Eckert v Cold Spring Hills Ctr. for Nursing & Rehabilitation
2020 NY Slip Op 34728(U)
November 9, 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

NANCY E. ECKERT, Individually, and as Administratrix of the Last Goods, Chattels, and Credits of GERARD E. MCGINNIS a/k/a JERRY MCGINNIS, deceased,	TRIAL/IAS PART 33 NASSAU COUNTY
Plaintiff,	Index No.: 612826/18 Motion Seq. No.: 01 Motion Date: 08/26/2020
-against-	
COLD SPRING HILLS CENTER FOR NURSING & REHABILITATION and PLAINVIEW HOSPITAL NORTHWELL HEALTH,	
Defendants.	

The following papers have been read on this motion:

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

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

Defendant Plainview Hospital i/s/h/a Plainview Hospital Northwell Health ("Plainview Hospital") moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, severing it from this action and deleting it from the caption. 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 Plainview Hospital's

Affirmation in Support Exhibit A. Issue was joined by defendant Plainview Hospital on or about October 15, 2018. *See* Defendant Plainview Hospital's Affirmation in Support Exhibit B.

In support of defendant Plainview Hospital's motion (Seq. No. 01), its counsel asserts, in pertinent part, that, "[i]n this medical malpractice action, the plaintiff alleges that the decedent (her father) was negligently treated by the defendants during a course of treatment between February and March 2018, leading to his premature expiration on April 6, 2018. More specifically, the plaintiff claims that PLAINVIEW HOSPITAL allowed the decedent to develop a pressure ulcer during a February 2018 hospitalization, which subsequently worsened and purportedly hastened his demise. As detailed below and in the annexed affirmation of board-certified geriatrician/wound care physician Jeffrey Levine, M.D., PLAINVIEW HOSPITAL did not depart from accepted standards of care at any time. When the decedent's pressure ulcer was identified during the February 2018 admission, PLAINVIEW HOSPITAL appropriately treated the ulcer, and it was small at the time of discharge. When the decedent was re-hospitalized in March 2018 for a blood transfusion, the pressure ulcer was properly treated medically and surgically. Moreover, no aspect of PLAINVIEW HOSPITAL's treatment caused or contributed to the decedent's expiration. His years of uncontrolled diabetes and metastatic prostate cancer, among other significant comorbidities, meant that the development of an ulcer was unavoidable and its healing impossible. As such, because the plaintiff will not be able to carry her burden of proof at trial, PLAINVIEW HOSPITAL respectfully submits that it (*sic*) entitled to summary judgment in its favor…. In sum and substance, the plaintiff alleged that PLAINVIEW HOSPITAL departed from the standard of care by falsifying records, failing to prevent the decedent from developing pressure wounds, failing to order appropriate consultations, and failing to treat the pressure wounds appropriately once appreciated. She

further alleged that, as a result of these purported departures, the defendants hastened the decedent's demise" *See* Defendant Plainview Hospital's Affirmation in Support Exhibits C and D.

In further support of the motion, defendant Plainview Hospital submits the transcripts from the Examination Before Trial ("EBT") testimonies of plaintiff, BSN Sutantar Dias, who testified on behalf of defendant Cold Spring Hills, and RN Siny Koshy, who testified on behalf of defendant Plainview Hospital, and the Expert Affirmation of Jeffrey M. Levine, M.D., A.G.S.F., C.M.D, C.W.S.-P. ("Dr. Levine"). *See* Defendant Plainview Hospital's Affirmation in Support Exhibits E-G; Defendant Plainview Hospital's Expert Affirmation.

Counsel for defendant Plainview Hospital asserts, in pertinent part, that, "[t]he plaintiff alleges that PLAINVIEW HOSPITAL departed from the standard of care by failing to prevent the formation of her father's bedsores and failing to appropriately treat them once appreciated.... She also baselessly asserted that PLAINVIEW HOSPITAL deliberately 'falsified' records without any specifics.... However, as wound care expert Dr. Levine explained, these allegations are completely without merit. As Dr. Levine opined, the standard of care required PLAINVIEW HOSPITAL to implement pressure wound prevention measures, which include turning and positioning, the use of pressure pads, heel elevation, maintaining skin dryness, the use of pressure-dispersing mattresses, and nutrition monitoring. In addition, when pressure wounds were appreciated, the standard of care required PLAINVIEW HOSPITAL to treat them with dressings, medication, further prevention measures, and, if necessary, surgery.... In the case at bar, there can be no credible dispute that PLAINVIEW HOSPITAL's care and treatment was (*sic*) within the standard of care at all times. As the medical records demonstrate, the decedent's pressure wound was appreciated by PLAINVIEW HOSPITAL RN Abraham on

February 15, 2018 at approximately 01:30 in the morning.... Thereafter, as the medical records, Dr. Levine, and PLAINVIEW HOSPITAL deposition witness RN Siny Koshy evidence, pressure wound prevention and treatment measures were implemented the same day and every day of the remainder of that admission. Such measures included turning and positioning, heel elevation, pressure pads, pressure mattresses, topical medication, maintaining skin dryness, and nutrition consultations. These measures were clearly effective, as the decedent's sacral pressure ulcer measured only 1.5cm x 1.0cm when he was transferred from PLAINVIEW HOSPITAL to COLD SPRING on February 26, 2018.... When the decedent was transferred to PLAINVIEW HOSPITAL from COLD SPRING on March 21, 2018 for a blood transfusion, there was no doubt that PLAINVIEW HOSPITAL was aware of the decedent's sacral pressure wound on admission. As the medical records and Dr. Levine's affirmation indicate, the same pressure prevention and treatment measures that were employed during the February 2018 hospitalization were utilized during the March 2018 admission.... Moreover, general surgeon Dr. Brett Keck performed surgical debridements of the sacral wound on both March 25 and 28, 2018.... While the treatment may not have resulted in the same positive outcome as during the February 2018 admission, it does not change the fact that the correct measures were taken. The fact that the decedent was already in terminal decline and that his ulcer had no chance of healing was due to factors that arose before the decedent's initial February 2018 admission and were completely outside of PLAINVIEW HOSPITAL's control,... Finally, PLAINVIEW HOSPITAL must emphasize that the plaintiff bears the burden of proof, and she has submitted absolutely no evidence whatsoever to support her utterly spurious allegation that PLAINVIEW HOSPITAL staff 'falsified' records. Of course, the plaintiff failed to describe this supposed instance of record falsification with any specificity in her supplemental verified bill of particulars, likely because

she is aware that it is without merit. PLAINVIEW HOSPITAL acknowledges that its records indicate that on February 14, 2018, at or about 21:58, the decedent arrived at the ED without any integumentary compromise, but less than four (4) hours later, on February 15, 2018 at or about 01:30, it is noted that the decedent had pressure ulcer…. Although unclear because of the plaintiff's vague bills of particulars, PLAINVIEW HOSPITAL must assume that the plaintiff claims in this issue constitutes 'falsification' of records. However, her position holds no water. The plaintiff has not provided any evidence demonstrating that the decedent's ulcer could not have formed within the four (4) hours between his arrival at the ED and the first note describing his pressure wound. In addition, even if PLAINVIEW HOSPITAL stipulated that these are erroneous *arguendo*, a point not conceded, the plaintiff has not submitted any evidence demonstrating that this was due to 'falsification' rather than mere human error. Furthermore, the plaintiff cannot submit any evidence showing that this four (4) hour gap was material. As stated above, Dr. Levine explained, and the medical records demonstrate, that PLAINVIEW HOSPITAL implemented pressure wound treatment and prevention protocols every day of the decedent's February 2018 admission…. The records show that measures such as turning and positioning, topical medications, pressure point padding, and skin dryness maintenance were employed starting on February 15, 2018, the first full day of the decedent's February 2018 admission…. Dr. Levine affirmed that this alleged discrepancy would not change his opinion that PLAINVIEW HOSPITAL's treatment conformed to accepted standards of practice at all times…. Therefore, even if the plaintiff's allegation that PLAINVIEW HOSPITAL's records show a discrepancy is accepted *arguendo*, a point vehemently contested, it does not constitute an issue of material fact sufficient to preclude summary relief in favor of PLAINVIEW HOSPITAL. As such, because the plaintiff will not be able to show any departures from the

standard of care, PLAINVIEW HOSPITAL respectfully submits that it should be granted summary judgment." *See* Defendant Plainview Hospital's Affirmation in Support Exhibits C, D, L and N; Defendant Plainview Hospital's Expert Affirmation.

Counsel for defendant Plainview Hospital further contends, in pertinent part, that, "[t]he plaintiff alleges that as a result of PLAINVIEW HOSPITAL's purported departures from the standard of care, her father developed a sacral pressure ulcer which led to his decline and, ultimately, premature demise.... However, as wound care expert Dr. Levine opined, the decedent's development of a pressure wound, and subsequent inability to heal, were only unavoidable due to his longstanding medical issues that predated PLAINVIEW HOSPITAL's treatment. As Dr. Levine explained, the Bethpage Primary Medical Care, P.C. and Advanced Radiation records demonstrated that the decedent had a long history of diabetes, metastatic prostate cancer, radiotherapy to treat the metastatic prostate cancer, and malnutrition, all of which caused and contributed to the formation and worsening of the pressure wound... The Bethpage Primary Medical Care records indicated that from at least 2011 onward, the decedent's HgbA1c level never fell below 7.5.... This is a clinically significant elevation, since the upper limit of normal is 6. Dr. Levine stated that these records show that the decedent's diabetes was uncontrolled for many years. Similarly, the decedent's persistent HgbA1c level of ≥10.0 and glucose levels of 200-400 (140 is the upper limit of normal) during the February 2018 PLAINVIEW HOSPITAL admission was additional evidence that the diabetes was severely uncontrolled. According to Dr. Levine, these facts are significant because diabetes, especially uncontrolled diabetes, causes microvascular disease. When blood vessels are damaged, as occurs in patients with microvascular disease, blood circulation becomes compromised. When blood circulation is compromised, the risks of developing a skin breakdown significantly increase as

the blood supply to the skin decreases. Moreover, if/when a pressure wound does develop due to microvascular disease, healing also becomes virtually impossible due to the lack of circulation and vascular damage. These phenomena were worsened by the decedent's cancer-related anemia and COPD-induced hypoxia (O_2 saturation of 61%, normal range ≥95%), each of which also materially deceased (*sic*) his skin perfusion. As such, according to Dr. Levine, the decedent's years of uncontrolled diabetes caused severe microvascular disease that made his development of a pressure ulcer unavoidable. It also meant that his wound was never likely to heal, even though PLAINVIEW HOSPITAL took all appropriate interventions and precautions.... As Dr. Levine further explained, the decedent's significant metastatic prostate cancer was another factor contributing to the development of his ulcer. The Advanced Radiation and PLAINVIEW HOSPITAL records indicated that the decedent suffered from severe metastatic prostate cancer for years, for which he received months of radiotherapy.... Dr. Levine opined that cancer is a comorbidity in and of itself that weakened the decedent's body, thereby raising the risk of decubitus development. For example, severe cancer causes anemia, which reduces the amount of oxygen in the bloodstream and leads to similar issues caused by diabetes-related microvascular disease, such as organ failure. The fact that the decedent had to be re-hospitalized at PLAINVIEW HOSPITAL on March 21, 2018 for severe anemia demonstrated the severity of his cancer. Indeed, radiation oncologist Dr. Obedian's final December 2017 note described the decedent's September 2017 PET scan as revealing 'innumerable' osseous metastases, which showed that cancer had spread all throughout the decedent's body.... In addition, Dr. Levine explained that radiotherapy in particular also causes a condition caused radiation dermatitis that can damage the skin, cause skin wounds, and delay healing. According, to Dr. Levine, the decedent's PLAINVIEW HOSPITAL imaging studies, which demonstrated rectal wall

thickening, bladder wall thickening, perianal inflammation, and proctitis with diarrhea, were evidence of long-term radiation damage. All of these findings were consistent with collateral damage from radiotherapy. As such, to the extent that the decedent suffered skin injury due to his radiotherapy regiment, it further increased his likelihood of skin breakdown.... Dr. Levine further opined that the decedent's month/years of malnutrition were yet another risk factor increasing his breakdown.... [T]he decedent's malnutrition and probable cachexia were likely caused by his advanced metastatic cancer, as his 'innumerable' cancerous growth would have absorbed significant amounts of nutrition from the food he was eating. These issues were severely compounded during the March 2018 PLAINVIEW HOSPITAL admission when the decedent also had dysphagia, or difficulty swallowing.... [A]s Dr. Levine opined, malnutrition deprives the body of the nutrients it needs to main (*sic*) skin integrity and promote wound healing, such as protein.... This combination of severe comorbidities meant that the decedent was a prime candidate for 'skin failure', which is more commonly known as a terminal/Kennedy Terminal Ulcer (KTU). As Dr. Levine stated, Kennedy ulcers are an unavoidable result of the general frailty of the body's organ systems (i.e., skin) as an individual reaches an advanced age. The skin can fail, just like any other organ, and its failure manifests as ulcers. Dr. Levine opined that these end-of-life ulcers are unavoidable for those predisposed to them, particularly for a person of advanced age and poor health, such as the decedent. His uncontrolled diabetes, severe metastatic cancer, malnutrition, and poor blood circulation/perfusion meant that his development of a pressure wound was unavoidable, and its healing impossible despite the numerous aggressive interventions PLAINVIEW HOSPITAL undertook. Therefore, it is clear that no aspect of PLAINVIEW HOSPITAL's care and treatment caused or contributed to any of the decedent's purported injuries.... Finally, according to Dr. Levine, the decedent's pressure ulcer

did not even cause his death. The decedent's death certificate, which was drawn by the New York State Department of Health, clearly states that the decedent died from an acute myocardial infarction (or heart attack) as a consequence of his atherosclerotic heart disease and hypertension.... The other significant conditions contributing to his death identified by the examiner were diabetes, COPD, and prostate cancer with bone metastases.... This is evidence that the decedent died due to his other longstanding comorbidities, as described at length above, and not because of the subject pressure wound.... As such, because the plaintiff will not be able to show causation, PLAINVIEW HOSPITAL respectfully submits that it should be granted summary judgment." *See* Defendant Plainview Hospital's Affirmation in Support Exhibits C, K, L, M and N; Defendant Plainview Hospital's Expert Affirmation.

In opposition to the motion, counsel for plaintiff submits, in pertinent part, that, "[t]he allegations in this matter as to PLAINVIEW HOSPITAL are that the Hospital departed from good and accepted practices in the medical and nursing care, in causing and allowing the decedent, GERARD E. McGINNIS to develop pressure ulcers while he was under the care of hospital personnel, in failing to properly treat pressure ulcers while under the care of the hospital physicians and nurses, in failing to adhere to hospital policies and procedures and general principles of accepted care regarding the prevention, care and treatment of pressure ulcers, and in falsifying their records (1) in documenting that a pressure ulcer that developed during admission was present on admission, (2) in altering electronic records and (3) in omitting the presence of a pressure ulcer at discharge on the Discharge Instruction ostensibly to avoid (*sic*) Medicare penalty in formulations of the third party payment rate. It is further claimed that the failure to prevent and properly treat the patient's condition caused and contributed to severe pain and suffering from the pressure ulcer and hastened his decline and demise.... The Affidavits of

plaintiff's Experts, … attest to the proper standard of care and provide credible evidence of the departures from the standard of care by both hospital physicians and nurses, and the departures were the competent producing cause of decedent's injuries."

Counsel for plaintiff further asserts, in pertinent part, that, "[i]n February, 2018, GERARD E. McGINNIS was an 82 year-old male living with his daughter in Massapequa Park. He was ambulatory without assistance or use of walking aids and independent in activities of daily living.… On February 14, 2018, Mr. McGINNIS sustained a fall at home. At 12:35 p.m. the Massapequa Fire Department EMS recorded his blood pressure, pulse and respirations and at 12:58 p.m. the E.M.T. recorded the results of a full body examination, which including findings of 'Normal Skin Assessment' and 'Normal Back Lumbar/Sacral Assessment,' indicating that Mr. McGINNIS had no evidence of any pressure ulcers.… He was brought by ambulance to PLAINVIEW HOSPITAL Emergency Department for evaluation of a head laceration. The ED Adult Triage Note is times 13:17 or **1:17 p.m.**, … The ED Adult Nurse Note dated and timed 2/14/18 21:58 or 9:58 p.m. indicates the Intake Assessment of the skin was 'warm, dry, intact.' … [T]he ED Adult Nurse History which indicated under 'Pressure Ulcer' that the original entry by Denise Burgin, RN on 2/14/18 at 13:52 (1:52 p.m.) was **'No,'** which was changed by Penelope Lowe, RN on 2/14/18 at 19:53, but this document does not note what it was changed to or why it was changed. The witness who testified on behalf of PLAINVIEW HOSPITAL, Nurse Siny Koshy, when asked about the policy in the hospital with respect to a nurse changing someone else's note, stated under oath, 'No one's (*sic*) supposed to change anyone's notes,' including a nurse supervisor.… The Emergency Department Provider Note was dated and timed 2/14/18 at 17:47 or 5:47 p.m. At that time, the ER Provider entered the following note: **'Present on Admission – Pressure Ulcer – No.'**… It is well-established from the medical record that

Mr. McGINNIS did not have any pressure ulcers when he presented to the PLAINVIEW HOSPITAL Emergency Department at or about **1:17 p.m.** on 2/14.18.... At 9:03 a.m. on 2/15, Mercy Abraham, R.N. documented the presence of Pressure Ulcer #1 on the sacrum, Unstageable, measuring 3 cm. x 4 cm., present on admission; Pressure Ulcer #2 on the left buttocks, Stage I measuring 5 cm. x 5 cm., present on admission and Pressure Ulcer #3 on the right buttocks, Stage I measuring 5 cm. x 5 cm., present on admission. Despite the identification of pressure ulcers at this time, there is no documentation of any Pressure Reduction Technique in place.... At 15:26 (3:26 p.m.) on 2/15/18, Gloria Bafu, RN documented the presence of the same three pressure ulcers, and also noted they were all present on admission. This record, ..., further contains the notation **Revised** in the right upper corner of the page. The hospital's witness, who holds a Master's Degree in Nursing Administration and Informatics (I.T./electronic medical records) and was promoted to Assistant Nurse Manager in May 2019 was unable to explain the meaning of **Revised** or explain the 'Edit History' pertaining to the electronic record.... It is clear from the PLAINVIEW HOSPITAL record that the pressure ulcers developed during the time that Mr. McGINNIS was under the care of personnel, including Physician's Assistants, Medical Doctors and Nurses, whether during the time he was in the Emergency Department or after he was admitted to telemetry. In fact, defendant does not dispute this, either in counsel's affirmation or the affidavit of the expert. There is no evidence in the record that Mr. McGINNIS was afforded any pressure ulcer preventative measures during the time he was in the Emergency Department, which was over 7 hours, and which, according to plaintiff's experts, was a departure from accepted care. It takes only 2 hours for a pressure ulcer to develop, as plaintiff's experts attest to, which is the rationale for the policy of turning and positioning patients unable to move on their own every 2 hours to prevent pressure ulcers. It is also clear that the admitting orders did

not include any pressure ulcer preventative measures for this patient at risk in the event the ulcers were not yet present, or treatment modalities, which should have been ordered by the attending physician or wound care nurse if the ulcers were present on admissions." *See* Plaintiff's Affirmation in Opposition Exhibits A-J; Defendant Plainview Hospital's Affirmation in Support Exhibits E, G and L.

Counsel for plaintiff also contends, in pertinent part, that, "[c]ontrary to Dr. Levine's affirmation which is largely unsubstantiated by the records or the testimony of Nurse Koshy on behalf of the hospital, the PLAINVIEW HOSPITAL record does not indicate Mr. McGINNIS had any pressure ulcer preventative measures in place either in the Emergency Room or on his admission to the floor. Dr. Levine cannot point to any physician orders for pressure ulcer prevention or treatment in the entire record. In fact, of the 24 pages of Dr. Levine's affirmation, only 3 paragraphs (16, 17 and 18) are devoted to discussion of the admission of February 14-26, 2018, which is the admission during which the deplorable medical and nursing care received by Mr. McGINNIS caused him to unnecessarily develop numerous pressure ulcers, resulting in severe pain and suffering and leading to a downhill course in his medical condition resulting in his untimely demise. Dr. Levine makes no comment on the type of dressings or lack thereof applied by nurses with no specialty training in wound care. Dr. Levine makes no comment regarding the failure of any nurse over the course of a 12 day admission to report to the attending physician or the intensivist or any of the multiple consulting specialists the presence of decubitus ulcers in an 82-year old diabetic. Dr. Levine omits any comment on the fact that none of the treating doctors acknowledge in their notes the fact that the patient has pressure ulcers....
Dr. Jeffrey Levine is a specialist in Wound Care and has written extensively on the subject. In the 24 pages of his affirmation, Dr. Levine does not defend the medical management of pressure

ulcer prevention and treatment by PLAINVIEW HOSPITAL during the February 14 admission, because he cannot. Dr. Levine does not address any of the departures which Nurse Koshy testified to in her deposition, nor does he offer any excuse to justify her negligence and that of the other nurses. Dr. Levine does not state that it was acceptable for Mr. McGINNIS not to be seen and evaluated by a Wound Care Nurse or physician who specializes in wound care during this entire admission. Dr. Levine falsely claimed that 'the wounds continued to heal' as a result of pressure ulcer prevention and treatment measures during the course of the hospitalization, which ignores the fact that the patient's ulcers progressed from Stage I to Stage III and he developed new pressure ulcers during his hospital stay...." *See* Defendant Plainview Hospital's Affidavit in Support; Defendant Plainview Hospital's Affirmation in Support Exhibit G.

Counsel for plaintiff adds, in pertinent part, that, "[a]nnexed hereto and made a part hereof as Exhibit 'A' is the affirmation of plaintiff's expert surgeon attesting to the multiple departures in the care and treatment of Mr. McGINNIS, which led to his development of pressure ulcers and his rapid decline in health, resulting in severe pain and suffering and hastened his demise. Annexed hereto as Exhibit 'B' is the affirmation of a wound care nurse setting forth the multiple departures in nursing care that caused Mr. McGINNIS to develop pressure ulcers, and prevented healing during his hospitalization of February 14-26, 2018. The expert further comments on the absence in Dr. Levine's affirmation of any proof from the medical records to substantiate his claim that Mr. McGINNIS had a 'terminal/Kennedy Terminal Ulcer... unavoidable as a result of the dying process.' There is not a single medical note in the PLAINVIEW HOSPITAL admission of February 14 that describes Mr. McGINNIS as moribund or terminal with impending death or in the dying process.... Dr. Levine cannot and does not provide examples from the record to support his statement that 'his development of a pressure

wound was unavoidable, and its healing impossible despite the numerous aggressive interventions PLAINVIEW HOSPITAL undertook.'" *See* Plaintiff's Affirmation in Opposition Exhibits A and B; Defendant Plainview Hospital's Affidavit in Support.

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 physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries.'" *Leigh v. Kyle*, 143 A.D.3d 779, 39 N.Y.S.3d 45 (2d Dept. 2016) *quoting Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011).

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

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

"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 Plainview Hospital's medical 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 falsifying medical records.

Therefore, based upon the above, defendant Plainview Hospital's motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, severing it from this action and deleting it from the caption, is hereby **DENIED.**

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
November 9, 2020