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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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CECELIA BAEZ, as Administrator of the Estate of ROSA QUINTANILLA, Deceased,

Plaintiffs,

-against-

ANTHONY R. VERRASTRO and PARK TERRACE CARE CENTER, INC.,

Defendants.

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PARK TERRACE CARE CENTER, INC.,

Third-Party Plaintiff,

-against-

WINTHROP-UNIVERSITY HOSPITAL, NYU WINTHROP HOSPITAL, an affiliate of NYU LANGONE,

Third-Party Defendant.

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TRIAL/IAS PART 12

Index No.: 603663-15
Submission Date: 5-17-19
Motion Sequence: 002, 003, 004

DECISION & ORDER

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Upon the foregoing papers, the following motions are determined as set forth below:

Sequence #002. Motion by third-party defendant WINTHROP-UNIVERSITY HOSPITAL, NYU WINTHROP HOSPITAL, an affiliate of NYU LANGONE ("WINTHROP") for an Order pursuant to CPLR §3212, dismissing third-party plaintiff's Complaint.

Sequence #003. Cross-motion by defendant ANTHONY R. VERRASTRO ("VERRASTRO") for an Order: (i) pursuant to CPLR §1010, severing the two causes of action as alleged in the plaintiff's Complaint and severing the third-party action from the First Cause of Action alleged in the Complaint as against the moving defendant VERRASTRO; and/or (ii) pursuant to CPLR §603, directing the issues between the parties be tried separately as to the individual issues of liability and damages between the successive independent tortfeasors; and/or (iii) dismissing any cross-claims against the defendant VERRASTRO.

Sequence #004. Cross-motion by defendant/third-party plaintiff PARK TERRACE CARE CENTER, INC. ("PARK TERRACE") for an order (i) denying third-party defendant's motion for summary judgment; and (ii) granting defendant/third-party plaintiff's motion for summary judgment, dismissing plaintiff's Complaint and all other claims against defendant/third-party plaintiff PARK TERRACE.

This action seeks damages for personal injury and wrongful death arising out of a motor vehicle accident and the ensuing care and treatment rendered to plaintiff's decedent, ROSA QUINTANILLA ("QUINTANILLA"). The Court refers to the parties submissions for a more comprehensive account of the underlying facts and procedural history of this action. The following are taken from the parties' submissions, and do not constitute findings of fact by the Court.

On May 20, 2015, 71 year old QUINTANILLA, a pedestrian, was struck by a motorcycle owned and operated by VERRASTRO. Nassau County Police EMS transported QUINTANILLA to the WINTHROP Emergency Department, where she was diagnosed with multiple severe and life-threatening injuries, including a fractured skull with brain injury and hemorrhage, traumatically amputated left leg, pneumothorax and numerous fractures in the face, torso and extremities.

Emergency surgery was performed, as described more fully in the moving papers and WINTHROP medical records (*NYSCEF Doc. 50*), after which QUINTANILLA was admitted to the Surgical Intensive Care Unit (SICU) for monitoring. In the following week, QUINTANILLA underwent several additional surgical procedures to repair multiple fractures.

On June 3, 2015, urinalysis findings indicated the presence of a urinary tract infection. QUINTANILLA was placed on antibiotic treatment with Bactrim. On June 7, 2015, her white blood count was within normal range.

QUINTANILLA remained at WINTHROP until June 18, 2015, when she was transferred to PARK TERRACE, a rehabilitation facility. PARK TERRACE records (*NYSCEF Doc. 51*) indicate that she did not have a fever upon admission. On June 19, 2015, normal temperatures were reported, and blood testing revealed a white blood count of 5.5 (normal 4.0 - 11.0). The urine sample was cloudy and positive for white blood cells and bacteria.

On June 23, 2019, the record indicated that QUINTANILLA was being monitored for drowsiness. At 4:00 pm, she was noted to be drowsy but easily aroused. At 6:00 pm, her temperature had risen to 100.2. At 10:00 pm, her temperature has risen to 101.9, and the order was given to administer Tylenol.

On the morning of June 24, 2019, temperatures of 100.8 and 99.8 were noted. At 3:00 pm, QUINTANILLA was being monitored for drowsiness and intermittent low to moderate grade fever. By 6:00 pm, her fever had risen to 101.8, and a persistence of drowsiness was noted. She now appeared lethargic, with deep, rapid respiration. Her oxygen saturation level had dropped to 90-91 percent. At 8:15 pm, QUINTANILLA was transferred back to WINTHROP by ambulance for evaluation and management, with a diagnosis of lethargy and fever, suspicious of sepsis.

QUINTANILLA was evaluated in the Emergency Room at WINTHROP in the late evening of June 24, 2015. Records indicate a fever of 102.2, along with tachycardia (rapid pulse) and tachypnea (rapid breathing). Sepsis protocols were initiated. She was given Tylenol and Moxifloxacin, an antibiotic.

In the morning of June 25, 2015, multiple tests were performed to identify the possible source(s) of infection. Chest x-ray was suspicious for pneumonia. Laboratory testing revealed urinary tract infection. CT scan of the abdomen and pelvis was consistent with colitis. Her temperature was noted at 103.2. She was started on the antibiotics Metronidazole and Ciprofloxacin. That day, she was admitted to the medical service, with presumed pneumonia and colitis. (*NYSCEF Doc. 50*). That evening, she was started on Meroprenem.

On June 26, 2015, QUINTANILLA was found unresponsive with agonal breathing, and no detectable blood pressure or pulse oximetry tracing. The rapid response team was called.

QUINTANILLA was intubated, a central line was placed and pressors were started. Due to abdominal distension and lactic acidosis, ischemic bowel was considered. QUINTANILLA was brought to the operating room on an emergent basis for an exploratory laparotomy and total abdominal colectomy. She was returned to the SICU in critical condition, where she was pronounced dead at 6:10 pm. The final diagnosis was unspecified septicemia.

The instant action was commenced against defendant VERRASTRO on June 5, 2015, prior to QUINTANILLA's death. By Order of the Court dated February 11, 2016 (Hon. George R. Peck, JSC), plaintiff was granted leave to amend the complaint to substitute plaintiff for QUINTANILLA, to join PARK TERRACE as a defendant, and to add a cause of action for wrongful death against both defendants. The Amended Verified Complaint (*NYSCEF Doc. 19*) asserts four causes of action: (FIRST) against VERRASTRO, sounding in negligence; (SECOND and THIRD) against PARK TERRACE sounding in medical malpractice and violation of public health law and regulations; and (FOURTH) against both defendants seeking damages for wrongful death. Issue was joined as to defendant VERRASTRO on or about March 8, 2016, and as to defendant PARK TERRACE on or about March 15, 2016.

On or about May 9, 2017, defendant PARK TERRACE served a third-party Summons and Complaint upon third-party defendant WINTHROP. The Third-Party Complaint asserts two causes of action against WINTHROP: (FIRST) sounding in medical malpractice; and (SECOND) seeking indemnification and/or contribution. Issue was joined as to third-party defendant WINTHROP on or about June 7, 2017.

WINTHROP's Motion for Summary Judgment (*Seq. 002*).

Third-Party plaintiff alleges, in sum and substance, that third-party defendant WINTHROP was negligent in its care and treatment of QUINTANILLA during her two admissions from May 20, 2015 through June 18, 2015, and from June 24, 2015 through June 26, 2015. In particular, PARK TERRACE asserts that WINTHROP departed from good and accepted practice insofar as it:

> "failed to properly diagnose, treat, and prevent the Plaintiff's decedent from obtaining C. difficile, health care-associated pneumonia "HCAP" and urinary tract infections during her admissions to Winthrop from May 20 - June 18th and readmission from June 24 - June 26, 2015; failed to timely discharge the Plaintiff s decedent, failed to properly and timely order and administer appropriate antibiotic therapy and treatment; failed to prescribe appropriate antibiotic therapy at the time of discharge; failed to properly implement and administer Foley catheter; failed to admit the Plaintiff's decedent to the ICU upon readmission; failed to appreciate critical lab values upon the readmission date

> of June 26, 2015, causing a delay of treatment at the time of readmission; failed to observe and treat poor kidney function; failed to properly identify, diagnose, and treat signs and symptoms of severe lactic acidosis; failed to properly identify, diagnose, and treat signs and symptoms of end organ damage; failed to properly identify, diagnose, and treat signs and symptoms of severe sepsis; failed to order appropriate lab testing while the Plaintiff s decedent was in the ER upon readmission to the hospital; failed to rule out sepsis; failed to treat sepsis; failed to provide appropriate and timely intravenous fluids; failed to provide timely resuscitation with intravenous fluids; failed to timely diagnose, and treat signs and symptoms of MRSA; failed to rule out MRSA; failed and omitted to perform timely and proper tests, examinations, procedures, studies and/ or surgery; failed and omitted to understand the clinical and laboratory analysis, history, physical examination, complaints, signs and /or symptoms for proper and timely diagnosis; failed to take prompt medical action and was negligent in other ways outlined in Plaintiff's Bill of Particulars of which will be known upon receipt and review of all medical records following depositions and other pre-trial discovery." Bill of Particulars, dated January 24, 2018, ¶¶3, 6 (*NYSCEF Doc. 49*).

WINTHROP moves for summary judgment dismissing the third-party action against it. In support of the motion, WINTHROP submits, among other things, the Affirmation of its expert physician, Dr. Mark Silberman, who is Board Certified in Internal Medicine, Emergency Medicine, Critical Care Medicine and Pulmonary Medicine (*NYSCEF Doc. 52*). Generally, Dr. Silberman opined that the staff at WINTHROP acted, at all times, in accordance with good and accepted practice with respect to the care and treatment of QUINTANILLA, and that none of the alleged acts or omissions proximately caused injury to QUINTANILLA.

In particular, Dr. Silberman opined:

1. With respect to the first admission (May 20 - June 18), there is no merit to the claim that WINTHROP failed to timely discharge QUINTANILLA. She was cleared for discharge on June 10, 2015, but discharge planning and arrangements for an appropriate rehabilitation facility took about one week, which is not unusual or improper.

2. There was no reason for WINTHROP to prescribe antibiotics at the time of discharge. QUINTANILLA was initially given prophylactic antibiotics in connection with her severe lacerations and multiple surgeries. Starting June 3, 2015, QUINTANILLA was given the antibiotic Bactrim twice per day for three days. As of June 7, 2015, she had a normal white blood count. There were no signs or symptoms of ongoing infection. Among other things, she had no fever, no urgency to void or discomfort on urination.

3. With respect to the second admission (June 24 - June 26), Dr. Silberman opined that there is no merit to the claims that: WINTHROP failed to timely admit QUINTANILLA to the ICU; WINTHROP failed to perform proper testing while QUINTANILLA was in the ER; WINTHROP failed to diagnose and treat lactic acidosis; WINTHROP failed to diagnose and treat severe sepsis; and WINTHROP failed to timely provide intravenous fluids. The basis for Dr. Silberman's opinion with respect to each of the above alleged departures, including reference to the medical record, is set forth in his opinion.

4. The claim that WINTHROP failed to properly treat QUINTANILLA's urinary tract infection is without merit. The course of Bactrim given twice daily for three days was reasonable and appropriate given the normal white blood cell count and the absence of any fever or UTI symptoms.

5. There is no merit to the claim that WINTHROP failed to property diagnose and treat C. difficile. During her first admission, QUINANILLA was tested for C. difficile on May 31, 2015, with negative results. Moreover, there were no signs or symptoms of C. difficile infection during the course of this admission. Upon her re-admission, QUINTANILLA was started on Metronidazole on the morning of June 25, 2015, shortly after the CT of the abdomen revealed colitis. Metronidazole, Dr. Silberman explained, is one of the few antibiotics known to treat C. difficile infection. Thus, Dr. Silberman opined, WINTHROP timely and appropriately treated suspected colitis, while awaiting the results of testing to determine the specific type of colitis.

6. There is no merit to the claims that: WINTHROP failed to diagnose and treat health care associated pneumonia; WINTHROP failed to evaluate or treat a MRSA infection; WINTHROP failed to properly utilize a Foley catheter; and WINTHROP failed to observe and treat abnormal kidney function. The basis for Dr. Silberman's opinion with respect to each of the above alleged departures, including reference to the medical record, is set forth in his opinion.

The Court finds that WINTHROP has established, *prima facie*, that it did not depart from good and accepted medical practice in the care and treatment of QUINTANILLA during her two admissions, and that WINTHROP has adequately addressed and rebutted the specific allegations of malpractice set forth in the third-party complaint and bill of particulars. See *Bendel v Rajpal*, 101 AD3d 662 (2d Dept. 2012). Accordingly, the burden shifts to the opposition to establish the existence of material issues of fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986).

In opposition, third-party plaintiff submits the Affirmation of its expert physician Dr. Kevin Shiley, who is Board Certified in Infectious Disease and Internal Medicine (*NYSCEF Doc. 77*). Dr. Shiley opined generally that WINTHROP failed to act within the confines of good and accepted practice and that its negligent acts or omissions were the sole cause of QUINTANILLA's infection and death. Dr. Shiley identified six departures:

(i) Failing to timely discharge QUINTANILLA after the May 20, 2015 admission. Dr. Shiley opined that the 8 day gap between the time QUINTANILLA was cleared for discharge and the time she was actually discharged, although not uncommon, "may indicate that there were additional consultations or treatments required before the patient was fully ready for discharge."

(ii) Prescribing a three (3) day course of antibiotics rather than a seven (7) day course. Dr. Shiley asserted that, for a suspected catheter-associated UTI, the recommended course of treatment is seven days, according to the guidelines of the Infectious Disease Society of America. A three day course of treatment could merely relieve symptoms and reduce white blood cell count without eradicating the bacteria causing the infection.

(iii) Failing to timely call a surgical consult. Dr. Shiley noted that QUINTANILLA presented on June 24, 2015 with symptoms of colitis, but that staff did not call for a surgical consult until June 26, 2015. According to Dr. Shiley, good and accepted practice would require a surgical consult within hours of symptoms of colitis.

(iv) Failing to properly diagnose and treat C. difficile. Dr. Shiley asserted that although QUINTANILLA was tested for C. difficile on May 31, 2015, she was not tested for C. difficile upon her readmission on June 25, 2015, notwithstanding that she was at high risk for developing C. difficile, that she presented with symptoms of C. difficile infection, and that a test was ordered on June 25, 2015, but not administered. Dr. Shiley noted that, because C. Difficile infection was suspected, QUINTANILLA was started on the antibiotic metronidazole on June 25, 2015, and oral vancomycin on June 26, 2015.

(v) Failing to diagnose and appropriately treat QUANTANILLA's urinary tract infection on her June 25, 2015 admission. According to Dr. Shiley, good and accepted practices require a urinalysis upon admission. A urine culture was not completed on QUANTANILLA until 13 hours after admission, notwithstanding that she exhibited symptoms of urinary retention in the emergency department. Treatment for the urinary tract infection was not given until 2:00 pm on June 25, 2015, more than 14 hours after admission, when Ciprofloxacin was prescribed.

(vi) Failing to properly document and chart QUINTANILLA's pressure ulcers on her May 20, 2015 admission. Dr. Shiley noted that, on May 30, 2015, an order for Dakins solution (a topic antibacterial agent) was written for application to "buttock wounds" which were not documented. Further, only one doctor noted, on June 5, 2015, that QUINTANILLA had perineal wounds. No further care or antibiotic treatments were noted to be given, notwithstanding the possibility of infection. According to Dr. Shiley, good and accepted practice requires documentation both of the existence of wounds and appropriate care given.

In reply, WINTHROP argues generally that Dr. Shiley's opinion lacks probative value and is insufficient to defeat summary judgment, insofar as it is silent on the essential issue of causation. Further, WINTHROP argues, insofar as two of the alleged departures were not pleaded in the third-party complaint or bill of particulars, they must be disregarded by the Court. See *Abalola v Flower Hosp.*, 44 AD3d 522 (1st Dept. 2007).

The Court finds, generally, that Dr. Shiley's opinion is not rendered insufficient by his failure to address the issue of proximate cause. The non-moving party's burden in opposing summary judgment is only to rebut the moving party's *prima facie* showing. That is, where defendant's expert demonstrates only that it did not depart from the relevant standard of care, the plaintiff is not required to address the element of proximate cause in addition to the element of departure, in order to defeat summary judgment. *Stukas v Streiter*, 83 AD3d 18 (2d Dept. 2011). At bar, Dr. Silberman's opinion made a *prima facie* showing only with respect to the issue of departure. He renders no opinion as to the lack of causal relationship between the alleged departures and QUINTANILLA's injuries and death.

The Court notes further that a plaintiff may oppose a motion for summary judgment on the basis of an unpleaded cause of action or theory of liability that is supported by the record. *Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276 (1978); *Swift Funding, LLC v Isacc*, 144 AD3d 471 (1st Dept. 2016); *Falkowski v Krasdale Foods, Inc.*, 50 AD3d 1091 (2d Dept. 2008); *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523, 524 (2d Dept 2005).

Turning to the individual alleged departures, the Court finds that third-party plaintiff has raised an issue of fact with respect to whether or not the treatment with Bactrim for three days as opposed to seven constituted a departure from the applicable standard of care. Although, as WINTHROP points out, the Infectious Disease Society of America differentiates between asymptomatic bacteriuria and symptomatic bacteriuria, the attached guidelines (*NYSCEF Doc.*

100) do not establish that the three day course was appropriate, even if QUINTANILLA was asymptomatic.[1]

The Court finds further that an issue of fact exists with respect to WINTHROP's proper diagnosis and treatment of QUINTANILLA's urinary tract infection upon her June 24, 2015 presentation to WINTHROP. The records show that QUINTANILLA arrived at the emergency department at approximately 9:00 pm on June 24, 2015. Moxifloxacin was administered at approximately 11:30 pm. Ciprofloxacin was administered on June 25, 2015 at 2:00 pm, and Meropenem was administered on June 25, 2015 at 8:13 pm. WINTHROP's expert, Dr. Silberman, opines that WINTHROP's care was appropriate because, while awaiting the results of further testing, QUINTANILLA was given Moxifloxacin, which was appropriate for the treatment of the particular strain of E. coli ultimately found in QUINTANILLA's urine. Third-party plaintiff's expert, Dr. Shiley, opines that Moxifloxacin is ineffective for a UTI because it does not enter the urinary tract. Meropenem and Ciprofloxacin, which are effective, were not given until June 24, 2015, at least 14 hours after admission. Thus, in Dr. Shiley's opinion, there was an inappropriate delay in proper treatment, as a result of the failure to perform urinalysis upon admission.

With respect to the remaining alleged departures, the Court finds that Dr. Shiley's opinion is insufficient to raise an issue of fact. His opinions regarding the failure to timely discharge QUINTANILLA, the failure to timely call a surgical consult, and the failure to properly document and chart QUINTANILLA's pressure ulcers, are speculative and/or conclusory. With respect to the diagnosis and treatment of C. difficile, the record shows that QUINTANILLA was started on the antibiotic metronidazole at 7:27 am on June 25, 2015. Dr. Shiley does not opine that this treatment was inappropriate or untimely. Accordingly, even if testing for C. difficile was delayed, absent a showing of a corresponding delay in proper treatment, no causal relationship can be established between the alleged departure and QUINTANILLA's injuries and death.

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[1] IDSA guidelines provide the following recommendations for duration of treatment (*NYSCEF Doc. 100, p. 654*) "47. Seven days is the recommended duration of antimicrobial treatment for patients with CA-UTI who have prompt resolution of symptoms (A-III), and 10-14 days of treatment is recommended for those with a delayed response (A-III), regardless of whether the patient remains catheterized or not.

i. A 5-day regimen of levofloxacin may be considered in patients with CA-UTI who are not severely ill (B-III). Data are insufficient to make such a recommendation about other fluoroquinolones.

ii. A 3-day antimicrobial regimen may be considered for women aged [less than or equal to] 65 years who develop CA-UTI without upper urinary tract symptoms after an indwelling catheter has been removed (B-II)." Plaintiff was 71.

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In view of the conflicting opinions of the parties' experts with respect to at least two material issues of fact, the Court finds that summary judgment in WINTHROP's favor is unwarranted.

PARK TERRACE's Cross-Motion for Summary Judgment (*Seq. 004*)

PARK TERRACE moves for summary judgment dismissing the Complaint as against it, on the ground that it did not depart from the accepted standard of care, and that, in any event, no act or omission on the part of PARK TERRACE caused or contributed to QUINTANILLA's injuries or death.

In opposition, plaintiff asserts that the motion is untimely. The Certification Order dated July 25, 2018 (*NYSCEF Doc. 88*) provided that motions for summary judgment had to be filed within 60 days following the filing of the Note of Issue. In this case, the Note of Issue was filed on September 27, 2018 *(NYSCEF Doc. 94*). This cross-motion, filed on December 28, 2018, was filed after the expiration of the 60-day period, and is therefore untimely.

It is well settled that an untimely summary judgment motion may be entertained only with leave of the Court upon "good cause" shown. *Miceli v State Farm Mutual Automobile Ins. Co.*, 3 N.Y.3d 725 (2004); *Brill v City of New York*, 2 N.Y.3d 648 (2004). "Good cause" requires a showing of good cause for the delay in making the motion. *Brill,* 2 N.Y.3d at 652. The rule applies to court-imposed deadlines shorter than the statutory 120 day period. *Giudice v Green 292 Madison, LLC*, 50 A.D.3d 506 (1st Dept. 2008). Moreover, absent a showing of good cause, the Court lacks discretion to consider even a meritorious, non-prejudicial summary judgment motion. *Hesse v Rockland County Legislature*, 18 AD3d 614 (2d Dept. 2005); *Thompson v New York City Bd. of Educ.*,10 AD3d 650 (2d Dept. 2004).

Courts have held that an untimely cross-motion may be considered without a showing of good cause, at least with respect to the causes of action or issues that are the subject of the timely motion, based upon the Court's power under CPLR 3212(b) to search the record and grant summary judgment to any party without the necessity of a cross-motion. See e.g. *Filannino v. Triborough Bridge & Tunnnel Auth.*, 34 A.D.3d 280, 281–282 (1st Dept. 2006). At bar, PARK TERRACE's motion is not a proper cross-motion to the extent that it was directed against the Complaint and not against the party that made the timely motion (WINTHROP). *Kershaw v Hospital for Special Surgery*, 114 A.D.3d 75 (1st Dept. 2013). Moreover, PARK TERRACE's liability to plaintiff was not the subject of the timely WINTHROP motion, although it may have been touched upon tangentially. Accordingly, to the extent that PARK TERRACE seeks relief

as against the plaintiff, PARK TERRACE was required to show good cause for the untimeliness of its motion, regardless of the merits of the motion or the absence of prejudice to the non-moving parties. See *Kershaw*, 114 A.D.3d 75. In the absence of such a showing, the Court lacks discretion to consider the motion.

VERRASTRO's Cross-Motion for Severance (*Seq. 003*)

VERRASTRO, the owner and operator of the vehicle that struck QUINTANILLA, moves to sever plaintiff's negligence cause of action against him from the causes of action against PARK TERRACE, and to sever the main action as asserted against him from the third-party action. VERRASTRO also moves for summary judgment dismissing any cross-claims against him, and, although not stated in the Notice of Motion, argues for dismissal of the wrongful death claim against him.

The Court notes at the outset, that to the extent that the motion seeks summary judgment, it is untimely. VERRASTRO does not deny that the motion was filed after the expiration of the 60 day period set forth in the Certification Order. As discussed above, absent a showing of good cause, the Court lacks discretion to consider even a meritorious, nonprejudicial summary judgment motion. *Hesse v Rockland County Legislature*, 18 AD3d 614 (2d Dept. 2005); *Thompson v New York City Bd. of Educ.*,10 AD3d 650 (2d Dept. 2004). That the delay was *de minimus* does not eliminate the requirement that good cause be shown. *Milano v George*, 17 AD3d 644 (2d Dept. 2005) (denying motion filed one day past deadline).

Moreover, as discussed above, VERRASTRO's motion is not a proper cross-motion to the extent that it was not directed against the party that made the timely motion (WINTHROP), and the claims and cross-claims against VERRASTRO were not the subject of the timely WINTHROP motion. Accordingly, to the extent that the motion seeks summary judgment dismissing those claims, it must be denied on the basis of untimeliness.

That is not to say, however, that the remaining branches of the motion may not be considered. The deadline set forth in the Certification Order, by its terms, applies only to motions for summary judgment. To the extent that the motion seeks other, non-dispositive relief, the deadline does not apply.

Nor must the motion be denied on the basis of its improper designation as a cross-motion. The Court has discretion to disregard a defect or irregularity if a substantial right of a party is not prejudiced. CPLR §2001. Insofar as the issues are fully briefed, and no party has

articulated any prejudice, the Court shall disregard the defect and consider the procedural relief sought on its merits.

CPLR §603 provides: "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue." The determination of whether to grant or deny severance pursuant to CPLR §603 is a matter of judicial discretion. Such determination depends on the absence of common issues of law or fact. *Herskovitz v Klein*, 91 AD3d 598 (2d Dept. 2012). Severance may be appropriate where individual issues will predominate in the presentation of the respective claims at trial, and where a joint trial poses a risk jury confusion and undue prejudice to the defendant. *Gittino v LCA Vision*, 301 AD2d 847 (3d Dept. 2003); *Abbondandolo v Hitzig*, 282 AD2d 224 (1st Dept. 2001).

Nonetheless, a determination to grant a severance should be exercised sparingly. *Shanley v Callanan Industries Inc.*, 54 NY 52, 57 (1981); *State Farm Fire and Casualty Company v Dayco Products, Inc.*, 19 A.D.3d 923 (3d Dept. 2005). Severance is inappropriate where there are common factual and legal issues and the interests of judicial economy and consistency of verdicts will be served by having a single trial. *Zili v City of New York*, 105 A.D.3d 949 (2d Dept. 2013). "Where complex issues are intertwined, albeit in technically different actions, it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one." *Shanley*, 54 NY at 57.

At bar, the Court does not find that the issues raised in the negligence cause of action against VERRASTRO are so separate and distinct as to warrant severance from the remaining causes of action. It is well settled that an initial tortfeasor may be liable to the plaintiff for the entire damage proximately resulting from his own negligent acts. *Ravo v Rogatnick*, 70 NY2d 305. The negligent owner/operator of a motor vehicle may be liable, not only for the injuries caused by the negligent operation of his vehicle, but also for the reasonably foreseeable aggravation of the plaintiff's injuries by subsequent acts of malpractice. *Derby v Prewitt*, 12 NY2d 100 (1962); *Dubicki v Maresco*, 64 AD2d 645 (2d Dept.1978).

The Affirmed opinion of Jay Itzkowitz, MD, submitted in support of the motion, is equivocal, conclusory, and insufficient to eliminate any issue of fact as to whether VERRASTRO's negligence caused or contributed to QUINTANILLA's death. Moreover, no evidence in the record establishes that the risk of infection and its sequella resulting from the

negligent conduct of others were not reasonably foreseeable consequences of the injuries sustained in the motor vehicle accident.

Although the issues relating to VERRASTRO's negligence may be separate and distinct from the issues relating to the medical malpractice of the subsequent care providers, the Court finds that the issues of causation are complex and intertwined. Accordingly, the Court believes that the interests of judicial economy and consistency of verdicts will be better served by one complete and comprehensive trial of all the issues. Moreover, the Court notes the absence of any showing of prejudice warranting severance.

* * *

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that WINTHROP's motion for summary judgment dismissing third-party plaintiff's Complaint (*Sequence #002*) is *denied*; and it is further

ORDERED, that VERRASTRO's motion for an Order: (i) pursuant to CPLR §1010, severing the two causes of action as alleged in the plaintiff's Complaint and severing the third-party action from the First Cause of Action alleged in the Complaint as against the moving defendant VERRASTRO; and/or (ii) pursuant to CPLR §603, directing the issues between the parties be tried separately as to the individual issues of liability and damages between the successive independent tortfeasors; and/or (iii) dismissing any cross-claims against the defendant VERRASTRO (*Sequence #003*) is *denied*; and it is further

ORDERED, that PARK TERRACE's cross-motion for summary judgment dismissing plaintiff's Complaint and all other claims against PARK TERRACE (*Sequence #004*) is *denied.*

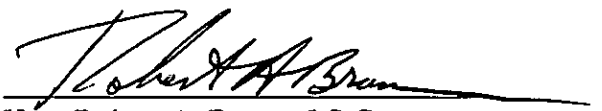
All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: August 19, 2019
Mineola, New York

ENTERED
AUG 22 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE

E N T E R:



Hon. Robert A. Bruno, J.S.C.

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