SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

ROBERT GOLD as Executor of the Estate of LORRAINE GOLD,

Plaintiff(s),

-against-

MOTION DATE: 3/01/10
INDEX NO.: 10309/07
SEQ. NOs. 3 & 4

PARK AVENUE EXTENDED CARE CENTER CORP, Individually and d/b/a PARK AVENUE EXTENDED CARE CENTER,

Defendant(s).

Defendant, Park Avenue Extended Care Center Corp., individually and d/b/a Park Avenue Extended Care Center (hereinafter Park Avenue), moves, pursuant to CPLR 2221(d), for leave to reargue so much of this Court's October 27, 2009 order as denied that branch of its motion for summary judgment dismissing plaintiff's claim alleging a negligent failure to prescribe anti-hypertensive medication as time-barred pursuant to CPLR §214-a; and, upon reargument, for summary judgment dismissing the plaintiff's complaint in its entirety.

The plaintiff has cross moved, pursuant to CPLR 2221(d), for leave to reargue so much of the order as granted the defendant summary judgment dismissing the remainder of the complaint.

The Court, *sua sponte,* vacates the October 27, 2009 order, and replaces it with this order *nunc pro tunc*. The final page of the earlier order was inadvertently omitted and is hereby added.

Defendant's motion for reargument is therefore academic, as the plaintiff's complaint is hereby dismissed in its entirety. The plaintiff's cross motion for leave to reargue is denied.

Defendant, Park Avenue Extended Care Center Corp., individually and d/b/a Park Avenue Extended Care Center ("Park Avenue"), moves for an Order, *inter alia*, pursuant

to CPLR 3212, awarding it summary judgment and dismissing the complaint of the plaintiff, Robert Gold as Executor of the Estate of Lorraine Gold. Plaintiff opposes defendant's motion and, in turn, cross-moves for an Order, *inter alia*, pursuant to CPLR 3212, awarding him summary judgment on the issues of a violation of Public Health Law §2801-d, and as to the negligence claim for departure and causation relating to falls and medication administration errors. The motions are determined as herein set forth below.

This is an action to recover damages for medical malpractice. Plaintiff claims that the decedent, Lorraine Gold, sustained personal injuries and died as a result of allegedly sub-standard care rendered during the course of her residency at Park Avenue's health care facility located at 425 National Boulevard, Long Beach, New York from June 4 -17, 2004. Specifically, the facts are as follows:

Lorraine Gold (hereinafter referred to as "Gold" or the "decedent") was admitted to Park Avenue Extended Care Center on June 4, 2004. She was 93 years old at the time of her admission. Previously, she had resided at The King David Manor. Her past medical history included chronic obstructive pulmonary disease (COPD), hypertension, osteoarthritis, congestive heart failure (CHF), and legal blindness. Gold's COPD required breathing treatments via nebulizer on a regular basis, as well as Prednisone. Additionally, she was prescribed Lasix (a diuretic) for the CHF and Xanax, an anti anxiety medication to be given every morning.

The Nursing Admission Assessment reveals that upon her arrival at Park Avenue, she required the assistance of one staff member for her activities of daily living including eating, mobility, transfers, toileting, bed mobility and hygiene. According to the Nurses Notes, authored upon her admission, Gold was able to express her needs and was alert with periods of confusion. She was also noted to be ambulatory with a steady gait, but required intermittent supervision secondary to being legally blind, for "safety." She was observed to become short of breath with exertion and required rest periods.

Upon her admission, a Fall Risk Assessment identified Gold to be at a high risk for falls, with a score of 14. Also upon her admission, a Physical Therapy Screen was performed which noted that Gold had no issues with range of motion in her extremities and no limitations with voluntary movements. Range of motion in her hip, knee and ankle were within functional limits. She was independent with transfers and gait without assistive devices.

On June 8, 2004, the staff at Park Avenue had two potential concerns for Gold: risk for dehydration and nutritional compromise. As a result, defendant developed care plans

for each. By June 14, 2004, defendant's staff had also developed a plan of care for her risk for falls which noted that the goal for Gold was "resident will be free from further accident/injury x 30 days." The interventions noted to be in place included: "bed alarm for safety, monitor closely q shift/ PRN, keep room free of clutter, keep area well lighted, encourage resident to request help, keep bed in lowest position and keep call light within reach."

A day after her care plan for falls was developed, on June 15, 2004, Gold suffered a fall. The records reveal that Gold self-reported her fall at 6:00 a.m. The Nursing Note from 6:00 a.m. documents that at 3:30 a.m., Gold called for assistance and was assisted to the bathroom by a certified nurse's aide, at which time she complained of left leg pain, stating that she had fallen, but was unable to remember the time of the purported fall. She stated that she had picked herself up from the floor near her bathroom while attempting to toilet herself and obtain a robe. She reported to an LPN that she had fallen while using the bathroom. The Nurses Notes indicate that after this report of a fall, the staff at defendant's facility applied an alarm to "ensure safety." Also, following this fall, Gold began to complain of left leg pain and required the administration of Tylenol, extra strength, in an attempt to remedy the pain. Based on the Nurses Notes, Gold, was "not able to ambulate by self as before, staff had to assist" and she was "very agitated, screaming for staff every 5 minutes despite attention." An unidentified physician was made aware of Gold's complaints of pain, for which radiological testing and Tylenol was ordered.

On June 16, 2004, Gold suffered another fall. On this date, she was discovered on the floor on her left side, with her head on the foot part of her bed. On assessment, she was noted to have a blue discoloration to her forehead for which ice was applied. As a result of this fall, Gold requested to "wear a diaper for toileting purposes because she was afraid to ambulate." Gold then utilized a wheelchair for ambulating purposes. She was also noted to be "more confused and non compliant with fall prevention." There is no indication that the physician was informed of the incident; rather the Nurses Notes state that they would "ask" the Nurse Practitioner to re-evaluate in the morning. The Nurse's Notes also indicate that "magnetic alarm on at this time of incident." Subsequent to the fall and head injury, neurological checks were initiated. The first neurological finding revealed that Gold was suffering from an elevated blood pressure, 184/60. By 11:30 p.m. that day, the Neurological Assessment revealed significant changes in Gold's status: the assessment noted that she was now restless, with confusion, and weakness of her left leg.

On June 17, 2004, Gold was found to be lethargic and with flaccidity to her left side, leaning to her left side. The physician ordered her transfer to the hospital for

evaluation. The Patient Transfer Form revealed that Gold was being transferred to "rule out" a CVA (apparently standing for "cerebrovascular accident," i.e., a stroke). Her blood pressure was recorded at 150/60 and the form indicated that she been only occasionally confused and with normal speech. Gold ultimately presented to South Nassau Communities Hospital on June 17th. Upon presentation, Gold's blood pressure was elevated at 191/89, her skin was warm, dry and she had poor skin turgor. A physician assessment noted that upon her arrival, Gold had been suffering from left sided weakness, increasing confusion and slurred speech for two days. A CT scan of the head noted an evolving posterior cerebral artery infarction, in addition to right thalamic nucleus insult. No hemorrhage was noted and midline remained preserved. Ultimately, Gold was diagnosed with a CVA (a stroke) and she was discharged back to Park Avenue on June 24, 2004.

Upon Gold's return to the facility, she was on numerous cardiac medications, including Cozzar, Digoxin and Imdur, none of which were provided during the first residency period. Gold remained at Park Avenue from June 24, 2004 through June 30, 2004, at which time she was transferred to Long Beach Medical Center for evaluation of shortness of breath.

She presented to the Emergency Room at Long Beach Medical Center with symptoms of weakness, low hematocrit, ecchymosis under the skin related to anticoagulation for recent CVA (stroke). The ER physician noted that she was admitted in "guarded" condition and she was ultimately diagnosed with sepsis/septicemia. Her physician also noted that she appeared "chronically ill" with guaiac positive stool and significant edema to her lower extremities. The History and Physical completed by Dr. Harish Sood, M.D. noted that she was admitted because she was very weak and very pale. Dr. Sood further noted that she was found to have gastrointestinal bleeding and decreased hemoglobin. Dr. Sood noted that she has "sudden loss of blood due to anticoagulation and a combination of aspirin, Plavix and steroids." It was determined that she would not be able to undergo exploratory procedures; however, it was determined that the most likely etiology of the bleeding was "gastritis or PUD (peptic ulcer disease), in this patient, with NO KNOWN prior GI History."

Gold was ultimately discharged from Long Beach Medical Center on July 8, 2004 when she was transferred to Komanoff Nursing Home. Upon her transfer, the Nursing Notes indicated that she was wheelchair bound, was transferred with a Hoyer lift, required total assistance with activities of daily living and was bowel and bladder incontinent. Oxygen was provided at two liters via nasal cannula.

On July 14, 2004, Gold was found on the floor, having fallen from her wheelchair. The following day, July 15th, her hemoglobin results were reported as 6.7 mg/dl and she was sent to Long Beach Medical Center for a possible transfusion. A subsequent Nursing Note indicated she was admitted for GI bleed and anemia. Upon her re-presentation to Long Beach Medical Center on July 15, 2004, she was noted to have appeared weak, pale and anemic. Dr. Lowenstein, a gastroenterologist, consulted and documented that her hemoglobin had dropped further to 7.3 mg/dl; he commented that her prior history of bleeding related to anticoagulants with an abnormal CT scan of the abdomen that was not worked up. He considered the possibility of a gastric malignancy and gastric ulcer as the cause of her persistent bleeding. He recommended Protonix and an EGD with possible colonoscopy.

On July 19, 2004, Dr. Lowenstein performed an EGD that identified an ulcerated gastric mass and hiatal hernia. The surgical pathology was negative for malignancy, but noted chronic gastritis. Additionally, her hospitalization was complicated with recurrent fevers and a diagnosis of a urinary tract infection. On July 26, 2004, Dr. Lipsky, an infectious disease specialist, was consulted and prescribed her antibiotics.

On July 28, 2004, Gold returned to the Komanoff Center. Nursing documented that she was alert and confused but able to make some of her needs known. She required total assistance with activities of daily living, including feeding, due to poor appetite.

On July 30, 2004, Mrs. Gold was pale and lethargic while out of bed. She was returned to her bed and oxygen placed. The staff was unable to obtain any vital signs and the physician assistant was called to pronounce Gold's death. Mrs. Gold died on July 30, 2004 of cardiorespiratory arrest. Significant contributor to her death was noted as a bleeding peptic ulcer. Her death certificate reflects that Dr. Harish Sood, MD attributed her immediate cause of death to cardiorespiratory arrest due to a bleeding peptic ulcer due to a hypertensive heart.

Plaintiff commenced this action on June 12, 2007. The Complaint asserts six causes of action: first, violation of Public Health Law ("PHL") §2801-d; second, common law negligence; third, gross negligence; fourth, wrongful death; and fifth and sixth, breach of contract claims. Plaintiff also advances claims for punitive damages. In this medical malpractice action, plaintiff claims in his complaint and bill of particulars that the defendant, residential health care facility: failed to give the plaintiff's decedent her medication, a list of which was provided to them at the time of plaintiff's admission; failed to install side rails as requested causing plaintiff's decedent to sustain numerous falls which in turn caused her to suffer a stroke, dementia, and ultimately an untimely

death; plaintiff's decedent suffered from decubitus ulcers on her ankles; and, that defendant was negligent and grossly negligent by violating Public Health Law §§2801-d and 2803-c; as well as various federal and state regulations (*Verified Bill of Particulars*, ¶2). The gravamen of his complaint is that as a result of Park Avenue's failure to install side rails upon his mother, Gold's bed, and as a result of defendant's failure to provide her with adequate and proper supervision, she was caused to sustain numerous falls, which, in turn caused her to suffer a stroke, dementia and ultimately, an untimely death.

Notably, plaintiff's claims in his complaint and bill of particulars reference his mother's admission and residency at the defendant, Park Avenue Extended Care Center, from June 4, 2004 through June 17, 2004 (*Complaint*, ¶20; *Verified Bill of Particulars*, ¶1). No where does the plaintiff allege any negligence or malpractice on the part of the defendant for his mother's residency thereat from June 24, 2004 through June 30, 2004. Thus, this Court will limit its discussion herein of the plaintiff's treatment rendered by the defendant during her first admission, i.e., from June 4, 2004 through June 17, 2004.

In addition, in opposing defendant Park Avenue's instant motion for summary judgment dismissal of the plaintiff's complaint (and in support of his cross motion summary judgment on the issues of a violation of the Public Health Law §2801-d and as to the negligence claim for departure and causation relating to falls and medication administration errors), plaintiff alters his theory of negligence and malpractice against the defendant. Specifically, plaintiff now claims that the decedent's stroke was attributable to Park Avenue's purported failure to continue her blood pressure medication. Plaintiff also introduces the theory that Park Avenue was negligent in "overmedicating" her with Prednisone during the June 24, 2004 through June 30, 2004 residency, which as stated above, and as reflected in the complaint and bill of particulars, is not at issue herein. Additionally, plaintiff now claims that Ms. Gold's death resulted from a bleeding peptic ulcer that was purportedly attributable to her receipt of "increased doses" of Prednisone during the June 24, 2004 through June 30, 2004 Park Avenue residency. Additionally, plaintiff claims that the decedent's June 16, 2004 fall that occurred could have been prevented by the use of a bed alarm and increased staffing.

Clearly, these are new theories that are beyond the scope of plaintiff's pleadings and bill of particulars. "While modern practice permits a plaintiff to successfully oppose a motion for summary judgment by relying on an unplead cause of action which is supported by the plaintiff's submissions," (*Gallello v. MARJ Distributors, Inc.*, 50 AD3d 734, 736 [2nd Dept., 2008], *citing Comsewogue Union Free School Dist. v. Allied-Trent Roofing Systems, Inc.*, 15 AD3d 523, 524 [2nd Dept. 2005]), here the plaintiff's unexplained delay in presenting the new theories of liability, after the note of issue has

been filed, warrants rejection of these arguments (*id.*, *citing Medina v. Sears Roebuck & Co.*, 41 AD3d 798, 799-800 [2nd Dept. 2007]). Neither the Complaint nor the Verified Bill of Particulars alleges that defendant should have, *inter alia*, continued her blood pressure medications and that it was the defendant's decision not to administer her said medication that ultimately led to her demise. Further, plaintiff has failed entirely to offer an explanation for his delay in asserting the additional theories. This is not the situation where the new theories are nothing more than a properly and more specifically stated, theory of medical malpractice that had originally been generally claimed in the bill of particulars. Here, there are new allegations. Considering the new theories and allegations at this juncture (*Winters v. St. Vincent's Med. Ctr. Of Richmond*, 273 AD2d 465 [2nd Dept. 2000]; *Golubev v. Wolfson*, 22 AD3d 635 [2nd Dept. 2005]) would be tantamount to prejudicing the defendant (*cf.*, *Zatorski v. Klein*, 11 AD2d 790 [2nd Dept. 1960]; *Malcolm M. Slaughter & Co. v. Saul*, 53 NYS2d 73 [App. Term 1945]), particularly where plaintiff was armed with the facts supporting the "new" theories from the outset and given that at no time did plaintiff move to amend his complaint or to supplement his bill of particulars.

Accordingly, this Court will also limit its discussion herein to the theories advanced by the plaintiff in his pleadings and bill of particulars: to wit, (1) failure to give the decedent her medicine; (2) failure to install side rails; (3) ulcers on her ankles; and (4) negligence and gross negligence in violating the Public Health Law §§2801-d and 2803-c, as well as various federal and state regulations.

Prior to addressing the merits of the parties' respective motions for summary judgment, this Court also notes that plaintiff's cross motion for summary judgment is made more than 90 days after the filing of the Note of Issue on December 2, 2008 and is thus untimely made. While this Court is not convinced that that the issues raised in plaintiff's cross motion are not "nearly identical" to the issues raised in the pending motion of the defendant, Park Avenue, for summary judgment, especially given the fact that plaintiff has altered his theories against the defendant, in "searching the record," this Court will nonetheless, consider the untimely cross motion by the plaintiff (*Grande v. Peteroy*, 39 AD3d 590, 591-92 [2nd Dept. 2007]; *cf., Bressingham v. Jamaica Hosp. Med. Ctr.*, 17 AD3d 496 [2nd Dept. 2005]; *Bickelham v. Herrill Bowling Corp.*, 49 AD3d 578, 580 [2nd Dept. 2008]).

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept. 2004], *aff'd. as modified*, 4 NY3d 627 [2005], *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v.*

New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Id*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez*, supra). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (*see, Demishick v. Community Housing Management Corp.*, 34 AD3d 518 [2nd Dept. 2006]).

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage" (*Ramsay v. Good Samaritan Hosp.*, 24 AD3d 645, 646 [2nd Dept. 2005]; *see also, Thomason v. Orner*, 36 AD3d 791 [2nd Dept. 2007]; *DiMitri v. Monsouri*, 302 AD2d 420 [2nd Dept. 2003]). "In a medical malpractice action, the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether defendant physician [and/or hospital] were negligent" (*Taylor v. Nyack Hospital*, 18 AD3d 537 [2nd Dept. 2005]) *citing Alvarez*, supra). Thus, a moving defendant doctor or hospital has "the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the plaintiff was injured thereby" (*Chance v. Felder*, 33 AD3d 645 [2nd Dept. 2006]) *quoting Williams v. Sahay*, 12 AD3d 366, 368 [2nd Dept. 2004], *citing Alvarez*, supra; *Johnson v. Queens-Long Is. Med. Group, P.C.*, 23 AD3d 525, 526 [2nd Dept. 2005]; *Taylor*, supra).

In support of its motion, Park Avenue submits the expert affirmation of Joseph J. Tartaglia, M.D., who is Board Certified in Internal Medicine and Cardiovascular Disease with Subcertifications in Geriatric Medicine and Nuclear Cardiology. Having reviewed plaintiff's medical records, Verified Bill of Particulars and the deposition testimonies, Dr. Tartaglia opines, "with a reasonable degree of medical certainty, that there were no departures in the care and treatment rendered by Park Avenue, its staff, agents, servants and/or employees in connection with the treatment of Lorraine Gold that proximately caused and/or contributed to her alleged injuries and death. Specifically, it is my opinion within a reasonable degree of medical certainty that the care provided to Mrs. Gold during her June 4-17, 2004 Park Avenue residency was adequate and appropriate, conforming to accepted standards of medical care. Specifically, it is my opinion within a reasonable degree of medical certainty that the alleged failure to have proper fall prevention measures in place did not proximately cause, nor contribute to the alleged injuries, cause Mrs. Gold to suffer a stroke, dementia, death or that any departures from the applicable standards of care caused her to develop decubitus ulcers on her ankles. It is also my opinion within a reasonable degree of medical certainty that Plaintiff's allegations that Mrs. Gold's injuries

occurred as the result of negligence in failing to physically restrain, supervise or monitor her are without merit" (*Tartaglia Aff.*, ¶4).

Dr. Tartaglia opines that the fall precautions in place during the June 4-17, 2004 admission conformed to accepted standards of care and that the decedent's condition before the subject falls did not warrant the degree of supervision claimed by plaintiff, which would be tantamount to continuous 1:1 supervision by a nursing home staff member as the applicable standard of care does not require nursing homes to provide 1:1 supervision of residents, like the decedent, whose physical and/or mental condition does not pose an immediate risk of harm to themselves or others (*Tartaglia Aff.*, ¶¶ 5-29). Dr. Tartaglia further opines that the use of raised side rails, a physical restraint, on the decedent's bed would have been unwarranted to treat her medical symptoms, violating the applicable regulations and interpretive guidelines pertaining to restraint use in nursing homes and that in any event, the absence of side rails did not proximately cause any of the alleged falls, as none of those incidents involved falls from bed (*Tartaglia Aff.*,¶¶ 30-36). Additionally, Dr. Tartaglia opines that there is no proximate causation between the decedent's falls, the alleged injuries and her death (*Id.*, ¶¶37-38). Based upon the records from South Nassau Communities Hospital, Dr. Tartaglia notes that the decedent suffered an ischemic stroke, specifically a right posterior cerebral artery ("PCA") obstruction. Dr. Tartaglia explains that the decedent's stroke was secondary to blood vessel occlusion due to a block arty supplying the brain, not secondary to trauma from a fall, a claim which is wholly unsupported by the Record, in view of the absence of evidence of a hemorrhagic stroke or bleeding into the subarachnoid space (*Id.*, ¶37). Since the decedent's stroke was not attributable to a fall and/or trauma, but rather, was an ischemic stroke that was developing over time, Dr. Tartaglia likewise opines that plaintiff's claims that the decedent suffered left-sided paralysis (secondary to a stroke) and dementia due to falling/head trauma are likewise meritless, warranting their dismissal (*Id.*, ¶38). With respect to plaintiff's claims concerning dehydration, malnutrition, and the development of decubitus ulcers, Dr. Tartaglia opines that there is no evidence in the record, specifically that the decedent had any skin breakdown at Park Avenue, to support such claims (*Id.*, ¶¶ 39-41). Dr. Tartaglia also establishes that the alleged failure to continue the decedent's unspecified medicines, which he presumes to be the blood pressure medications Diovan and Acupril, which Mrs. Gold had been taking before the subject Park Avenue residency, did not cause any injury to her, as her blood pressure remained in the normal range until the twelve hour period before she was hospitalized for a stroke when here pressures were elevated, a symptom that often presents contemporaneously with a stroke (*Id.*, ¶41). Dr. Tartaglia opines that he decedent's death was not attributable to the alleged wrongdoing, but rather, to cardiorespiratory arrest that was secondary to a bleeding peptic ulcer. He concludes that in view of the absence of any proximate

causation between the alleged wrongdoing and the claimed injuries, plaintiff's PHL ¶2801-d claim, predicated upon purported violations of a multitude of Federal and State regulations governing nursing homes, should be dismissed (*Id.*, ¶¶43-47).

Defendant, Park Avenue, has established its entitlement to summary judgment thereby shifting the burden to the plaintiff to demonstrate the existence of a material issue of fact. To defeat defendant's motion, "plaintiff is obligated to submit competent, rebuttal medical evidence establishing that defendant[] deviated from the applicable standard of care, as well as a causal nexus between [its] conduct and her injuries (citations omitted)" (*Hoffman v. Pelletier*, 6 AD3d 889, 890 [3rd Dept. 2004]). Affidavits of a medical expert which are conclusory, speculative or based on an incorrect understanding of the facts are of no probative value (*Glazer v. Choong-Hee Lee*, 51 AD3d 970, 971 [2nd Dept. 2008]; *Micciola v. Sacchi*, 36 AD3d 869, 871 [2nd Dept. 2007]). "[W]here the parties adduce conflicting medical expert opinions" however, summary judgment is not appropriate as such "credibility issues can only be resolved by a jury" (*Feinberg v. Feit*, 23 AD3d 517, 519 [2nd Dept. 2005]; *Roca v. Perel*, 51 AD3d 757, 759 [2nd Dept. 2008]).

Plaintiffs' opposition herein relies principally upon the expert affidavit of Charlotte Sheppard, RN-BC, BSN, LHRM, a registered nurse practicing in Florida in the area of geriatrics and "familiar with the standards of practice pertaining to Nursing Facilities and acute care hospitals across the United States;" as well as the Expert Affidavit of Joseph Namey, D.O., F.A.C.S., Board Certified in Internal Medicine with a subspecialty in Geriatrics. As neither expert is able to raise an issue of fact warranting a trial, *infra*, defendant's motion for summary judgment dismissal of plaintiff's complaint is granted.

Failure to Give the Decedent Her Medicine

Obviously, Charlotte Sheppard, who is not a physician, is not qualified to render expert testimony as to whether the decedent's medical symptoms warranted the use of restraints and whether Park Avenue committed any acts of wrongdoing by not continuing the blood pressure medication that the decedent was taking prior to her Park Avenue residency (*D'Elia v. Menorah Home and Hosp. for the Aged and Infirm*, 51 AD3d 848, 851 [2nd Dept. 2008]). Nurse Sheppard, who is not a medical doctor, lacks the qualifications to render a medical opinion as to the relevant standard of care and whether the defendant deviated from that standard (*LaMarque v. North Shore Univ. Hosp.*, 227 AD2d 594 [2nd Dept. 1996]). She is unqualified to render expert medical opinion testimony as to the standard of care governing the prescribing of anti-hypertensive medications because she is precluded from prescribing blood pressure medications in the first place. Accordingly, her affidavit cannot be considered in opposition to defendant's

motion to dismiss claims of medical malpractice stemming from defendant's alleged failure to give the decedent her unspecified medications.

Turning to Dr. Namey's expert opinion, his affidavit fails to provide any medical basis for his conclusion that "the failure to properly medicate Ms. Gold with her anti-hypertensive medication was a substantial contributing factor in Ms. Gold suffering a stroke and hypertension" (*Namey Aff.*, ¶5). Dr. Namey opines as to the purported causal link between the lack of blood pressure medications and the decedent's stroke in a conclusory manner as follows:

> 5. As noted, Ms. Gold had a history of Hypertension. Prior to her presentation to [Park Avenue] she was prescribed, and administered anti-hypertensive medications. During her residency at [Park Avenue] she was not prescribed or administered anti-hypertensive medications. Ultimately, Ms. Gold suffered hypertension, elevated blood pressures and a stroke. It is my opinion, based upon a reasonable degree of medical certainty, as well as my training, education and experience, that the failure to properly medicate Ms. Gold with her anti-hypertensive medication was a substantial contributing factor in Ms. Gold's suffering a stroke and hypertension. As noted by Charlotte Sheppard the failure to provide this medication violated numerous state and federal regulations which, based upon a reasonable degree of medical certainty, were a substantial contributing factor in causing Ms. Gold's hypertension and stroke.

Dr. Namey's opinion is unsupported by facts in the record, is conclusory and is devoid of any medical basis (*Wicksman v. Nassau County Health Care Corp.*, 27 AD3d 644 [2nd Dept. 2006]; *Ross v. Braverman*, 44 AD3d 923, 925 [2nd Dept. 2007]). Dr. Namey's affidavit fails to provide sufficient opinion testimony to establish medical causation between plaintiff's claim the that failure to give the decedent her blood pressure medications ultimately led to her death.

Failure to Install Side Rails

Plaintiff has failed entirely to raise an issue of fact or to otherwise rebut Dr. Tartaglia's observation and finding that the failure to install or use side rails on the decedent's bed did not proximately cause or contribute to plaintiff's injuries and death as none of plaintiff's falls involved her falling from her bed.

Plaintiff's reliance upon the affidavit of Nurse Sheppard for this proposition, again,

falls short of raising a triable issue of fact. This Court is not convinced that Nurse Sheppard is competent under New York law to render expert opinions as to whether the decedent's medical symptoms warranted the use of restraints. Accordingly, her opinion as to defendant's alleged failure to equip the decedent's bed with side rails, a physical restraint, is herewith disregarded. In *D'Elia v. Menorah Home and Hosp. for the Aged and Infirm*, supra, the Second Department held that the determination of whether the use of restraint in the nursing home setting would be "medically advised or required" falls within the realm of medical malpractice, as opposed to common law negligence, thereby requiring expert medical opinion, i.e., that of a licensed physician (*D'Elia v. Menorah Home and Hosp. for the Aged and Infirm*, 51 AD3d 848, 851 [2nd Dept. 2008]; *Elliot v. long Island Home, Ltd.*, 12 AD3d 481, 482 [2nd Dept. 2004]). As a result, Nurse Sheppard's affidavit cannot be considered in opposition to defendant's motion (or in support of plaintiff's cross motion).

In this regard, Dr. Namey's affidavit is devoid of any comment as to this issue. Dr. Namey fails entirely to discuss whether raised side rails would have been an appropriate means of fall prevention for the decedent, in view of her physical and medical condition as it existed at the time of her falls and in consideration of the potential risks and benefits of restraint use (*Yamin v. Baghel*, 284 AD2d 778 [3rd Dept. 2001]), or, more centrally, that the absence of raised side rails proximately caused any of her falls. Accordingly, defendant's motion for summary judgment dismissal of plaintiff's medical malpractice cause of action as stemming for their alleged negligence in failing to install and/or use side rails in the case of plaintiff's decedent, is granted and said claims are dismissed.

Ulcers on Her Ankles

With respect to plaintiff's allegations that the decedent, as a result of defendant's negligence and malpractice, suffered from decubitus ulcers on her ankles, in opposing defendant's motion, plaintiff's submissions are devoid of any comment responsive to Dr. Tartaglia's opinion that there is no evidence that she had any skin ulcers or experienced any skin breakdown during the subject Park Avenue residency. Accordingly, plaintiff's claims relating to decubitus ulcers are also dismissed.

Negligence and Gross Negligence: Violation of Public Health Law §§2801-d, 2803-c, and Various Federal and State Regulations

Public Health Law §2801-d provides a private right of action to nursing home residents for "deprivations" of rights and benefits "created or established for the well-being of the patient" by the terms of any contract, or any Federal or State statute, code, rule or regulation (Public Health Law §2801-d[1]). In order to recover under the statute,

the plaintiff must establish, as in a traditional personal injury case, that there were "injuries suffered as a result of said deprivation" (*Id*).

In this case, defendant, via the expert affirmation of its expert, Dr. Tartaglia, has established that there is no evidence that the decedent suffered any injuries as a result of the alleged violations of the Federal regulatory provisions. In opposition, plaintiff relies upon the affidavit of Nurse Sheppard who opines, without any support in the record, that the decedent's rights were violated. Her opinions are speculative and conclusory and predicated upon allegations of wrongdoing that were not previously advanced herein.

Specifically, based upon the papers presented for this Court's consideration, this Court cannot find any evidence to rebut Dr. Tartaglia's expert opinion that there were any deficiencies in the degree of "supervision" provided given the decedent's health and status during the length of her residency, that the use of a physical restraint would have been inappropriate for the decedent, that the absence of a physical restraint did not proximately cause any injury to the decedent (due to the fact that the decedent was not involved in any falls from bed), nor cause her to sustain any injuries, aside from possibly a bruised forehead. As such, Nurse Sheppard's assertion that 42 CFR §483.25, which states that "[e]ach resident must receive and the facility must 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" regarding accident hazards and adequacy of supervision and assistive devices to prevent accidents was violated and that the decedent was injured as a result is entirely meritless.

Nurse Sheppard's claim as to defendant's violation of 42 CFR §483.15(a) regarding the "Dignity" sub-section of the regulation governing the promotion of resident care "in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality" is also meritless. Nurse Sheppard fails entirely to discuss any acts that occurred during the decedent's residency that would constitute a violation of this regulation, nor any injury that may have resulted from such violation.

Nurse Sheppard's affidavit also fails to establish a PHL §2801-d claim predicated upon a violation of 42 CFR §483.20[k][3][I] which states "that the services provided or arranged by the facility" must "meet professional standards of quality" (42 CFR §483.20[k][3][I]). Her opinions fail to establish that plaintiff's claims relate to fall prevention, stroke prevention, blood pressure medication administration and decubitus ulcer prevention and care.

Plaintiff's submissions also fail to rebut Dr. Tartaglia's opinion that the decedent sustained no injuries resulting from a violation of 42 CFR §483.10, the "Resident Rights" provision. Nurse Sheppard opines, in opposition, that the sub-section (b)(11) of this regulation was violated, regarding physician and family notification of changes in resident condition. The record, in this respect, does not support this allegation; there is no evidence that decedent's physician and family were not appropriately notified about changes in her condition and that she sustained any injury as a result of any purported violation of this sub-section of the regulation.

Having failed to raise an issue of fact as to his claims for medical malpractice, defendant's motion for summary judgment dismissing the plaintiff's complaint in this regard is granted and the complaint, including plaintiff's claims for punitive damages (*Sultan v. King's Highway Hospital Center*, 167 AD2d 534 [2nd Dept. 1990]; *Schiffer v. Speaker*, 36 AD3d 520 [1st Dept. 2007]; *Graham v. Columbia-Presbyterian Medical Center*, 185 AD2d 753 [1st Dept. 1992]), is dismissed in its entirety.

Under these circumstances, plaintiff's cross motion for summary judgment is denied as academic.

Settle Judgment on Notice.

DATED MAY 21 2010

A.J.S.C.

ENTERED

MAY 26 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE