

Wicks v Visiting Nurse Serv. of N.Y.

2020 NY Slip Op 34963(U)

May 5, 2020

Supreme Court, Nassau County

Docket Number: Index No. 608803/16

Judge: Jack L. Libert

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SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

JEFFREY WICKS and LINDA WICKS SMITH as CO-
GUARDIANS OF JAMES FELBERT WICKS,

Plaintiffs,

-against-

VISITING NURSE SERVICE OF NEW YORK, VNSNY
HOME CARE, LIYING CHEN, M.D. and ROCKVILLE
SKILLED NURSING & REHABILITATION CENTER,
LLC,

Defendants.

TRIAL PART 20
NASSAU COUNTY

MOTION # 02, 03, 04
INDEX # 608803/16
MOTION SUBMITTED:
JANUARY 15, 2020

The following papers having been read on this motion:

- Notice of Motion/Order to Show Cause.....1, 2, 3**
- Cross Motion/Answering Affidavits.....4, 5, 6**
- Reply Affidavits.....7, 8, 9**

Motion by defendant LIYING CHEN, M.D. for an Order pursuant to CPLR §3212, granting said defendant summary judgment and dismissal of this action (Motion Seq. No. 2).

Motion by defendant ROCKVILLE SKILLED NURSING & REHABILITATION CENTER, LLC for an Order pursuant to CPLR §3212, granting said defendant summary judgment and dismissal of this action (Motion Seq. No. 3).

Motion by defendants VISITING NURSE SERVICE OF NEW YORK HOME CARE II, d/b/a VISITING NURSE SERVICE OF NEW YORK HOME CARE, sued herein as VISITING NURSE SERVICE OF NEW YORK and VNSNY HOME CARE, for an Order pursuant to CPLR §3212, granting said defendants summary judgment and dismissal of this action (Motion Seq. No. 4).

This is an action sounding in medical malpractice and negligence, arising from the nursing and rehabilitative care provided to plaintiff JAMES FELBERT WICKS ("Mr. WICKS") by defendants in April and May of 2014.

At the time of the underlying events, Mr. WICKS was a 90 year old man with a medical history of, dementia, prostate disease, hernia repair, hypertension, anemia, depression and anxiety. He underwent hernia repair surgery at non-party Mercy Medical Center ("Mercy") in Rockville Centre, New York, where he had been admitted from April 12, 2014 to April 23, 2014. On April 23, 2014, Mr. WICKS was discharged from Mercy and transferred for subacute rehabilitation, to defendant ROCKVILLE SKILLED NURSING & REHABILITATION CENTER, LLC ("ROCKVILLE"), a skilled nursing facility located in Rockville Centre, New York, Defendant LIYING CHEN, M.D. ("Dr. CHEN"), was the physician at ROCKVILLE who was assigned to Mr. WICKS's care.

On May 14, 2014, Mr. WICKS was discharged from ROCKVILLE to his home. There he received nursing and physical therapy services from defendant VISITING NURSE SERVICE OF NEW YORK HOME CARE II, d/b/a VISITING NURSE SERVICE OF NEW YORK HOME CARE, sued herein as VISITING NURSE SERVICE OF NEW YORK and VNSNY HOME CARE ("VNS").

On May 22, 2014, Mr. WICKS was brought to the emergency room at Mercy, based upon observations of a change in his mental status, including significant fatigue and left sided weakness. After the performance of a CT scan of the brain, it was determined that Mr. WICKS had a subdural hematoma, described in the radiology report as a "large right extra-axial fluid collection representing acute bleed superimposed upon chronic subdural fluid." On May 23, 2014, Mr. WICKS underwent right frontal burr hole drainage of the hematoma, with the placement of a subdural drain and cranioplasty of less than 5 cm in diameter. Mr. WICKS remained at Mercy until his discharge on June 4, 2014 to another rehabilitation facility in Rockville Centre.

Plaintiffs' claim against the defendants is based upon the allegation that the subdural hematoma was the result of a fall sustained by Mr. WICKS while in the care of defendant ROCKVILLE, or during his prior hospitalization at Mercy. The gravamen of plaintiffs' claim is that defendants were negligent, either because they failed to safeguard Mr. WICKS from falling, or failed to timely appreciate the signs and symptoms of the subdural hematoma. In either case, plaintiffs contend, defendants' negligence either caused or contributed to Mr. WICKS condition, or allowed the condition to worsen.

The instant action was commenced on November 11, 2016 with the electronic filing of the Summons and Complaint (see *NYSCEF Doc. 1*¹). The Complaint states six causes of action: FIRST and SECOND, negligence claims against VNS; THIRD, a medical malpractice claim against Dr. CHEN; FOURTH, a claim against ROCKVILLE pursuant to New York Public Health Law §§ 2801-d and 2803-c; FIFTH, a negligence claim against ROCKVILLE; and SIXTH, a medical malpractice claim against defendant ROCKVILLE. Issue was joined as to each of the defendants. Discovery was completed, and a Note of Issue was filed.

Motion by Dr. CHEN (Seq. 002).

Plaintiffs allege that Dr. CHEN's medical care and treatment of Mr. WICKS departed from accepted standards of medical care, diagnosis, treatment, and services in the medical community. In particular, plaintiffs allege that Dr. CHEN committed malpractice in the period of April 23, 2014 to May 14, 2014, which consisted of:

failing to use due, reasonable and proper skill in the care and treatment of the plaintiff; failing to order and follow up on the implementation of adequate accident and fall preventions; failing to note that Plaintiff was at an increased risk for falls; failing to adequately evaluate the plaintiff; failing to adequately supervise, monitor, and observe the plaintiff; failing to order and follow up on the adequate supervision, monitoring and observation of Plaintiff; allowing the plaintiff to fall at the facility of co-defendant Rockville Skilled Nursing & Rehabilitation Center, LLC, and be injured; failing to properly document and investigate the plaintiffs fall; failing to institute an appropriate plan of care for the plaintiff; failing to adequately and properly examine the plaintiff; failing to take a proper history of plaintiff; failing to properly and timely assess and determine plaintiffs baseline medical condition; failing to compare and contrast plaintiffs baseline medical condition with his deteriorating associated with the plaintiffs injuries, including but not limited to severe head trauma and injury, subacute subdural hematoma with midline shift on right side, cerebral infarction, altered mental status, left-side hemiparesis, left side weakness and lethargy, and limited movement on upper and lower extremities; failing to hire efficient and skilled personnel; failing to properly train personnel failing to maintain a suitable index of suspicion; failing to institute proper and adequate policies and procedures, including but not limited to accident and fall prevention; and failing to adhere to the policies and procedures instituted for, inter alia, accident and fall prevention. Third Supplemental Verified Bill of Particulars to LIYING CHEN, M.D., ¶4 (*NYSCEF Doc. 49*).

Dr. CHEN moves to dismiss the Complaint against her on the grounds that: (1) there is no evidence

¹ "NYSCEF Doc. No." refers to the corresponding document number in the New York State Courts Electronic Filing System. This Court may take judicial notice of its computerized NYSCEF records. See *Perez v New York City Housing Auth.*, 47 AD3d 505 (1st Dept. 2008).

that Mr. WICKS sustained a fall at ROCKVILLE; (2) Dr. CHEN did not depart from accepted standards of practice; and (3) there is no evidence of a causal relationship between Dr. CHEN's treatment of Mr. WICKS and his subsequent diagnosis of a subdural hematoma.

In support of her contention that Mr. WICKS did not sustain a fall at ROCKVILLE, Dr. CHEN relies upon the ROCKVILLE medical record (*NYSCEF Doc. 61*). In particular, Dr. CHEN relies upon the absence of any evidence in the record that Mr. WICKS sustained a fall at any time during his residence at ROCKVILLE between April 23, 2014 and May 14, 2014. Although there were several reported incidents in which Mr. WICKS attempted to get out of his wheelchair unassisted, the record indicates that Mr. WICKS was successfully redirected and that there was no need to contact his physician. Moreover, there was no evidence that Mr. WICKS sustained any type of head trauma while at the facility.

In addition, Dr. CHEN highlights deposition testimony establishing that there was a protocol in place in April and May of 2014 to respond to and document a resident's fall. Dr. CHEN testified that if a resident sustained a fall, a registered nurse was required to evaluate the resident immediately, to call the attending physician, and to generate an incident report. The physician would then examine the resident, institute a treatment plan based upon the severity of the injury, and sign off on the incident report (*NYSCEF Doc. 52*). Jacqueline Lyn, the current director of nursing at ROCKVILLE, testified similarly with respect to the protocol in place in April and May of 2014. That is, staff would undertake an internal investigation into the circumstances of the fall, would assess the resident for injury and pain, and would notify the attending physician and a family member (*NYSCEF Doc. 53*). Dr. CHEN suggests that the absence of any record of activity undertaken pursuant to the above-described protocol demonstrates that no fall occurred.

Dr. CHEN offers the expert opinion of Lawrence Diamond, M.D. (*NYSCEF Doc. 63*) in support of her assertion that she did not commit any departures from accepted medical practice in connection with her treatment of Mr. WICKS, and that no act or omission on her part was the cause of any of Mr. WICKS's alleged injuries.

Dr. Diamond opines that upon Mr. WICKS's admission to ROCKVILLE, appropriate fall prevention measures were put in place. Dr. CHEN saw Mr. WICKS four times during his three week residence at ROCKVILLE – for an initial evaluation upon admission on April 23, 2014, and for follow-up visits on May 1, 2014, May 9, 2014 and May 12, 2014 – which, Dr. Diamond states, is consistent with accepted practice. Based upon the medical records and deposition testimony, Dr. Diamond opines that Dr. CHEN's initial

evaluation of Mr. WICKS was totally appropriate, and that there were timely and appropriate follow up visits by Dr. CHEN. During the follow up visits, there were no changes noted in Mr. WICKS's medical/neurological condition, and there was no physical evidence that Mr. WICKS had sustained any kind of traumatic injury. In Dr. Diamond's opinion, Mr. WICKS was appropriately discharged on May 14, 2014. Based upon the foregoing, Dr. Diamond concludes, to a reasonable degree of medical certainty, that Dr. CHEN did not commit any departures from accepted medical practice.

Dr. Diamond opines further that there is no evidence that Mr. WICKS's subdural hematoma developed as a consequence of any traumatic injury sustained by Mr. WICKS, or that such an injury occurred while Mr. WICKS was a resident at ROCKVILLE. Dr. Diamond notes that there was no evidence of a recent fall, and, according to medical records of Mr. WICKS's readmission to Mercy on May 22, 2014, Mr. WICKS's left-sided weakness first manifested itself on the previous day, when Mr. WICKS was at home. Dr. Diamond explains that in the case of an elderly person such as Mr. WICKS, even relatively minor events, such as tapping ones head against a headboard in bed or jostling ones head in a car, could cause a subdural hematoma to worsen. Thus, in Dr. Diamond's opinion, the precipitating factor could have occurred when Mr. WICKS was at home. In addition, Dr. Diamond notes evidence that Mr. WICKS sustained a fall during his first admission to Mercy, and, although Mr. WICKS only complained of wrist discomfort at that time, there is no way to determine if also he sustained an insult to his head in that fall. In Dr. Diamond's opinion, it would be pure speculation to say what caused the acute on chronic subdural hematoma to develop, or when it developed. Accordingly, Dr. Diamond concludes, to a reasonable degree of medical certainty, that none of the actions of Dr. CHEN was the proximate cause of any injury to Mr. WICKS.

In opposition, plaintiffs contend that, at minimum, there are issues of fact as to whether Mr. WICKS sustained a fall at ROCKVILLE. Plaintiffs proffer the deposition testimony of Mr. WICKS's son, plaintiff JEFFREY WICKS ("JEFFREY") (*NYSCEF Docs 50 and 51*). JEFFREY testified that on the first day of Mr. WICKS's admission to ROCKVILLE (April 23, 2014), at approximately 10:00 pm, he received a telephone call from a nurse named "Marie" with a heavy foreign accent (later identified, upon belief, as nurse Marie Charles). According to JEFFREY, "Marie" reported that Mr. WICKS had gotten out of bed and had been found lying on the bathroom floor, and that tests would be done to make sure that he was all right. JEFFREY testified that when he spoke to someone on the nursing staff the following day (believed to be a different "Marie"), she denied knowledge of any fall.

To substantiate this testimony, plaintiffs offer telephone records indicating that the WICKS residence received a phone call from ROCKVILLE at 9:50 pm on April 23, 2014 (*NYSCEF Doc. 117*). They also point to evidence in the medical records that Marie Charles was on duty from 3:00 pm to 11:00 pm on April 23, 2014, and that other nurses named “Marie” were also on duty in the relevant time period (*NYSCEF Doc. 61*). In addition, they cite evidence that JEFFREY made telephone inquiries in May of 2014 regarding his father’s fall: one to a social worker on May 23, 2014, in which he described the circumstances of the fall (as allegedly told to him), and requested copies of his father’s entire record; and one to the nursing staff on May 27, 2014. The record also indicates that he spoke to Marie Charles on June 4, 2014 seeking further information about his father’s fall. Everyone to whom JEFFREY spoke advised him that there was nothing in the record to indicate that his father had sustained a fall at the facility (See *NYSCEF Docs. 61 and 62*).

In addition, plaintiffs submit the affirmation of their unidentified expert, a Board Certified physician specializing in internal and geriatric medicine (*NYSCEF Doc. 114*). In the affirmation, offered in opposition to all of the defendants’ motions, the expert opines generally, to a reasonable degree of medical certainty, that the defendants’ actions and omissions were negligent and constituted a departure from accepted standards of medical and nursing practice, and that defendants’ negligence proximately caused the injuries enumerated in the bills of particulars.

Plaintiffs’ expert cites evidence in the record indicating that Mr. WICKS sustained one or more falls during the relevant time period. First, the expert cites medical records from Mr. WICKS’s first admission to Mercy suggesting that Mr. WICKS fell while at Mercy. That is, it was noted on April 13, 2014 that Mr. WICKS stood up suddenly from his wheelchair, and knocked over the wheelchair and the patient care assistant. Thereafter Mr. WICKS complained of wrist discomfort, and X-rays of his wrist and right shoulder were ordered. Mr. WICKS was placed on a safety watch, and his son JEFFREY was informed of the fall (see *NYSCEF Docs. 59 and 60*).

Second, the expert refers to JEFFREY’s testimony suggesting that Mr. WICKS fell on April 23, 2014, his first day of admission to ROCKVILLE. He acknowledges that there is no evidence in the medical record that this fall occurred, or that Dr. CHEN was notified of this fall.

Third, plaintiffs’ expert refers to notations in the Mercy medical record (from the second admission on May 22, 2014) suggesting that the subdural hematoma developed over time as a result of a fall.

Particularly, he refers to a note made by Dr. Stephen Onesti, the neurosurgeon who performed the burr hole surgery, that the onset of symptoms was gradual, and that there was a four week history of progressive lethargy and left hemiparesis following a fall. In addition, he cites a note made by a consulting physical medicine and rehabilitation specialist that the hematoma was likely traumatic in nature, given Mr. WICKS's history of falls. Plaintiffs expert opines that a subdural hematoma of the kind suffered by Mr. WICKS does not develop over time without any signs or symptoms. Thus, according to plaintiffs' expert, defendants should have been "on the lookout" for such signs and symptoms.

Plaintiffs' expert opines that Dr. CHEN was on notice of the fall that occurred at Mercy, insofar as it was reflected in the medical records which she claims to have reviewed (see EBT Dr. CHEN, *NYSCEF Doc. 50*). Moreover, Dr. CHEN was on notice of significant behavioral changes that were reflected in Mr. WICKS's medical record at ROCKVILLE, which, the expert opines, are reflective of traumatic head injury. In particular, plaintiffs' expert refers to the record of mood changes, increased confusion and increasingly aggressive behavior as reported by the nursing staff, from April 24, 2014 until Mr. WICKS's discharge on May 14, 2014. The expert notes JEFFREY's testimony that Mr. WICKS's demeanor and behavior changed drastically after his alleged fall at ROCKVILLE – according to JEFFREY, prior to Mr. WICKS's admission to ROCKVILLE, he was oriented and his dementia was only manifested in forgetfulness. On the evening of April 24, 2014, when he went to see his father at ROCKVILLE, Mr. WICKS was confused and talking in a voice, tone and manner that JEFFREY had never heard.

Plaintiffs' expert opines that Dr. CHEN should have been aware of Mr. WICKS's behavioral changes, either from her own observations or from a careful review of the medical record. Further, Dr. CHEN should have been aware of Mr. WICKS's prior fall at Mercy (if not the fall at ROCKVILLE). To the extent that Dr. CHEN was unaware, the expert opines, that constitutes a departure from accepted standards of practice. In the opinion of plaintiffs' expert, Mr. WICKS's fall history, coupled with his behavioral changes, should have alerted Dr. CHEN to the possibility that Mr. WICKS had sustained a traumatic head injury and that further investigation was warranted. To the extent that Dr. CHEN discounted Mr. WICKS's behavioral changes as attributable solely to Mr. WICKS's age or dementia, and to the extent that she failed to undertake further testing or consultation with specialists, that constitutes a departure from accepted standards of

practice.²

On the issue of causation, plaintiffs' expert opines generally that the defendants' departures were the proximate cause of the development and/or subsequent progression of the subdural hematoma. The expert does not specifically address the causal relationship between Dr. CHEN's departures and the subsequent progression of hematoma, but relies upon the inference that the failure to timely assess, test, and treat the subdural hematoma caused a worsening of the condition, and ultimately exacerbated the harm to Mr. WICKS.

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage. To prevail on a motion for summary judgment in a medical malpractice action, a defendant must establish, *prima facie*, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries. The failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden then shifts to the plaintiff to produce evidence in admissible form sufficient to establish the existence of triable issues of fact" (*Stiso v Berlin*, 176 AD3d 888, 890 [2d Dept. 2019] [internal citations omitted]).

The Court finds that Dr. CHEN has established, *prima facie*, that she did not depart from accepted medical practice in the care and treatment of Mr. WICKS during his three-week residence at ROCKVILLE (see, generally, *Stiso*, 176 AD3d at 889-890; *Alessi v Mucciolo*, 156 AD3d 750 [2d Dept. 2017]). The medical record supports Dr. CHEN's assertion that Mr. WICKS did not sustain a fall at ROCKVILLE. Further, the opinion of Dr. Diamond is sufficiently detailed and supported by the record to establish a basis for his opinion that appropriate fall prevention measures were in place, and that Dr. CHEN's evaluation, care and treatment of Mr. WICKS conformed to the accepted standard of practice. Dr. Diamond has adequately addressed the specific allegations of malpractice set forth in the complaint and bill of particulars (see *Bendel v Rajpal*, 101 AD3d 662 [2d Dept. 2012]).

The Court finds further, however, that viewed in the light most favorable to plaintiffs, the evidence is sufficient to raise an issue of fact on the question of departure. JEFFREY's testimony that he was informed

² Plaintiff's expert suggests an additional departure on the part of Dr. CHEN – namely, the failure to order and implement additional fall prevention interventions. To have any legal relevance, however, such departure would have to have occurred on the date of admission. Any additional measures implemented thereafter would not have prevented the alleged fall that, according to plaintiffs, resulted in the hematoma.

that his father had sustained a fall at ROCKVILLE is not conclusively refuted by the absence of evidence in the medical record, particularly in view of evidence that he did receive a telephone call from the facility on the evening in question³, that the person to whom he claims to have spoken was on duty at the time of the call, and that he made further inquiries about the alleged fall at the time of his father's subsequent diagnosis and surgery. Dr. CHEN's challenges to JEFFREY's testimony merely raise issues of credibility, which are not appropriately determined on a motion for summary judgment (*Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 [1997]).

Moreover, the opinion of plaintiffs' expert is sufficient to raise an issue of fact, insofar as it sets forth an adequate rationale for the expert's conclusions, relies on specifically cited evidence in the record, and addresses specific assertions made by Dr. CHEN's expert⁴ (*see Wagner v Parker*, 172 AD3d 954, 955 [2d Dept 2019]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Feinberg v Feit*, 23 A.D.3d 517, 519 [2d Dept. 2005]).

On the issue of causation, the Court finds that Dr. CHEN has not met her *prima facie* burden. Her expert, Dr. Diamond, relies upon the absence of evidence of a fall at ROCKVILLE, and suggests other possible causes of the hematoma. To the extent that the occurrence of a fall at ROCKVILLE remains a disputed issue of fact, Dr. Diamond does not establish that such fall, if it occurred, did not cause or contribute to Mr. WICKS's injuries. To the extent that he suggests that even a minor event, such as a "tapping" or jostling of the head could trigger the development of a subdural hematoma in a person of Mr. WICKS's age, he may actually support, rather than refute, plaintiffs' position – that is, by permitting the inference that a subdural hematoma may have developed from the alleged fall notwithstanding the absence of physical

³ None of the defendants challenges the documentary proof that a phone call was made from ROCKVILLE to JEFFREY on the night in question, or offers an alternative explanation for the call.

⁴ To the extent that the theory of departure relied upon by plaintiffs expert – that Dr. CHEN failed to appreciate the signs and symptoms of hematoma – was not specifically addressed in the bill of particulars, the Court notes that it is not materially new or different, but rather falls within the broader categories of departure that were pleaded. Moreover, a plaintiff may oppose a motion for summary judgment on the basis of an unpleaded theory of liability that is supported by the record. See *Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276 (1978); *Swift Funding, LLC v Isacc*, 144 AD3d 471 (1st Dept. 2016); *Falkowski v Krasdale Foods, Inc.*, 50 AD3d 1091 (2d Dept. 2008); *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523, 524 (2d Dept 2005).

evidence of injury, such as swelling or contusions.

Further, Dr. Diamond does not address the discrepancies in the medical record as to when the signs and symptoms of the subdural hematoma began to manifest.⁵ Rather, he states only that it is impossible to determine when the hematoma began to develop. This statement does not establish that the subdural hematoma was not discernable while Mr. WICKS was at ROCKVILLE, or that an earlier inquiry would not have led to an earlier diagnosis and better outcome for Mr. WICKS. Moreover, Dr. Diamond does not eliminate the possibility that the Mr. WICKS sustained an insult to his head at the time of the April 13, 2014 fall at Mercy, which is consistent with plaintiffs' theory that Mr. WICKS's behavioral changes were attributable to a fall.

Insofar as Dr. CHEN has not met her *prima facie* burden to demonstrate the absence of causation, the burden does not shift to plaintiffs to raise an issue of fact. (*In Sook Choi v Doshi Diagnostic Imaging Services, P.C.*, 152 AD3d 750, 751-52 [2d Dept 2017]; *Stukas v Streiter*, 83 A.D.3d 18 [2d Dept. 2011]). Accordingly, the Court need not consider the sufficiency of plaintiffs' proof on the issue of causation for purposes of opposing this summary judgment motion.

Motion by ROCKVILLE (Seq. 003).

Plaintiffs allege that the medical malpractice and negligence of defendant ROCKVILLE occurred from April 23, 2014 to May 14, 2014. The allegations against defendant ROCKVILLE include:

failing to use due, reasonable and proper skill in the care and treatment of the plaintiff; failing to administer adequate accident and fall preventions; failing to properly note that the plaintiff was at an increased risk for falls; failing to adequately supervise, monitor, and observe the plaintiff; allowing the plaintiff to fall multiple times throughout Plaintiff's admission, and be injured; failing to properly document and investigate plaintiff's fall, failing to timely diagnose plaintiff's injuries, including severe head trauma and injury and subacute subdural hematoma with midline shift on right side; failing to properly and timely treat plaintiffs injuries; failing to timely bring the plaintiff to an emergency room; failing to timely obtain consultations with appropriate specialists; failing to timely order the necessary diagnostic tests and studies; failing to appreciate the results of the diagnostic tests and studies performed; failing to timely notify the plaintiff's treating physician and family of injuries and significant changes in the plaintiffs medical condition; causing, permitting and allowing plaintiffs medical

⁵ The notes cited by plaintiffs' expert (that the symptoms developed over a four-week period) conflict with a notation made by the Emergency Department doctor on May 22, 2014 stating that Mr. WICKS's altered mental status was a new problem which started on the previous day, and with the note dated May 28, 2014 documenting JEFFREY's statement that in the previous week, his father was able to go up and down stairs without a problem.

condition to deteriorate and worsen; failing and neglecting to anticipate and foresee the dangers, risk and harm of not providing a proper care for the plaintiff; failing to hire efficient and skilled personnel; failing to properly train personnel failing to maintain a suitable index of suspicion; failing to institute proper and adequate policies and procedures including accident and fall prevention; and failing to adhere to the policies and procedures instituted for accident and fall prevention. Verified Bill of Particulars to ROCKVILLE, ¶3 (*NYSCEF Doc. 73*).

In addition, plaintiffs assert that the above acts or omissions constitute a deprivation of Mr. WICKS's rights pursuant to the New York State Public Health Law.

ROCKVILLE now moves to dismiss the Complaint against it, on the basis that: (1) ROCKVILLE developed and effectively implemented a comprehensive care plan to prevent injury to Mr. WICKS; (2) there is no record of an acute head injury that occurred during Mr. WICKS's residence at ROCKVILLE; (3) Mr. WICKS's subdural hematoma was not the result of an acute head injury but rather, was found to be a chronic subdural hematoma which may develop without trauma to the head.

In support of their motion, ROCKVILLE submits, among other things, the expert opinion of Barbara Tommasulo, MD (*NYSCEF Doc. 68*). Dr. Tommasulo opines generally that the care and treatment rendered by ROCKVILLE was within the standard of care for skilled nursing and rehabilitation facilities in 2014. Further, Dr. Tommasulo opines that ROCKVILLE complied with the standards set forth in all Federal Regulations, OBRA Regulations, and New York's Public Health Law and Regulations governing residential health care facilities. Finally, Dr. Tommasulo opines that there were no departures from accepted practice by ROCKVILLE that caused or contributed to the injuries alleged by plaintiffs.

Dr. Tommasulo's opinion is largely consistent with that of Dr. Diamond (in support of Dr. CHEN's motion). Generally, Dr. Tommasulo notes that there is no record of any accident, fall or event of acute trauma sustained by Mr. WICKS during his three-week residency at ROCKVILLE, and that none of the signs or symptoms of recent head trauma or subacute subdural hematoma were appreciated while Mr. WICKS was at ROCKVILLE.

Upon Mr. WICKS's admission to ROCKVILLE, Dr. Tommasulo reports, a comprehensive, individualized Care Plan was put into place. Dr. Tommasulo notes that Mr. WICKS was correctly identified as being at high risk for falls due to his poor cognition, poor safety awareness, limited mobility and transfer dependency. The Care Plan included many interventions designed to prevent potential falls or accidents, which Dr. Tommasulo details in her opinion.

As similarly observed by Dr. Diamond, there were no reported instances of a fall, accident or any kind of trauma to Mr. WICKS while a resident at ROCKVILLE. Moreover, according to Dr. Tommasulo, during Mr. WICKS's residency at ROCKVILLE, he did not exhibit any of the signs or symptoms of severe head trauma or subacute subdural hematoma, which she enumerates in her opinion. Dr. Tommasulo opines that the noted instances of Mr. WICKS's aggressive or combative behavior with the staff were not unusual for a patient suffering from dementia. Further, Dr. Tommasulo cites evidence that the behavior was not new; i.e., that Mr. WICKS's condition was debilitated since his hernia surgery at Mercy. The medical record from Mercy contained findings of diminished cognitive and functional status, which she specifies in the opinion, as well as recorded instances of combative or aggressive behavior.⁶

Based upon the medical records, particularly those generated during Mr. WICKS's second admission to Mercy on May 22, 2014, Dr. Tommasulo opines that the subdural hematoma sustained by Mr. WICKS did not result from an acute trauma to the head; that is, it was a chronic subdural hematoma of unknown etiology. Dr. Tommasulo cites the specific evidence in the record upon which her opinion is based.

In up to 50% of cases of chronic subdural hematomas, Dr. Tommasulo asserts, no cause is identified. Dr. Tommasulo explains the mechanism by which a chronic subdural hematoma may develop without severe trauma to the head. Older patients with brain atrophy (such as Mr. WICKS), or those on anti-coagulant medication (such as Mr. WICKS) may be particularly prone to bleeding spontaneously, or with relatively trivial or minimal trauma. The bleeding may develop over a period of days or weeks, and is slow. Once there is subdural bleeding, she explains, it tends to recur – as it did in this case, resulting in the acute-on-chronic subdural hematoma identified on Mr. WICKS's CT scan.

Based upon the foregoing, particularly the absence of evidence that Mr. WICKS sustained an acute head injury at ROCKVILLE, Dr. Tommasulo concludes, to a reasonable degree of medical certainty, that there were no departures from accepted practice that caused or contributed to an acute head injury (as alleged), a subacute subdural hematoma (as alleged), or the chronic subdural hematoma found on the CT scan of May 22, 2014.

⁶ Notably, the Patient Review Instrument, prepared by Mercy in connection with Mr. WICKS's discharge to ROCKVILLE on April 23, 2014, noted no prior aggressive or disruptive behaviors. (It also noted no history of falls.)

In opposition, plaintiffs submit the same expert opinion that they submitted in opposition to Dr. CHEN's motion. With respect to defendant ROCKVILLE, plaintiffs' expert asserts, in essence, that the absence of a record of the alleged fall at ROCKVILLE does not establish that the fall did not occur; rather it reflects a failure on the part of ROCKVILLE to document the fall, as it is required to do under the law and its own protocols.

Further, plaintiffs' expert highlights the deposition testimony of Jacqueline Lyn, R.N., the witness for defendant ROCKVILLE, wherein she stated that: (i) in 2014, there was only one nurse and one LPN assigned to all twenty-two beds on the fourth floor where Mr. WICKS resided; (ii) despite that the Mercy medical records were reviewed upon Mr. WICKS's admission, he was recorded to have no history of falls; (iii) there was no reason to notify anyone if a resident got up from a wheelchair unassisted and (iv) she did not know the signs and symptoms of a subdural hematoma.

Plaintiffs' expert opines that ROCKVILLE was negligent and departed from accepted standards of practice by failing to prevent Mr. WICKS's fall, notwithstanding his known susceptibility to falls, his known tendency to attempt ambulation without assistance, and his history of actual falls, including his recent fall at Mercy.

Plaintiff's expert disputes Dr. Tommasulo's opinion that the subdural hematoma developed spontaneously, over time, and not as a result of a fall. According to plaintiffs' expert, given the recent falls sustained by Mr. WICKS which went untreated, the development of the hematoma was "not surprising."

In any event, plaintiffs expert opines that (as discussed above in connection with Dr. CHEN's motion) ROCKVILLE departed from accepted practice by failing to appreciate the significance of Mr. WICKS's behavioral changes, particularly in the context of his recent fall history, and to timely assess, examine, and treat Mr. WICKS for a subdural hematoma. The expert highlights Dr. Onesti's note that there was a four-week history of progressive lethargy and left hemiparesis following a fall. Thus, he concludes that ROCKVILLE had ample time and opportunity to detect, test for, and treat the subdural hematoma, and that their failure to do so rendered their care and treatment of Mr. WICKS below the accepted standard of care.⁷

⁷ To the extent that this theory of departure was not specifically addressed in the bill of particulars, the Court notes that it is not materially new or different, but rather falls within the broader categories of departure that were pleaded. Moreover, a plaintiff may oppose a motion for summary judgment on the basis of an unpleaded theory of liability that is supported by the record. See *Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276 (1978); *Swift Funding, LLC v Isacc*, 144 AD3d 471 (1st Dept. 2016); *Falkowski v Krasdale Foods, Inc.*, 50 AD3d 1091 (2d

With respect to the causes of action for negligence and malpractice, the Court finds that ROCKVILLE has met its *prima facie* burden to establish that it was not negligent and that it did not depart from accepted standards of care. The medical record supports ROCKVILLE's assertion that Mr. WICKS did not sustain a fall at ROCKVILLE. Further, the opinion of Dr. Tommasulo is sufficiently detailed and supported by the record to establish a basis for her opinion that appropriate fall prevention measures were in place and implemented. Finally, the Court finds that Dr. Tommasulo has adequately addressed the specific allegations of malpractice set forth in the complaint and bill of particulars.

The Court finds further, however, that viewed in the light most favorable to plaintiffs, the evidence is sufficient to raise issues of fact. As discussed above, the testimonial evidence that Mr. WICKS sustained a fall while at ROCKVILLE is not conclusively refuted by the absence of evidence in the medical record. Rather, the totality of the evidence raises issues of fact and credibility that are not appropriately determined on a motion for summary judgment (*see Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 [1997]; *see also Chimbo v Bolivar*, 142 AD3d 944 [2d Dept. 2016]).

Moreover, the opinion of plaintiffs' expert is sufficient to raise issues of fact on departure, insofar as it sets forth an adequate rationale for the expert's conclusions, relies on specifically cited evidence in the record, and addresses specific assertions made by ROCKVILLE's expert (*see Wagner v Parker*, 172 AD3d 954, 955 [2d Dept 2019]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Feinberg v Feit*, 23 A.D.3d 517, 519 [2d Dept. 2005]).

With respect to causation, the Court finds that issues of fact preclude summary judgment. On the record presented, it cannot be determined as a matter of law whether the subdural hematoma sustained by Mr. WICKS was caused by a fall⁸, or by some other mechanism. The experts on both sides appear to agree that the cause may not be readily discernable. That is not to say, however, that plaintiffs will be unable to prevail at trial. Their burden is merely to persuade the jury that it is more likely than not that a fall caused

Dept. 2008); *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523, 524 (2d Dept 2005).

⁸ Like Dr. Diamond, Dr. Tommasulo suggests that even a trivial head injury could cause a subdural hematoma in a person of Mr. WICKS's age and medical history.

Mr. WICKS's injuries. Again, the determination will likely depend on the credibility of both the lay and expert witnesses, and as such, is not a determination that can properly be made on summary judgment (*see Feinberg, supra*). Moreover, it cannot be determined on the record presented whether an earlier diagnosis and treatment of Mr. WICKS's subdural hematoma would have resulted in a better outcome.

In view of the Court's determination that issues of fact preclude summary judgment on the plaintiffs' negligence and malpractice claims, the Court finds that plaintiffs' claims pursuant to the Public Health Law also defy summary judgment, insofar as they are premised upon the same disputed facts.

Motion by VNS (Seq. 004).

Plaintiffs claims against VNS arise out of the home care services, including skilled nursing and physical therapy, provided to Mr. WICKS by VNS from May 15, 2014 through May 22, 2014 following his discharge from ROCKVILLE. The alleged negligent acts and omissions on the part of VNS consisted of:

failing to treat and care for the plaintiff in a careful and skillful manner; failing to treat the plaintiff in accordance with good and accepted medical customs, practices, and standards; failing to perform a proper risk assessment of plaintiff's symptoms; failing to heed, detect, and diagnose the plaintiff's symptoms and complaints as they relate to the plaintiff's head trauma, pain, weakness, and lethargy; failing to institute an appropriate plan of care for Plaintiff; failing to adhere to the plan of care instituted for the plaintiff; failing to adequately monitor and care for the plaintiff's medical condition; failing to inform the plaintiff and family members of the true nature of his condition, including the symptoms of severe head trauma and injury and subacute subdural hematoma; failing to timely order the transfer of the plaintiff to an emergency room; failing to timely obtain consultations with appropriate specialists; failing to appreciate the significance of plaintiffs signs, symptoms and complaints; causing, permitting and allowing plaintiff's medical condition to deteriorate and worsen; causing and creating serious and irreversible complications associated with the plaintiffs injuries, including severe head trauma and injury and subacute subdural hematoma; failing to use their best judgment in the care and treatment of the plaintiff; failing to conduct physical examinations; failing to order tests, studies, and observations of the plaintiff; failing to accurately interpret, recognize, detect, and diagnose the signs and symptoms of severe head trauma and subacute subdural hematoma; failing to make necessary and required plans and preparations for the management and treatment of the plaintiff; failing to properly manage the treatment of the plaintiff; failing to acquire such nursing, medical, anatomical, physiological, and pathological knowledge required for the skillful treatment of the plaintiff; failing to anticipate and foresee the dangers, risks, and harms to the plaintiff in the treatments provided to the plaintiff; failing to keep accurate records of the course of plaintiffs illness and the treatment administered; failing to adequately and properly examine the plaintiff at each visit; and failing to have an effective care plan in place for the plaintiff. Verified Bill of Particulars to VNS, ¶2 (*NYSCEF Doc. 90*).

VNS now moves to dismiss the action against it, on the grounds that (1) the skilled nursing services provided by VNS complied with the applicable standard of care; that is, the skilled nurses appropriately

evaluated and treated Mr. WICKS; and (2) the physical therapy services provided by VNS complied with the applicable standards of care; that is, the physical therapist appropriately evaluated and administered physical therapy to Mr. WICKS.

With respect to the skilled nursing services, VNS submits the expert opinion of Mary R. Brennan, RN. Based upon her review of the medical records and the deposition transcripts, among other things, and her training and experience in the area of home nursing care, Nurse Brennan opines that the home nursing care rendered to Mr. WICKS during the one week period from May 15, 2014 through May 22, 2014 was at all times entirely reasonable, appropriate and consistent with accepted standards of care.

Nurse Brennan outlines the standard applicable to home care nurses. Generally, she states that home care nurses are required to follow the physician's orders regarding patient care, unless the orders are patently irrational or cannot be carried out under the existing circumstances. Their role is to assess the patient, including for any significant change in the patient's condition. If there is a significant deterioration in condition, particularly one that is unanticipated, some intervention by the home care nurse will be required. Otherwise, they are to follow the physician's orders, and are not required to contact the physician after each visit.

Nurse Brennan describes in detail the orders provided by Dr. CHEN and the VNS Plan of Care, including the conditions for which Mr. WICKS required observation and treatment. In this case, Nurse Brennan opines, the home care nurse provided care as ordered, and there were no indications or circumstances that warranted contacting the physician or intervening otherwise, prior to the visit on April 22, 2014.

The VNS nurse's initial assessment of Mr. WICKS was performed on May 15, 2014. Medical history was provided by son JEFFREY, and included a reported history of falls. The initial assessment revealed multiple impairments, including significant impairment in cognitive function. Based upon the medical history provided by JEFFREY, however, these impairments were not new. Son JEFFREY reported a significant decline in function and mental status following the April 2014 surgery. The impairments noted in the initial assessment pre-existed Mr. WICKS's discharge from ROCKVILLE, and did not reflect any change in Mr. WICKS's condition since his return home on the previous day. They were present and evaluated medically at discharge from ROCKVILLE, and no further work-up or intervention was required, other than what was

ordered.

Repeat in person nursing assessment was done on May 19, 2014 as ordered. There was no order requiring an interim nursing assessment, nor was there any indication to do so. The May 19, 2014 assessment revealed no indication or report of any deterioration in Mr. WICKS's condition relative to the prior visit. Mr. WICKS, from a nursing standpoint, appeared stable. Nurse Brennan opines that Mr. WICKS's lethargy on May 19, 2014 could reasonably be expected given his recent hospitalization and rehabilitation discharge, along with his history of Alzheimer dementia. There was no report from ROCKVILLE or documentation in the Plan of Care that Mr. WICKS sustained a recent fall or other accident, so there was nothing to suggest that the lethargy was attributable to a subdural hematoma.

The VNS nurse returned on May 22, 2014, consistent with the physician's orders. There was no indication for any interim nursing visits. On arrival, the nurse was informed by JEFFREY that he was about to take his father to the hospital because Mr. WICKS's mental status had changed significantly. JEFFREY reported that the onset of symptoms occurred on the previous night. Given the change of condition, it was appropriate to contact 911 so that Mr. WICKS could be taken to the emergency room for medical evaluation. No further nursing care or intervention was required.

Based upon the foregoing, Nurse Brennan concludes that the VNS nurses complied with the standard of care. They performed a thorough assessment when they opened the case and followed the frequency of visits set forth in the plan of care. They took appropriate actions based on the assessments made and circumstances known at the time of their visits. The precipitous decline in Mr. WICKS's condition, which apparently occurred subsequent to the nurse's May 19 assessment and the physical therapist's last visit on May 21, was first reported to and observed by the nurse on May 22, and 911 was called. No further or different nursing care was indicated or required under the presenting circumstances and orders.

With respect to physical therapy services, VNS submits the opinion of Jeffrey Rothman, a licensed physical therapist for over thirty years. Based upon his review of the records and his training and experience, Mr. Rothman opines that the physical therapy care rendered to Mr. WICKS by VNS was at all times reasonable, appropriate, and consistent with accepted standards of physical therapy practice, as well as in accord with physician's orders.

According to Mr. Rothman, home physical therapy is provided pursuant to a physician's order. The

therapist is required to document the physical therapy administered and to assess the patient's performance and progress. If the assessment indicates a significant deterioration from the prior visit, generally some intervention is required. Absent such a significant change, the therapist is generally permitted to continue therapy as ordered, and is not required to contact the physician after each visit.

In this case, the initial home physical therapy evaluation was performed on May 19, 2014 by physical therapist (PT) Thomas Hurley. Mr. WICKS's function was reported as significantly decreased relative to his pre-surgery level of functioning. PT Hurley's assessment revealed significant limitation in functioning, consistent with the reported history of deconditioning following surgery in a patient with dementia. PT Hurley noted that Mr. WICKS required prompting, but was cognitively intact 75-90% of the time. There was no indication or report of a change in Mr. WICKS's functional abilities since he returned home from ROCKVILLE five days earlier. PT Hurley determined that Mr. WICKS was able and willing to participate in a home exercise program and recommended physical therapy three times a week to improve his gait, transfers and balance, as well as to improve strength. According to Mr. Rothman, this was reasonable, appropriate, and consistent with the physical therapy care goals.

Mr. Rothman opines that Mr. WICKS's lethargy on May 19, 2014 could reasonably be expected given his recent hospitalization and rehabilitation discharge, along with his history of Alzheimer dementia. There was no report the Mr. WICKS sustained a fall or accident, so there was nothing to suggest that the lethargy was due to a subdural hematoma. PT Hurley understood that a nurse had seen Mr. WICKS a few days earlier.

On May 21, 2019, PT Hurley returned for the next scheduled visit and discovered that Mr. WICKS's abilities were significantly decreased relative to the prior visit, as described in Mr. Rothman's opinion. PT Hurley recommended that JEFFREY bring Mr. WICKS to the emergency room for a medical evaluation because of the significant change in Mr. WICKS's status. Mr. Rothman opines that it was reasonable and proper for PT Hurley to recommend that Mr. WICKS be taken to the emergency room, and it was reasonable for him to rely upon JEFFREY to do so. He was not obligated to call the ambulance himself at that point.

Mr. Rothman concludes that PT Hurley complied with the standard of care. He took appropriate actions based upon the assessments made and circumstances as they were known at the time of his visits, including relying upon the son to take his father to the hospital emergency room, particularly if there were any further deterioration in the father's condition. The further deterioration appeared to have occurred that

night, subsequent to PT Hurley's visit.

The opposition relies upon the same expert affirmation submitted in opposition to the CHEN and ROCKVILLE motions.⁹ Plaintiffs' unidentified expert, a Board Certified physician specializing in internal medicine and geriatric medicine, opines that VNS departed from the accepted standard of care by failing to appropriately and properly assess Mr. WICKS, failing to properly monitor him, and failing to appropriately respond to issues raised by his medical history and present condition.

First, plaintiffs' expert opines that VNS should have personally reviewed Mr. WICKS's medical history and records, rather than relying upon son JEFFREY's reporting. Second, the expert opines that the VNS providers should not have disregarded Mr. WICKS's lethargy and confusion, which they noted repeatedly, or attributed it solely to his post-surgical recovery and dementia without further inquiry. Such conditions, the expert opines, are known signs and symptoms of head or brain trauma. Even if they did not personally review the medical records, he notes, son JEFFREY reported a prior history of falls. The VNS providers should have taken that history into account in their assessment of Mr. WICKS's condition, and appreciated the significance of the signs and symptoms displayed by Mr. WICKS. Such factors should have prompted the VNS providers to alert a medical specialist to the possibility of a subdural hematoma. Their failure to do so, he opines, led to the formation and sustainment of the hematoma.

The Court finds that the competing expert opinions and the underlying record present issues of fact and credibility as to whether the VNS providers appropriately assessed Mr. WICKS's condition on each of their visits prior to Mr. WICKS's readmission to Mercy. In particular, an issue of fact is raised as to whether the lethargy and confusion noted by the VNS providers should have triggered further investigation or consultation with Mr. WICKS's physician, or whether it was appropriate for the VNS providers to assume that the conditions, having been noted prior to Mr. WICKS's discharge, were unremarkable and required no

⁹ VNS's counsel challenges the legal sufficiency of the opinion of plaintiffs' expert on the ground that, as an internist/geriatrician, there is no basis to conclude that he possesses sufficient knowledge, experience, or training in the area of home nursing practice to render his opinion reliable as to the applicable standard of care. Pursuant to the standard articulated by VNS's own experts, however, the role of the VNS providers was, among other things, to assess the patient's medical condition, to note any significant deterioration, and to intervene in the event of a significant change. The Court does not find that the background and training of plaintiff's expert was insufficient, so as to render his opinion inadmissible on the issue of whether Mr. WICKS's condition was properly assessed, whether the findings noted were significant, and whether the response thereto was appropriate. See, generally, *Matter of Enu v Sobol*, 171 AD2d 302 (3d Dept. 1991) ("[I]f a physician possesses the requisite knowledge and expertise to make a determination on the issue presented, he need not be a specialist in the field").

further intervention. The Court finds that each of the experts' opinions is adequately explained and grounded upon evidence in the record. In view of the conflict between the experts' opinions, the issue cannot be decided as a matter of law.

* * *

Based upon the foregoing, it is

ORDERED, that the motion by defendant CHEN for summary judgment (*Sequence 002*) is *denied* ; and it is further

ORDERED, that the motion by defendant ROCKVILLE for summary judgment (*Sequence 003*) is *denied*; and it is further

ORDERED, that the motion by defendant VNS for summary judgment (*Sequence 004*); is *denied*.

E N T E R

DATED: May 5, 2020

/S/

HON. JACK L. LIBERT
J. S. C.

ENTERED

May 07 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE