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

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RALPH MARTONE, by LAURA ROUBLICK as Guardian Ad Litem,

Plaintiffs,

-against-

PREMIER HOME HEALTH CARE SERVICES, INC., and PRIORITY HOME CARE,

Defendants.

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DECISION AND ORDER
Motion Sequence #3
Index No. 69311/2017

COLANGELO, J.

The following papers were considered on Defendants' Motion for an Order granting Summary Judgment pursuant to CPLR §3212:

Notice of Motion-Affirmation-Exhibits A-Q	108-129
Affirmation in Opposition-Exhibits 1-20	133-153
Affirmation in Reply	155

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Background

This is a personal injury action that arises from Plaintiff Ralph Martone's claim that Defendants Premier Home Health Care Services, Inc and Priority Home Care ("Defendants") were negligent in failing to provide proper care to Ralph Martone while he was in their care. Laura Roublick was appointed as Guardian Ad Litem to represent the interest of Ralph Martone by Order of the Honorable Joan B. Lefkowitz, J.S.C. dated November 19, 2018.

The action was commenced by the filing of a Summons and Verified Complaint on November 20, 2017. Issue was joined on behalf of Defendants by service of a Verified Answer denying the material allegations set forth in the Complaint on December 21, 2017. Verified Bills of Particulars were served on January 5, 2018 and supplemented on February 9, 2018 and again on April 8, 2019.

The Complaint filed in this action contains two causes of action, both arising from Defendant's alleged failure to fulfill their obligations to care for Plaintiff by failing to appear at his independent living facility on April 4, 2017. Plaintiff also seeks to invoke the doctrine of *res ipsa loquitor*. In the second cause of action, Plaintiff alleges that Defendant was subject to rules and regulations set forth in 42 U. S. C. §1395(1) and 42 C.F.R. 483.

The Affirmation of Defendant's counsel, Michael F. Bastone, Esq., is submitted, *inter alia,* in support of Defendant's motion. The relevant facts as stated therein are as follows:

In April 2016, Plaintiff moved to Five Star Premier Residences, an independent living facility in Yonkers, New York. He had been prescribed medication for, *inter alia*, depression and Parkinson 's disease psychosis. Based upon the concerns of Plaintiff's endocrinologist and primary care physician that Plaintiff was not safe living in the facility alone, Plaintiff's family engaged a home heath aide to come to Plaintiff's apartment to remind him to take his medications. On February 23, 2017, during a visit to his primary care physician, Plaintiff could not articulate the reason he came to the doctor, and his appointment was rescheduled so that a family member could accompany him. On March 20, 2017, Plaintiff was severely anemic and was sent to Northern Westchester Hospital for a transfusion. His doctors noted that he seemed confused, less alert than usual with delayed responses to questions. In April 2017, Plaintiff's

family added services to his Home Health Aide Agreement, specifically that an aide would come to Plaintiff's apartment in the morning to assist him with dressing, bathing, and morning care, and remind Plaintiff to take his medications and to eat breakfast ("morning care"). (Bastone Aff. ¶31).

On the morning of April 4, 2017, a Home Health Aide was due to appear at Plaintiff's apartment to provide morning care. According to Defendants, the assigned Home Health Aide was out for medical reasons and did not appear. An attempt was made to notify Plaintiff of this, but Plaintiff did not respond to his door. (*Id.* ¶32). Later that morning, Plaintiff was found in an unresponsive state in the shower in his apartment. EMS was called, and the ambulance crew found Plaintiff in the shower. He was found to be "wedged" on his shower seat with his legs holding him up. EMS noted that there was no sign of an apparent fall, and a head to toe examination revealed no injury. (*Id.* ¶33).

Plaintiff was taken via ambulance to St. Joseph's Medical Center and upon presentation was diagnosed with potential cerebrovascular accident. Plaintiff was not able to communicate upon arrival. The ambulance crew observed Plaintiff lying on the shower floor with left sided weakness and altered mental status. There were feces in the shower. During the ambulance ride, Plaintiff's blood sugar was 220. According to the EMS crew, Plaintiff was able to communicate while in the ambulance, and he denied any injuries or trauma. (*Id.* ¶34). Plaintiff was transferred to Westchester Medical Center ("WMC"). A physical examination at WMC showed no signs of injury to his head, skin or extremities. (*Id.* ¶41). A CT scan of Plaintiff's head revealed no intracerebral hemorrhage, but did show chronic small vessel ischemic changes of the brain and diffuse volume loss changes. (*Id.* ¶43). Plaintiff was discharged from WMC to Somers Manor

Rehabilitation & Nursing Center ("Somers") on April 8, 2017 after four days in the hospital. He was noted to have sustained a recent fall secondary to autonomic neuropathy. (*Id.*, ¶¶52 & 53). During his stay at Somers, Plaintiff had multiple incidents in which he attempted to leave his wheel chair on his own, and slid to the floor. (*Id.* ¶58).

A further CT scan was performed at WMC on August 4, 2107, after a lumbar drain placement was performed a day earlier. It was suspected that Plaintiff had possible normal pressure hydrocephalus and the drain was placed to evaluate the potential benefits of a shunt. Some improvement was noted and Plaintiff returned on August 9, 2017 for the placement of a ventriculo-peritoneal shunt. (*Id.* ¶61).

The Expert Affirmation of Neurologist Jay M. Coblentz, M.D. dated May 15, 2019 is submitted in support of Defendant's motion. (Def. Exh. A). Dr. Coblentz is a licensed physician who is Board Certified in Psychiatry and Neurology, with over forty years of experience in the field of neurology. (Coblentz Aff. ¶¶2, 4). His opinions are based upon his review of all of the Plaintiff's medical records, Bills of Particulars and supplements thereto.

Dr. Coblentz opines within a reasonable degree of medical certainty that there is no evidence that Plaintiff sustained an acute injury on April 4, 2017. He cites the documentation of the responding EMS workers "no fall apparent" and "no obvious signs of injury" and contemporaneous medical records which reveal no evidence of a traumatic injury on April 4, 2017. In his opinion, Plaintiff did experience transient altered mental status and rhabdomyolysis on April 4, 2017 after which he returned to his pre-April 4, 2017 neurological status. Plaintiff's current physical and mental deficits are entirely explained by his pre-existing, degenerative neurological and medical conditions and a subsequent onset of normal pressure hydrocephalus,

independent and unrelated to any of the events of April 4, 2017. (*Id.* ¶¶9, 59). Further, the Emergency Department ("ED") at St. Joseph's Medical Center examined Plaintiff and found no evidence of head trauma. On examination, his head and face were noted to be normocephalic and atraumatic, meaning that there were no signs that Plaintiff struck his head on April 4, 2017. The medical records make no references to any cuts, abrasions, bruises or other external sings of traumatic injury to the head. A CT scan of the head revealed no signs of fracture. (*Id.* ¶60).

Dr. Coblentz opines that over the course of the remaining three days at WMC, Plaintiff experienced continued neurological improvement back to his baseline. (*Id.* ¶63). His opinion is further supported by Plaintiff's progression and rehabilitation at the Somers facility, where he was documented to be alert and oriented, able to engage with staff and other residents in conversation, make his needs known to staff, feed and dress himself and participate in his own medical care. (*Id.* ¶¶66). Dr. Coblentz opines that Plaintiff did demonstrate signs of his pre-existing dementia, depression and declining memory, but appeared to return to baseline mental functioning. (*Id.*). According to Dr. Coblentz, Plaintiff also returned to his baseline physical functioning. (*Id.* ¶67).

Dr. Coblentz acknowledges that Plaintiff did suffer transient rhabdomyolysis on April 4, 2017, likely due to lying in warm water and/or pressure on his muscle tissues. He opines that this condition resolved with treatment at WMC, and had no lasting effect on Plaintiff's state of heath, nor did it contribute to any decline in mental status. (*Id.* ¶70). Contrary to Plaintiff's allegations in the Bills of Particulars, Dr. Coblentz opines to a reasonable degree of medical certainty that Plaintiff did not experience "blunt force trauma causing cognitive decline", not did he suffer "catastrophic global decline as a result of the subject fall" on April 4, 2017. (*Id.* ¶71).

Dr. Coblentz opines to a reasonable degree of medical certainty that Plaintiff's diagnosis of normal pressure hydrocephalus in August 2017 is unrelated to the events of April 4, 2017, and this separately occurring condition explains Plaintiff's more rapid decline after the diagnosis. The CT scan of Plaintiff's brain taken immediately following April 4, 2017 showed no evidence of this condition. Plaintiff exhibited no clinical signs of this condition from April through June 2017. (*Id.* ¶¶86-88).

Plaintiff opposes the instant motion and takes the position that negligent acts/ommissions of Defendant and the failure to follow their own protocols caused and/or contributed to the Plaintiff' fall and the resulting injuries. The Affirmation of Plaintiff's counsel, Robert Kerrigan, Esq. and Affirmation of Ronald Roth, M.D. are, *inter alia*, submitted in support of Plaintiff's opposition.

It is undisputed that Plaintiff was residing in Five Star Premier Residences in Yonkers, New York on April 4, 2017. In January 2017, Defendant was hired to come into Plaintiff's apartment for 15 minutes to watch him take his insulin and pills and to check to see that Plaintiff had food appropriate for his diabetes. (Kerrigan Aff. ¶¶3, 36). In late March 2017, Plaintiff's daughter hired an aide to come into Plaintiff's apartment for an hour each day to make sure he showered, dressed and ate breakfast. (*Id.* ¶38). A key to Plaintiff's apartment was made and delivered to the employees at the front office. (*Id.* ¶39). Plaintiff's daughter left a text message for Defendant's office manager, Laura Sukhraj as to the instructions related to Plaintiff's care, and that the key to Plaintiff's apartment would be left at the front desk so that the aide could come in if Plaintiff does not answer the door right away. The office manager was to relay the message to the aide. (*Id.* ¶¶43-44; Pl. Exh. 11).

On April 4, 2017, the scheduled aide called in sick. According to the deposition testimony of Ms. Sukhraj, if an aide calls in sick, the scheduling coordinator (Donna Smith) who is in charge of the aides should start looking for a replacement. (Pl. Exh. H, pp. 10-11). Ms. Smith had told her at about 9:00 a.m. that the aide called in sick . Ms. Smith or whoever answers the call needs to contact the resident if they are in independent living, to let them know that they are looking for a replacement aide. Ms. Smith went to knock on Plaintiff's door but there was no answer. (*Id.*, ¶¶15-16). Ms. Smith continued to look for an aide, and in the interim, an incident occurred. A staff member at the facility saw water coming from Plaintiff's apartment and opened the door. (*Id.*, pp. 17-18). No other family member was contacted when Plaintiff failed to answer to door because Plaintiff was an independent resident. Ms. Smith continued to look for an aide. (*Id.*, p. 36). Ms. Sukhraj did not recall that a key was available at the facility's concierge. (*Id.*, p. 37). Ms. Sukhraj testified that she learned from the facility director that Plaintiff had fallen. The facility called 911. (*Id.*, p. 38).

Donna Marie Smith was Defendant's staff coordinator on April 4, 2017. She testified that Plaintiff was to receive one hour care which includes showering, medication reminder and assistance with dressing, whatever is on the care plan. . (Def. Exh. G, pp.11-12). After the aide called in sick, Ms. Smith immediately went to the facility and knocked on Plaintiff's door. When there was no response , she went downstairs and spoke to her administrator and told her that Plaintiff was not responding to the door. (*Id.*, pp. 15-16). Ms. Smith testified that the protocol at that point was to call the family, which was not done. (*Id.*, pp. 19-20). Ms. Smith continued to try to get an aide. She did not try to call Plaintiff or go back to his apartment. (*Id.*, pp. 22-23). Ms. Smith received a call from Plaintiff's daughter who asked if she had found her dad. (*Id.*, p.

28). Ms. Smith was told by her administrator that Plaintiff "was found in the bathroom, and he had fell or something." (*Id.*, p. 29). According to Ms. Smith, the date of the incident was the date on which additional services were to be provided to Plaintiff. (*Id.*, p. 46). The services included helping Plaintiff in the shower, making sure he took his medications, making sure he ate his breakfast. (*Id.*, p. 47).

The Affirmation of Dr. Ronald Roth is offered by Plaintiff in opposition to Defendant's motion and to establish that Plaintiff fell in the shower on April 4, 2017 and suffered initial injuries and exacerbation of said injuries. (Pl. Exh. 20). Dr. Roth has been certified in Family Medicine since 1978. According to his Affirmation, he is familiar with standards of Internal/Geriatric Medicine practice as well as the standards applicable to Hospitals in New York State, and New York State Statutes and Regulations applicable to Hospitals. As past of his Family/Geriatric Medicine Practice, he is familiar with standards applicable to long-term managed care for patients such as Plaintiff, who require assistance to live independently, including those applicable to Certified Home Health Agencies and Licensed Home Care Services Agencies. (*Id.*, Qualificaitons).

Dr. Roth states that "Mr. Martone was discovered lying unconscious on a hard surface (the shower floor) for a prolonged period with hot water raining down on him. It is [his] opinion, to a reasonable degree of medical certainty that Mr. Martone suffered a traumatic injury from the fall and that the delay in emergency care caused or contributed to the rhabdomyolysis, fever and altered mental state." (*Id.*, ¶¶16-17). He concludes, "Mr. Martone was diagnosed weeks after his injury. It is [his] opinion, to a reasonable degree of medical certainty Mr. Martone's fall and delay in emergency care caused or contributed to the hydrocephalus, the need for the shunt, the

decline in cognitive function and his inability to return to his prior level of functioning." (*Id.*, ¶28).

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974), the Court of Appeals held that:

> [s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

On a motion for summary judgment, the moving party has the burden to make "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Voss v. Netherlands Ins Co.*, 22 N.Y.3d 728 (2014), *quoting Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *See also Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985); *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341(1974); *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000).

Once the moving party has sustained his or her burden of making a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action." *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

This Court finds that Defendant has tendered sufficient evidence to establish the absence of material issues of fact and entitlement to judgment as a matter of law. The evidence establishes that Plaintiff was found non-responsive in his shower on April 4, 2017. However, contrary to the general and conclusory assumption of Plaintiff and Dr. Roth that Plaintiff suffered a fall, EMS personnel who responded to the scene specifically documented that there was no obvious signs of injury. Upon arrival to the hospital, no signs of traumatic injury were seen. Plaintiff's head was described as normocephalic and atraumatic, with no evidence of cuts, abrasions or other outward sign of injury. A CT scan of the head showed no signs of fracture, hemorrhage, or infarct.

Dr. Roth has not presented any qualifications that can properly serve as a basis for his opinions regarding Plaintiff's prior neurological status, the existence of a neurological injury causing cognitive decline, and the causal relationship between the Plaintiff's onset of a neurologic condition, normal pressure hydrocephalus and the event of April 4, 2017. Dr. Roth is without qualifications with which to challenge the opinions of Dr. Coblentz. That being the case, Plaintiff's opposition is insufficient to defeat Defendant's motion.

Notwithstanding Dr. Roth's lack of training or expertise in the area of neurology, the Court finds his Affirmation to contain only speculative and conclusory opinions which ignore the extensive medical records, treatment and history of Plaintiff. His Affirmation fails to discuss the contrary medical facts and the opinions of Dr. Coblentz.

In *Simpson v. Edghill*, 169 A.D.3d 737, 738 (2d Dept. 2019), the Second Department restated the well-established principle that "'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' " *Behar v. Coren*, 21 A.D.3d 1045, 1047 (2d dept. 2005) *quoting Postlethwaite v. United Health Services Hospitals, Inc.*, 5 A.D.3d 892 (3rd Dept. 2004); *see Noble v. Kingsbrook Jewish Medical Center*, 168 A.D.3d 1077, 1080 (2d Dept. 2019) "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" *Behar v. Coren*, 21 A.D.3d 1045, 1047 (2d Dept. 2005). Where no such foundation is laid, the expert's opinion is "of no probative value" (*see DiLorenzo v. Zaso*, 148 A.D.3d 1111, 1113 [2d Dept. 2017]).

Accordingly and based upon the foregoing, Defendant's motion is granted in it's entirety, and Plaintiff's Complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 29, 2019
White Plains, New York

HONORABLE JOHN P. COLANGELO, J.S.C.