

Liberti v Saugy

2011 NY Slip Op 31582(U)

June 9, 2011

Supreme Court, Suffolk County

Docket Number: 09-18476

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 1-4-11
ADJ. DATE 6-9-11
Mot. Seq. # 002 - MD

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| -----X | | DUFFY & DUFFY |
| JEAN E. LIBERTI, Individually and as | : | Attorney for Plaintiff |
| Administratrix of the Estate of NUNZIO J. | : | 1370 RXR Plaza, West Tower, 13 th Floor |
| LIBERTI, Deceased, | : | Uniondale, New York 11556 |
| | : | |
| | : | RIVKIN RADLER LLP |
| Plaintiff, | : | Attorney for Defendants Saugy & Bethpage |
| | : | Orthopaedics |
| - against - | : | 926 RXR Plaza |
| | : | Uniondale, New York 11556-0926 |
| | : | |
| | : | LEWIS JOHS AVALLONE AVILES, LLP |
| | : | Attorney for Defendants Suffolk Orthopaedic |
| JOHN A. SAUGY, JR., M.D., SUFFOLK | : | & Wright |
| ORTHOPAEDIC ASSOCIATES, P.C., | : | 425 Broad Hollow Road, Suite 400 |
| BETHPAGE ORTHOPAEDICS, P.C., | : | Melville, New York 11747 |
| WILLIAM K. WRIGHT, P.A., JEFFREY D. | : | |
| WAGNER, P.A., JEAN G. CHARLES, D.O. | : | SHAUB AHMUTY CITRIN & SPRATT |
| and SOUTHSIDE HOSPITAL, | : | Attorney for Defendants Wagner, Charles & |
| | : | Southside Hospital |
| Defendants. | : | 1983 Marcus Avenue |
| -----X | | Lake Success, New York 11042 |

Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10; Notice of cross-motion and supporting papers ; Answering Affidavits and supporting papers 11-16; Replying Affidavits and supporting papers 17-19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants John A. Saugy, Jr. M.D. and Bethpage Orthopaedics, P.C. for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint as asserted against them is denied.

This medical malpractice action is premised upon the alleged negligence of the defendants, lack of informed consent, and the wrongful death of the plaintiff's decedent, Nunzio Liberti. A claim sounding in negligence and negligent hiring has been asserted against Southside Hospital. A derivative claim is asserted on behalf of Jean E. Liberti. It is claimed that the defendants negligently departed from the appropriate standards of medical care and treatment of the plaintiff's decedent. It is alleged that the defendants failed to timely and properly prevent, diagnose, and treat the decedent for deep vein thrombosis while treating the decedent for an injury to his ankle from February 19, 2008 until his death on February 27, 2008.

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The defendants, John Saugy, Jr. M.D. and Bethpage Orthopaedics, P.C. now seek summary judgment dismissing the complaint on the bases that Dr. Saugy fully complied with the standard of care during his treatment of Nunzio Liberti, and that his care and treatment did not cause or contribute to the plaintiff's decedent's development of deep vein thrombosis resulting in pulmonary embolism and death.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The requisite elements of proof in a medical malpractice action are: (1) a deviation or departure from accepted practice; and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a *prima facie* case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a *prima facie* showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

In support of this motion, the defendants have submitted, *inter alia*, an attorney's affirmation, copies of the summons and complaint, the moving defendants' answer and the plaintiff's verified bill of particulars;

plaintiff's medical records from Suffolk Orthopaedic Associates, P.C.; the affirmation of the defendants' expert Dr. John Feder, M.D.; and the unsigned transcript of the examination before trial of Jean E. Liberti dated February 5, 2010, and a copy of the signed transcript of the examination before trial of John A. Saugy, Jr., M.D. The unsigned copy of the plaintiff's deposition transcripts is not in admissible form as required by CPLR 3212 (see *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), is not accompanied by an affidavit pursuant to CPLR 3116, and is not considered on this motion.

Dr. Saugy testified to the extent that he is duly licensed to practice medicine in the State of New York and is board certified in orthopedic surgery. Upon completion of his residency in 2002, he joined Suffolk Orthopaedics as an orthopedic surgeon. He became a full partner in the corporation in 2006 and left the group in June 2008 to form his own independent practice which is incorporated under the name of Bethpage Orthopaedics, P.C. He continued, however, that he did not see Bethpage Orthopaedic patients until June 2008, although it had been incorporated prior to that time.

Dr. Saugy testified that, William Wright was employed as a physician's assistant and examined the plaintiff's decedent upon presentation to Suffolk Orthopaedics on February 21, 2008. Dr. Saugy asserted that, as a physician's assistant, Wright was authorized to write prescriptions, but he did not have the same training as a physician. Dr. Saugy stated that Bill Wright examined Mr. Liberti initially and advised him that he diagnosed Mr. Liberti with a bimalleolar sprain involving the lateral and medial ligaments, for which he applied a cast. He stated Wright took three x-rays, ruled out a fracture, and found tenderness on the medial and lateral side of the ankle. Wright recommended that Mr. Liberti return in two to three weeks for further x-rays and also prescribed an anti-inflammatory medication, Naprosyn, a pain medication, Vicodin, and Aspirin. Thereafter, Dr. Saugy examined the plaintiff decedent.

Dr. Saugy testified that he was not aware that Mr. Liberti had been seen at Southside Hospital concerning his ankle several days prior. He stated that he saw Mr. Liberti in the examination room and checked the short-leg fiberglass cast, which was applied up to the knee, to ascertain that it was properly applied. He noted that Mr. Liberti was moving his toes well, and he saw no evidence of any vascular problems. Mr. Liberti's toes were warm and pink with good capillary refill. He advised him that he had a sprain and that he would be required to wear the cast for a couple of weeks. Dr. Saugy also stated that the follow up x-rays were advised because certain syndesmosis injuries, wherein there is a tear in the ligament between the tibia and fibula in the ankle level, can show some bony changes eventually. He did not grade the sprain, and he never saw Mr. Liberti again after that visit.

Dr. Saugy stated Mr. Liberti's death certificate gave the cause of his death as pulmonary thromboembolus secondary to deep leg vein phlebothrombosis ("DVT"), which he described as a blood clot in the vein in the leg. When he saw Mr. Liberti, he did not have any known risk factors for DVT. He testified that DVT was considered as Bill Wright recommended to Mr. Liberti that he take aspirin. Dr. Saugy stated he didn't have a problem with recommending the aspirin, but he thought it was "going sort of above and beyond what was necessary." He also stated that he thought it was not something any orthopedic surgeon would have done in that not all sprains are treated with DVT prophylaxis as a rule. He did not feel Mr. Liberti had any absolute risk factors for DVT, although he was obese and had the appearance that he may be immobile and not able ambulate very well the next few days. He stated that a previous DVT would be an absolute risk factor for DVT.

Dr. Saugy further testified that there are exams which could be performed in the office to test for DVT, such as checking for calf tenderness or calf pain with dorsal flexion of the ankle, but this could not be done with Mr. Liberti due to his ankle injury. He stated Wright squeezed Mr. Liberti's calf and found no tenderness. An ultrasound or venogram with dye injection into the vein can also be performed, but he did not have these modalities available at his office and did not order these tests. He continued that in the very early stages of DVT, there may possibly be no signs or symptoms and that it could take hours or days to develop. He did not have an opinion concerning whether or not Mr. Liberti had a DVT when he saw him on February 21, 2008. Dr. Saugy testified that he did not discuss Mr. Liberti's past medical history with him.

When asked to assume that the decedent's wife testified that several days after that visit that Mr. Liberti complained of numbness in his toes, Dr. Saugy opined that this could be due to swelling which interferes with the nerves working properly. He continued that it could be compartment syndrome which would be very rare with an ankle injury, or it could be due to DVT.

John Feder, M.D. set forth in his expert affirmation that he is a physician licensed to practice medicine in the State of New York and is board certified in orthopedic surgery. It is Dr. Feder's opinion, with a reasonable degree of medical certainty, that the care and treatment rendered by Dr. Saugy to Nunzio Liberti met, and, in some instances, exceeded the standard of care for the management of ankle sprains in 2008. He states Mr. Liberti, a 49 year old male, fell on ice on his deck ramp at home on February 19, 2008 and had pain in his right ankle with standing or twisting. The pain improved with elevation of the extremity. On his medical history sheet, he denied any prior surgical history, hospitalizations, fractures, medication, or past medical history, including blood clots.

Dr. Feder states that on February 19, 2008, Mr. Liberti was seen at Southside Hospital where he received x-rays and was placed in an air cast and referred for further evaluation. On February 21, 2008, Mr. Liberti was seen initially by William Wright, a physician's assistant employed with Suffolk Orthopaedic Associates, P.C.. Examination at that time revealed moderate swelling of the right ankle with tenderness over the lateral malleolus with point tenderness over the anterior talotibular ligament and deltoid. The achilles was intact. There was no tenderness at the syndesmosis. There was equivocal ankle stability, and a negative squeeze test. The diagnosis of bimalleolar sprain was made. A short leg cast was applied and was to be worn for two to three weeks. Aspirin was prescribed daily for DVT prophylaxis by Wright, although Dr. Saugy did not feel there was a history to suggest Mr. Liberti was at higher risk of developing DVT, and that DVT prophylaxis was not necessary. However, due to Mr. Liberti's immobility and weight, Dr. Feder states that Dr. Saugy agreed with the recommendation to treat with aspirin, met with Mr. Liberti, and discharged him after assessing the cast and the circulation to his toes. Thereafter, Dr. Saugy had no further contact with Mr. Liberti.

Dr. Feder opines that it is routine on Long Island for practices such as Suffolk Orthopaedic Associates, P.C. to employ physician's assistants to render care and treatment to patients under the supervision of a physician. He states that it was entirely appropriate for Dr. Saugy to rely upon the physician's assistant to accurately discuss the results of his examination, and his diagnosis, treatment and recommendations. Dr. Feder continues that after Mr. Liberti was seen by the physician's assistant, it was appropriate for Dr. Saugy to review the x-rays, conduct an examination of the cast applied by the physician's assistant, to speak with the patient to determine if he had any complaints, and then to instruct him to return for follow up in two to three weeks. Dr. Feder adds that it was appropriate for Dr. Saugy to rely upon the history provided by Mr. Liberti in reaching a diagnosis and in determining a proper plan of treatment as Mr. Liberti reported he had no medical conditions and was not taking any medications.

Dr. Feder set forth the signs, symptoms and risk factors of DVT, including severe leg trauma. He opines that the examination performed by the physician's assistant prior to applying the short leg cast demonstrated that there were no signs or symptoms of DVT. He continues that standard management of an ankle sprain includes immobilizing the ankle in a cast, keeping it elevated, and prescribing anti-inflammatories and analgesics. He opines that the standard of care for an ankle sprain does not include DVT prophylaxis in the absence of any of the above-referenced risk factors. Dr. Feder continues that Dr. Saugy exceeded the prevailing standard of care by recommending that Mr. Liberti take 325 mg. aspirin daily to protect against the risk of DVT based upon Mr. Liberti's size, weight, and expected immobility due to the sprain. Despite being instructed to take aspirin and Naprosyn, an anti-inflammatory which promotes bleeding, Dr. Feder states that Mr. Liberti still developed a DVT. The DVT caused a pulmonary embolism and death within eight days of his injury. Dr. Feder concludes that there is nothing that Dr. Saugy did during this brief encounter with Mr. Liberti which caused or contributed to his death.

Dr. Feder states that on February 27, 2008, Mr. Liberti was brought to Southside Hospital in full cardiac and respiratory arrest and was pronounced dead shortly after arrival. Pursuant to the Death Certificate, Dr. Feder states the cause of death was pulmonary thromboemboli and deep leg vein phlebothrombosis with blunt force trauma and ankle fracture. The autopsy report indicated the cause of death as the same. These reports have not been provided to the Court. Dr. Feder concludes, however, that there was no evidence of an ankle fracture based upon the prior x-rays conducted at Suffolk Orthopaedic Associates. He reviewed the x-ray report from Southside Hospital, but did not review those x-ray films, and concludes that there was no evidence of an ankle fracture. Dr. Feder further concludes that Mr. Liberti did not suffer a blunt force trauma, but fell. Dr. Feder states that the conclusions of the medical examiner that there was a blunt force trauma and a fracture of the ankle are not supported by either the history provided by the plaintiff or by the objective studies of the ankle.

It is determined that Dr. Feder's affirmation raises factual issues concerning whether or not Mr. Liberti suffered a blunt force trauma and a fractured ankle when he fell on his deck. Dr. Feder does not opine whether the standard of care would be the same for a blunt force injury as for an ankle sprain if Mr. Liberti did suffer a blunt force injury when he fell. Dr. Feder does not opine whether the initial diagnosis of a sprained ankle was correct and whether it was appropriate not to consider whether a blunt force trauma to the ankle could have been suffered in the fall. Thus, the defendant has not established *prima facie* entitlement to summary judgment dismissing the complaint. It is further determined that the plaintiff's expert's affirmation raises factual issues which preclude summary judgment in any event.

The plaintiff's expert¹ states that he is a physician licensed to practice medicine and is board certified in orthopedics. He sets forth his opinion with a reasonable degree of medical certainty that Dr. Saugy departed from appropriate and accepted standards of medical practice in his care and treatment of the plaintiff's decedent, and that such departures were substantial contributing factors in causing Mr. Liberti's death. He states that if the appropriate standard of care had been met, the patient would have been properly assessed for DVT. If DVT existed at the time of the office visit, appropriate treatment could have been rendered before the clot was able to break off and travel to the lungs. The decedent would have been given appropriate prophylaxis to eliminate the development of future clot formation, and would have been re-

¹ The Court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name. In addition, the Court has returned the unredacted affirmation to the plaintiff's attorney.

examined within 2-3 days of the initial office visit. The presence of DVT would have been discovered and treated based upon Mr. Liberti's complaints of numbness and pain, which were, unquestionably, signs and symptoms associated with the presence of DVT, which ultimately led to his death.

The plaintiff's expert set forth that the term, DVT, refers to deep venous thrombosis, a blood clot in the veins of the leg due to thickening and clumping of the blood, occurring mostly in the lower leg or thigh, but also occurring in other parts of the body. He states an embolus is a blood clot which breaks off and travels through the blood stream. It is a pulmonary embolism when it blocks blood flow in the main artery of the lung or one of its branches. The obstruction of the blood flow through the lungs and the resultant pressure on the right ventricle of the heart leads to difficulty breathing, chest pain on inspiration, and palpitations. Severe cases of pulmonary embolism can cause death.

The plaintiff's expert continues that given the fact that a severe ankle sprain can feel the same as a broken ankle, every ankle injury should be evaluated by a physician. While an orthopedist may be permitted to rely on a physician's assistant to facilitate and aid in patient care, the orthopedist is not permitted to simply sign off on a patient's chart without performing a proper evaluation of the patient's condition and addressing any and all factors that may affect that patient's health, particularly when billing for those services. The plaintiff's expert opines Dr. Saugy's failure to properly evaluate the plaintiff's decedent was a departure from the standard of care.

The plaintiff's expert states that common complaints for a broken ankle include immediate, severe pain, swelling, bruising, tenderness to touch, and inability to put weight on the injured foot. The plaintiff's expert continues that DVT can occur without any symptoms or signs, but when present, include leg pain, tenderness, leg edema and swelling, venous distention of subcutaneous vessels, discoloration, and a palpable cord (thrombus). Compression of the veins, physical trauma, cancer, infections, certain inflammatory diseases, and specific conditions such as stroke, heart failure, or nephrotic syndrome can lead to DVT. Factors which increase a patient's risk for DVT can include surgery, hospitalization, immobilization (such as when orthopedic casts are used), smoking, obesity, age, certain drugs, inborn tendencies to form clots (thrombophilia), for which DVT prophylaxis should be given, including numerous anti-coagulant agents. The plaintiff's expert states that in the decedent's case, Dr. Saugy departed from accepted standards of care in that he prescribed aspirin for DVT prophylaxis. This, he states, was inappropriate under the circumstances of obesity, immobility, and recent lower extremity trauma. He states that proper DVT prophylaxis should have been initiated as DVT is a medical emergency.

The plaintiff's expert states that there are two tests to aid in the determination of DVT include testing for the "Homan's Sign" which elicits pain in the posterior calf when the foot is dorsiflexed. The "Pratt's Sign" involves squeezing the posterior calf, which, if DVT is present, elicits pain. During physical examination, the circumference of the affected and contralateral limbs at fixed points can be measured, and the venous tract palpated for tenderness. He opines that physical examination for DVT is unreliable in excluding DVT and that diagnostic studies can be conducted. This would include testing for D-dimer levels (fibrin degradation product indicative of thrombosis and dissolution by plasmin), complete blood count, and primary coagulation studies (PT, APTT, Fibrinogen, liver enzymes, renal function and electrolytes).

The plaintiff's expert states that Dr. Saugy should have established whether the patient actually had DVT while he was in the office. However, he continued, Dr. Saugy testified that he did not have an opinion concerning whether Mr. Liberti had a DVT. When Dr. Saugy saw the plaintiff's decedent, he did so because "the patient has to be assigned to a physician in the office" possibly for billing purposes, but he did not

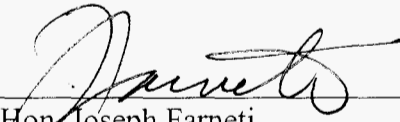
know who set the policy or why it was in place. He continues that Dr. Saugy never saw the plaintiff's decedent's ankle or leg or foot, other than the portion of the toes outside the cast, and could not confirm any of the reported findings related to P.A. Wright's examination, including whether an appropriate examination was conducted and whether all appropriate observations were made. The plaintiff's expert states that Dr. Saugy testified that the squeeze test cannot rule out the presence of DVT, and, at the very least, Dr. Saugy should have had additional clinical tests performed and should have had blood work drawn and a D-Dimer test run. Thus, opines the plaintiff's expert, the defendant departed from the standard of care by failing to properly rule out DVT on this office visit on February 21, 2008.

The plaintiff's expert states that Mrs. Liberti testified that her husband had contacted Suffolk Orthopaedics between February 21, 2008 and February 27, 2008 due to numbness in his toes and was advised that the numbness was normal. When she went to the defendant's office on February 25, 2008 to drop off some forms and to ask a question about the medications her husband was on, she advised the office staff about the numbness her husband was experiencing. She was told by the person at the desk that "the doctor" advised that taking aspirin was okay and that the numbness was normal. While Dr. Saugy testified that he was not aware of such communication, and while the decedent's wife testified that the information about the numbness was communicated to his office staff, the plaintiff's expert states he cannot determine this factual issue. He opines, however, that because a hard cast was placed, that Dr. Saugy should have had the plaintiff's decedent return within two to three days to evaluate his leg for increased swelling, redness or other indications of DVT. Complaints of numbness and pain require that the patient been seen immediately. Therefore, opines the plaintiff's expert, if Dr. Saugy was apprised of this information, good and accepted practice required that Mr. Liberti be seen immediately or be sent to the emergency room or other facility to rule out DVT. The plaintiff's expert opines that Dr. Saugy permitted the presence of, and the development of DVT, which was left untreated, causing the clot to break away and lodge in the decedent's lung. This caused Mr. Liberti's death. At a very minimum, opines the plaintiff's expert, Dr. Saugy reduced this patient's chance for successful treatment and recovery. He states that all the aforementioned departures were contributing factors in the plaintiff's decedent suffering from pulmonary embolism and death.

Based upon the foregoing, it is determined that the factual issues and opinions set forth by the plaintiff's expert, which conflict with those opinions set forth by the defendants' expert, preclude summary judgment. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]).

Accordingly, this motion by the defendants John A. Saugy, Jr. M.D. and Bethpage Orthopaedics, P.C. for an Order granting summary judgment dismissing the complaint as asserted against them is denied.

Dated: June 9, 2011


 Hon. Joseph Farneti
 Acting Justice Supreme Court

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