of such actions.”

(continued...)

adequate and appropriate medical care, and allegations that defendants violated 10 NYCRR 415.12(c)(1)<sup>5</sup> by failing to prevent the development of pressure sores (*Zeides*, 300 AD2d at 179).

In discussing when punitive damages may be awarded in a medical malpractice case, the court has explained that:

“Punitive damages are warranted where the conduct of the party being held liable evidences a high degree of moral culpability (*Giblin v Murphy*, 73 NY2d 769, 772) or where the conduct is so flagrant as to transcend mere carelessness (*Frenya v Champlain Val. Physicians’ Hosp. Med. Ctr.*, 133 AD2d 1000, 1001), or where the conduct constitutes willful or wanton negligence or recklessness (*Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 204). It is not necessary that the

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<sup>4</sup>(...continued)

<sup>5</sup> 10 NYCRR 415.12(c), quality of care, provides that:

“Each resident shall receive and the facility shall provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, in accordance with the comprehensive assessment and plan of care subject to the resident’s right of self-determination.

“Pressure sores. Based on the comprehensive assessment of a resident, the facility shall ensure that:

“A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable despite every reasonable effort to prevent them; and

“A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.”

conduct complained of be intentionally harmful (*see, Home Ins. Co. v American Home Prods. Corp., supra; Gruber v Craig*, 208 AD2d 900, 901).”

(*Rey v Park View Nursing Home*, 262 AD2d 624, 627 [1999]; *accord Kraycar v Monahan*, 49 AD3d 507 [2008]; *Hill v 2016 Realty Assoc.*, 42 AD3d 432 [2007]; *Morton v Brookhaven Mem. Hosp.*, 32 AD3d 381 [2006]; *Osborne v Rivington House-Nicholas A. Rango Health Care Facility*, 19 Misc3d 1132A, 2008 NY Slip Op 50975U, 6 [2008]).

As is also relevant herein, in concluding that a plaintiffs’ claim for punitive damages should be dismissed, the Appellate Division, Second Department, noted that “[r]esearch discloses no medical malpractice action in this State where a judgment for punitive damages has been sustained,” explaining that a “doctor in a malpractice case is ordinarily not an actor who intends to inflict an injury on his patient” (*Spinosa v Weinstein*, 168 AD2d 32, 42-43 [1991], quoting *Dries v Gregor*, 72 AD2d 231, 235 [1980]). Nonetheless, it must be recognized that:

“Courts in this State have long recognized that those who, without specifically intending to cause harm, nevertheless engage in grossly negligent or reckless conduct showing an utter disregard for the safety or rights of others, may also be deserving of the imposition of punitive damages (*see e.g. . . . Guariglia v Price Chopper Operating Co., Inc.*, 38 AD3d 1043, *lv denied* 9 NY3d 801 [negligence in leaving prescription drugs within reach of toddler]; *Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712, 715 [negligent failure to keep ferrous materials away from an MRI magnet] . . . *Figueroa v Flatbush Women’s Servs.*, 201 AD2d 613, 613-614 [medical malpractice in performance of abortion]; *Doe v Roe*, 190 AD2d at 474-476 [unauthorized disclosure of HIV-status information in violation of Public Health Law]; *Graham v*

*Columbia-Presbyt. Med. Ctr.*, 185 AD2d 753, [negligent abandonment by physician of physically unstable patient during treatment] . . . *McWilliams v Catholic Diocese of Rochester*, 145 AD2d 904 [mistreatment of patient in community residence for mentally retarded persons].”

(*Randi A. J. v Long Is. Surgi-Center*, 46 AD3d 74, 81 [2007]).

In addressing this issue, it must also be recognized that Public Health Law § 2801-d(a) provides for an award of damages for violation of the Article, stating that “where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient, punitive damages may be assessed.”<sup>6</sup> In the recent case of *Everett v Loretto Adult Community* (32 AD3d 1273 [2006]), the Appellate Division, Fourth Department, applied the standard governing an award of punitive damages in a medical malpractice action to a claimed violation of Public Health Law § 2801-d and held that summary judgment dismissing the demand should have been granted, finding that “[d]efendants met their initial burden on the motion by establishing the absence of any conduct that could be viewed as so reckless or wantonly negligent as to be the equivalent of

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<sup>6</sup> Public Health Law § 2801-d(2) provides that:

“Upon a finding that a patient has been deprived of a right or benefit and that said patient has been injured as a result of said deprivation, and unless there is a finding that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient, compensatory damages shall be assessed in an amount sufficient to compensate such patient for such injury . . . In addition, where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient, punitive damages may be assessed.”

a conscious disregard of the rights of others and plaintiff failed to raise an issue of fact requiring a trial” (*id.* at 1274). In contrast, another court, albeit a trial court, has held that:

“Punitive damages are available pursuant to Public Health Law § 2801-d, however, ‘where the deprivation of any . . . right or benefit [as defined by the statute] is found to have been willful or in reckless disregard of the lawful rights of the patient. . . . ‘This would appear to be a less stringent standard than that under the law governing medical malpractice.’”

(*Osborne*, 2008 NY Slip Op 50975U at 6).

Turning to the issue of the need for expert testimony to establish that no violation of Public Health Law § 2801-d exists, the court notes that:

“As a general rule the admissibility of expert testimony on a particular point is addressed to the discretion of the trial court (*Selkowitz v County of Nassau*, 45 NY2d 97). The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror (*People v Allweiss*, 48 NY2d 40, 50; *Selkowitz v County of Nassau*, 45 NY2d 97, *supra*; *Dougherty v Milliken*, 163 NY 527).

(*De Long v County of Erie*, 60 NY2d 296, 307 [1983]).

In discussing the need for expert testimony in a medical malpractice case, it has been held that:

“Simple negligence principles are applicable to those cases where the alleged negligent act may be readily determined by the trier of fact based on common knowledge. However, where the directions given or treatment received by the patient is in issue, consideration of the professional skill and judgment of the practitioner or facility is required and the theory of

medical malpractice applies (*see Reardon v Presbyterian Hosp. in City of N.Y.*, 292 AD2d 235, 236-237 [2002]).”

(*Friedmann v New York Hospital-Cornell Med. Ctr.*, \_\_\_ AD3D \_\_\_, 2009 NY Slip Op 6362, 1 [2009], so that a request for summary judgment on a claim sounding in negligence, rather than malpractice, can be evaluated without the benefit of expert testimony (*id.*). If, however:

“the subject matter . . . and treatment thereof are ‘not within the ordinary experience and knowledge of laypersons’ (*Estate of Ward v Hoffman*, 139 AD2d 691, 693 [1988]), the plaintiff must establish a prima facie case of medical malpractice through expert medical opinion (*see McDermott v Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20 [1964]).”

(*Elkin v Goodman*, 24 AD3d 717 [2005]; *accord Fiore v Galang*, 64 NY2d 999, 1001 [1985] [except as to matters within the ordinary experience and knowledge of laymen, in a medical malpractice action, expert medical opinion evidence is required to demonstrate merit]).

Thus, “an expert should be permitted to offer an opinion on an issue which involves “professional or scientific knowledge or skill not within the range of ordinary training or intelligence” (*Wichy v City of New York*, 304 AD2d 755, 756 [2003], quoting *Selkowitz*, 45 NY2d at 102, quoting *Dougherty*, 163 NY at 533). “The test is one of need as applied to the unique circumstances of each case” (*Dufel v Green*, 84 NY2d 795, 798 [1995]). As is also significant herein, it has been recognized that “the need for expert testimony signifies only that the technical and scientific nature of the [process in issue] is beyond the ken of the average juror, not that the claim sounds in medical malpractice” (*Weiner v Lenox Hill Hosp.*,

88 NY2d 784, 789 [1996], citing *De Long*, 60 NY2d at 307; accord *Zak v Brookhaven Mem. Hosp. Med. Ctr.*, 54 AD3d 852, 853 [2008 [expert testimony is necessary to establish proximate cause unless the matter is one which is within the experience and observation of the ordinary juror]].

### ***Discussion***

The court finds that defendants fail to make a prima facie showing of entitlement to summary judgment as a matter of law dismissing plaintiff's demand for an award of punitive damages. In so holding, the court first notes that although defendants summarize decedent's records in their Statement of Facts, detailing the progression of his condition and the treatments ordered for his skin wounds and infections, the records fail to demonstrate that the care rendered to decedent was in accordance with the care plan established for him. More specifically, the records fail to address the issues of how often decedent was turned and repositioned, whether he was provided with pillows and lotion and whether his skin wounds were treated in the manner and with the frequency ordered.

Further, in arguing that plaintiff fails to provide any evidence that proper care was not rendered to decedent, defendants fail to recognize that the burden of proof on a motion for summary judgment is on them, as movants, to establish that they are entitled to summary judgment; the burden is not on plaintiff to oppose the motion until this standard is met. In this regard, it is well settled that a defendant "cannot obtain summary judgment by pointing to gaps in plaintiff's proof" (*Coastal Sheet Metal v Martin Assoc.*, 63 AD3d 617 [2009],

quoting *Torres v Industrial Container*, 305 AD2d 136, 136 [2003]; accord *Bryan v 250 Church Assoc.*, 60 AD3d 578, 578 [2009]; *Vittorio v U-Haul Co.*, 52 AD3d 823, 823 [2008]; *Gonzalez v Beacon Term. Assoc.*, 48 AD3d 518 [2008]).

In addition, although defendants rely upon decedent's medical records to argue that they properly treated his skin wounds, they do not submit an affidavit from an expert to establish that the treatments ordered were appropriate. In this regard, the court notes that an expert affidavit may not be necessary in a case that involves a patient falling out of a bed (*see e.g. Passet v Menorah Nursing Home*, 16 Misc3d 1117A, 2007 NY Slip Op 51452U [2007]), falling off a toilet (*see e.g. Williams v Ruby Weston Manor*, Kings Co Sup Ct, Index No. 6667/05 [June 23, 2006]), or striking her leg on a bed rail (*see e.g. Friedmann*, 2009 NY Slip Op 6362 at 1). In contrast, however, since this case involves the proper medical treatment to be given for progressively worsening bed sores and pressure wounds, this court finds that expert testimony is needed, since the appropriateness of the treatment rendered is beyond the ken of the average juror (*see e.g. Weiner*, 88 NY2d at 789; *De Long*, 60 NY2d at 307; *Zak*, 54 AD3d at 853).

Additionally, defendants do not establish that their failure to supply decedent with a specialty mattress earlier does not evidence a willful or reckless disregard of decedent's lawful rights. In this regard, it is first noted that defendants' contention that decedent was provided with an appropriate pressure relieving mattress upon his admission to St. Elizabeth is contradicted by its assertion that a specialty mattress was ordered on March 10, 2004.

Further, the fact that a specialty mattress was ordered on March 10, 2004 does not establish when, if ever, such mattress was provided to decedent. More fundamentally, defendants fail to establish entitlement to summary judgment as a matter of law by demonstrating that its policy to furnish a ROHO mattress to a patient only after he or she developed as Stage III or IV skin lesion is appropriate and within accepted standards of medical care and does not violate 10 NYCRR 415.12. Again, as was noted above in addressing the appropriateness of the treatment rendered to decedent, the court similarly finds that expert testimony is necessary to establish that St. Elizabeth's determination that a ROHO mattress was not called for prior to a patient developing a Stage III or IV bed sore does not provide a basis for the dismissal of plaintiff's demand for an award of punitive damages, since the court is unable to evaluate defendants' claim in the absence of expert opinion.

Accordingly, that branch of defendants' motion seeking dismissal of plaintiff's demand for an award of punitive damages is denied (*see generally Bush v Cobble Hill Health Ctr.*, 17 Misc3d 1135A, 2007 NY Slip Op 52268U [2007] [defendant failed to make a prima facie showing of entitlement to judgment as a matter of law, since material issues of fact as to the treatment of decedent were not eliminated by the voluminous deposition transcripts, medical records presented and the affidavit of the expert]).

### ***Negligent Hiring and Supervision***

#### ***The Parties' Contentions***

Defendants contend that plaintiff's demand for damages against St. Elizabeth as

premised upon claims of negligent hiring and supervision must be dismissed in the absence of evidence that the alleged wrongdoing fell outside of the scope of the employees' job duties and responsibilities.

Plaintiff does not oppose this branch of defendants' motion.

### ***The Law***

It is well settled that:

“Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training (*Watson v Strack*, 5 AD3d 1067 [2004]; *Weinberg v Guttman Breast & Diagnostic Inst.*, 254 AD2d 213 [1998]). However, an exception exists to this general principle where, as here, the injured plaintiff seeks punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee (*see Watson v Strack, supra; Karoon v New York City Tr. Auth.*, 241 AD2d 323 [1997]).”

(*Talavera v Arbit*, 18 AD3d 738, 739 [2005]).

### ***Discussion***

As noted above, plaintiff does not oppose the dismissal of his complaint as is premised upon negligent hiring and supervision. Moreover, his opposition is addressed only to defendants' alleged failure to provide proper care to decedent and their alleged reckless conduct in failing to order a specialty mattress. Finally, plaintiff does not establish that his claim falls within the exception to the rule that would allow him to recover punitive damages based upon gross negligence in the hiring or retention of an employee (*see generally*

*Flanagan v Catskill Reg. Med. Ctr.*, \_\_\_ AD3d \_\_\_, 2009 NY Slip Op 6161, 3 [2009] [action alleging negligent hiring and negligent supervision should have been dismissed where the record was devoid of evidence that any of the appellants knew or should have known that an employee had displayed a propensity for the conduct which allegedly caused the injury, a prerequisite to sustaining a cause of action alleging negligent hiring or supervision]).

Accordingly, plaintiff's complaint, as it is premised upon a claim of negligent hiring or supervision, is dismissed.

### ***Lack of Informed Consent***

#### ***Defendants' Contentions***

Defendants argue that plaintiff's claim for damages premised upon a lack of informed consent should be dismissed because there is no evidence of any injuries sustained by decedent as the result of a violation to his physical integrity.

#### ***Plaintiff's Contentions***

Plaintiff contends that summary judgment dismissing his claim as premised upon lack of informed consent should not be dismissed because if decedent or his family had been informed that decedent would develop bed sores; that he would not be provided with a specialty mattress until the bed sores became Stage IV ulcers; that he would develop sepsis, osteomyelitis and would die, a reasonable person would not agree to allow decedent to be treated by defendants.

### *The Law*

“It is a firmly established principle of the common law of New York that every individual of adult years and sound mind has a right to determine what shall be done with his own body and to control the course of his medical treatment” (*Rivers v Katz*, 67 NY2d 485, 493 [1986] [internal citations omitted]). Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation (Public Health Law § 2805-d[1]).

“The doctrine of informed consent developed out of the common-law principles and requires that, absent an emergency, before performing any medical procedure, a physician obtain the consent of a patient, after explaining the nature of the treatment, substantial risks and alternative therapies, or risk the imposition of civil liability upon his failure to obtain informed consent (*see, e.g., Matter of Storar*, 52 NY2d 363, 376-377, *supra*; *Schloendorff v Society of N. Y. Hosp.*, 211 NY 125, *supra*, at 129-130).”

(*Delio v Westchester County Med. Ctr.*, 129 AD2d 1, 14 [1987]).

As is also relevant herein, it is well settled that in order to sustain a valid cause of action based on lack of informed consent, a plaintiff must establish a nonemergency violation of his or her physical integrity (*see e.g. Flanagan*, 2009 NY Slip Op 6161 at 3; *Saguid v Kingston Hosp.*, 213 AD2d 770, 773 [1995]).


### *Discussion*

The complaint herein does not state a valid cause of action based on lack of informed consent, since it does not rely on any nonemergency violation of decedent's physical integrity, but essentially on the premise that treatment was unduly delayed (*see e.g. Saguid*, 213 AD2d at 773), or improper (*see e.g. Iazzetta*, 200 AD2d at 213; *accord Janeczko v Russell*, 46 AD3d 324, 325 [2007] [a failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that involved invasion or disruption of the integrity of the body]; *Smith v Fields*, 268 AD2d 579, 580 [2000] [since plaintiff's lack of informed consent claim sought to recover damages for defendant's alleged failure to inform her of the risks of allowing periodontal disease to go untreated, it failed to state a viable cause of action for recovery]; *Campea v Mitra*, 267 AD2d 190, 191 [1999] [plaintiffs' claim that defendant doctor failed to recommend surgery at a time when more beneficial results could have been obtained failed to state a cause of action based on lack of informed consent]; *Schel v Roth*, 242 AD2d 697, 698 [1997] [where plaintiff alleged that due to their negligence, the defendants failed to evaluate the seriousness of his condition, with the result that affirmative treatment was not sought in a timely manner, plaintiff failed to state a cause of action based on the lack of informed consent because he did not allege that his injuries were due, in whole or in part, to his having undergone some affirmative violation of his physical integrity]).

***Conclusion***

Defendants' motion is granted to the extent of dismissing plaintiff's claims for violations of Public Health Law § 2801-d, as it is premised upon conduct and/or treatment occurring prior to December 8, 2003, as time barred; dismissing the cause of action sounding in negligent hiring or supervision; and dismissing the cause of action for lack of informed consent. The remaining claims and causes of action shall be severed and shall continue. All other relief requested is denied.

The foregoing constitutes the order and decision of this court.

E N T E R,  
  
HON. GERARD H. ROSENBERG  
J. S. C.