

Tyson v Rociunas

2020 NY Slip Op 34848(U)

April 23, 2020

Supreme Court, Westchester County

Docket Number: Index No. 58032/2014

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

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GWENDOLYN TYSON, AS EXECUTRIX
OF THE ESTATE OF PAUL H. TYSON,
SR.,

Plaintiff,

- against -

INDEX NO. 58032/2014

DECISION/ORDER

Motion Date: 01/08/2020

Motion Seqs. 1, 2, 3, 4, 5, & 6¹

LIGIJA MARUA ROCIUNAS, M.D., ALAN
KENNETH DOCKERAY, M.D., PAUL
AUGUSTUS LAWHORNE, JR., RPA-C, and
KEVIN ARMANDO MENA, R.N., and
SOUND SHORE MEDICAL CENTER OF
WESTCHESTER,

Defendants.

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ECKER, J.

The following papers were considered on the motions of ALAN KENNETH DOCKERAY, M.D. (“DOCKERAY”) (Mot. Seq. 4), made pursuant to CPLR 2221, for an order granting leave to reargue the short form order dated September 11, 2019, and upon reargument, granting the motion of DOCKERAY (Mot. Seq. 2), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and directing entry of judgment in favor thereof; and SOUND SHORE MEDICAL CENTER OF WESTCHESTER (“SOUND SHORE”) (Mot. Seq. 5), made pursuant to CPLR 2221, for an order granting leave to reargue the short form order dated September 11, 2019, and upon reargument, granting SOUND SHORE’s motion (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and directing entry of judgment in favor thereof:

¹ Defendant Ligija Marija Rociunas, M.D. also moved to reargue the court’s September 2019 order (Mot. Seqs. 3, 6). By stipulation filed March 13, 2020, the parties discontinued the action with prejudice as against Rociunas. Accordingly, motion sequences 3 and 6 are denied as moot by virtue of the discontinuance.

PAPERS**MOT. SEQ. 4 (DEFENDANT ALAN KENNETH DOCKERAY, M.D.)**

Notice of Motion, Affirmation in Support, Exhibits A-I

Affirmation in Opposition, Exhibits A-B

Reply Affirmation in Further Support

MOT. SEQ. 5 (DEFENDANT SOUND SHORE MEDICAL CENTER)

Notice of Motion, Affirmation in Support, Exhibits A-J

Affirmation in Opposition, Exhibits A-B

Reply Affirmation in Further Support

MOT. SEQ. 1 (DEFENDANT SOUND SHORE MEDICAL CENTER)²

Notice of Motion, Affirmation in Support, Exhibits A-J

"Combined" Affirmation in Opposition, Exhibits A-F

Reply Affirmation

MOT. SEQ. 2 (DEFENDANT ALAN KENNETH DOCKERAY, M.D.)

Notice of Motion, Affirmation in Support, Exhibits A-N

Reply Affirmation, Exhibits A-B

Plaintiff, as administrator of the decedent's estate, commenced two separate actions against, among others, Alan Kenneth Dockeray, M.D., and Sound Shore Medical Center of Westchester (hereinafter collectively referred to as defendants), which were subsequently consolidated in 2018 via written stipulation.³ Plaintiff seeks to recover damages for, among other things, medical malpractice and loss of consortium for the loss of her husband, Paul H. Tyson, Sr. (hereinafter decedent). Plaintiff alleges that defendants failed to timely and properly diagnose and treat decedent of epiglottitis, which resulted in his death in 2012. With the exception of Paul Augustus Lawhorne, Jr., RPA-C,⁴ defendants filed separate motions for summary judgment in May 2019 in compliance with the timeframe set forth in the trial readiness order. Thereafter, the parties consented by written stipulations to adjourn the motions so as to extend plaintiff's time to file opposition. Ultimately, plaintiff filed a "combined opposition" on August 30, 2019. By short form order dated September 11, 2019 (hereinafter the September 2019 order),⁵ this court denied all such motions because the applications were in derogation of the CPLR 3212

² Sound Shore and Mena jointly filed the summary judgment motion denominated under sequence 1 (NYSCEF Doc No 48). By stipulation filed in September 2019, the parties voluntarily discontinued the action as against Mena. Hence this action continues only as against Alan Kenneth Dockeray, M.D., Paul Augustus Lawhorne, Jr., RPA-C, and Sound Shore Medical Center.

³ The second action was commenced only against Sound Shore under Index No. 60390/2017.

⁴ Lawhorne appeared in this action, was deposed, but has not moved for any relief.

⁵ Defendants filed separate notices of appeal with respect to the September 2019 order.

(a), violated the Differentiated Case Management (DCM) Protocol part Rule II.D, and contravened an order of the Hon. Joan B. Lefkowitz, J.S.C., which denied the parties' request to so order a stipulation of adjournment. Now, defendants move to reargue their prior motions pursuant to CPLR 2221 (d).

In moving for reargument, defendants ascribe error to the court insofar that their motions for summary judgment were timely and ought to have been considered on the merits, notwithstanding the fact that plaintiff's opposition was untimely. It is well settled that a motion for reargument is addressed to the sound discretion of the court and is designed to afford a party an opportunity to establish that the court "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d 772, 773 [2d Dept 2019], *appeal dismissed* 178 AD3d 770 [2019]; *see* CPLR 2221 [d] [2]; *Gonzalez v Arya*, 140 AD3d 928, 929 [2d Dept 2016]; *Robinson v Viani*, 140 AD3d 845, 847-848 [2d Dept 2016]).

Here, defendants demonstrated that the court mistakenly overlooked the facts in arriving at its prior determination in the September 2019 order (*see Weiss v Bretton Woods Condominium II*, 151 AD3d 905, 906 [2d Dept 2017]). There was an oversight by the court as to the timeliness of the unopposed summary judgment motions and the parties' consent to adjourn the motions in order to allow plaintiff additional time to file opposition. A review of the record reveals that the trial readiness order directed that any motion or cross motion for summary judgment must be served within 45 days of the filing of the note of issue, and that oppositions papers were to be served within 30 days of service. Plaintiff filed the note of issue on April 8, 2019, and defendants filed their respective applications within the 45-day period. However, plaintiff's requests for adjournment to file opposition, albeit consented to by defendants in written stipulations, were belated and denied by Justice Lefkowitz, thus rendering plaintiff's opposition untimely. Significantly, defendants' applications were timely since they filed their motions within the 45-day time period pursuant to the trial readiness order (*see R.J. Hyland, Inc. v Love Family Sports, LLC*, 102 AD3d 939, 942 [2d Dept 2013]; *Gomez v Penmark Realty Corp.*, 50 AD3d 607, 608 [1st Dept 2008]). Moreover, plaintiff filed a limited opposition for reargument, urging that the motions for summary judgment be decided on the merits. Accordingly, the court exercises its discretion in granting defendants' motions to reargue (*see* CPLR 2221 [d] [2]; *Fuessel v Chin*, 179 AD3d 899, 900-901 [2d Dept 2020]; *Gonzalez v Arya*, 140 AD3d at 929; *see also Mazinov v Rella*, 79 AD3d 979, 980 [2d Dept 2010]; *Singleton v Lenox Hill Hosp.*, 61 AD3d 956, 957 [2d Dept 2009]; *Bueno v Allam*, 170 AD3d 939, 940-941 [2d Dept 2019]). Upon granting reargument, the court will address each of the defendant's motions in turn.

Preliminarily, the court exercises its discretion to accept and consider plaintiff's untimely opposition papers since defendants had due opportunity to serve reply papers and, thus, were not prejudiced thereby (*see* CPLR 2204, 2214; *Bakare v Kakouras*, 110 AD3d 838, 839 [2d Dept 2013]; *Lawrence v Celtic Holdings, LLC*, 85 AD3d 874, 875 [2d Dept 2011]; *Vlassis v Corines*, 254 AD2d 273, 274 [2d Dept 1998]; *compare Jiewen Lin*

v City of New York, 117 AD3d 913, 914 [2d Dept 2014]; *Risucci v Zeal Mgt. Corp.*, 258 AD2d 512, 512 [2d Dept 1999]).

The factual backdrop surrounding this case is not complicated. By all accounts, decedent was suffering from a sudden onset of sore throat during the early morning hours of June 1, 2012, which reportedly worsened over the course of that day. Decedent worked that morning at a store with his son, Paul Tyson, Jr. Decedent's son testified that decedent had complained about his worsening condition and he noticed a considerable change to decedent's voice, describing it as extremely high-pitched with a distinct wheezing sound. Plaintiff, decedent's wife, corroborated as much, testifying that decedent's voice was inordinately hoarse and that decedent complained of difficulty swallowing, which precipitated decedent's visit to Sound Shore Medical Center that same afternoon. After being examined at Sound Shore's facility by Lawhorne, a physician's assistant, decedent was diagnosed with viral pharyngitis — a mild-like sore throat — and discharged the same day. Decedent died later that day of epiglottitis.⁶

Turning first to Dockeray's motion, he argues that no negligence can be attributed to him inasmuch he did not evaluate or treat decedent on the date of his death. Dockeray further asserts that no further examination by him of decedent was warranted, that decedent did not have to be hospitalized, and that Lawhorne treated decedent, prescribed medication, and discharged him. In support of his motion, Dockeray submits, among other things, his own affirmation, as well as affirmations of Philip Perlman, M.D., a licensed physician board certified in otolaryngology head and neck surgery, and Thomas Klie, D.O., a licensed physician board certified in emergency medicine.

Conversely, plaintiff contends that Dockeray, being decedent's primary care physician since the 1990s, owed him a duty of care in the context of a physician-patient relationship. Specifically, plaintiff asserts that decedent telephoned Dockeray's office on the morning of June 1, 2012, left a voice message complaining of a sore throat and, after not having received a call back, decedent went to the hospital on his own initiative. Plaintiff avers that decedent, after being treated and discharged, left the hospital and encountered Dockeray, at which point, after a short discussion, Dockeray sent decedent back to the emergency room for further evaluation. Plaintiff thus claims that Dockeray committed medical malpractice by failing to follow up on decedent's condition, which plaintiff now alleges was a misdiagnosis of viral pharyngitis, and Dockeray failed to diagnose and treat decedent's fatal epiglottitis infection, of which he should have made himself aware.

Despite conceding that he was decedent's primary care physician, Dockeray stresses in his affidavit that he did not examine or treat decedent in any capacity on June 1, 2012. Dockeray described that he was on his way to begin a work shift at Sound Shore's facility and had a brief social encounter with decedent near the parking area shortly after decedent

⁶ Epiglottitis is a rare infection that can enlarge the epiglottis, block the windpipe, and make it extremely difficult to breathe so as to cause one's death (see Epiglottitis, Harvard Health Publishing, Harvard Medical School, Dec. 2018, https://www.health.harvard.edu/a_to_z/epiglottitis-a-to-z [last visited Apr. 23, 2020]).

was discharged.⁷ Dockeray stated that decedent's voice was not "hoarse or raspy," and, other than having a sore throat, decedent assured him that he was fine. Dockeray added that he did not alter any of the original treatment provided by Sound Shore and made no inapposite recommendations from that of Lawhorne. Having taken no part in evaluating decedent, Dockeray thus maintains that he did not engage in medical practice.

As to the dispute of whether Dockeray had an existing duty of care to decedent, the court finds that there is an issue of fact in this regard to be resolved by the jury. A physician-patient relationship is necessary for damages stemming from medical malpractice. One "is created when professional services are rendered and accepted for purposes of medical or surgical treatment. An implied physician-patient relationship can arise when a physician gives advice to a patient, even if the advice is communicated through another health care professional" (*Thomas v Hermoso*, 110 AD3d 984, 985 [2d Dept 2013] [internal citations omitted]; see *Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695, 697 [2d Dept 2015]). "[W]hether a physician-patient relationship exists is generally an issue of fact" for jury determination (*Tom v Sundaresan*, 107 AD3d 479, 479 [1st Dept 2013]; see *Thomas v Hermoso*, 110 AD3d at 985; *Pizzo-Juliano v Southside Hosp.*, 129 AD3d at 697). Moreover, "[i]t is not necessary that a [physician] see, examine, take a history of[,] or treat a patient in rendering medical services" (*Raptis-Smith v St. Joseph's Med. Ctr.*, 302 AD2d 246, 247 [1st Dept 2003]; see *Cogswell v Chapman*, 249 AD2d 865, 866-867 [3d Dept 1998]).

Here, plaintiff overcame summary judgment on the issue of whether an implied physician-patient relationship existed between Dockeray and decedent for purposes of treating the sore throat (see *Tom v Sundaresan*, 107 AD3d at 479). Medical records maintained by Sound Shore notate that, on June 1, 2012, decedent was admitted to the triage location at 1:50 p.m. and was discharged from the emergency room the same day at approximately 2:38 p.m. Shortly thereafter, decedent came across Dockeray outside of Sound Shore's facility. Dockeray testified that his encounter with decedent near the hospital spanned about 2 or 3 minutes. He explained that, shortly after decedent was discharged, he encountered him standing at the portico entrance to Sound Shore's emergency room, and said to decedent "[l]et's go back and talk to the ER physician just to see how things went." Dockeray continued that he escorted decedent back to the triage area. Though maintaining that he never specifically asked decedent about the condition of his throat, Dockeray testified that he made an inquiry with Lawhorne about decedent's diagnosis. Lawhorne confirmed that their conversation lasted a couple of minutes and testified that he told Dockeray that the "strep is negative," to which Dockeray responded whether administering steroids to decedent were a viable option.⁸ Lawhorne stated to Dockeray that administering steroids was not necessary and, so, Dockeray advised decedent to call him over the weekend should any problems arise, and that he would "see [decedent] after the weekend." Acknowledging that he could have changed decedent's

⁷ Dockeray asserts that he lived on the same street as decedent and the two had a friendly relationship other than their physician-patient association.

⁸ According to Lawhorne, steroids could decrease the inflammation or erythema (reduce swelling of the tissue since blood vessels can become engorged).

treatment plans from that of Lawhorne, Dockeray believed there was no reason to since decedent had already left the facility. Critically however, Dockeray, as decedent's primary care physician for many years, facilitated and escorted decedent back to the emergency room on June 1, 2012 immediately after decedent had been discharged therefrom. Accordingly, Dockeray's assertions that he did not evaluate decedent in any manner, and that Lawhorne was the sole medical professional responsible in rendering treatment, does not categorically resolve this issue of fact in Dockeray's favor (see *Thomas v Hermoso*, 110 AD3d at 985; *Pizzo-Juliano v Southside Hosp.*, 129 AD3d at 697). The record contains undisputed evidence of an existing physician-patient relationship between decedent since Dockeray was decedent's primary doctor, that decedent called Dockeray's office the morning of his death, that such call was not returned by Dockeray, coupled together with what transpired outside Sound Shore's facility and in the emergency room. Thus, there are issues of fact as to Dockeray's conduct on the day in question such that it will be for the jury to determine whether Dockeray rendered a medical opinion, however slight (see *Raptis-Smith v St. Joseph's Med. Ctr.*, 302 AD2d at 247; compare *Badolato v Rosenberg*, 67 AD3d 937, 938 [2d Dept 2009]; *Heller v Peekskill Community Hosp.*, 198 AD2d 265, 265-266 [2d Dept 1993]).

Turning next to Sound Shore's motion for summary judgment dismissing all claims against it, it argues that there was no deviation or departure from medical practice by its registered nurse, Kevin Armando Mena. Sound Shore maintains that Mena provided decedent with the necessary triage care by making the appropriate medical recommendations to alleviate the sore throat which decedent complained of and did not cause decedent to suffer the alleged injuries leading to his death. Plaintiff counters that Sound Shore was negligent inasmuch as it failed to determine decedent was likely suffering from a bacterial infection such as epiglottitis, failed to administer antibiotics and steroids, and prematurely discharged decedent from its medical facility, causing him to suffer acute airway obstruction which resulted in decedent's death.

In support, Sound Shore submits, among other things, the medical records it maintained of decedent's visit to the emergency room, deposition transcripts of the individual defendants, and an expert affirmation from Gregory Mazarin, M.D., a licensed physician certified by the American Board of Emergency Medicine. Plaintiff, in opposition, submits, among other things, decedent's autopsy report and an expert affirmation of Bryan Kurtz, M.D., also a licensed physician certified by the American Board of Emergency Medicine.

"In order to establish a prima facie case of liability in a medical malpractice action, the plaintiff must show (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury" (*Bueno v Allam*, 170 AD3d at 941 [internal quotation marks and citations omitted]). "A physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure or that any alleged departure was not a proximate cause of the plaintiff's injuries" (*Bueno v Allam*, 170 AD3d at 941 [internal quotation marks and citations omitted]; accord *Leigh v Kyle*, 143 AD3d 779, 781 [2d Dept 2016]). "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 [physician] met the prima facie burden” (*Leigh v Kyle*, 143 AD3d at 781 [internal quotation marks and ellipses omitted]; see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *B.G. v Cabbad*, 172 AD3d 686, 687 [2d Dept 2019]).

It is well settled that “[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions” (*Mehtvin v Ravi*, 180 AD3d 661, 664 [2d Dept. 2020]; accord *Moyer v Roy*, 152 AD3d 1188, 1189 [4th Dept 2017]; *Poter v Adams*, 104 AD3d 925, 927 [2d Dept 2013]). Varying medical opinions adduced by the parties raise material “credibility issues [that] can only be resolved by a jury” (*Macancela v Wyckoff Hgts. Med. Ctr.*, 176 AD3d 795, 798 [2d Dept 2019]; *Nisanov v Khulpateea*, 137 AD3d 1091, 1094 [2d Dept 2016]; *Berthen v Bania*, 121 AD3d 732, 733 [2d Dept 2014]; see also *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012]; *Hayden v Gordon*, 91 AD3d 819, 821 [2d Dept 2012]).

As to the issue of causation, plaintiff raised triable issues of fact in opposition as to whether defendants deviated from accepted medical practice and whether those departures were a proximate cause of decedent’s death (see *Olgun v Cipolla*, 82 AD3d 1186, 1187-1188 [2d Dept 2011]). The autopsy report proffered by plaintiff found that the cause of death was “pharyngitis with epiglottitis.” Notably, the report highlighted that decedent suffered from “severe epiglottitis,” with his epiglottis described as “red, enlarged and edematous” and accompanied with pharyngitis.

Mena testified that decedent visited the triage area of Sound Shore’s facility, complaining of sore throat aggravated by swallowing. According to Mena, decedent described having a moderate degree of pain and notated decedent’s elevated blood pressure. Based on his observations, Mena sent decedent to the “fast track” section of Sound Shore’s emergency room for further examination by Lawhorne. In evaluating decedent, Lawhorne, among other things, performed a rapid strep test which resulted negative, diagnosed decedent with viral pharyngitis, prescribed liquid Motrin as well as suggesting other homoeopathic recommendations, and ultimately discharged decedent. About four hours after being discharged, decedent suddenly died due to pharyngitis with epiglottitis.

Mazarin opined that Mena properly assessed decedent in performing an appropriate triage physical examination of decedent upon his arrival to Sound Shore’s facility. As Mazarin explained, the role of Mena, as the registered nurse, is to perform a limited assessment of the patient to determine whether he or she should be transported to the main section or the fast track section of the emergency room. Mazarin elaborated that the term “triage” is a preliminary determination of the patient’s medical status in order to determine the acuity level of care needed to treat the patient. In reaching his conclusion, Mazarin described that decedent’s condition did not require referral to the main section of the emergency room since decedent did not complain of difficulty breathing, no abnormal oxygen saturation rate or breathing sounds, or noticeable changes in his voice. Mazarin added that decedent arrived with no fever, 99% saturation rate, normal respiratory condition, and the sore throat was without acute distress. Hence, Mazarin

concluded that Mena provided the appropriate triage care based on his preliminary determination that decedent be transported to the fast track area of Sound Shore's emergency room.

In addition, Mazarin opined that Lawhorne properly diagnosed decedent with viral pharyngitis because it was consistent with the erythema visualized by Lawhorne during decedent's physical examination, which included using an otoscope to visualize decedent's throat, palpate decedent's neck, auscultate decedent's lungs, and a cardiac exam. Mazarin explained that the erythema was mild with superficial swelling of the blood vessels and opined that Lawhorne could not have discerned that decedent had epiglottitis. Mazarin stated that epiglottitis is rare among adults and may be medically suspected when a patient complains of severe sore throat, inability to swallow, or other more extreme symptoms. Absent those symptoms, Mazarin opined that the presence of erythema around decedent's throat was indicative of viral pharyngitis and Lawhorne's recommendations to decedent to take liquid Motrin and gargle using warm saltwater were in accordance with the appropriate standard of care. Mazarin believed that no further examination of decedent was warranted and that his discharge from the emergency room was proper under the circumstances. Based on the foregoing, Mazarin opined with a reasonable degree of medical certainty that decedent received sufficient medical care and treatment from Sound Shore.

Perlman opined that decedent did not present any signs or symptoms of acute epiglottitis when he arrived at the emergency room in June 2012 — e.g., manifesting such things as difficulty swallowing saliva, drooling, severe pain, or a high fever. Because he was not exhibiting any of these symptoms, Perlman posited that there was no need for an X ray or an ear, nose, and throat (ENT) consultation. In sum, Perlman concluded that decedent's complaints of a mild sore throat and his moderately normal conditions were consistent with diagnosis of viral pharyngitis and, thus, sufficient to discharge decedent.

Likewise, Klie opined that decedent's lack of symptoms indicated that he did not have epiglottitis when he appeared at the emergency room and that the care and treatment decedent received from Sound Shore was appropriate. Klie concluded that it was medically reasonable to diagnose decedent with viral pharyngitis because decedent was afebrile, in no acute distress, and had no airway compromise. Klie pointed out that decedent did not complain of or display alarming symptoms such as severe sore throat, fever, muffled or hoarse voice, difficulty swallowing or breathing, or drooling. Additionally, Klie explained that Dockeray's specialty as an internist does not ordinarily consist of patient treatment in an emergency room. In this particular instance, Klie believed that the circumstances did not require Dockeray to provide further treatment, or that Dockeray should have admitted decedent to the hospital facility after their brief social encounter.

However, Kurtz, plaintiff's medical expert, opined that defendants' failure to diagnosis decedent with epiglottitis directly caused his death. Kurtz surmised that the care and treatment provided by defendants to decedent was inadequate and not in accordance with the accepted medical standards of practice for emergency medicine. Kurtz noted that Sound Shore's chart failed to document decedent's airway compromise that causes

stridor (a significant high-pitched wheezing of one's voice). Kurtz explained that stridor and a complaint of difficulty swallowing, coupled with decedent's rapid progression of symptoms exhibited over the course of a day, should have warranted Sound Shore to conduct X ray or CT scans of decedent's throat and chest in order to view the severity of the inflammation, and possibly discover an infection such as epiglottitis. Additionally, Kurtz emphasized that Sound Shore failed to have a physician or other medical doctor fully evaluate decedent, asserting that merely having a nurse and physician's assistant assess decedent was insufficient under the conditions presented. In failing to do the foregoing, Kurtz opined that Sound Shore's failure to diagnosis epiglottitis deviated from the accepted standard of medical care, thereby causing decedent's death. Similarly, Kurtz faulted Dockeray in failing to implement a more comprehensive treatment plan despite consulting with Lawhorne regarding decedent's diagnosis and treatment.⁹ Kurtz believed that Dockeray, as the qualified physician, blanketly concurred with a physician's assistant without conducting additional examinations of decedent. As such, Kurtz opined that Dockeray's failure to diagnosis and treat decedent of epiglottitis deviated from the accepted standard of medical care, consequently resulting in his death.

Applying the relevant legal principles to the present matter, the parties present a classic battle of expert opinions in whether decedent should have been diagnosed with and treated for epiglottitis. The parties' submissions present conflicting expert opinions on whether Sound Shore or Dockeray departed from the accepted standard of medical care, and whether the alleged deviations caused the fatal injuries, therefore raising issues of credibility that are within the province of the factfinder (see *Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017]). The parties' dispute is centered around the evaluations and assessments of decedent, and whether the failure to administer the proper tests on decedent arguably led to his death (see *Nisanov v Khulpateea*, 137 AD3d at 1094-1095). Thus, the court finds that, on the record presented, there are triable issues of fact as to departure and causation that may have led to decedent's tragic death (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d at 904). Accordingly, defendants' motions for summary judgment dismissing the complaint insofar as asserted against each of them is denied (see *Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d at 904; *Nisanov v Khulpateea*, 137 AD3d at 1094-1095; see also *Lee v Fenton*, 116 AD3d 945, 945-946 [2d Dept 2014]; *Olgun v Cipolla*, 82 AD3d at 1187-1188).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by the parties was not addressed by the court, it is hereby denied. Accordingly, it is hereby:

ORDERED that the motion of defendant ALAN KENNETH DOCKERAY, M.D. (Mot. Seq. 4), made pursuant to CPLR 2221, for an order granting leave to reargue the September 2019 order is granted to the extent of this order; and it is hereby further

⁹ Kurtz underscored that he had "no opinion" as to whether a patient-physician relationship existed with decedent and Dockeray.

ORDERED that the motion of defendant SOUND SHORE MEDICAL CENTER (Mot. Seq. 5), made pursuant to CPLR 2221, for an order granting leave to reargue the September 2019 order is granted to the extent of this order; and it is hereby further

ORDERED that the motion of defendant SOUND SHORE MEDICAL CENTER (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and directing entry of judgment in favor thereof is denied; and it is hereby further

ORDERED that the motion of defendant ALAN KENNETH DOCKERAY, M.D. (Mot. Seq. 2), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and directing entry of judgment in favor of him is denied; and it is hereby further

ORDERED that the motions of defendant LIGIJA MARIJA ROCIUNAS, M.D. (Mot. Seqs. 3 and 6) are denied as moot and the action is discontinued against said defendant with prejudice; and it is hereby further

ORDERED that the caption shall be amended to reflect the remaining parties based on the prior discontinuances and determinations made in this decision; and it is hereby further

ORDERED that the remaining parties shall appear at the Settlement Conference Part of the Court, Room 1600, on a date to be set hereinafter by said Part.

The foregoing constitutes the decision and order of the court.

Dated: April 23, 2020
White Plains, New York

E N T E R:

/s/ Lawrence H. Ecker, J.S.C.

HON. LAWRENCE H. ECKER, J.S.C.

Apr. 23, 2020, 5:22 p.m.

APPEARANCES

All parties appearing via NYSCEF.