Christophel v New York-Presbyterian/Weil Med. Coll. of Cornell Univ. Anesthesiology Residency Training Program
2018 NY Slip Op 30109(U)
January 19, 2018
Supreme Court, New York County
Docket Number: 154413/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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THOMAS H. CHRISTOPHEL, Individually and as Administrator of the ESTATE OF JANET Y. CHRISTOPHEL, Deceased,

INDEX NO. 154413/13

Plaintiff

-against-

NEW YORK-PRESBYTERIAN/WEIL MEDICAL COLLEGE OF CORNELL UNIVERSITY ANESTHESIOLOGY RESIDENCY TRAINING PROGRAM
525 East 68th Street, Box 1124
New York, NY 10021

WORKFORCE HEALTH & SAFETY CLINIC
NEW YORK HOSPITAL
1315 York Avenue
New York, NY 10021-5304

BRIDGE BACK TO LIFE
500 8th Avenue, Suite 906
New York, NY `10018

MEDICAL SOCIETY OF THE STATE OF NEW YORK
COMMITTEE FOR PHYSICIAN HEALTH
99 Washington Avenue, Suite 410
Albany, NY 12210

Defendants

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BRIDGE BACK TO LIFE CENTER, INC.,

Third-Party Plaintiff,

-against-

THE NEW YORK PRESBYTERIAN HOSPITAL,

Third-Party Defendant

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JOAN A. MADDEN, J.:

Defendant/Third-Party Plaintiff Bridge Back to Life Center, Inc., i/s/h/a Bridge Back to Life ("Bridge Back" or "defendant") moves for an order granting it summary judgment (i) dismissing common-law negligence, medical malpractice, and wrongful death claims against it

or, in the alternative, (ii) dismissing plaintiff's claims for lost wages and employee benefits.[1] Plaintiff Thomas H. Christophel ("Plaintiff"), as Administrator of the Estate of Dr. Janet Y. Christophel ("Dr. Christophel"), deceased, opposes the motion and cross moves for summary judgment on his claims for common-law negligence, medical malpractice, and wrongful death.

Background

This action for wrongful death and medical malpractice arises out of the death of 29-year-old Dr. Christophel, who committed suicide on May 15, 2011, by self-administering an overdose of Propofol.[2] At the time of her death, Dr. Christophel was a second-year resident of anesthesiology at New York-Presbyterian Hospital/Weill Medical College of Cornell University Anesthesiology Residency Training Program ("NYPH" or "NYPH/Weill"). The NYPH/Weill residency program exposes residents to the practice of anesthesia at three hospitals: (1) NYPH; (2) Hospital for Special Surgery ("HSS"); and (3) Memorial Sloan-Kettering Cancer Center

Upon beginning residency in July of 2010, Dr. Christophel had one episode of Fentanyl abuse and subsequently abused Midazolam on more than one occasion for one month[3] (Weiner ME[4] at 1). Dr. Christophel began self-administering Propofol in August 2010, when she started a

[1] Bridge Back is the only remaining defendant in the main action. As indicated herein, the claims against the other direct defendants have been dismissed.
[2] Propofol is a potent anesthetic that is administered intravenously in a hospital operating room setting and is only available at hospital pharmacies.
[3] Fentanyl is an opioid pain medication. Midazolam is a medication used, *inter alia*, to provide preoperative sedation. Both drugs are typically administered in a hospital operating room setting like Propofol.
[4] Dr. Weiner's ME of Dr. Christophel (Defendant's Motion Exh. V) is cited herein as "Weiner ME" for brevity. The Weiner ME was conducted in connection with Dr. Christophel's voluntarily joining the Medical Society of the State of New York Committee For Physician Health ("CPH"), after she returned to work following her treatment at Bridge Back. CPH is an advocacy group providing non-disciplinary, confidential assistance to, *inter alia*, physicians, residents, and medical students experiencing problems from stress, including substance abuse and other psychiatric disorders.

rotation at the HSS (Id.). At some point during the following weeks, Dr. Christophel began self-administering surgical doses up to 150 cc (Id. at 2).

On August 31, 2010, Dr. Christophel took a nap in the on-call room and inadvertently slept through her alarm, and after an attending noticed that Dr. Christophel looked disoriented, she was sent home (Id. at 2, 8). That evening, Dr. Christophel's sister, Mihee Kim ("Kim"), who was living with Dr. Christophel at the time, found Dr. Christophel asleep with an IV and shaking in her bed. In response, Kim called Dr. Christophel's boyfriend, Dr. Frank Buttacavoli ("Buttacavoli"), who advised her to cut the IV to stop the flow of Propofol (Kim EBT at 46-49). That evening, both Kim and Buttacavoli encouraged Dr. Christophel to come clean to the program director of the anesthesiology residency program, Dr. Maria Bustillo ("Dr. Bustillo") (Weiner ME at 2; Kim EBT at 51).

Dr. Christophel's next shift was on September 2, 2010. Upon arrival to work, a colleague informed Dr. Christophel that Dr. Bustillo was expecting her (Weiner ME at 2). Dr. Bustillo testified that she summoned Dr. Christophel to have "evaluated by work health and safety" after the attending told her they could not wake her up for rounds and given that there was a missing bottle of Midazolam (Bustillo EBT at 38, 41, 120-121). At this meeting, Dr. Christophel admitted her Propofol abuse to Dr. Bustillo and, as a result, Dr. Bustillo administratively referred her to NYPH's Workforce Health and Safety Clinic ("Workforce") for intake and evaluation (Bustillo EBT at 39, 122-125).

I. Treatment[5]

On September 2, 2010, Dr. Christophel completed intake and evaluation with Workforce clinical case manager Mary DeSantis, RN ("Nurse DeSantis" or "DeSantis"). Intake and

[5]Unless otherwise noted, the facts in this section regarding Dr. Christophel's treatment by Bridge Back, are based on the November 21, 2016 affidavit of Gary Butchen, the President and Chief Executive Officer of Bridge Back and the documentary evidence attached thereto.

evaluation involves (1) pre-placement; (2) a medical evaluation; (3) a psychiatric evaluation; and (3) lab work, toxicology screening, and a urine test.[6] Nurse DeSantis completed pre-placement, where she scheduled Dr. Christophel's appointments with medical providers at Workforce and elaborated on services that are either provided by Workforce or which Workforce has access to outside the hospital. A nurse practitioner, Irma Noreaga, NPRN, completed the medical evaluation of Dr. Christophel (Moore EBT at 137-138; DeSantis EBT at 47).

On September 7, 2010, Dr. Christophel underwent a psychiatric evaluation with Dr. Joanna Moore ("Dr. Moore") , who is an addiction psychiatrist, and the Director of Occupational Psychiatry at Workforce (Moore EBT at 28, 46, 91; DeSantis EBT at 74-78). Dr. Moore testified that Dr. Christophel denied depression and based on her responses to questions and her appearance, Dr. Moore determined that Dr. Christophel was not depressed (Moore EBT at 157-159). Dr. Moore also testified that based on Dr. Christophel's denials to questions about wanting to hurt herself, or a plan to do so, she determined that Dr. Christophel did not have any suicidal ideation (Id at 165-166). Following the evaluation, Dr. Christophel had her first session with Dr. Moore with respect to Dr. Christophel's treatment; Dr. Moore referred Dr. Christophel to a six-week intensive outpatient program ("IOP") at Bridge Back before she would be considered for return to work (Moore EBT at 34; DeSantis EBT at 78-79, 81-84).

Bridge Back treated Dr. Christophel on an outpatient basis, regarding her Propofol use, from September 8, 2010 (date of intake) until her suicide on May 15, 2011. Bridge Back last

[6] Dr. Christophel was not tested for Propofol. Dr. Moore, who as noted above is an addiction psychiatrist and the Director of Occupational Psychiatry at Workforce, explained at her deposition that Propofol has a limited detection window. Dr. Moore also testified, "[t]here is only one lab that tests for Propofol [a]nd it has a three to four week turn around before you get the results" and a test would not have been helpful because Dr. Christophel acknowledged her Propofol use (Moore EBT at 146-147).

communicated with Dr. Christophel on May 2, 2011, 13 days before her suicide; it wrote a final discharge report on May 17, 2011.

On September 8, 2010, Dr. Christophel executed an attendance agreement with Bridge Back. The agreement specifies that Dr. Christophel's treatment schedule was tailored to meet her needs, that consistent attendance was essential to successful treatment, and that Bridge Back expected her compliance with the agreed-upon treatment schedule. The agreement reflected that Dr. Christophel's treatment would begin on September 10, 2010, and that a medical assessment would be done on September 23, 2010.

On September 9, 2010, Ms. Peta Gaye Hermitt ("Ms. Hermitt"), an alcohol and certified substance abuse counselor at Bridge Back[7], completed initial determination/level of care assessment of Dr. Christophel. Ms. Hermitt reported that, based on the initial evaluation, Dr. Christophel did not present symptoms that necessitated "acute hospital care, acute psychiatric care, or other intensive services [that could not] be provided in conjunction with outpatient care or [that] would prevent [Dr. Christophel] from participating in a chemical dependence service" (Demma EBT at 84-85).

A biopsychosocial assessment was also conducted by Ms. Hermitt on September 9, 2010 in which Dr. Christophel denied any mental health issues, but admitted trying the drug Fentanyl once in May 2010 and using the drug Midazolam more than once in May 2010. Dr. Christophel listed Propofol as her primary drug and reported taking the drug daily by injection for two to three weeks, and that she built up a tolerance to it.

Anthony Demma ("Demma"), the Assistant Clinical Director of Bridge Back and the primary counselor ("PC") of its clinical staff,[8] testified at his deposition that a level of care

[7] Ms Hermitt is also a licensed clinical social worker.
[8] As PC of the clinical staff at Bridge Back, Demma was responsible for coordinating and managing Dr. Christophel's treatment plan, for assuring that Dr. Christophel's records were maintained, and for assuring that all services rendered to her were provided in accordance with

greater than IOP was not considered because it was not necessary based on the initial evaluation and because Propofol, as a drug of choice, does not preclude IOP. According to Demma's testimony, the past symptoms that were reported by Dr. Christophel, including memory loss, blackouts, diet or appetite problems, sleep dysfunction, and anxiety, past and present symptoms of guilt, shame, loss of self-respect, and resentment, fall within normal limits of someone who is using drugs. Demma also testified that because Dr. Christophel did not report any withdrawal symptoms such as chills, fevers, headaches, sweats, vomiting, cramps, constipation and diarrhea, and denied suicidal and homicidal ideations, she did not present a mental status that could not be treated on an outpatient basis, and a greater level of care was not necessary.

With respect to Dr. Christophel's substance use history, Demma testified that the fact she experimented with two other drugs and built up tolerance easily with the third drug indicated the progression of her disease. Demma testified that this progression did not indicate the need for a greater level of care than IOP. The record also contains an "Admitting Psychiatric Assessment," of Dr. Christophel dated September 20, 2010, by Dr. Jenifer C. Stelwagon, an addiction psychiatrist on defendant's staff, in which it was noted that Dr. Christophel had no suicidal tendencies.

During the course of IOP (or Phase I), Dr. Christophel was on administrative leave from her residency. Between September 10, 2010 and October 5, 2010, Dr. Christophel attended 11 three-hour long Phase I intensive outpatient sessions, submitted to required weekly urine tests, and attended individual counseling sessions with Demma at Bridge Back to Life.[9] Phase I focuses on developing the client's understanding about the disease of addiction, developing the client's ability to identify the internal and external triggers related to substance abuse, the

the treatment plan. Demma also holds the following titles: (1) PsyD (*i.e.*, doctor of psychology), and (2) LCSM (*i.e.*, licensed clinical social worker)

[9] Dr. Christophel also submitted to urine tests and toxicology screens at Workforce during this period; these tests do not demonstrate Propofol use; however they did show use of alcohol, marijuana, and some other drugs.

negative consequences, the importance of developing a relapse prevention program, and the positive aspect of remaining clean and sober.

On October 6, 2010, Dr. Christophel executed the second attendance agreement, which reflected Phase II of her treatment plan. The only modification was that Dr. Christophel was no longer scheduled to attend intensive outpatient sessions. Instead, Dr. Christophel was scheduled to attend three 90-minute long group therapy sessions per week. Between October 8, 2010 and October 25, 2010, she attended eight group therapy sessions.[10] According to Bridge Back's Progress Note dated October 13, 2010, Dr. Christophel revealed at a group meeting that she had used alcohol during the prior week, and that she agreed with the group that using alcohol could put her in a "high risk situation."

After completing 15 sessions at Bridge Back, Dr. Christophel was cleared to return to work on October 27, 2010, by Workforce personnel. Dr. Moore testified that once there was a verbal confirmation that Dr. Christophel was compliant with treatment and in recovery, she was at a point where she could return to work. Dr. Jacqueline Vorenkamp, the corporate medical director of Workforce, organized a conference call to present this information to the NYPH/Weill and Workforce personnel involved in Dr. Christophel's recovery. In addition to discussing these circumstances, they determined restrictions that would take place upon Dr. Christophel's return to work (Moore EBT at 57-58, 60-61, 83-84). There is no written record of the conference call. On October 27, 2010, Dr. Christophel executed a Confidential Re-Entry Agreement ("return to work agreement") between her and NYPH, under which "[she] agree[d] to release and discharge the Hospital, its trustees, agents, employees, and the Hospital's medical staff and residency program leadership from any claims…damages or causes of actions of any

[10] Dr. Christophel was involved in three groups: (1) Impaired Professionals Group (Mondays from 6:00 p.m. to 7:30 p.m.); (2) Women's Group (Wednesdays from 6:00 p.m. to 7:30 p.m.); and (3) Relapse Prevention (Fridays from 6:00 p.m. to 7:30 p.m.).

nature whatsoever arising out of, or related to or in any way connected with any...act or omission in connection with this agreement."

II. Return to Work

Dr. Christophel officially returned to work on November 8, 2010. In accordance with the return to work agreement, Dr. Christophel met with Nurse DeSantis and Dr. Moore at Workforce; submitted to weekly urine tests, toxicology screens, and periodic track mark inspections at Workforce; was monitored by personnel in the department she was in; and agreed to continue counseling at Bridge Back.

Bridge Back was not consulted by the hospital and offered no opinion regarding the decision to authorize Dr. Christophel's return to work or the terms of the return to work agreement. On November 8, 2010, Dr. Christophel executed an updated attendance agreement with Bridge Back, reflecting her return to work. In accordance with the updated attendance agreement, Dr. Christophel was scheduled to attend group therapy for professionals once a week to accommodate her work schedule.[11] Additionally, Dr. Christophel attended once monthly individual session with Demma and submitted to weekly urine tests at Bridge Back. On December 28, 2010, Demma reported that Dr. Christophel said she felt glad to return to work although she felt shameful that others knew of her substance use.

With respect to the group sessions, Dr. Christophel attended 17 group sessions between November 8, 2010 and May 2011; no counselor or employee at Bridge Back ever reported signs or symptoms of depression or suicidal ideations. Although Dr. Christophel was encouraged to

[11] Although Dr. Christophel attended Bridge Back's weekly group sessions on a voluntary basis, her failure to attend would have resulted in a discussion with her supervisors and Dr. Moore (DeSantis EBT at 206-207). Initially, however, Dr. Christophel did not attend the sessions upon her return to work due to a scheduling conflict with her rotation schedule. Nurse DeSantis testified that Dr. Christophel was allowed absences on the condition that she informed DeSantis and notified Bridge Back in advance (Id. at 129-131; 133-135 Bridge Back to Life, Case Conference Note, Attached to Defendant's Motion, Exh. D, last page).

attend group sessions on a regular basis, she was resistant to attending self-help groups for the purpose of maintaining abstinence and failed to attend sessions on a regular basis. Demma testified that Dr. Christophel did not have consistent attendance at all scheduled sessions, but the majority of her absences, noted in the Bridge Back records, were due to work. With respect to Dr. Christophel's individual sessions with Demma, Demma testified that "there was some sort of barrier or resistance to attending an individual counseling [session] for 45 minutes" so he modified her schedule to "either meet with her before or after one of the group sessions" (Demma EBT at 133).

Additionally, Dr. Christophel was reintegrated on rotation, without on-call for a month and without access to prescription substances, to ease her into full operating room responsibilities (Moore EBT at 63; Weiner's ME at 3, 7; Bustillo EBT at 73-75). Prior to returning to the floor, Dr. Christophel was assigned to pre-admission testing ("PAT") (*i.e.*, where patients are evaluated before surgery) from November 8, 2010 through December 10, 2010. Thereafter, Dr. Christophel completed, and performed well in, a rotation in obstetrics, one in neuro intensive care unit ("neuro ICU"), and ended in orthopedics before resuming duties as an anesthesiology resident.

On March 6, 2011, Dr. Christophel returned to the operating room floor. Upon returning, Dr. Christophel joined the Medical Society of the State of New York Committee For Physician Health ("CPH"), which an advocacy group which provides non-disciplinary, confidential assistance to, *inter alia*, physicians, residents, and medical students experiencing problems from stress including substance abuse and other psychiatric disorders. She joined CPH "on [her] own volition [for advocacy] when applying for future jobs and out of state licenses" (Weiner ME; DeSantis EBT at 135). Dr. Weiner conducted his ME of Dr. Christophel, in connection with Dr. Christophel joining CPH. The ME reflects that Dr. Christophel reported that her return to work

was "awkward" because "[s]omebody in the department slipped [and gossiped]" about her Propofol abuse (Weiner ME at 3). Dr. Weiner noted in the ME that although Dr. Christophel was "bright and motivated" and would "no doubt 'perform' well on her road to reintegration as a resident," in his opinion, she was still "at risk for relapse into substance abuse or other behaviors that could affect her ability to care for patients....Without the means to cope with professional and personal stress, she will be left with feeling that she might be inclined to anesthetize again, or if she does not, she will be susceptible to symptoms of depression" (Weiner ME at 10-11). Demma testified that he never saw the ME (Demma EBT at 90-91).

On March 28, 2011, Dr. Christophel expressed an unwillingness to Bridge Back to attend self-help sessions but agreed to attend Smart Recovery Online[12] under her agreement with CPH. Demma testified that the online program was more suitable to Dr. Christophel because she did not want to socialize or interact or establish a sober support network (Demma EBT at 136). On April 11, 2011, Dr. Christophel completed a form for CPH in which she answered "no" in response to a question as to whether she ever experienced suicidal ideation (Defendant's Motion, Exh. P).

Dr. Christophel returned to HSS in early-May of 2011, and reported on May 5, 2011 that "HSS was eerie remembering prior experiences at HSS" (DeSantis EBT at 151-155). On May 2, 2011, Dr. Christophel tested positive for alcohol (or EtG/EtS), which Demma reported to Nurse DeSantis and CPH. The record reflects that Dr. Christophel admitted to having a glass of champagne at her friend's wedding with her boyfriend.

Demma testified that Dr. Christophel's use of alcohol did not cause him to consider increasing the level of treatment she was receiving at the time because Dr. Christophel communicated her acceptance and understanding of the disease of addiction, the negative

[12] According to Demma, Smart Recovery is an "online 12-step program that has certain components [that are different than]... self-help groups like AA or NA" in that the program does not include "the spiritual aspect" that is a component of AA or NA (Demma EBT at 135-136).

consequences related to addiction, and her responsibilities related to addiction. Demma explained at his deposition that one must understand the negative consequences in order to develop a relapse prevention program. Initial relapse prevention skills include being aware of urges and cravings. Demma testified that "[Dr. Christophel] reported having a full understanding of the urges and cravings related to substances" and thus she was in the beginning stage of relapse prevention (Demma EBT at 147). Demma also testified that, according to Dr. Christophel's self-reporting, Dr. Christophel was not worried about relapsing upon her return to in the operating room and that, on the contrary, she was confident about resuming full operating room duties and administering anesthetic drugs. When asked whether he was concerned that Dr. Christophel would relapse once she returned to work he responded that "she was being monitored by EAP (i.e. Employment Assistance Program)... Mary DeSantis (of Workforce); her residency program directors, Dr. Bustillo and Dr. Moore. So those three people I had confidence in them to monitor her on a regular basis" (Id at 185).

Additionally, Demma testified that Dr. Christophel informed him of her return to HSS "where the negative consequences happened" and that "she felt uncomfortable being in the same place, not because of the [presence] of Propofol, but because of the people who were involved...[S]he felt there was a great deal of shame and guilt involved, and she felt like people were judging her" (Demma EBT at 142-144). Demma testified that he responded with encouragement and advised Dr. Christophel "to remain focused on herself and not to be concerned about what other people thought of her" (Demma EBT at 144). On May 3, 2011, Demma prepared a case conference note, reflecting that Dr. Christophel began a new rotation and would be absent from treatment (*i.e.,* Professionals Group therapy session once a week) for four weeks, which was confirmed by Nurse DeSantis.

III Weekend of Dr. Christophel's death

In May 2011, it became apparent to Kim and Buttacavoli that Dr. Christophel had relapsed upon returning to HSS. The record shows that Dr. Christophel had not used Propofol from September 2010 until her relapse at some point in May 2011, during the week of her death (Buttacavoli EBT at 56). Buttacavoli testified that, on May 13, 2011, he called Dr. Jaclyn Hechtman ("Hechtman"), who went to medical school with Dr. Christophel and with whom she was socializing with that night, and expressed his concern and requested that she keep an eye on Dr. Christophel (Buttacavoli EBT at 79-80; Hechtman EBT at 30, 86). Hechtman testified that after her conversation with Buttacovoli, she asked Dr. Christophel directly if, and Dr. Christophel conceded that, she was using Propofol again (Hechtman EBT at 31-32).

Buttacovoli testified that, on May 14, 2011, Dr. Christophel admitted to him by phone that she had relapsed on Propofol and expressly stated that Propofol was so easy to obtain at HSS. (Buttacavoli at 41; 72-73). Hechtman testified that she went to Dr. Christophel's apartment that morning and watched Dr. Christophel dispose of "a case of [Propofol]…down the sink" (Hechtman EBT at 35-39, 41-42, 111-112). Hechtman testified that "[Dr. Christophel] was sad, unsure what to do next, but she came to the conclusion more on her own that anesthesiology wouldn't be safe…[and they] talked about what to do next" with Buttacavoli, who was on speakerphone with them (Id at 38- 41; 91-93). Hechtman testified that she stayed with Dr. Christophel until after her phone conversation with Dr. Bustillo regarding her decision to resign from the residency program and then left Dr. Christophel alone in her apartment (Hechtman EBT at 43-44).

Dr. Bustillo supported her decision and stated she would send the chief resident, Dr. Gerard DeGregoris ("Dr. DeGregoris"), to her apartment the following day to check on her

(Bustillo EBT at 90, 176).[13] At around 7:00 p.m., Dr. Christophel emailed DeSantis, Mr. Demma, and Karen Clancy of CPH to advise them of her decision to resign and her plan to move to Texas to live with Buttacavoli and take time off from medicine. Dr. Christophel thanked the email recipients for "going above and beyond what was required" of their jobs and wrote that she planned to see or speak with them once or twice before leaving New York (Defendant's Motion, Exhibit Q).

The following day, on May 15, 2011, Dr. Christophel overdosed on Propofol. According to Dr. DeGregoris, that morning he spoke with Dr. Christophel briefly on the phone, and then visited her at her apartment for five or ten minutes (DeGregoris EBT at 20-21, 39, 45). With respect to the phone conversation, Dr. DeGregoris testified that Dr. Christophel informed him of her resignation and explained she felt the temptation to misuse drugs was too great and had thus decided to remove herself from that temptation and pursue a different line of work (DeGregoris EBT at 23-24). Dr. DeGregoris described her tone of voice as being "thoughtful and reasonable" (DeGregoris EBT at 26-28). Dr. DeGregoris testified that, when he visited Dr. Christophel at her apartment, her tone was "normal [and] not distressed," her speech was clear and coherent, and that she did not do or say anything to suggest she was not of sound mind, that she was depressed, or that she was considering suicide (DeGregoris EBT at 29-33).

Buccacavoli testified a "cloud of depression" came over Dr. Christophel that day (Buttacavoli EBT at 92-93). Buccacavoli, Kim and Hechtman testified Dr. Christophel was worried about her decision to resign, her loans, and her future career in medicine (Buttacavoli EBT at 92-93; Kim EBT at 71-72; Hechtman EBT at 50). Buttacavoli testified that when neither he nor Kim could get a hold of Dr. Christophel later that afternoon, he called Dr. Christophel's

[13] Dr. Bustillo explained in her testimony that the chief residents take a "big brother/sister" role to the residents (Bustillo EBT at 91-92). She testified that after the chief resident left Dr, Christophel's apartment, he called her and told her Dr. Christophel looked good and was in good spirits (Id. at 92-93).

doorman and Hechtman to go to Dr. Christophel's apartment (Buttacavoli EBT at 95). The doorman and Hechtman found Dr. Christophel's body and a hand-written note, in which she apologized "for not being strong enough" (Hechtman EBT at 46-48, 55, 58, 96-99).

All the people who knew Dr. Christophel well testified that they were shocked or surprised by her suicide, and that, for as long as they knew her, Dr. Christophel had never displayed any behaviors indicating she might commit suicide.[14] Dr. Bustillo, Dr. Moore, and DeSantis all testified Dr. Christophel's suicide was a shock because she did not appear depressed, because she looked well, seemed happy, and was continuing appropriately with her treatment.[15] Furthermore, Dr. DeGregoris testified that Dr. Christophel's suicide was a complete shock because "she seemed fine" when he had seen her a few hours before her death (DeGregoris EBT at 36-37, 38).

Demma prepared and executed a client discharge report on May 17, 2011, in which he reported that Dr. Christophel attended 48 sessions total, 40 of which were group sessions and eight individual. In addition, Demma reported, and testified, that Dr. Christophel had not achieved the following five goals: (1) to attain abstinence from alcohol; (2) with respect to drug goals, to return to work and remain gainfully employed; (3) to establish a sober support network; (4) with respect to emotional goals, to attain optimum ego, and mental health, functioning (*i.e.*, that the client achieves a better or an improved mental status than when the client first came in to

[14] Buttacavoli, Dr. Christophel's family, and Hechtman testified to the shock of Dr. Christophel's suicide (Buttacavoli EBT at 59-60, 96-97; Kim EBT at 35, 37-38,56,59-60;Plaintiff EBT at 29-31, 33-34; Jong Christophel EBT at 24-27, 28, 37-39, 44-45; Hechtman EBT at 65-66, 68-71).
[15] Nurse DeSantis testified that, during her last meeting with Dr. Christophel on May 12, 2011, Dr. Christophel did not exhibit any signs or symptoms that would indicate she was at risk of committing suicide; on the contrary, she was "smiling and...really proud" because "she was so happy" she passed her second-year residency exam (DeSantis EBT at 155-160). Dr. Bustillo, Dr. Moore, and DeSantis testified to the shock of Dr. Christophel's suicide (Bustillo EBT at 113-115; Moore EBT at 201-202; DeSantis EBT at 63, 160-162).

the center); and (5) to at least understand the hazard related to nicotine dependency and to attain some sort of abstinence from it.

Plaintiff originally brought this action against NYPH/Weill, Workforce, CPH, and Bridge Back. Defendants NYPH/Weill, Workforce, and CPH moved to dismiss the claims against them based, *inter alia*, on the Confidential Re-Entry Agreement's release clause that Dr. Christophel signed on October 27, 2010, when she was cleared to return to the residency program. By decision and order dated December 6, 2013, and a supplemental order dated March 13, 2014, Justice Alice Schlesinger granted the motion to dismiss the claims against NYPH and Workforce, but denied the motion as to CPH. The complaint alleged that CPH's failure to turn over Dr. Weiner's medical exam would have alerted the other defendants as to Dr. Christophel's risk of relapse, was a proximate cause of Dr. Christophel's death.

CPH appealed, and by decision and order, the Appellate Division, First Department reversed and dismissed the claims against CPH. See Christophel v. New York-Presbyterian Hosp, 126 AD3d 435 (1st Dept 2015). Specifically, the court wrote:

> CPH owed no duty to turn over the report of the [ ] medical exam since the medical records were confidential... Moreover, there is no evidence indicating that decedent was suicidal or that CPH should somehow have anticipated that she was... In any event, even assuming the existence of such a duty, upon receipt of the report, CPH alerted the other defendants as to the potential for relapse and requested that they serve as decedent's monitor and therapist.[16] Additionally, we note that CPH does not practice medicine...[or] provide any medical treatment.

Id. at 435 (internal citations omitted).

On December 16, 2014, Bridge Back filed a third-party summons and complaint asserting claims sounding in contribution and indemnity against third-party defendant, NYPH. NYPH filed its answer on March 31, 2015, seeking dismissal of the third-party complaint, together with costs and disbursements.

[16]As noted above, Demma testified that he never saw the ME report from CPH.

In this action, plaintiff alleges that Bridge Back is liable for the professional malpractice, medical malpractice and negligence of its employees and agents that participated in the treatment of Dr. Christophel's substance use disorder. Plaintiff contends that, between September 8, 2010 and May 15, 2011, Bridge Back, its employees, and its agents, departed from the standard of care in that it failed to competently and properly treat Dr. Christophel's substance use disorder, and that based on the alleged departures, the defendant knew or should have known that Dr. Christophel would relapse, resulting in serious injury or death.

Specifically, the plaintiff contends, *inter alia*, the defendant committed malpractice in its treatment of Dr. Christophel in that it: (1) failed to competently treat Dr. Christophel for Propofol abuse given the lure of the drug and potential for relapse and the high percentage of fatalities suffered by Propofol abusers; (2) failed to become informed as to the appropriate treatment for Propofol abusers or to recognize the potential for relapse among health care providers that are substance abusers; (3) allowed Dr. Christophel's absences from 12 (or 30%) of her scheduled Phase II Group Therapy sessions, due mostly to work scheduling conflicts; (4) failed to require Dr. Christophel to attend self-help meetings regularly; (5) failed to require Dr. Christophel to develop a sober support network and to complete a relapse prevention plan; and (6) failed to formulate and undertake an adequate intervention plan upon learning that Dr. Christophel failed to abstain from alcohol twice during the period in question, including referring her to a higher level of treatment, such as an inpatient treatment.

Plaintiff also alleges that defendant committed malpractice as it failed to undertake a intensive comprehensive evaluation of Dr. Christophel, and upon such evaluation, should never have accepted Dr. Christophel as a patient, and should have referred her to an inpatient treatment facility specializing in health care providers. Plaintiff further alleges that defendant was negligent and committed medical malpractice in that it allowed Dr. Christophel to return to

work without clearing her return to work, without participating in the return to work decision-making process, and without noting her progress in therapy. The plaintiff contends that the defendant should have recommended "no return to work" as she failed to complete any of her goals during eight months of treatment.[17]

The Motion

In Bridge Back's motion, it argues that it is entitled to summary judgment on the sole ground that Dr. Christophel's suicide was not legally foreseeable as a matter of law. In support of its argument, Bridge Back relies on First Department decision dismissing claims against CPH, and deposition testimony and other evidence that Dr. Christophel's behavior during the weekend of her death did not arouse any concern of a potential suicide, and that those who knew Dr. Christophel were shocked and surprised by her suicide. Bridge Back also points out that Christophel's assessment and treatment records are devoid of any references to suicidal thoughts or actions. With respect to plaintiff's claims for lost wages and employment benefits, Bridge Back argues that such claims must be dismissed as the evidence establishes that Dr. Christophel resigned from her residency before she died.

In support of its motion, Bridge Back submits the affidavit of Mr. Gary Butchen ("Mr. Butchen"), President and Chief Executive Officer of Bridge Back to Life Center, Inc. who outlines defendant's care and treatment of Dr. Christophel, as indicated in the background section of this decision. Bridge Back also submits the affirmation of a physician, Dr. Laurence Westreich ("Dr. Westreich"), who is board certified in psychiatry and has subspecialty certifications in addiction psychiatry and forensic psychiatry issued by the American Board of Psychiatry and Neurology.

[17]Although plaintiff's Amended Bill of Particulars includes additional departures, as such departures are not substantiated by plaintiff's expert, they are presumed to be abandoned.

Upon review of the pleadings, medical records, deposition transcripts, and other records, Dr. Westreich opines to a reasonable degree of psychiatric certainty that Dr. Christophel's suicide was an impulsive act and not reasonably foreseeable to Bridge Back. Moreover, he opines that there was no reasonably available information, such as reported suicidal ideations, which should have alerted Bridge Back to an elevated risk of foreseeable suicide.

In support of his opinions, Dr. Westreich points to the sworn testimonies by those who interacted with Dr. Christophel the weekend she died, including medical professionals likely to recognize the signs and symptoms of depression and suicidal ideations, who were all shocked or surprised by Dr. Christophel's suicide. Furthermore, he explains that future plans are evidence against suicidality, and points to (1) Dr. Christophel's last email, (2) the website left open on her computer regarding jobs in Texas, and (3) her contemplating future plans to her sister, friends, and colleagues.

In addition, Dr. Westreich opines that the risk Dr. Christophel would commit suicide was properly and repeatedly assessed, and self-assessed by Dr. Christophel herself, between September 2010 and May 2011. In support of his opinion, he points to three assessments by three independent clinicians during that period (Dr. Moore, the addiction psychiatrist at Workforce, Dr. Jennifer Stelwagon of Bridge Back, and Dr. Weiner of CPH), and notes that none of these assessments reported suicidal ideation. He also points out the Dr. Weiner did not share his report with Bridge Back and even if he had, Dr. Weiner reported no risk of suicide. Moreover, he cites to Dr. Christophel's own handwritten form for CPH from April 2011, in which she denied suicidal ideation or prior suicide attempts. He explains that this denial is particularly significant to the issue of foreseeability of suicide because Dr. Christophel herself was the most aware of her own thoughts and actions regarding suicidality, and she indicated no plan or contemplation of suicide a month before her death.

Plaintiff opposes the motion and cross moves for summary judgment, arguing that the record demonstrates that Bridge Back deviated from accepted standards of care in its treatment of Dr. Christophel. With respect to his opposition, the plaintiff argues that the defendant failed to satisfy its burden of demonstrating its entitlement to summary judgment based on its allegation that Dr. Christophel's suicide was an "impulsive act" and therefore not foreseeable. To the contrary, the plaintiff argues that Dr. Christophel's relapse on or about May 10, 2011, was foreseeable based on the negligent and inadequate care afforded to Dr. Christophel by Bridge Back, and thus Dr. Christophel's death was also foreseeable.

In support of this position, the plaintiff attaches supporting medical literature drawing a causal connection between substance abuse and suicide. As for the defendant's expert's opinion, regarding foreseeability, the plaintiff argues that Dr. Westreich relies upon periods that precede Dr. Christophel's relapse on or about May 10, 2011, which are not relevant because Dr. Christophel did not appear to be suicidal until after relapse. As for the defendant's argument that the Appellate Division's dismissal of the claims against CPH warrants a grant of summary judgment in favor of Bridge Back, plaintiff argues that the duty owed to Dr. Christophel by Bridge Back is not comparable to the duty owed by CPH.

In support of his opposition and cross motion for summary judgment, plaintiff submits the affirmation of Eric B. Hedberg, M.D. ("Dr. Hedberg"), a physician duly licensed to practice medicine in Alabama, who is board certified in psychiatry and addiction medicine and completed an anesthesia residency prior to psychiatry,[18] Upon review of the pleadings,

[18]Defendant argues that the court should not consider Dr. Hedberg's affidavit as he affirms under CPLR 2106, which is impermissible since he is not a physician licensed in the State of New York; his affirmation relies on inadmissible hearsay contained in the deposition testimony of Dr. Christophel's boyfriend as to conversations he had with Dr. Christophel before she died; and the affirmation exceeds 25 pages, in violation of Rule 14 (b)of the Local Rules of the Supreme Court, New York County, Civil Branch, (limiting affirmations and affidavits to twenty-five pages in length "[u]nless advance permission otherwise is granted by the court for good cause..."

deposition transcripts, and medical records, Dr. Hedberg opines, to a reasonable degree of psychiatric certainty, that Bridge Back failed to properly and competently treat Dr. Christophel for her substance use addiction between September 2010 and May 2011, as defendant did not help or cause Dr. Christophel to make any significant lifestyle change, did not pay ongoing attentiveness to underlying mental health issues, and did not aid in her dealing with situational factors that can drive substance abuse, such as her return to work at the place of her initial abuse on Propofol. In support of these conclusions, Dr. Hedberg cites to records where Dr. Christophel admitted feelings of shame and guilt of her Propofol use, that her colleagues knew of her Propofol use, that she resented what her treatment entailed. Dr. Hedberg opines that such reluctance to participate in therapy compounded by her desire to return to work evidenced that she had the wrong goal and wrong attitude and was not committed to treatment, a formula for relapse and possible death.

With respect to foreseeability, Dr. Hedberg opines to a reasonable degree of psychiatric certainty that Bridge Back "should have foreseen Dr. Christophel's death by suicide on May 15, 2011, as it was preceded by her foreseeable relapse on Propofol on or about May 10, 2011." He further opines that Dr. Christophel's relapse was foreseeable as the testimony shows, she had not achieved any of her goals in over eight months of psychotherapy, had not formed a sober support network, and had not completed a relapse prevention plan, and had two lapses with

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and cautions that "[m]aterials presented in violation of this Rule will not be read"). These arguments are unavailing. In his reply affidavit, Dr. Hedberg certifies that his opinions in his affirmation in support of plaintiff's cross motion are correct, and any hearsay statements in the expert's affidavit may be considered in opposition to summary judgment since it is not the only evidence relied on by Dr. Hedberg (See Douglas H. v. Louise H., 138 AD3d 497, 498 (1st Dept 2016)(forensic report admitted into evidence where it does not rely to a significant extent on hearsay statements); Derrick v. North Star Orthopedics, PLLC, 121 AD3d 741, 743 (2d Dept 2014)(hearsay statement may be used to oppose summary judgment as long as it is not the only evidence submitted in opposition to the motion). Finally, in its discretion, the court shall consider Dr. Hedberg's affirmation despite its length.

alcohol, but yet she was still returned to the operating room setting where she had free access to, and had first succumbed to, Propofol, her drug of choice. He opines that after her lapses with alcohol, the proper treatment would have been a referral to a higher, residential level of care. He also explains that having a sober support network and completing a relapse prevention plan are essential to successfully treat substance use disorder.

Dr. Hedberg opines that defendant's failure to compel Dr. Christophel to attend once-weekly group sessions, self-help groups (*e.g.*, AA meetings), and allowing her to miss multiple therapy sessions due to work sent an improper message to Dr. Christophel that (1) her treatment was not as important as her work schedule, and that (2) defendant felt her addiction was under control. As a result of its failure, Dr. Hedberg opines that Dr. Christophel acquired no recovery skills to prevent relapse and that in any competent treatment program, she would not have been allowed to return to work due to the risk of relapse and death. Dr. Hedberg opines that Bridge Back departed from the standard of psychiatric care in its failure to communicate that Dr. Christophel was not ready to return to anesthesia, which, in a safety sensitive position such as a physician, Dr. Hedberg states is one of the most important tasks.

Dr. Hedberg opines to a reasonable degree of psychiatric certainty that Dr. Christophel's suicide was a combination of her impaired cognitive functioning, her perceived "failure," her massive student loan debt, and probable impulsive act to stop the pain and embrace oblivion. To substantiate this opinion, he cites, extensively, to Buttacavoli's testimony transcripts.[19] In addition, Dr. Hedberg cites to Dr. Christophel's resignation email and opines that she herself summarized as to why she required residential treatment specializing in the treatment of healthcare professions to effectively address her shame, guilt, denial, and resistance to treatment

[19]To the extent Dr. Hedberg relies on testimony from Buttacavoli to argue that Dr. Christophel's suicide was foreseeable, it should be noted that Buttacavoli's knowledge of Dr. Christophel's mental state in the weeks and days leading up to her death cannot be imputed to Bridge Back.

along with back-to-work issues. Dr. Hedberg notes Demma's testimony that no one at Bridge Back had ever treated anyone with a Propofol addiction, and adds that had Bridge Back personnel made even a minimal effort to educate themselves about the seriousness of Propofol addiction, they would have learned of the extremely high death rate among anesthesia residents.

Finally, the plaintiff asserts that defendant's departures from the standard of addiction medicine treatment proximately led to Dr. Christophel's relapse, and that her relapse was the natural and probable consequence of the alleged departures. Plaintiff argues that even if Dr. Christophel's closest friends did not recognize signs that she was at risk for suicide, or even if Dr. Christophel was making future plans hours before her death, the reality is Dr. Christophel's relapse and abuse of Propofol, for several days, impaired her judgment and elevated her risk of suicide. With respect to the impairment of Dr. Christophel's judgment, Dr. Hedberg opined that "Propofol and drugs of abuse affect the frontal cortex when executive decisions are made. The frontal cortex is the primary area of the brain that inhibits impulses. Dr. Christophel apparently impulsively committed suicide. There is no evidence that she planned the suicide in a pre-meditative manner. Because of the relapse she was not making rational decisions" (Hedberg's Affirmation ¶ 124).

In opposition to plaintiff's cross-motion, and in support of its summary judgment motion Bridge Back raises new arguments and submits an additional expert affidavit from Dr. Louis E. Baxter, Sr. ("Dr. Baxter"), a physician who is board certified in addiction medicine by both the American Society and the American Board of Addiction Medicine.[20] Contrary to Dr. Hedberg's opinions which are stated within "reasonable degree of psychiatric certainty," Dr. Baxter opines that this case should be focused on the appropriateness of the addiction treatment that Dr. Christophel received from Bridge Back and thus forms all his opinions to a reasonable degree of

[20] Defendant submits Dr. Baxter's Affidavit with a Certificate of Conformity.

addiction medicine certainty, based upon the local, regional, and national standards of care of treatment for substance abuse disorders.

Upon his review of the medical records, deposition transcripts, pleading documents, and other records, Dr. Baxter opines that Bridge Back satisfied the standard of care of ongoing monitoring and treatment for a voluntary outpatient substance use disorder treatment facility treating healthcare professionals. In his opinion, ongoing monitoring and treatment is the standard of care in substance use treatment of healthcare professionals, and during this time, treatment goals are reviewed and work continues for many years, sometimes for a lifetime, to meet the established treatment goals; in some cases, the goals are never fully met. Dr. Baxter notes that, in this case, Dr. Christophel died before she could accomplish her goals. Dr. Baxter also explains that a treatment facility, such as Bridge Back, can only instruct, counsel, motivate, and encourage patients to engage in and internalize therapy; the patient must be or become a willing participant at some juncture.

Moreover, Dr. Baxter opines that Bridge Back appropriately treated Dr. Christophel in an outpatient setting in accordance with the New York State-approved patient placement tool, Level of Care for Alcohol and Drug Treatment Referral ("LOCATR"), and with the nationally accepted standard under American Society of Addiction Medicine Patient Placement Criteria. Dr. Baxter opines, contrary to Dr. Hedberg, that Dr. Christophel did not require a referral to inpatient care. He explains that neither Dr. Christophel's profession nor her drug of choice automatically necessitated inpatient treatment. He cites to Dr. Christophel's Biopsychosocial Assessment conducted by Bridge Back to Life on September 8, 2010, in which Dr. Christophel reported using Propofol for two to three weeks; he opines that this Assessment further evidences that defendant's treatment of Dr. Christophel was appropriate because, under DSM-IV-TR, which was operative at the time, Dr. Christophel did not meet the criteria for Propofol abuse or

dependence which requires the individual must have abused the drug "over a 12-month period" to meet criteria for "abuse or dependence." (Baxter Aff, ¶ 22). Dr. Baxter adds that Dr. Christophel did not meet the standards for an inpatient Under the DSM-IV-TR definition, referral pursuant to LOCATR because she exhibited no substantial deficits in functional skills or complications of comorbidities requiring medical management or daily monitoring. Dr. Baxter opines that referral to any level of care should be guided by established evidence-based, peer-reviewed, State- and nationally-accepted standards of addiction treatment; under those standards, Dr. Christophel did not require a referral to inpatient care.

With respect to Dr. Christophel's missed treatment sessions, Dr. Baxter opines that Bridge Back breached no standard of care regarding its response to treatment sessions she missed at Bridge Back because (1) her treatment was voluntary, and (2) absolute attendance of every scheduled counseling session is not the national standard of treatment programs. He explains that affording some concessions and time off for legitimate reasons is preferable to penalizing and losing the engagement of patients in treatment through draconian enforcement, rigidity, and punishment.[21]

To substantiate his opinion that Dr. Christophel's treatment at Bridge Back was voluntary, Dr. Baxter explains that all admissions for substance use disorder treatment in the United States are voluntary. Additionally, Dr. Baxter points to a document in the Bridge Back's record indicating Dr. Christophel's acknowledgment that her treatment was voluntary and that she could discharge herself from treatment at any time.

Dr. Baxter also opines that Bridge Back responded appropriately to Dr. Christophel's feelings of "guilt" and "shame"; her desires to "forget the past" and "forget about her addiction;"

[21] Dr. Baxter also attached an article published by the National Institute on Drug Abuse. The article, entitled "Description of an Addiction Counseling Approach, indicates that clients are given many chances before termination from treatment for nonattendance.

her resentment towards treatment; her struggle with the "stigma of substance abuse;" and her reluctance to attend self-help meetings and to develop a sober support network (¶¶ 30, 34). Dr. Baxter explains that such reactions are not uncommon among patients in substance use disorder treatment and that these issues are rarely resolved in the early phases of recovery treatment regardless of the level of care. He states that the national standard in addiction treatment is engagement, retention, and recovery management and opines that Bridge Back and Mr. Demma addressed Dr. Christophel's feelings and self-image issues accordingly.[22]

With respect to Dr. Christophel's reluctance to attend self-help meetings and to develop a sober support network, Dr. Baxter explains that many patients in substance use disorder treatment are resistant to treatment recommendations regardless of the treatment setting. Dr. Baxter further states that defendant addressed these issues on numerous occasions and was practicing Motivational Enhancement Therapy ("MET"). According to Dr. Baxter, the foundation of MET is to meet the patient where they are in terms of acceptance and adherence to treatment recommendations, hoping to motivate them through continued engagement to perform better and to continue engagement in therapy. Moreover, Dr. Baxter opines that Dr. Christophel's attendance in online self-help environment evidenced some progress in her resistance towards attending self-help meetings and thus demonstrated defendant's counseling was effectively eroding Dr. Christophel's reluctance through treatment.

Dr. Baxter also disagrees with Dr. Hedberg's opinion that defendant's treatment was insufficient because relapse prevention was not emphasized at her stage of treatment when she died, explaining that relapse prevention is typically taught in the final phases of treatment, which

[22] Dr. Baxter states that specific examples of defendant's appropriate treatment and response to Dr. Christophel's stated feelings in group are referenced in the records dated September 14, 2010; October 15 and 25, 2010; December 6, 2010; January 10 and 17, 2011; February 14 and 28, 2011; and April 4 and 18, 2011.

Dr. Christophel had not yet arrived to since she was still in Phase II of treatment. Dr. Baxter also disagrees with Dr. Hedberg's opinion that Bridge Back was unfit to treat Dr. Christophel's Propofol use because of its lack of Propofol-specific knowledge, stating that the treatment of addiction focuses on the disease itself and not the specific substance abused by the patient, especially since users invent and reinvent new substances to abuse constantly, and adds that many counselors are not familiar with the pharmacology of specific types of drugs and medications forming the basis of their treatment.

Additionally, Dr. Baxter opines that Bridge Back did not act inappropriately regarding Dr. Christophel's return to work because it was clear from a review of the records that Bridge Back did not authorize Dr. Christophel's return to work, nor did it authorize the duties that she was allowed to perform; Dr. Christophel's return to work and the duties she was allowed to perform were authorized solely by her hospital and residency program. Dr. Baxter also opines that Bridge Back appropriately treated Dr. Christophel even though she failed to meet her treatment goals, explaining that the treatment process continues for years like any chronic medical illness, and in some instances, the goals are not satisfied. He states that Dr. Christophel's treatment with Bridge Back was ongoing when she died, that Bridge Back never discharged her, and that her treatment goals may have been achieved had she not taken her own life.

He adds that although Dr. Christophel's treatment ended in suicide, she made progress in the earliest stages of her recovery to abstain from Propofol, as evidenced by her improved relationship with Kim, her discussion of her family of origin issues, and her positive communications regarding work in Bridge Back treatment sessions with Dr. Weiner. Further, he points out that no witness or record reports that Dr. Christophel expressed fear or trepidation working with Propofol, an urge to use Propofol, or suicidal thoughts before she died. Therefore,

Dr. Baxter opines to a reasonable degree of addiction medicine certainty that Dr. Christophel's relapse and overdose suicide were not foreseeable and thus were not preventable by Bridge Back. He opines that Dr. Christophel's suicide was not caused by a failure by Bridge Back to treat her appropriately.

In further support of his opposition and cross motion, the plaintiff submits the reply affidavit of Dr. Hedberg which, plaintiff argues, shows that Dr. Christophel's suicide was a foreseeable consequence of Bridge Back's negligence with respect to allowing her to return to work without having completed treatment and without a comprehensive evaluation by her addictionologist.[23] Dr. Hedberg opines that Bridge Back departed from the national standard of care for treating substance use disorder in anesthesia professionals and failed to safely aid Dr. Christophel's resumption of her anesthesia career. Dr. Hedberg states that, at his treatment program, "readiness to return to work" is discussed at every team meeting, and that in his outpatient programs, a letter clearing clients to return to work is sent to their work supervisors, not vice-versa as was the case here.

Dr. Hedberg disagrees with Dr. Baxter's opinion that the standard of care in treating Dr. Christophel was limited to one for a "voluntary outpatient treatment provider" which Dr.

[23]By letter dated December 15, 2016, the defendant requests that the court either (1) preclude Plaintiff's sur-reply arguments as procedurally improper and highly prejudicial to Bridge Back; or (2) grant Bridge Back leave to respond to Plaintiff's arguments in a sur-sur-reply, arguing that a movant is entitled to the final word on a motion for summary judgment under governing law, citing CPLR § 2214(b) (permitting submission of initial moving papers, opposition, and reply). In this connection, the defendant argues that, in reply, the plaintiff inappropriately responds to arguments at issue on the underlying motion rather than responding to arguments raised in opposition to the plaintiff's cross-motion. The court finds plaintiff's reply was appropriate because it addressed the defendant's opposition arguments, including whether the defendant's role was limited to that of a voluntary outpatient treatment provider and regarding the proper standard of care, which issues were first raised by defendant in its opposition papers. See All State Flooring Distribs., L.P. v. MD Floors, LLC, 131 AD3d 834 (1st Dept 2015)(noting that the purpose of reply papers is to address arguments made in opposition to the position taken by movant).

Hedberg opines would be appropriate for the treatment of an alcoholic. In support of his position, Dr. Hedberg relies on an American Association of Nurse Anesthetists ("AANA") publication, entitled "Peer Assistance Advisors' Treatment Recommendations for the Treatment of the Disease of Addiction in Anesthesia Professionals and Students" which he states specifies the national standard of care for the treatment of the substance use disorder in anesthesia professionals was in 2010 and 2011.[24] Dr. Hedberg opines the treatment recommendations set forth in AANA's publication are the appropriate standard of care for treating substance use disorder in anesthesia professionals, all of which he opines were unmet during Dr. Christophel's treatment with Bridge Back.

Moreover, Dr. Hedberg opines that the fact that Dr. Christophel returned to work without having "completed treatment" or having a "comprehensive evaluation" by an American Society of Addiction Medicine ("ASAM") board certified addictionologist, further evidences defendant's failure to satisfy the national standard of care for addictionologists set forth in the AANA publication. Dr. Hedberg references that, pursuant to the AANA treatment recommendations, completion of a minimum of 28 days of inpatient treatment is recommended (also termed "short term"), with 90 days of treatment (also termed "long term") being most desirable and offering the highest success rate.[25]

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[24] Additionally, Dr. Hedberg states this national standard of care is contained in the video series, called "Wearing Masks," published between the years 2000 and 2010, in particular the 2006 video entitled "The Challenge of Re-Entry."

[25] Dr. Hedberg also states that Dr. Stelwagon, who was the only addictionologist who treated Dr. Christophel at Bridge Back was bound by the standards of care enunciated in "The ASAM Standards of Care for the Addiction Specialist Physician," although he does describe these standards or state how such standards differ from the AANA recommendations. He also acknowledges that these standards were not published until 2014, but nonetheless asserts, without substantiation, that the ASAM standards were "common and current in the preceding years, including 2010 and 2011" (Hedberg Aff. ¶ 22).

Next, Dr. Hedberg opines that the treatment provided by Bridge Back was ineffective and states that discharge summary in which defendant does not document that any treatment goals were met. Dr. Hedberg opines that it was defendant's duty to refer to a more effective treatment level, especially considering the safety sensitive position of Dr. Christophel's workplace. Finally, Dr. Hedberg opines that had Dr. Christophel been properly treated for her Propofol addiction, it is "highly likely" she would still be alive today.

Discussion

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. In claiming that any treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. See Joyner–Pack v. Sykes, 54 AD3d 727, 729 (2d Dept 2008). A 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 AD3d 403, 404 (1st Dept 2010). A defendant's expert opinion must "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dept 2003)).

If the movant makes a prima facie showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 NY2d 320, 324-325 (1986). Specifically, this requires that a plaintiff opposing a defendant's summary

judgment motion "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact.... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." Id. at 324–25. In addition, a plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered.'" Dallas-Stephenson v Waisman, 39 AD3d at 307 (1st Dept 2007). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment." Diaz v. Downtown Hospital, 99 NY2d 542, 544 (2002).

Here, even assuming *arguendo* that, as plaintiff argues, the relationship between Dr. Christophel and Bridge Back was akin to a physician-patient relationship, it is well settled that a medical provider's duty "is to provide the level of care acceptable in the professional community in which [the provider] practices. [The provider] is not required to achieve success in every case and cannot be held liable for mere errors of professional judgment." Schrempf v. State, 66 NY2d 289, 295 (1985)(internal citations omitted). Thus, "a doctor is not liable in negligence merely because a treatment, which the doctor as a matter of professional judgment elected to pursue, proves ineffective . . ." Park v Kovachevich, 116 AD3d 182, 190 (1st Dept), lv denied 23 NY3d 906 (2014)(internal citation and quotation omitted). However, liability may be imposed "if the doctor's treatment decisions do not reflect his or her own best judgment, or fall short of the generally accepted standard of care." Id. at 190. Moreover, "[a] decision will not be insulated by the medical judgment rule if it is not based on a careful examination." Id at 191.

In this case, plaintiff alleges two categories of departures giving rise to its claims of malpractice/negligence against Bridge Back: (1) the failure to properly evaluate and effectively treat Dr. Christophel for her Propofol use, including by treating her on an intensive outpatient basis instead of a residential treatment facility, particularly when the outpatient treatment proved ineffective; (2) the failure to recommend that Dr. Christophel should not return to work and allowing her to return to work without participating in the return to work decision-making process, despite her lack of progress in therapy.

As stated above, in its motion, defendant argues that it is entitled to summary judgment as Dr. Christophel's death was not foreseeable. In its opposition to plaintiff's cross motion and in further support of its motion, defendant also argues that it exercised proper medical judgment with respect to Dr. Christophel's evaluation and treatment, and that it had no obligation or control of Dr. Christophel with respect to her return to work. Plaintiff counters that Dr. Christophel's suicide was forseeable following her relapse in taking Propofol, and that her relapse arose out of defendant's departures in evaluating and treating Dr. Christophel, and its departures and negligence in allowing Dr. Christophel to return to work without participating in that decision. The issues raised in the motion and cross motion, including those raised by defendant as to foreseeability and causation, by plaintiff as to defendant's alleged departures in connection with its evaluation and treatment of Dr. Christophel, and by defendant's opposition as to its exercise of professional judgment in its evaluation and treatment of Dr. Christophel, are intertwined. Thus, the legal analysis of the individual issues overlap.

As a threshold matter, when, as here, the alleged medical malpractice/negligence arises out of a defendant's treatment of a patient on a voluntary outpatient basis, a defendant may be held liable for forseeable injuries resulting from the failure to exercise professional judgment,

although the duty to control a patient's conduct has been held to be limited.[26] See Webdale v. North General Hosp., No. 111310/99, slip op. (S Ct NY Co, June 13, 2000), appeal dismissed 287 AD2d 945 (1st Dept 2001)(noting that when "the individual involved is a voluntary psychiatric outpatient, the institution's control over the patient, and thus its duty to prevent the patient from harming others, is more limited.... However, the duty does not disappear, and the institution may be held liable if the failure to place the patient on inpatient status resulted from something other than an exercise of professional judgment"); Rivera v. NY City Health & Hosps. Corp., 191 FSupp2d 412, 417–19 (SD NY 2002) (although "no bright-line rule exists," outpatient health care providers generally owe their patients (and to the public at large) a duty to take reasonable measures within their power to prevent foreseeable harm); compare Cartier v. Long Island College Hosp., 111 AD2d 894 (2d Dept 1985)(physicians treating patient at outpatient alcoholism treatment center owed no duty to public at large to control patient's conduct).

As for the first category of departures, Bridge Back has established that it properly evaluated Dr. Christophel, while issues of fact exist with respect to whether defendant departed from accepted practice in its treatment of Dr. Christophel. With regard to the evaluation of Dr. Christophel, the evidence submitted by Bridge Back shows that before starting treatment at Bridge Back, Dr. Christophel was subject to multiple assessments, including by Dr. Stelwagon, an addiction psychiatrist, and a biospsychosocial assessment and an intake/level of care assessment. Moreover, the assessments of Dr. Christophel at Workforce by Nurse DeSantis, a clinical case worker, and Dr. Moore, an addiction psychiatrist, are consistent with Bridge Back's evaluation. In addition, defendant submits the expert opinion of Dr. Baxter in support of the

[26]Contrary to the opinion of plaintiff's expert, there is no basis in the record for concluding that plaintiff's treatment was other than on a voluntary basis, including the fact that her ability to return to work was contingent on her participation in defendant's program.

appropriateness of its evaluation and determination that outpatient treatment was appropriate under criteria of the New York State-approved patient placement tool for drug treatment and nationally accepted standards, and was based on defendant's consideration of various factors, including that Dr. Christophel reported using Propofol for two to three weeks, which did not meet the criteria for 12 months of Propofol abuse or dependence, requiring inpatient treatment. This evidence demonstrates Bridge Back did not depart from the applicable standard of care in its evaluation of Dr. Christophel, including its decision to treat her on an intensive outpatient basis.

Moreover, plaintiff has not raised an issue of fact as to whether defendant committed any departures in connection with its evaluation of Dr. Christophel. While Dr. Hedberg opines that Bridge Back did not sufficiently evaluate Dr. Christophel and that Dr. Christophel should have been placed in a residential treatment program specializing in Propofol addiction, such opinion is insufficient to raise an issue of fact in view of evidence that Dr. Christophel received numerous assessments from different mental health professionals prior to the determination as to the appropriateness of her intensive outpatient treatment at Bridge Back. Notably, Dr. Hedberg does not allege that the initial evaluations of Dr. Christophel were insufficient, nor does he articulate what kind of evaluation should have been done that would have more accurately assessed her condition, or how such evaluation would have altered defendant's determination as to the appropriate course of treatment.

In this regard, the holding in Park supra informs the court's determination that Dr. Hedberg's affidavit is insufficient to raise a triable issue of fact as to the appropriateness of Dr. Christophel's evaluation. In Park, the Appellate Division, First Department found that plaintiff's expert failed to controvert defendants' prima facie showing that a thorough

assessment of decedent was done prior to his release from a psychiatric facility, where plaintiff's expert failed to "elaborate how [defendants'] evaluation by at least seven health care professionals in several different disciplines was deficient or what steps they should have taken to bring it within acceptable medical standards." 116 AD3d at 193. See also Durney v Terk, 42 AD3d 335, 336 (1st Dept), lv denied 9 NY3d 813 (2007)(hospital and medical team did not depart from accepted psychiatric practice in formulating discharge plan which included intensive outpatient treatment and thus could not be held liable for patient's suicide following discharge); Betty v. City of New York, 65 AD3d 507 (2d Dept 2009)(defendants entitled to summary judgment where "the plaintiff failed to raise a triable issue of fact as to whether the defendants' treatment regimen was something less than a professional medical determination or was not based on a careful examination and evaluation of [the patient's] condition").

Moreover, while Hedberg relies on the recommendations in an AANA publication for inpatient treatment for chemically dependent anesthesia professionals and students, such recommendations do not constitute a standard of care. Significantly, Hedberg concludes that the AANA's recommendations apply to Dr. Christophel without providing a factual basis for this conclusion.[27] See Diaz v New York Downtown Hosp. 99 NY2d 542, 545 (2002)(granting summary judgment to plaintiff, noting that plaintiff's expert failed "to provide any factual basis for her conclusion that the guidelines establish or are reflective of a generally-accepted standard or practice"). In the absence of evidence of the defendant conducted an insufficient evaluation of Dr. Christophel or departed from generally accepted standard of care in its evaluation of Dr.

[27]The court notes that even if it were shown that the recommendations applied to the factual circumstances of this case, such recommendations are a factor to be considered and do not constitute the standard of care, Halls v Kiyici, 104AD3d 502,504 (1st Dept 2013).

Christophel, Dr. Hedberg's opinion "merely presents a different course of treatment," and is insufficient to raise a triable issue of fact. Park supra at 192.

As for the alleged departure regarding Dr. Christophel's treatment, Dr. Hedberg's opinion raises triable issues of fact with respect to whether Bridge Back properly and competently treated Dr. Christophel in light of her failure to meet certain treatment goals and her resistance to therapy. In this regard, Dr. Hedberg points to Dr. Christophel's two lapses with alcohol use, her missed therapy sessions, her failure to establish a sober support network and complete a relapse prevention program, and Dr. Christophel's undiagnosed depression and unresolved feelings of guilt and shame. While defendant submits evidence, including Dr. Baxter's affidavit to support its position that its treatment of Dr. Christophel was appropriate, including with respect to its response to her failure to meet certain treatment goals, his opinion is insufficient to eliminate issues of fact in this regard.

While the opinion of plaintiff's expert is sufficient to raise a triable issue of fact with respect to whether defendant departed from accepted practice in its treatment of Dr. Christophel, to prevail such opinion must demonstrate "the requisite nexus between the malpractice allegedly committed and the harm suffered" Park supra at 191 (internal citations and quotations omitted). Here, plaintiff's expert opinion that "defendant's departures from the standard of addiction medicine treatment proximately led to Dr. Christophel's relapse, and that her relapse was the natural and probable consequence of the alleged departures [and that]... had Dr. Christophel been properly treated for her Propofol addiction, it is 'highly likely' she would still be alive," fails to provide a nonspeculative basis for finding a connection between defendant's alleged departures regarding its treatment of Dr. Christophel and her suicide. See e.g. Nieves v. City of New York, 91 AD2d 938, 939 (1st Dept 1983)(plaintiff's expert testimony that suicide "could have been"

result of decedent's discharge from hospital for self-inflicted stab wound that it was "possible" that had he received treatment he would not have taken his own life was insufficient to establish causation); Grzelecki v. Sipperly, 2 AD3d 939, 941 (3d Dept 2003)(plaintiff failed to raise issue of fact precluding summary judgment where the expert affidavits submitted by plaintiff failed to "provide a causal nexus between the alleged malpractice and decedent's suicide"); Darren v. Safier, 207 AD2d 473, 475 (2d Dept 1994)(finding that plaintiff failed to show that hospital's alleged failure to follow its psychiatric guidelines was the proximate cause of patient's suicide one month following his discharge).

Of particular significance, and as discussed more fully below in addressing foreseeablity, is the absence of any mention of suicidal ideations in the multiple assessments of psychiatrists and social workers both before and during Dr. Christophel's treatment, or evidence that Dr. Christophel was suicidal in the days leading up to her death. As plaintiff puts forth no nonspeculative basis for finding a nexus between any departure or negligence by Bridge Back in its treatment of Dr. Christophel and Dr. Christophel's suicide, or that her suicide was foreseeable, Dr. Hedberg's opinion "reflects a reasoning back from the fact of injury to find negligence," and is therefore insufficient to raise a factual issue as to foreseeablity or causation. Park supra at 192 (internal citation an quotation omitted).

The remaining issues involve the second category of departures relating to whether Bridge Back breached a duty of care owed to Dr. Christophel in not participating in the decision relating to her return to work,[28] and whether Dr. Christophel's suicide was a foreseeable

[28]Dr. Hedberg opines that this participation should have included a "comprehensive evaluation" in accordance with AANA's recommendations regarding re-entry into the anesthesia workplace. However, as explained above and in footnote 27, in connection with recommendations cited by Dr. Hedberg regarding treatment, such recommendations are merely factors to be considered and do not constitute a standard of care. Diaz v New York Downtown Hosp. 99 NY2d at 545.

consequence of the lack of such participation. Here, the record shows that Workforce, as opposed to Bridge Back to Life, assumed the duty of evaluating Dr. Christophel, consulting with NYPH's residency program with respect to Dr. Christophel's return to work, and monitoring Dr. Christophel after her return to work.

However, even assuming *arguendo* that Bridge Back owed a duty to communicate with Workforce regarding Dr. Christophel's return to work, to establish that there was a breach of such duty, it must be shown that "the resulting injury was a reasonably foreseeable consequence of [defendant's] conduct." Cygan v. City of New York , 165 AD2d 58, 67 (1st Dept), lv denied 78 NY2d 855(1991). Of relevance here, liability for an alleged failure to prevent a reasonably foreseeable suicide has been held to exist when "an institution or mental health professional with sufficient expertise to detect suicidal tendencies and with the control necessary to care for the person's well-being fails to take such steps." Id. Here, there is no evidence that Dr. Christophel was suicidal at the time that she returned to work such that her suicide was reasonably foreseeable. In this connection, while plaintiff's expert opines that Dr. Christophel's relapse in her use of Propofol was foreseeable, he also opines that her suicide was foreseeable after her relapse on May 10, 2011, while the record reveals that defendant's last contact with Dr. Christophel was on May 3, 2011.

Moreover, it is undisputed that throughout her treatment, Dr. Christophel never revealed any indication of suicidal tendencies so as to put defendant on notice that her return to work might result in her suicide. In this connection, the record shows that even after Dr. Christophel's used Propofol on May 10, 2011, her supervisors at the NYPH residency program, family and colleagues, including those who spoke and met with Dr. Christophel in the days

leading up to her death,[29] indicated that Dr. Christophel did not do or say anything to suggest she was not of sound mind, that she was depressed, or that she was contemplating suicide. The record also indicates that Bridge Back did not have contact with Dr. Christophel after May 3, 2011. In fact, Dr. Hedberg acknowledges that Dr. Christophel's suicide was "an impulsive act." As for Dr. Hedberg's opinion that the Propofol impaired Dr. Christophel's cognitive functioning and led to her death, he provides no medical basis for this conclusion, nor does he point to any evidence that Bridge Back knew of Dr. Christophel's alleged impairment.

As Dr. Christophel's suicide was not foreseeable, Bridge Back cannot be held liable for any departure and/or negligence related to its failure to participate in the decision permitting Dr. Christophel to return to work.[30] See Cygan, supra at 68 (finding that off-duty police officer's suicide four months after his gun was returned to him after a period during which he was undergoing psychological evaluation for reasons other than suicidal behavior was unforeseeable); Smith v. New York City Health and Hospitals Corp., 211 AD2d 483 (1st Dept 1995)(holding that defendant could not be held liable for injuries to third persons caused by decedent's suicide where there was no evidence that decedent had ever been a danger to anyone other than herself); compare Huntley v. State of New York, 62 NY2d 134 (1984)(affirming liability of defendant psychiatric hospital for patient's suicide where the patient, with a history of instability who had communicated specific suicide plan at an off-site location to member of hospital staff, left the hospital unsupervised and jumped from the roof of a nearby parking garage).

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[29]In fact, as noted above, Dr. Christophel's chief resident visited Dr. Christophel at her apartment on the morning of her death and testified that her speech was clear and coherent, and she did not seem depressed or suicidal.

[30]That said, contrary to defendant's argument, the court finds that the First Department's decision dismissing the complaint against CPH is not dispositive of the issues here.

Accordingly, while the court recognizes the tragic circumstances underlying Dr. Christophel's death, in the absence of a basis for imposing liability, Bridge Back's motion for summary judgment must be granted, and plaintiff's cross motion must be denied.

Conclusion

In view of the above, it is

ORDERED that defendant Bridge Back to Life's motion for summary judgment is granted; and it is further

ORDERED that plaintiff Thomas H. Christophel's motion for summary judgment must be denied; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint and the third-party complaint in their entirety.

Dated: January 19, 2018

J.S.C.
HON. JOAN A. MADDEN
J.S.C.