Barbara v All Metro Health Care Assoc., Inc
2020 NY Slip Op 35302(U)
February 21, 2020
Supreme Court, Nassau County
Docket Number: Index No. 603523/15
Judge: James P. McCormack
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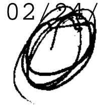


SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 18 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

_______________________________________x

PHILIP BARBARA, As Preliminary Executor of the Estate of FRANK BARBARA a/k/a FRANK J. BARBARA a/k/a FRANK JOSEPH BARBARA, Deceased,

Plaintiff(s),

-against-

ALL METRO HEALTH CARE ASSOCIATES, INC, d/b/a ALL METRO HEALTH CARE, ALL METRO HOME CARE SERVICES OF NEW YORK d/b/a ALL METRO HEALTH CARED, MANORVILLE COMMUNITY AMBULANCE, INC, PECONIC BAY MEDICAL CENTER NORTHWELL HEALTH, INC. f/k/a NORTH SHORE LIJ HEALTH SYSTEM, INC, and CARMELA LOVECCHIO, DO,

Defendant(s).

_______________________________________x

Index No.: 603523/15

Motion Seq. No.: 002, 003, 004 & 005
Motion Submitted: 2/3/20

The following papers read on this motion:

Notices of Motion/Supporting Exhibits..XXXX
Affirmation in Opposition..X
Reply Affirmations...XXX

This motion by the defendant Peconic Bay Medical Center and Northwell Health, Inc., f/k/a North Shore-LIJ Health Systems, Inc. ("the Hospital") (Sequence No. 2) for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and any and all cross-claims against them is determined as provided herein.

This motion by the defendants All Metro Health Care Services, Inc. d/b/a All Metro Health Care, All Metro Home Care Services of New York, Inc., d/b/a All Metro Health Care, All Metro Aids, Inc., d/b/a All Metro Health Care and All Metro Health Care Services, Inc., d/b/a All Metro Health Care ("All Metro Health Care") (Sequence No. 3) for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and any and all cross-claims against them or in the alternative, an order granting them partial summary judgment dismissing the claims sounding in negligent hiring and retention, punitive damages and wrongful death against them is determined as provided herein.

This motion by the defendant Carmela Lovecchio, D.O. (Sequence No. 4) for an order pursuant to CPLR 3212 granting her summary judgment dismissing the complaint against her is determined as provided herein.

This motion by the defendant Manorville Community Ambulance, Inc. (Sequence No. 5) for an order pursuant to CPLR 3217 (b) granting it a court ordered Order of Discontinuance and dismissal of the complaint against it is determined as provided herein.

The plaintiff in this action seeks to recover for, inter alia, the wrongful death of his father, Frank Barabara ("the decedent"). He alleges that the defendants' negligent care

and treatment of the decedent including the defendant Peconic Bay Medical Center's negligent discharge instructions which were provided to his future caretakers when he was discharged from its facility proximately caused his demise. More specifically, he alleges that all of the defendants failed to take adequate measures to address the decedent's dysphagia or difficulty swallowing. He alleges, inter alia, that Dr. Loveechio and the Hospital were negligent in discharging the decedent on a regular diet and that their discharge instructions failed to adequately warn of his dysphagia and to inform his future caretaker(s) of the treatment protocol that should be followed in light thereof. The plaintiff alleges that All Metro Health Care was negligent in permitting the decedent to be on a regular diet following his discharge from the Hospital when its employees cared for him at his home and that it was negligent in failing to act on some of the information that was provided to it by the Hospital at the time of the decedent's discharge. He alleges that that information included the decedent's history of both dysphagia and a restricted diet which had been followed in the Hospital. The plaintiff alleges that as a result of the defendants' negligence, the decedent choked to death at his home while eating a half of a hard boiled egg. At that time, he was under the care of Margie Herold, an employee of defendant All Metro Health Care. The plaintiff also alleges, inter alia, that home health aide Herold was negligent in her care of the decedent, in particular, giving him a half of a hard boiled egg to eat; in the manner in which she responded to him when he was choking; and, in relaying critical information to the police and/or EMS when they responded to the scene.

All of the defendants seek summary judgment dismissing the complaint and all

cross-claims against them. The facts pertinent to the determination of these motions are as follows:

The decedent began receiving services from All Metro Health Care in 2011 upon a referral from the Northport Veteran's Association. At that time, he was 78 and lived at the plaintiff's home. His primary diagnosis was multiple sclerosis, chronic obstructive pulmonary disease, hypertension, depression, osteoporosis, and Type II diabetes. He was non weight bearing and required a Hoyer lift to get out of bed. Up until the subject hospitalization, his diet had been consistently monitored and the only limitation was salt free. On May 15, 2014, the decedent was hospitalized via ambulance at the Hospital due to difficulty breathing and a three week history of a urinary tract infection. He reported not feeling well for a few weeks, that he had been suffering from congestion and that he was taking antibiotics. In addition to his diagnosis, his medical history included multiple bowel resections, hypercholesterolemia, gall stones, T9-T12 compression fractures, L2-L3 degeneration, right hip open reduction internal fixation and a hemicolectomy. His record notes that he also suffered from quadriparesis and paraplegia and that he was immobile and weak in both his upper and lower extremities. Neurology, nutrition and speech pathology consults were ordered in light of his presentation. Worthy of note, the decedent's medical records clearly indicate that prior to this hospitalization, his dietary needs were regularly assessed by his care givers and the only restriction ever imposed was salt free.

On May 16, 2014, the day after he was admitted, the decedent was examined by Speech Pathologist Jennifer Naples. After examining the decedent and evaluating his

ability to swallow, Naples concluded that his swallowing initiation was delayed, that there was decreased hypopharyngeal rise and that he had problems transferring food anteriorly. She told the plaintiff that she suspected that his father was suffering from dysphagia. Her directives instructed that the decedent was to be NPO -no food or liquids by mouth-; that aspiration precautions be put in place; and, that a modified barium study be conducted to rule out aspiration and to determine the best diet. That diagnosis was noted the next day, May 17th, by attending doctor Dr. Lovecchio when she saw the decedent. She examined the decedent that day and noted that they were awaiting the results of the modified barium study and that aspiration precautions were in place.

The following day, May 18, 2014, the decedent was examined by Speech Pathologist Jamie Rosso. She performed a bedside trial of purred foods and honey thick liquids. She noted that the decedent presented with suspected oropharyngeal dysphagia marked by reduced bolus formation, increased transit time and delayed initiation swallowing. She did not note any aspiration/penetration with pureed foods or honey thick liquids via presentation by teaspoon and there was no cough, throat clearance or change in vocal quality. Nevertheless, , she diagnosed the decedent with dysphagia and recommended that he be put on a dysphagia 1 diet, the most restrictive type which includes only pureed and mashed foods. Rosso instructed that the decedent's diet include only honey thick liquids via teaspoon with aspiration precautions. She noted that her findings were pending the outcome of the barium test. She shared her findings with Dr. Lovecchio. Dr. Lovecchio saw the decedent later that day and noted Russo's findings and orders. She noted that the decedent's diet had been advanced by speech. That is,

Rosso changed his diet to permit pureed and mashed foods.

The following day, May 19th, 2014, a "video swallows done ... show[ed] trace of penetration with thin liquids on 1 swallow." The decedent was seen by another speech pathologist who after testing thin liquids and observing full clearance, advanced his diet to include thin liquids but aspiration precautions remained in place. Naples met with the decedent and the plaintiff later that day and told them that the barium study showed that the decedent presented with mild penetration, no aspiration, and mild pharyngeal residue. He was diagnosed with mild oropharyngeal dysphagia, without difficulty with mastication, i.e., chewing. Both the plaintiff and the decedent were educated regarding feeding guidelines and aspiration precautions. Those test results were also shared with Dr. Lovecchio. Naples recommended that the dysphagia I diet along with a thin liquid diet be continued along with the aspiration precautions. Dr. Lovecchio evaluated the decedent again on May 19th at 5:45 PM and diagnosed him with dysphagia secondary to multiple sclerosis and noted that his diet had been advanced per speech pathology.

The following day, May 20, 2014, Naples evaluated the decedent again and noted that he was tolerating his diet well and consuming 75-100% of his meals. She recommended that his current diet, i.e., the dysphagia I diet along with thin liquids, be continued along with the aspiration precautions. That directive was concurred in by Dietician Monika Benitez later that day. She also noted that the decedent was consuming 75-100% of his meals and that he required assistance during meal times. The decedent was discharged on May 21, 2014, by Dr. Lovecchio. She noted that Gentiva Home Health and the Veterans' Association would conduct their own physical therapy and

speech evaluations. Dr. Loveechia placed no restrictions on the decedent's diet in her "Discharge Instructions" despite his history at the Hospital; She checked off "regular diet." The diagnosis of dysphagia was not reflected in the Discharge Instructions, either, nor were the dietary restrictions that had been in place or the aspiration precautions. Hospital Nurse McCord also faxed a 14 page report to the Veterans' Affairs, Gentiva Home Health and All Metro Health Care which included a description of the decedent's stay there. Those documents noted that the decedent had been diagnosed with dysphagia secondary to multiple sclerosis and that his diet had been "advanced" pers speech therapy on May 19th. The two instances of the decedent's diet being advanced by speech in the Hospital's records are when pureed food was added and when thin liquids were added. There was no further reference to the decedent's diet. In her "Discharge Summary" which was included In the faxed documents, Dr. Loveechia noted that the "video swallow" done on May 19th showed a trace of penetration with thin liquids on 1 swallow and that the study was otherwise normal.

The plaintiff testified at his examination-before-trial that he discussed his father's diet with a speech pathologist at the Hospital and was told that his diet had been restricted because the muscles in his throat had weakened. The speech pathologist explained that they would try to strengthen his muscles and return him to eating solid food before he was discharged. He testified that he was cautioned that the decedent had to be watched closely while eating because problems could recur. In fact, the plaintiff acknowledged that his father was able to eat normal food before he was discharged from the Hospital but again, he emphasized that he was reminded that his father had to be closely watched while

eating. He testified that he was instructed that if his father exhibited any problems at all eating, he should take him off of solid food and put him on a liquid diet until he was properly examined. The plaintiff also recalled discussing the change in his father's diet with the person who was discharging him whom he was unable to further identify. He testified that that person confirmed that the decedent was being put back on a regular diet and cautioned that he needed to be watched closely and that normal food should be stopped if any problems were observed.

The decedent returned home on May 21st and his diet returned to regular. He ate solid foods that were cut up. On May 24th, Joanne Zaino, RN, of All Metro Health Care visited the decedent at his home and conducted an evaluation including a nutritional assessment and dietary intake evaluation which enabled her to prepare a Plan of Care and complete a coordination of services note. She noted that the decedent was swallowing slowly at times. She met with Home Health Aid Margie Herold and assessed her ability to care for the decedent. She found her to be satisfactory. She instructed Herold on assisting the decedent with his feedings. In fact, the plaintiff testified at his examination-before-trial that Nurse Zaino told Herold that the decedent's food had to be cut up, he had to be closely watched while he was eating and that if she observed any problems, solid food should be stopped and she should put the decedent on a liquid diet. Nurse Zaino testified at her examination-before-trial that there were no dietary restrictions on the papers that the Hospital provided All Metro Health Care and that she created the decedent's care plan accordingly and did not include any diet restrictions in her Plan of Care.

Similarly, Nurse Michael Parrinello of the Veterans' Affairs Home Care evaluated the decedent. He testified at his examination-before-trial that he discussed the decedent's hospitalization with the plaintiff and was told that he had suffered from a urinary tract infection and that there had been concerns about his oxygen saturation. He did not recall the plaintiff telling him about the decedent's diagnosis of dysphagia or dietary restrictions while he was at the hospital. When he prepared a Home Care Note, Parrinello did not mention dysphagia but rather indicated that the diagnosis from the Hospital was a urinary tract infection. No changes in the decedent's diet were made by Parrinello, however, he noted that the plaintiff was to notify the Veteran's Affairs if he observed any signs of dysphagia.

Both Nurse Zaino and the plaintiff's spouse Nurse Machin testified that the plaintiff consumed his meals the entire time he was home up until the date of the incident without any complications. Of note, his breakfast regularly included a half of a boiled egg. Nevertheless, at his examination-before-trial, the plaintiff testified that he shared his concerns regarding his father's swallowing issues with Nurse Zaino and Herold. He testified that he instructed Herold that his father was never to be left alone while eating and that his food should be cut into small pieces. He even placed written instructions to that effect on the refrigerator. He also testified that Zaino acknowledged that she was getting paper work from the hospital and said she was aware of his father's dietary issues.

On June 9, 2014 a nurse from Gentiva Home Health evaluated the decedent and noticed that he was experiencing swallowing issues. She documented that the documents faxed to it (as well as to All Metro Health Care and the Veterans' Association) reflected

that the decedent had been diagnosed with dysphagia secondary to multiple sclerosis while he was at the Hospital. She ordered a speech therapy evaluation per the Discharge Instructions and directed that the decedent be re-evaluated for dysphagia. The home assessment noted abnormal findings including dyspnea with exertion, no fluid restriction, bilateral rhonchi and a productive cough while at rest. She instructed that the decedent's diet be soft, with no other restrictions.

A video of the fateful incident on June 12, 2014 shows that Herold gave the decedent a half of a hard boiled egg with his breakfast. It was not cut up. It also shows that Herold left the room a few times while the decedent was eating his breakfast but she was seated right beside him when he began to choke and had been for a while. The decedent is seen sipping his coffee, bringing a napkin to his mouth, hunching his shoulder with a sporadic movement of his head and appearing to cough to clear his throat. The video shows the decedent pointing to his throat which is the universal sign for choking. Seven seconds later, Herold attempts to perform the Heimlich maneuver across the decedent's upper chest, with no success. Herold calls for help and one minute and two seconds after the decedent first motioned for help, the plaintiff and his marital partner Machin entered the room and attempt to assist the decedent. Machin is observed calling 911 two minutes and thirty-seven seconds after the decedent first gestured for help.

Machin, who had recently graduated nursing school when this occurred, testified at his examination-before-trial that he continuously assessed the decedent while waiting for EMS. He testified that the decedent had a pulse and was continuously breathing during that time period and that his color remained normal. He testified that he never had any

reason to believe that the decedent's airway was blocked. Machin testified that the decedent turned cyanotic when the police arrived but he returned to normal within 10-15 seconds.

The police arrived approximately 13 minutes after the decedent's attack began and EMS arrived two minutes later. The Police report indicates that Herold told Officer Kmiotek that she had been feeding the decedent, she left the room for short period of time and that when she returned, the decedent was feeding himself. Shortly theater, he showed signs of being unable to breath. Herold also told the police that she had been told by the plaintiff to cut the decedent's food into small pieces and not to leave him unattended while he was eating. Officer Kmiotek reported not finding anything blocking the decedent's airway when he checked it. He then began CPR and continued to administer it until the Manorville Community Ambulance personnel arrived. Herold did not mention anything about the decedent eating to EMS. An EMS responder reported that when he asked Herold what had happened, she told him that the decedent had been drinking coffee and then passed out. When EMS arrived, the decedent had no pulse or respiratory rate. His oxygen saturation level was 89%. The monitor indicated that the decedent was asystole, that he was given three doses of epinephrine and that his rhythm changed to pulseless electrical activity at 32. He was given atropine, his pulse elevated to 60 beats and his blood pressure returned to 108/76. The EMS crew was unable to provide the decedent an airway due to an obstruction but its report also indicates that the airway was cleared. An EMS responder reported that he was unable to intubate the decedent because he encountered "dried up phlegm looking yellow substance" on every attempt. The notes

indicate that the obstruction was food, egg in the airway, and that they were not successful removing it from the decedent's airway. The decedent was revived but he went into cardiac arrest and died at the Hospital. When the decedent was intubated at the Hospital, a half of a hard boiled egg was found to be lodged in his throat. The autopsy report states that the cause of death was cardiac arrest subsequent to choking, specifically, aspiration of food bolus due to esophageal dysmotility related to multiple sclerosis. The manner of death was described as accidental aspiration of food bolus with contributing factors of hypertension and atherosclerotic cardiovascular disease.

The Department of Health investigated and sustained an allegation of misconduct against All Metro Health Care, concluding that "[t]he aide left the patient alone several times while eating breakfast and drinking fluids. Patient's hands began to shake and his head fell to the side. Patient did not answer when name was called." The video however clearly reflects that the Herold was sitting right beside the decedent when the subject incident occurred. All other allegations advanced by the plaintiff were found to be unsubstantiated by the Department of Health.

Nurse Kamen of All Metro Health Care testified at her examination-before-trial that All Metro Health Care was only providing nursing supervision of the aides it was supplying: It was not performing clinical services; It was the responsibility of other agencies to obtain orders and note changes. She also testified that there was no indication given by the Hospital that the decedent should be on a dysphagia diet following his discharge. She also noted that the evaluation by the Veterans' Affairs Practicing Nurse Parrinello did not yield any changes in the decedent's diet, either, nor did Gentiva Home

Health's evaluation.

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the moving party has made a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form which establishes the existence of a material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). A defendant seeking summary judgment bears the burden of establishing its *prima facie* entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its defense, rather than merely by pointing out gaps in the plaintiff's case (*Alizio v Feldman*, 82 AD3d 804 [2d Dept 2011]; *Nationwide Prop. Cas. v Nestor,* 6 AD3d 409, 410 [2d Dept 2004]). Where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center*, supra at 852). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to them (*Giraldo v Twins Ambulette Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]). Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)' " *(Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury (quotations and citations omitted)" (*Gentile v Malihan*, __ AD3d __, 2020 WL 356162 at *1 [2d Dept 2020]). "In a medical malpractice action, a defendant moving for summary judgment has 'the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby (citations omitted)" (*Bacalan v St. Vincents Catholic Med. Centers of New York*,__ AD3d __, 2020 WL 465525 at *2 [2d Dept 2020]). "In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars (citations omitted)" (*Bacalan v St. Vincents Catholic Med. Centers of New York*, 2020 WL 465525 at *2; see also, *Bendel v Rajpal*, 101 AD3d 662, 663 [2d Dept 2012], quoting *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]). "The failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Oliver v New York City Health and Hosps. Corp.*, 178 AD3d 1057 [2d Dept 2019]).

"Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury" (*Semel v. Guzman*, 84 AD3d 1054, 1056 [2d Dept 2011], citing *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 [2d Dept 2005]; *Goldberg v Horowitz*, 73 AD3d 691 [2d Dept 2010]; see also, *Skelly–Hand v. Lizardi*, 111 AD3d 1187, 1189 [2d Dept 2013]). A plaintiff is not required to eliminate all other possible

causes (*Skelly–Hand v. Lizardi*, supra at 1189). " 'The plaintiff's evidence may be deemed legally sufficient even if [her] expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased [the] injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury' " (*Alicea v. Ligouri*, 54 AD3d 784, 786 [2d Dept 2008], quoting *Flaherty v Fromberg*, 46 AD3d 743, 745 [2d Dept 2007]; citing *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2d Dept 2003]; *Wong v Tang*, 2 AD3d 840, 840-841[2d Dept 2003]; *Jump v Facelle*, 275 AD2d 345, 346 [2d Dept 2000], lv denied 95 NY2d 931 [2002]).

"Once the health care provider has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the *prima facie* burden" (*Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1088 [2d Dept 2014], citing *Gillespie v New York Hosp. Queens,* 96 AD3d 901, 092 [2d Dept 2012]; *Stukas v. Streiter*, 83 AD3d 18, 24 [2d Dept 2011]). The plaintiff must meet that burden "through the submission of evidentiary facts or materials" (*Schmitt v Medford Kidney Ctr,* supra at 1088-1089, citing *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]; *Stukas v Streiter,* supra at 24; see also, *Gentile v Malihan*, 2020 WL 356162 at * 1). A plaintiff's expert's statement which "fail[s] to respond to relevant issues raised by the defendants' experts" does not suffice to establish the existence of a material issue of fact (*Ahmed v Pannone*, 116 AD3d 802 [2d Dept 2014]; see also, *Brinkley v. Nassau Health Care Corp.,* 120 AD3d 1287 [2d Dept 2014]). And, "[a]n expert's opinion which ... fails to set forth his or her rationale, methodology and

reasons therefor fails to establish an issue of fact (*Rivers v Birnbaum*, 102 AD3d 26, 44 [2d Dept 2012]; *Dunn v Khan*, 62 AD3d 828, 829-830 [2d Dept 2009]). " '[G]eneral allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment (citations omitted)' " (*Bendel v Rajpal*, supra, at p 189, quoting *Bezerman v Bailine*, 95 AD3d 1153, 1154 [2d Dept 2012]; *Savage v Quinn*, 91 AD3d 748, 749 [2d Dept 2012])."In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on 'specifically cited evidence in the record (quotations and citations omitted)" (*Schwartz v Partridge*, __ AD3d__, 2020 WL 355966 at * 1 [2d Dept 2020]).And, "[a]n expert opinion that is contradicted by the record cannot defeat summary judgment (quotations and citations omitted)" (*Schwartz v Partiridge*, 2020 WL 355966 at *1; *Lowe v Japal,* 170 AD3d 702, 703 [2d Dept 2019])." Finally, a plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars (quotations and citations omitted)" (*Bacalan v St. Vincents Catholic Med. Centers of New York*, 2020 WL 465525 at *3; see also, *Palka v. Village of Ossining*, 120 AD3d 641[2d Dept 2014]; see also, *Golubov v. Wolfson*, 22 AD3d 635[2nd Dept.2005]).

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions since such conflicting expert opinions will raise credibility issues which can only be resolved by a jury. However, [again,]

expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact (quotations and citations omitted)" (*Lowe v Japal*, 170 AD3d at 702).

The Hospital has submitted the affirmation of Board Certified Internist Elias G. Sakalis, M.D. in support of its motion for summary judgment. Having reviewed the pertinent medical and legal documents, he opines to a reasonable degree of medical certainty as follows:

Dr. Elias opines that the care and treatment rendered by the Hospital to the decedent conformed with good and accepted standards of care *up until the time of his discharge* and did not proximately cause his demise. In fact, at this juncture, that is not contested. He also opines that it was not the Hospital's responsibility to evaluate whether the decedent was fit for discharge; Rather, that was the attending physician Dr. Loveechio's decision. In any event, he opines that the decedent's discharge from the Hospital on May 21st was appropriate in light of his improved status. The propriety of the plaintiff's discharge *per se* is not contested either at this juncture; It is the discharge orders that are alleged to have been issued in error. Similarly, Dr. Elias opines that the Hospital was not responsible for monitoring the decedent's status or the care that he was provided at home. That, too, is not disputed. Dr. Elias also opines that the plaintiff's allegation that the Hospital failed to file a Form 485 is misplaced as that is a Home Health Care Certification and plan of care which is prepared by the home care agency. The plaintiff does not dispute that, either. He also opines that the Hospital forwarded all necessary documentation to the decedent's subsequent health care providers relying in

part on the faxed documentation sent by Nurse McCord. In fact, the contents thereof is alleged to be incomplete, i.e., The plaintiff alleges that the materials fail to reflect the decedent's ongoing diagnosis of dysphagia and his continuous dietary restrictions while in the Hospital. In fact, they do not (see infra).

Glaringly absent from the Hospital's motion is any allegation let alone evidence that the decedent's discharge on a "regular diet" was within acceptable medical standards. While it notes that its staff counseled the decedent as well as the plaintiff consistently throughout the decedent's stay at the Hospital regarding his dietary restrictions and swallowing function , it maintains that it cannot be held liable based on any error in the decedent's discharge instructions since they were within Dr. Lovecchio's exclusive purview.

"In general, a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee (quotations and citations omitted) " (*Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 1213 [2d Dept 2018], quoting *Toth v Bloshinsky*, 39 AD3d 848, 850 [2d Dept 2007]). "Therefore, when hospital employees, such as resident physicians and nurses, have participated in the treatment of a patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees have merely carried out the private attending physician's orders (citations omitted)" (*Dupree v Westchester County Health Care Corp.*, 164 AD3d at 1213). "These rules shielding a hospital from liability do not apply when: (1) 'the staff follows orders despite knowing "that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders'

" (*Dupree v Westchester County Health Care Corp.*, 164 AD3d at1213, quoting *Doria v Benisch,* 130 AD3d 777, 777-778 [2d Dept 2015], quoting *Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265 n. 3 [1968]); (2) the hospital's employees have committed independent acts of negligence; or (3) the words or conduct of the hospital give rise to the appearance and belief that the physician possesses the authority to act on behalf of the hospital (citations omitted)" (*Dupree v Westchester County Health Care Corp.*, 164 AD3d at1213). " 'Thus, in order to establish its entitlement to judgment as a matter of law defeating a claim of vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice "was an independent contractor and not a hospital employee" ' " (*Dupree v Westchester County Health Care Corp.*, 164 AD3d at1213, quoting *Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 683 [2d Dept 2014], quoting *Alvarado v Beth Israel Med. Ctr.*, 78 AD3d 873, 875 [2d Dept 2010]) *and that an 'exception to the general rule [does] not apply* (emphasis added)' " (*Dupree v Westchester County Health Care Corp.*, 164 AD3d at1213, quoting *Rizzo v Staten Is. Univ. Hosp.*, 29 AD3d 668, 668–669 [2d Dept 2006]). This doctrine has been applied where the plaintiff establishes that there is an issue of fact as to whether portion(s) of a private physician's discharge order was contraindicated by normal practice (*Fink v DeAngelis*, 117 AD3d 894, 896 [2d Dept 2014]).

The Hospital's position here disregards the cardinal rule of law that Hospital staff, while in generally not responsible for the acts or omissions of private doctors at their Hospitals, are nevertheless responsible when a physicians' acts or omissions are contrary to good and accepted standards and ought at a minimum to be called into question by

their employees. Contrary to the Hospital's position, the discharging doctor who is not an employee of the Hospital is not solely responsible for the contents of the discharge order (*Fink v DeAngelis*, 117 AD3d at 896). Here, there is at an issue of fact as to whether Dr. Lovecchio's discharge order -which is on Hospital stationery- should have at a minimum raised questions regarding its propriety insofar as it indicates that the decedent should be placed on a "Regular Diet" in light of his history during his stay and the change in his dietary instructions. "[O]bservations and information known to or readily perceivable by hospital staff that there is a risk of harm to a patient under the circumstances can be sufficient to trigger the duty to protect. This commonsense approach safeguards patients when there is reason to take action for their protection and does not burden the practice of medicine or intrude upon the traditional relationship between doctors and nurses" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 255 [2002], citing *Toth v Community Hosp. at Glen Cove*, 22 NY2d at 265).

Nor does the 14 page report summarizing the decedent's Hospital stay which was faxed to the decedent's future care givers including All Metro Health Care entitle the Hospital or Dr. Lovecchio to summary judgment. Those documents reflect only that a video study which was done on May 19th showed a trace of penetration with thin liquids on one swallow, that the decedent had been diagnosed with dysphagia and that his diet had been "advanced" per speech therapy on May 19th. Not only does that language not reflect the ongoing diagnosis of dysphagia as well as the continuous limitations to the decedent's diet, relying on that language disregards the blatantly inconsistent instructions in the discharge order which clearly indicated that the decedent was to follow

a regular diet. Furthermore, the discharge order was the last record created at the Hospital and could easily be viewed by All Metro Health Care as taking precedent over the decedent's past history at the Hospital. In view of the foregoing, the Hospital has not established its entitlement to summary judgment dismissing the complaint against it as there are issues of fact as to whether Dr. Lovecchio was negligent in discharging the decedent on a regular diet and concomitantly whether the Hospital is vicariously liable for her negligence.

Since the defendant Hospital failed to establish his prima facie entitlement to judgment as a matter of law, we need not consider the sufficiency of the plaintiffs' opposition papers (*Wei Lin v Sang Kim*, 168 AD3d 788, 789 [2d Dept 2019]). While the Hospital's Reply papers need be considered, the court notes that in Reply, the Hospital continues to maintain that it cannot be held vicariously liable for Dr. Lovecchia's alleged negligence in discharging the decedent on a regular diet and to the extent that it was responsible for apprising future caregivers of the decedent's history of dysphagia and diet restrictions, it did so via the faxed materials. The faxed materials however only note the diagnosis of dysphagia secondary to multiple sclerosis and that the decedent's "diet advanced as per speech," which fails to inform the recipients of those documents of any of the underlying details regarding the decedent's dietary instructions. In fact, a review of all the medical records clearly establishes that that notation was only a reflection that his pureed/mashed food diet had been expanded on May 19th to include thin liquids.

In any event, assuming, arguendo, that the Hospital had established the propriety of Dr. Loveechio's discharge order when viewed in conjunction with the faxed

documents, the plaintiff has established the existence of a material issue of fact. The plaintiff's experts have opined that home care agencies rely primarily if not exclusively on the discharge order in formulating their plan of care. Neither the hospital nor Dr. Lovecchio can be absolved here where inconsistent documentation was forwarded to the home health care providers, simply because if one of the two documents containing conflicting information was given priority, it may have prevented the decedent from being placed on a regular diet and choking.

The plaintiff alleges that All Metro Health Care was negligent in that it placed the decedent on a regular diet despite the information contained in the faxed documents, i.e., the discharge summary. He also alleges that it failed to properly aid and supervise the decedent; failed to cut his food into small piece; left him unattended while he was eating; improperly applied the Heimlich maneuver; failed to tell responders that he was choking; failed to provide an appropriate plan of care and to make changes when indicated; and, failed to adequately take precautions against his choking. He also seeks to recover of All Metro Health Care for negligent hiring, retention and supervision of their employees, specifically Herold.

All Metro Health Care seeks summary judgment on the grounds that it was entitled to rely on the discharge instructions in formulating the decedent's care plan and in caring for him; that Herold's care and treatment of the decedent was in accordance with the prevailing standards; and, that in any event, there were other possible causes of the decedent's demise. All Metro Health Care had submitted the affidavits of Speech Pathologist Kerri Elorriaga, RN Amy Neigeborn, and an affirmation of Dr. Joseph

LaMantia in support of its application.

Having reviewed the pertinent medical and legal records, Elorriaga opines as follows to a reasonable degree of medical certainty:

Elorriaga opines that there were no restrictions on the decedent's diet that forbade Herold from giving the decedent a half of a hard boiled egg with his breakfast. She notes that the decedent was discharged from the Hospital on a regular diet and that there were no contraindications to providing the decedent with a half of a hard boiled egg. She notes that the decedent regularly had a half of a hard boiled egg with his breakfast for nearly three weeks while at home following his discharge from the Hospital. She notes that no aspirations were found when the modified barium swallow study was conducted at the Hospital. She opines that the surveillance footage of the subject incident which she describes in detail confirms that Herold was present when the decedent first experienced difficulty, that he responded immediately, that she called for help within one minute and that 911 was contacted in less than three minutes. Thus, she opines that there were no acts or omissions by Herold that deviated from the applicable standards of care or caused the decedent's demise.

Elorriaga further opines that a thin liquid diet is contraindicated if a patient is having trouble swallowing as it is the most likely texture to be aspirated into the lungs. She also opines that if a speech therapist has concerns about a patient's ability to swallow, they would impose restrictions themselves and not rely on a family member to ascertain when restrictions are needed. She also explains that piecemeal solids are actually more difficult for a person with dysphagia to consume as the smaller particles are more

difficult to eat because it is more difficult to form it into a single cohesive bolus when chewing, especially chopped eggs whereas hard boiled eggs can easily be bitten and chewed to a safe bolus size and more easily swallowed. She opines that providing the decedent who had no history of problems chewing or swallowing solid foods a hard boiled egg was appropriate; that cutting up the egg into smaller pieces could have been more challenging for the decedent to chew and swallow; and, that cutting up the egg into small pieces would have made it more difficult to transport to the decedent's mouth thereby impairing his ability to eat independently.

Elorriaga also opines that it would have been inappropriate for Herold or even a Nurse evaluator from All Metro Health Care to change the decedent's diet plan and in so doing override the speech pathologist or medical doctor who had prescribed it. Furthermore, the standard of care calls for patients to be put on the least restrictive diet to ensure optimal nutrition and maximum quality of life. She notes that the decedent scored the highest possible on the Braden scale as it pertained to nutrition and eating meals. She notes that the video demonstrates that the decedent took intermittent bites and sipped coffee. He was aware of the need to take small bites, to chew slowly and to alternate consistencies as part of safe self-feeding practice to prevent choking. She opines that the likelihood of an unforeseeable choking incident was not increased because the decedent was given a half of a hard boiled egg as opposed to a chopped egg or a piece of toast. She also opines that the hard boiled egg was not a substantial factor in causing the choking and the ensuing consequences.

Having reviewed the pertinent medical and legal records, Nurse Neigeborn opines

to a reasonable degree of nursing certainty as follows:

Like Elorriaga, Neigeborn opines that there was no restriction on the decedent's diet that forbade Herold from giving him a half of a hard boiled egg for breakfast and that surveillance footage of the incident shows that Herold was present when the incident began and reacted in a timely and appropriate fashion. She also opines that there were no departures by any of All Metro Health Care's staff that caused or contributed to the decedent's demise. Neigeborn opines that there was no reason for Nurse Zaino or Herold to change the decedent's diet while he was under their care nor was there a reason for Zaino to request further diet evaluation or to report a change in his status. She notes that the decedent was discharged from the Hospital on a regular diet and that when Zaino assessed his eating abilities, all she observed was that he ate slowly, which is not an indication of an inability to eat or problems doing so; Therefore, there were no reasons to report a change in status. She opines that slow eating is in fact preferable for a patient in the decedent's condition as it ensures that a properly formed bolus is created before being swallowed. She additionally notes that Zaino was familiar with the decedent and was in a good position to recognize changes in his condition.

Nurse Neigeborn also notes that Nurse Practitioner Parrinello saw the decedent after Zaino evaluated him and as the primary provider, he saw no reason to change his diet, either. Similarly, the Nurse from Gentiva Home Health only noted the dysphagia that the decedent had experienced at the Hospital prompting her to seek a further evaluation by a speech language pathologist. She did not change the decedent's diet nor did she order a medical evaluation or a stat speech evaluation which reflects that there were no

problems with the decedent's diet. Like Elorriaga, Nurse Neigeborn opines that it would have been inappropriate for anyone from All Metro Health Care to override a speech pathologist or doctor's diet plan. She opines that a nurse or aide doesn't have the required education or experience to make that determination. Also like Elorriaga, she notes the importance of good nutrition in avoiding medical compromise in elderly patients and that the medical impact must be considered too when making changes to his or her diet. Neigeborn notes that Herold was certified and had been employed as a home health aide for years and that she had been working with the decedent for a while. She also notes that she was observed and supervised by Nurse Zaino who was a licensed nurse with years of experience demonstrating that there was an appropriate level of supervision here.

Nurse Neigeborn also addresses the regulations that All Metro Health Care is alleged to have violated. She notes that the services provided by All Metro Health Care were approved by VA Home Health and authorized by a doctor. A form 485 was on file for the time period in question and there was no reason to replace or update it. As for the alleged failure to prepare a care plan, she notes that they were regularly done and it was updated following the hospitalization. There was however no reason to update the decedent's diet as it remained the same as before he was hospitalized. Even after he was seen by the Nurse Practitioner from Gentiva Home Health, the decedent's diet remained unchanged. The only changes were the urinary tract infection and the potential for aspiration on liquids. She also rejects the plaintiff's claim that there was a failure to adequately supervise Herold. A supervisory visit was performed by Nurse Zaino only

three days after the decedent returned home and the nutritional services she was to provide the decedent were reviewed with her.

Neigeborn also opines that there is no evidence that Herold was intentionally misleading or untruthful when the responders came to the house. She notes the circumstances were very alarming for Herold and that she promptly notified her employer of what had happened. She also opines that the Department of Health found the plaintiff's allegations to unsubstantiated, which is for the most part accurate but one allegation was found to be founded, i.e., the aide was observed leaving the decedent alone at times. Neigeborn opines that there was no failure to exercise reasonable care by All Metro Health Care and its staff that caused or contributed to the decedent's alleged injuries and therefore the claims for common law negligence and wrongful death must be dismissed. She also opines that there was no intentional, reckless or wanton conduct by All Metro Health Care's staff in connection with its care of the decedent which caused or contributed to his injuries and opines that the claims for punitive damages must be dismissed.

Having reviewed the pertinent medical and legal documents, Dr. Lamantia opines to a reasonable professional degree of certainty as follows:

Dr. LaMantia also opines that All Metro Health Care's staff did not depart from the standards of care nor did any of their acts or omissions cause the decedent;'s demise. He notes that the decedent was discharged on a regular diet and that there were no restrictions on his diet which precluded Home Health Care Services from giving him a half of a hard boiled egg. He was assessed by Nurse Practitioner Parrinello at home who

made no changes to his diet. The decedent tolerated that diet and when evaluated by a Nurse from Gentiva Home Health was kept on a regular diet. Furthermore, Dr. LaMantia opines that the surveillance demonstrates that the decedent was properly monitored by Herold while he ate his breakfast. He opines that Herold responded immediately when the decedent exhibited distress, properly attempted the Heimlich maneuver, called for help in a timely fashion and that emergency services were notified in a timely fashion. Dr. LaMantia opines that home health aides are not required to be certified in basic life support which includes the Heimlich maneuver and CPR; They are paraprofessionals who assist with the activities of daily living including personal hygiene, meal preparation, cleansing, transfers and non-medical care. Dr. LaMantia also notes that the decedent was not mobile and was strapped to a chair and therefore, since she was alone, it was appropriate for Herold to attempt the Heimlich maneuver while he was sitting. And, while Herold's arms are not ideally placed, the chair was obstructing her. He also opines that Herold's failure to perform a finger sweep was not inappropriate as that can actually exacerbate an obstruction when no object has been seen. He notes that the fact that there was no expulsion when the Heimlich maneuver was performed does not, standing alone, render it inappropriate. He opines that even assuming that the decedent died as a result of choking, there is no evidence that that was a result of negligence on Herold's part.

As for Herold's alleged failure to tell the responders that the decedent was choking, Dr. LaMantia opines that assuming that to be the case, the care provided to the decedent would not have been any different. He explains that responders are trained not

to rely solely on the information offered by witnesses when treating a person in distress; Witnesses are generally not trained to know what to look for with respect to an acute event. Neither the responding officers nor EMS would rely solely on Herold's or any witnesses' observations in diagnosing and treating the decedent. And, Officer Kmiotek represented that Herold told him that the decedent had been eating and he did not find an obstruction in the decedent's airway. Furthermore, regardless of what Herold told EMS, they were obligated to investigate the decedent's airway and to secure it. Dr. LaMantia opines that since the last thing Herold observed the decedent do was drink coffee without an issue and then raise his hands slightly, it was reasonable for her to assume that he was experiencing a seizure like event. Thus, even if Herold failed to relay the possibility that the decedent might have been choking on a hard boiled egg to EMS , their treatment of the decedent would not have been any different had she done so and that failure was not a proximate cause of the decedent's death.

Dr. LaMantia opines that a patient deprived of oxygen for the amount of time between when the decedent went into distress and when EMS arrived, i.e., fifteen minutes, would not have an oxygen saturation level of 89%; Therefore, the decedent had to have been breathing up until at or near the time that EMS arrived. He accordingly opines that the decedent could not have had an obstructed airway during that entire period of time and therefore, the egg could not have been blocking his airway. He notes that Machin testified that the decedent was breathing and retained his color until even after EMS arrived and that Officer Kmiotek did not see any obstruction in the decedent's airway and he was the first responder to examine him.

Dr. LaMantia also opines that the egg actually could have dislodged from the decedent's stomach and entered his esophagus during the resuscitation efforts. He explains that food is often displaced during CPR as a result of air entering the stomach and causing emesis as well as due to the loss of protective airway refluxes. He also opines that if the decedent's choking was originally caused by liquid, i.e., the coffee he sipped just before signaling for help, any solid in the airway could have moved and caused an obstruction. More specifically, he opines that it is possible that if the decedent choked on liquid, the egg could have been regurgitated from his esophagus or stomach as a result of being unconscious with loss of his protective airway reflexes and/or the chest compressions done during CPR. In addition, he opines that a cardiac event could have caused choking, too, and the ensuing results. Thus, there are numerous possible causes of the decedent's death.

Dr. LaMantia also opines that the common law negligence claim and wrongful death claims must be dismissed because there is no evidence of any failures to exercise reasonable care in All Metro Health Care's care and treatment of the decedent by its staff that proximately caused his demise.

All Metro Health Care correctly maintains that since the plaintiff seeks to hold it liable based upon the theory of respondeat superior, the claim for wrongful hiring and retention fails. " 'Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior, and a plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention' " (*Trotman v New York City Tr. Auth.*, 168

AD3d 1116, 1117 [2d Dept 2019], quoting *Tangalin v MTA Long Is. Bus*, 92 AD3d 766, 767 [2d Dept 2012]).

Nor may punitive damages be assessed here. "Such damages may be imposed for wanton or reckless disregard for the safety or rights of others where the conduct is sufficiently blameworthy, and the award of punitive damages ... advance[s] a strong public policy of the State by deterring its future violation (quotations and citations omitted)" (*Valensi v Park Ave. Operating Co., LLC*, 169 AD3d 960, 961-62 [2d Dept 2019]). "The violation of rights must be so flagrant as to transcend mere carelessness (quotations and citations omitted)" (*Valensi v Park Ave. Operating Co., LLC*, 169 AD3d at 962). As opined to by both Nurse Neigeborn and Dr. LaMantia, there is no evidence that any of the defendants' actions "evinced a high degree of moral culpability which manifested a conscious disregard for the rights of others or conduct so reckless as to amount to such disregard (citations omitted)" (*Valensi v Park Ave. Operating Co., LLC*, 169 AD3d at 961; see also, *Anzolone v Long Is. Care Ctr., Inc.*, 26 AD3d 449, 451 [2d Dept 2006]).

Via the affidavits of its experts, All Metro Health Care has established that its care and treatment of the decedent complied with the applicable standards of care and that none of its actions or omissions were a proximate cause of the decedent's demised. The burden accordingly shifts to the plaintiff to establish the existence of material issues of fact with respect to both of those issues.

In opposition to All Metro Health Care, the plaintiff has submitted the affidavits of Registered Nurse Joann McIntyre and Dr. Peter M. Jenei.

Having reviewed the applicable medical and legal records, Nurse McIntyre opines to a reasonable degree of professional certainty as follows:

Nurse McIntyre opines that Hospital employee Nurse McCord and All Metro Health Care violated standards of care in their care of the decedent by failing to recognize the discrepancy between Dr. Loveechio's discharge order insofar as it placed the decedent on a regular diet in light of his diagnosis of dysphagia and a dysphagia I diet while he was in the Hospital and to at a minimum seek clarification with respect thereto. She opines that while the primary duty for filling out discharge instructions lies with the attending physician, Hospital staff has a duty to review those instructions, to compare them to the diagnosis and recommendations made in treating the patient and if a conflict exists, to discuss it with the attending physician. That was not done here. She further opines that the need for clear instructions free of conflicts and the need to ensure that all diagnoses and instructions are incorporated into the discharge order and not buried in other documents is exacerbated by home care agencies' failure to thoroughly review all the documentation provided them as is their responsibility and instead taking short cuts and relying exclusively on the discharge instructions, as was done here.

Nurse McIntryre opines that the documents faxed to the decedent's care givers by the Hospital including All Metro Health Care included "recommendations for a dysphagia one diet, thin liquids and aspiration precautions." Thus, she opines that both "the VA and All Metro were on notice that the decedent had been diagnosed with dysphagia and that a level I dysphagia diet had been recommended." When examined however, that record simply reflects that on May 19th- two days before the decedent was discharged- his

records state "dysphagia 2° to MS" and "diet advanced as per speech." Thus, at most, Nurse McIntyre is actually faulting All Metro Health Care for failing to act on the discrepancy between the discharge order and *that notation* in the decedent's chart, not a reflection that "the decedent had been diagnosed with dysphagia and that a level I dysphagia diet had been recommended."

Based on the foregoing, Nurse McIntrye opines that hard boiled eggs are not permitted on a dysphagia I diet and should not have been given to the decedent. She opines that Herold deviated from the standards of care in giving the decedent a half of a hard boiled egg with breakfast without pureeing it or cutting it up. Nurse McIntyre also opines that patients with dysphagia often sip fluids in an attempt to move an object lodged in their throat and opines that that was what the decedent was doing when he took a sip of coffee before signaling for assistance to Herold. She accordingly faults Herold for failing to recognizing that the decedent's sipping coffee was an early sign of choking as he attempted to dislodge something from his throat. She opines that had Herold recognized that the decedent's sipping coffee was a sign that he was choking, she could have responded sooner and had a better chance of dislodging the egg from his airway. While she faults Herold for not telling the EMT responders that the decedent was observed sipping coffee shortly before he signaled for help and opines that had she done so, earlier effective efforts to dislodge the food from his airway could have been undertaken, a report by an EMT responder is to the contrary. That is, she reported that the decedent had been sipping coffee before he passed out. McIntyre also faults Herold for leaving the decedent alone several times while he was eating, however, he was not

alone when this incident occurred.

Nurse McIntyre also opines that All Metro Health Care failed to update the decedent's care plan after he was discharged from the Hospital based on its failure to update his care plan to reflect his diagnosis of dysphagia and the diet changes made in the Hospital. She opines that that diagnosis should have been have been reflected in the decedent's plan of care post-Hospital and thereby shared with all personnel from All Metro Health Care who had contact with the decedent. She opines that the decedent's plan of care should also have been updated to reflect his diagnosis of dysphagia in the Hospital once the Gentiva nurse took note of it. She likewise faults All Metro Health Care for failing to add the diagnosis to its orders. She also faults All Metro Health Care for failing to advise the decedent's primary caretaker and for not updating the decedent's plan of care with respect to the Gentiva Home Health nurse's notation that he was slow to swallow. She opines that that should have prompted a change in the decedent's plan of care to include aspiration precautions as well. She also opines that these findings should have led to Herold being instructed about aspiration precautions. In addition, she opines that the conflict between the decedent's diet of Low Salt prior to his Hospitalization compared with his diet at discharge as regular should have prompted inquiry by All Metro Health Care, in particular, Nurse Zaino, as that also constituted a change in his diet.

As for proximate cause, Nurse McIntyre opines that had Nurse McCord made certain that All Metro Health Care received clear and complete instructions in the discharge sheet and/or had All Metro Health Care amended the decedent's plan of care to reflect the diagnosis of dyphagia and recommended dyphagia I diet, or even taken

aspiration precautions in light of the Gentiva Home Health Nurse's findings, the decedent would not have been fed a half of a hard boiled egg and his aspiration of that egg would not have occurred. She similarly opines that had Herold shared the families' concerns with her supervisors, there would have been changes to the decedent's plan of care and his choking on the egg would have been avoided. She similarly opines that had Herold cut up the egg or pureed it, taken the appropriate aspiration precautions and remained constantly with the decedent while he was eating, he would not have eaten a bite that was too big for him and aspirated on it. She attests that aspiration precautions include body position, food served in small units, alternating solids and liquids, drinking water or thin liquids with meals and avoiding distractions. Nurse McIntyre also notes that despite the fact that the decedent had no problem on the regular diet while at home until the subject date, the risk of aspiration was always present: She explains that not every bite can be expected to cause aspiration and the fact that a risk takes time to eventuate does not indicate that it was not present previously.

Having reviewed the pertinent medical and legal records, Dr. Jenei opines to a reasonable degree of professional certainty as follows:

Dr. Jenei opines that the Hospital and Dr. Loveechio's deviations from the standard of care center on the discharge instructions. He opines that it was Dr. Loveechio's duty to make sure the diagnosis of dysphagia and the dysphagia I/thin liquid diet and aspiration precautions be reflected on the discharge instruction sheet. He further opines that it was also her duty to make sure that the discharge papers did not contain conflicting diagnoses and instructions as was the case here. Like Nurse McIntryre, Dr.

Jenei opines that the Hospital had a duty to review the discharge instructions and to bring the conflict here up to Dr. Loveechio. He opines that it was incumbent on the staff to alert Dr. Loveechio about the discharge instructions in comparison to the decedent's consistent diagnosis with dysphagia and his dietary restrictions that had been imposed as a result thereof throughout his stay at the Hospital. As for the faxed materials, like Nurse McIntyre, while he acknowledges home health care agencies' obligation to review all documentation provided them, he opines that they often rely on the discharge instructions as their bible and even if they review all of the documentation that is provided them, they often defer to what is set forth in the discharge instructions in the event of a conflict. He accordingly opines that it is the responsibility of the Hospital to make sure home health care agencies are provided clear instructions and that all diagnoses and instructions are incorporated in the discharge instructions and not buried in ancillary documents. Thus, Dr. Jenei faults both Dr. Loveechio and the Hospital for failing to provide clear discharge instructions which reflect the diagnosis of dysphagia and the diet which was followed as result thereof.

Dr. Jenei agrees with Nurse McIntyre's opinions regarding All Metro Health Care's failure to reflect the dysphagia diagnoses and diet restrictions in the decedent's plan of care and regards the fact that decedent tolerated the diet for a while as irrelevant to the diagnoses and need to follow a regimented diet. He disagrees with Elorriaga's opinion that a half of a hard boiled egg was appropriate and opines that it should have been pureed. He also opines that even had the egg been cut into smaller pieces, aspiration would have been less likely. Dr. Jenei also opines that Herold should not have fed the

decedent a hard boiled egg even if she did not know about the dysphagia diagnosis since he had Multiple Sclerosis and paralysis; that the decedent should never have been left all alone while eating; that aspiration precautions should have ben taken; that Herold should have realized from the decedent's sipping coffee accompanied by his signal moments later that he was attempting to dislodge food from his airway and prompted an appropriate reaction; that Herold should not have performed the Heimlich maneuver on the decedent's chest; that Herold should have notified her supervisor immediately after unsuccessfully attempting the Heimlich maneuver; and, that she should not have misled the respondents by mentioning that the decedent was sipping coffee and omitting that he had been eating. As for the need for home health aids to know how to perform a Heimlich maneuver, Dr. Jenei opines that any aide assigned to this decedent should have been trained to do that in light of his status since there was a high probability that that maneuver would be necessary. And, he opines that Herold should have moved the decedent before attempting the maneuver if the chair obstructed her ability to perform it properly.

Dr. Jenei rejects Dr. LaMantia's theory that there could have been other causes of the decedent's death as there is no evidence anywhere that he suffered a cardiac event or that food was regurgitated from his stomach or esophagus. And, he opines that an 89% oxygen saturation after 15 minutes is entirely consistent with a substantial obstruction of an airway. He opines that a food bolus need not completely obstruct an airway in order to precipitate choking, impair respiration, and ultimately cause death. And, a partially lodged food bolus can become completely lodged due to a patient's movements or the

patient being moved. He notes that the decedent had a zero respiration rate from when the EMS arrived until he died and that there is no record of anything that could have caused that other than aspirating a food bolus which was consistent with the decedent's actions before losing consciousness. Thus, he opines that it is more likely than not that the cause of the decedent's death was choking brought on by aspirating a half of a hard boiled egg.

Dr. Jenei also opines that Herold should have called 911 sooner and should not have misled the EMS responders by telling them only that the decedent was drinking coffee and omitting the fact that he had been eating, too. He opines that when a person is choking, a few minutes in response time can make all the difference in the world and inaccurate information could have dissuaded the first responders from looking for food in the decedent's airway or from doing so as thoroughly as they otherwise might have. He opines that the first responders may have made choices based on the misinformation provided by Herold and he opines that the misinformation may have led the first responders astray from conducting an aggressive search for an obstruction in the decedent's airway.

The plaintiff has failed to establish the existence of material issues of fact with respect to some of All Metro Home Health Care's care of the decedent as well as whether its actions or omissions caused the decedent's demise, to wit;

The plaintiff has not established the existence of a material issue of fact with respect to the decedent's diet not being updated or the inclusion of a half of a hard boiled egg. Even had All Metro Health Care been negligent in failing to adequately review the

additional documents that were faxed to it by Nurse McCord, there was nothing in them that would have alerted All Metro Health Care to the need to question the propriety of Dr. Loveechio's discharge order. In fourteen pages, there was only a single limited referral to a dysphagia diagnoses and his diet being "advanced" by speech, neither of which creates a inconsistency which calls the propriety of the Hospital's discharge instructions into question. The language that the plaintiff alleges was contained in those papers, i.e., references to dysphagia and a dysphagia I diet are not there.

The plaintiff has not established an issue of fact with respect to his allegation that All Metro Health Care failed to update the decedent's care plan. It was only providing supervisory nurse services, not clinical. In any event, there was no reason for it to update the decedent's plan of care with respect to diet. The decedent was discharged on a regular diet and he did not exhibit any problems with it up until the subject incident. No one from the Veterans Affairs' organization or Gentiva Home Health ever recommended that the decedent's care plan be update or amended, either, and those entities had far greater responsibilities with respect to the decedent's care plan than All Metro Health Care.

Nor has the plaintiff established the existence of material issues of fact with respect to his claims of gross negligence or punitive damages.

Finally, while the plaintiff has not established an issue of fact with respect to medical malpractice by All Metro Health Care, it has however established the existence of issues of fact as to whether the care the decedent was provided when he experienced his choking was negligent and was a proximate cause of his demise.

Dr. Lovecchio relies on the experts' opinions offered by the Hospital and All Metro Health Care in support of their applications. She maintains that all of those experts, Dr. Elias in particular, established that her care and treatment of the decedent conformed to the applicable standards of care and was not a proximate cause of his demise. None of those experts have established that she did not deviate from the applicable standards of care in discharging the decedent on a regular diet in light of his history at the Hospital, nor did they establish that those discharge orders were not a proximate of the decedent's demise. Dr. Loveechio has therefore not established her entitlement to summary judgment dismissing the complaint against her.

Accordingly, it is hereby

ORDERED, the Hospital's motion for summary judgment (Motion Seq. 002) is DENIED; and it is further

ORDERED, that All Metro Home Health Care's summary judgment motion (Motion Seq. 003) is GRANTED to the extent that the claims grounded on an inappropriate diet being provided by it, failure to update the decedent's plan of care, etc., and the claims sounding in medical malpractice, gross negligence and punitive damages are dismissed. Thye motion is otherwise DENIED; and it si further

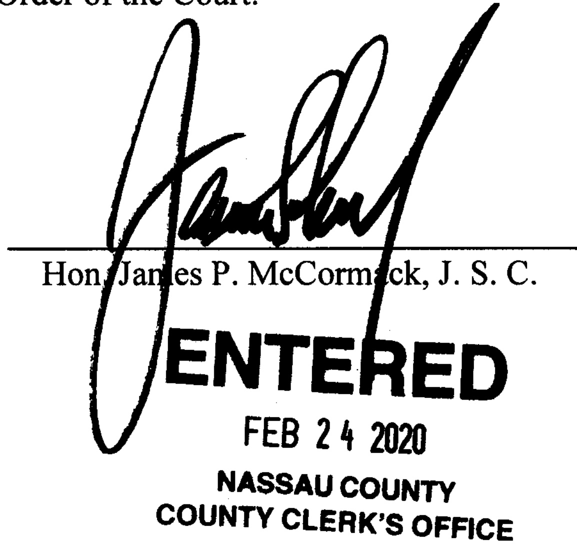
ORDERED, Dr. Loveechio's motion for summary judgment (Motion Seq. 004) is DENIED; and it si further

ORDERED, that Manorville Community Ambulance's motion to dismiss (Motion Seq. 004) is GRANTED without opposition. The complaint is dismissed against Manorville Community Ambulance.

The court has considered the other arguments raised by the parties and finds them without merit.

This constitutes the Decision and Order of the Court.

Dated: February 21, 2020
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.