McMahon v Chaudhry
2013 NY Slip Op 32927(U)
November 7, 2013
Sup Ct, Suffolk County
Docket Number: 10-40773
Judge: Joseph Farneti
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[* 1]

SHORT FORM ORDER

INDEX No. 10-40773
CAL No. 12-02356MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 1-18-13 (001)
MOTION DATE 4-19-13 (004)
MOTION DATE 5-9-13 (002, 003 & 005)
ADJ. DATE 9-19-13
Mot. Seq. # 001 - MD # 004 - MD
002 - MD # 005 - MG
003 - MD

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CONSTANCE McMAHON, individually, and as Administratrix of the Estate of JAMES J. McMAHON, deceased,

Plaintiff,

- against -

JAHANZEB CHAUDHRY, M.D., ASPAN OHSON, M.D., ROBERT RAJKUMAR, M.D., WSNCHS NORTH, INC., Individually, and d/b/a NEW ISLAND HOSPITAL, NEW ISLAND DIAGNOSTIC IMAGING, P.C., ISLAND MEDICAL PHYSICIANS, P.C., and OAKWOOD OPERATING CO., LLC, individually and d/b/a AFFINITY SKILLED LIVING AND REHABILITATION CENTER,

Defendants.

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Upon the following papers numbered 1 to 123 read on these motions for dismissal and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-7; (002) 8-25; (003) 26-38; (004) 39-50; (005) 51-71; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 72-80; 81-88; 89-96; 97- 98; Replying Affidavits and supporting papers 99-104; 105-106; 107-108; 109-112; 113-116; 117-119; 120-123 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (seq. #001) by defendant, WSNCHS d/b/a New Island Hospital and d/b/a St. Joseph Hospital, pursuant to CPLR 3126 and 3211 (a) (3), dismissing the claim for loss of consortium as to Constance McMahon due to lack of standing and lack of legal capacity to sue is denied; and it is further

ORDERED that motion (seq. #002) by defendant, Jahanzeb Chaudhry, M.D., pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted against him on the issue of liability for his negligence is denied; and/or pursuant to CPLR 3211 (a) (3), dismissing the claim for loss of consortium as to Constance McMahon due to lack of standing and lack of legal capacity to sue is denied; and it is further

ORDERED that motion (seq. #003) by defendants, Aspan Ohson, M.D. and New Island Diagnostic Imaging, PC., pursuant to CPLR 3212 and 3211 (a) (3), for summary judgment dismissing the claim for loss of consortium as to Constance McMahon due to lack of standing and lack of legal capacity to sue is denied; and it is further

ORDERED that motion (seq. #004) by defendants, Aspan Ohson, M.D. and New Island Diagnostic Imaging, P.C., pursuant to CPLR 3101 (d) and 3126 (3), for an Order precluding plaintiffs from offering expert testimony at trial for failure to serve expert witness disclosure in accordance with CPLR 3101 (d) is denied, and/or pursuant to CPLR 3101 (d), for an Order compelling the plaintiff to serve expert witness disclosure is denied; and pursuant to CPLR 3212, for leave to file a late motion for summary judgment is denied in its entirety; and it is further

ORDERED that motion (seq. #005) by defendants Oakwood Operating Co., LLC, individually and d/b/a Affinity Skilled Living and Rehabilitation Center, pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted against it is granted.

In this medical malpractice action, it is alleged that the defendants negligently departed from the good and accepted standards of medical care and treatment of the plaintiff's decedent, James J. McMahon. On or about October 15, 2010, plaintiff Constance McMahon was appointed as administratrix of the estate of the decedent. She has set forth causes of action for negligence, lack of informed consent, wrongful death, and loss of consortium. It is asserted that the defendant, who was born on July 29, 1936, died as a result of septic shock, urosepsis, abdominal perforation, and 9.5 cm abdominal aortic aneurysm, on September 24, 2009. It is alleged that the defendants failed to timely and properly diagnose and treat this abdominal aortic aneurysm until September 15, 2009. The decedent fell at his son's wedding on September 6, 2009, was treated at New Island Hospital on September 6, 2009, and was discharged with a knee brace. On September 7, 2009, he was readmitted to New Island Hospital where he was diagnosed with a hip fracture for which he received hemi-arthroplasty surgery to his right hip. He remained at New Island Hospital through September 11, 2009, when he was transferred

to Affinity Living and Rehabilitation for physical and occupation therapy, and remained there through September 13, 2009, under the care of defendant Jahanzeb Chaudhry, M.D. The decedent was subsequently transferred to Southside Hospital on September 13, 2009, where he remained until his death on September 24, 2009.

Motion (001) was filed prior to the filing of the note of issue and certificate of readiness. Motions (002), (003), (004), and (005) were filed subsequent to the filing of the note of issue and certificate of readiness and are decided pursuant to CPLR 3212, as those parties have moved pursuant to CPLR 3211 (a) (3), 3126 and 3212. Those parties who served their motions after the filing of the note of issue and certificate of readiness have clearly charted a course for summary judgment, as indicated in the notice of motion.

In support of motion (001), defendant WSNCHS d/b/a St. Joseph Hospital and d/b/a New Island Hospital has submitted, *inter alia*, an attorney's affirmation; a copy of the summons and complaint, its answer and the answer served by defendant Aspan Ohson, M.D., and plaintiff's verified bill of particulars; an unsigned but certified transcript of plaintiff's examination, and continued examination, before trial; and an uncertified and unauthenticated document of the married couple benefit information form labeled the U.F.C.W. Local 1500 Pension Fund, containing the un-notarized signature of a person by the name of James John McMahon dated February 8, 2000.

In support of motion (002), defendant Jahanzeb Chaudhry, M.D. has submitted, *inter alia*, an attorney's affirmation; the expert affidavit of Gregory Mazarin, M.D.; memorandum of law; copies of the summons and complaint, defendant's answer and demands, plaintiff's verified bill of particulars; transcript of the plaintiff's examination before trial; uncertified copies of the decedent's medical records from Affinity Skilled Living and Rehabilitation and Southside Hospital which fail to comport with CPLR 3212 and 4518; signed and certified transcripts of the examinations before trial of Jahanzeb Chaudhry, M.D., non-party witnesses Mary Lavery, R.N., Tina Silverman, L.P.N., and Rebecca Anderson, R.N.; and one page of the decedent's Pension benefit form. In his reply, defendant Chaudhry has submitted a certification page for the Southside Hospital record and further affirmation of Gregory Mazarin, M.D.

In support of motion (003), defendants Aspan Ohson and New Island Diagnostic Imaging, P.C. have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, their respective answers with demands, answers served by co-defendants, Oakwood Operating Co., LLC, plaintiff's verified bill of particulars and supplemental verified bill of particulars; signed transcripts of the examination and continued examinations before trial of Constance McMahon; uncertified records from Local 1500 Welfare and Pension Funds; demand for copy of marriage certificate; Local 1500 Welfare Fund-full time member sheet, income tax return without signature page; and unauthenticated Marriage statute law of the Bahamas (LRO 2008).

In support of motion (004), defendants Aspan Ohson and New Island Diagnostic Imaging, P.C. have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, their answers and demands, plaintiff's verified bill of particulars; copy of the note of issue and certificate of readiness signed December 7, 2012 and filed with this Court on December 12, 2012; a copy of plaintiff's

expert disclosure, dated November 30, 2012, of a physician, board certified in diagnostic radiology and a diplomate of the National Board of Medical Examiners; letter dated February 19, 2013 indicating receipt of plaintiff's expert disclosure as rejected by the law office for defendant Oakwood Operating Co., LLC d/b/a Affinity Skilled Living and Rehabilitation; certified copy of decedent's New Island Hospital records; and an uncertified Southside Hospital record which is not in admissible form pursuant to CPLR 3212 and 4518.

In support of motion (005), defendants Oakwood Operating Co, LLC d/b/a Affinity Skilled Living and Rehabilitation Center (Affinity) have submitted, *inter alia*, an attorney's affirmation; affirmation of Lawrence N. Diamond, M.D., affidavit of Catherine Pearsall, R.N.; copies of the summons and complaint, defendant's answer and demands, plaintiff's verified bill of particulars and supplemental bill of particulars; preliminary conference order; plaintiff's expert disclosure dated December 4, 2012; signed and certified transcripts of the examinations before trial of the plaintiff, Jahanzeb Chaudhry, M.D., Mary Lavery, R.N., non-party Tina Silverman, L.P.N., Rebecca Anderson, R.N.; certified copy of the decedent's medical record from Affinity; and the uncertified copy of plaintiff's record from Southside Hospital. Inter alia, a supplemental affirmation has been submitted by Dr. Diamond in defendant's reply papers. A supplemental reply has also been submitted by this defendant containing a certified copy of the Southside Hospital record.

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]).

LOSS OF CONSORTIUM

If a defendant fails to raise the issue of standing and/or capacity to sue as an affirmative defense in an answer or a timely pre-answer motion to dismiss, the issue of standing is waived pursuant to CPLR 3211 (e). It is noted that lack of standing and/or capacity to sue has been raised in the answers served by defendants WSNCHS North, Inc. d/b/a New Island Hospital d/b/a St. Joseph Hospital (collectively "WSCHS"), Aspan Ohson, M.D., New Island Diagnostic Imaging, P.C., and Jahanzeb Chaudhry, M.D. It is noted, however, that defendant, Oakwood Operating Co., LLC, individually and d/b/a Affinity Skilled Living and Rehabilitation Center, has not raised the affirmative defense of lack of standing

and/or capacity to sue in its answer. While defendants Robert Rajkumar, M.D., and Island Medical Physicians, P.C. have not moved for dismissal of the plaintiff's derivative claim for loss of consortium, it is noted in their answers served with motion (003) that the affirmative defense that plaintiff lacks legal capacity to sue has been raised.

Motions (001), (002), and (003) specifically seek dismissal of plaintiff's cause of action for loss of consortium. "The consortium plaintiff has suffered no direct injury of his or her own. Rather, the right to recover is derived, both in a literal and legal sense, from the injury suffered by a spouse. Further, the consortium claim and the principal personal injury claim are closely interconnected; together they represent the total, compensable damages-direct and indirect-suffered as a result of the plaintiff's injury" (***Liff v Shidkrout***, 49 NY2d 622, 427 NYS2d 746 [1980]). Loss of consortium is a claim specific to married persons. "Consortium represents the marital partners' interest in the continuance of the marital relationship as it existed at its inception, not upon some guarantee that the marital partners are free of any preexisting latent injuries. Loss of consortium includes not only loss of support or services, but elements of love, companionship, affection, society, sexual relations, solace, and more" (***Torres v Cho, M.D.***, 28 Misc3d 435, 902 NYS2d 781 [Sup Ct, New York County 2010]).

The moving defendants assert that plaintiff's claim for loss of consortium should be dismissed on the basis that the plaintiff and decedent were never married, and therefore Constance McMahon is precluded from asserting her derivative claim. As set forth in ***Sharpe v West Side Hematology & Oncology, P.C.***, 2007 NY Slip 34472(U) (Sup Ct, New York County 2007), to maintain a loss of consortium claim, the plaintiff must have been married to the decedent when he died. It continued that, when an original marriage certificate is available, that certificate is *prima facie* proof of marriage. In the absence of a marriage certificate, the presumption of a valid marriage is extremely strong. The court cited to other cases that stand for: wherever possible, the courts have endeavored to sustain the validity of marriage; and on the highest grounds of public policy, all legal presumptions are in favor of the validity of marriage. The court added that, in light of this strong public policy, some trial courts have permitted parties to introduce circumstantial evidence of a wedding to prove the validity of a marriage when a certificate is unavailable or was not obtained. Other courts have considered the absence of circumstantial evidence in determining the existence of a valid marriage. Cohabitation raises a presumption of a valid marriage that can only be overcome by substantial evidence.

Where persons live and cohabit as husband and wife, and are reputed to be such, a presumption arises that they have been legally married, and this presumption, especially in a case involving legitimacy, can be rebutted only by the most cogent and satisfactory evidence. The presumption of marriage, from a cohabitation, is one of the strongest presumptions known to the law. The law presumes morality, not immorality; marriage and not concubinage; legitimacy, and not bastardy. While cohabitation does not constitute marriage, it tends to prove that a marriage has been entered into by the parties. Considering contemporary lifestyles and household arrangements, greater care should be exercised in applying the presumption and when used, it should be to reach a just and equitable result or to prevent an injustice (***Estate of Lowney***, 152 AD2d 574, 543 NYS2d 698 [2d Dept 1989]; ***Amsellum v Amsellum***, 189 Misc2d 27, 730 NYS2d 212 [Sup Ct, Nassau County 2001]). In ***Estate of Lowney***, *supra*, where the distributees claimed that a valid ceremonial marriage was not established between the decedent and cohabitant, the Appellate Division, reversing the decision of the Surrogate's Court of

Richmond County, concluded that because the decedent and the cohabitant lived together as husband and wife and were reputed to be such, a presumption arose that they were legally married, and the distributees had not rebutted that very strong presumption with the vague testimony of the 89 year-old sister of the cohabitant who claimed that she was never told about the wedding.

In the instant action, it is determined that the lack of substantial evidence to the contrary, and the bare and vague conclusory assertions by the moving defendants that the plaintiff and decedent were never legally married, have not overcome the strong presumption that they were married, as the plaintiff testified.

It is noted that the plaintiff's bill of particulars set forth Constance McMahon as "wife" of the decedent, and further stated that the plaintiff and decedent were married on March 9, 1968. At her deposition, Constance McMahon testified that she was formerly known as Constance DeCarlo, and that she and James McMahon were married on March 9, 1968 in the Bahamas. She did not know where in the Bahamas she was licensed to marry. She had been living in New York, went to Florida and met up with the decedent. They then traveled to the Bahamas together for the express purpose of getting married. She did not get married in New York or the United States since her father objected to her marrying the decedent. She was 20 years of age at the time. The decedent, who was born in 1936, was 32 years of age at the time of their marriage. She stated that neither of them was ever married to anyone else, and they were never divorced or separated. The plaintiff testified that her husband made all the arrangements for their marriage which took place in a garden setting at a hotel in the Bahamas. The ceremony was performed by someone of a clerical nature. They did not have a separate ceremony in New York. Her husband had the marriage license when they returned to New York, and she did not know if he had filed it in New York State. She last saw her marriage license about a decade ago. After her marriage, she changed her last name on her driver's license and social security card to McMahon. The couple had three children together during the course of their marriage, Angela, Charles, and Brian.

The plaintiff continued that her husband worked 30 years for Pathmark and benefitted from the Local 1500 Retail Food Clerk's Union pension fund. In September 2009, he was receiving a monthly check from that pension fund from Prudential Insurance. The plaintiff continued that the pension payments stopped in September 2009 when the decedent passed away, and she received a $2,000.00 death benefit. She testified that her husband wanted his full pension and asked her if she would mind if she did not get any of his pension when he died. She agreed as she had her own pension. Thus, she testified, when he circled on his pension application that he was not married, it reflected that conversation so that he could collect his full pension benefits during his lifetime. It is also noted that on February 14, 2000, he elected not to have his pension payable on the Joint and Survivor annuity form. Since then, she has received no other payments from Pathmark, Prudential, or life insurance or disability. She received no death benefits from his social security.

The plaintiff has submitted an uncertified document from Local 1500 Welfare Fund (full-time member), allegedly signed by the decedent on March 9, 1984, wherein he named Constance as his spouse and beneficiary. He also named his three children, Angela, Charles and Brian as beneficiaries. A 1994 individual tax form, listed Constance McMahon as the spouse, and indicates that they are married filing jointly. Constance McMahon also submitted a copy of her social security card with the name

McMahon. An AARP Life Insurance -New York Life, signed by "Mr. James McMahon" and dated May 30, 2000, has been submitted wherein Constance McMahon was designated his beneficiary as his wife.

Based upon the foregoing, the strong presumption of marriage has been demonstrated by the plaintiff's testimony and the evidentiary proof submitted, and has not been rebutted by substantial evidence. Rather, the defendants have advanced mere conclusory and unsupported assertions.

Accordingly, motion (001) by defendant, WSNCHS d/b/a New Island Hospital and d/b/a St. Joseph Hospital, that part of motion (002) by defendant, Jahanzeb Chaudhry, M.D., and motion (003) by defendants, Aspan Ohson, M.D. and New Island Diagnostic Imaging, PC., which seek an Order dismissing the claim for loss of consortium as to Constance McMahon due to lack of standing and lack of legal capacity to sue is denied.

EXPERT WITNESS DISCLOSURE

In motion (004), defendants, Aspan Ohson, M.D. and New Island Diagnostic Imaging, PC., move pursuant to CPLR 3101 (d) and 3126 (3) for an Order precluding plaintiffs from offering expert testimony at trial for failure to serve expert witness disclosure and/or for an Order compelling the plaintiff to serve expert witness disclosure. They further seek leave to file a late motion for summary judgment.

CPLR 3101 (d) does not impose a time frame within which expert disclosure must be served, and the court is not divested of discretion to consider an affirmation or affidavit submitted by that party's expert in the context of a timely motion for summary judgment (***Jacobs v Nussbaum***, 100 AD3d 702, 953 NYS2d 875 [2d Dept 2012]; ***SCG Architects v Smith, Buss & Jacobs, LLP***, 100 AD3d 619, 952 NYS2d 896 [2d Dept 2012]; ***Hayden v Gordon***, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; ***Ocampo v Pagan***, 68 AD3d 1077, 892 NYS2d 452 [2d Dept 2009]; ***Browne v Smith***, 65 AD3d 996, 886 NYS2d 696 [2d Dept 2009]; ***Hernandez-Vega v Zwanger-Pesiri Radiology Group***, 39 AD3d 710, 833 NYS2d 627 [2d Dept 2007]). Thus, plaintiff's expert disclosures, served November 30, 2012 and December 4, 2012, prior to the filing of the note of issue and certificate of readiness on December 12, 2012, are deemed timely served.

On November 30, 2012 and December 4, 2012, the plaintiff served expert disclosure pursuant to CPLR 3101 (d). It was not until February 19, 2013, that the moving defendant rejected the expert witness disclosure served on December 4, 2012. The letter did not reject the expert disclosure served on November 30, 2012. The December 4, 2012 expert disclosure pertained to plaintiff's surgical expert. In reviewing said disclosure, it is determined that the plaintiff sufficiently apprised the moving defendants in detail about their alleged negligent departures from the standards of care, and the expert's anticipated testimony. Specifically set forth in the expert response of November 30, 2012 is that the moving defendants improperly read and interpreted the lumbar spine imaging of September 7, 2009 and failed to diagnose a large aneurysm of the distal abdominal aorta, readily apparent on the study. The defendants then failed to communicate the presence of this aneurysm to the clinical service and decedent's attending physicians, or obtain clinical correlation; and failed to advise the decedent that he needed immediate

surgical intervention, thus delaying diagnosis and treatment of the aneurysm, leading to his death. The expert disclosure of December 4, 2012, also set forth that the moving defendants failed to recognize the existence of a large abdominal aortic aneurysm on the radiologic studies, including a CT scan, and failed to timely treat the same. The disclosure is adequate under the circumstances, and defendant has not demonstrated prejudice, other than a conclusory and unsupported assertion by counsel (*see* ***SCG Architects v Smith, Buss & Jacobs, LLP***, 100AD3d619, 952 NYS2d 896 [2d Dept. 2012]; ***Flores v New York Hospital-Cornell Medical Center***, 249 AD2d 263, 743 NYS2d 267 [1st Dept 2002]). Thus, the moving defendants' application to preclude defendants from offering expert testimony at trial and/or compel further expert disclosure is denied.

Turning to the movant's request for an extension of time within which to serve a motion for summary judgment, the same is denied as the moving defendants asserted conclusory and unsupported reasons for their inability to prepare a defense, and as to why the plaintiff will not be prejudiced. It can be determined from the expert disclosures provided by the plaintiff, that adequate expert disclosure was timely provided by the plaintiff, and that defendants, relying thereon, could have provided an adequate defense, if available, and timely moved for summary judgment. No excuse has been proffered by the moving defendants for their failure to move sooner for the relief requested in motion (004) in that the defendants have been aware, since prior to the filing of the note of issue, of plaintiff's expert disclosures and the time limit in which to move for summary judgment. Thus, that part of the application by defendants Aspan Ohson, M.D. and New Island Diagnostic Imaging, PC. for an extension of time in which to serve a motion for summary judgment is denied.

Accordingly, motion (004) by defendants, Aspan Ohson, M.D. and New Island Diagnostic Imaging for an Order of preclusion and/or an Order directing the plaintiff to serve expert witness disclosure and for leave to file a late motion for summary judgment is denied in its entirety.

MEDICAL MALPRACTICE

In motion (002), defendant, Jahanzeb Chaudhry, M.D. also seeks summary judgment dismissing the complaint as asserted against him on the basis that he did not depart from good and accepted standards of medical care and treatment, and did not proximately cause the injuries and death of the decedent. In motion (005), defendants Oakwood Operating Co., LLC, individually and d/b/a Affinity Skilled Living and Rehabilitation Center ("Affinity"), seeks summary judgment dismissing the complaint asserted against it on the bases that the staff at Affinity did not depart from the good and accepted standards of care and did not proximately cause the decedent's injuries or death.

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]).

An expert opinion must represent a reasonable degree of certainty and must not be based on supposition or speculation (*see* ***The People of the State of New York v Bethune***, 105 AD2d 262 [2d Dept 1984]; ***People v the State of New York v Robar***, 29 Misc3d 625 [County Ct, Sullivan County 2010]). "The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (***Toomey v Adirondack Surgical Assoc.***, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001] [citations omitted]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Machac v Anderson***, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

Mary Lavery, R.N. testified that she is a registered nurse and the director of nursing at Affinity Skilled Living and Rehab Center, formerly known as Oakwood Care Center. She oversees a staff of about 300. In-service programs are used to train staff, and on an ongoing basis for different topics. The facility is a sub-acute rehab and long-term care center. It receives a PRI (Patient Review Instrument) form from the transferring hospital advising of a patient's needs so the facility can determine if it can meet the needs of that patient. She reviews the PRI when it is received. When a patient is received into Affinity with a foley catheter in place, the catheter is inspected. She described the nursing admission assessment. The patient is photographed upon admission for identification purposes. Robin Bauer is the director of admissions and is notified of a patient's admission. Lavery continued that Dr. Chaudhry was a staff physician credentialed and supervised at the facility by the medical director, Dr. Noor Khan. She was not notified of the decedent's admission. She would not have been notified if the decedent's family requested to have him transferred. She is involved in a meeting every morning and speaks to the nurses, residents, or family about any concerns.

Tina Silverman testified to the extent that she is a licensed practical nurse and was employed by Affinity from 2007 through 2010. Paul Glasser, R.N. was her supervisor. She explained what conditions a patient presented that would require that she call to advise a patient's doctor. She explained the assessment that would be made for patients admitted with a foley catheter in place. She did not have an independent recollection of James McMahon or his wife. Her notes in the decedent's chart indicate that she first saw the decedent about 4 or 5 p.m. on September 12, 2009. At 8 p.m., she charted her assessment of the decedent, and the telephone orders given by Dr. Chaudhry for the antibiotics and tests

which he ordered at that time. However, the chest x-ray ordered by him Saturday could not be done by Eastern Portable until Monday. None of the orders were stat (immediate). She stated that the doctor makes the determination concerning whether a patient is sent to an emergency room. She would notify the doctor of any changes in the condition of the patient or any concerns, such as a fall. She notified Mrs. McMahon about her husband being started on antibiotics, and rescheduled the chest x-ray for Sunday as a result of the conversation.

Rebecca Anderson, R.N. testified to the extent that she is a registered nurse, but was a licensed practical nurse from 2002 through 2010. In September 2009, she was employed at Affinity on a per diem basis as a float nurse. She had no independent recollection of the decedent. She cared for the decedent on Saturday and Sunday during the day, giving him his treatments and medications. She followed through with his lab work and called his doctor, Dr. Chaudhry, with results on September 12, 2009. She noted on Saturday and Sunday that the decedent was alert and responsive with expressive aphasia, and, despite encouragement to eat, demonstrated poor appetite for which a dietary supplement was started. He had no pain or discomfort. He had been admitted on Friday, September 11, 2009. On Sunday, September 13, 2009, at about 12:40 p.m., she spoke with the decedent's wife who was upset because the chest x-ray was not being done. Eastern Portable had been called at 9 a.m. and was to be there before 2 p.m. to take the x-ray. She called her supervisor, Jean Lauer, to assess the decedent because Mrs. McMahon wanted her husband sent to the hospital. Anderson then contacted Dr. Chaudhry who gave the order to transport the decedent to Southside Hospital emergency room to be seen.

Dr. Chaudhry testified to the extent that he is licensed to practice medicine in New York and is board certified in internal medicine and geriatric medicine. He is in private practice and has been a staff admitting physician at Huntington Hospital and a part-time staff physician at Affinity Skilled Living and Rehabilitation Center since 2007. At Affinity, he had 48 hours in which to see a patient who was admitted to the facility, but was not required to see patients on a regular basis and would rely upon the nurses to call him if there was an acute change in a patient's condition, such as an abnormal blood test or diagnostic x-ray result. He was responsible to monitor the patient by seeing the patient once a month, being available for any changes, making sure that the medications recommended upon discharge from the hospital were carried out, and evaluating the need for testing. On a day-to-day basis, the nurses took care of the patients. James McMahon was admitted to his care at Affinity for subacute rehabilitation services consisting of physical and occupational therapy. He had no independent recollection of the decedent except for his notes. At Affinity, there is limited radiology testing as they do not have CT or MRI machines. Basic blood and urine testing is available. Chest x-rays can be done by calling in a company to do a portable x-ray.

On September 11, 2009, Dr. Chaudhry, as the primary and only physician for the decedent, reviewed the transfer sheet from New Island Hospital, obtained the history, reviewed the vital signs obtained by the nurse, and examined the decedent who was alert and oriented and could communicate with him directly. Upon examining the decedent's abdomen, he found it was soft, non-tender, with positive bowel signs. A foley catheter was in place to drain the urine. The decedent was post-operative right hemi-arthroplasty, and also had expressive dysphagia resulting from a prior stroke. He had a mild cough, however, his lungs were clear. Blood work, including pre-albumin was ordered. He set forth the

remainder of his orders. He saw x-rays from New Island Hospital of the plaintiff's lumbar spine, right hip, chest, and pelvis from September 7, 2009. He stated that at no point before the decedent was released or discharged from Affinity was he notified that the decedent's condition had become urgent, or required emergency room treatment. Nurses at Affinity could assess whether or not the patient had become unstable.

Dr. Chaudhry testified that the September 12, 2009 nursing progress note at 8:00 p.m. indicated the decedent's white blood count was 15.2, and that he was alert and compliant. He gave telephone orders for antibiotics, blood work, urinalysis, and a chest x-ray as he suspected the decedent had an infection, possibly pneumonia, bronchitis, or a urinary tract infection. He did not suspect that the decedent had an aneurysm as he was hemodynamically stable and did not have abdominal pain, claudication, or pain in the limbs due to lack of blood supply. He did not feel that the decedent had an increased risk for an aneurysm. He continued that screening for aneurysm usually begins at age 50, and a work-up should have been done years before as the decedent was 73. He was not aware of any history of trauma or fall that the decedent had prior to seeing him, aside from the right hip fracture. He thought that any testing to rule out an aneurysm would have been done at the hospital while he was admitted. He wrote no further orders thereafter. However, he gave a standard order for physical therapy. At 11:00 a.m., it was noted that the decedent's appetite was poor. He noted that the decedent's chart indicated on September 13, 2009 at 12:15 p.m., "angry family stating they are not waiting any longer. Requesting sending resident to hospital. M.D. informed. Order received to send patient to Southside Hospital." Dr. Chaudhry testified that he was contacted and gave the order to send the decedent to Southside Hospital as the family did not want to wait until Monday for the chest x-ray. It was his opinion, however, that the decedent was not unstable and did not require hospitalization. On September 14, 2009, the day after the decedent was transferred to Southside Hospital, he wrote a note which included that the decedent was sent to the ER secondary to altered mental status, but he testified that he should not have written "altered mental status" as the reason because the family had requested the transfer. Thereafter, at 8:50 p.m., Affinity was notified that the decedent had been admitted to Southside Hospital ICU with a diagnosis of sepsis (infection in the blood stream). He believed, based upon the urine culture, that the decedent had a urinary tract infection caused by the catheter, which was removed on the morning of his second day at Affinity due to the risk of infection. The infection was sensitive to the antibiotics which he had prescribed while the decedent was at Affinity. Dr. Chaudhry testified that sepsis became an issue when the decedent showed signs of decompensating and becoming unstable.

The expert affirmation of Gregory I. Mazarin, M.D. has been submitted by Dr. Chaudhry in support of his application for dismissal of the complaint as asserted against him. Dr. Mazarin's affirmation is not informative of his entire education and training or work experience upon which he bases his expert opinions, which goes to the weight of his opinions. He set forth the materials and records which he reviewed, and opined within a reasonable degree of medical certainty that Jahanzeb Chaudhry, M.D. did not depart from good and accepted standards of medical care and treatment, and that the care and treatment which he provided did not proximately cause, or subsequently contribute to plaintiff's decedent's alleged injuries and death.

Dr. Mazarin stated that defendant Chaudhry was a staff physician at Affinity Skilled Living and Rehabilitation Center, where he worked a few days a week, admitting residents and treating them at the

facility. He opined that defendant Chaudhry had an appropriate level of training to discharge his duties as a self-employed staff physician at a short-term and long-term facility such as Affinity, a sub-acute care facility. It was his responsibility to see admitted residents within 48 hours, and thereafter once a month for renewal of orders unless informed by the nursing staff of any abnormal laboratory values or acute changes in the resident's condition.

On September 11, 2009, the 73 year old decedent, James McMahon, transferred into Affinity from New Island Hospital following right hip hemi-arthroplasty surgery after he sustained a fractured hip from a fall on September 6, 2009. He presented with a prior history of a stroke, hypertension, high cholesterol, and hernia repair. Dr. Mazarin stated that Chaudhry performed an appropriate physical examination for someone in stable condition admitted for rehabilitation following the surgery, and recorded his findings. The decedent had a foley catheter in place to empty urine from his bladder. His abdomen was soft and non-tender, with bowel sounds present. The surgical site had staples in place, but no edema. Admitting blood work was obtained the following day on September 12, 2009, revealing a white blood cell count of 15.2, elevated from 10.6 on September 11, 2009, for which Chaudhry was notified and ordered antibiotics, Levaquin and Bacid, for a possible urinary tract infection, a urinalysis, culture and sensitivity, and a chest x-ray to rule out pneumonia. The foley catheter was removed the morning of September 13, 2009. However, Chaudhry did not see the decedent prior to his transfer to Southside Hospital on September 13, 2009. The decedent was transferred to Southside Hospital at 1:12 p.m. because, about 11:30 a.m. on September 13, 2009, his condition changed, however, Dr. Mazarin does not indicate the changes in decedent's condition, or his condition upon which transfer was based.

Dr. Mazarin stated that there was no evidence that decedent had a urinary tract infection on September 13, 2009 as the report from that culture, issued September 15, 2009, indicated klebsiella and streptococcus, and a later report revealed no klebsiella or streptococcus, but escherica coli, a new contaminant. He continued that the 9.5 cm x 7.5 cm aneurysm was not diagnosed until an ultrasound was interpreted by a radiologist on September 15, 2009, two days after the decedent was admitted to Southside Hospital. Dr. Mazarin stated that based upon the description provided by the radiologist, the aneurysm had been present for in excess of one year, however, he does not set forth the basis for this conclusory opinion. He continued that the aneurysm was not detectable during the physical performed by defendant Chaudhry and that the examination was appropriate, however, he did not describe how the exam was performed. Dr. Mazarin added that on September 16, 2009, and September 22, 2009, the CT scans obtained revealed no evidence that the aneurysm was leaking. Therefore, concluded Dr. Mazarin, because the aneurysm was not diagnosed at Southside Hospital, and the decedent was never diagnosed as a surgical candidate, Dr. Chaudhry did not substantially cause or contribute to the injuries or death of the decedent.

In opposing Dr. Chaudhry's motion for summary judgment, the plaintiff has submitted the affirmation of her expert, a physician licensed to practice medicine in New York State since 1974, who is board certified in general surgery. He set forth his education and training, and the records and materials he reviewed. He opined that defendant Chaudhry departed from good and accepted medical practice by failing to perform an adequate history and physical examination on September 11, 2009 through September 13, 2009; by failing to diagnose a life-threatening 9.5 cm diameter AAA (abdominal aortic aneurysm); failing to diagnose and treat urosepsis; failure to timely transfer the decedent to a

hospital emergency room, all of which were substantial factors in the decedent's death from irreversible septic and hemorrhagic shock with multi-organ failure, causing him to no longer be a viable surgical candidate.

The plaintiff's expert continued that when the decedent was admitted to Affinity on September 11, 2009, following repair of the right femoral neck hip fracture, he was extremely thin at only 132 pounds, although he was six feet tall. When patients are so thin, abnormal abdominal masses are easily palpable through the anterior abdominal wall upon physical examination, which Dr. Chaudhry should not have missed in the absence of negligence. The plaintiff's expert continued that Dr. Chaudhry had actual notice of an x-ray done on September 7, 2009 at New Island Hospital which showed "vascular calcifications." This was a red-flag which should have raised an appropriate index of suspicion for an AAA leading to a careful physical examination, an order for a potentially life saving abdominal ultrasound or CT scan, and a rapid transfer of the decedent back to the emergency room of the hospital. This transfer only occurred at the family's insistence about noon on Sunday, September 13, 2009. It was the family that realized that the decedent was rapidly deteriorating.

The plaintiff's expert stated that Dr. Chaudhry should have returned on Saturday to examine the decedent upon learning of the grossly elevated white blood cell count of 15.2, indicative of an infection. The telephone order by Dr. Chaudhry for antibiotics without having seen the decedent violated the tenets of the standard of care and endangered the safety of the decedent who had a serious urinary infection, as evidenced by the culture and sensitivity done at Southside Hospital on September 14, 2009, showing Klebsiella and Enterococcus faecalis. The plaintiff's expert continued that defendant's bare allegation that the AAA was not even diagnosed at Southside Hospital until September 16, 2009 ignores the fact that the decedent came into the emergency room on September 13, 2009 in such a bad and neglected condition that he was not a candidate for a diagnostic workup or surgery, as he was in profound septic and hemorrhagic shock, and in a pre-morbid state due to defendant's omissions. The abdominal CT scan on September 16 and 22, 2009 revealed a life-threatening 9.5 cm diameter AAA, as well as free fluid in the abdomen-pelvis which, together, with the profound fall in hemoglobin and hematocrit of 6.9 and 20.0 respectively, represented blood from free aneurysm rupture. The plaintiff's expert stated that defendant's reliance upon the absence of a retro peritoneal hematoma as proof the AAA was not leaking is misplaced as the blood tracked from the leaky AAA into the free abdominal cavity, and simply did not collect in the back of the abdomen or retro peritoneum. Had the defendant timely transferred the decedent to the emergency room and not waited until he was irreversibly doomed to die from shock, sepsis and multi-organ failure, the leaky AAA would have been remediable and survivable.

The plaintiff's expert opined that while the plaintiff did not decompensate until over four hours after he arrived at Southside's emergency room at 2:19 p.m. on September 13, 2009, this does not exculpate him from the egregious delay in transferring a critically ill patient, as the emergency room record shows that he was hypotensive (88/40) with a rapid, irregular heart rate of 82 upon presentation to the emergency room. Because the decedent was in such bad condition when he arrived in the emergency room, opined plaintiff's expert, strong intravenous antibiotics, fluids, blood transfusion, a central line to monitor his pressures, endotracheal intubation, mechanical ventilation, and drugs to artificially support his blood pressure failed to reverse the condition as he fell into profound shock, irreversible sepsis, and multi-organ failure, leading to his death on September 24, 2009.

Based upon the foregoing, it is determined that there are many factual issues raised by plaintiff's expert, as well as conflicting opinions between the plaintiff's and defendant's experts with regard to departures and causation which preclude summary judgment from being granted to Dr. Chaudhry. It is noted that Dr. Mazarin's affirmation submitted in the reply, and his supplemental reply affirmation do not resolve the factual issues which preclude summary judgment.

Accordingly, that branch of motion (002) by Jahanzeb Chaudhry, M.D., which seeks summary judgment dismissing the complaint as asserted against him is denied.

In motion (005), defendants Oakwood Operating Co., LLC, individually and d/b/a Affinity Skilled Living and Rehabilitation Center, has submitted the affirmation of its expert physician, Lawrence N. Diamond, M.D., who affirms he is licensed to practice medicine in New York State and has been board certified in family practice since 1986, with a sub-certification in geriatric medicine since 1994. He set forth his work experience and the materials and records reviewed and the bases for his opinions. He opined within a reasonable degree of medical certainty that the nursing staff and employees of Affinity at all times acted in accordance with good and accepted standards of medical practice in the care and treatment of the decedent while he was a resident at that facility, and that the care and treatment rendered by them to the decedent was not the proximate cause of any injuries to, or the death of the decedent.

Dr. Diamond set forth the status and findings by the nursing staff and defendant Chaudhry upon decedent's admission to Affinity, and noted that the decedent's abdomen was soft and non-tender with good bowel sounds. Although the decedent had expressive aphasia, he was able to communicate with the defendants. Dr. Diamond indicated the orders written and telephoned by Dr. Chaudhry, and demonstrated the nurses' compliance with those orders, including the timely and appropriate administration of medications, obtaining laboratory results, and calling Dr. Chaudhry with the elevated white blood cell count. Dr. Diamond stated that although the decedent had the elevated white blood cell count, he demonstrated no changes in his clinical condition warranting any further or different intervention, and remained stable. He complained of no pain or discomfort. He was alert and responsive. His suture line was clean, dry, and intact. His cough was non-specific and mild, and there was no lung congestion heard. He was hemodynamically stable. Dr. Diamond continued that while the facility was able to do everything medically indicated in-house, they took into account Mrs. McMahon's concerns and acted upon those concerns promptly by arranging to transfer the decedent to Southside Hospital emergency room. Dr. Diamond opined that even if the patient had been transferred sooner to Southside Hospital, it would not have made a difference in his outcome as he remained stable for hours upon his transfer to Southside Hospital. It was not until 6:50 p.m. that the decedent's vital signs changed rapidly and he became critically ill.

Dr. Diamond opined that the decedent had a catastrophic event with no preceding sequelae while he was at Affinity. He was not dehydrated based upon the normal sodium level reported. His hemoglobin was low at 6.9, along with an elevated BUN, consistent with internal bleeding. The staff at Affinity had less than forty-eight hours in which to assess the decedent's condition and provide available treatment. The physicians who examined the decedent at Southside emergency room did not detect the AAA upon physical examination, and it was only detected later via radiologic studies during his

admission to the hospital. Dr. Diamond concluded that even if the decedent had been transferred to the hospital earlier when the wife first claimed to have noticed a change in the decedent's condition, there would have been no change in his outcome due to a catastrophic event consisting in part of an internal bleed which could not have been detected or treated earlier.

By way of the affidavit of Catherine Pearsall, R.N., Ph.D., it is further demonstrated that the nursing staff at Affinity complied with good and accepted standards of nursing care and treatment of the decedent who had been admitted to Affinity for rehabilitation, not for urgent care and treatment. Nurse Pearsall set forth the care and treatment provided by the nursing staff, including a nursing assessment and examination of the decedent. She stated that an examination of a patient's abdomen by a nurse is not designed, nor is it likely to disclose an abdominal aneurysm as it is not within the purview of a nursing examination. The standard of care required that the staff monitor the patient for a change in condition and notify the physician accordingly of the change, and report abnormal laboratory results, and follow all the orders issued by the physician for the patient. Nurse Pearsall indicated the orders given by Dr. Chaudhry, and stated that the nursing staff timely and appropriately carried out those orders. She supported her opinion with the record of care. She stated that the decedent did not demonstrate a change in condition and remained stable so that the nurses were not required to notify the doctor or transfer the decedent earlier. She concluded that the decedent was hemodynamically stable from the time he entered the facility until hours after he was transferred out, and that there was nothing that the nursing staff did or did not due which caused or contributed to the injuries or death of the decedent.

Based upon the foregoing, it is determined that Oakwood Operating Co., LLC, individually and d/b/a Affinity Skilled Living and Rehabilitation Center demonstrated *prima facie* entitlement to summary judgment dismissing the complaint asserted against it.

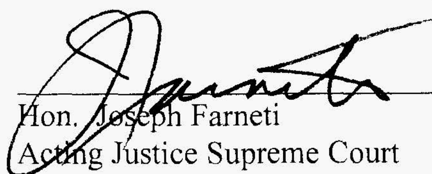
In opposing this motion, the plaintiff has submitted the affirmation of her expert, a physician licensed to practice medicine in New York State since 1974, who is board certified in general surgery. He set forth his education and training, and the records and materials he reviewed. He opined that the defendant Affinity departed from good and accepted medical practice by failing to perform an adequate history and physical examination on September 11, 2009 through September 13, 2009; by failing to diagnose a life-threatening 9.5 cm diameter AAA; failing to diagnose and treat urosepsis; failure to timely transfer the decedent to a hospital emergency room, all of which were substantial factors in the decedent's death from irreversible septic and hemorrhagic shock with multi-organ failure, causing him to no longer be a viable surgical candidate.

It is noted that the bases for plaintiff's expert's opinions are the same as set forth for defendant Chaudhry. However, it has not been demonstrated that the nursing staff or employees of Affinity violated any standard of nursing care, failed to follow the orders and directions of Dr. Chaudhry, or acted outside the scope of their duties and responsibilities, or that they substantially caused or contributed to any of the injuries or death of the decedent. It has been demonstrated that the nurses administered the medications and tests ordered by Dr. Chaudhry, and notified him with the results of the abnormal laboratory tests. Plaintiff's expert has not offered an opinion with regard to any specific departures from the good and accepted nursing standards of care and treatment, and have failed to demonstrate that there is anything which the staff at Affinity did or failed to do which proximately caused decedent's injury and

death. It has been demonstrated that Dr. Chaudhry was not an employee of defendant Affinity, but instead, a self-employed independent contractor. The plaintiff's affidavit that she thought Dr. Chaudhry was on staff at the facility is conclusory, unsupported by the record, and self-serving. Thus, the plaintiffs have not established that Affinity is vicariously liable for any alleged acts or omissions by defendant Dr. Chaudhry, and has not raised any factual issues which preclude summary judgment from being granted to defendant Affinity.

Accordingly, motion (005) is granted and the complaint is dismissed as asserted against Oakwood Operating Co., LLC, individually d/b/a Affinity Skilled Living and Rehabilitation Center.

Dated: November 7, 2013



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**