

Ramos v Lopez

2018 NY Slip Op 33458(U)

May 25, 2018

Supreme Court, Westchester County

Docket Number: 60284/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
DENISE RAMOS, as administratrix of the estate of
MARTIN PERRY, deceased,

Plaintiff,

-against-

JOSEPH LOPEZ, M.D. LAURA COLLINS, R.N.,
CORRADO P. MARINI, M.D., ANTHONY POLICASTRO,
M.D., WESTCHESTER MEDICAL CENTER ADVANCED
PHYSICIANS SERVICES, P.C., WESTCHESTER
MEDICAL CENTER and WESTCHESTER COUNTY
HEALTH CARE CORPORATION,

Defendants.

-----X
LEFKOWITZ, J.

DECISION AND ORDER

Index No.: 60284/2016

Order Date: Mar. 5, 2018

Seq. Nos.: 2, 3

The following papers were read on motion sequence 2 by defendants for an order (1) pursuant to CPLR 3126 dismissing the action for plaintiff’s willful failure to comply with defendants’ discovery demands; (2) permitting defendants to enter judgment dismissing plaintiff’s complaint against defendants; (3) imposing costs and sanctions against plaintiff’s counsel; and (4) for such other and further relief as the court deems just and proper; and on motion sequence 3 by plaintiff for an order (1) pursuant to CPLR 3126 striking the answers of defendants Joseph Lopez, M.D. (“Lopez”), Laura Collins, R.N. (“Collins”), Corrado P. Marini (“Marini”), Anthony Policastro, M.D. (“Policastro”), Westchester Medical Center Advanced Physicians Services, P.C. (“WMCAPS”), Westchester Medical Center (“WMC”) and Westchester County Health Care Corporation (“WCHCC”) for failure to provide outstanding discovery and to comply with prior court orders, directing the clerk to enter a default judgment as to liability against all defendants and setting this matter down for an inquest for the assessment of damages; or, alternatively, (2) pursuant to CPLR 3126 entering a conditional order striking the answers of all defendants unless they provide within 20 days of service of an order: (a) a complete copy of the PowerPoint presentation given on May 28, 2015 which addressed/discussed the decedent’s care as previously identified in defendants’ discovery responses and privilege logs, as well as the names of any physicians, nurses or other staff who attended the presentation; (b) all incident reports prepared by defendants regarding decedent’s treatment; (c) the investigation file and materials referred to in defendants’ second supplemental privilege log; (d) defendants’ rules and regulations relating to the use of restraints and CIWA protocols; (e) the curriculum vitae for Collins and Policastro; (f) a verified statement setting forth each individual defendant’s residence address; (g) a copy of the self-insured retention plan under which defendants claim they are insured, excess insurance information, claims made against each defendant under said plan, the amount of each such claim and the amount actually paid out for each such claim; and (h) a complete list of any other cases or matters in which any individual defendant has testified as a party or expert witness, including each court where such testimony has been given and the full caption and index number for each such matter; (3) in the event that defendants claim any of the

aforementioned materials do not exist, an affidavit by an individual with personal knowledge and authority regarding such matters setting forth with particularity those items which are claimed not to exist or no longer exist; what steps were taken to locate each of said items; when each of said items was last observed to be in existence and where each of said items were last observed to exist; and stating with specificity the name and addresses of any individual, organization or entity from whom defendants believe any such materials may be obtained; (4) pursuant to 22 NYCRR 130-1.1, awarding plaintiff costs and sanctions; and (5) for such other and further relief as this Court deems just and proper.

Defendants' Motion Seq. 2

Defendants' Order to Show Cause, Affirmation in Support, Redaction Cover Sheet, Exhibits A-N;
Affirmation in Opposition, Exhibits A-J;

Plaintiff's Motion Seq. 3

Plaintiff's Order to Show Cause, Good Faith Affirmation, Affirmation in Support, Exhibits A-Q;
Affirmation in Opposition, Redaction Cover Sheet, Exhibits A-M.

Upon the foregoing papers and proceedings held on March 5, 2018, these motions are determined as follows:

Facts and Procedural Posture

On May 19, 2015, decedent, then age 62, was transported by ambulance to Good Samaritan Hospital after falling from a chair and off the front porch of his home and onto the driveway. He was treated in the emergency room at Good Samaritan Hospital for a head injury. Decedent was noted to have sustained a contusion to his right forehead and periorbital area, was unresponsive and foaming at the mouth upon arrival, and was intoxicated.¹ Decedent was then transferred to WMC on May 20, 2015 by helicopter where he was admitted to the Critical Care Unit for evaluation of his head injury and treatment for alcohol intoxication and withdrawal.² It is alleged that shortly after midnight on May 22, 2015, decedent was out of bed and in a chair when he became agitated and fell after removing his Bi-Pap³ mask and went into respiratory arrest. Plaintiff alleges that although efforts to resuscitate him were successful, he sustained irreparable, anoxic brain damage.

Decedent remained at WMC until he was transferred on or about June 2, 2015 to Friedwald Center for Rehabilitation and Nursing where he remained until November 29, 2015 when he was transferred to Nyack Hospital where he died that day.

¹Plaintiff's affirmation in opposition, p.4, para. 10.

²Plaintiff's affirmation in opposition, p. 4, para. 10-11.

³Bi-level Positive Airway Pressure.

Plaintiff commenced this action alleging medical malpractice by the filing of a summons and verified complaint on July 27, 2016⁴, and defendants served their verified answers with discovery demands on November 28, 2016, December 5, 2016 and December 22, 2016.⁵ As part of their discovery demands, defendants sought authorizations for all of decedent's "prior and subsequent treating physicians and institutions."

On or about March 16, 2017, plaintiff served her verified bills of particulars on defendants wherein she asserts, as is relevant here, that defendants were negligent in failing to: attach appropriate significance to decedent's medical history and course, adequately appreciate the seriousness and gravity of decedent's condition, take a proper history, perform a proper follow-up examination, appreciate the significance of decedent's history, consider and appreciate the effects of medication, properly treat alcohol withdrawal, properly treat alcohol toxicity, comply with or follow defendants' own guidelines and protocols relating to management and treatment of patients suffering from alcohol toxicity and/or withdrawal, attach appropriate significance to the decedent's medical history, take a proper history, appreciate the significance of decedent's history and the effects of medications that decedent was taking and in ignoring decedent's signs, symptoms and complaints.⁶

On same date, plaintiff served discovery demands on defendant hospital which included a request for production of any incident reports as well as records from any quality assurance or mortality or morbidity proceeding that contained statements by any of the individually named defendants relating to decedent's treatment. Additionally, plaintiff demanded defendant hospital produce certain rules and regulations applicable to her claims. In the event defendants determined that any of the requested materials did not exist or could no longer be located, plaintiff demanded that an affidavit be provided by a person with personal knowledge and authority to that effect.⁷

By letter dated March 17, 2017, plaintiff refused to provide authorizations for all prior and subsequent treating physicians and institutions on the grounds that such requests were palpably overbroad and improper. However, without waiving this objection, plaintiff's counsel forwarded certain authorizations demanded by defendants to plaintiff for signature, permitting defendants to obtain copies of decedent's records from those providers which plaintiff deemed relevant and agreed to furnish such executed authorizations to defendants upon their receipt by plaintiff.⁸ By letter dated April 5, 2017, plaintiff's counsel provided authorizations for the following subsequent treating facilities; Good Samaritan Hospital, Nyack Hospital and Friedwald Center for Rehabilitation and Nursing, but refused to furnish authorizations for decedent's prior treating physicians or institutions.⁹

⁴Exhibit B to defendants' moving papers, Motion Seq. No. 2, NYSCEF Doc. No. 45.

⁵NYSCEF Doc. No. 9, 10, 13, 14, 15, 18, 21; Defendants' Exhibit C to Motion Seq. No. 2, NYSCEF Doc. No. 46.

⁶Exhibit D to defendants' moving papers, Motion Seq. No. 2, NYSCEF Doc. No. 47.

⁷Exhibit B to plaintiff's moving papers, Motion Seq. No. 3, NYSCEF Doc. No. 63.

⁸Exhibit E to defendants' moving papers, Motion Seq. No. 2, NYSCEF Doc. No. 48.

⁹Exhibit F to defendants' moving papers, Motion Seq. No. 2, NYSCEF Doc. No. 49.

By preliminary conference order dated May 22, 2017, (Lefkowitz, J.) defendants were directed to provide, among other things, responses to all of plaintiff's outstanding discovery demands within thirty days. Plaintiff was ordered to provide, inter alia, Medicaid lien information, if applicable, and HIPPA compliant authorizations for all decedent's medical providers' billing records within twenty days.¹⁰

On June 20, 2017 defendants served their responses to plaintiff's discovery demands.¹¹ Included in those responses were their objections to plaintiff's demands for the incident reports and demands directed to the hospital defendant for complete copies of all mortality and morbidity reports, quality assurance and peer review reports containing statements made by any named party on grounds that such demands were overbroad, vague, unduly burdensome and subject to privilege. Plaintiff additionally sought discovery of any and all rules, regulations, guidelines, protocols, policies and procedures pursuant to CPLR 3101 and 3120 applicable to defendant hospital which was objected to, but defendant hospital agreed to provide such material under separate cover. As to plaintiff's demand for witnesses, defendants advised that the names of decedent's medical personnel were contained in his medical record, should plaintiff wish to identify specific names and/or initials included in such records, defendants advised they would attempt to determine the individuals' status and provide a last known address if such person is no longer employed.

By letter dated September 5, 2017, among other things, plaintiff provided supplemental responses to defendants' discovery demands including, inter alia, authorizations for Dr. Viral R. Sheth, M.D. (internist/cardiologist), United Healthcare of New York (collateral source), Social Security Administration and the New York State and Local Employees Retirement System for information regarding decedent's pension. Additionally, plaintiff furnished defendants with a copy of decedent's death certificate, a copy of his 2015 1099 form, 2015 Social Security Benefit Statement and April 30, 2015 Pension notice. With regard to defendants' demand for information regarding Medicare and Medicaid benefits, plaintiff stated that she had not received nor was she aware of any Medicaid or Medicare liens being asserted.

Plaintiff's correspondence additionally enumerated the outstanding discovery from defendants which included, inter alia, copies of defendant hospital's rules, regulations, guidelines, protocols, policies and procedures, records from any quality assurance or mortality or morbidity proceeding that contained statements by any of the individually named defendants relating to decedent's treatment, certified medical and billing records for decedent's treatment at WMC, primary and excess insurance information, curriculum vitae for each individual defendant and the current residence address for each individually named defendant.¹²

By compliance conference referee report and order dated September 12, 2017 (Lefkowitz, J.), defense counsel was directed to serve their supplemental responses to plaintiff's March 17, 2017 demands within three weeks from the date of such order. With regard to defendants' objection on grounds of privilege to plaintiff's demand for copies of defendant hospital's rules, regulations, guidelines, protocols, policies and procedures, records from any quality assurance or mortality or morbidity proceeding that contained

¹⁰Exhibit D to plaintiff's moving papers, Motion Seq. No. 3, NYSCEF Doc. No. 65.

¹¹Exhibit E to plaintiff's moving papers, Motion Seq. No. 3, NYSCEF Doc. No. 66.

¹²Plaintiff's Exhibit F to moving papers, NYSCEF Doc. No. 67.

statements by any of the individually named defendants relating to decedent's treatment, defendants were ordered to provide plaintiff with a detailed privilege log within same date.¹³

On October 12, 2017, defendants served their privilege log which identified two types of documents which they asserted were subject to privilege. One set was classified as "accident, incident and investigation reports" dated October 28, 2015, and the subject matter was identified as "Confidential investigation report, created for Quality Assurance purposes, documenting the facts and circumstances surrounding the investigation of the patient." The second set of documents were identified as "Mortality and Morbidity Reports", dated May 28, 2015 and described as the "[d]epartment's peer review of case at quality assurance medical review committee meeting pertaining to patient Martin Perry."¹⁴

Defendants conducted plaintiff's deposition on November 13, 2017.¹⁵ During her deposition plaintiff testified that, at the time of the incident decedent was taking numerous medications, but she was unsure of the identity and number of prescriptions nor did she know the name of the hospital, surgeon and/or physicians who previously treated decedent for a prior heart condition and surgery performed in connection thereto and/ or the name of decedent's primary care physician.

Plaintiff additionally asserted that she visited decedent's house on the same day of his fall, looked at the chair decedent was sitting on when he fell from the porch and observed that one leg of the chair was missing.

Following plaintiff's examination before trial, defendants served post-deposition demands dated November 16, 2017 seeking, among other things: any and all documentation or receipts demonstrating financial support allegedly provided by decedent to his mother and his nephew, Brett; the name of the gym decedent belonged to; any photographs of the plastic chair in which decedent was allegedly sitting on May 19, 2015 as testified to by plaintiff at her deposition; any photographs taken of decedent during his admission to WMC from May 20, 2015 to June 4, 2015 and any photographs taken of decedent during his admission to any subsequent facilities after his discharge from WMC on June 4, 2015 including, but not limited to Friedwald Center for Rehab and Nyack Hospital. Defendants additionally requested authorizations for the decedent's employment records from the Ramapo Central School District. Defendants further reiterated their demands for authorizations for decedent's primary care physician, the name and address of decedent's pharmacy and any and all prior treating physicians for the decedent.¹⁶

By letter dated November 22, 2017 plaintiff objected to defendants' demand for the authorization for the decedent's employment records as palpably overbroad and improper as the decedent had been retired for many years prior to the incident and asserted that plaintiff was not making a claim related to his previous employment. Plaintiff also objected to the demands for authorizations for any and all prior treating physicians as palpably overbroad and improper. Plaintiff further objected to defendants' request "for an

¹³Plaintiff's Exhibit G to moving papers, NYSCEF Doc. No. 68.

¹⁴Plaintiff's Exhibit H to moving papers, NYSCEF Doc. No. 69.

¹⁵Defendants' Exhibit G to moving papers, NYSCEF Doc. No. 50.

¹⁶Defendants' Exhibit H to moving papers, NYSCEF Doc. No. 51.

inspection of the plastic chair” decedent was sitting in at the time he fell as irrelevant to the plaintiff’s claim of medical malpractice and damages.¹⁷

By compliance conference referee report and order issued November 24, 2017 (Lefkowitz, J), defendants were directed to furnish plaintiff with previously demanded and outstanding discovery including, but not limited to, the curriculum vitae for each individual defendant and the current residence address for each individually named defendant, copies of defendant hospital’s rules, regulations, guidelines, protocols, policies and procedures, records from any quality assurance or mortality or morbidity proceeding that contained statements by any of the individually named defendants relating to decedent’s treatment, defendants were ordered to provide a detailed privilege log together with verification of bill of particulars as to affirmative defenses within two weeks of such order.¹⁸

In accordance with this Court’s order of November 24, 2017, on December 5, 2017, defendants served their amended responses to plaintiff’s combined demands for discovery and inspection. As to plaintiff’s demands for copies of accident and investigation reports, they responded that defendants and their representative were not aware of any accident, incident and investigation reports pertaining to the occurrences, events and/or injuries which are the subject of this action, prepared in the regular course of business operations or practices of any person, firm, corporation, association or other entity. In regard to plaintiff’s demand for copies of mortality and morbidity reports, quality assurance reviews and peer review reports containing statements made by any named party to this action, defendants answered that neither they nor their representatives were aware of any mortality and morbidity reports, quality assurance reviews and peer review reports containing statements by any named party to this action beyond those contained within the records pertaining to the occurrences, events and/or injuries which are the subject of this action, prepared in the regular course of business operations or practices of any person, firm, corporation, association or other entity. Defendants assured plaintiff that should they come into possession of such materials, they would provide a supplemental response in compliance with the CPLR. Concerning plaintiff’s demand for copies of rules, regulations and guidelines, protocols, policies and procedures relating to the treatment of patients believed to be suffering from alcoholism or symptoms of alcohol withdrawal; CIWA protocols and guidelines relating to the use of restraints, sedation and extubation of patients, defendants set forth that they performed a search for the rules, regulations, guidelines, protocols, policies and procedures for the treatment of patients believed to be suffering from alcoholism or symptoms of alcohol withdrawal in existence for May of 2015, for the sedation and extubation of patients, and their search revealed no documents responsive to plaintiff’s demands. With regard to plaintiff’s demand for copies of rules, regulations and guidelines, protocols, policies and procedures relating to CIWA protocols and restraints in existence in May 2015, defendants conducted a search for such documents which they averred they would provide under separate cover to the extent such documents exist.¹⁹ Concomitantly, defendants served their amended privilege log reflecting that no accident nor incident report exists. However, it was noted that one investigative report was created in anticipation of litigation on October 28, 2015 following the receipt of plaintiff’s notice of claim

¹⁷Defendants’ Exhibit I to moving papers, NYSCEF Doc. No. 52. It is unclear why plaintiff is objecting to a demand defendants did not make. A review of defendants’ demand reveals that they requested “Any photos of the plastic chair in which the decedent Martin Perry was allegedly sitting on, on May 19, 2015, as testified to by plaintiff at her deposition”. Plaintiff stated in her November 22, 2017 correspondence that “we object to your request for an inspection of the plastic chair decedent was using when he fell on May 19, 2015.”

¹⁸Plaintiff’s Exhibit I to moving papers, NYSCEF Doc. No. 70.

¹⁹Plaintiff’s Exhibit J to moving papers, NYSCEF Doc. No. 71.

on August 5, 2015. Under the category “Nature of Privilege”, defendants assert “Attorney-Client Privilege”. As to plaintiff’s demand for mortality and morbidity power point presentation, defendants responded that on May 28, 2015, there was a “[P]resentation of multiple case studies to be discussed for education of medical providers in the department of surgery. No written statements were made by any named party to this action at this presentation” and assert privilege pursuant to NY Pub Health Law 2805 and NY Ed Law 6527[3].²⁰

By correspondence of same date, defendants requested authorizations for the ambulance provider that transported decedent to Good Samaritan Hospital and the transport that brought him to WMC. Once again, defendants renewed their demands for authorizations for decedent’s employment and Medicare records. They also sought authorizations for decedent’s Blue Cross records, UMC and another for Lance Kovar, M.D.²¹

By letter dated December 11, 2017, plaintiff provided authorizations for Lance Kovar, M.D., Dr. Siegel (decedent’s Gastroenterologist), Ramapo Valley Ambulance Corp., and Rocky Mountain Holdings, LLC (helicopter transport from Good Samaritan Hospital to WMC). The authorization for the ambulance was limited to May 19, 2015 and helicopter transport was limited from May 20, 2015. Plaintiff further asserted that pursuant to a letter she received from the Social Security Administration, Retirement, Survivors and Disability Insurance, decedent was “never entitled to Medicare”.²²

By compliance conference referee report and order dated December 19, 2017 (Lefkowitz, J), defendants were directed to provide CIWA protocols and protocols regarding restraints within two weeks from the date of such order. Should such documents not exist, defendants were ordered to respond, in writing, that such documents do not exist and additionally, were directed to provide the curriculum vitae for Collins and Policastro, as previously ordered. Defendants were also directed to provide a second supplemental amended privilege log including the authors and recipients of correspondence, and with respect to the PowerPoint presentation, defendants were directed to provide the names of the participants, the presenter and the purpose of the presentation.²³

By letter dated January 8, 2018, defendants requested, inter alia, authorizations for the ambulance and helicopter transports which were not date restricted and renewed their requests for authorizations for decedent’s employment records, primary care physician and pharmacy records, all without date restriction, authorizations for decedent’s Medicare records and an authorization for UMC. For the first time, defendants now sought to inspect the chair “[I]n order to obtain a complete picture of the incident leading to decedent’s admission to Westchester Medical Center” and additionally sought to “investigate the site of the injury”. Defendants then reiterated their request for the full name and address of “Rodney” and the name of decedent’s gym. In connection with defendants’ post examination before trial discovery demands, they requested from plaintiff color photographs of decedent which she concedely possessed in black and white including the name(s) of the person(s) that took each photograph and his/her relationship to decedent, the

²⁰Plaintiff’s Exhibit K to moving papers, NYSCEF Doc. No. 72.

²¹Defendants’ Exhibit J to moving papers, NYSCEF Doc. No. 53.

²²Defendants’ Exhibit K to moving papers, NYSCEF Doc. No. 54.

²³Plaintiff’s Exhibit L to moving papers, NYSCEF Doc. No. 73.

date each photograph was taken and descriptions of each photograph. Additionally, defendants requested an authorization for a copy of decedent's Blue Cross/Blue Shield policy, a new authorization for Dr. Kovar, as the one provided to them yielded no results together with the dates and locations of treatment, medical record numbers and any other identifying information to assist the provider in locating decedent's medical records and a copy of the letters of administration. Finally, defendants requested plaintiff supplement her bill of particulars to provide a monetary value for special damages alleged along with details entailing charges for hospitals, doctors, nurses and medicine, the amounts reimbursed to plaintiff for medical and/or hospital expenses by decedent's medical insurance or other sources, identifying the party or business and any additional pecuniary loss claimed as a result of decedent's alleged wrongful death.²⁴

By letter dated January 16, 2018, plaintiff advised defendants she refused to provide: defendants with an authorization for decedent's employment records, transport records unrestricted to date and rejected their application to inspect decedent's chair. Plaintiff claims she does not know who decedent's primary care physician was nor does she know where he filled his prescriptions. Since she believes he may have filled his prescriptions at CVS Pharmacy in Suffern, she provided an authorization for the release of information regarding his prescriptions. Although plaintiff testified that decedent was a member of a gym, she asserts she has no information regarding decedent's gym membership so she is unable to provide an authorization.

Finally, plaintiff states she will provide a monetary value for special damages alleged along with details entailing charges for hospitals, doctors, nurses and medicine; however, she complains she has already furnished defendants with a collateral source authorization for amounts reimbursed to plaintiff for medical and/or hospital expenses by decedent's medical insurance or other sources, identifying the party or business and previously provided defendants with additional pecuniary loss information claimed as a result of decedent's alleged wrongful death.

The parties appeared for a compliance conference on January 17, 2018. At that conference the parties were provided a briefing schedule for the present motions. On same date, defendants served plaintiff with a second supplemental amended privilege log. As to the investigation report dated October 28, 2015, they assert that a confidential report was created in anticipation of litigation following the receipt of the notice of claim on August 5, 2015 which includes a description, summary of documentation and chronology of events that were part of WMC quality assurance investigation. Defendants assert attorney-client privilege, NY Pub Health Law 2805-j, 2805-l, 2805, NY Ed Law 6527[3] and NY Mental Hyg Law 29.29 which specifically exempts from disclosure any and all records created or prepared in accordance with a quality assurance review program and/or medical malpractice prevention program citing *Katherine F. V State of New York*, 94 NY2d 200 [1999]; *Logue v Velez*, 92 NY2d 13 [1999]; *Klingner v Mashioff*, 50 AD3d 746 [2d Dept 2008] and *Megrelishvili v Our Lady of Mercy Med. Ctr.*, 291 AD2d 18. Regarding the Department of Surgery, Surgical Care Section Morbidity and Mortality Meeting Power Point presentation, defendants state that the subject matter and purpose was peer review of cases for the surgical critical care section's medical review committee meetings, including a listing of cases and/or issues to be discussed for peer review purposes. The presentation was prepared by Gustavo Pena-LaGrave, M.D., Fellow of the Surgical Critical Care Section and presented to the Faculty of the Surgery Critical Care Section. No resident doctors, nurses nor faculty from a different department were present nor were written statements made by any named

²⁴Defendants' Exhibit L to moving papers, NYSCEF Doc. No. 55.

party to this action at the presentation. Defendants claim such privilege pursuant to NY Pub Health Law 2805 and NY Ed Law 6527[3].

The Parties' Contentions

A. Defendants' Motion Seq. No. 2.

Defendants argue that the complaint should be dismissed due to plaintiff's continual failure to comply with their discovery demands. Plaintiff asserts decedent suffered brain damage as a result of defendants' negligence in the treatment and management of decedent's alcohol toxicity and further that they failed to: attach appropriate significance to decedent's medical history and course, adequately appreciate the seriousness and gravity of decedent's condition, take a proper history, perform a proper follow-up examination, appreciate the significance of decedent's history, consider and appreciate the effects of medication, properly treat alcohol withdrawal and alcohol toxicity, comply with or follow defendants' own guidelines and protocols relating to management and treatment of patients suffering from alcohol toxicity and/or withdrawal, attach appropriate significance to the decedent's medical history, take a proper history, appreciate the significance of decedent's history and the effects of medications that decedent was taking and in ignoring decedent's signs, symptoms and complaints. Defendants maintain they are entitled to explore alternative causes of decedent's brain damage which resulted in decedent's hospitalization at defendant WMC which, they contend could be attributable to his excessive drinking followed by a fall.

Further, based on plaintiff's allegations, including but not limited to, defendants' failure to: take and appreciate decedent's proper history, take a proper medical history and attach appropriate significance to such medical history and course, consider and appreciate the effects of medication, properly treat alcohol withdrawal and alcohol toxicity, defendants are entitled to have access to all of decedent's medical history and pharmacy records, including unlimited authorizations for all prior treating physicians, ambulance companies and institutions and plaintiff's employment records. Similarly defendants argue that they are entitled to information concerning all of the decedent's medications in order to properly evaluate the decedent's medical condition when he was admitted to WMC.

Defendants contend that although plaintiff provided an authorization for the CVS Pharmacy in Suffern, plaintiff is still holding back information concerning the decedent's medication. Defendants assert that in light of plaintiff's testimony that she brought decedent's medication from his house to WMC, and these medications would contain labels identifying the name of the dispensing pharmacy, plaintiff should be able to provide defendants with the names of all of decedent's pharmacies.

In light of the foregoing, defendants maintain they are entitled to authorizations for all of decedent's prior treating physicians, institutions, pharmacies, and ambulance companies as well as his employment records.

In opposition, plaintiff argues that defendants are not entitled to the discovery they demand, and their motion should be denied as plaintiff has complied with all court directives concerning discovery, has timely responded to all of defendants' discovery demands and has timely interposed any objections thereto. Plaintiff argues that defendants have failed to demonstrate the relevance of the discovery which they now seek. Specifically, plaintiff states that defendants' demand to inspect the chair from which the decedent fell off of his porch is irrelevant to plaintiff's claims. Additionally, plaintiff argues that the decedent's employment records have no bearing on plaintiff's claims in this case as the decedent had been retired almost ten years

before his death, and plaintiff is not claiming lost income or lost inheritance relating to the decedent's former employment. With respect to other pharmacy records, plaintiff testified at her deposition that she brought the decedent's medication to WMC but the medication bottles were never returned to her.

Plaintiff states that she has provided unrestricted authorizations for Good Samaritan Hospital, Friedwald Center for Rehabilitation and Nursing and Nyack Hospital as well as an authorization for Dr. Viral Sheth, restricted to May 1, 2010 to present, who plaintiff believes was the decedent's primary care provider, as well as unrestricted authorizations for Dr. Lance Kovar, Dr. Siegel, the decedent's insurance records from United Healthcare, Social Security Administration records and New York State and Local Employees Retirement System. Plaintiff has also provided defendants with confirmation from the Social Security Administration that the decedent was never entitled to Medicare. Plaintiff also provided an authorization for the Ramapo Valley Ambulance Corps, limited to May 19, 2015, which transported the decedent to Good Samaritan Hospital and an authorization for Rocky Mountain Holdings, Inc. which provided air transport for the decedent from Good Samaritan Hospital to WMC, limited to May 20, 2015, the date of transport. Plaintiff objects to providing unlimited authorization for ambulance records as defendants have failed to establish that other than the May 19, 2015 incident, decedent had ever been transported by ambulance.

B. Plaintiff's Motion Seq. No. 3.

Plaintiff's motion seeks to strike defendants' answer for their failure to provide discovery pursuant to court orders. She seeks, inter alia, a PowerPoint presentation given on May 28, 2015 which addressed the decedent's care and the names of any physicians, nurse, staff who attended the presentation, all incident reports regarding decedent's care, investigative files and materials, a copy of the self-insured retention plan, excess insurance information and any claims made under such plan against defendants including the amount of the claim and the amount actually paid out on each claim and a list of any other cases or matters in which any of the defendants has testified as a party or expert witness, a verified statement setting forth each individual defendant's residence address, and the curriculum vitae for defendants Collins and Policastro. Plaintiff also seeks costs and sanctions.

With respect to the PowerPoint presentation, defendants state that it was presented to faculty of the critical care section, and no written statements were made by any named party in this proceeding.

As to the investigation report, defendants counter that such report was specifically created by defendants' Risk Management Department in anticipation of this litigation which was prompted by receipt of plaintiff's August 5, 2015 notice of claim, and such report was prepared and submitted to defendants' attorneys. Defense counsel maintains that Peter Crean, Esq., a partner in the firm has personal knowledge of the procedure that was employed by defendant hospital, was the recipient of the report and can speak directly to the procedure employed by the Risk Management Department. Moreover, defendants argue that the report is unresponsive to plaintiff's demand as plaintiff's request was limited to reports "prepared in the regular course of business". The subject report was prepared in anticipation of litigation and not in the regular course of business and is subject to privilege.

Defendants further counter that plaintiff is not entitled to any further insurance information. They have advised plaintiff that defendants Lopez, Collins, Marini, Policastro, Westchester Medical Center Advanced Physicians Services P.C. and Westchester County Health Care Corporation d/b/a Westchester Medical Center maintained a Healthcare Professional Liability Self Insured Retention of \$12 million for each

and every medical incident for the period between January 1, 2015 through December 31, 2015. Defendants posit that the only reason to seek insurance information is to determine how much of the available coverage has been exhausted by prior claims; however, since defendants have \$12 million “for each and every medical incident” occurring during the policy period, any other claims during this time frame would not affect the coverage available for plaintiff in this instance. Further, defendants argue that plaintiff has established no valid legal support for defendants to identify any prior testimony defendants may have provided in any other matter.

As to the remaining discovery demands by plaintiff, defendants asseverate that they have either complied with such request or such demand should be denied as irrelevant.

Defense counsel asserts that they have submitted copies of its policies and procedures for restraint and seclusion-Adult and Pediatric and Clinical Management Guidelines for Alcohol Withdrawal Syndrome on January 8, 2018. With regard to plaintiff’s demand for each individual’s personal address, defendants argue that personal verification by defendants of the bill of particulars was unnecessary since the bill of particulars was served out of defense counsel’s Manhattan office. As to the request for the curriculum vitae of Collins and Policastro, such documents were produced.

Analysis

It is axiomatic that under CPLR 3101(a)(1), there must be full disclosure of all matters “material and necessary” in the prosecution or defense of an action. The phrase “material and necessary” is interpreted liberally to require disclosure, on request, of any facts bearing on the controversy that will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Matter of Kapon*, 23 NY3d 32 [2014], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Trial courts have broad discretion to supervise discovery and enter appropriate remedies to ensure the fair and efficient conduct of discovery (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]). The test is one of usefulness and reason (*see quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]), and courts have articulated the “material and necessary” standard to include not only relevant evidence but also discovery of matters “reasonably calculated to lead to the discovery information bearing on the claims” (*see Redmond v Hanypsiak*, 153 AD3d 1374 [2d Dept 2017]; *Matter of Harriman Estates at Aquebogue, LLC v Town of Riverhead*, 151 AD3d 854 [2nd Dept 2017]; *D’Alessandro v Nassau Health Care Corp.*, 137 AD3d 1195 [2d Dept 2016]).

On a CPLR 3126 motion to strike papers as a consequence of a party’s failure to proceed with discovery, “the nature and degree of the penalty ... is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party’s failure to disclose is willful and contumacious (*see Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*see Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal*, 38 AD3d at 820; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

Turning first to defendants’ demands for authorizations for decedent’s pharmacy records, prior treating physicians, ambulance companies and/or other transport companies, institutions and hospitals, this Court agrees with defendants that they are entitled to have access to all of decedent’s medical history and

pharmacy records, including unlimited authorizations for all prior treating physicians, ambulance companies and institutions. Similarly, defendants are entitled to information concerning all of decedent's medications in order to properly evaluate his medical condition upon admission to defendant WMC.

Plaintiff has alleged, inter alia, that defendants failed to: take decedent's proper history and appreciate the significance thereof, take a proper medical history and attach appropriate significance to such medical history and course, consider and appreciate the effects of medication, properly treat decedent's alcohol withdrawal and alcohol toxicity, adequately appreciate the seriousness and gravity of decedent's condition, perform a proper follow-up examination and consider and appreciate the effects of his medication.

Although physician-patient communications are privileged pursuant to CPLR 4504[a], a litigant is deemed to have waived such privilege when, in commencing or defending a personal injury action, such person has affirmatively placed his or her mental or physical condition in issue (*see Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452). Moreover, defense counsel is entitled to review records showing the nature and severity of decedent's prior medical conditions which, in this case, may have an impact upon the amount of damages (*see Montalto v Heckler*, 113 AD3d 741 [2d Dept 2014]; *M.C. v Sylvia Marsh Equities, Inc.*, 103 AD3d 676 [2d Dept 2013]).

Here, plaintiff has placed decedent's entire medical condition in controversy through her broad allegations contained in the bill of particulars (*see O'Brien v Village of Babylon*, 153 AD3d 547 [2d Dept 2017]; *Greco v Wellington Leasing L.P.*, 144 AD3d 981 [2d Dept 2016]; *Farrell v E.W. Howell co., LLC*, 103 AD3d 77s [2d Dept. 2013]; *Bravo v Vargas*, 1113 AD3d 577 [2d Dept 2014]; *Amoroso v City of New York*, 66 AD3d 618 [2d Dept 2009], plaintiff directed to provide authorizations for preexisting kidney, cardiac and diabetic conditions). Accordingly, defendants' demand for unrestricted authorizations for decedent's pharmacy records, prior treating physicians, ambulance companies and/or other transport companies, institutions and hospitals is granted.

With regard to defendants' demand for authorizations for decedent's employment records, such request is also granted. Plaintiff's argument that decedent's employment records have no relationship to her claims herein is unavailing.

In the instant matter, plaintiff has claimed decedent suffered brain damage as a result of defendants' negligence, inter alia, in the treatment and management of decedent's alcohol toxicity and/or withdrawal, defendants' failure to take a proper history and appreciate the significance of such history. By providing defendants with appropriate authorizations for decedent's employment records, they may be able to determine if his employment records reflect a history of alcohol abuse, alcohol toxicity and/or alcohol withdrawal; if treatment was sought, and if so, where treatment was sought; whether decedent applied for medical leave; if he was subject to physical examinations in connection with his employment and the names and addresses of such physicians, if applicable, among other information. The discovery of such information is certainly relevant to plaintiff's claims and defendants' defenses (*see Vaughn v Mount Sinai Med. Ctr.*, 2014 Slip Op 32988(U) [West Co 2014]).

As to defendants' demand for inspection of the plastic chair decedent was sitting in when he fell on May 19, 2015 set forth in their letter of January 8, 2018, such request is denied. Defendants' post-ebt notice of discovery and inspection requested only that plaintiff produce "photos of the plastic chair in which the decedent Martin Perry was allegedly sitting on, on May 19, 2015, as testified by the plaintiff at her deposition." Furthermore defendant has failed to demonstrate to this Court how it has been prejudiced by

plaintiff's failure to provide them with photographs of the plastic chair in which decedent was sitting at the time of the fall.

With regard to defendants' demand for an authorization for Medicare and/or Medicaid information, plaintiff's response that decedent was not "entitled to Medicare" as stated by the Social Security Administration is woefully inadequate. Plaintiff must either obtain the information requested by defendants from the appropriate entities or provide defendants with duly executed authorizations to enable them to obtain such information.

Turning now to plaintiff's motion, she seeks an order striking defendants' answers, or alternatively, a conditional order providing defendants provide her with a complete copy of the power point presentation as set forth in their privilege log, all incident reports prepared by defendants regarding decedent's treatment, the investigative file and materials referred to in defendants' privilege log, the rules and regulations relating to the use of restraints and CIWA protocols and the curriculum vitae for defendants Collins and Policastro, a verified statement setting forth each individual defendants' residence address, a copy of the self-insured retention plan under which defendants claim they are insured, excess insurance information, claims made against each defendant under said plan, the amount of each such claim and the amount actually paid out for each such claim and a complete list of any other cases or matter in which any individual defendant has testified as a party or expert witness, including each court where such testimony has been given and the full caption and index number for each such matter.

As to the incident reports, plaintiff complains that defendants first advised that there were no incident reports; however, in the ensuing months defendants amended their privilege log to reflect that they, in fact, possess an investigative report which was prepared in anticipation of litigation. Plaintiff argues that defendants' belated, second supplemental amended privilege log is insufficient as it does not detail who conducted the investigation, what the investigation entailed nor what documents and records had been reviewed or generated during that process.

Defendants' second supplemental, amended privilege log sets forth the nature of the contents of the documents, who prepared the records and the basis for the claimed privilege. Their privilege log denotes that Item No. 1 is an investigation report that is confidential and created in anticipation of litigation following the receipt of the plaintiff's notice of claim on August 5, 2015 and includes a description, summary of documentation and chronology of events that were part of WMC's "quality assurance investigation". The author and recipient of such document is "From Charlotte Anderson of WMC Risk Management to Peter Crean, Esq., Trial Partner at Martin, Clearwater and Bell, LLP." The date of such document is October 28, 2015 and the privileges claimed are set forth as "Attorney-Client Privilege; Public Health Law 2805-j, 2805-l, 2805-m, Education Law 6527(3) and Mental Hygiene Law 29.29 specifically exempt from disclosure any and all records created or prepared in accordance with a quality assurance review program and/or medical malpractice prevention program" and citing *Katherine F. V State of New York*, 94 NY2d 200 [1999]; *Logue v Velez*, 92 NY2d 13 [1998]; *Klingner v Mashioff*, 50 AD3d 746 [2d Dept 2008]; *Megrelishvilli v Our Lady of Mercy Med. Ctr.*, 291 AD2d 8 [1st Dept 2002]. Defendants allege that Item 2 is "Department of Surgery, Surgical Critical Care Section Morbidity and Mortality Meeting Power Point" and the subject matter and purpose of such document is "Peer review of cases for the Surgical Critical Care Section's medical review committee meetings, including a listing of cases and/or issues to be discussed for peer review purposes. The date is May 28, 2015 and the author and participants are listed as "Prepared by Gustavo Pena-LaGrave, M.D., Fellow of the Surgical Critical Care Section and presented to the Faculty of the Surgery Critical Care Section. No Resident doctors or Nurses were present. No Faculty from a different department or section was

present. No written statements were made by any named party to this action at this presentation.” The privileges claimed are pursuant to NY Pub Health Law 2805 and NY Ed Law 6527[3].

The CPLR creates privileges for communications and their clients exchanged in the course of obtaining legal advice or services (*see* CPLR 4503[a]) as well as for attorney work product (*see* CPLR 3101[c]). Pursuant to CPLR 3122[b], “[w]henver a person is required...to produce documents for inspection, and where such person withholds one or more documents that appear to be within the category of the documents required...to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document” (*see Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 442 [2003]). Whether a particular document is nor is not protected by the attorney client privilege doctrine is necessarily a fact-specific determination, and the burden to establish the material is, in fact, material prepared in anticipation of litigation falls on the party seeking to preclude disclosure (*see Robertson v Brookdale Hosp. Med. Ctr.*, 153 AD3d 743 [2d Dept 2017]). Examination of the documents in camera is necessary before a determination of whether certain items demanded should in fact be disclosed (*see Ural v Encompass Ins. Co. of Am.*, 158 AD3d 845 [2d Dept 2018]; *Cioffi v S.M. Foods, Inc.*, 142 AD3d 520 [2d Dept 2016]).

Based on defendants’ submissions, this Court will undertake an in camera review of the investigative report.

Turning now to plaintiff’s demand for defendants’ power point demonstration materials, she requested defendants “[P]rovide complete copies of all Mortality and Morbidity Reports, Quality Assurance Reviews and Peer Review reports containing statements made by any named party to this action”. Defendants claim that Item 2 is identified as “Department of Surgery, Surgical Critical Care Section Morbidity and Mortality Meeting Power Point” and the subject matter and purpose of such document is “Peer review of cases for the Surgical Critical Care Section’s medical review committee meetings, including a listing of cases and/or issues to be discussed for peer review purposes”. The date is May 28, 2015 and the author and participants are listed as “Prepared by Gustavo Pena-LaGrave, M.D., Fellow of the Surgical Critical Care Section and presented to the Faculty of the Surgery Critical Care Section. No Resident doctors or Nurses were present. No Faculty from a different department or section was present. No written statements were made by any named party to this action at this presentation.” The privileges claimed are pursuant to NY Pub Health Law 2805 and NY Ed Law 6527[3].

Generally, proceedings and records relating to performance of a medical or quality assurance review function are protected from disclosure, and the party seeking to invoke such privilege bears the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes (*see* NY Ed Law 6527[3]); *Kneisel v QPH, Inc.*, 124 AD3d 729 [2d Dept 2015]; *Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]; *Daly v Brunswick Nursing Home, Inc.*, 95 AD3d 1262 [2d Dept 2012]; *Estate of Mirco Teta v Mercy Med. Ctr.*, 60 AD3d 624 [2d Dept 2009]; *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41 [2d Dept 2003]). The purpose of the discovery exclusion is to ‘enhance the objectivity of the review process’ and to assure that medical review committees may frankly and objectively analyze the quality of health services rendered’ by hospitals (*see Logue v Velez*, 92 NY2d at 17, *quoting* Mem of Assembly Rules Comm., Bill Jacket, L

1971, ch 990 at 6). The privilege attaches to the proceedings and work product of a hospital's quality assurance committee (*see Park Assocs. v N.Y. State Attorney General*, 99 NY2d 434 [2003]).

NY Pub Health Law 2805-j requires each hospital to maintain a coordinated program for the identification and prevention of, inter alia, medical malpractice, including the establishment of a quality assurance committee (NY Pub Health Law 2805-j [1]). Moreover, NY Pub Health Law 2805-m provides, inter alia, that information collected and maintained pursuant to NY Pub Health Law 2805-j and any incident reporting requirements shall be kept confidential (NY Pub Health Law 2805-m [1]).

The party seeking to assert the privilege of quality assurance bears the burden of demonstrating that the information and documents demanded were obtained or prepared in accordance with the relevant statutes (*see Daly v Brunswick Nursing Home*, 95 AD3d 1262 [2d Dept 2012]); *Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]; *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41 [2d Dept 2004]). In order to assert the quality assurance privilege, a hospital is required to demonstrate that it has a review procedure and the information claimed to be privileged was obtained or maintained in accordance with the review procedure (*Kivlehan v Waltner*, 36 AD3d at 597).

Notably, both NY Ed Law 6527 (3) and NY Pub Health Law 2805-m, by their own language, limit the confidentiality provided under the statutes to records, reports, information collected and maintained, and proceedings. NY Pub Health Law 6527 (3) provides: "Neither the proceedings nor records relating to the performance of a medical or a quality review function or participation in a medical and dental malpractice prevention program nor any report required ... shall be subject to disclosure" Similarly, NY Pub Health Law 2805-m provides that "information required to be collected and maintained pursuant to sections twenty-eight hundred five-j ..., reports required to be submitted ... shall be kept confidential and shall not be released" It is also noteworthy that in order to demonstrate the applicability of the quality assurance privilege, a hospital must demonstrate the existence of a quality assurance review procedure and that the information which it asserts is privileged from disclosure and was obtained or maintained in accordance with that quality assurance review procedure (*see Daly v Brunswick Nursing Home*, 95 AD3d 1262; *Kivlehan v Waltner*, 36 AD3d 597).

Disclosure however cannot be had where the item or information demanded does not exist (*see Ural v Encompass Ins. Co. of Am.*, 158 AD3d 845 [2d Dept 2018]; *Maffai v County of Suffolk*, 36 AD3d 765 [2d Dept 2007]; *Bach v City of New York*, 304 AD2d 686 [2d Dept 2003]; *Romeo v City of New York*, 261 AD2d 379 [2d Dept 1999]). Thus, a party seeking discovery cannot compel the creation of an otherwise non-existent writing (*see Banigan v Hill*, 57 AD3d 463 [2d Dept 2008]; *Jonassen v A.M.F. Inc.*, 104 AD2d 484 [2d Dept 1981]) nor may a person be compelled to produce that which he or she does not possess or control (*see Gray v Wallman & Kramer*, 225 AD2d 362 [1st Dept 1996]; *Samello v Intershoe, Inc.*, 78 AD2d 796 [1st Dept 1980]).

In support of defendants' position that such documents are subject to privilege, they submit the affidavit of Cynthia Cuddy, vice president of the Quality Assurance Department of defendant WMC. Ms. Cuddy asserts that in her capacity as vice president of WMC's Quality Assurance Department, she is responsible for and fully familiar with such department, the purpose of which is to improve patient care and identify and prevent medical malpractice. She avers that she is fully familiar with the Morbidity and Mortality meetings and is aware that often a power point presentation is created for the purpose of presentation and education at such meetings. Ms. Cuddy learned that on May 28, 2015 a power point demonstration was prepared and presented by Gustavo Pena-La Grava, M.D., then a Fellow in the Surgical

Critical Care Section and such presentation was conducted in accordance with WMC's requirements pursuant to NY Pub Health Law 2805-j and with the knowledge that the protection and privileges under NY Ed Law 6527[3] and NY Pub Health Law 2805 would be afforded. She noted that no minutes of the meeting were recorded. She contended that the custom and practice of this program is to disallow any physician who was directly involved in the care and treatment of the patient to present the case or give any statements. In light of the above, Ms. Cuddy maintained that their office does not have any statements of any kind made by any of the individually named parties in this action within the power point demonstration.

Plaintiff counters that defendants have not established that the power point presentation does not contain any statements by the individual defendants whether verbal, written or recorded in some fashion.

To the extent that defendants may possess any statements of the individual defendants contained in the power point demonstration of May 28, 2015, such statements shall be furnished to this Court for an in camera review, and if no such statements exist, defendants must provide an affidavit by an individual with personal knowledge and appropriate authority setting forth that no such statements exist to plaintiff.

As to plaintiff's demand for the rules and regulations relating to the use of restraints and CIWA protocols, by letter dated January 8, 2018, defendants submitted copies of their Trauma Practice Management Manual including Clinical Management Guidelines: Alcohol Withdrawal Syndrome including Restraint and Seclusion - Adult and Pediatric, which plaintiff does not deny.

Defendants have also produced the curriculum vitae of the individual defendants Policastro and Collins that plaintiff requested.

Plaintiff has further demanded defendants provide the residence address of each individual defendant, and defendants concede they have not. CPLR 3118 provides that "A party may serve on any party a written notice demanding a verified statement setting forth the post office address and residence of the party...". In light of such unambiguous provision, defendants shall provide the post office address and residence of each individual defendant as demanded.

Plaintiff additionally requested pursuant to CPLR(f), copies of each and every primary, contributing and excess insurance agreement, including face sheets, endorsements and certificates annexed and/or pertaining thereto, and of the complete contents of any and all such policies, which may be required to pay all or part of any judgment herein or which may be required to reimburse or indemnify any party hereto for payments made to satisfy any judgment on behalf of plaintiff; a sworn statement from defendant and not from his attorneys disclosing the number of claims against said defendant during the applicable policy periods, the amounts sought in said claims, and the total of all sums previously paid out against said policies.

By letter dated October 12, 2017, defense counsel advised plaintiff that each individual defendant (Lopez, Collins, Marini, Policastro, WMCAPS, WCHCC d/b/a WMC) maintained a Health Care Professional Liability Self Insured Retention of \$12,000,000 for each and every medical incident for the period between January 1, 2015 through December 31, 2015. Defendants assert that there is no authority for plaintiff to demand the actual policy. Moreover, defendants counter that plaintiff's demand for information regarding other "liability claims that have been made against such coverage, the amounts claimed and any amounts paid in response to plaintiff's demand" is similarly unsupported. They posit that the only reason to seek such information is to determine how much of the available coverage has been exhausted by prior claims. Since defendants have \$12,000,000 available coverage for each and every

medical incident occurring during the relevant period, they assert that any other claims during this period would not affect the coverage available in the instant matter. Finally, plaintiff's demand that defendants identify any prior testimony they have provided in any other matters has no legal support.

Under CPLR 3101(f) a claimant "may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." The purpose of this rule is to facilitate settlement of claims by affording the plaintiff knowledge of the limits of defendants' liability policies by enabling the litigants to enter into realistic settlement negotiations (*see Folgate v Brookhaven Memorial Hosp.*, 86 Misc 2d 191 [Suffolk Co 1976]).

In this instance, defense counsel has, by correspondence, advised plaintiff that each individual defendant (Lopez, Collins, Marini, Policastro, WMCAPS, WCHCC d/b/a WMC) maintained a Health Care Professional Liability Self Insured Retention of \$12,000,000 for each and every medical incident for the period between January 1, 2015 through December 31, 2015 which amounts to \$72,000,000 in coverage. They posit that the only reason to seek such information is to determine how much of the available coverage has been exhausted by prior claims; however, defendants have \$12,000,000 available coverage for each and every medical incident occurring during the relevant period with \$72,000,000 available in the aggregate, they assert that any other claims during this period would not affect the coverage available in the instant matter.

Defendants are obligated to provide copies of all insurance policies pursuant to plaintiff's demand for the period during which decedent was under defendants' care. Plaintiff is additionally entitled to obtain from defendants a sworn statement disclosing the number of claims that were made against such insurance policies during the same period, the amount of each claim and the amounts paid out against those policies (*see Lolly v Brookdale Univ. Hosp. & Med. Ctr.*, 25 AD3d 667 [2d Dept 2006]; *Brandes v N. Shore Univ. Hosp.*, 1 AD3d 549 [2d Dept 2003]; *Anderson v House of Good Samaritan Hosp.*, 1 AD3d 970 [4th Dept 2003]; *Morris v Clements*, 228 AD2d 990 [3d Dept 1996]; *Sullivan v Brooklyn, Caledonian Hosp.*, 213 AD2d 474 [2d Dept 1995]). With respect to plaintiff's demand for a complete list of any cases or matters in which any individual defendant has testified as a party or expert witness, including each court where such testimony has been given and the full caption and index number for each such matter, general background questions regarding the individual's experience testifying as an expert in court is routinely permitted (*see Orner v Mount Sinai Hosp.*, 305 AD2d 307 [1st Dept 2003]).

Finally, plaintiff's applications for an award of sanctions against defendants is denied. A review of the entire record herein reveals that defendants' conduct was not willful and contumacious.

Accordingly it is hereby

ORDERED *that*, plaintiff shall provide proper, duly executed authorizations unrestricted in time to defendants in order to permit defendants to obtain decedent's pharmacy records within ten (10) days of the order herein; *and it is further*

ORDERED *that*, plaintiff shall provide proper, duly executed authorizations unrestricted in time to defendants in order to enable defendants to obtain the medical records of decedent's prior treating physicians' and decedent's hospital and/or institutional records prior to the date of the incident herein within ten (10) days of the order herein; *and it is further*

ORDERED *that*, plaintiff shall provide proper, duly executed authorizations unrestricted in time directed to any ambulance company or companies and/or other transport companies that may have transported decedent prior to the incident complained of herein within ten (10) days of the order herein; *and it is further*

ORDERED *that*, plaintiff shall provide proper, duly executed authorizations unrestricted in time directed to decedent's employer or employers, as the case may be within ten (10) days of the order herein; *and it is further*

ORDERED *that*, defendants' demand for inspection of the plastic chair decedent was sitting in when he fell on May 19, 2015, is denied; *and it is further*

ORDERED *that*, plaintiff must either obtain the information requested by defendants concerning whether decedent was a recipient of Medicare or Medicaid, and if so, the amount of the lien or liens, if any; and if not, written statements from the appropriate entities indicating that decedent was not, in fact, a Medicare or Medicaid recipient or provide proper, duly executed authorizations unrestricted in time directed to the appropriate entities to enable defendants to obtain such information within ten (10) days of the order herein; *and it is further*

ORDERED *that*, defendants shall furnish to this Court within ten (10) days of the order herein, a copy of the material listed in their defendants' second supplemental amended privilege log under Item 1 for an in camera review; *and it is further*

ORDERED *that*, to the extent defendants may possess any statements of the individual defendants contained in the power point demonstration of May 28, 2015 and noted in their second supplemental amended privilege log, such statements shall be furnished to this Court for an in camera review, and if no such statement or statements exist, defendants must provide an affidavit by an individual with personal knowledge and appropriate authority setting forth that no such statements exist to plaintiff within ten (10) days of the order herein; *and it is further*

ORDERED *that*, defendants shall provide by verified statement the post office address and residence of each individual defendant as demanded by plaintiff within ten (10) days of the order herein; *and it is further*

ORDERED *that*, defendants shall provide copies of all insurance policies pursuant to plaintiff's demand for the period during which decedent was under defendants' care and a sworn statement disclosing the number of claims that were made against each such insurance policy during the same period, the amount of each claim and the amounts paid out against those policies within ten (10) days of the order herein and a complete list of any cases or matters in which any individual defendant has testified as a party or expert

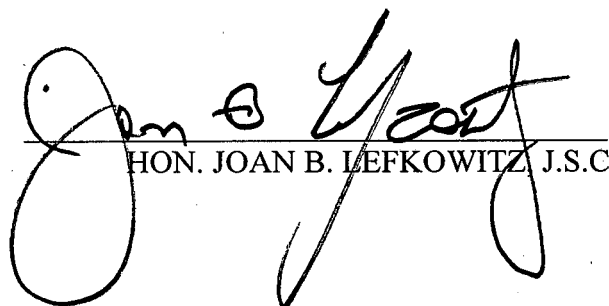
witness, including each court where such testimony has been given and the full caption and index number for each such matter within ten (10) days of the order herein; *and it is further*

ORDERED *that*, the application by plaintiff for an award of sanctions against defendants is denied in its entirety; *and it is further*

ORDERED *that*, the parties shall appear for a conference in the Compliance Conference Part of the Supreme Court of the State of New York, County of Westchester, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York 10601, Courtroom 800, on July 10, 2018, at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
May 15 2018


HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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