Eckert v Cold Spring Hills Ctr. for Nursing & Rehabilitation

2020 NY Slip Op 34727(U)

November 18, 2020

Supreme Court, Nassau County

Docket Number: Index No. 612826/18

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER

Acting Supreme Court Justice

TRIAL/IAS PART 33
NASSAU COUNTY

NANCY E. ECKERT, Individually, and as Administratrix of the Last Goods, Chattels, and Credits of GERARD E. MCGINNIS a/k/a JERRY MCGINNIS, deceased,

Plaintiff,

-against-

COLD SPRING HILLS CENTER FOR NURSING & REHABILITATION and PLAINVIEW HOSPITAL NORTHWELL HEALTH,

Defendants.

Index No.: 612826/18
Motion Seq. No.: 02
Motion Date: 08/26/2020

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmations and Exhibits	**1**
Affirmation in Opposition and Exhibits	**2**
Reply Affirmation and Exhibits	**3**

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

Defendant Cold Spring Acquisition LLC s/h/a and d/b/a Cold Spring Hills Center for Nursing & Rehabilitation ("Cold Spring") moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it; or alternatively, in the event that summary judgment is not granted in its entirety, moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's claims for punitive damages. Plaintiff opposes the motion.

Plaintiff commenced the instant medical malpractice action with the filing of a Summons and Verified Complaint on or about September 21, 2018. *See* Defendant Cold Spring's Affirmation in Support Exhibit A. Issue was joined by defendant Cold Spring on or about November 9, 2018. *See* Defendant Cold Spring's Affirmation in Support Exhibit B.

In support of defendant Cold Spring's motion, its counsel asserts, in pertinent part, that, "[p]laintiff, NANCY E. ECKERT, Individually, and as Administratrix of the Last Goods, Chattels and Credits of GERALD E. MCGINNIS a/k/a JERRY MCGINNIS, Deceased, (hereinafter 'Plaintiff'), commenced this personal injury/wrongful death lawsuit by the electronic filing of a Summons and Complaint in Supreme Court, Nassau County, on or about September 21, 2018…. The Complaint asserts causes of action for negligence, violations of PHL § 2801, gross negligence, medical malpractice and wrongful death…. Issue was joined by Cold Spring Hills by service of a Verified Answer, dated November 9, 2018…. In the Complaint, Plaintiff claims the decedent 'was caused to sustain serious bodily injuries that ultimately led to his death'… during the period of negligence of February 14, 2018 up to and through April 6, 2018…. As set forth in Plaintiffs' (*sic*) Verified Bill of Particulars as to Cold Spring Hills (*sic*), Plaintiff's Bill of Particulars as to Cold Spring Hills alleges negligence from February 27, 2018 through March 20, 2018 and continuing up to and through March 25, 2018. The Bill of Particulars alleges that Cold Spring Hills failed to adequately, properly and correctly and timely diagnose the Plaintiff's (*sic*) true condition which resulted in the need for multiple surgical interventions, onset of infection at surgical scar site, the need to have a PICC line inserted, infection at (*sic*) site of PICC line, bacterial infection and stage IV sacral decubitus, all of which deprived the Plaintiff (*sic*) of a substantial chance of cure. Furthermore, Plaintiff alleges that Cold Spring Hills failed to timely and properly perform diagnostic testing and examinations as

well as failing to keep adequate, complete, accurate, thorough and relevant records, which would have showed the condition including the formation of bedsores and compression ulcers which resulted in the need for surgical intervention. Plaintiff's Supplemental Bill of Particulars includes allegations (which are uncertain as to whether they are directed at defendant Cold Spring Hills or co-defendant Plainview) including false record keeping, failure to change medical treatment, failure to order wound care consultation, onset of infection at surgical site, infection of PICC line, infection of Stage IV ulcer and septic shock.... Plaintiff served a Supplemental Bill of Particulars on or about September 30, 2019 indicating (*sic*) that essentially alleged the same allegations as the Bill of Particulars, including, allegations related to PICC lines, infection of PICC line, stage IV sacral decubitus and failure to compose proper records upon which to rely on (*sic*)." *See* Defendant Cold Spring's Affirmation in Support Exhibits A-D.

Counsel for defendant Cold Spring submits, in pertinent part, that, "[t]he decedent presented to Plainview Hospital on February 14, 2018 after having fallen in the bathroom and suffering a right scalp abrasion at his daughters (*sic*) house.... He was noted to have prostate cancer and required oxygen supplementation. Diffuse metastatic bone disease was indicated in a chest x-ray.... The assessment on February 15, 2018 documented that the decedent had pressure ulcers on the sacrum, right buttocks and left buttocks.... The sacrum was unstageable.... The right buttocks was a Stage I.... The left buttocks was also a Stage I.... The record indicates that the sacral pressure ulcer was present upon admission to Plainview Hospital.... On February 17th, the record noted that the decedent had a sacral ulcer (*sic*) was a Stage II and heals (*sic*) were to be elevated off bed, positioned off wounds, pressure points protected.... There was a dry dressing to be used and covered with gauze.... On February 19th, a Braden assessment was documented.... The decedent had a Stage II sacral ulcer.... There was also a skin tear on the

right arm and a dressing appearance, dry and intact.... On February 22nd it was documented that the decedent's sacral pressure ulcer was now a Stage III.... The decedent was discharged to Cold Spring Hills on February 26th...." *See* Defendant Cold Spring's Affirmation in Support Exhibit E.

Counsel for defendant Cold Spring further asserts, in pertinent part, that, "[t]he decedent's initial admission to Cold Spring Hills Center was on February 26, 2018.... The decedent had a medical history of cancer, hypertension, diabetes and hyperlipidemia, together with asthma, and was noted to have respiratory failure with continued use of supplemental oxygenation via nasal cannula.... The decedent had both urinary and bowel incontinence.... With respect to the Care Plan, it was noted on February 26, 2018 upon admission, that the decedent was to be turned and positioned every two hours.... The decedent was assessed as being at risk for skin breakdown with a prior history of pressure ulcers and based upon his impaired mobility, bowel and bladder incontinence, prior history of cancer and diabetes.... The decedent was admitted with a history of respiratory failure and was oxygen dependent using a trach collar.... He had a history of prostate cancer, COPD and required an assist x1 with respect to transfers, bed mobility, toileting and other activities of daily living.... The decedent's cancer had metastasized to his bone and preventative measures were institutes such as a pressure reducing mattress, cushions in place to prevent further skin breakdown, and safety interventions to prevent falls.... The initial orders with respect to wound care on February 27, 2018, indicated cleaning the sacrum with saline, applying Hydrogel to the wound bed, together with zinc oxide and to cover and dry with dressing daily on an as needed basis.... The decedent was also seen by dietary (*sic*) on this date and indicated that he had no swallowing or chewing issues and had stable weight as well as no eating issues.... Therefore, he was put on a regular consistency HBV

protein diet.... With respect to specific skin prevention, notes from February 27, 2018 reference monitoring the decedent's skin every shift, wound care rounds to be performed weekly, turning and positioning every two hours, monitor for infections, redness and changes in ulcer size and drainage.... It should be noted that decedent presented to the facility with a Stage II sacrum pressure ulcer. His initial wound care note of February 27, 2018 confirmed the Stage II sacrum ulcer and pressure relieving devices were in place and care was to be implemented.... Hydrogel and zinc oxide were used.... On March 5, 2018, the sacrum ulcer was Stage II at 3.6 x 4.1 x 0.1 cm. Pressure relieving devices were in place.... The treatment remained the same.... The next wound care note was from March 12, 2018 which indicated that the sacrum Stage II ulcer had deteriorated to being unstageable, that Dr. Bresner was consulted and Santyl was ordered, pressure relieving devices were in place and the plan of care was to be continued.... The last wound care note was from March 20, 2018. The sacrum ulcer was again indicted to be unstageable with necrotic tissue present. Santyl was ordered upon consultation with Dr. Bresner. MVI with minerals was instituted to aid wound healing. Also, the decedent was to receive protein bars with meals for better nutrition.... The decedent's nursing assessment indicated that there was no evidence of dementia and that the decedent was alert and oriented.... Wound charting of the decedent's ulcer indicated that on February 26, 2018 upon admission it was 3 x 6 x 4 x 1 x 0.1 cm.... On March 5, 2018, the sacrum ulcer was Stage II at 3.6 x 4.1 x 0.1 cm.... As of March 12, 2018, the sacrum ulcer had progressed to being unstageable and was 4.6 x 4.5 x 0 cm.... The note of March 20, 2018, indicated that the sacrum ulcer was unstageable at 7.6 x 5.8 x 0 cm initially and it was noted on March 20, 2018 that the Hydrogel was then changed to Santyl.... Notes from March 21, 2018 indicated that the decedent was transferred to the hospital for transfusion therapy because of worsening chronic anemia.... With respect to the wound care,

the sacral ulcer was unstageable requiring Colganase topical and follow up with respect to the offloading measures…. The decedent was discharged from Plainview Hospital on April 3, 2018…. The decedent was transferred to Nassau University Medical Center on April 6, 2018 where he was pronounced dead due to cardiopulmonary arrest…. The Death Certificate lists the cause of death as acute myocardial infarction due to or as a consequence of atherosclerotic heart disease due to or as a consequence of hypertension with other significant conditions contributing to death including diabetes, chronic pulmonary disease, prostate cancer with metastasis to bones…." *See* Defendant Cold Spring's Affirmation in Support Exhibits E-I.

Counsel for defendant Cold Spring further asserts, in pertinent part, that, "Cold Spring has come forward with a *prima facie* showing of entitlement to summary judgment through the detailed and factually supported Expert Affirmation of Lawrence Diamond, M.D., as well as the pertinent medical records and exhibits annexed to the Notice of Motion, establishing that the care provided to Plaintiff's decedent conformed to accepted standards of care, was reasonable (to the extent that Plaintiff's claims sound in common law negligence) and that with respect to the Public Health Law §§ 2801 (*sic*) causes of action, Cold Spring Hills did not deprive the decedent of any 'rights or benefits' to which he may have been entitled as a patient of a residential health care facility…. Additionally, Dr. Diamond opines that none of the allege wrongdoing proximately caused or contributed to the decedent's claimed injuries and death…. Further, Dr. Diamond opines that since the Record is devoid of any evidence that the decedent's death was proximately caused by Cold Spring Hills (*sic*) care, dismissal of the Wrongful Death cause of action is warranted…. Finally, Dr. Diamond opines that since there is no evidence of intentional or reckless conduct by Cold Spring Hills in its care of the decedent, as well as no evidence of intentional or reckless disregard of his rights as a nursing home resident, Plaintiff's

claims for punitive damages under PHL § 2801-d(2) must be dismissed.... Clearly, Dr. Diamond's highly detailed Expert Affirmation sets forth the facts in the record herein, discussing in great detail, the decedent's medical history, his treatment course at Cold Spring Hills, where he presented in a debilitated state of health with a pre-existing sacral pressure ulcer, and the care provided during the alleged period of negligence throughout the decedent's admission, during which he experience worsening in the conditions of his skin due primarily to his battle with metastatic prostate cancer from June 2016, a fall at home, prior blood transfusions, chronic obstructive pulmonary disorder, low blood count and anemia which was inevitable progression as a result of all these issues.... Dr. Diamond addresses Plaintiff's claims, opining that Plaintiff's allegations of wrongdoing lack merit and her claims against Cold Spring Hills should be dismissed.... Regarding punitive damages, Dr. Diamond opines any claim for punitive damages that may be available pursuant to Public Health Law § 2801-d(2) should nevertheless be dismissed, as the Record is devoid of any conduct by Cold Spring Hills that could possibly warrant such damages.... Importantly, Dr. Diamond opines that the wound care team was continuously seeing the decedent and Nurse Dias testified to her continued assessments of the sacral pressure ulcer.... As he further explained, the standard f (*sic*) care allows for a 2-3 week period of time to assess the treatments rendered, therefore, Cold Spring Hills appropriately changed treatments to Santyl on March 12th to liquefy the necrotic tissue of the sacral pressure ulcer.... Nurse Dias's testimony solidified that using enzymatic debridement first before surgical debridement and Dr. Diamond confirmed that is well within the standard of care and was appropriate.... Therefore, Dr. Diamond concluded any allegations regarding failure to change medical treatments or order wound care consultations are without merit as wound care was appropriately caring for the decedent.... Regarding Plaintiff's Wrongful Death claim,

Dr. Diamond opines that since the decedent's death was not proximately caused by Cold Spring Hills alleged wrongdoing, Plaintiff's cause of action for wrongful death should be dismissed.... Dr. Diamond opines that since the decedent died due to cardiopulmonary arrest, and prostate cancer, all conditions which Cold Spring Hills neither caused, nor allowed to worsen, the wrongful death claim must be dismissed.... Here, the Record clearly reflects that appropriate and proper care was (*sic*) provided to the decedent while at Cold Spring Hills. In fact, the Record reflects the decedent was appropriately turned and positioned, provided adequate nutrition, given proper medication for his conditions, and was appropriately observed for any signs or symptoms of infection, for (*sic*) which never occurred.... In light of the medical treatment provided to the decedent being within appropriate standards of medical care, any claim of wrongdoing against Cold Spring Hills must be dismissed as the Record reflects that the decedent was of sound mind and able to make his medical needs known.... Additionally, the decedent was eating normally and has no issues in his nutritional intake.... Plaintiff's claims as to PICC lines, sepsis and infections are meritless and must be dismissed. **As Dr. Lawrence opines, (*sic*) Record is devoid of any evidence that there were infections of the decedent's pressure ulcers**.... Further, Dr. Lawrence opines that the Record is also devoid of any evidence that the decedent had a PICC line and therefore these claims should also be dismissed.... As Dr. Diamond opines, the Cold Spring Hills Record was within the standard of care as all care plans were properly devised and implemented, progress notes were kept and (*sic*) maintained accountability records, medication and treatment records, as well as wound tracking and implementation.... Dr. Diamond's Expert Affirmation establishes there were no deprivations of any nursing home resident 'rights or benefits' or the failure to provide adequate and appropriate medical care which proximately

caused and/or contributed to the decedent's alleged injuries and death...." *See* Defendant Cold Spring's Affidavit in Support; Defendant Cold Spring's Affirmation in Support Exhibit E.

In opposition to the motion, counsel for plaintiff submits, in pertinent part, that, "[t]he within affirmation, together with the affidavits of plaintiff's experts, a Board Certified surgeon ... and a Certified Nurse Practitioner with additional certification in Wound, Ostomy and Continence Nursing ... will demonstrate that there is no merit to the defendant's application, and that it must, as a matter of law, be denied in its entirety. It is remarkable that defendant should burden this Court with a motion for summary judgment after the witness on behalf of COLD SPRING, the Wound Care Nurse Sutantar Dias, R.N., admitted to numerous departures on the part of COLD SPRING staff from accepted practice in wound care, all of which caused and contributed to the exacerbation of the sacral pressure ulcer, deprived Mr. McGinnis of the opportunity for the ulcer to heal and caused him severe pain and suffering to the time of his death. In addition, it is respectfully submitted that the affirmation of defendant's expert, Lawrence Diamond, M.D., a nursing home Medical Director, is a conclusory statement of unsubstantiated facts that offers no evidentiary details to support the assertion that the nursing home met the standard of care."

Counsel for plaintiff contends, in pertinent part, that, "[o]n February 26, 2018, an Admitting Physician History and Physical was completed by Dr. Olaf Butchma, identified by the nursing home witness, Sutantar Dias, RN, as the nursing home Medical Director.... The Medical Director of a nursing home is responsible for coordinating and evaluating the medical care within the facility and ensuring that a system exists to monitor the performance and practices of all health care practitioners treating residents. Nowhere is this responsibility more relevant than in

the management of wound care…. Dr. Butchma made no notation of a finding of a pressure ulcer on this patient; he noted the skin had 'fair turgor' and under Pressure ulceration he noted 'see assessment.' He also did not note that the patient had low albumin, and he did not address this problem in his admitting orders. To promote wound-healing, Mr. McGinnis should have been treated for his low albumin…. The initial measurements of the sacral ulcer by the Wound Care Nurse on 2/27 were 3.6 cm x 4.1 cm x 0.1 cm and it was described as 'pink, red, moist with multiple openings.' Dr. Butchma ordered 'sacrum cleanse with normal saline and cover with foam dressing daily and PRN.' On 2/27, Nurse Practitioner Vidya changed the treatment order to Hydrogel. Dr. Butchma's admitting orders included 'Monitor skin integrity daily… 7a.m.-3p.m.' The Dietary-Nutrition Assessment created on 2/26 notes 'sacrum open area with redness per Nursing admit assessment. Will provide increased HBV protein to aide [sic] wound healing.' The Wound Care Nurse who testified on behalf of COLD SPRING did not know what HBV stood for, but characterized this as a high protein supplement…. Wound Care Nurse Dias also testified that a protein supplement had to be ordered by a physician and it has to be in the physician's orders for the resident to receive it…. According to the record, no protein supplement was ordered for Mr. McGinnis until March 20, when Pro-State liquid, multivitamins and Vitamin C were ordered, twenty-two days following his admission and one day prior to his discharge, after his sacral ulcer had deteriorated, become necrotic, progressed to 'Unstageable' and increased in size to 7.6 cm. x 5.8 cm. The nursing home claims that preventative measures were in place including a pressure reducing mattress and cushions to prevent further skin breakdowns…. The nursing home also claims that the resident was turned and repositioned every 2 hours…. However, as pointed out in the testimony of Wound Care Nurse Dias, the same C.N.A.'s (*sic*) (Certified Nurse's Aides) who initialed the record to signify that they turned and

positioned the patient on March 2 also initialed that the resident's skin was *'intact,'* when it was not because he had a sacral pressure ulcer. The evidence demonstrates that the nursing home records are unreliable, and cannot be used as evidence that the resident was turned and positioned every 2 hours. The importance of turning and positioning a resident such as Mr. McGinnis is set forth in the affirmation of plaintiff's Wound Care Nursing expert,... Dr. Diamond's affirmation in defense of the nursing home ... notes that the Care Plan included that the resident was to be turned and positioned every two hours and the decedent was to be monitored for skin integrity on a daily basis. It is clearly not enough to include these measures in a Care Plan; they have to be carried out by the staff. The evidence shows that the nursing (*sic*) departed from accepted practice by failing to implement their Plan of Care. Dr. Diamond omits the fact that the record puts into question whether Mr. McGinnis was in fact turned and positioned every 2 hours, and also omits the fact that the records documents clearly that daily monitoring of his skin condition was not properly carried out.... Following Nurse Dias's resident encounter on March 5, Mr. McGinnis was seen by Robert Bressner, M.D. on March 6, 7 and 12. Dr. Bressner's progress notes make no reference to the resident having a sacral pressure ulcer, low albumin or anemia, and Dr. Bressner did not enter orders addressing the low albumin, anemia, or pressure ulcer management. Instead, on 3/12 he noted 'Assessment Plan: Diet and medicine reviewed, treatment and care in place' indicating his complacency with the inadequate medical and nursing care to date. Dr. Diamond's affirmation glossed over the time between March 5 and March 12 and notes 'the next wound care note was from March 12, 2018, which indicated that the sacrum Stage II ulcer had deteriorated to being unstageable.' Dr. Diamond failed to mention that there was a standing order as of the admission on 2/26 to 'Monitor skin integrity daily... 7a.m.-3p.m.' In accordance with the policies and procedures of the nursing

home, and in keeping with good and accepted wound care practice, the Wound Care Nurse should have been notified immediately on observation by the nursing staff and C.N.A.'s (*sic*) of any change in the pressure ulcer during the week of March 5-12. Dr. Diamond failed to address what the standard of care was for the care and treatment of Mr. McGinnis's pressure ulcer between March 5 and March 12.... Although Dr. Diamond's affirmation stated that it is his opinion that the Care Plan was properly devised and implemented['] he can offer no proof in evidentiary form that it was properly implemented.... Based on the fact (*sic*) that there was no daily skin monitoring or reporting of changes between March 5 and March 12, and that there was a failure of the nursing home to provide any nutritional support to Mr. McGinnis throughout his stay at the nursing home, neither of which are addressed by Dr. Diamond in his affirmation, there can be no credence or validity to Dr. Diamond's conclusions that 'Mr. McGinnis's sacral pressure ulcer worsening [while a resident at COLD SPRING] was an inevitable progression.' According to plaintiff's experts, it was treatable when Mr. McGinnis entered the nursing home, and but for the nursing home's gross neglect and negligent nursing and medical care, the pressure ulcer became larger and necrotic.... As for Dr. Diamond's statement that there is no evidence of lack of supervision..., Dr. Diamond failed to set forth what he purports to be the standard of care regarding the supervisory responsibilities of the Medical Director of a nursing facility regarding the management of residents, and specifically one with a pressure ulcer. Plaintiff, through her experts and the testimony of Nurse Dias, has demonstrated sufficiently that there was lack of supervision at the nursing home on every level. The Medical Director was negligent in failing to order treatment to address the resident's anemia and low albumin on admission and failing to insure ethical standards in record-keeping. The nursing staff was negligent in failing to perform daily skin checks.... Had they done so diligently, they would not

have documented skin 'intact' and they would have timely notified the Wound Care Nurse of interim changes in the ulcer between her March 5 and March 12 examinations. The attending physician, Dr. Bressner, failed to document an examination of the pressure ulcer on March 6, March 7, March 12 and March 13. Dr. Bressner likewise failed to timely order medical treatment to address the resident's anemia and low albumin, as well as effective treatment for his high glucose levels, all of which should have been medically corrected to assist with wound healing. ... Contrary to the affirmation of Dr. Diamond, plaintiff's expert is of the opinion that the failure on the part of the nursing home to address Mr. McGinnis's underlying medical problems not only caused his pressure ulcer to deteriorate, become incurable and cause him severe pain and suffering, but also hastened his demise. Dr. Diamond stated his opinion that all the record-keeping by Cold Spring Hills was within the standard of care. Dr. Diamond once again has overlooked a significant portion of the record, namely, the 'late entry' notes by Dr. Bressner entered on 3/20 and back-dated to 3/16 and 3/19. These notes contain misstatements, including that the patient was on a feeding tube, and that the pressure ulcer was Stage II on 3/16 and 3/19, when the wound care nurse's notes indicate that she discussed the patient with Dr. Bressner on 3/12, when the pressure ulcer was deteriorated and necrotic, and he ordered Santyl, a chemical debridement. Dr. Bressner altered the record on 3/20 and entered false statements to cover up his prior inattentiveness to treatment of the sacral pressure ulcer. In addition to these false record entries, the nursing home included diagnoses of COPD and iron deficiency anemia, apparently to maximize their Medicare reimbursement, when Mr. McGinnis did not have these conditions. It is plaintiff's contention that Dr. Bressner is liable for unethical falsification of medical records and that it was the responsibility of the Medical Director of Cold Springs (*sic*) to see to it that progress notes were accurately entered at the time of the encounter. It is plaintiff's

position that it is for a jury to determine whether or not the nursing home management of Mr. McGinnis violated PH Law 2801-d, and rises to the level of neglect and disregard creating substantial and unjustifiable risk of harm entitling plaintiff to punitive damages. It could well be decided that the wanton and callous disregard on the part of the medical staff in causing and allowing Mr. McGinnis's medical condition to deteriorate and the wanton and callous disregard on the part of the nursing staff in falsely documenting that Mr. McGinnis's skin was 'intact,' their failure to notify the Wound Care Nurse of the deterioration of a pressure ulcer that had become necrotic and the falsification of records is deserving of punitive damages." *See* Plaintiff's Affirmation in Opposition Exhibits A and B; Defendant Cold Spring's Affidavit in Support; Defendant Cold Spring's Affirmation in Support Exhibits F and K.

As indicated, in opposition to the motion, plaintiff has submitted two expert affidavits. *See* Plaintiff's Affirmation in Opposition Exhibits A and B.

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).

"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).

"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).

"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).

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*, 21 A.D.3d 802, 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).

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). "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).

The Court notes that there are opposing opinions of defendant Cold Spring's expert and plaintiff's medical experts concerning the allegations of medical malpractice. The Court, therefore, finds that summary judgment is not appropriate in the instant matter with respect to plaintiff's medical malpractice claims. The Court further finds that there are genuine issues of fact as to plaintiff's allegations of negligence, wrongful death and falsifying medical records, as well as plaintiff's causes of action for violations of the New York Public Health Law.

Therefore, based upon the above, the branch of defendant Cold Spring's motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, is hereby **DENIED.**

The branch of defendant Cold Spring's motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's claims for punitive damages under New York Public Health Law § 2801-d(2), is hereby **GRANTED.**

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
November 18, 2020

ENTERED
Nov 23 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE