

Hinds v Morgan

2019 NY Slip Op 34756(U)

January 17, 2019

Supreme Court, Nassau County

Docket Number: Index No. 600940/17

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

_____ X

JUDY E. HINDS, as Executor of the Estate
of EARL H. CLARKE, and JUDY E.
HINDS, Individually,

TRIAL/IAS, PART 21
NASSAU COUNTY

Index No. 600940/17

Plaintiff(s),

-against-

Motion Seq. No.: 004, 005 &
006

Motions Submitted: 11/16/18

DANIEL J. MORGAN, M.D., MOUNT
SINAI BROOKLYN, and SHEEPSHEAD
NURSING AND REHABILITATION
CENTER, LLC,

Defendant(s).

_____ X

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XXX
Affirmation in Opposition.....X
Reply Affirmations.....XXX

Defendant, Daniel J. Morgan, M.D. (Dr. Morgan), moves this court (Motion Seq. 004) for an order, pursuant to CPLR §3212, granting him summary judgment and dismissing the complaint against him. Defendant, Mount Sinai Brooklyn (Mount Sinai), moves separately for summary judgment (Motion Seq. 005) seeking to have the complaint dismissed against them, as well as having their matter severed from the other

Defendants. Defendant, Sheepshead Nursing and Rehabilitation Center, LLC (Sheepshead), also separately moves for summary judgment (Motion Seq. 006) seeking to have the complaint dismissed against them. Plaintiff, Judy Hinds, as Executor of the Estate of Earl H. Clarke (Clarke) , and Judy Hinds Individually (Hinds), opposes all three motions.

Hinds commenced this action in Kings County, by service of a summons and complaint dated July 13, 2016. Thereafter, an amended complaint dated September 14, 2016 was served. The allegations against Dr. Morgan include medical malpractice, lack of informed consent and wrongful death. The allegations against Mount Sinai include medical malpractice, lack of informed consent, wrongful death and negligent hiring and supervision. The allegations against Sheepshead include medical malpractice, lack of informed consent and wrongful death. Hinds has a derivative action against all Defendants. Issue was joined by service of an answer by Mount Sinai dated September 20, 2016. Sheepshead interposed an answer dated October 24, 2016. Dr. Morgan served an answer dated November 8, 2016. By short form order of the Hon. Gloria Dabiri, Kings County Supreme Court, dated January 6, 2017, venue was changed from Kings County to Nassau County. The case certified ready for trial on February 22, 2018 and a note of issue was filed on March 16, 2018.

The following facts were taken from the pleadings, the deposition transcripts of the parties and the exhibits annexed to the motion papers. On February 7, 2015, Clarke, who

was then 64 years old, fell down stairs in his home. On February 25, 2015, he went to Kings Highway Orthopedic Associates complaining of pain in both knees. He saw non-party Dr. Robert Copulsky who aspirated both knees, diagnosed him with hemarthrosis, and recommended Clarke return in week for a follow-up visit. On March 3, 2015, Clarke returned and saw Dr. Morgan. Through a physical examination, Dr. Morgan diagnosed Clarke with bilateral quadriceps tendon tear and recommended surgery. That same day, Clarke received preoperative medical clearance and signed a "Request and Authorization for Operation and/or Procedure" form.

On March 6, 2015, Clarke was operated on by Dr. Morgan at Mount Sinai. Dr. Morgan was not an employee of Mount Sinai at the time. After the surgery, Clarke was placed in hard casts over both legs from top of the thighs down to the feet. According to Dr. Morgan, the hard casts were necessary to prevent an accidental re-tearing of the tendons post-operation. Despite the hard casts, Clarke would still be able to stand and ambulate with a walker. To avoid clotting in the legs, Dr. Morgan ordered Clarke receive 5000 units of subcutaneous Heparin every 12 hours, 81mg of aspirin orally once each day, and physical therapy. The parties disagree on the extent to which these orders were followed.

On March 10, 2015, Clarke was transferred from Mount Sinai to Sheepshead. He was to continue on the Heparin, aspirin and physical therapy. Again, the parties disagree on Clarke's condition while he was at Sheepshead. Dr, Morgan, Mount Sinai and

Sheepshead argue the evidence indicates he was largely stable and improving, while Hinds argues there were clear, obvious and ominous signs of a deep vein thrombosis (DVT). On March 22, 2015 at 9:02 p.m., Clarke was unresponsive and not breathing. Staff performed CPR and 911 was called. Emergency medical staff arrived and took over CPR. Clarke remained at Sheepshead until 9:45p.m when he was transferred to Maimonides Medical Center. He was pronounced dead at 10:17 p.m. An autopsy determined the cause of death was DVT and a pulmonary embolism (PE).

Dr. Morgan now argues the case should be dismissed against him because the DVT and PE must have appeared after Clarke left his care, based upon the fact that he died two weeks after leaving Mount Sinai. Mount Sinai argues that they are entitled to summary judgment because Dr. Morgan was not their employee, they merely followed his orders, and they committed no independent acts of negligence that would implicate them. Sheepshead moves for summary judgment, arguing that their care was appropriate and there were no deviations from accepted medical and/or nursing practice.

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the moving party has made a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form which establishes the existence of a material issue of fact (*Zuckerman*

v City of New York, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). A defendant seeking summary judgment bears the burden of establishing its *prima facie* entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its defense, rather than merely by pointing out gaps in the plaintiff's case (*Alizio v Feldman*, 82 AD3d 804 [2d Dept 2011]; *Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]). Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center*, *supra*, at p. 852). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulettes Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]). Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

“ ‘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’ ” (*DiGeronimo v Fuchs*, 101 AD3d 933, 935 [2d Dept 2012], quoting *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]; *see also, Klein v Argoff*, 101 AD3d 1090 [2d

Dept 2012]). Therefore, “[i]n an action sounding in medical malpractice, a defendant physician moving for summary judgment must establish, *prima facie*, **either** that there was no departure from accepted medical practice, **or** that any departure was not a proximate cause of the plaintiff’s injuries (emphasis added)” (*LeMaire v Kunchman*, 102 AD3d 659 [2d Dept 2013], citing *Faicco v Golub*, 91 AD3d 817, 818 [2d Dept 2012]; *Stukas v Streiter*, *supra* at p. 24; *see also*, *Klein v Argoff*, *supra*; *DiGeronimo v Fuchs*, *supra*). “ ‘In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff’s [complaint and] bill of particulars (citations omitted)’ ” (*Bendel v Rajpal*, 101 AD3d 662, 663 [2d Dept 2012], quoting *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]).

“Conclusory statements set forth in an affirmation of a medical expert which do not refute or address the specific allegations of negligence made by the plaintiff in his or her complaint and bill of particulars are insufficient to make a *prima facie* showing that a defendant physician is entitled to judgment as a matter of law (citations omitted)” (*Bendel v Rajpal*, *supra*, at p. 663).

Once a defendant physician has made the requisite showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact with respect to the issues on which the defendant met the *prima facie* burden (*LeMaire v Kunchman*, *supra*, at p. 659 [citation omitted]). “ ‘[G]eneral allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice

are insufficient to defeat a defendant's motion for summary judgment (citations omitted)' ” (*Bendel v Rajpal, supra*, at p. 189, quoting *Bezerman v Bailine*, 95 AD3d 1153, 1154 [2d Dept 2012]).

Furthermore, “ [i]n a [medical] malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not' that the defendant's deviation was a substantial factor in causing the injury (citations omitted)” (*Goldberg v Horowitz*, 73 AD3d 691, 694 [2d Dept 2010], quoting *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881 [2d Dept 2005]; see also, *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [2d Dept 1998], *lv denied*, 92 NY2d 818 [1999]). “A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to 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 (citations omitted)’ ” (*Goldberg v Horowitz, supra*, at p. 694, quoting *Alicea v Ligouri*, 54 AD3d 784 [2nd Dept 2008] [internal quotation marks omitted]).

DR. MORGAN'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 004)

Dr. Morgan argues that the DVT and PE developed and occurred after Clarke left his care, absolving him of any liability. Further, he argues that while Clarke was in his care, he did not depart from accepted standards of medical care. Regarding lack of informed consent, Dr. Morgan points to his deposition testimony, as well as the consent form signed by Clarke, wherein Clarke acknowledged being informed of the risks associated with the surgery and alternatives. Finally, as there was no medical malpractice, the derivative action cannot lie.

In support of his motion, Dr. Morgan relies upon, *inter alia*, his deposition testimony, his own affidavit, and the expert affirmation of Craig Levitz, M.D., Board Certified in Orthopedic Surgery and Sports Medicine. Dr. Levitz renders the following opinions: 1) Dr. Morgan's recommendation of bilateral quadriceps tendon repair surgery was appropriate, and was performed properly; 2) That placing Clarke in hard casts, and ordering 5000 unites of subcutaneous Heparin every 12 hours, together with 81 mg of aspirin once a day was appropriate; 3) That there was no need for Dr. Morgan to monitor Clarke's prothrombin time (PT), partial thromboplastin time (PTT) or international normalized ration (INR); 4) That there were "no signs or symptoms" of DVT or PE while Clarke was at Mount Sinai and his discharge was appropriate; 5) that once Clarke was discharged, he was no longer under Dr. Morgan's care; and 6) that the DVT and PE developed while Clarke was at Sheepshead.

In light of Dr. Levitz's affirmation and the other exhibits, the court finds Dr. Morgan has established entitlement to summary judgment as matter of law. The burden shifts to Hinds to raise a material issue of fact requiring a trial of the matter.

In opposition, Hinds submits the redacted¹ affirmation of her expert, hospital records and the autopsy report. Hinds' expert, a Board Certified General Surgeon, opines that Clarke's death was "entirely preventable", and resulted from Defendants' deviations from good and accepted standards of medical care. Of particular interest to the court is the expert's opinion that Clarke presented to Mount Sinai, pre-surgery, with 10 DVT risk factors, to wit: 1) Diabetes Mellitus, 2) Hypertension, 3) Hyperlipidemia, 4) Metabolic Syndrome, 5) family history of DVT, 6) Being over age 40, 7) administration of a spinal anesthetic, 8) significant trauma to the legs, 9) orthopedic surgery and 10) hard casts causing significant immobility. The court finds these risk factors relevant because Defendants all downplay Clarke's risk to develop DVT. Further, the expert opines that the relatively simple procedure of inserting a Greenfield Filter would have prevented a DVT from traveling to the heart or lungs.

The expert takes issue with Dr. Morgan's assertion that hard casts were good and accepted medical practice. The hard casts prevented the use of Serial Compression Devices (SCD). SCDs are placed on the legs and pump intermittently, putting pressure on the legs which causes blood to flow through the deep veins. Further, the use of hard

¹The court was provided an un-redacted copy to review *in camera*.

casts prevented Dr. Morgan, or any other care providers, from conducting a physical examination of the legs to observe for DVT signs and symptoms, prevented the use of a Venous Doppler which could have been used to perform an ultrasound to look for DVTs, left only three toes exposed preventing any “meaningful” range of motion of physical therapy exercises and preventing the muscles of the lower legs from contacting, forcing blood up to the heart. In light of the foregoing, the expert opines that hard leg casts were a deviation from good and accepted medical procedure.

The expert further opines that, post-operation, Dr. Morgan should have tested for PT, PTT and INR, in light of the abnormalities in blood clotting factors shown in the pre-operative lab results. Further, a D-dimer test was “absolutely required” in light of Clarke’s risk factors for clotting. While Dr. Morgan did order Clarke receive Heparin and aspirin, Hinds’ expert opines that the dosages he ordered would have been appropriate for one with “very remote” risk of DVT. With someone with significant risk factors like Clarke, the dosage should have been 5000 units every eight hours, not every 12.

As for informed consent, Hinds’ expert, and Hinds’ counsel, both assert that Dr. Morgan never gave Clarke any alternatives, and did not advise Clarke that death was a potential outcome of the surgery.

A cause of action for lack of informed consent requires proof that the medical provider failed to discuss risks associated with the surgery along with alternatives, that a reasonably prudent patient would not have undergone the procedure had those risks and

alternatives been discussed, and that the procedure was the proximate cause of the injury. (*Mathias v. Capuano*, 153 AD3d 698 [2d Dept 2017]). The fact that the patient may have signed a consent form does not automatically establish *prima facie* entitlement to summary judgment on informed consent. *Id.* Herein, in support of the motion, Dr. Morgan points to the consent form, and his own testimony that all alternatives and risks were discussed with Clarke prior to the surgery. Hinds' testimony tends to contradict Dr. Morgan. While Hinds acknowledged it was Clarke's signature on the consent form, she testified that he only signed documents in admitting, and did not sign anything after that or before the surgery. However, she also acknowledges that Clarke had discussions with doctors outside of her presence. While she testified that Clarke told her what those discussions entailed, it is not clear from her testimony if he told her everything that was discussed. In light of the fact that Clarke spoke with doctors outside of Hinds' presence, and taking into consideration both Dr. Morgan's testimony and the signed consent form, the court finds Hinds is unable to raise a material issue of fact on informed consent.

Regarding medical malpractice, wrongful death and the derivative claim, Dr. Morgan argues, in reply, that the court should not consider the opinion of Hinds' expert. Dr. Morgan alleges that the expert fails to "...state that he has the skill or experience necessary to render an opinion in this case as to the standard of care as it relates to DVT prophylaxis in a patient who has undergone bilateral quadriceps tendons repair surgery, which is an orthopedic surgery...". Further, Dr. Morgan argues that the expert's

affirmation is silent as to whether he has ever “performed this type of surgery”. While this is true, what the court finds relevant about Hinds’ expert opinion is the risk factors for PVT. Hinds’ expert does not opine on the manner in which the surgery was performed, therefore his experience in performing such a surgery would be irrelevant. The court finds that as a Board Certified surgeon, the expert can render an opinion on risk factors for PVT.

Dr. Morgan asserts that, even if the court considers the affirmation, certain deviations alleged in the bill of particulars should be dismissed, to wit: 1) Dr. Morgan recommending a bilateral quadriceps tendon repair surgery, 2) that pre-operative imaging studies should have been taken, 3) that the surgery was improperly performed and 4) that 5000 units of Heparin was the incorrect dosage, even though the expert questions the frequency of the dosage. The court agrees with Dr. Morgan in this regard. The expert renders no opinion regarding these four alleged deviations, and there is no other evidence supporting that they were deviations. However, there is an issue of fact as to whether the 5000 units of Heparin should have been given at a higher frequency.

Further, the court agrees with Dr. Morgan that Hinds’ expert did not specifically address the arguments that PT/INR/PTT testing was unnecessary because Clarke was given Heparin, not Coumadin, and because it was being given subcutaneously. However, the court disagrees with Dr. Morgan in that the expert did not address the need for the D-dimer test. Dr. Morgan alleges that the D-dimer is only necessary where there

is some suspicion of a blood clot which did not exist here. However, the expert listed 10 risk factors for blood clots that Clarke had, thereby raising an issue of fact for that deviation.

Finally, Dr. Morgan claims that Hinds' expert does not address proximate cause, and to the extent he does, it is conclusory and speculative in nature. While Hinds' expert does not use the words "proximate cause" or "causation", it is clear from reading his affirmation that he attributes Dr. Morgan's deviations as causing Clarke's injuries and death. For example, the expert opines that the hard casts prevented Clarke from being able to use his legs and prevented him from being able to use SCDs, meaning "...pooling of blood and stasis in the lower legs became a virtual certainty". While proximate cause is often worded differently, it is clear that the expert is stating that the deviations caused the clots.

In light of the foregoing, Dr. Morgan's motion will be denied in part and granted in part.

MOUNT SINAI'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 006)

Initially, Mount Sinai's motion to sever will be denied. Despite listing it in the notice of motion and in the "Wherefore" clause, Mount Sinai offers no argument in support of the relief in the body of the motion or in any of their exhibits. Further, the

cause of action for lack of informed consent will be dismissed against Mount Sinai, for the same reasons addressed, *supra*, regarding Dr. Morgan.

A hospital cannot be held vicariously liable for the actions of a doctor who is not in the employ, and is a private attending physician unless the hospital commits independent acts of negligence, or the doctor's orders are contraindicated. (*Cerny v. Williams*, 32 Ad3d 881 [2d Dept 2006]). Mount Sinai argues that as Clarke was Dr. Morgan's patient, they cannot be held liable for his injuries and death. However, Mount Sinai's own records raise an issue of fact as to whether or not they were negligent. In particular, while Dr. Morgan directed the 5000 units of Heparin every 12 hours, this schedule was not adhered to by Mount Sinai. Their own records indicate there were significant delays, with one dose being five hours late. Though Mount Sinai's expert, Dr. Roshan P. Shah lists the times of the dosages, he does not render an opinion regarding the delays or the impact delays would have. In fact, based upon Dr. Shah's affirmation, not one dosage was given timely, with the shortest delays being 40 minutes and the longest delays being five hours and four minutes. For some reason, three doses were given on March 8, and that is not addressed either. As a result, Mount Sinai's motion to dismiss as related to failure to use skill, care and diligence, and regarding medication, will be denied regardless of the sufficiency of the opposition papers.

Based upon Dr. Shah's affirmation, the court finds that Mount Sinai has established *prima facie* entitlement to summary judgment regarding: 1) the decision to

perform the surgery, 2) the determination to use hard casts, 3) PT/PTT testing, 4) the ordering of 5000 units of Heparin every 12 hours and 81mg of aspirin once a day, 5) signs and symptoms of DVT, 6) instructions on early motion and physical therapy, 7) radiology studies, 8) supervision of staff, 9) assignment of a physician, 10) spirometry, 11) accurate and timely notes, 12) pulmonology and vascular consults, 13) D-dimer testing 14) exercises and 15) discharge. The burden shifts to Hinds to raise a material issue of fact requiring a trial on these alleged deviations.

The court finds Hinds fails to raise an issue of fact regarding 1) the decision to perform the surgery, 2) the determination to use hard casts, 3) PT/PTT testing, 4) the ordering of 5000 units of Heparin every 12 hours and 81 mg of aspirin once a day, 5) instructions on early motion and physical therapy, 6) radiology studies, 7) supervision of staff, 8) assignment of a physician, 9) spirometry, 10) accurate and timely notes, 11) pulmonology and vascular consults, 12) D-dimer testing 13) exercises and 14) discharge. Hinds' experts fails to even address these issues in his affirmation, except for physical therapy and exercises.

Hinds' expert states that Mount Sinai staff failed to inform Dr. Morgan that his orders for physical therapy and exercises could not be completed due to the hard casts. However, this opinion is not supported by the record. There is no expert to define "physical therapy" and "exercises", or to state that what did occur did not comply with Dr. Morgan's orders. It is clear that Mount Sinai staff attempted to do certain activities

with Clarke. They had him ambulate from his bed to a chair. He used a walker to walk very short distances. The records indicate he did certain exercises in his bed. The court finds that due to the short period of time Clarke was at Mount Sinai, and the fact that Dr. Morgans orders did not define physical therapy while still in the hospital, Hinds has not established that those orders were not complied with.

However, Hinds has raised an issue of fact regarding signs and symptoms of DVT. Hinds' counsel supplies a chart of all the times Clarke complained of pain in his legs not related to the incisions. While the court agrees with Mount Sinai's counsel that Hinds' chart is somewhat misleading in leaving out the times where Clarke notes no, or minor, pain, the fact remains that there were instances of leg pain, and as they are a potential sign of DVT, there is an issue of fact as to whether Dr. Morgan should have been notified. As such, Mount Sinai's motion for summary judgment will be denied in part and granted in part.

SHEEPSHEAD'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ 006)

Sheepshead's motion will be mostly regardless of the sufficiency of the opposition papers. Regarding Sheepshead, the following facts are undisputed: 1) Clarke briefly lost consciousness after standing one day after being admitted, 2) Clarke was experiencing periods of vertigo, 3) when exerting himself, Clarke was experiencing shortness of breath, 4) an order for a chest x-ray was made but never performed, 5) an order for a pulmonary

consult was made but never performed, and 6) Clarke was experiencing leg pain unrelated to the incisions.

Both of Sheepshead's experts, Nurse Practitioner Irene Richman and Dr. Alan Mensch, a pulmonologist, state that there were no signs of DVT. However, while both experts reference the episode where Clarke lost consciousness, that Clarke had episodes of vertigo, and shortness of breath, neither one explains why they were not signs of DVT, or why no further action needed to be taken. Neither expert addresses the ordering of a chest x-ray, but it never being performed. Neither expert addresses the ordering of a pulmonary consult and it never being performed. Both expert opine Clarke was not experiencing leg pain, yet the records contradict these statements. Nurse Richman does state at one point that Clarke's failure to seek to take pain medication means he was not experiencing leg pain, however the court sees no evidence supporting that opinion. Clearly, there are other possible reasons Clarke did not ask for, or take narcotic pain medication.

The court finds that the experts' failure to address these relevant, glaring points in their affirmations renders their opinions speculative. It appears the experts either intentionally avoided addressing these issues, or were not aware of them. Either way, the court finds it cannot consider the expert affirmations in support of the motion. Absent the expert affirmations, the court further finds there is not enough support from the other exhibits to entitle Sheepshead to summary judgment as a matter of law. As a result, their

motion will be denied in its entirety, except as related to informed consent based upon the arguments discussed, *supra*.

Accordingly, it is hereby

ORDERED, that Dr. Morgan's motion for summary judgment (Motion Seq. 004) is DENIED as related to medical malpractice, wrongful death and the derivative cause of action, consistent with terms of this order; and it is further

ORDERED, that Dr. Morgan's motion for summary judgment is GRANTED as related to the cause of action for lack of informed consent, and the following alleged deviations: recommending a bilateral quadriceps tendon repair surgery; that pre-operative imaging studies should have been taken; that the surgery was improperly performed; that 5000 units of Heparin was the incorrect dosage (but the frequency of the dosage is an alleged deviation that can still be pursued at trial); and that PT/INR/PTT testing should have been ordered. All other alleged deviations remain viable; and it is further

ORDERED, that Mount Sinai's motion for summary judgment (Motion Seq. 005) is DENIED as related to medical malpractice, wrongful death and the derivative action, consistent with the terms of this order; and it is further

ORDERED, that Mount Sinai's motion for summary judgment is GRANTED as related to the lack of informed consent cause of action and the following alleged deviations: the decision to perform the surgery, the determination to use hard casts, the failure to perform PT/PTT testing; the ordering of 5000 units of Heparin every 12 hours

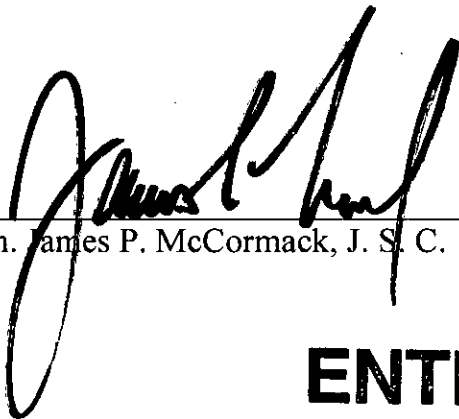
and 81mg of aspirin once a day; lack of instructions on early motion and physical therapy; failing to order radiology studies; failure to properly supervise staff; failure to assign a physician; failure to order spirometry testing; failure to take accurate and timely notes; and failure to order a vascular consult; failure to order D-dimer testing; failing to order exercises and improper discharge of the patient. All other alleged deviations remain viable; and it is further

ORDERED, that Sheepshead's motion for summary judgment (Motion Seq. 006) is DENIED as related to medical malpractice, wrongful death and the derivative claim; and it is further

ORDERED, that Sheepshead's motion is GRANTED solely related to the lack of informed consent cause of action.

This constitutes the decision and order of the court.

Dated: January 17, 2019
Mineola, New York



Hon. James P. McCormack, J. S. C.

ENTERED

JAN 22 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE