

**Henry v Sunrise Manor Ctr. for Nursing &
Rehabilitation**

2014 NY Slip Op 32403(U)

September 5, 2014

Supreme Court, Suffolk County

Docket Number: 10-6848

Judge: Jr., Andrew G. Tarantino

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SHORT FORM ORDER

**ORIGINAL
WHEN BLUE**

INDEX No. 10-6848
CAL. No. 13-02174MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 3-20-14
ADJ. DATE 7-1-14
Mot. Seq. # 002 - MotD
003 - MG

-----X
CAROLYN HENRY, as Administratrix of the
Estate of CALVIN NESBITT, Deceased,

Plaintiff,

- against -

SUNRISE MANOR CENTER FOR NURSING
AND REHABILITATION; also known as
SUNRISE MANOR NURSING HOME, INC. ABU
MUHAMMAD-M HAQUE, M.D. and "JOHN
DOE/JANE DOE (#1-#10)" said names being
fictitious and intended to represent those individuals
who rendered treatment to Calvin Nesbitt at Sunrise
Manor Center for Nursing and Rehabilitation,

Defendants.
-----X

NAPOLI BERN RIPKA LLP
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Upon the following papers numbered 1 to 43 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-19; (003) 20-33; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 34-36; Replying Affidavits and supporting papers 37-38; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendant Sunrise Manor Nursing Home, Inc. d/b/a Sunrise Manor Center for Nursing and Rehabilitation s/h/a Sunrise Manor Center for Nursing and Rehabilitation, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against it is denied as to the causes of action for medical malpractice and negligence, and is granted to the extent that the cause of action for lack of informed consent and the claim for punitive damages are dismissed; and it is further

ORDERED that motion (003) by defendant Abumuhammad-M. Haque, M.D. s/h/a, Abu Muhammad-M Haque, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted in its entirety.

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/s/

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In this medical malpractice action, the plaintiff, Carolyn Henry, as the administratrix of the estate of decedent, Calvin Nesbitt, seeks monetary damages against the defendants for medical malpractice; lack of informed consent; negligence, negligent hiring, and negligent retention which resulted in the conscious pain and suffering of the decedent and his wrongful death. Plaintiff also seeks punitive damages premised upon defendants' alleged malicious, outrageous, gross indifference and "aggravated conduct beyond mere negligence." Decedent, Calvin Nesbitt, suffered a CVA (cerebral vascular accident/stroke) in 2007, was treated at Good Samaritan Hospital from January 30, 2008 through February 19, 2008 for possible transient ischemic attacks or CVA, cancer of the prostate, and for pneumonia, urinary tract infection, and small bowel obstruction. He was subsequently discharged and transferred to defendant nursing home, Sunrise Manor Nursing Home, Inc. (hereinafter Sunrise Manor) on February 19, 2008 for rehabilitation. He was admitted to the service of defendant Dr. Abumuhammad-M Haque. The decedent was transferred from Sunrise Manor to Good Samaritan Hospital emergency room on February 27, 2008, and admitted to the intensive care unit where he was intubated and placed on a ventilator. He died later that day. Dr. Haque signed the decedent's death certificate, indicating the immediate cause of death as septic shock as a consequence of aspiration pneumonia or as a consequence of cerebral vascular accident, with acute chronic renal failure as a significant condition contributing to the decedent's death.

In motion (002), defendant Sunrise Manor seeks summary dismissal of the complaint asserted against it or in the alternative, dismissal of the claims for punitive damages.

In motion (003), defendant Haque seeks summary dismissal of the complaint asserted against him or in the alternative, dismissal of the claims for punitive damages and lack of informed consent.

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 (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which are not in evidence, and that the expert testimony is limited to facts in evidence (*see Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.*, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2005]). Uncertified records, reports, and studies which are not in admissible form are not in evidence.

In support of motion (002), defendant nursing home has submitted, inter alia, an attorney's affirmation; the affidavit of Luigi Capobianco, M.D.; copies of the summons and compliant, defendants' answers, verified bill of particulars; uncertified medical records from defendant Sunrise Manor and Good Samaritan Hospital which are not in admissible form pursuant to CPLR 3212 and 4518; an uncertified copy of decedent's death certificate; and unauthenticated court decisions from unrelated matters.

In support of motion (003), defendant Haque submitted, inter alia, an attorney's affirmation; affirmation of Robert Fuentes, M.D.; answer served by defendant Haque, and plaintiff's verified bill of particulars; uncertified

admission records from Good Samaritan Hospital and Sunrise Manor; and defendant Haque's transcript of his examination before trial which is certified but unsigned and is considered as adopted as accurate by him (*see Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

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 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 224 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], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

"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]).

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]).

The plaintiff opposes these motions with a redacted version of an expert affidavit and has provided an unredacted copy of said expert affidavit for this court's *in camera* inspection (*Marano v Mercy Hospital*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; *Rubenstein v Columbia Presbyterian Medical Center*, 139 Misc.2d 349, 527 NYS2d 680 [N.Y. County 1988]; *Rose v Horton Medical Center*, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]).

Turning to motion (002), Sunrise Manor has submitted the expert affirmation of Luigi M. Capobianco, M.D. who is licensed to practice medicine in New York State and is board certified in wound care and in family practice with subcertification in geriatric medicine. He set forth his education and training, and current work experience and affiliations. He stated that he reviewed the relevant medical records and testimony pertaining to this matter, however, none of the testimonies have been provided by this moving defendant as evidentiary proof in support of his opinions, which opinions he set forth within a reasonable degree of medical certainty. It is Dr. Capobianco's opinion that Sunrise Manor did not depart from accepted standards of care; and did not proximately cause the decedent's injuries and death. Dr. Capobianco opines that there is no basis for claiming that the decedent was not provided informed consent or that he was damaged by some affirmative violation of his physical integrity in the absence of informed consent. He further opines that there were no Public Health Law §2801-d violations of decedent's rights or benefits as a nursing home resident or failure to provide adequate and appropriate medical care which proximately caused and/or contributed to the decedent's injuries and death. He opined that there is no basis for plaintiff's claims for punitive damages. Dr. Capobianco set forth plaintiff's claims as asserted against Sunrise

Manor, and also his medical history and admission to Good Samaritan Hospital prior to his transfer to Sunrise Manor.

Dr. Capobianco indicated that the 74 year old decedent was admitted to Good Samaritan Hospital from January 30, 2008 through February 19, 2008 with complaints of right leg weakness, and sporadic difficulty with speech and double vision, symptoms suspicious of transient ischemic attacks. He had a medical history of an acute CVA, prostate cancer, chronic renal insufficiency, hypertension which was difficult to control, and other surgeries. During this admission to Good Samaritan Hospital, the decedent was quite confused and agitated, prompting a psychiatry consultation yielding a diagnosis of dementia with underlying delirium, and behavior attributed to sun downing. He was provided various medications. On February 2, 2008, the decedent began to have recurrent nausea, vomiting and diarrhea. A gastroenterology consultation, x-ray, and abdominal CT scan led to the diagnosis of an obstruction of the small bowel, for which a nasogastric tube was placed. A surgery consult was obtained with gastroenterology on February 6, 2008, with conservative management of the partial small bowel obstruction, presumed to be related to adhesions. His diet progressed from nothing by mouth to clear liquids, which precipitated vomiting. Small bowel distention was noted on February 9, 2008 on x-ray, suggestive of ileus, but surgery was delayed due to the decedent having a fever. A repeat x-ray the following day demonstrated resolution of the obstruction, and surgery was cancelled. On February 10, 2008, the decedent's urinary output was poor, and blood was noted in the foley catheter tubing. Urine culture was positive for klebsiella pneumonia and enterococcus faecalis, for which he was placed on Augmentin for seven days, which was completed at Sunrise Manor. His chest x-ray revealed probable pneumonia. He had a fever and elevated white blood cell counts from February 12 through February 18, 2008, the day before his transfer to Sunrise Manor. His BUN and creatinine were indicative of chronic renal failure at that time.

Dr. Capobianco indicated that the decedent was transferred to Sunrise Manor on February 19, 2008 with a foley catheter in place for urinary obstruction related to prostate cancer. Upon admission to Sunrise Manor, his mini mental status examination revealed that the decedent had severe cognitive deficits. He was seen by Dr. Haque who ordered various blood work. On February 20, 21, and 23, 2008, the decedent was found on the floor, without apparent injury. Action was taken on each occasion to prevent reoccurrence, as determined by nursing, and by physical, occupational, and speech therapies. Dr. Capobianco continued that on February 23, 2008, the decedent had an episode of vomiting and low grade fever; normal blood pressures throughout his admission, and no evidence of spiking fevers until February 24, 2008 during the night shift. Thereafter, his appetite was noted to be poor and he was out of bed several times. He had to be placed on a bedside floor mat to sleep, but was placed back to bed and given Haldol. On February 26, 2008, he was out of bed in the wheelchair throughout the day, slept during the evening shift, and could not be aroused during the night at 1:50 a.m. on February 27, 2008. At 2:30 p.m., when his physician was alerted, the decedent was ordered to be transferred via ambulance to Good Samaritan Hospital, due to the change in his mental status.

Dr. Capobianco commented upon the decedent's condition upon arrival to Good Samaritan Hospital emergency room as unresponsive to verbal or tactile stimuli, with normal blood pressure, temperature of 101.3, sinus tachycardia of 116, and no respiratory distress. However, it was noted that he was oozing brown foul smelling stool, his abdomen was distended, and there were diminished bowel sounds. He was diagnosed with hypotension and sepsis. Blood cultures and urinalysis were taken. X-rays revealed no pleural effusions, and on follow-up, his lungs were noted to be clear. By 8:30 a.m., he was intubated and placed on mechanical ventilation. His blood work indicated acute renal failure, and a large amount of bacteria and blood were found in his urine, with cultures positive for klebsiella pneumonia and gram negative rods. After being seen by various specialists, it was determined by a nephrologist that he was experiencing septic shock and renal failure. His prognosis was poor. Dr. Capobianco stated, that as reflected by the death certificate dated February 27, 2008, it was believed the decedent died from septic shock secondary to aspiration pneumonia and CVA, with acute and chronic renal failure as another significant condition contributing to the decedent's death. He added that the decedent had been treated at Good Samaritan

Hospital from January 30, 2008 through February 19, 2008 for pneumonia with Zithromax, and during his February 19, 2008 through February 27, 2008 admission to Sunrise Manor, the decedent did not demonstrate signs of pneumonia which warranted further testing or treatment.

It is Dr. Capobianco's opinion that the decedent died secondary to urosepsis, a life-threatening condition of the urinary tract that spreads into the blood stream, which was not caused by Sunrise Manor, and which it did not fail to diagnose. The foley catheter was necessitated by the decedent's prostate cancer and enlarged prostate. When the decedent was placed on Augmentin for seven days for his urinary tract infection at Good Samaritan Hospital on February 13, 2008, Sunrise Manor continued the Augmentin until February 22, 2008. Dr. Capobianco opined that the decedent's development of urosepsis was unavoidable, and there were no actions by Sunrise Manor which caused him to develop sepsis and die. He continued that the decedent's development of urosepsis was proximately caused by his multiple co-morbid medical conditions, including pre-existing urinary tract infection. He indicated in a conclusory and unsupported opinion that the record is devoid of any evidence suggesting that the urinary tract infection was not properly treated or that Sunrise Manor's actions led to the development of the sepsis. He added that there was no indication that a urine culture was needed or indicated as he completed the Augmentin on February 22, 2008.

Dr. Capobianco opined that there was no protracted hypotension which Sunrise Manor failed to treat, resulting in acute renal failure, and he did not become hypotensive until four hours after his return to Good Samaritan Hospital on February 27, 2008. He continued that the decedent did not demonstrate significant changes in his anxiety and mental status from the time of his admission to Sunrise Manor until just before his transfer to Good Samaritan Hospital. He continued that the decedent exhibited the same conditions at Sunrise Manor as he was diagnosed with prior to his admission thereto, *ie*, severe cognitive deficits, significant confusion and agitation. He stated that on February 24, 2008, when the decedent had vomiting and liquid stool, these symptoms were not signs or symptoms of sepsis or infectious process, and did not warrant his transfer to the hospital. He stated that Sunrise Manor timely transferred the decedent to Good Samaritan Hospital when he could not be aroused after sleeping the entire evening shift, and timely and properly recognized his changes in oxygen saturation and pulse, and inability to arouse. An earlier transfer to Good Samaritan Hospital would not have affected the outcome or prevented the decedent from dying on February 27, 2008 as his severely compromised condition rendered him unable to fight off the gram negative sepsis which caused his already failing kidneys to shut down, and which proximately caused his death.

It is Dr. Capobianco's opinion that Sunrise Manor is not responsible for non-party Analytical Diagnostic Labs.'s failure to provide CBC results on February 22, 2008, and had they done so, he opines that the results would not have yielded any results suggestive of sepsis or an infectious process which warranted hospitalization for the decedent. This is so, he stated, because the decedent's last WBC was declining on February 18, 2008.

Dr. Capobianco stated that the record is devoid of any evidence that the decedent was damaged by an affirmative violation of Public Health Law §2801-d as there was no invasive medical procedure for which an informed consent was needed, and there were no injuries or damages proximately caused by the various statutory violations alleged by plaintiff, in that the 405 regulations apply only to general hospitals and not Article 28 residential health care facilities such as Sunrise Manor. Dr. Capobianco set forth his opinions concerning the inapplicability of the alleged violations by Sunrise Manor of the various New York Code of Rules and Regulations set forth by plaintiff.

Dr. Capobianco disagreed with the attribution (by Dr. Haque) of the decedent's septic shock to aspiration pneumonia, as reflected in the death certificate signed by Dr. Haque, as the decedent did not exhibit signs and symptoms of pneumonia. Also, diagnostic studies on February 27, 2008 did not reveal aspiration pneumonia. Thus, he stated, the decedent did not die from aspiration pneumonia.

Based upon the foregoing, there are factual issues in the moving papers concerning the cause of death of the plaintiff's decedent, precluding summary judgment from being granted to the defendant Sunrise Manor. It is also noted that Dr. Capobianco, has not commented on the nursing notes dated February 23, 2008, contained in the Sunrise Manor record, wherein it was noted twice that the decedent had bloody urine in his catheter bag. Dr. Capobianco did not indicate what the standard of care is when bloody urine is noted, and how the nursing staff at Sunrise Manor comported with said standard of care. Such factual issues raised in the moving papers preclude summary judgment from being granted to Sunrise Manor.

It is additionally noted that even if Sunrise Manor demonstrated prima facie entitlement to summary dismissal of the complaint as to the causes of action for negligence and medical malpractice, that plaintiff's expert has raised factual issues which preclude summary judgment from being granted.

The expert's conflicting testimonies preclude summary judgment.

Accordingly, that part of motion (002) by defendant Sunrise Manor for summary dismissal of those causes of action premised upon medical malpractice and negligence asserted against it is denied.

Turning to motion (003), Dr. Haque testified to the extent that he maintains a solo practice in internal medicine and is board certified in the same since 1996, with recertification in 2006. He has been a staff physician at Sunrise Manor Nursing Home since 2001, and also at Berkshire Nursing Home, Ross Nursing and Rehab Center, and Good Samaritan and Southside Hospitals. The decedent, Calvin Nesbitt, was assigned to him as a patient on February 19, 2008, at Sunrise Manor. He stated that he did not have much memory of the decedent, just that he was an elderly man. He stated that he believed he saw the decedent twice, once on his date of admission to Sunrise Manor when he conducted the decedent's history and physical, and after the decedent was found on the floor.

Dr. Haque continued that the decedent presented with a history of being a 74 year old male admitted for rehabilitation with CVA and right hemiplegia and recurrent small bowel obstruction. He was also noted to have an enlarged prostate, and there was a question whether he might have cancer of the prostate with obstruction. He had dementia and was taking antipsychotic medication due to past behavioral issues, but he was coherent and knew where he was and why he was admitted. Dr. Haque's plan on February 19, 2008 was to continue the medications, which he set forth, and to check him for anemia. Dr. Haque indicated there was an incident report which he signed on February 22, 2008 concerning an incident on February 20, 2008. He indicated that the plaintiff's decedent was found on the floor in a sitting position by his bed, with urine on the floor. He performed a limited examination of the plaintiff's decedent and found no injury.

Dr. Haque stated that there were two more incidents thereafter on February 21 and 23, 2008, where the decedent was found lying on the floor. He did not see the plaintiff's decedent again until he was admitted to the hospital and signed nursing home reports afterwards. He would have relied upon the nurse's assessments reported to him concerning whether or not the plaintiff's decedent was injured or needed attention after the second and third time the decedent was found on the floor. He believed that this history of falls were simple regular incidents, unrelated to a stroke or changes which were occurring during a stroke. He added that the plaintiff's decedent's mental status was the same as the first time he evaluated him, and he told the nurses to report any change in mental status or physical findings, and to monitor him closely with neuro checks. Dr. Haque testified that patients with dementia have more fall risks, and that the nursing home has its own protocol and guidelines for dealing with fall risk assessment and prevention. He stated the decedent had no change in his mental status, no signs of infection, and no change in his condition, as reported.

Dr. Haque testified that the plaintiff's decedent died on February 27, 2008 from sepsis caused by aspiration pneumonia from simple saliva or food going to the wrong place. He had been admitted on an emergency basis from the nursing home to Good Samaritan Hospital on February 27, 2008 with pneumonia. Dr. Haque testified that the decedent did not have pneumonia when he was admitted to the nursing home on February 19, 2008. He continued that aspiration pneumonia can happen very rapidly, that aspiration is an acute thing and causes pneumonia. He did not know if it happened in the ambulance, in the nursing home, or in the emergency room. He went to the emergency room at Good Samaritan Hospital and examined the decedent on February 27, 2008, and found him to be unresponsive, intubated, on the ventilator, and in shock. He stated that the decedent was found unresponsive in the nursing home. His diagnosis was acute respiratory failure due to pneumonia aspiration, rule out CVA or stroke, acute renal failure, aspiration pneumonia, rule out sepsis. He stated that the decedent was very sick and that he called in multiple consults. His note of May 8, 2008, prepared after discharge, contained a secondary diagnosis because the decedent's abdomen was moderately distended and he had a small bowel obstruction. He also noted renal failure due to the sepsis on February 27, 2008. He signed the death certificate, indicating decedent's immediate cause of death was septic shock as a consequence of aspiration pneumonia, or as a consequence of cerebral vascular accident. Acute chronic renal failure was noted to be a significant condition contributing to the decedent's death.

Robert Fuentes, M.D. affirms that he is licensed to practice medicine in New York State and is board certified in internal medicine. He set forth his training and education and indicated that he is currently engaged in private practice, and having practiced for 30 years, is familiar with the standard of care as it existed in 2008. It is Dr. Fuentes's opinion within a reasonable degree of medical certainty that the care provided by Dr. Haque was at all times in conformity with accepted internal medicine practice as it existed in 2008, and that in no way did the care provided by Dr. Haque depart from accepted medical standards, or proximately cause injury or death to the plaintiff's decedent. He continued that there is no basis for a claim for lack of informed consent as there is no evidence that the decedent was damaged by some affirmative violation of his physical integrity in the absence of informed consent. There is no basis that Sunrise Manor was negligent, or engaged in negligent hiring, and that there is no basis for punitive damages.

With regard to defendant Haque, Dr. Fuentes stated that the records bear out that the decedent was admitted to Good Samaritan Hospital from January 30, 2008 through February 19, 2008 and was treated for transient ischemic attack and urinary tract infection, and was discharged on antibiotics. Dr. Haque did not treat the decedent during that hospital admission. It was not until the decedent was discharged and transferred to Sunrise Manor that defendant Haque first became involved in his care and treatment on February 19, 2008. Dr. Haque was a fee for service provider at the nursing home and was assigned to be the decedent's physician. Dr. Haque authored a thorough admission history and physical note and admission orders, comporting with accepted medical practice. Dr. Fuentes continued that Dr. Haque next became involved with the decedent after he was found on the floor on three occasions between February 20 and 23, 2008. He examined the decedent and found he sustained no injuries and that he required no medical treatment relative to the falls. Dr. Fuentes opined that Dr. Haque conformed to accepted medical practice in performing these focused examinations. Additionally, the decedent suffered no injuries as a result of those alleged falls. He continued that while the decedent was a resident at the nursing home, Dr. Haque properly and timely ordered the appropriate laboratory work, and appropriately acted upon the results.

Dr. Fuentes stated that when the decedent was constipated for two days, as per the February 21, 2008 nursing note, Dr. Haque appropriately and timely ordered a fleet enema if there was a negative result from citrate of magnesia. Oozing stool was not noted until February 27, 2008 when the decedent was transferred to Good Samaritan Hospital. Dr. Fuentes opined that the decedent's oozing stool and vomiting were not signs of sepsis that warranted the decedent to be transferred to the hospital. When the decedent had vomiting on February 24, 2008, Dr. Haque ordered bananas, rice, applesauce, and toast for 24 hours. Thereafter, the vomiting resolved, and there were no further episodes. The decedent's vital signs were stable. There was nothing which required a reassessment by

Dr. Haque, and no reason to suspect that the decedent was experiencing septic shock at that time, or that he needed to be hospitalized. A single temperature elevation of 100.7 on February 24, 2008 is not a sign and symptom of an infection.

It is Dr. Fuentes' opinion that the cause of decedent's death was sepsis, a life-threatening infection of the body, which Dr. Haque did not cause or fail to diagnose. When the decedent was admitted to Sunrise Manor, there were no signs or symptoms to suggest that the decedent was experiencing an infectious process, including that of the urinary or respiratory tract, or of the digestive system, up to the time he was transferred to Good Samaritan Hospital on February 27, 2008. Dr. Fuentes stated that when the decedent was admitted to Sunrise Manor, he was taking an antibiotic, Augmentin, for a klebsiella pneumonia and enterococcus faecalis infection in his urine, and that Dr. Haque appropriately continued the antibiotic until completed. Dr. Fuentes noted that when the decedent was readmitted to Good Samaritan Hospital on February 27, 2008, his blood culture was positive for gram negative rods and klebsiella pneumonia which is the same bacteria the decedent had during his prior admission to Good Samaritan Hospital and which preceded any treatment by Dr. Haque. Dr. Fuentes continued that during the decedent's admission to Sunrise Manor, he exhibited no signs of an infection and therefore, the standard of care did not require a urine culture, nor was there was need to obtain a urine culture during his nursing home admission.

Dr. Fuentes continued that on February 27, 2008, Dr. Haque was notified by the nursing home staff concerning the decedent's change in mental status as he was unable to be aroused. Dr. Haque ordered that the decedent be transferred to Good Samaritan Hospital, and conformed with accepted medical practice in so doing. He stated that there was no indication to transfer the decedent to the hospital prior to February 27, 2008. Dr. Fuentes continued that the decedent did not have protracted hypotension while under the care of Dr. Haque at the nursing home, and only became hypotensive four hours after his admission to Good Samaritan Hospital. He added that Dr. Haque did not depart from the standards of care, and that there was nothing which Dr. Haque did or failed to do which was a substantial factor in a delay in the diagnosis of sepsis or the institution of any particular therapy for that condition. Because no invasive treatment was provided by Dr. Haque, there was no basis for him to provide informed consent to the decedent.

Based upon the foregoing, it is determined that defendant Haque has demonstrated prima facie entitlement to summary dismissal of the complaint as asserted against him. It is further determined that the plaintiff has not submitted expert opposition to this motion by Dr. Haque, and has therefore, failed to raise a triable issue of fact to preclude summary judgment from being granted to him.

Accordingly, that branch of motion (003) by defendant Dr. Haque premised upon medical malpractice is granted, and that cause of action asserted in the complaint against him is dismissed.

Sunrise Manor and defendant Dr. Haque also seek dismissal of those causes of action asserted against them for lack of informed consent. In a medical malpractice action alleging lack of informed consent, it must be demonstrated that (1) the practitioner failed to disclose the risks, benefits, and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed, and (2), a reasonable person in plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment (*Orphan v Pilnik, M.D.*, 15 NY3d 907; 914 NYS2d 729 [2010]). Here, it has not been demonstrated that there was an insufficiency of disclosure of information provided by Sunrise Manor or Dr. Haque for a procedure or treatment or that the plaintiff would have declined the procedure or treatment had he been fully informed, and plaintiff's expert does not comment upon informed consent or the lack thereof.

Accordingly, those causes of action alleging lack of informed consent are dismissed against both Sunrise Manor and Dr. Haque.

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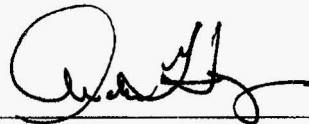
Sunrise Manor and Dr. Haque also seek dismissal of plaintiff's claim for punitive damages. Punitive damages "may only be awarded for exceptional misconduct which transgresses mere negligence, as when the wrongdoer has acted 'maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness' . . . or has engaged in 'outrageous or oppressive intentional misconduct' or with 'reckless or wanton disregard of safety or rights' " (*Sharapata v Town of Islip*, 56 NY2d 332; 452 NYS2d 347 [1982]; *Camillo v Olympia & York Props. Co.*, 157 AD2d 34; 554 NYS2d 532 [1st Dept 1990]). Here, the plaintiff seeks punitive damages. However, it has not been demonstrated that there was sufficient behavior on the part of the Sunrise Manor defendants to warrant an award of punitive damages, and plaintiff's expert commented only to the departure from the standard of care. His opinions were devoid of any reference to willful, wanton, intentional, malicious, or outrageous conduct.

Accordingly, that brand of motion (002) by defendant Sunrise Manor which seeks dismissal of the application for punitive damages is granted.

Absent a valid claim for compensatory damages, there can be no claim for punitive damages (*Hubbell v Trans World Life Ins. Co. of New York*, 50 NY2d 899; 430 NYS2d 589 [1980]). "A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action..." (*Racanova v Equitable Life Assur. Soc. of U.S.* 83 NY2d 603; 612 NYS2d 339 [1994]). Demand for punitive damages does not amount to a separate cause of action (*Lee Mfg. v Chemical Bank*, 186 AD2d 408; 588 NYS2d 408 [2d Dept 1992]). Accordingly, it is determined that because no liability has been demonstrated as against defendant Dr. Haque, any claim for punitive damages must fail as well, as such claim cannot stand on its own.

Accordingly, that part of motion (003) by defendant Dr. Haque which seeks dismissal of any claim for punitive damages is granted.

Dated: 5 Sept 2014



A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION