Jackson v Elrac, Inc.
2014 NY Slip Op 30962(U)
April 15, 2014
Sup Ct, New York County
Docket Number: 112187/09
Judge: Joan B. Lobis
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SCANNED ON 4/16/2014

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ Justice

PART 6

Damon Jackson

-v-

Elvac Inc

INDEX NO. 112187/09

MOTION DATE 12/3/14

MOTION SEQ. NO. 010

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Order & Judgment

FILED

APR 16 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/15/14

JOAN B. LUPO J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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DAMON JACKSON, as Administrator of the Estate of RAMON WRIGHT,

Plaintiff,

-against-

ELRAC, INC., ELRAC LLC, ENTERPRISE HOLDINGS, INC., ENTERPRISE RENT-A-CAR COMPANY, WMK, INC. d/b/a MOBILITY WORKS, MIDDLETOWN PARK MANOR, ANDREW HIRSCH, M.D., and ORANGE REGIONAL MEDICAL CENTER,

Defendants.

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Index No. 112187/09

Decision, Order, and Judgment

FILED

APR 16 2014

COUNTY CLERK'S OFFICE
NEW YORK

JOAN B. LOBIS, J.S.C.:

This medical malpractice and products liability action arises out of injuries Ramon Wright sustained while operating a vehicle owned by Elrac, LLC,[1] and his subsequent hospitalizations and treatment. Motion sequences nos. 10, 11, 12, and 13 have been consolidated for purposes of this decision, order, and judgment. Defendants Elrac, Inc., WMK Inc. d/b/a Mobility Works, Dr. Andrew Hirsch, D.O.,[2] and Orange Regional Medical Center (ORMC) move for summary judgment pursuant to Section 3212 of the Civil Practice Law and Rules. Plaintiff Damon Jackson, the administrator of Ramon Wright's estate, opposes the motions. For the following reasons, the motion by WMK, Inc., is granted; the motion by Elrac is denied; and the motions by Dr. Hirsch and ORMC are granted in part.

[1]Listed in the caption as Elrac, Inc., Elrac LLC, Enterprise Holdings, Inc., Enterprise Rent-A-Car Company.

[2]Dr. Hirsch is listed in the caption as "Andrew Hirsch, M.D."

Ramon Wright had been paralyzed due to a T4 spinal cord injury since the 1960s. He was wheel chair bound but had use of his upper body. Since 1998 Dr. Hirsch had served as his primary care physician. Mr. Wright lived alone but the record is not clear as to what activities of daily living he did unaided. He had home services from Orange County Department of Social Services. Mr. Wright drove vehicles that were equipped with hand controls that controlled the gas and brake. He was able to transfer himself in and out of vehicle. Mr. Wright would regularly rent these vehicles from Elrac.

Elrac's vehicles were sometimes modified by Mobility Works. There was no contract between Elrac and Mobility Works, just work orders on an on-call basis. The modifications included either permanent or temporary hand controls. Vendors from Mobility Works would explain to Elrac employees how the hand control units functioned and explain the contents of the hand control unit owner's manual. Renters of these vehicles would be provided with a packet of instructions from Mobility Works and a photocopy of instructions on how to use the hand controls from the manufacturer. The same hand control models were installed from the 1990s until 2007.

In late December 2006, Mr. Wright rented a blue two-door 2007 Chevrolet Monte Carlo from Elrac. This vehicle was modified with permanent hand controls on September 6, 2006. Once installed, Mobility Works tested the hand controls with a test drive and visual inspections to make sure they were safe for use and installed properly. The hand controls were the 3500 model, which is manufactured by Mobility Products and Design.

On December 24, 2006, Mr. Wright drove to the Bronx to visit his family and then drove home to pick up Damon Jackson, who is Mr. Wright's son and the Plaintiff. Plaintiff had driven with the decedent on many occasions. In deposition testimony, Mr. Jackson explained how his father would normally drive: Mr. Wright would enter the automobile, turn off the fan to the heating system, position his legs so they do not touch the pedals, slant his knees to the left, and angle his feet to the right so that the gas pedal would be in front of his feet.

Mr. Wright had been driving for several hours longer than expected because he got lost in the Bronx. When Mr. Wright picked him up, Plaintiff claims that the temperature dial was to the right, though he was not sure how far, and the fan was off. He explains that Mr. Wright's feet were in front of the gas pedal, left of the center console. Mr. Jackson noticed that the car was hot, but Mr. Wright claimed he always turns off the heat. They pulled over and Mr. Jackson saw that his father's leg was burned.

Mr. Wright contacted his primary care physician Andrew Hirsch, D.O., on December 26, 2006, and was directed to the emergency room. Mr. Wright suffered 2nd and 3rd degree burns to his right ankle and foot. Plaintiff alleges that Mr. Wright was admitted on his own, and that Dr. Samina Choudry assigned Dr. Hirsch to be his attending physician at ORMC. Defendants claim that Dr. John Dermigny, a member of the same physician group as Dr. Hirsch, ordered that Mr. Wright be admitted to ORMC as his patient.

At the hospital, Mr. Wright saw Dr. Francis Winski, a non-party plastic surgeon, who recommended continued local wound care and antibiotics. Dr. Hirsch did not see the patient

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until December 29, 2006, when he began to treat the patient for his burns. A week later, Dr. Winski performed surgical skin grafting on Mr. Wright's wounds.

Dr. Winski, Dr. Hirsch, and the ORMC case management team arranged for Mr. Wright to be transferred to Elant at Goshen, a subacute nursing facility in Goshen, NY, on January 12, 2007. He remained at Elant overnight but was transferred to ORMC in the morning as he allegedly refused treatment and was verbally abusive. Mr. Jackson alleges that Mr. Wright argued with staff because Elant refused to call Dr. Hirsch to obtain a prescription for his pain medication, which resulted in Mr. Wright taking his own medication and being discharged.

On January 16, 2007, Mr. Wright was discharged from ORMC with home nursing services as per his discharge plan. He had been receiving home nursing care prior to his injuries as well. Dr. Hirsch, who started treating Mr. Wright in 1998, previously prescribed nursing care for 5 days a week and 3 to 4 hours a day, which was administered by the Orange County Department of Social Services.

Good Samaritan Home Care provided Mr. Wright with his remaining wound care and nursing services. Dr. Winski saw Mr. Wright on January 26, February 20, and March 27, 2007. At each visit Dr. Winski noted that there was no sign of infection and that the wounds were healing. At the last visit, Dr. Winski noted that the wounds at the right foot and leg sites were almost completely healed. He prescribed pain medication but did not order further home nursing care for the patient's surgical sites. A month later, Mr. Wright returned to see Dr. Winski because the graft site from the previous surgery opened after the patient taped over the site. A small blister

had developed. On May 21, 2007, Dr. John Peralo evaluated Mr. Wright due to an ischemic left leg. Defendants allege that Mr. Wright refused hospitalization at this time, but on May 22, 2007, Mr. Wright returned to ORMC due to left foot gangrene and a left hip ulcer. His leg could not be salvaged and an above the knee amputation was performed.

After a brief stay at ORMC In-patient Rehabilitation, Mr. Wright was readmitted on June 5th through 11th under the care of Dr. Mary Ellen King. On June 11, 2007, Mr. Wright was transferred to Middletown Park Manor Rehabilitation and Health Care Center, but he signed himself out on June 12, 2007. The following day, David Wright, Ramon Wright's brother, brought him to the Behavioral Health Unit Emergency Room at ORMC. He was admitted until June 18 and was under the care of Dr. David Hunt.

Mr. Wright continued receiving services from the Orange County Department of Health. At the end of June, a home nurse and Dr. Mayefsky advised Mr. Wright to report to the hospital due to a fever. Mr. Wright refused to go. His condition had worsened by this time and he now suffered multiple infections, sepsis, a sacral stage IV bedsore, osteomyelitis of his buttocks and left femur, and necrotic wounds. On July 3, 2007, Mr. Wright saw Dr. Hirsch, complaining of fever and several wounds. Mr. Wright had not seen Dr. Hirsch since his first hospitalization at ORMC. He did not allow Dr. Hirsch to examine him and refused to go to the hospital.

In mid-July, Mr. Wright finally agreed to be hospitalized. He was transported to ORMC on July 11, 2007, where he was treated for sepsis, gangrene, and multiple bed sores. Until

August 16, 2007, Mr. Wright was under the care of Dr. Hunt. He returned to ORMC on August 28 but allegedly refused care in the emergency room. He passed away on August 29.

Plaintiff filed summons and complaint in August 2009. The complaint alleges negligence, strict products liability, and violation of express and implied warranty by Elrac and Mobility Works. The complaint also alleges medical malpractice and negligence against all the "medical defendants." Plaintiff's primary allegation against the "vehicle defendants" is that the vehicle was unsafe due to the heating, ventilation, and air conditioning (HVAC) system, and that the vehicle was negligently modified, altered, refitted, distributed, labeled, marketed, leased, and sold. He also alleges that the modifications were negligently designed and installed and lacked proper warnings, labels, and instructions. In opposition papers, Plaintiff narrows his claims against the medical defendants, alleging that Dr. Hirsch and ORMC lacked a proper discharge plan of care on January 16, 2007, Dr. Hirsch failed to monitor Ramon Wright, and Dr. Hirsch failed to prescribe continued home and nursing care for Mr. Wright. Defendants now move for summary judgment pursuant to section 3212 of the Civil Practice Law and Rules.

In their motion for summary judgment, Mobility Works claims that it installed and distributed the hand controls in Mr. Wright's vehicle but did not design or manufacture them. It argues that neither General Motors, who manufactured the vehicle, nor the manufacturer of the HVAC system issued warnings that the hand controls should not be installed in the 2007 Monte Carlo. Mobility Works contends that the Plaintiff cannot establish that the decedent was owed a duty of care as Elrac supplied renters with the manuals and information regarding the hand controls. It maintains that even if there was a duty, there is no evidence that the duty was breached

since the hand controls were not defective nor improperly installed. Mobility Works affirms that there can be no proximate cause as it is not foreseeable in the normal course of events that Mr. Wright would have suffered third degree burns to his foot from the heating system.

Mobility Works states that the products liability claims should be dismissed because the record shows that the hand controls were safe and proper for their intended use, and there was no evidence of a manufacturing or design defect. It contends that Plaintiff does not allege that a code, rule, regulation, or industry standard was violated. Mobility Works maintains that there was no design defect as the hand controls were reasonably safe, and Plaintiff has not identified any defect with the design. It argues that because there was no dangerous condition, there could not be a failure to warn. Furthermore, there were no complaints or prior incidents involving hand controls so Mr. Wright's accident was not foreseeable.

In support of its motion for summary judgment, Mobility Works provides the affidavit of John Goebelbecker, a registered Professional Engineer licensed in the state of Illinois. Mr. Goebelbecker has a Master of Science in Mechanical Engineering from the University of Notre Dame. Mr. Goebelbecker explains that Mr. Wright's vehicle contained hand control Model 3500. The model functions by pushing the brake pedal down when the handle is pushed forward and pushing the accelerator pedal down when the handle is rotated downward. He avers that the hand controls are mounted below the steering column, and do not interfere with an operator's range of motion, use of the brake and accelerator pedal, or occupy any space in front of the foot controls. He opines that the hand controls were neither designed nor configured in such a way that would tend to move or force the driver's right leg more to the right or more towards the area of the lower

heating air discharge duct. He affirms that the hand controls allow a driver to operate the vehicle without utilizing the foot controls and, therefore, without having to place the right foot near the center tunnel and floor vent. He maintains that this would be different for a non-disabled driver who would normally place his or her right foot on or near the accelerator pedal when the vehicle was not being braked so that the right foot of a driver utilizing the foot controls would be near the center tunnel and the heating vent for extended periods of time. Lastly, he contends that Mobility Works complied with all of the relevant requirements of the 2006 National Mobility Equipment Dealers Association.

In its motion for summary judgment, Elrac argues that there is no admissible evidence that the HVAC system burned Mr. Wright. Elrac claims that Mr. Wright was not accompanied by anyone during the several hours when it is alleged he was burned, and that he did not provide any sworn testimony concerning the event. It argues that Mr. Wright had rented the same vehicle from Elrac on December 8, 2006, for four days. During this time there were no complaints about the vehicle. It claims that it never received any complaints from other customers regarding the HVAC system in any Monte Carlo.

Elrac contends that summary judgment is warranted because Plaintiff's Expert Witness Disclosure does not identify an expert witness in support of his contention. It maintains that claims regarding the safety of products as complex as cars require an expert opinion. It argues that Plaintiff never attempted to measure the air temperature in the foot well when testing the HVAC system. Elrac avers that the temperature in the foot well where Mr. Wright's foot would have been positioned never exceeded 84 degrees Fahrenheit, which meets the General Motors

internal performance standards for vehicle HVAC systems, and is not injury producing. It also claims that all necessary and appropriate information regarding the HVAC system is in the owner manual for the vehicle.

In support of their motion, Elrac provides the expert testimony of Ronald Orlando, an automotive engineer who is currently a Senior Manager and Product Consultant at General Motors Technical Center. Mr. Orlando has automotive HVAC experience as a development and design release engineer. Elrac's expert inspected the vehicle that is the subject of this case on April 8, 2011. On May 30, 2012, he witnessed a driving demonstration of the vehicle. He also conducted several demonstrations and tests on an exemplar vehicle, which is the same model and substantially similar to the vehicle Mr. Wright was driving. Among the tests he administered were an airflow testing, infrared (IR) imaging study, and a climatic wind tunnel (CWT) test.

The CWT test simulated driving conditions with heater controls in positions as alleged by the Plaintiff and in temperature conditions like those on the day of Mr. Wright's injury. Mr. Orlando avers that the test data indicates that although the air that the HVAC heater discharge ranged from 185 to 195 degrees Fahrenheit, the air in the location where Mr. Wright's foot would be never exceeded 84 degrees Fahrenheit. Mr. Orlando claims that the test demonstrated how the air temperature rapidly declined or dissipated as the air is directed toward the foot/leg area in the 2007 Monte Carlo, and that this decline simulated Mr. Wright's driving conditions. He affirms that the vehicle met the General Motors internal standards and specifications for the operation, performance, and function of the HVAC system, and was not injurious. Mr. Orlando observed Plaintiff's representatives place a single thermocouple device into the discharge of the HVAC

heater outlet of the vehicle during a demonstration at the New Jersey Motor Sports Park. He explains that they did not measure the temperature in the foot well area.

Mr. Orlando states that GM did execute a design change that affected the heater outlet of the 2007 Chevrolet Monte Carlo. The change was made to accommodate a location change to a portion of the OnStar equipment located in close proximity to the heater outlet. He avers that there was no defect in the original design, and that there were no significant differences in temperatures measured for the re-designed heater outlet when compared to the original. He contends that its design was safe, not defective, and imposed no risk that required a warning. He affirms that the design was state of the art at the time it was manufactured.

Medical defendant ORMC claims that it has a prima facie case for summary judgment as the discharge plans established by the interdisciplinary teams were in conformity with good and accepted hospital practice. In addition, it claims that the regulations Plaintiff alleges ORMC violated are inapposite. In particular, Section 415 of the Title 10 of the New York Code, Rules, and Regulations concerns standards for nursing homes, which ORMC is not. It argues that Part 483 of Title 42 of the Code of Federal Regulations does not apply as it sets standards for state and long-term care facilities. It maintains that Public Health Law Section 2803 applies to nursing homes and not ORMC. It contends that Section 405.9 of Title 10 of the New York code, Rules, and Regulations also does not apply as Sections 405.9(7), 405.9(9), and 405.9(15)(f) do not exist.

In support of its motion, ORMC provides the expert affidavit of Patricia Metzger, the Director of Case Management for ORMC. Ms. Metzger is a licensed social worker and a

certified case manager in the State of New York. She affirms that it is her opinion within a reasonable degree of certainty in the field of case management that the care and treatment provided by the hospital and nursing staff, including the discharge plans for Mr. Wright, were within the good and accepted nursing and hospital practices and were not a substantial factor in causing any injury to him.

Ms. Metzger explains that every time Mr. Wright was discharged from the hospital, a discharge plan was reviewed by an interdisciplinary team and agreed to by the patient and his attending physician. She opines that on January 16 and June 18, 2007, both instances when Mr. Wright was discharged home, he was given a discharge plan including home care services. She contends that for every admission, a case manager reviewed the records, coordinated with the interdisciplinary team, including the attending physician, the nursing staff, and members of other disciplines who were providing services to Mr. Wright at the time. She affirms that when Mr. Wright was discharged home with home care, the home care agency would evaluate his needs to determine what level of care is required.

Dr. Hirsch argues Plaintiff alleges he violated inapposite statutes: New York Public Health Law Sections 2801-d, 2803-c, 2903-c; Sections 415.2-12 of Title 10 of the New York Code, Rules, and Regulations; or Title 42, Section 483 of the Code of Federal Regulations. He maintains that these statutes only apply to either nursing homes or long term residential or healthcare facilities. He avers that he also has no ownership interest in a residential health care facility.

He states that he has made a prima facie showing of entitlement to summary judgment. He claims that the discharge, made in conjunction with the plastic surgeon treating Mr. Wright's wounds, was appropriate. He contends that Mr. Wright was directed to follow up with the plastic surgeon, which he did, and that the wounds continued to heal. Dr. Hirsch argues that an attending physician has a right to rely on other physicians to perform treatment, and that an attending physician does not have a duty to supervise specialists to whom he referred patients. He claims that undertaking a patient's general care does not create a duty to supervise specialized care given by other physicians.

He asserts that he did not see the patient during the subsequent hospitalizations in May, June, July, and August 2007. Dr. Hirsch further contends that he set a proper course of treatment in motion and justifiably relied on a specialist, the plastic surgeon, to manage Mr. Wright's burns. Dr. Hirsch saw the patient in July and directed Mr. Wright to seek hospitalization, which he refused.

Dr. Hirsch argues that there was no causative link between his actions and Mr. Wright's injuries. He claims that the initial injury was to Mr. Wright's right lower extremity, was managed by the plastic surgeon, and healed after discharge. He avers that injuries to Mr. Wright's left leg occurred when Dr. Hirsch was not treating him, and that Mr. Wright was under the care of multiple physicians who oversaw his care and discharge instructions.

In support of his motion, Dr. Hirsch submits his own expert affidavit. Dr. Hirsch is a New York licensed physician who is board certified in Family Medicine. Dr. Hirsch attests

that all care rendered by him from December 26, 2006, forward was in accord with good and acceptable medical standards. He opines that it was appropriate to discharge Mr. Wright from the hospital on January 12, 2007, to a subacute nursing facility for continued care of his right lower extremity wounds. He contends that after the patient returned to ORMC on January 13, it was appropriate to have him evaluated by a plastic surgeon again and discharge him home with the degree and frequency of home nursing/wound services that were ordered based upon discussion with the plastic surgeon, the hospital's Case Management Team, and the patient. He argues that the patient's wounds continued to heal, which demonstrates that the home care ordered was appropriate.

Dr. Hirsch maintains that the patient did not suffer new injuries until mid-May but that he did not treat him for these issues. He avers that Mr. Wright was under the service of other physicians as Dr. Hirsch was unable to provide service due to a disability. July 3 was the only other time he claims to have seen Mr. Wright. Dr. Hirsch affirms that Mr. Wright refused hospitalization on July 3, and when he accepted hospitalization on July 11 he was admitted under the service of a different physician.

In responding to Mobility Works motion, Plaintiff affirms that the only reason for its opposition to the summary judgment motion is due to the possibility that Elrac relied on Mobility Works to inspect its vehicles for safe use by a disabled person. Plaintiff relies on deposition testimony by Lance Rice, Elrac's regional risk manager, who states that Elrac "contracted out to a vendor" to inspect a vehicle to determine if it is safe for use by a disabled person. Plaintiff claims that "Elrac testified that based upon its decades-old business relationship

with WMK, WMK was to make the determination whether the vehicle was safe for a paraplegic's use." Plaintiff argues that Mobility Works' expert affidavit is irrelevant to the issue as the only issue of fact is whether WMK agreed to determine the safety of the 2007 Chevrolet Monte Carlo for paraplegics. Plaintiff states there are no claims as to the hand controls.

In opposition to Elrac's motion, Plaintiff argues that the motion must be denied on both procedural and substantive grounds. On procedural grounds, Plaintiff asserts that Elrac failed to submit all pleadings and documents as required by the Civil Practice Law and Rules. Additionally, he states that Elrac did not provide the court with the necessary documents to make an informed decision. Plaintiff claims that Elrac's expert affidavit is inadmissible because it does not conform to Section 2309(c) of the Civil Practice Law and Rules in that the notarized signature on Mr. Orlando's affidavit was not completed and there was no certificate acknowledging "that the notary is entitled to take such oaths and that the oath conforms to the laws of the state [.]"

Plaintiff also claims that its expert disclosure was stricken, without prejudice, only as it pertained to medical malpractice claims and causation, not to liability against Elrac. Furthermore, he asserts that the Court merely required Plaintiff to be more specific and submit the expert disclosure no later than 45 days prior to the date when trial was to commence, which is May 5, 2014.

Plaintiff contends that Elrac's position that the 2007 Chevrolet Monte Carlo was not defective and did not overheat the driver foot well is incorrect. He argues that defense expert's testing was improperly done, and that he was misleading when stating that the heater case

ventilation was redesigned for OnStar components instead of complaints due to "hot foot," which is when hot air blows onto a driver's leg in the foot well. Plaintiff asserts that when the temperature knob of the HVAC controls is set to high, and the fan blower set to off, that hot air is pushed into the driver foot well. He maintains that his medical expert, Dr. Bernard Schayes, confirms that the temperature of the heat being blown directly on the foot in the subject vehicle was dangerous to human skin and could easily burn a driver. Plaintiff affirms that the discovery and medical records show that it is undisputed that Mr. Wright burned his foot from the HVAC and so thus it is defective per se. Plaintiff cites to Mr. Wright's admission records as evidence that he burned his foot in the vehicle. Lastly, Plaintiff argues that Elrac cannot explain how Mr. Wright burned his foot, if not through the HVAC system.

In support of the products liability claims, Plaintiff provides the expert affidavit of Richard Pederson. Mr. Pederson is an engineer specializing in automotive engineering including heating and ventilation design and testing. He is the Director of Automotive Engineering at Peter Vallas Associates, Inc. and a consultant for National Forensic Engineers, Inc. Mr. Pederson affirms that he inspected Mr. Wright's vehicle on May 30, 2012, by driving the vehicle at slow, medium, and high speeds and visually inspecting the HVAC system, engine, and HVAC filter. Mr. Pederson measured the temperature of the vehicle with a Newport HHM290/N Supermeter with a differential thermocouple thermometer to record ambient air temperature at the center of the floor air discharged. The HVAC controls were placed in the maximum heat temperature, floor discharge of the air, blower control full counter-clockwise (the "off" position), and recirculating air. Testing was also done with the temperature at 50% - 75%.

Mr. Pederson opines that the testing revealed temperatures that were in violation of GM's policies as laid out in the GM Partial Vehicle Technical Specifications. He avers that the temperatures were at a level that according to General Motors own specifications were in excess of the levels that would cause potential injury to human skin. He contends that within a high degree of engineering certainty, the performance of the HVAC system in the subject vehicle produces high temperatures at the left floor discharge opening, which is where it would blow directly on the expected location of feet resting in the foot well and where Mr. Wright's feet would have been resting. Plaintiff's expert affirms that the owners' manual text did not contain any warnings that the driver could subject his right foot to abnormally high temperatures which could result in injuries. He avers that the failure to provide warnings is a breach of the standard of care in the field of engineering and HVAC car design.

Mr. Pederson maintains that an alternative design was available for the heater case in the subject vehicle, and that the case used was defectively designed. He asserts that design changes were made by General Motors prior to October 2005 that could have prevented the injury. In particular, changes needed to be made to the openings so that hot air is not directed to the foot. Mr. Pederson argues that though Elrac claims that design changes to the Monte Carlo after Mr. Wright's injuries were made due to the OnStar system, in actuality the changes were made to prevent "hot foot." He states that this is made clear in GM's own documents, specifically Bates Stamp 2655 and 2656.

Lastly, he contends that Mr. Orlando's testing was flawed. He asserts that an exemplar vehicle may not be substantially similar to Mr. Wright's vehicle. He argues that Mr.

Orlando's data about airflow is flawed and that the two designs for the heater case were not substantially similar. He argues that Mr. Orlando's testing of the airflow was also flawed because he did not place the anthropomorphic foot and leg in the appropriate positions in the foot well.

Plaintiff also provides the expert affidavit of Bernard Schayes, M.D., a New York licensed physician, to rebut the summary judgment motion as to the products liability cause of action. Dr. Schayes states that the hospital records from the December 26, 2006, admission indicate that Mr. Wright was burned from excessively high heat from a car's heating and ventilation system entering the driver foot well area. He avers that the photos of Mr. Wright's burns are consistent with the description of the burns in the admission record. He contends that the burns are consistent with high temperature heat directly blowing onto Mr. Wright's foot and onto his shoe and sock. He opines that within a reasonable degree of medical certainty, the burn could not have happened absent hot air being blown directly onto Mr. Wright's foot or near his foot and ankle, and that the temperature was near or exceeded 109 degrees Fahrenheit.

Plaintiff submits opposition to ORMC and Dr. Hirsch's motions for summary judgment in one set of papers under motion sequence no. 11. Plaintiff contends that Dr. Hirsch's motion must be denied because it is procedurally defective. He claims that when a doctor is a party, he must submit an affidavit in proper form. He claims that Dr. Hirsch did not state in his affidavit that it was subscribed and affirmed to be true under the penalties of perjury, and, therefore, it is inadmissible.

Plaintiff also asserts that neither Dr. Hirsch nor ORMC provided all the required documents necessary for a motion. Plaintiff maintains that Dr. Hirsch and ORMC should have provided the answers of the remaining defendants, testimony of Nurse Corigliani, and the deposition testimony of Nurse Sheehan.

Plaintiff claims that Mr. Wright informed ORMC on several occasions that he did not have proper home care. Plaintiff also alleges that Dr. Hirsch was not aware of Mr. Wright's home care needs. He argues that Dr. Hirsch knew Mr. Wright was not independent or self-sufficient prior to his December 2006 injuries.

Plaintiff contends that each of Mr. Wright's admissions to ORMC were through the emergency room. He maintains that for each emergency room admission, Mr. Wright was assigned a physician to be his attending. Because Mr. Wright entered through the emergency room, Plaintiff argues that ORMC is vicariously liable for the acts of independent physicians. He states that even if there was no liability, ORMC was required to have a proper plan of care upon discharge.

He argues that Mr. Wright's discharge plan on January 16, 2007, shows a failure by ORMC's Case Management team to evaluate Mr. Wright's discharge needs. Plaintiff suggests that the discharge instructions should have required a specialty mattress, heel guards, pillows, specific nutrition, and his prior home care services. Plaintiff asserts that the discharge plan violated Sections 405.9(a)(9) and 405.9(f) of Title 10 of the New York Codes, Rules, and Regulations by not ensuring that there was a proper plan for discharge.

Plaintiff alleges that Dr. Hirsch knew that prior to the December 2006 injuries, the home health aide was insufficient. Plaintiff states that in July 2006 Social Services could not find an aide and for 15 days Mr. Wright went without one. He suggests that this is why Dr. Hirsch transferred Mr. Wright to Elant at Goshen in January 2007. Plaintiff contends that Dr. Hirsch's prescription for pre-existing care and nursing care for 1 hour per day 2 times a week was insufficient for Mr. Wright's needs.

On May 14, 2007, Dr. Hirsch's staff contacted him to advise him that Mr. Wright's condition had deteriorated, including an open wound on his left thigh with blackened skins and black left toes. Dr. Hirsch arranged for an appointment with another doctor, who suggested hospitalization. Plaintiff claims that Mr. Wright did not refuse to be hospitalized but wanted to speak to Dr. Hirsch first. Mr. Jackson alleges that Dr. Hirsch continued treating Mr. Wright between January and August 2007. Plaintiff states that Dr. Hirsch gave prescriptions in every month between January and June. He maintains that Dr. Hirsch never transferred Mr. Wright's care to anyone else in the practice.

In support of his opposition to these motions for summary judgment, Plaintiff provides the opinion of Bernard Schayes, M.D. Dr. Schayes claims that Defendants' position is misleading. He explains that Mr. Wright was not intent on refusing care at any time and was doing everything in his power to heal. Dr. Schayes contends that the January 16, 2007, discharge plan was inadequate as he believes the records reveal that Dr. Hirsch did not properly evaluate Mr. Wright prior to discharge. He asserts that the determination by Dr. Hirsch, who was on the ORMC interdisciplinary team overseeing Mr. Wright's discharge, violated the standard of medical care

because he was aware that prior home service was unreliable at the time he made the discharge plan.

Plaintiff's expert affirms that Dr. Winski's only role was to evaluate the burn wounds in post-discharge follow-up appointments, but the prescriptions for post-discharge care were all written by Dr. Hirsch. Dr. Schayes asserts that Nurse Corigliani, another member of the interdisciplinary team, failed to do her job as her reports had little or no information about Mr. Wright's needs, and she never examined him. Dr. Schayes indicates that the standard of care, in addition to ORMC's policy and the law, require a hospital to evaluate a patient's needs before discharge and to ensure that those services are arranged for and available for the patient. He avers that this is not the responsibility of the home care service to determine after discharge takes place.

Dr. Schayes opines that the discharge plan was inadequate and violated the standard of care because it did not provide for proper medical devices to be available to prevent skin breakdown and to promote healing, to ensure that Mr. Wright had care 24 hours per day while his foot was required to be elevated, proper nutrition and protein supplements, and someone to help him with all his activities of daily living. He contends that Mr. Wright had a skin fragility and vascular disease, which made him more susceptible to edema and skin breakdown and, as a result, needed someone to help him keep his skin clean, dry and lubricated. He opines that a specialty mattress, cushions, and heel boots would have prevented friction and shearing of skin.

Dr. Schayes also claims that Dr. Hirsch violated the standard of care by taking 7 days to arrange an appointment for Mr. Wright, after learning that there was an open wound with blackened skin on May 14, 2007. Plaintiff's expert affirms that by not providing a proper discharge plan and by failing to properly monitor Mr. Wright, Dr. Hirsch and ORMC were directly

responsible for Mr. Wright's eventual edema and skin breakdown on his left side, including his thigh and left toes. He claims that by May 22, 2007, the records indicate that Mr. Wright was already at the end stage of his life due to the failed monitoring and discharge plan. Dr. Schayes maintains that according to records, Dr. Hirsch continued treating Mr. Wright until June 2007.

In reply, "vehicle defendant" Mobility Works argues that any cross-claims by defendants should be dismissed. Elrac, Dr. Hirsch, and ORMC have in their answers cross-claimed for indemnification and apportionment of responsibility. Mobility Works claims that Dr. Hirsch and ORMC have agreed to discontinue, and that Elrac submits no opposition to Mobility Work's motion for summary judgment. Mobility Works contends that Plaintiff's complaints should be dismissed as the Plaintiff concedes that the hand controls did not cause any injury. It claims that Plaintiff has never raised the argument that Mobility Works was required to inspect and determine that the 2007 Chevrolet Monte Carlo was safe for Mr. Wright's foot. Mobility Works affirms that William LaChappelle testified on their behalf that there was no vendor agreement with Elrac in September 2006. It asserts that Elrac only submits work orders on an on-call basis. It also maintains that Lance Rider's deposition testimony that is cited by Plaintiff is misleading as Mr. Rider states that in the original contract Mobility Works was required to inspect the vehicle only to "ensure that the hand controls were appropriately installed[.]" Mr. Rider also testified that for Mr. Wright's vehicle, Mobility Works was only required to install permanent hand controls. Mobility Works contends that the Plaintiff cannot produce any vendor agreement supporting his argument.

Elrac contends that Plaintiff's allegations of procedural defects are inconsequential. Elrac states that the Court can overlook procedural defects such as missing pleadings when the record is sufficiently complete. Elrac also annexed all required pleadings with the reply. It also claims that the lack of a certification accompanying Mr. Orlando's affidavit is not a fatal defect, especially as the Plaintiff has not disputed the authority of the notary or demonstrated any prejudice. It claims this can be remedied by submission of a certification *nunc pro tunc.* Elrac attaches the required certification to the reply and requests that the affidavit be given appropriate consideration.

Elrac concedes, for the purposes of the motion for summary judgment, that there is a factual issue concerning the claimed defect in the car's design. Elrac, however, argues that Plaintiff and Plaintiff's expert cannot show a causal link between the car's design and Mr. Wright's burn injury. It claims that the medical records that Plaintiff cites to reflect that Mr. Wright attributes his injury to the car's heater but that the records would be inadmissible as hearsay. Elrac asserts that though medical records are usually given a presumption of reliability, the reliability is destroyed when different accounts of a patient's condition are given to different medical providers. Elrac claims that the medical records invite speculation but there is no rational way to choose between the different accounts Mr. Wright gives of his injuries.

Medical defendant ORMC, in reply, argues that Plaintiff's allegation that the motion was procedurally defective is incorrect. ORMC states that there is no requirement that it submit deposition testimony that it did not cite to or rely on in support of their motion. It also claims that it is not controverted that it met its prima facie burden for summary judgment. ORMC

contends that Dr. Schayes' opinions are conclusory, fail to address proximate cause, and are limited to the discharge plan from January 16, 2007.

ORMC asserts that Plaintiff does not oppose ORMC's motion addressing New York Public Health Law Sections 2801-d, 2803-c, 2903-c; Sections 409 and 415 of Title 10 of the New York Codes, Rules, and Regulations; and Section 483 of Title 42 of the Code of Federal Regulations. ORMC also argues that statutory violations under Sections 405.9(a)(9) and 405.9(f)(1) & (9) are improper as they have not been asserted prior to Plaintiff's opposition to the motion.

In reply, Dr. Hirsch claims that Plaintiff does not address his contention that the following statutes and regulations are inapposite: New York Public Health Law Sections 2801-d, 2803-c, 2903-c; Section 415 of Title 10 of the New York Codes, Rules, and Regulations; and Section 483 of Title 42 of the Code of Federal Regulations. He also claims that Plaintiff's allegation that Dr. Hirsch's affidavit is not proper is incorrect as it was notarized and states that he was duly sworn. He contends that there is no requirement that the words "under the penalty of perjury" be included in the affidavit.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that

the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer's Estate, 93 A.D.2d 355 (1st Dep't 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

The Court finds that Mobility Works has established a prima facie case for summary judgment. Plaintiff does not rebut its claims but argues that it may have had a duty to determine if Mr. Wright's vehicle was safe for use for a paraplegic. Plaintiff, however, does not offer any evidence in support of this argument. Mobility Works, in reply, conclusively shows that there is no deposition testimony or any evidence indicating that there was any duty beyond inspecting the hand controls, which Plaintiff does not believe caused any injury. Accordingly, summary judgment is granted.

The Court now addresses alleged procedural defects in Elrac's motion for summary judgment. Section 3212(b) of the Civil Practice Law and Rules requires that in a motion for summary judgment the moving party submit an affidavit, a copy of the pleadings, and other available proof, such as depositions and written admissions, in support. Rule 14 of the New York County Supreme Court Rules of the Justices requires that counsel attach all pleadings and other documents as required by the Civil Practice Law and Rules and as necessary for an informed decision. The record is sufficiently complete when "a complete set of the papers is available from

the materials submitted" by all the parties. Washington Realty Owners, LLC v. 260 Wash. St., LLC, 105 A.D.3d 675 (1st Dep't 2013) (internal citations omitted). On review, the parties in this case have provided all necessary pleadings and papers.

Section 2309 of the Civil Practice Law and Rules requires that persons authorized to administer oaths, such as a notary public, without the state "shall be treated as if taken within the state if it is accompanied by such certificate of certificates as would be required to entitle a deed acknowledge without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation." The Appellate Division has held that absence of a certificate is not a fatal defect, and it can be corrected *nunc pro tunc*. See Moccia v. Carrier Car Rental Inc., 40 A.D.3d 504 (1st Dep't 2007). Elrac has submitted the necessary certification as part of the reply and has complied with the oath formalities of Section 2309 of the Civil Practice Law and Rules.

The Court now turns to the substantive issues raised by Elrac's motion. Distributors may also be held liable under strict products liability theories. See Vail v. Kmart Corp., 25 A.D.3d 549 (2d 2006) ("A manufacturer or distributor of a product may be held liable under a theory of strict products liability . . . ."). In strict products liability actions based on design and manufacturing defects, to establish entitlement to summary judgment, a movant must set forth information demonstrating that the product was "'designed and manufactured under state of the art conditions,' 'that its manufacturing process complied with applicable industry standards' or that proper testing and inspection was performed on the products before they left the defendant's possession [.]" Boyle v. New York, 79 A.D.3d 664, 665 (1st Dep't 2010) (internal citations omitted). Evidence

must be set forth that the product "as designed and manufactured [ ] was reasonably safe." Id. A defendant is required "to come forward with evidence in admissible form establishing that plaintiff's injuries were not caused by a manufacturing defect in the product." Graham v. Walter S. Pratt & Sons Inc., 271 A.D.2d 854 (3d Dep't 2000) (internal citations omitted). Plaintiff can rebut the defendant's prima facie case by "submitting evidence that raised the inference that" the vehicle "as designed, was not reasonably safe, and that excluded all other possible causes of the defective conditions [.]" Reeps v. BMW of N. Am., LLC, 94 A.D.3d 475, 476 (1st Dep't 2012).

A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for use of the product. Liriano v. Hobart Corp., 92 N.Y.2d 232, 237 (1998) (internal citations omitted). A "defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use[.]" Yun Tung Chow v. Reckitt & Colman, Inc., 17 N.Y.3d 29, 33 (2011) (internal citations omitted), citing Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 107 (1983).

A manufacturer has a duty to warn against latent dangers from foreseeable uses of its product. Liriano, 92 N.Y.2d at 237. A manufacturer also must warn of the danger of unintended uses of its product that are reasonably foreseeable. Id. The distributor must have knowledge, actual or constructive, of an inherent danger in a product to be liable. Mulhall v. Hannafin, 45 A.D.3d 55, 58 (1st 2007). In a summary judgment motion, the movant must show that it lacked knowledge of an inherent danger. The lack of knowledge is fatal to a failure to warn claim. Id.

Elrac has met its prima facie burden for summary judgment. Elrac provided evidence and expert testimony that the HVAC system was designed and manufactured under state of the art conditions, that the manufacturing process complied with industry standards, and that proper testing and inspection was performed. Plaintiff, however, rebuts Elrac's prima facie case through the expert affidavit of Mr. Pederson, who indicates that the vehicle was not reasonably safe due to the HVAC system and disagrees that it was designed and manufactured under state of the art conditions. Mr. Pederson contends that Elrac had knowledge of the danger of "hot foot." The competing expert affidavits raise triable issues of fact. Summary judgment is denied.

The Court now addresses alleged procedural defects in the medical Defendants' motions for summary judgment. Rule 2106 of the Civil Practice Law and Rules allows for a physician, authorized by law to practice in New York, who is not a party, to submit an affirmation "affirmed by him to be true under the penalties of perjury . . . in lieu of and with the same force and effect as an affidavit." When a physician is a party to an action, the physician cannot submit an affirmation instead of an affidavit. Slavenburg Corp. v. Opus Apparel, 53 N.Y.2d 799, 801 (1981). To be considered competent evidence, an affidavit must either be sworn to or affirmed to be true. See Gilphilin v. Ware, 205 A.D.2d 353 (1st 1994).

The Court finds that Dr. Hirsch's affidavit is not defective. Dr. Hirsch submits an affidavit, not an affirmation, as he is a party in this matter. The affidavit is notarized and states that he is duly sworn. The Court also finds that Defendants have submitted all necessary documents and pleadings. Each defendant has submitted a copy of their pleadings along with their motion for summary judgment.

In a medical malpractice case, to establish entitlement to summary judgment, a movant must demonstrate that it did not depart from accepted standards of practice or that, even if it did, the departure did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). Conclusory affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff's essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id. If a defendant establishes a prima facie case, only then must a plaintiff rebut that showing by submitting an affidavit from a doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207. Summary judgment should be determined "upon the facts appearing in the record, without regard to technical defects or deficiencies in the pleadings, and should be denied 'if plaintiff's submissions [provide] evidentiary facts making out a cause of action.'" Javitz v. Slatus, 93 A.d.2d 830 (2d Dep't 1983) (citing Alvord & Swift v. Muller Constr. Co., 46 N.Y.2d 276, 280 (1978)).

Defendant ORMC has met its prima facie burden for summary judgment in challenging allegations that it violated New York Public Health Law Sections 2801-d, 2803-c, 2903-c; Sections 409 and 415 of Title 10 of the New York Codes, Rules, and Regulations; and Section 483 of Title 42 of the Code of Federal Regulations. The statutes are not applicable to ORMC and Plaintiff does not rebut the prima facie case in opposition papers. Accordingly, summary judgment is granted.

Section 405.9(b)(9)[3] of Title of the New York Codes, Rules, and Regulations requires hospitals to "provide for the assignment, management and disposition of patients who are not admitted as private patients of members of the medical staff." Section 405.9(f)(1) requires hospitals to "ensure that each patient has a discharge plan which meets the patient's post-hospital care needs." Section 405.9(f)(2) requires that hospitals "have a discharge planning coordinator responsible for the coordination of the hospital discharge planning program."

The Court finds ORMC has established a prima facie case for summary judgment regarding Plaintiff's claims that ORMC violated Sections 405.9(b)(9) and 405.9(f)(2) of Title 10 of the New York Code, Rules, and Regulations as the Plaintiff has not raised these claims prior to his opposition to the motion for summary judgment. Plaintiff may oppose a motion for summary judgment by relying on an unpleaded cause of action supported by the plaintiff's submission. Langan v. St. Vincent's Hosp. of NY, 64 A.D.3d 632, 633 (2d Dep't 2009). There is nothing on the record, however, that supports a violation of 405.9(b)(9) as it is uncontroverted that Mr. Wright

[3]Plaintiff, in opposition papers, quotes from 405.9(b)(9) but mistakenly cite to it as 405.9(a)(9), which does not exist. Defendant, presumably, opposes 405.9(b)(9).

was assigned to a physician who was professionally responsible for his care. Plaintiff's theory is "materially different from those pleaded in the complaint and bill of particulars." Pinn v. Baker's Variety, 32 A.D.3d 463, 464 (2d Dep't 2006). Nor is there any claim in Plaintiff's pleadings or opposition papers that ORMC lacked a discharge planning coordinator without appropriate training or experience.

Defendant ORMC has not met its prima facie burden for summary judgment as to Section 405.9(f)(1) of the New York Codes, Rules, and Regulations. Section 405.9(f)(1), though raised for the first time in opposition papers, is not a new theory of liability. Plaintiff did not specifically raise 405.9(f)(1) in pleadings but raised violations of non-existent sections. Plaintiff did claim, however, that the hospital's discharge plan failed to meet the patient's post-hospital care needs. The record, including Dr. Schayes' opinion, supports this cause of action. Plaintiff may have been mistaken as to the exact section of 405.9(f) that sets out the relevant regulation, but the pleadings contain this exact theory of liability.

The Court is not convinced that ORMC has established a prima facie case for summary judgment as to Plaintiff's remaining claims. ORMC's expert does not provide an opinion that is detailed and specific. Joyner-Pack, 54 A.D.3d at 729. Ms. Metzger repeatedly establishes that procedures are in place to ensure an appropriate discharge plan but does not explain how the discharge plan itself was proper or explain the standard of care. In addition, Ms. Metzger is not a physician, and cannot provide an expert opinion as to the medical treatment and care in question. Therefore, summary judgment is denied.

Defendant Dr. Hirsch has met his burden to establish a prima facie case for summary judgment. Dr. Andrew Hirsch averred that his care for Mr. Wright met the accepted medical standards. Plaintiff has failed to oppose Dr. Hirsch's challenge to claims that he violated New York Public Health Law Sections 2801-d, 2803-c, 2903-c; Section 415 of Title 10 of the New York Codes, Rules, and Regulations; and Section 483 of Title 42 of the Code of Federal Regulations.

Plaintiff has, however, rebutted Dr. Hirsch's prima facie case on claims that Dr. Hirsch lacked a proper discharge plan of care on January 16, 2007, that he failed to monitor Ramon Wright, and that he failed to assure that appropriate home and nursing care was in place for Mr. Wright given his physical and mental state at the time of his discharge. Plaintiff's expert, Dr. Schayes, opined that Dr. Hirsch's discharge plan and care did not meet the standard of care and proximately caused Mr. Wright's skin breakdown. Though Dr. Hirsch was not present at Mr. Wright's hospitalizations, there is a question of fact as to what his ongoing duty to his patient was as his primary care physician after January 16, 2007. Accordingly, it is

ORDERED that Mobility Works' motion for summary judgment is granted; it is further

ORDERED that Elrac's motion for summary judgment is denied; it is further

ORDERED that ORMC's motion for summary judgment is granted in part, only in so far as Plaintiff alleges a cause of action for the violation of New York Public Health Law

Sections 2801-d, 2803-c, 2903-c; Sections 409, 405.9(b)(9), 405.9(f)(2), and 415 of Title 10 of the New York Codes, Rules, and Regulations; Section 483 of Title 42 of the Code of Federal Regulations; and as to claims that the discharge plans and care in hospitalizations after January 2007 were improper; it is further

ORDERED that Dr. Hirsch's motion for summary judgment is granted in part, only in so far as Plaintiff alleges a cause of action for violations of New York Public Health Law Sections 2801-d, 2803-c, 2903-c; Section 415 of Title 10 of the New York Codes, Rules, and Regulations; and Section 483 of Title 42 of the Code of Federal Regulations; and it is further

ORDERED that the parties appear for a pre-trial conference on May 6, 2013, at 9:30 am, in Part 6, at 60 Centre Street, Room 345.

Dated: April 15, 2014

ENTER:

JOAN B. LOBIS, J.S.C.

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