

<b>Wolpow v L. Abraham</b>
2012 NY Slip Op 32051(U)
July 13, 2012
Supreme Court, Suffolk County
Docket Number: 08-6997
Judge: W. Gerard Asher
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INDEX No. 08-6997  
CAL. No. 11-00842MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 32 - SUFFOLK COUNTY

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 8-17-11 (#007)  
MOTION DATE 9-14-11 (#008)  
ADJ. DATE 11-29-11 (#007) & (#008)  
Mot. Seq. # 007 - MG  
# 008 - MD

-----X  
SHARON WOLPOW and HARRIS BERKOWITZ,  
Individually, and as the Administrator of the Estate  
of FLORENCE BERKOWITZ,  
Plaintiffs,

KATZ & KREINCES, LLP  
Attorney for Plaintiffs  
170 Old Country Road, Suite 316  
Mineola, New York 11501

- against -

FUREY, FUREY, LEVERAGE, et al.  
Attorney for Defendants Abraham,  
Mahoney, Guran, Fitterman, Choi,  
Huntington Hospital & Huntington Medical  
Group  
600 Front Street  
Hempstead, New York 11550

L. ABRAHAM, R.N., E. MAHONEY, R.N., ALAN  
D. FETTERMAN, M.D., ADRIAN E. GURAN,  
M.D., NICK FITTERMAN, M.D., PAUL K. CHOI,  
M.D., HUNTINGTON HOSPITAL,  
HUNTINGTON MEDICAL GROUP, P.C.,  
GURWIN JEWISH-FAY J. LINDNER  
RESIDENCES, INC., GURWIN JEWISH FAY  
LINDNER, GURWIN CENTER LONG TERM  
HEALTH CARE, GURWIN JEWISH SENIOR  
RESIDENCES, GURWIN JEWISH GERIATRIC  
FOUNDATION, INC., THE ROSALIND AND  
JOSEPH GURWIN JEWISH GERIATRIC  
CENTER OF LONG ISLAND, INC., and  
GURWIN JEWISH ASSISTED LIVING,

SHAUB, AHMUTY, CITRIN & SPRATT  
Attorney for Defendant Fetterman  
1983 Marcus Avenue  
Lake Success, New York 11042-1056

Defendants.  
-----X

WILSON, ELSER, MOSKOWITZ, et al.  
Attorney for Defendants Gurwin  
3 Gannett Drive  
White Plains, New York 10604

Upon the following papers numbered 1 to 41 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (007) 1-10; Notice of Cross Motion and supporting papers (008) 11-22; Answering Affidavits and supporting papers 23-26; 30-37; Replying Affidavits and supporting papers 27-29; Other 38-41; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that motion (007) by the defendant, Alan D. Fetterman, pursuant to CPLR 3212 for summary judgment dismissing the complaint, is granted; and it is further

**ORDERED** that motion (008) by the defendants, The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, Inc.; Gurwin Jewish-Fay J. Lindner Residence, Inc., s/h/a/ Gurwin Jewish-Fay Lindner Residences, Inc., Gurwin Jewish Fay Lindner, Gurwin Center Long Term Health Care, Gurwin Jewish Senior Residences, Gurwin Jewish Geriatric Foundation, Inc., and Gurwin Jewish Assisted Living, pursuant to CPLR 3212 for summary judgment dismissing the complaint, is denied.

The complaint sets forth causes of action alleging medical malpractice and negligence, lack of informed consent, and wrongful death of the plaintiffs' decedent, Florence Berkowitz. A derivative claim is asserted on behalf of the plaintiffs, Sharon Wolpow and Harris Berkowitz. It is claimed that the plaintiffs' decedent sustained injuries on February 13, 2007 when she tripped and fell at the Gurwin defendants' facility and sustained a fractured hip due to the alleged negligence of the defendants in failing to provide a safe environment and failing to institute proper fall precautions. That same day, the plaintiffs' decedent was transferred to Huntington Hospital and was admitted to the service of Dr. David Weissberg. She was diagnosed with a fractured left hip for which an open reduction with internal fixation of the left hip fracture was performed on February 15, 2007 by Dr. Weissberg. On February 20, 2007, the plaintiffs' decedent was discharged back to Gurwin for rehabilitation. On February 21, 2007, at 9:00 a.m., the plaintiffs' decedent was found to be unresponsive with shallow breathing. She was transferred back to Huntington Hospital at 9:15 a.m., where she was admitted to the service of Alan Fetterman, M.D. at 2:26 p.m., and was diagnosed with sepsis. She died later that day. It is further alleged that the defendants negligently departed from good and proper standards of care in failing to timely and properly diagnose and treat the plaintiffs' decedent, and in negligently causing her death on February 21, 2007.

In motion (007), Alan D. Fetterman, M.D. seeks summary judgment dismissing the complaint asserted against him on the bases that his treatment of the decedent was limited, and that the care and treatment he provided did not proximately cause the decedent's death. In motion (008), Gurwin Jewish-Fay Lindner Residences, Inc., Gurwin Jewish Fay Lindner, Gurwin Center Long Term Health Care, Gurwin Jewish Senior Residences, Gurwin Jewish Geriatric Foundation, Inc., The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, Inc. and Gurwin Jewish Assisted Living (the Gurwin defendants) seek summary judgment dismissing the complaint on the bases that the decedent's death was not caused by their negligence or medical malpractice; that although the decedent demonstrated confusion upon her readmission to Gurwin, the confusion was not indicative of any escalating or impending infection; and that the decedent was a chronically ill, elderly lady with dementia whose death was unavoidable; that they did not depart from good and accepted standards of care in their care and treatment of the decedent; and that they complied with Public Health Law 2801-c and d, 2903-c (e), (g), and (h), and 22 NYCRR 415.12 (i)(iv).

It is noted that in opposing these motions, the plaintiff asserts that the defendants' expert affirmations should not be considered in that compliance with CPLR 3101 (d) expert response was not demonstrated by the defendants prior to filing the note of issue and certificate of readiness. CPLR 3101 (d) (1) (i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party (*Barchella Contracting Co., Inc. v Cassone*, 2011 NY Slip Op 7387, 931 NYS2d 253 [2d Dept., Oct. 18, 2011]; *Vega v LaPalorcia*, 281 AD2d 623, 722 NYS2d 562 [2d Dept 2001]; *Shopsin v Siben & Siben, Esqs.*, 289 AD2d 220, 733 NYS2d 697 [2d Dept 2001]). Here,

there has been no showing of prejudice to the plaintiff, and any potential prejudice has been ameliorated by adjournments of the motions and the lapse in time between expert disclosure and the filing of the motions. Further, defendant Fetterman submitted a copy of his response to plaintiff's demand for expert witness disclosure with a proof of service dated March 18, 2011. Thus, the expert affirmations of all parties are considered in determining the within motions.

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *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 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]).

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, Derdiarian 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 defendant's 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]). "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]).

The original wrongdoer is liable for all the proximate results of his own tortious acts, including

aggravation of injuries by a successive tort-feasor (*see, Frost v Chung Sin Bak*, 2011 NY Slip op 30465U [Sup. Ct., New York County]; *Dubicki v Maresco*, 64 AD2d 645, 407 NYS2d 66 [2d Dept 1978]).

In support of motion (007), defendant Fetterman has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, his answer with demand, and the plaintiff's verified bill of particulars; uncertified copies of decedent's medical records; and the affirmation of the defendant Fetterman's expert Gisele Wolf-Klein. Dr. Fetterman's expert has set forth in her affirmation that in addition to reviewing the medical records from Huntington Hospital and Gurwin Jewish Medical Center, that the EBT's of the plaintiff and Dr. Fetterman were also reviewed.

Dr. Wolf-Klein has set forth that the plaintiff's decedent's death certificate attributed the decedent's cause of death to acute renal failure, due to, or as a consequence of, sepsis and/or COPD. Dr. Wolf-Klein opines with a reasonable degree of medical certainty that Dr. Fetterman did not depart from the accepted standards of care and did not cause or contribute to the decedent's death. Dr. Wolf-Klein also notes that Dr. Fetterman was not involved in treating Ms. Berkowitz during her stay at the hospital February 13, 2007 - February 20, 2007. Dr. Wolf-Klein states that Dr. Fetterman was notified that the decedent was in the emergency room at 11:10 a.m. on February 21, 2007, in shock and unresponsive. Dr. Fetterman advised the nursing staff to have the emergency department doctor contact him once the evaluation of Ms. Berkowitz was completed. At 2:26 p.m., Dr. Fetterman was called and Ms. Berkowitz was admitted to his service. Dr. Fetterman examined Ms. Berkowitz sometime between 2:24 p.m. and 3:00 p.m. Dr. Wolf-Klein opines that Dr. Fetterman obtained an appropriate history, performed an appropriate physical examination and engaged in an appropriate process of diagnosis and treatment, all within the applicable standard of care.

Plaintiff's entire opposition is based solely on an argument that Dr. Wolf-Klein's affirmation should be disregarded as untimely. This argument has been rejected as noted above.

Accordingly, motion (007) by defendant Alan D. Fetterman for summary judgment dismissing the complaint is granted.

In support of motion (008), the Gurwin defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, their answer and demands, and plaintiffs' verified bill of particulars; uncertified copies of decedent's medical records; the unsigned and uncertified copy of the transcript of the examination before trial of Nancy De La Cruz dated June 9, 2010; the signed and certified copy of the transcript of the examination before trial of Dr. Mohamed J. Alam; and the expert affirmation of Gary Burke, M.D. The moving defendants have not submitted a copy of their co-defendants' answers for this court to ascertain if there are any cross claims asserted against them. The decedent's records from Huntington Hospital and the Gurwin facility are not certified pursuant to CPLR 3212 to be considered as admissible evidence (*see, Friends of Animals v Associated Fur Mfrs.*, supra). Expert testimony is limited to facts in evidence (*see, also, Allen v Uh*, supra; *Hornbrook v Peak Resorts, Inc.*, supra; *Marzuillo v Isom*, supra; *Stringile v Rothman*, supra; *O'Shea v Sarro*, supra). The transcript of Nancy De La Cruz, an employee of the moving defendants, is considered pursuant to *Zalat v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011] as adopted as accurate by the moving defendant.

Nancy De La Cruz testified to the effect that she has been employed by Fay J. Linder as a resident care coordinator since May 2001. She stated that a resident care coordinator was another name for a home

health assistant. She testified that she went to the Autonomía University of Santo Domingo from 1979 to 1987 and received a degree as a medical doctor but she did not pass the FLEX exam in the United States. She is currently studying to become a laboratory technician at Farmingdale. She also worked as a home health assistant for an agency in Queens and at Helping Hands, in Northport. She earned a CNA (certified nursing assistant) certificate in Jamaica, Queens in 1994 and worked in the Rockville Centre Nursing Home for two years.

De La Cruz further testified that at Fay J. Linder, her duties were to help the residents with their daily care, such as showering, dressing, or moving them to the dining room. Residents had different care levels, and either the nurse or the wellness director determined the level of care required by each resident. One aide was assigned to a wing consisting of about eight to nine apartments. She testified that Florence Berkowitz was in B-wing apartment 201, which consisted of a bedroom and a bathroom. In February 2007, Mona Benvenuto, LPN, was her supervisor and the nurse for Florence Berkowitz. The wellness director was in charge. She usually cared for the plaintiff's decedent each morning, and checked the wellness board for her assignment and to see if there was any change for the residents she was caring for. There was nothing in writing other than the assignments that indicated what procedure she was to follow as an aide, based upon the resident's problem with ambulation. She stated that Ms. Berkowitz smoked a lot, did not socialize with other residents, liked to read books, wanted to be back in Florida, and was unhappy to be at the facility. She reported that to Mona Benvenuto, but did not know what Mona did about it. Ms. Berkowitz's son and daughter came to visit, but De La Cruz stated she had no contact with them and never spoke to them.

De La Cruz testified that Ms. Berkowitz was permitted to get out of bed on her own, and only needed assistance with dressing relative to putting on shoes and socks, as per her instructions from the wellness director. She usually walked Ms. Berkowitz to the dining room in the morning after getting her ready as she was not steady walking, and to make sure she arrived on time. She continued that Ms. Berkowitz had no restrictions in terms of leaving her apartment, and could walk out of her apartment unassisted at any time and walk around the hallways, if she wanted. She could not remember if anyone told her that Ms. Berkowitz had a problem with her balance or gait, or that she was at a risk for falling. She walked with the assistance of a walker, but she did not know why. She did not know if Ms. Berkowitz had dementia, but testified that she was confused at times, such as when she was supposed to get her mail, but could not remember other occasions. She stated that Lindner did not provide a device for the residents to wear in the event they fell and needed assistance. She checked Ms. Berkowitz once a day in the morning and did not have any instructions from the wellness director to check her during the day. She indicated that Ms. Berkowitz had a phone and television in her apartment, that she followed directions when she was asked to do something, and was sometimes caught with cigarettes which she was not permitted to keep, as residents were only permitted to smoke outside.

De La Cruz testified that she was at lunch when Ms. Berkowitz fell, and was told by her coworker, Maria Hernandez, about the fall when she returned. She testified that Hernandez told her that they went to get Ms. Berkowitz for lunch and found her on the floor. She did not know if Ms. Berkowitz was found on the carpeted floor or on the tile floor, or whether or not she was conscious when found. She did not know who found her. She never spoke to anyone at the facility about the incident.

Mohamed J. Alam, M.D. testified to the extent that he has been a physician licensed to practice

medicine in New York since 2000. In 2001, he did a one-year fellowship at Long Island Jewish Medical Center. He is board certified in internal medicine and geriatric medicine. In 2001, he began working as a staff physician at the Gurwin Jewish Geriatric, and was paid by them. The facility changed its name to Gurwin Jewish Nursing and Rehabilitation Center. Dr. Susan Field is director of the department of medicine. He stated that he had no duties and responsibilities at the Gurwin Jewish-Fay J. Lindner Residences. He has never had any privileges at any hospital in the United States. He worked from 9 a.m. to 5 p.m., Monday through Friday. From 5 p.m. to 6 p.m., there was a mid-level practitioner (physician assistant or nurse practitioner) covering on site. After 6 p.m., patient coverage was provided by telephone on an on call basis.

Long-term care at the Gurwin Jewish Nursing and Rehabilitation Center involves a patient coming to the facility for the rest of his or her life. Dr. Alam continued that subacute patients are there temporarily either for rehabilitation, or for other reasons such as IV antibiotics, with the goal of returning the patient to his or her previous residence. He remembered Florence Berowitz and evaluated her upon her admission on February 20, 2007 to the Gurwin Jewish Nursing and Rehabilitation Center for subacute rehabilitation following her hospitalization at Huntington Hospital where she was treated for a fractured hip. He continued that when he saw her about 3 p.m. that day, she was very confused, was unable to answer questions appropriately, but was able to follow simple commands. Dr. Alam testified that he did not evaluate Ms. Berowitz for dementia as she was not able to answer any questions upon admission. He stated that her confusion could have been from dementia or from other problems, but he thought she had advanced dementia which could not be determined with one visit. He felt she was depressed as she had been placed on antidepressant medication.

Dr. Alam testified that on February 20, 2007, the "Hospital Community Patient Review Instrument" (PRI) was faxed to Gurwin from Huntington Hospital. It indicated that Ms. Berkowitz had a urinary tract infection. There was no history of disruptive behavior or delusions or hallucination. Her diagnosis was that of left hip fracture. A plan of care was provided, but Dr. Alam stated that Gurwin can change the plan. They are not bound by the hospital's care plan, but they usually follow it. She was started on Bactrim for the urinary tract infection on February 18, 2007, which was to be continued for five days. He did not see any indication that she was being treated for acute renal failure. He wrote general admission orders for Ms. Berkowitz upon her arrival. He did not order any regimen for checking vital signs because, he stated, they are routinely done. He did not order more frequent monitoring. He noted at 8:30 p.m., Ms. Berkowitz's blood pressure was recorded at 100/54 for that shift. At 5 a.m. on February 21, 2007, the only note recorded for that day prior to 9 a.m., her blood pressure was noted to be 115/79.

Dr. Alam continued that he did not know if Ms. Berkowitz had been evaluated for acute renal failure while she was at Huntington Hospital, but he reviewed her records, some of which had been faxed to Gurwin, and determined that her BUN and creatinine were both elevated, which was consistent with acute renal failure. Because he noted that her renal function was getting worse, he wrote an order wherein extra fluids, in the amount of an additional 1000 ml per day (one liter-4 cups) were to be encouraged. He did not make a determination concerning whether or not she was dehydrated. He did not check her skin turgor. Dr. Alam then testified that the Huntington Hospital progress note dated February 19, 2007 indicated that Ms. Berkowitz was assessed as having acute renal failure. There was a plan to start gentle hydration by intravenous fluid administration of one half normal saline at 60 cc's per hour. Dr. Alam testified that he was not aware of this and that he would have assumed the problem was resolved, or that the IV fluid was

given, when the order was for the day before. He continued that it would not be significant to him unless it was written on the day of discharge. However, he stated, he was not given the complete chart. Upon her admission to Gurwin, he noted she had multiple ecchymosis and skin tears to all extremities, but he did not know how she obtained the same.

Dr. Alam stated that he talked once to Ms. Berkowitz's daughter, Sharon Wolpow, who signed a DNR (do not resuscitate) order. He could not remember the sum and substance of their conversation, but stated he told her that her mother was at Gurwin for rehabilitation following the hip fracture, and that he told her about the plan according to the hospital discharge summary, and advised her that her mother would be seen by physical therapy and occupational therapy, that her electrolytes and blood count would be monitored, and that her medication for her urinary tract infection would be continued. He testified that he thought Ms. Berkowitz's condition was stable upon her admission. He did not speak with anyone from Huntington Hospital about Ms. Berkowitz's condition. At about 9 p.m. after her admission on February 20, 2007, the nurse's note indicated that Ms. Berkowitz's blood pressure was 120/52 and heart rate 75. On February 21, 2007, Ms. Berkowitz was administered Ativan at 1 a.m. for increased anxiety, with fair effect. At 2 a.m, Ms. Berkowitz was administered a Percocet tablet for left hip pain, which helped decrease the pain on a pain scale from 8 down to 3.

Dr. Alam stated that he saw Ms. Berkowitz just that one day on February 20, 2007. She had already been transferred to Huntington Hospital when he returned to work on February 21, 2007. He spoke to Dr. Fermo, another staff physician, and learned that Ms. Berkowitz became unresponsive and hypotensive, was found by a staff member, and was sent back to Huntington Hospital by Dr. Fermo. Dr. Alam continued that he did not know what time Ms. Berkowitz had been found by the staff. He did not speak to any of the nursing staff who had been caring for her during the night prior to 9 a.m. He did not know how long she had been unresponsive before she was seen by Dr. Fermo. Dr. Alam noted that the record revealed that Ms. Berkowitz's blood pressure was 50 systolic by palpation when she was checked by Dr. Fermo and she was started on oxygen. He then had a very short conversation with Dr. Fetterman at Huntington Hospital and learned that Ms. Berkowitz was very sick, but Dr. Fetterman did not tell him what was wrong with her, or what was being done for her. He did not express to Dr. Fetterman what he thought had happened to Ms. Berkowitz after he saw her. He continued that Dr. Fetterman is the hospitalist for the Gurwin facility and takes care of some of their patients pursuant to an agreement.

Dr. Alam also testified that he did not have an opinion based upon a reasonable degree of medical certainty as to what caused Ms. Berkowitz to become unresponsive on the morning of February 21, 2007. However, he stated, her CBC, which he ordered on February 20, 2007, and which was drawn early in the morning on February 21, 2007, revealed an elevated white count with a shift to the left, which indicated to him that there was an acute infection which was present either for a couple of days or a couple of hours. However, he stated, he had ordered the CBC to rule out anemia as she looked pale. He also ordered a comprehensive metabolic panel (Chem-7) to evaluate her hypertension, a Chem-20 to evaluate her kidney function, and a full therapeutic recreation participation level, as tolerated. She was to receive a rehabilitation assessment for physical therapy and occupational therapy. Dental and orthopedics consultations, and a chest x-ray and left hip x-ray were additionally ordered on February 20, 2007 when he admitted her. He noted her sodium was high at 147, indicating dehydration. PT/INR blood work for anti-coagulation monitoring was ordered. These test results were received after Ms. Berkowitz had been transferred to Huntington Hospital. He also wrote medication orders upon admission.

Dr. Alam testified that the signs of urinary tract infection can include change in mental status, and that he did not attribute her confusion to the urinary tract infection. In his case summary prepared after her transfer to Huntington Hospital from Gurwin Rehabilitation, he wrote that her diagnosis was septicemia, or infection of the blood stream, as the patient had a low blood pressure and because he also learned that she had a high white blood count. The second diagnosis he wrote was acute renal failure based upon the blood work.

Dr. Alam continued to testify about the DNR documentation sheet which he signed and wherein he made a determination of dementia, based upon the mini-mental examination he performed upon her admission, his conversation with her daughter, and the hospital record. He did not contact the Gurwin Residence where she had been residing when she sustained the hip fracture to determine if she had dementia while residing there. Dr. Alam continued that the DNR document set forth that "Resuscitation would pose an extraordinary burden in light of the resident's medical condition and expected outcome." Dr. Alam testified that this included all of her medical conditions, such as COPD, but not her urinary tract infection. He continued, however, that he did not know how advanced her COPD was, and that he did not do testing to determine whether COPD would impose an extraordinary burden on her. He continued that atrial fibrillation could possibly impose an extraordinary burden on the patient for resuscitation if they go into cardiac arrest. He did not do anything to determine if she had any damage to her heart other than having atrial fibrillation. He did an EKG and chest x-ray to determine whether the patient's hypertension had affected her heart. Dr. Alam testified that when he signed the DNR order, he did not know if there was any heart damage, what the level of function of the right ventricle was, or whether or not she had arteriosclerotic heart disease. He indicated she had an ejection fraction of 47% and that 49% is normal for females, and that she had undergone major surgery under general anesthesia despite the same. He testified that he did not recommend the DNR, but asked the daughter who made the determination. Dr. Alam testified that when Ms. Berkowitz was found unresponsive, no resuscitative efforts were made. Oxygen was administered, but he stated that this is not a resuscitative measure.

Gary Burke, M.D. has set forth in his affirmation submitted in support of Gurwin defendants' motion for summary judgment that he is a physician licensed to practice medicine in New York State and is board certified in internal medicine. Dr. Burke set forth the materials he reviewed, including the medical charts from the Huntington Hospital admissions of February 13, 2007 through February 20, 2007 and February 21, 2007; the Gurwin admission for rehabilitation of February 20, 2007, and the records maintained by Gurwin during Ms. Berkowitz' residency at assisted living. Based upon his review of the aforementioned documents, it is Dr. Burke's opinion based on a reasonable degree of medical certainty that the Gurwin defendants and its staff did not depart from the good and accepted standards of care in their care and treatment of Ms. Berkowitz, and did not cause or contribute to her death.

It is determined that Dr. Burke's opinions are conclusory and unsupported by the evidentiary submissions which accompany the moving defendants' application. Although Dr. Burke opines that the confusion demonstrated by Ms. Berkowitz upon her admission on February 20, 2007 to Gurwin Rehabilitation was due the fact that she had just undergone a significant operation and was then transferred between facilities in a short span of time, Dr. Burke does not address the possibility of dehydration which Dr. Alam was concerned about in ordering additional fluids for Ms. Berkowitz upon her admission. He does not address the concerns that Dr. Alam had with reference to acute renal failure or renal insufficiency and does not address the elevated BUN and creatinine levels which Dr. Alam testified were faxed to him,

and for which he ordered additional blood work to determine renal function/failure, dehydration and electrolyte levels, all of which he stated could cause or contribute to confusion. Dr. Burke affirms that Ms. Berkowitz was suffering from dementia, but this conflicts with the testimony of Ms. De La Cruz who stated that Ms. Berkowitz followed orders, fed herself, was able to get out of bed to ambulate without assistance, and needed assistance with dressing only as to socks and shoes and to the dining room while she was at the Gurwin Residence. She also enjoyed reading and was permitted to smoke outside. Dr. Alam testified that he could not diagnose dementia based upon only one meeting with her. Dr. Burke does not address Ms. Berkowitz's mental status while residing at the Gurwin Residence or during her first admission to Huntington Hospital on February 13, 2007, and does not opine, except for conclusory assertions, concerning the marked change in her mental status relative to confusion on February 20, 2007.

Dr. Burke also sets forth that Ms. Berkowitz suffered from co-morbidities, and that the sudden onset of septicemia and death was largely based upon her age and chronic medical conditions. However, he does not indicate the standard of care for testing and treating Ms. Berkowitz's symptoms presented upon her arrival to Gurwin Rehabilitation, in consideration of the information obtained from Huntington Hospital, inclusive of laboratory tests as set forth by Dr. Alam, or the decedent's mental status prior to admission. He does not set forth the protocol to rule in or rule out the cause, or causes, for her confusion or renal failure. Dr. Alam testified that confusion could be caused by any infection as well as other many causes, which he did not consider. Dr. Burke does not address the care and treatment administered by the hospital and nursing staff at Gurwin Rehabilitation and how it comported with good and accepted standards of care. He does not address the circumstances surrounding her condition from 1 a.m. on February 21, 2007 when she was medicated for agitation, or at 2 p.m. when she was medicated for pain, how the pain was distinguished from agitation or confusion. He does not set forth the care and treatment which was administered when she was found to be unresponsive and how such care comported with accepted standards of care. Although Dr. Burke states that Ms. Berkowitz suffered from co-morbidities, and that her death was unavoidable, he does not reconcile his opinions concerning her cause of death with the reason that Ms. Berkowitz was admitted to Gurwin, namely for rehabilitation with a plan to return her to her assisted living status.

Additionally, although Dr. Burke sets forth that he finds no evidence that the defendants violated NYCRR §415.12 (i) (iv) or Public Health Law provision 2803-c 3 (e), (g), or (h) by failing to provide appropriate and adequate medical care, he does not set forth how the statutes were complied with by the defendants in providing 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. No comprehensive plan of care has been demonstrated to show that it was complied with, how her multiple skin abrasions were care for and treated; and that there was no deprivation of the decedent's rights.

Based upon the foregoing, it is determined that the Gurwin defendants have not demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against them.

In any event, even if the moving defendants had demonstrated their entitlement to summary judgment, the plaintiff's expert has raised factual issues which would preclude summary judgment from being granted to the defendants. The plaintiff's expert opines that Ms. Berkowitz fell at the Gurwin Residence, as she was left unattended in her room at lunch time and was only checked when it was realized that she was not in the dining room. The plaintiff's expert affirms that Dr. Burke does not address the events which occurred at the residence at the time she fell; that Dr. Burke did not review those records from the residence; that he does not comment upon Dr. Alam's testimony or that of nurse De La Cruz. The

plaintiffs' expert continues that although Dr. Burke opines that Ms. Berkowitz was in stable condition while at Gurwin Rehabilitation, her blood pressure was 100/54, and for a person with hypertension, this was a warning sign, in combination with the confusion and lethargy she was exhibiting, that she had an unabated urinary tract infection, was dehydrated, and going into renal failure and septic shock. The plaintiff's expert further opines that Dr. Alam and the staff at Gurwin Rehabilitation had a responsibility to properly assess Ms. Berkowitz's condition, and had they considered her signs and symptoms, they would have diagnosed her deteriorating kidney function before she went into septic shock, at a time early enough to treat the acute renal failure and avoid her demise. The plaintiff's expert further opines that this was not a case of sudden onset septicemia, but rather a clearly progressive urinary tract infection which spread to the patient's kidneys causing septic shock and acute renal failure resulting in her death.

Plaintiffs also submit the testimony of Maria Hernandez who testified that in February 2007 she was employed at Gurwin Jewish Fay Lindner Residence. She worked as a resident care coordinator assisting residents with showering and dressing. On February 13, 2007, she was working the 7 a.m. to 3 p.m. shift. She stated that Nancy Cruz was assigned to take care of Florence Berkowitz that day, and that she did not have responsibility for Ms. Berkowitz when Nancy Cruz went to lunch. She was not present when Ms. Berkowitz fell and learned about it when a stat call came over the speaker. Ms. Hernandez testified that she had been in the dining room and did not see Ms. Berkowitz, and decided to check Ms. Berkowitz's room to see if she was there. She first checked the synagogue and recreation room. She could not remember if she was the first person to arrive in Ms. Berkowitz's room, or if she was the person who found Ms. Berkowitz on the floor. She did not know how long Ms. Berkowitz had been on the floor before being found. No doctor examined Ms. Berkowitz before the ambulance arrived to take her to the hospital. Ms. Hernandez testified that it was one of her duties on the date of the accident to assist Florence Berkowitz to lunch, but then stated that it was not part of her duty to assist her to lunch as she goes by herself. She could not remember if anyone told her how Ms. Berkowitz fell and she did not know what caused her to fall. Ms. Hernandez testified that she never saw Ms. Berkowitz being confused. In view of the foregoing, factual issues exist as to the circumstances surrounding Ms. Berkowitz's fall and whether or not the Gurwin defendants were negligent in causing or permitting the plaintiff's decedent to fall, thus precluding summary judgment.

Accordingly, the motion (008) by the Gurwin defendants for summary judgment, in their favor dismissing the complaint is denied.

Dated: July 13, 2012

W. Gerard Arler  
 J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION