SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

GEORGE KAFFL and DOROTHY KAFFL,

Plaintiffs,

- against -

GLEN COVE HOSPITAL, ELENA BELKIN, M.D., GLENGARIFF HEALTHCARE CENTER, WINTHROP UNIVERSITY HOSPITAL and NORTH SHORE UNIVERSITY HOSPITAL,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 606346/14
Motion Seq. Nos.: 06, 07, 08
Motion Dates: 10/15/18
10/15/18
10/22/18

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 06), Affirmations and Exhibits	1
Notice of Motion (Seq. No. 07), Affirmation and Exhibits	2
Notice of Motion (Seq. No. 08), Affirmation and Exhibits	3
Affirmation in Opposition to Motions (Seq. Nos. 06 and 07) and Exhibits	4
Affirmation in Reply to Motion (Seq. No. 06)	5
Affirmation in Reply to Motion (Seq. No. 07)	6
Reply Affirmation to Motion (Seq. No. 08)	7

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants Glen Cove Hospital ("Glen Cove"), Elena Belkin, M.D. ("Dr. Belkin") and North Shore University Hospital ("North Shore") move (Seq. No. 06), pursuant to CPLR § 3212(b), for an order granting summary judgment dismissing the Verified Complaint as against them; and move, pursuant to CPLR § 3211(a)(7), for an order dismissing the Verified Complaint as against them. Plaintiffs oppose the motion.

Defendant Glengariff Healthcare Center ("Glengariff") moves (Seq. No. 07), pursuant to CPLR § 3212, for an order granting summary judgment dismissing the Verified Complaint as against it. Plaintiffs oppose the motion.

Defendant Winthrop University Hospital ("Winthrop") moves (Seq. No. 08), pursuant to CPLR § 3212, for an order dismissing the Verified Complaint as against it, and any and all cross-claims as against it. No opposition was submitted to this motion.

This is an action for medical malpractice and violation of the Public Health Law alleging the failure to properly and timely diagnose, treat and/or prevent the development and/or progression of a pressure ulcer on plaintiff George Kaffl's buttocks and the sequelae therefrom. Plaintiffs commenced the action with the filing of a Summons and Verified Complaint on or about November 25, 2014. *See* Defendants Glen Cove, Dr. Belkin and North Shore's Affirmation in Support Exhibit A. Issue was joined by defendants Glen Cove, Dr. Belkin and North Shore on or about January 22, 2015. *See* Defendants Glen Cove, Dr. Belkin and North Shore's Affirmation in Support Exhibit B. Issue was joined by defendant Glengariff on or about May 7, 2015. *See* Defendant Glengariff's Affirmation in Support Exhibit C. Issue was joined by defendant Winthrop on or about December 18, 2014. *See* Defendant Winthrop's Affirmation in Support Exhibit A.

In support of defendants Glen Cove, Dr. Belkin and North Shore's motion (Seq. No. 06), their counsel submits, in pertinent part, that, "[a]s outlined in more detail in the Affidavit of [non-party Heidi Huddleston Cross, R.N., M.S.N., FNP-BC, CWON], the plaintiff [George Kaffl] was admitted to NSUH on March 13, 2013, for *inter alia*, fever and abdominal pain. At NSUH, he had surgery and later developed lower extremity weakness and incontinence. The

plaintiff remained at NSUH until April 23, 2013, when he was transferred to the GLEN COVE HOSPITAL Rehabilitation ('GCHR') unit. The plaintiff was at GCHR until May 2, 2013, when he was transferred to the GLEN COVE HOSPITAL ('GCH') medical unit until May 8, 2013 for suspected sepsis. The plaintiff was then at GCHR from May 8, 2013 until June 6, 2013. On June 6, 2013, the plaintiff was transferred to GLENGARRIF (*sic*) HEALTHCARE CENTER where he remained until June 29, 2013. On June 29, 2013, the plaintiff returned to GCH (medical unit) for a urinary tract infection and underwent surgical debridement of a sacral ulcer. Thereafter, he returned to GLENGARRIF (*sic*). As per the bills of particulars, the dates of negligence *vis-à-vis* NSUH are March 13, 2013 to April 23, 2013.... By comparison, the dates of negligence with respect to GCH are April 23, 2013 to June 6, 2013 ... and for Dr. Belkin April 23, 2013 to June 6, 2013 and June 29, 2013 to July 11, 2013.... In the bill of particulars and amended bill of particulars as to NSUH, it is alleged, inter alia, that NSUH departed from the following accepted standards of care while treating the plaintiff. As a result, the plaintiff suffered, inter alia, the following injuries: pressure ulcers of the right and left buttocks, osteomyelitis of the sacrum, sepsis, necrotic sacral ulcer and stage IV sacral pressure ulcer with exposed bone. The plaintiff made similar allegations against GCH and DR. BELKIN." *See* Defendants Glen Cove, Dr. Belkin and North Shore's Affirmation in Support Exhibits C-H and Y.

Counsel for defendants Glen Cove, Dr. Belkin and North Shore further contends, in pertinent part, that, "[h]erein, the affidavit of Nurse Cross fully supports the moving defendants' position that they are entitled to summary judgment and/or dismissal ... as to all of plaintiff's (*sic*) cause (*sic*) of action. More specifically, therein, the expert opines, *inter alia*, that the care provided to the plaintiff by the moving defendants was timely, proper, and not a cause of

injury. In fact, the expert opines (*sic*) the plaintiff's skin breakdown was unavoidable due to his comorbidities. Thus, summary judgment should be granted since the moving defendants have made a *prima facie* showing of entitlement to summary judgment by demonstrating compliance with the standard of care, no injury, and no proximate cause of injury. [citations omitted]. Inasmuch as Nurse Cross has refuted, *inter alia*, proximate cause, not only are NSUH and GCH entitled to summary judgment so, too, is Dr. Belkin [citations omitted]. As an aside, NSUH submits it cannot be vicariously liable for Dr. Belkin since there is no evidence Dr. Belkin treated the plaintiff at NSUH nor was such alleged. Similarly, GCH asserts it is not vicariously liable for Dr. Belkin since plaintiff failed to specifically allege such [citation omitted]." *See* Defendants Glen Cove, Dr. Belkin and North Shore's Affirmation in Support Exhibit Y.

Counsel for defendants Glen Cove, Dr. Belkin and North Shore also argues, in pertinent part, that, "[w]ith respect to plaintiff's cause of action premised upon PHL § 2801-d, such cannot stand against any of the moving defendants because, *inter alia*, they are not 'residential health care facilities' for the purpose of the statute [citations omitted]. Indeed, New York Public Health Law section 2801-d is entitled 'Private actions by patients of residential health care facilities' and Public Health Law section 2801(3) defines a 'residential health care facility' as 'a nursing home or a facility providing health-related service'. Inasmuch as NSUH and GCH are hospitals ..., the plaintiff's cause of action premised upon PHL § 2801-d must be dismissed.... Furthermore, and importantly, that particular statute 'authorizes a private right of action for the violation of rights enumerated in section 2803-c of the statute' [citation omitted]. However, according to the Second Department, New York PHL § 2803-c does not provide a private right of action against hospitals and physicians such as NSUH, GCH, and Dr. Belkin, which is further reason to grant the instant application [citations omitted]. Accordingly, the moving defendants are entitled to

summary judgment and/or dismissal based on existing precedent. [citations omitted]. Assuming, arguendo, that PHL § 2801-d applied to the moving defendants, the moving defendants have demonstrated their prima facie entitlement to summary judgment vis-à-vis said statute by way of, *inter alia*, the affidavit of Nurse Cross ... who has opined that the plaintiff's 'alleged injuries did not arise through any action or negligence of its employees' [citation omitted]." *See id.*

Counsel for defendants Glen Cove, Dr. Belkin and North Shore further contends, in pertinent part, that, "[i]n this matter, the plaintiff's (*sic*) lack of informed consent cause of action must be dismissed due to lack of proximate cause [citations omitted]. Moreover, the plaintiff has failed to identify any procedures by the moving defendants that were performed without informed consent and has not alleged any unconsented to affirmative violation of the plaintiff's physical integrity. In point of fact, the plaintiff's (*sic*) bills of particulars at para.4 ... are silent with respect to any overt acts by the moving defendants vis-à-vis skin integrity. Thus, dismissal and/or summary judgment are the proper remedies herein. [citation omitted]. To the extent non-party Dr. Reid performed debridement surgery on the plaintiff in July, 2013, the moving defendants submit that the burden to obtain informed consent was on Dr. Reid, not the movants, and in any event, the hospital chart contained informed consent documents vis-à-vis Dr. Reid's procedures [citations omitted]. In addition, where a hospital has no reason to suspect malpractice, i.e., that the plaintiff's physician is acting without informed consent, the hospital has no duty to obtain a patient's informed consent [citation omitted]." *See* Defendants Glen Cove, Dr. Belkin and North Shore's Affirmation in Support Exhibits C-H and Y-Z.

Counsel for defendants Glen Cove, Dr. Belkin and North Shore also asserts, in pertinent part, that, "[i]n the present matter, the plaintiff claims that while at the defendants' hospitals, he suffered skin breakdown. Furthermore, the plaintiff's (*sic*) summons and complaint asserted

causes of action for both negligence and medical malpractice, but the negligence cause of action is duplicative of the cause of action for medical malpractice and therefore must be dismissed.... In an action where the plaintiff alleges he/she developed skin breakdown due to the acts and omissions of medical professionals such as in the instant suit, the action sounds in medical malpractice. [citations omitted]. Here, ..., the plaintiff alleges the defendants failed to prevent the development of pressure sores and once such (*sic*) developed, failed to halt their progression.... [T]he implementation of pressure sore prevention efforts involves a 'substantial relationship to the rendition of medical treatment' and consequently the plaintiff's negligence cause of action is duplicative of their cause of action for malpractice and should be dismissed."

In support of defendant Glengariff's motion (Seq. No. 07), its counsel submits, in pertinent part, that, "[p]rior to George Kaffl's admission to Glengariff Healthcare Center (hereinafter 'Glengariff'), he had a significant medical history. His medical history included diabetes, hypertension, hypertriglyceridemia, gout, melanoma to the upper left leg, coronary artery disease with the placement of two stents, orthostatic hypotension, pancreatitis with pancreatic stent, abdominal aneurysm, renal insufficiency, hemodialysis, a history of a TIA and cauda aquina syndrome. Mr. Kaffl had been admitted to North Shore University Hospital from March 13, 2013 to April 23, 2013, and to Glen Cove Hospital Rehabilitation Unit from April 23, 2013 to May 2, 2013. He was hospitalized at Glen Cove from May 2, 2013 to May 8, 2013. George Kaffl was then readmitted to Glen Cove Hospital Rehabilitation Unit from May 8, 2013 to June 6, 2013, where he received physical therapy, occupational therapy and hemodialysis. During his admission to the co-defendant, the plaintiff had been seen by Marjorie Reid, M.D., a plastic surgeon, for the treatment of a sacral decubitus ulcer.... George Kaffl was admitted to Glengariff for rehabilitation and dialysis on June 6, 2013. Upon admission, it was documented

that the plaintiff had a Stage III sacral ulcer measuring 5 cm. x 3.5 cm. x .5 cm. The records documented that a comprehensive care plan was generated. The plaintiff had a pressure redistribution mattress and a gel cushion for a wheelchair. He was to be turned and positioned every two hours while in bed and to limit time in the wheelchair for no more that two hours at a time. In addition, the plaintiff had physical therapy, occupational therapy and hemodialysis, which was provided by the co-defendant, Winthrop University Hospital, three times a week. The records also documented that the plaintiff had appropriate consults including dietary, which ordered appropriate supplements to promote wound healing.... The records documented that George Kaffl was incontinent of bowel and bladder; however, he was able to self-catheterize. In fact, the nursing notes documented that Mr. Kaffl frequently refused urinary catheterization and voided in his diaper.... The records from Glengariff documented that Dr. Marjorie Reid, who had treated the plaintiff at Glen Cove Hospital Rehabilitation Unit, continued to treat the plaintiff's sacral pressure ulcer. Dr. Reid first saw the plaintiff on June 11, 2013 and noted that he had an unstable ulcer of the sacrum. Santyl, Solosite and Critic-Aid was ordered. The records documented that the plaintiff received treatments as ordered. In addition, Dr. Reid saw the plaintiff on June 8, 2013 and June 26, 2013 for the sacral ulcer. On June 26, 2013, Dr. Reid performed an excisional debridement of the sacral ulcer.... On June 29, 2013, the plaintiff was transferred to Glen Cove Hospital after having seizure-like activity during dialysis. The plaintiff was admitted to Glen Cove Hospital from June 29, 2013 to July 11, 2013. During the admission, Dr. Reid saw the plaintiff for the Stage III sacral ulcer.... On July 3, 2013, Dr. Reid performed an excisional debridement of the sacral ulcer.... On July 8, 2013, Dr. Reid performed a surgical debridement of the sacral ulcer. At the time of discharge on July 11, 2013, the sacral ulcer was to be treated locally with Santyl with a possible wound vac.... The plaintiff was readmitted to

Glengariff on July 11, 2013 with a sacral ulcer which measured 6 cm. x 5 cm. x 4 cm. x 1.5 cm.... The records documented that the Comprehensive Care Plan was updated to reflect the plaintiff's condition. Mr. Kaffl continued to have a pressure redistribution mattress and a gel cushion for a wheelchair. He was also followed by Dietary. Mr. Kaffl continued to have dialysis three times a week, which was provided by Winthrop University Hospital.... Dr. Marjorie Reed continued to see the plaintiff at Glengariff.... In addition, the records documented that there were weekly wound assessments which noted that the sacral ulcer had slowly decreased in size with no signs and symptoms of infection.... On September 18, 2013, the plaintiff was readmitted to Glen Cove Hospital for the treatment of sepsis, secondary to pneumonia. During this admission, the plaintiff was seen by Infectious Disease who opined that it was unlikely that the sacral ulcer was the source of the fever in light of the clean appearance of the wound.... During the admission to Glen Cove Hospital, the plaintiff was seen again by Dr. Reid and Dr. Sordi, a plastic surgeon. The plaintiff was discharged on September 26, 2013 with the diagnosis of presumptive sepsis and pneumonia.... The plaintiff was readmitted to Glengariff from September 26, 2013 to October 4, 2013.... The records again documented that the plaintiff had a Stage IV pressure ulcer which measured 5 cm. x 3 cm. x 2 cm. The plaintiff was seen by Dr. Reid who ordered the sacral ulcer to be treated with Solosite and Critic-Aid. In addition, the plaintiff had weekly wound assessments which indicated that the sacral ulcer was stable with no signs of infection.... Again, the records, including the Comprehensive Care Plan and the CNA accountability records documented that appropriate care was visited to the plaintiff. The plaintiff continued to have hemodialysis by the co-defendant, Winthrop University Hospital.... The plaintiff's condition was stable and he was permitted to be discharged to the community on October 13, 2013.... The plaintiff continued under the care and treatment of Dr. Marjorie Reid from October 4, 2013 until

June 14, 2015. During that period of time, the sacral ulcer slowly improved, and as of June 5, 2015, the sacral ulcer had closed.... The plaintiff then came under the care and treatment of Thomas Davenport, M.D. at Long Island Plastic Surgery. Dr. Davenport performed two flap closures of the sacral wound. The last procedure was performed on June 27, 2017. To date, the sacral flap remains intact." *See* Defendant Glengariff's Affirmation in Support Exhibits D-K.

Counsel for defendant Glengariff further asserts, in pertinent part, that, "[i]t is respectfully submitted that the evidence in this case does not support that the treatment provided to the plaintiff at Glengariff departed from accepted community standards of practice and that such departure was a proximate cause of the Plaintiff's injuries. Therefore, the Plaintiff's complaint must be dismissed as a matter of law. Annexed hereto ... is the Affirmation of Jeffrey Farber, M.D. It is Dr. Farber's opinion that the records are devoid of any proof of conduct by or on behalf of Glengariff demonstrating that it departed from accepted community standards of practice. Further, it is the opinion of Dr. Farber that it was the Plaintiff's multiple comorbidities that led to the inevitable breakdown of the skin.... Herein, the affidavit of Dr. Jeffrey Farber fully supports the moving defendants' (*sic*) position that they are entitled to summary judgment as to all of plaintiff's (*sic*) cause (*sic*) of action. More specifically, therein, the expert opines, inter alia, that the care provided to the plaintiff by the moving defendants (*sic*) was timely, proper, and not a cause of injury. In fact, the expert opines the plaintiff's skin breakdown was unavoidable due to his comorbidities. Further, while under the care of Glengariff, the Plaintiff's condition did not worsen. Thus, summary judgment should be granted since the moving defendants (*sic*) have made a prima facie showing of entitlement to summary judgment by demonstrating compliance with the standard of care, no injury, and no proximate cause of injury. [citation omitted]. Furthermore, the deposition testimony of Dorothy Kaffl fails to demonstrate that the care given

to her husband by or on behalf of Glengariff departed from the accepted standard of care." *See* Defendant Glengariff's Affirmation in Support Exhibits A and L.

In opposition to these motions (Seq. Nos. 06 and 07), counsel for plaintiffs submits, in pertinent part, that, "[t]he defendants, GLEN COVE HOSPITAL [GCH], ELENA BELKIN, M.D. [BELKIN] and NORTH SHORE UNIVIERSITY (*sic*) HOSPITAL [NSUH] have failed to submit an Affirmation from a physician setting forth that there were no departures on the part of the defendants, their agents and/or employees, in addressing each of the allegations set forth in the plaintiffs' Bills of Particulars, and in addressing the issue of causation. Defendants, NSUH, GCH and BELKIN rely on the affidavit from a nurse who is not competent nor qualified to render an opinion on the standard of care for a physician and whether any of the physicians committed malpractice. She is also not competent to testify on the issue of causation.... A nurse does not possess the requisite skill, training, education, knowledge or experience to testify regarding the standards of care for a physician and therefore the defendants have not met their initial burden. [citations omitted].... By failing to submit an affidavit from a medical doctor, the defendants, North Shore University Hospital, Glen Cove Hospital and Dr. Elena Belkin failed to meet their obligation on their motion for summary judgment. A nurse is not allowed to provide opinion testimony on the standard of care to be applied to a medical doctor. [citations omitted]. The defendants have not established by submitting an affidavit from a medical doctor that there are no triable issues of fact and rebutting each of the plaintiffs' allegations set forth in the Plaintiffs' Bills of Particulars. [citations omitted]."

Counsel for plaintiffs also asserts that, assuming *arguendo* that the Court finds that defendants Glen Cove, Dr. Belkin and North Shore met their initial burden, the motion for summary judgment should be denied since issues of fact exist as set forth in the affidavits of

plaintiffs' medical expert and nursing expert. Counsel submits, in pertinent part, that, "[a] question of fact exists whether George Kaffl developed a stage 2 pressure ulcer of his left buttock during his admission to NSUH or whether he only developed a skin tear. George Kaffl was diagnosed with a skin tear at NSUH but, when he was transferred directly from NSUH to Gen (*sic*) Cove Rehab he was found on admission at Glen Cove Rehab to have a stage 2 pressure ulcer on his left buttock. Therefore, a question of fact exists whether NSUH departed from the accepted standard of care in failing to prevent, diagnose and treat the stage 2 pressure ulcer on George Kaffl's left buttock. A skin tear is not the same thing as a pressure ulcer... When George was transferred directly from NSUH to Glen Cove Hospital, Rehabilitation Department on April 23, 2013, he was found upon admission to have a Stage 2 pressure ulcer on his left buttocks.... This is in direct contrast to the records at NSUH and the testimony of Nurse Slattery that George Kaffl did not have any pressure ulcer when he was discharged from NSUH. The records from NSUH indicate that George Kaffl was supposed to be turned and positioned every two hours with staff using a turning sheet and had a specialty bed or mattress. However, there is nothing documented in the medical record (*sic*) that he actually was turned and positioned every two hours." *See* Plaintiffs' Affirmation in Opposition Exhibits C-E.

Counsel for plaintiffs further submits, in pertinent part, that, "[a]s set forth in the Medical Expert's Affidavit and Nurse Foglia's Affidavit, it is their expert opinion that there were deviations from the standards of care during this hospitalization at North Shore University Hospital. There are no notes anywhere in the NSUH record that George Kaffl was diagnosed with a pressure ulcer on his left buttock yet he was found to have a Stage 2 ulcer on his left buttock upon his transfer to Glen Cove Rehab. The failure of the staff at NSUH to diagnose the pressure ulcer while he was a patient at NSUH was a departure. The failure of the nursing staff at

NSUH to notify a physician of the development of the pressure ulcer on the left buttock was a departure. The plaintiff did not have appropriate care for the pressure ulcer since no one diagnosed the presence of the pressure ulcer. The failure of the staff at NSUH to document the development of the pressure ulcer and/or to mischaracterize it as a skin tear was a departure. The Stage 2 pressure ulcer on his left buttock, measuring 3 cm x 0.5 cm did not just develop instantaneously. The pressure ulcer developed because he was not properly turned and positioned and not properly offloaded. The pressure ulcer took time to develop and should have (*sic*) diagnosed and treated before he was discharged from NSUH. The failure of the staff at NSUH to prevent, observe, examine, diagnose and treat the left buttock ulcer during this admission were departures. In addition to all the deviations previously mentioned plaintiff's (*sic*) experts opined that the staff at North Shore University Hospital; (*sic*) failed to maintain good skin integrity and keep the patient free of pressure ulcers; failed to accurately diagnose pressure ulcer development; failed to notify a physician of the development of and/or deterioration of pressure ulcer; failed to assess and diagnose and document a pressure ulcer; failed to properly offload the left buttock; failed to maintain good skin integrity and keep patient free of pressure ulcers as evidenced by development of the stage 2 pressure ulcers of the buttocks; failed to order wound care consult; failed to have preventative measures in place prior to development of pressure ulcer, such as ensuring that the patient gets turned and positioned every two hours; failed to follow proper protocols and procedures; failed to diagnose and treat pressure ulcers; failed to document turning and positioning of patient every two hours; failed to address significant weight loss which may have contributed to development of pressure ulcer; and failed to take reasonable steps to prevent pain and suffering from the left buttock ulcer. It is plaintiffs' experts' opinions that the departures above were a substantial contributing factor in causing George Kaffl to develop the Stage 2

pressure ulcer on his left buttock. All interventions were not utilized, such as turning and positioning every two hours and properly offloading the buttocks. He had a foley catheter in place which was removed 4/11/13. It was not put back in until 4/16/13. His urinary incontinence added to further deterioration of the pressure ulcer. Also his Albumin was low at 2.2-2.7. George Kaffl's co-morbiditities made him more susceptible to the development of pressure ulcers. Therefore, the assessments and a plan of care should have taken all of his diagnoses into consideration and put into effect, evaluated and changed as needed. The Nursing Staff and the attending physicians should have been aware of the presence of the pressure ulcer, coordinated care for the wound and the nursing staff should have advised the physicians if they observed any changes in the condition of the pressure ulcer. The patient was misdiagnosed with a skin tear instead of a Stage 2 pressure ulcer on his left buttock which after his discharge was measured as 3 cm x 0.5 cm when he was transferred to Glen Cove Rehab. That is not acceptable medical care. Therefore, an issue of fact exists regarding whether the plaintiff developed a pressure ulcer or a skin tear during his admission to NSUH. A question of fact exists regarding the veracity of the defendants' own medical records and the care and treatment NSUH provided to George Kaffl. If the records from GCH Rehab are correct, then the notations in the NSUH (*sic*) that the plaintiff did not have any pressure ulcer are untrue.... The conflict between the records of the defendant (*sic*), NSUH and GLEN COVE REHAB present obvious questions of fact that the jury will have to reconcile and are not matters for the court to determine as matters of law. Therefore, the motion for summary judgment of North Shore University Hospital should be denied." *See* Plaintiffs' Affirmation in Opposition Exhibits A and B.

Counsel for plaintiffs adds that, "George Kaffl was admitted to Glen Cove Rehab from 4/23/13 through 5/2/13 for in-patient acute rehabilitation and on-going hemodialysis. On 5/2/13

he was transferred to Glen Cove Hospital where he was admitted through 5/8/13 because he had sepsis and Clostridium Difficile. George Kaffl was transferred back to the Glen Cove Rehab on 5/8/13 where he remained until 6/6/13. Review of the documentation about his skin by the nursing staff and among the various disciplines reveals notable inconsistencies. These create questions of fact for the jury to reconcile and as plaintiffs' expert's (*sic*) stated, are demonstrative of departures from the standard of care in this setting which are, by their nature, interdisciplinary and exact.... It is plaintiffs' experts' opinions that the documentation of the pressure ulcers was improper and there appears to have been a breakdown in communication between the nursing staff and physicians. Although the Nursing Staff documented the presence of a new sacral ulcer as of May 17, 2013, there is no indication that a physician was aware of it or that a physician was advised of the presence of the sacral ulcer until May 28, 2013. Furthermore, it is impossible to fathom that this patient all of a sudden developed an 8 cm x 14 cm pressure ulcer. These wounds take time to develop and they don't go from zero to 8 cm x 14 cm overnight. This is one of many notes that raise a question about the veracity of the patient's medical records. In addition, a meeting should have been held with George Kaffl and his family representatives to advise them of the presence of a pressure ulcer as soon as it developed. This was not done. The plaintiff and his family were not notified of the presence of the pressure ulcer on his left buttock and sacrum until 5/26/13 when they spoke with Dr. Reid about the pressure ulcer.... The plaintiff and his representatives had a right to know about the presence of the pressure ulcer before it reached this stage and to be involved in the decisions-making process regarding his care and treatment. The defendant should have been aware of the presence of the pressure ulcer on the sacrum before it reached 8 cm x 14 cm and the plaintiff and his representatives should have been advised of its presence before that time as well." *See* Plaintiffs' Affirmation in Opposition Exhibits A, B, G-N,

S and T.

Counsel for plaintiffs also contends, in pertinent part, that, "[i]t is plaintiffs' experts' further opinion that the staff at Glen Cove Hospital and Glen Cove Rehab failed to recognize the impact of his unusual neurologic condition on pressure ulcer healing as well as the risk for the development of additional pressure ulcers. This occurred because the staff failed to function in accordance with the interprofessional care team process which is foundational to the management of the geriatric patient. As a result, the left buttock pressure ulcer with which he had upon admission, worsened and he developed a new sacral pressure ulcer. This sacral ulcer became extensive, progressing to involve and infect the bone of his sacrum and ultimately requiring multiple, complicated surgeries over the ensuing years. Plaintiffs' experts set forth in their Affidavits that there were deviations from the Standards of Care during this admission to Glen Cove Rehab Department and that said departures caused the left buttock ulcer to worsen and caused the sacral pressure ulcer to develop and deteriorate. Upon admission to GCH on 4/23/13 George Kaffl did not have a sacral pressure ulcer. By the time he was discharged from Glen Cove Rehab to Glengariff he had a Stage 3 sacral ulcer or possibly an Unstageable ulcer in this location. This occurred because the interdisciplinary team members were not working with the same knowledge base due to inconsistent and inaccurate documentation about his skin; even within the nursing department the documentation was conflicting.... In addition, all disciplines failed to recognize that (*sic*) the fact that Mr. Kaffl lacked full sensation in his sacral area rendered him uniquely vulnerable to skin breakdown in this region even though he could walk to a limited extent.... In their affidavits, plaintiffs' experts stated that the deviations from the Standards of Care during this admission to Glen Cove Hospital - Rehab Department were a substantial factor in causing the sacral pressure ulcer and/or allowing the left buttock ulcer and

sacral ulcers to deteriorate.... Upon admission to the Rehabilitation Department, George Kaffl did not have any pressure ulcers on his sacrum. During the four weeks he was admitted to Glen Cove Rehab, he developed a new sacral pressure ulcer that progressed all the way to a Stage II pressure ulcer. The pressure ulcer on the left buttocks had increased in size and progressed from a State II to a Stage III. Therefore, questions of fact exist precluding the grant (*sic*) of summary judgment to the defendants, Glen Cove Hospital - Rehab Department and Dr. Elena Belkin." *See* Plaintiffs' Affirmation in Opposition Exhibits A and B.

Counsel for plaintiffs further asserts, in pertinent part, that, "George Kaffl was transferred from Glen Cove Rehab to Glengariff Healthcare Center for sub-acute rehabilitation on June 6, 2013. The Nursing Admission Assessment documented that he had a pressure ulcer to the sacrum, stage 3, measuring 5 cm x 3.5 cm x 0.5 cm.... The wound care physician, Dr. Marjorie Reid saw him at this facility as well. On 6/11/13, she documented that the sacral pressure ulcer was unstageable, measuring 7 cm x 7 cm x 1 cm with white/grey necrotic tissue.... She recommended the he does (*sic*) not sit for more than two hours in his wheelchair at a time. In the Glengariff records, there is a Resident CNA Documentation History wherein the CNA's are supposed to document when the residents are turned and positioned.... The first notation that George Kaffl was turned and positioned is dated July 14, 2013. There are no notations that he was turned and positioned before this date.... Therefore, there is no documentary proof that he properly offloaded.... It is plaintiffs' experts opinions that there were deviations from the Standards of Care during his first admission to Glengariff Healthcare Center and that the departures were a substantial factor in causing the sacral pressure ulcer to deteriorate.... Questions of fact exist whether Glengariff caused and/or contributed to the deterioration of the plaintiff's sacral ulcer which went from Stage 3 upon admission to Stage 4 with osteomyelitis

involving the coccyx and sacrum. This is an issue for the jury to determine as the trier of facts, not for the court to decide as a matter of law. Therefore, defendant, Glengariff Healthcare Center's motion should be denied." *See* Plaintiffs' Affirmation in Opposition Exhibits A, B, O-Q.

In reply to plaintiffs' opposition to defendants Glen Cove, Dr. Belkin and North Shore's motion (Seq. No.6), their counsel submits, in pertinent part, that, "[a]s an initial matter, the plaintiffs offer no meaningful opposition to those branches of the movants' motion seeking dismissal and/or summary judgment of those causes of action based upon negligence, lacked of informed consent, and the Public Health Law. Accordingly, those causes of action must be dismissed as unopposed. [citation omitted]. In addition, the plaintiffs' opposition papers have not addressed the movants' arguments that NSUH and/or GCH are not vicariously liable for Dr. Belkin since vicarious liability was not advanced in the complaint or bills of particulars and plaintiffs have not move (*sic*) to amend their bill of particulars to allege such. Consequently, any argument that NSUH or GCH is vicariously liable for Dr. Belkin is without merit. [citations omitted].... [T]he plaintiffs' argument that the movants did not make a prima facie showing of entitlement to summary judgment because they relied on the affidavit of an expert nurse - as opposed to a physician - is spurious as per precedent. [citations omitted]."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To

obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage." *Pagano v. Cohen*, 164 A.D.3d 516, 82 N.Y.S.3d 492 (2d Dept. 2018) *quoting Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 A.D.3d 959, 18 N.Y.S.3d 689 (2d Dept. 2015) *quoting Geffner v. North Shore Univ. Hosp.*, 57 A.D.3d 839, 871 N.Y.S.2d 617 (2d Dept. 2008). *See also Leigh v. Kyle*, 143 A.D.3d 779, 39 N.Y.S.3d 45 (2d Dept. 2016); *Schmitt v. Medford Kidney Ctr.*, 121 A.D.3d 1088, 996 N.Y.S.2d 75 (2d Dept. 2014); *Fink v. DeAngelis*, 117 A.D.3d 894, 986 N.Y.S.2d 212 (2d Dept. 2014); *DiGeronimo v. Fuchs*, 101 A.D.3d 933, 957 N.Y.S.2d 167 (2d Dept. 2012). "On a motion for summary judgment dismissing a cause of action to recover damages for medical malpractice, a defendant physician must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries." *Pagano v. Cohen*, *supra* at 1 *quoting Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, *supra* at 960 *citing Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011).

"A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries." *Michel v. Long Is. Jewish Med. Ctr.*, 125 A.D.3d 945, 5 N.Y.S.3d 162 (2d Dept. 2015) *lv denied* 26 N.Y.3d 905, 17 N.Y.S.3d 86 (2015). *See also Barrocales v. New York Methodist Hosp.*, 122 A.D.3d 648, 996 N.Y.S.2d 155 (2d Dept. 2014); *Berthen v. Bania*, 121 A.D.3d 732, 994 N.Y.S.2d 359 (2d Dept. 2014); *Trauring v. Gendal*, 121 A.D.3d 1097, 995 N.Y.S.2d 182 (2d Dept. 2014); *Stukas v Streiter*, *supra* at 23; *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 947 N.Y.S.2d 148 (2d Dept. 2012). Expert evidence is required when evaluating the

"performance of functions that are an integral part of the process of rendering medical treatment ... to a patient." *D'Elia v. Menorah Home and Hosp. for the Aged & Infirm*, 51 A.D.3d 848, 859 N.Y.S.2d 224 (2d Dept. 2008). *See also Koster v. Davenport*, 142 A.D.3d 966, 37 N.Y.S.3d 323 (2d Dept. 2016) *lv to appeal denied* 28 N.Y.3d 911, 47 N.Y.S.3d 227 (2016). Additionally, the conclusions reached by the defendant and his or her expert(s) must be supported by evidence in the record. *See Poter v. Adams*, 104 A.D.3d 925, 961 N.Y.S.2d 556 (2d Dept. 2013).

"In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider '"departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries."' *Schmitt v. Medford Kidney Ctr.*, 121 A.D.3d 1088, 996 N.Y.S.2d 75 (2d Dept. 2014) *quoting DiGeronimo v. Fuchs*, 101 A.D.3d 933, 957 N.Y.S.2d 167 (2d Dept. 2012) *quoting Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011) *citing Fink v. DeAngelis*, 117 A.D.3d 894, 986 N.Y.S.2d 212 (2d Dept. 2014). "'In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries.'" *Leigh v. Kyle*, 143 A.D.3d 779, 39 N.Y.S.3d 45 (2d Dept. 2016) *quoting Stukas v. Streiter*, *supra*. "A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries." *Michel v. Long Is. Jewish Med. Ctr.*, 125 A.D.3d 945, 5 N.Y.S.3d 162 (2d Dept. 2015) *lv denied* 26 N.Y.3d 905, 17 N.Y.S.3d 86 (2015). *See also Barrocales v. New York Methodist Hosp.*, 122 A.D.3d 648, 996 N.Y.S.2d 155 (2d Dept. 2014); *Berthen v. Bania*, 121 A.D.3d 732, 994 N.Y.S.2d 359 (2d Dept. 2014); *Trauring v. Gendal*, 121 A.D.3d 1097, 995 N.Y.S.2d 182 (2d

Dept. 2014); *Stukas v Streiter*, *supra* at 23. Expert evidence is required when evaluating the "performance of functions that are an integral part of the process of rendering medical treatment ... to a patient." *D'Elia v. Menorah Home and Hosp. for the Aged & Infirm*, 51 A.D.3d 848, 859 N.Y.S.2d 224 (2d Dept. 2008). *See also Koster v. Davenport*, 142 A.D.3d 966, 37 N.Y.S.3d 323 (2d Dept. 2016) *lv to appeal denied* 28 N.Y.3d 911, 47 N.Y.S.3d 227 (2016). The conclusions reached by the defendant must be supported by evidence in the record. *See Poter v. Adams*, 104 A.D.3d 925, 961 N.Y.S.2d 556 (2d Dept. 2013). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden." *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 947 N.Y.S.2d 148 (2d Dept. 2012).

"Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury." *Semel v. Guzman*, 84 A.D.3d 1054, 924 N.Y.S.2d 414 (2d Dept. 2011) *citing Johnson v. Jamaica Hosp. Med. Ctr.*, 21 A.D.3d 881, 800 N.Y.S.2d 609 (2d Dept. 2005); *Goldberg v. Horowitz*, 73 A.D.3d 691, 901 N.Y.S.2d 95 (2d Dept. 2010). *See also Skelly–Hand v. Lizardi*, 111 A.D.3d 1187, 975 N.Y.S.2d 514 (2d Dept. 2013). A plaintiff is not required to eliminate all other possible causes. *See Skelly–Hand v. Lizardi*, *supra* at 1189. "'The plaintiff's evidence may be deemed legally sufficient even if [her] expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased [the] injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury.'" *Alicea v. Ligouri*, 54 A.D.3d 784, 864 N.Y.S.2d 462 (2d Dept. 2008) *quoting Flaherty v. Fromberg*, 46

A.D.3d 743, 849 N.Y.S.2d 278 (2d Dept. 2007) *citing Barbuto v. Winthrop Univ. Hosp.*, 305 A.D.2d 623, 760 N.Y.S.2d 199 (2d Dept. 2003); *Wong v. Tang*, 2 A.D.3d 840, 769 N.Y.S.2d 381 (2d Dept. 2003); *Jump v. Facelle*, 275 A.D.2d 345, 712 N.Y.S.2d 162 (2d Dept. 2000) *lv denied* 95 N.Y.2d 931, 721 N.Y.S.2d 607 (2000) *lv denied* 98 N.Y.2d 612, 749 N.Y.S.2d 3 (2002).

"While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field ... the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable (quotations omitted)." *Shectman v. Wilson*, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009) *quoting Behar v. Cohen*, 21 A.D.3d 1045, 803 N.Y.S.2d 629 (2d Dept. 2005) *lv den.* 6 N.Y.3d 705, 812 N.Y.S.2d 34 (2006) *quoting Postlethwaite v. United Health Services Hospitals, Inc.*, 5 A.D.3d 892, 773 N.Y.S.2d 480 (3d Dept. 2004). "Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered (citations omitted)." *Shectman v. Wilson*, *supra* at 850.

In support of their motion (Seq. No. 06), defendants Glen Cove, Dr. Belkin and North Shore submit the expert affidavit of Nurse, Heidi Huddleston Cross, R.N., M.S.N., FNP-BC, CWON,. *See* Defendants Glen Cove, Dr. Belkin and North Shore's Affirmation in Support Exhibit Y. As a general rule, the opinion of an expert witness who is not a medical doctor as to the course of treatment a physician should have undertaken is beyond the professional and educational experience of the witness, and thus may not be considered competent medical opinion on the issue of the physician's negligence, for purposes of a medical malpractice action. *See Elliot v. Long Island Home, Ltd.*, 12 A.D.3d 481, 784 N.Y.S.2d 615 (2d Dept. 2004). The

Court notes that in *Zak v. Brookhaven Memorial Hospital Medical Center*, 54 A.D.3d 852, 863 N.Y.S.2d 821 (2d Dept. 2008), the cited by counsel for defendants Glen Cove, Dr. Belkin and North Shore, the Court actually held that, "[a]lthough the registered nurse was qualified to establish that the allegedly negligent admission of heparin without a physician's order was a departure from acceptable standards of good nursing care, she was ***not qualified*** to opine that said departure was a substantial factor in causing any injury separate and apart from the decedent's underlying condition (emphasis added)." *Id.* Additionally, *Domoroski v. Smithtown Center for Rehabilitation*, 2011 WL 1527197 (2011), also cited by defendants Glen Cove, Dr. Belkin and North Shore, involved wrongful death and negligence claims, not a medical malpractice cause of action. *See id.*

Therefore, based upon the above, the Court finds that the expert affidavit submitted by defendants Glen Cove, Dr. Belkin and North Shore is insufficient to establish their claim for summary judgment on the first cause of action asserted against them for medical malpractice.

"'To establish a cause of action for malpractice based on lack of informed consent, plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury.'" *Godel v. Benjy Goldstein & George Freud, D.D.S., PLLC*, 155 A.D.3d 939, 64 N.Y.S.3d 127 (2d Dept. 2017) *quoting Foote v. Rajadhyax*, 268 A.D.2d 745, 702 N.Y.S.2d 153 (3d Dept. 2000) *citing* New York Public Health Law § 2805–d; *Dyckes v. Stabile*, 153 A.D.3d 783, 61 N.Y.S.3d 110 (2d Dept. 2017);

Figueroa–Burgos v. Bieniewicz, 135 A.D.3d 810, 23 N.Y.S.3d 369 (2d Dept. 2016). "'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law.'" *Godel v. Benjy Goldstein & George Freud, D.D.S., PLLC*, *supra* at 942 *quoting Schussheim v. Barazani*, 136 A.D.3d 787, 24 N.Y.S.3d 756 (2d Dept. 2016) *citing Walker v. Saint Vincent Catholic Med. Ctrs.*, 114 A.D.3d 669, 979 N.Y.S.2d 697 (2d Dept. 2014); *Kozlowski v. Oana*, 102 A.D.3d 751, 959 N.Y.S.2d 500 (2d Dept. 2013).

The Court finds that plaintiffs have failed to meet their burden of proof with respect to the second cause of action, lack of informed consent, as asserted against defendants Glen Cove, Dr. Belkin and North Shore. Said defendants have established their entitlement to summary judgment dismissing the claim sounding in lack of informed consent. *See Schuck v. Stony Brook Surgical Assoc.*, 140 A.D.3d 725, 33 N.Y.S.3d 369 (2d Dept. 2016).

With respect to the third cause of action, statutory violations, as against defendants Glen Cove, Dr. Belkin and North Shore, New York Public Health Law § 2801-d, the statute asserted in plaintiffs' Verified Complaint, only applies to nursing homes. *See Novick v. South Communities Hosp.*, 136 A.D.3d 999, 26 N.Y.S.3d 182 (2d Dept. 2016). Therefore, said statute is inapplicable to said defendants.

A medical malpractice action, which is a species of negligence, involves three (3) basic duties of care owed to a patient by a professional health care provider: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill. *See Nestorowich v. Ricotta*, 97 N.Y.2d 393, 740 N.Y.S.2d 668 (2002); *Pike v. Honsinger*, 155 N.Y. 201 (1898).

The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can be assessed on the basis of the common everyday experience of the trier of facts. *See Miller v. Albany Med. Ctr., Hosp.*, 95 A.D.2d 977, 464 N.Y.S.2d 297 (3d Dept. 1983). A claim sounds in medical malpractice when the conduct at issue constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. *See Bleiler v. Bodnar*, 65 N.Y.2d 65, 489 N.Y.S.2d 885 (1985); *Scott v. Uljanov*, 74 N.Y.2d 673, 543 N.Y.S.2d 369 (1989); *Pacio v. Franklin Hosp.*, 63 A.D.3d 1130, 882 N.Y.S.2d 247 (2d Dept. 2009). Conversely, a claim sounds in negligence when "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's [or medical provider's] failure in fulfilling a different duty," such as protecting a patient against a risk of failing or adopting proper procedures and regulation. *See Bleiler v. Bodnar*, *supra*; *Weiner v. Lenox Hill Hosp.*, 88 N.Y.2d 784, 650 N.Y.S.2d 629 (1996); *Halas v. Parkway Hosp*, 158 A.D.2d 516, 551 N.Y.S.2d 279 (2d Dept. 1990). Here, the allegations of negligence asserted in the Verified Complaint are treatment related and involve the exercise of specialized medical knowledge or skills on the part of defendants. Consequently, this is a matter of medical malpractice rather than negligence, as demonstrated by the pleadings.

Therefore, based upon the above, defendants Glen Cove, Dr. Belkin and North Shore's motion (Seq. No. 06), pursuant to CPLR § 3212(b), for an order granting summary judgment dismissing the Verified Complaint as against them; and, pursuant to CPLR § 3211(a)(7), for an order dismissing the Verified Complaint as against them, is hereby **DENIED as to the First Cause of Action for malpractice and as to the Fifth Cause of Action for loss of services**, and

is hereby **GRANTED as to the Second Cause of Action for lack of informed consent, as to the Third Cause of Action for statutory violations, and as to the Fourth Cause of Action for negligence.**

With respect to defendant Glengariff's motion (Seq. No. 07), pursuant to CPLR § 3212, for an order granting summary judgment dismissing the Verified Complaint as against it, summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions. *See Romano v. Persky*, 117 A.D.3d 814, 985 N.Y.S.2d 633 (2d Dept. 2014); *Shehebar v. Boro Park Obstetrics & Gynecology, P.C.*, 106 A.D.3d 715, 964 N.Y.S.2d 239 (2d Dept. 2013); *Poter v. Adams*, 104 A.D.3d 925, 961 N.Y.S.2d 556 (2d Dept. 2013); *Hayden v. Gordon*, 91 A.D.3d 819, 937 N.Y.S.2d 299 (2d Dept. 2012); *Wexelbaum v. Jean*, 80 A.D.3d 756, 915 N.Y.S.2d 161 (2d Dept. 2011); *McKenzie v. Clarke*, 77 A.D.3d 637, 908 N.Y.S.2d 370 (2d Dept. 2010); *Roca v. Perel*, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept. 2008); *Graham v. Mitchell*, 37 A.D.3d 408, 829 N.Y.S.2d 628 (2d Dept. 2007); *Feinberg v. Feit*, 23 A.D.3d 517, 806 N.Y.S.2d 661 (2d Dept. 2005). *See also*. "Such conflicting expert opinions will raise credibility issues which can only be resolved by a jury." *DiGeronimo v. Fuchs*, 101 A.D.3d 933, 957 N.Y.S.2d 167 (2d Dept. 2012).

In light of the opposing opinions of defendant Glengariff's medical expert and plaintiffs' medical experts, and viewing the evidence in the light most favorable to the non-moving party, the Court finds that summary judgment is not appropriate as against defendant Glengariff in the instant matter with respect to plaintiffs' first cause of action, for medical malpractice, second cause of action, for statutory violations, and fifth cause of action for loss of services.

Furthermore, the Court is applying to defendant Glengariff the same criteria and holdings as detailed above as to its findings with respect to the third cause of action, lack of informed

consent, and the fourth cause of action, negligence.

Accordingly, defendant Glengariff's motion (Seq. No. 07), pursuant to CPLR § 3212, for an order granting summary judgment dismissing the Verified Complaint as against it, is hereby **DENIED as to the First Cause of Action for malpractice, as to the Third Cause of Action for statutory violations and as to the Fifth Cause of Action for loss of services**, and is hereby **GRANTED as to the Second Cause of Action for lack of informed consent and as to the Fourth Cause of Action for negligence**.

In plaintiffs' opposition papers to the previous motions (Seq. No. 06 and 07), their counsel stated, "[t]he plaintiff is not opposing the motion for summary judgment of the defendant, WINTHROP UNIVERSITY HOSPITAL." *See* Plaintiffs' Affirmation in Opposition ¶ 4.

Therefore, defendant Winthrop's motion (Seq. No. 08), pursuant to CPLR § 3212, for an order dismissing the Verified Complaint as against it and any, and all cross-claims as against it, is hereby **GRANTED**.

The remaining parties shall appear for Trial, in Nassau County Supreme Court, Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on March 26, 2019, at 9:30 a.m

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C

Dated: Mineola, New York
March 21, 2019

ENTERED
MAR 21 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE