

Jahn v King St. Home, Inc.

2020 NY Slip Op 35022(U)

October 2, 2020

Supreme Court, Westchester County

Docket Number: Index No. 54558/2016

Judge: Lawrence H. Ecker

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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**

-----X
VICTORIA JAHN, Executrix of the Estate of
EDWARD P. JAHN, and VICTORIA JAHN,

INDEX NO. 54558/2016

Plaintiffs,

DECISION/ORDER

- against -

**Mot. Seqs. 1 & 2
Submit Date: 7/22/2020**

KING STREET HOME, INC., WALSH
BRUNETTI, LLC, JAMES BRUNETTI, M.D.
a/k/a JAMES A. BRUNETTI, M.D., and
MARCUS MAYUS, M.D.,

Defendants.

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ECKER, J.

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF relative to the motion of codefendants WALSH BRUNETTI, LLC, JAMES BRUNETTI, M.D., and MARCUS MAYUS, M.D. (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the amended complaint of plaintiffs VICTORIA JAHN, Executrix of the Estate of EDWARD P. JAHN, and VICTORIA JAHN as asserted against each of them, and that plaintiffs' wrongful death claim is time-barred by the statute of limitations; and the motion of defendant KING STREET HOME, INC. (Mot. Seq. 2), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the amended complaint with prejudice as against it.

Beginning in January 2010 until the date of his death in 2014, Edward P. Jahn (hereinafter the decedent) was under the continuous medical care administered by Brunetti and Mayus for various medical conditions including Hepatitis C, Type-2 Diabetes, cirrhosis of the liver, and lung cancer. Between December 11, 2013 through December 24, 2013, the decedent was admitted and remained in Greenwich Hospital for reported "coffee ground emesis," having a history of lower abdominal pain, and the decedent remained under the care of his treating physicians, Brunetti and Mayus. During his stay at Greenwich Hospital, a computed tomography (CT) scan revealed that the decedent had a right upper lobe lung lesion and a growing liver lesion with hepatoma, indicating that he had cancer. The decedent underwent a right thoracotomy (surgical opening of the

chest cavity) with wedge resection. His biopsy showed neuroendocrine carcinoma, likely of pulmonary origin (lung cancer).

On December 24, 2013, the decedent was discharged from Greenwich Hospital and transferred to King Street Home, Inc. ("King Street"), a long-term care rehabilitation facility in the Village of Rye Brook. On December 26, 2013, the decedent allegedly complained of and experienced increased pain, an altered mental status, confusion, dehydration, decreased appetite, and loss of balance. In light of these complaints, Brunetti and Mayus prescribed to the decedent various diuretics, anti-inflammatory and pain management medications, including Toradol, OxyContin, Tramadol, Lasix, Amiloride, and Fentanyl patches. However, the decedent continued to experience an increasingly poor appetite, dehydration, confusion, and pain. Consequently, the decedent suffered several falls as a result of his altered mental status, delirium, loss of balance, and strength. Plaintiffs avers that despite the decedent having suffered several physical falls, defendants failed to: reevaluate the decedent's prescriptions; increase the decedent's daily prescription dosage to increase the frequency of his bowel movements; monitor his fluid intake to prevent dehydration; and order laboratory blood work or perform any further assessment of the effectiveness of the prescribed medications on the decedent to better ascertain the cause of his deteriorating physical and mental health.

On January 19, 2014, the decedent was transported to Greenwich Hospital after coughing yellow sputum and appearing pale, overly confused, and lethargic. Defendants ordered and obtained the decedent's blood work the same day, demonstrating that he was in critical condition. The next day, the decedent's family was advised that he was dying as a result of worsened acute renal failure, advanced cirrhosis, a developed lung tumor, and septic shock which had advanced beyond the point of treatment. The decedent ultimately died on January 23, 2014.

In April 8, 2016, Victoria Jahn, the surviving spouse of the decedent, commenced this wrongful death action in her capacity as the executrix of the decedent's estate and in her individual capacity for a derivative claim for loss of consortium.¹ Plaintiffs allege that King Street, Walsh Brunetti LLC ("Walsh"), Brunetti, and Mayus breached their duty of care to the decedent during the course of his medical treatment due to the mismanagement of his medical care. Plaintiffs further allege that the negligent care and administration of medication to the decedent without adequate laboratory testing and supervision caused him further injuries, pain and suffering, thus resulting in his untimely death.

King Street interposed an Answer in June 2016 — later amended in 2020 — asserting nine affirmative defenses including that plaintiffs' action is time-barred. Likewise, Walsh, Brunetti, and Mayus each filed separate answers in June 2016 — amended in January

¹ Plaintiffs amended the complaint in December 2019.

2020 — claiming that this action is time-barred.² Following discovery, defendants now move for summary judgment to dismiss the complaint as against each of them.³

I. STATUTE OF LIMITATIONS ON PLAINTIFFS' CLAIMS

Walsh, Brunetti, and Mayus (herein referred to as the “physician defendants”) contend that plaintiffs’ action is time-barred by the statute of limitations since they alleged a single cause of action for wrongful death that is governed by a two-year statute of limitations period that began to accrue on January 23, 2014, at the time of the decedent’s death. As such, the physician defendants and King Street assert that plaintiffs’ belated commencement of this action on April 8, 2016 asserting a wrongful death claim arose over two years prior to January 23, 2014; and, thus is time-barred. Consequently, the physician defendants maintain that plaintiff Victoria Jahn’s derivative claim must also be dismissed since it is contingent upon the time-barred claim.

Plaintiffs, in opposition, maintain that the negligence action is not time-barred under CPLR 214-a. More specifically, plaintiffs contend that courts have recognized the applicability of the 2-year, 6-month statute of limitations period set forth in CPLR 214-a for negligence and medical malpractice actions, even where the alleged negligence resulted in an individual’s death. Plaintiffs point out that the complaint includes “approximately thirty-seven (37) examples” of medical malpractice in which the “[d]efendants deviated from the standard of care in their assessment, monitoring, treatment and diagnosis of [the decedent’s] medical condition.” Plaintiffs maintain that such allegations, existing separate and apart from their wrongful death claim, were brought before the court approximately 2 years and 2 months after defendants alleged negligent acts which caused the decedent’s death, and thus are timely under CPLR 214-a.⁴

CPLR 214-a states that “[a]n action alleging medical . . . malpractice must be commenced within two years and six months of the act, omission, or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure.” “Generally, a claim will be

² Walsh, Brunetti, and Mayus are all represented by the same counsel.

³ The note of issue was filed on January 1, 2020.

⁴ Plaintiffs alternatively argue that in the event this action is time-barred, they be granted leave to further amend the pleadings to assert separate allegations of negligence “to recover damages for conscious pain and suffering endured by the plaintiff, separate and distinct from a wrongful death cause of action, which would not be time-barred.” In so doing, plaintiffs cite to allegations in the amended complaint concerning decedent’s pain and suffering due to defendants’ alleged negligence, including the decedent suffering from dehydration, emotional distress, fear of death, stress, anxiety, a decreased diet, and, an increased risk of, numerous falls and injuries from his bed and chair. Such contention by plaintiffs is without merit.

deemed to sound in medical malpractice when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. Thus, when the complaint challenges the medical facility's performance of functions that are an integral part of the process of rendering medical treatment and diagnosis to a patient, such as taking a medical history and determining the need for restraints, it sounds in medical malpractice. By contrast, when the gravamen of the action concerns the alleged failure to exercise ordinary and reasonable care to insure that no unnecessary harm befell the patient, the claim sounds in ordinary negligence" (*D'Elia v Menorah Home & Hosp. For Aged & Infirm*, 51 AD3d 848, 850-851 [2d Dept 2008] [internal quotation marks and citations omitted]; see *Rey v Park View Nursing Home*, 262 AD2d 624, 626 [2d Dept. 1999]).

Here, the court finds that plaintiffs' amended complaint pleads allegations sounding in medical malpractice against the defendants which relate to the performance of various medical functions. Indeed, plaintiffs commenced this action on April 8, 2016 based, in part, on allegations that defendants' deviated from the accepted standard of medical care that resulted in injuries *separate and apart* from the decedent's sudden death — namely, worsening azotemia; tibial fracture; hyponatremia; decreased diet and oral intake; acute kidney injury; dehydration; antemortem pain and suffering; psychological, physiological, and neurological sequelae; emotional distress; fear of death; stress; anxiety; and pain and suffering. Under CPLR 214-a, the court finds that plaintiffs timely commenced the medical malpractice claims against the physician defendants by alleging that their departure from good and accepted standards of medical practice resulted in the aforementioned injuries to the decedent during the period of continuous care and treatment spanning from January 2010 through January 23, 2014. Similarly, plaintiffs timely commenced the medical malpractice claims against King Street based on their allegations that King Street likewise deviated from the standard of medical care due to the injuries the decedent suffered during his period of continuous care spanning from his presentment to King Street on December 24, 2013 through his death on January 23, 2014. Thus, plaintiffs' claim of medical malpractice against all defendants is timely pursuant to CPLR 214-a (see *Scanzano v Horowitz*, 49 AD3d 855, 856-857 [2d Dept 2008]; *Murphy v Jacoby*, 250 AD2d 826, 826-827 [2d Dept 1998], *lv dismissed* 92 NY2d 1046 [1999]). As such, the derivative claim asserted by the decedent's surviving spouse alleging loss of enjoyment/consortium, which is predicated on the primary claim of medical malpractice, is likewise timely (*Maddox v City of New York*, 108 AD2d 42, 49 [2d Dept 1985], *affd* 66 NY2d 270 [1985]).

To the extent that plaintiffs' amended complaint, in part, asserts that defendants' alleged malpractice caused the decedent's death, such allegations sounding in the wrongful death claim are time-barred by EPTL 5-4.1. Pursuant to EPTL 5-4.1, a cause of action to recover damages for wrongful death may be maintained against persons "who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued; and "[s]uch an action must be commenced within two years after the decedent's death." "The act of filing marks interposition of the claim for Statute of

Limitations purposes” (*Burwell v Yonkers Gen. Hosp.*, 6 AD3d 478, 480 [2d Dept 2004] [internal quotation marks and citation omitted]).

Here, the action was filed on April 8, 2016 based, in part, on plaintiffs’ allegation that defendants’ deviations from the accepted standard of medical care resulted in the wrongful death of the decedent on January 23, 2014. Accordingly, the cause of action sounding in wrongful death was time-barred by the two-year statute of limitations which ran from the death of the decedent on January 23, 2014 (see EPTL 5-4.1; *Stubbs v Pirzada*, 55 AD3d 597, 598 [2d Dept 2008]; *Garcia v Peterson*, 32 AD3d 992, 992 [2d Dept 2006]; *Burwell v Yonkers Gen. Hosp.*, 6 AD3d at 480).

II. DEFENDANTS’ MOTIONS FOR SUMMARY JUDGMENT

a. *Walsh, Brunetti, and Mayus’ Motion for Summary Judgment (Mot. Seq. 1)*

As for their combined motion for summary judgment, the physician defendants contend that the medical care rendered by them to the decedent did not deviate from the standard of medical care and was not the proximate cause of this death, and the alleged derivative claim asserted by his surviving spouse must fail. In support of their motion, Walsh, Brunetti, and Mayus submit, among other things, the pleadings, the bill of particulars, deposition transcripts of the parties, voluminous medical reports of the decedent, the expert affidavits of Stephen J. Urciuoli, M.D., a physician board-certified in internal medicine, and Colin T. Swales, M.D., a physician board-certified physician in internal medicine, gastroenterology, and transplant hepatologist.

Plaintiffs, in opposition, contend that the medical care rendered to the decedent by the physician defendants deviated from the standard of medical care and that such acts and/or omissions were the proximate cause of the decedent’s injuries, causing pain and suffering, and his untimely death. Plaintiffs stress that the record discloses triable issues of fact. To counter the physician defendants’ motion, plaintiffs submit, among other things, the expert affidavit of Stephen J. Ryzewicz, a board-certified internal medicine physician.

Preliminarily, the physician defendants argue in their reply papers that the expert affidavit of Ryzewicz, an out-of-state physician, ought to be rejected since it was not made under oath, duly notarized, and lacked a certificate of conformity as required by CPLR 2106 and 2309 (c). As to CPLR 2106, plaintiffs proffer an excuse insofar that Ryzewicz’s affidavit was submitted during the unprecedented COVID-19 pandemic. The physician defendants aver that the State of Massachusetts, where Ryzewicz practices medicine, had not established a protocol to obtain a notary by remote means. As to CPLR 2309 (c), plaintiffs cured the non-fatal form defect by submitting a certificate of conformity, annexed to the sworn expert affidavit, stating therein that Ryzewicz’s affidavit was notarized by a notary public in Massachusetts, and that such notarization conformed with the laws of the state of Massachusetts (NYSCEF Doc. 115). Under these circumstances, the court exercises its discretion to accept Ryzewicz’s sworn expert affidavit and certificate of

conformity *nunc pro tunc* in light of the COVID-19 health emergency and resultant shutdowns (see generally CPLR 2001, 2309 [c]; *Falah v Stop & Shop Cos., Inc.*, 41 AD3d 638, 638-639 [2d Dept 2007]; *Sparaco v Sparaco*, 309 AD2d 1029, 1031 [2d Dept. 2003], *lv denied* 2 NY3d 702 [2004]).

Turning to plaintiffs' substantive claims, "[i]n 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]; see *Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 1098 [2d Dept 2010]). "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]; *Brady v Westchester County Healthcare Corp.*, 78 AD3d at 1098).

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]).

Here, the physician defendants' experts collectively opined to a reasonable degree of medical certainty that the decedent was appropriately evaluated and treated by Brunetti and Mayus while at King Street's facility; that the decedent was prescribed the proper medications given his condition; and that any such medications were appropriately monitored without the necessity of performing additional laboratory blood tests. Urciuoli surmised that upon reviewing the decedent's medical records, including his creatinine and liver function tests, such did not support a finding that the decedent was dehydrated. Swales stated that the cause of the decedent's death was attributable to "septic shock, likely caused by the fungal bloodstream infection (*Candida glabrata*) identified on the final blood culture dated January 28, 2014, which ultimately is the consequence of a natural progression of liver disease and had nothing to do with the management of his medication or the timeliness of any blood testing." Urciuoli refutes Ryzewicz's finding of the presence of dehydration in the decedent. Swales explained that the decedent's death was

attributable to his poor prognosis for his failing liver as well as having lung cancer, thus placing him at an increased risk of death. Based on the foregoing, Urciuoli and Swales both opined with a reasonable degree of medical certainty that the decedent received sufficient medical care and treatment from the physician defendants.

In contrast, plaintiffs' expert, Ryzewicz, opined that the physician defendants were negligent because they increased the number of medications which further contributed to the decedent's confusion, delirium, loss of balance, strength, and poor appetite; that the physician defendants failed to monitor or alter the patient plan based on the decedent's decreased appetite and increased level of dehydration; that they failed to recognize the decedent's worsening physical and mental status; and that they failed to regularly order laboratory blood work and delayed such testing until after the decedent had fallen on several occasions. Further, Ryzewicz stated that those symptoms and the decedent's deteriorating status contributed to several of his falls, including on January 9, 11, 13, and 17, 2014 and, thus caused his death. Also, Ryzewicz believed that the physician defendants failed to adjust the decedent's medical plan and/or refer him to a specialist after his ammonia levels were elevated and his confusion increased to a significant degree. Ryzewicz described that the decedent's hyponatremia was caused by low levels of fluids since he was not continually hydrated, poor oral intake, and an unmodified diuretic administration. According to Ryzewicz, this resulted in the decedent's acute kidney injury by the use of opioids and a rapid decline in his physical and mental health that went unattended by Brunetti and Mayus, thereby contributing to the decedent's injuries and subsequent death. Hence, Ryzewicz opined to a reasonable degree of medical certainty that Brunetti and Mayus' treatment led to the decedent's death and they deviated from the accepted standard of medical care.

Applying the relevant legal principles here, the parties present a classic battle of expert opinions in whether the physician defendants adequately monitored and administered the requisite care to the decedent. The parties' submissions present conflicting expert opinions as to whether Brunetti and Mayus 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 dispute is centered around the evaluations and assessments of the decedent by the physician defendants, 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, Walsh, Brunetti, and Mayus' motion for summary judgment dismissing the amended 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). In light of such finding, the derivative claims of Victoria Jahn likewise survive.

b. King Street's Motion for Summary Judgment (Mot. Seq. 2)

With respect its motion for summary judgment, King Street submits, among other things, the expert affidavit of Mark Lachs, a board-certified physician of internal medicine with sub-certification in geriatric medicine. King Street contends that Brunetti and Mayus are private attending physicians who, at all relevant times, were employed by and administering medical care through Walsh. King Street asserts that Brunetti and Mayus had privileges to admit their patients, including the decedent, to King Street's facility for post-operative rehabilitation services. King Street maintains that after being admitted to King Street's facility, Brunetti and Mayus, as the physicians, exercised exclusive supervision and control of the decedent's medical care. King Street thus argues that the nursing staff at its facility simply followed the directives of the private, attending physicians, and such did not deviate from the accepted standard of medical care to prompt an inquiry by King Street.

Plaintiffs counter King Street's motion by contending that it is liable for its wrongful acts and omissions, including King Street's alleged failure to regularly monitor and report changes of the decedent's medical status to his primary care physicians. Plaintiffs aver that Brunetti and Mayus expected to receive reports from King Street regarding any changes in the decedent's bowel movements, fluid intake and output, weight and mental status; however, Victoria Jahn was allegedly never informed of any changes. In opposition, plaintiffs submit, among other things, the expert affidavit of Kimberly A. Williams, MSN, NP-C, an advanced practice nurse.

Brunetti and Mayus, as the treating physicians, both testified that they evaluated the decedent, directed any requisite laboratory bloodwork, prescribed medications, and monitored his state of health. King Street points to Brunetti and Mayus' deposition testimony confirming that they placed the laboratory test orders or the fact that a nurse may place such orders under a physician's direction.

Lachs opined that the attending physicians' orders, including medication, laboratory bloodwork, and analysis thereof were the standard course of care, and appropriate for a patient presenting with the decedent's medical history. Lachs asserted that ordering further lab tests and bloodwork is in the "exclusive purview of the attending physicians," Brunetti and Mayus. Moreover, Lachs explained that the standard of care for a patient such as the decedent did not call for "daily" laboratory testing and bloodwork to be performed on him. According to Lachs, the standard of care requires that bloodwork be performed only in certain instances where there is a change in mental or physical status of the admitted patient. Lachs concluded that under the circumstances, the decedent's bloodwork was done timely and adequately administered. Lachs concurred with the treating physicians' assessment that the decedent was properly deemed "clinically stable" between January 13, 2014 and January 19, 2014; and thus, additional lab tests were not requested. Lachs noted that some abnormal test results were to be expected since decedent's end-stage liver disease (cirrhosis) was causing hepatorenal syndrome —

which is the development of renal or kidney failure. Lachs faulted the physician defendants for not providing directives to King Street's nursing staff relative to administering medication to the decedent, performing laboratory bloodwork and analysis, all of which Lachs believes were done in accordance with the standard course of care and are appropriate for a patient presenting with the decedent's medical history. Lachs concluded within a reasonable degree of medical certainty that no act or omission by King Street was a proximate cause of any injury allegedly suffered by the decedent.

In contrast, Williams opined that King Street was negligent insofar as it "failed to maintain a complete and accurate medical record surrounding the care of [the decedent] including but not limited to failure to obtain at minimum daily vital signs and to provide detailed information surrounding [his] falls"; "failure to fully assess and document [the decedent's] abdominal distention/ascites through girth measurements"; "failure to obtain daily weights, totaling a 34.4 pound unplanned increase in less than 30 days"; a "failure to monitor and document [the decedent's] fluid intake and output"; and "failure to appropriately respond to [the decedent's] deteriorating condition including taking more frequent vital signs and assessments." Williams stresses that the nursing staff at King Street did not adequately respond or report the decedent's deteriorating condition to the attending physicians who relied on King Street's assessment reports in rendering medical care. Williams surmised that the nursing staff at King Street failed to carry out lab orders on January 9, 2014 and January 11, 2014, administer Marinol to the decedent on January 12, 2014, and administer the Toradol order by Mayus on the decedent which was given January 17, 2014. Williams opined that King Street's failure to maintain records of the decedent for any changes in his bowel movements, fluid intake and output, weight and mental status, coupled with King Street's failure to inform the attending physicians of the decedent's observed changes regarding his medical condition, constituted a deviation of the appropriate standard of medical care which proximately caused the decedent's injuries and resultant death. Williams stated that King Street failed to appreciate the decedent's diagnosis of hepatic encephalopathy, associated cognitive impairment, and his progressive ascites. She explained that King Street did not adequately care for, treat, diagnose, monitor, or supervise the decedent. Williams opined that King Street was negligent in its assessment and evaluation as it pertained to the decedent's risk for dehydration, falls, and inadequate nutrition/hydration. In sum, Williams concluded with a reasonable degree of nursing certainty that King Street's treatment and care of the decedent did not meet the accepted standard of medical care.

Applying the relevant legal standard to King Street's motion, the conflicting expert affidavits of Lachs and Williams are replete with issues of fact, including whether the nursing staff at King Street failed to perform frequent assessments and lab/blood work on the decedent, properly document the decedent's deteriorating condition and report same to the attending physicians, and implement the physicians' orders in a timely manner (see *Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 AD3d 739, 740 [2d Dept 2017]; *Reustle v Petraco*, 155 AD3d 658, 660 [2d Dept 2017]). Accordingly, there are inherent issues of fact as to whether King Street was negligent in monitoring and/or

administering care to the decedent which ought to be resolved by a trier of fact. Therefore, King Street's motion for summary judgment dismissing the amended complaint insofar as asserted against it, is denied (*see Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d at 904; *Nisanov v Khulpateea*, 137 AD3d at 1094-1095).

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 those branches of defendants' motions for summary judgment dismissing plaintiffs' cause of action for wrongful death are granted since such claim is time-barred; and it is further

ORDERED that those branches of defendants' motions for summary judgment dismissing plaintiffs' causes of action sounding in negligence arising from the alleged medical malpractice are denied since such claims were timely filed; and it is further

ORDERED that the motion of codefendants WALSH BRUNETTI, LLC, JAMES BRUNETTI, M.D., and MARCUS MAYUS, M.D. (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the amended complaint of plaintiffs VICTORIA JAHN, Executrix of the Estate of EDWARD P. JAHN, as against each of them, is denied; and it is further

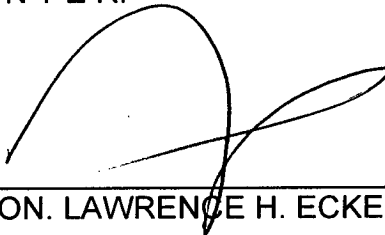
ORDERED that the motion of defendant KING STREET HOME, INC. (Mot. Seq. 2), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the amended complaint with prejudice as against it, is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court at a date, time, and manner to be hereafter directed by said Part.

The foregoing constitutes the decision and order of the court.

Dated: October 2, 2020
White Plains, New York

ENTER:



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

APPEARANCES:

Parties appearing via NYSCEF.

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