

<b>Blaney v Liang Wen</b>
2021 NY Slip Op 31486(U)
April 28, 2021
Supreme Court, New York County
Docket Number: 805289/2017
Judge: Judith N. McMahon
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JUDITH REEVES MCMAHON PART IAS MOTION 30**

*Justice*

-----X

JOHN BLANEY,

Plaintiff,

- v -

LIANG WEN, EDWARD PHILLIPS, STEPHEN LANSEY,  
AMSTERDAM NURSING HOME CORP.,

Defendant.

-----X

**INDEX NO. 805289/2017**

**MOTION DATE 04/21/2021,  
04/21/2021,  
04/21/2021**

**MOTION SEQ. NO. 003 004 005**

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 161, 186, 187, 188

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 004) 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 162, 185

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 005) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 163, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant Liang Wen (“NP Wen”) moves this Court for an Order granting her summary judgment and dismissal of all claims asserted against her in this Action pursuant to CPLR §3212 (“Motion No. 003”). Defendants Edward C. Phillips, M.D. s/h/a Edward Phillips (“Dr. Phillips”) and Stephen Lansey, M.D. s/h/a Stephen Lansey (“Dr. Lansey”) move this Court for an order

- (1) granting them summary judgment and dismissing plaintiff’s complaint in its entirety with prejudice as against them pursuant to CPLR §3212(b) and severing the action against them;
- (2) in the alternative, dismissing Plaintiff’s second cause of action for violation of Public Health Law §2801 (seeking punitive damages) and third cause of action alleging violation of Public Health Law §2801-d and §2803-c (seeking punitive damages);

(3) dismissing plaintiff's fifth cause of action for loss of consortium;  
(4) in addition/in the alternative, pursuant to CPLR §§3212(e) and (g), granting partial summary judgment in favor of the moving defendants, severing and dismissing all claims for which the plaintiff is unable to raise an issue of act in opposition hereto, including dismissing and/or limiting the claims for pecuniary loss, loss of services and loss of inheritance and limiting the potential damages for trial. ("Motion No. 004").

Defendant Amsterdam Nursing Home, Corp. ("Amsterdam") also moves this Court for an Order pursuant to CPLR §3217(b) discontinuing the above matter as against it and granting it summary judgment as to Defendant NP Wen's cross-claims against it for contribution and/or indemnification. ("Motion No. 005").

It is hereby ordered that Motion No. 003 is denied while Motion No. 004 is granted. Motion No. 005 is hereby granted in part and denied in part, as detailed below.

### FACTS

Plaintiffs John Blaney, as Administrator of the Estate of Jane F. Blaney, deceased, and John Blaney, individually ("Plaintiff" and "Mr. Blaney") commenced this Action for medical malpractice and wrongful death in connection with the care and treatment administered to his wife, decedent Jane Blaney ("Mrs. Blaney"), who was a 74-year old resident of Amsterdam. According to Plaintiff's Complaint, Defendants Amsterdam, NP Wen, Dr. Phillips and Dr. Lansey (collectively "Defendants") failed to diagnose and treat Mrs. Blaney's small bowel obstruction at Amsterdam from September 15, 2015 to September 17, 2015. On September 17, 2015, Mrs. Blaney was taken to St. Luke's-Roosevelt Hospital, where she died as a result of the bowel obstruction.

Prior to her death, Mrs. Blaney suffered from dementia and was a resident at Amsterdam since 2014. NP Wen is a nurse practitioner who is employed by Optum, which has a contract to provide services at Amsterdam, and was assigned to Mrs. Blaney through an elective service

under Medicare. On September 15, 2015, NP Wen was notified by Amsterdam nursing staff that Mrs. Blaney had loose bowel movements. NP Wen examined Mrs. Blaney and documented complaints of abdominal pain and loose bowel movements. Mrs. Blaney's abdomen was soft and non-tender with increased bowel sounds. NP Wen ordered diagnostic tests, including a stat (rapid) abdominal x-ray, blood count and metabolic panel. NP Wen documented that Mrs. Blaney should be monitored closely and ordered she be on a clear liquid diet. The abdominal x-ray showed a high grade distention of multiple small bowel loops and a generalized paucity of gas within the colon and a moderate to large amount of retained fecal matter. The radiological impression was a high grade small bowel ileus and clinical correlation with continued follow-up assessment for resolution was advised.

NP Wen testified that she became aware of the abdominal x-ray results on September 16, 2015 at noon and re-examined Mrs. Blaney, who was relaxed, smiling and not displaying any symptoms. Based upon Mrs. Blaney's lack of symptoms, NP Wen thought the radiologist misinterpreted the abdominal x-ray report. NP Wen did not discuss the x-rays results with the interpreting radiologist and ordered Ciprofloxacin to treat a possible urinary tract infection. NP Wen testified that when she discussed the results of the x-ray with Dr. Phillips on September 16, 2015, Dr. Phillips agreed with her assessment to repeat the abdominal x-ray. NP Wen also testified that she told Dr. Phillips that Mrs. Blaney did not have pain or complaints and was at ease after her repeat examination.

On September 16, 2015, NP Wen left Amsterdam when her shift ended at 5:00 pm. The record shows that the results of the second abdominal x-ray were faxed to Amsterdam at approximately 10:30 PM on September 16<sup>th</sup>. NP Wen did not become aware of these results until her normal rounds at noon on September 17<sup>th</sup>. NP Wen testified that she expected the

Amsterdam nursing staff to obtain these results and notify her of them when she returned for her shift the following day. The record shows that Dr. Lansey was the Amsterdam on-call attending on September 16, 2015 from 6 PM to 7:00-8:00 AM on September 17, 2015. Both Dr. Phillips and Dr. Lancey maintain that NP Wen did not communicate with the Amsterdam staff or note in the chart that the results of the x-ray should be followed up immediately and sent to her or the covering physician.

Dr. Phillips represents that his involvement with Mrs. Blaney's care was limited to the conversation he had with NP Wen on September 16, 2015 and no evidence exists showing he was made aware of the x-ray results. Dr. Lansey represents that he was not made aware that an x-ray was pending and that he entered a telephone order in the chart for Geri-Tussin after an Amsterdam nurse informed him that Mrs. Blaney complained of a cough. After a nurse informed him of Mrs. Blaney's complaint of loose bowel movements, Dr. Lansey entered a telephone order for IV saline and NPO (nothing by mouth) to provide Mrs. Blaney a chance to rest her bowels at 11:30 PM. Dr. Lansey also discontinued NP Wen's prior order for a clear liquid diet for 24 hours. According to Dr. Lansey's testimony, he was not informed that an x-ray was pending or the results of such test by the Amsterdam nursing home staff. Dr. Lansey testified that he made the telephone order without any indication of a possible small bowel obstruction.

When NP Wen received the results of the second abdominal x-ray on September 17, 2015, the report showed high grade distention of multiple small bowel loops and the impression was a small bowel obstruction. NP Wen made a note that Mrs. Blaney was to be transferred to the emergency department due to a small bowel obstruction. Mrs. Blaney went to the hospital by ambulance at 3:10 PM and was subsequently transferred to Mount Sinai St. Luke's ("MSSL")

with a chief complaint of abdominal distention for two days. After an abdominal x-ray showed there were multiple dilated air-filled loops of small bowel with little air in the colon, the radiologist noted the possibility of an obstruction needed to be considered and recommended a CT scan. The procedure was cancelled when Mrs. Blaney vomited, aspirated, desaturated and developed acute hypoxic respiratory failure likely due to aspiration pneumonia during transport to the CT scan. After Mrs. Blaney was intubated and resuscitated, a second CT scan was cancelled due to her persistent desaturation. After coding and being resuscitated, Mrs. Blaney subsequently went into cardiac arrest and passed away at 3:30 AM on September 18, 2015.

Mr. Blaney alleges that Mrs. Blaney suffered pain and suffering due to Defendants' failure to diagnose and properly treat her bowel obstruction. The Court notes that Mr. Blaney has withdrawn his causes of action for wrongful death and loss of consortium. Mr. Blaney also entered into a stipulation with Amsterdam to withdraw his causes of action against it.

#### NP Wen's Motion for Summary Judgment

In support of her motion for summary judgment dismissal of the Complaint, NP Wen submits the expert affirmation of Nurse Practitioner Diane E. Meehan ("NP Meehan"). NP Meehan opines that NP Wen properly evaluated Mrs. Blaney, considered her symptoms, repeatedly ordered rapid diagnostic tests to be performed in Amsterdam's facility and collaborated with a physician on a plan of care. NP Meehan opines that Mrs. Blaney's clinical presentation on the evening of September 15<sup>th</sup> and at noon on September 16<sup>th</sup> did not require NP Wen to initiate a transfer for emergency medical treatment. NP Meehan notes that on September 16<sup>th</sup>, Mrs. Blaney had no acute or progressive GI physical examination findings and was at ease without vomiting or nausea.

According to NP Meehan, NP Wen acted with the standard of care for nurse practitioners and properly collaborated with Dr. Phillips regarding Mrs. Blaney's x-ray report. Regarding the second abdominal x-ray taken on September 16, 2015, NP Meehan states that the record shows the results were faxed to Amsterdam at approximately 10:30 PM on September 16<sup>th</sup> and indicated a small bowel obstruction. NP Meehan further states that while the record does not show who was notified of the results and when, NP Wen was not the one responsible for taking action. NP Meehan also opines that NP Wen was not responsible for failing to act upon the findings of this report which was in the possession of Amsterdam. According to NP Meehan, NP Wen was also not responsible for the failure of Mrs. Blaney's care team to alert her or a physician of the positive radiology report.

Dr. Phillips' and Dr. Lansey's Summary Judgment Motion

Dr. Phillips and Dr. Lansey submit the affidavit of Ian Storch, D.O. ("Dr. Storch") in support of their motion for summary judgment. According to Dr. Storch, both Dr. Phillips and Dr. Lansey acted within the standard of care at all times and did not proximately cause any of Mrs. Blaney's alleged injuries. Dr. Storch states that as a nurse practitioner, NP Wen was fully capable of and authorized to assess patients on her own and order procedures, tests and medications independently. Dr. Storch notes that Dr. Phillips' role was limited to a single discussion with NP Wen following her evaluation of Mrs. Blaney on September 16, 2015 and receipt of the initial abdominal x-ray report from September 15, 2015. Dr. Storch highlights that when NP Wen collaborated with Dr. Phillips, she told him that she believed the radiologist misinterpreted the x-ray based on Mrs. Blaney's improved clinical presentation. Dr. Storch also emphasizes that NP Wen did not seek to consult with Dr. Phillips until September 17, 2015 when she told him that Mrs. Blaney was being transferred to the hospital.

Dr. Storch opines that there was no indication for Dr. Phillips to perform any of the interventions that Plaintiff asserts he should have, including ordering an NGU tube or transferring Mrs. Blaney to the hospital on September 26, 2015, and he was not responsible for following-up on the results of the second abdominal x-ray. According to Dr. Storch, it was NP Wen who was responsible for following up on these results. Dr. Storch states that Dr. Lansey's role was limited to ordering cough syrup, IV Saline and NPO after he received a call from a nurse who told him about Mrs. Blaney's complaint of loose bowel movements. Dr. Storch notes that there is no indication that Dr. Lansey knew that an x-ray result was pending or that NP Wen told him to expect and follow up on the pending x-ray results prior to leaving at 5 PM on September 16, 2015. Dr. Storch opines that there was also no indication that Dr. Lansey should perform any of the interventions asserted by Plaintiff, including transferring Mrs. Blaney to the hospital.

#### Amsterdam's Motion

Amsterdam moves this Court for an order discontinuing the Complaint as against it and dismissing the cross-claims for contribution and indemnification by NP Wen. Amsterdam represents that on June 29, 2020, Plaintiff agreed to voluntarily discontinue the Action as against it. Amsterdam asserts that it was required to make this motion to discontinue the Action as against it after Dr. Phillips, Dr. Lansey and NP Wen refused to sign this stipulation of discontinuance. Amsterdam also asserts that NP Wen's cross-claims should be dismissed against it, as NP Wen cannot establish a prima facie case for indemnification or contribution. Furthermore, Amsterdam argues, NP Wen failed to state a cause of action for contribution or indemnification since she has failed to make factual allegations regarding what tortious conduct is attributable to Amsterdam. Amsterdam emphasizes that it did not employ NP Wen, Dr.

Phillips or Dr. Lansey and that no one at Amsterdam supervised or controlled NP Wen's work.<sup>1</sup> According to Amsterdam, NP Wen cannot claim contractual indemnification since there was no contract between NP Wen and Amsterdam.

### Plaintiff's Opposition

In opposition to Motions 003, 004 and 005, Plaintiff submits the redacted affidavit of a physician who is board certified in Internal Medicine and Geriatric Medicine (Plaintiff's Expert"). Plaintiff's Expert refutes NP Meehan's repeated attempts to diminish Wen's responsibility for Jane Blaney's care" in her role as a nurse practitioner.<sup>2</sup> Plaintiff's Expert states that NP Wen made no attempt to obtain the results of the first abdominal x-ray until her normally scheduled rounds at noon on September 16, 2015. According to Plaintiff's Expert, NP Wen also departed from the standard of care in failing to discuss Mrs. Blaney's condition and the need to follow-up with the on-call physician before leaving on September 15<sup>th</sup> at 5 PM at the end of her shift. According to Plaintiff's Expert, NP Wen further departed from the standard of care in giving Mrs. Blaney Tylenol, which would mask her pain, and resuming Senna, which is contraindicated in a patient with a suspected bowel obstruction.

Plaintiff's expert also states that Dr. Phillips departed from the standard of care in failing to examine Mrs. Blaney, consult with the interpreting radiologist or review the x-ray himself after consulting with NP Wen.<sup>3</sup> Regarding the second abdominal x-ray that NP Wen ordered on September 16<sup>th</sup>, Plaintiff's Expert opines that NP Wen departed from the standard of care in

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<sup>1</sup> Amsterdam submit the affidavit of William Pascocello, Senior Vice President and Administrator of Amsterdam, in support of its position that it did not employ NP Wen, Dr. Lansey or Dr. Phillips.

<sup>2</sup> Plaintiff's Expert states that the very document NP Meehan relies upon states that the New York State Education Law holds nurse practitioners independently responsible for the diagnosis and treatment of their patients and that nurse practitioners do not require physician supervision.

<sup>3</sup> Plaintiff's Expert disputes NP Meehan's position regarding Mrs. Blaney's improved clinical presentation on September 16<sup>th</sup> and notes that the record from MSSL show Mrs. Blaney had abdominal distention for two days prior to her admission on September 17, 2015. Plaintiff's Expert also states that both NP Wen and Dr. Phillips departed from the standard of care by failing to immediately transfer Mrs. Blaney to the hospital.

failing to contact Amsterdam that night to obtain the results. Plaintiff's Expert also states that NP Wen departed from the standard of care by failing to communicate with the on-call physicians regarding Mrs. Blaney's condition and pending x-ray results. According to Plaintiff's Expert, NP Wen and Dr. Phillips departed from the standard of care in failing to timely follow up with the results of the second abdominal x-ray results and communicating with Dr. Lansey about such results. Plaintiff's Expert opines that Dr. Lansey departed from the standard of care by either failing to transfer Mrs. Blaney to the hospital upon learning about results of the second abdominal x-ray or by administering an NPO order over the phone without personally examining her. According to Plaintiff's Expert states, the departures by NP Wen, Dr. Phillips and Dr. Lansey resulted in a delay in transferring Mrs. Blaney to the hospital and were the proximate cause of her death.

### DISCUSSION

Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing Judgment in favor of any party." CPLR §3212(b). A party seeking summary judgment must show that there are not material issues of fact that are in dispute and that it is entitled to judgment as a matter of law. *See Dallas-Stephenson v. Waisman*, 39 AD3d 303, 306 [1st Dept., 2007]. Once a movant makes such a showing, "the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial. *Id.*

Standard for Summary Judgment in Medical Malpractice Actions

“A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries.” *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]. (See *Costa v. Columbia Presbyt. Med. Ctr.*, 105 AD3d 525, 525 [1st Dept 2013]). “Once a defendant has established prima facie entitlement to summary judgment, the burden shifts to plaintiff to ‘rebut the prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged.’” *Ducasse v. New York City Health and Hosps. Corp.*, 148 AD3d 434, 435 [1st Dept 2017] (internal citations omitted). “The opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants.” *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002].

“To defeat summary judgment, the expert's opinion “must demonstrate ‘the requisite nexus between the malpractice allegedly committed’ and the harm suffered.” *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015] (internal citations omitted). “General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion.” *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 325 [1986]. (See *Otero v. Faierman*, 128 AD3d 499, 500 [1st Dept 2015]. See generally *Cruz v. New York City Health and Hosps. Corp.*, 188 AD3d 592, 593 [1st Dept 2020]; *Henry v. Duncan*, 169 AD3d 421 [1st Dept 2019]). “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.’” *Lowe v. Japal*, 170 AD3d 701, 703 [2d Dept 2019]. See *Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009].

Motion No. 003

Here, the Court finds that based upon the affidavit of NP Meehan, NP Wen sufficiently demonstrated a prima facie entitlement to judgment as a matter of law. NP Meehan gives a detailed opinion of how NP Wen acted within the standard of care for nurse practitioners, including her actions based upon Mrs. Blaney’s clinical presentation on September 16<sup>th</sup> and her decision to consult with Dr. Phillips regarding Mrs. Blaney’s care. NP Meehan also sufficiently opines that NP Wen properly ordered diagnostic tests and monitored Mrs. Blaney’s symptoms. Based upon NP Wen’s prima facie showing, the burden now shifts to Plaintiff to demonstrate an issue of material fact.

The Court finds that Plaintiff has met this burden, namely through the affidavit of his expert. Plaintiff’s Expert sufficiently rebuts NP Meehan’s affidavit and NP Meehan’s characterization of NP Wen’s limited responsibility as a nurse practitioner. Plaintiff’s Expert also explains how NP Wen departed from the standard of care, including by failing to communicate with Dr. Lansey about Mrs. Blaney’s condition and the need to follow up on her pending second abdominal x-ray results. Plaintiff’s Expert also shows that an issue of fact exists regarding NP Wen’s decision to prescribe Tylenol and Senna for a patient with dementia who was suspected of having a possible bowel obstruction. Therefore, the Court finds that summary judgment as to NP Wen is precluded and hereby denies her motion.

Motion No. 004

With respect to the motion made by Dr. Phillips and Dr. Lansey, the Court finds that they have met their prima facie burden and shown that they did not depart from the standard of care or proximately cause Mrs. Blaney's injuries. Dr. Storch sufficiently explains the limited role of both Dr. Phillips and Dr. Lansey and how there was no indication that either should have taken the steps asserted by Plaintiff, including inserting an NG tube or transferring Mrs. Blaney to a hospital. Dr. Storch further details how NP Wen told Dr. Phillips that she believed the radiologist misinterpreted the first abdominal x-ray based on Mrs. Blaney's improved condition and how NP Wen did not further contact him for consultation until Mrs. Blaney was being transferred to the hospital on September 17<sup>th</sup>. Dr. Storch also sufficiently explains how there is no evidence that Dr. Lansey knew about the pending second abdominal x-ray results or the need to follow up on such results. Therefore, the Court finds that Dr. Phillips and Dr. Lansey met their prima facie burden.

This Court further finds that Plaintiff has failed to sufficiently rebut the prima facie showing of Dr. Phillips and Dr. Lansey to defeat their motion for summary judgment. Plaintiff's Expert fails to sufficiently explain how the standard of care required Dr. Phillips to examine Mrs. Blaney himself or follow up with the radiologist after conferring with NP Wen regarding her plan to order a second abdominal x-ray, particularly since NP Wen represented that Mrs. Blaney's condition had improved. The Court also finds that Plaintiff's Expert's statements regarding Dr. Lansey are speculative, since there is no indication in the record that he knew about the results of the second abdominal x-ray when making his orders over the phone. Plaintiff's Expert also failed to sufficiently explain how Dr. Lansey was required to personally examine Mrs. Blaney before administering his NPO order when he was simply responding to

Mrs. Blaney's complaint of a loose bowel movement. Therefore, this Court finds that Plaintiff has failed to sufficiently show the existence of a triable issue of fact and Dr. Phillips and Dr. Lansey's motion to dismiss must be granted.

Motion No. 005

Based upon the stipulation signed by Plaintiff and Amsterdam, the Court hereby discontinues the Action as against Amsterdam.

However, the Court denies the portion of Amsterdam's Motion seeking to dismiss the cross-claims of NP Wen for contribution and indemnification. Amsterdam may renew their motion to dismiss such cross-claims before this Court after a final finding of fact is made in this Action.

Accordingly, it is hereby

**ORDERED** that Motion No. 003 is denied in its entirety; it is further

**ORDERED** that Motion No. 004 is granted in its entirety; it is further

**ORDERED** that the portion of Motion No. 005 seeking to discontinue the Action as against Amsterdam is hereby granted; it is further

**ORDERED** that the Action is hereby discontinued as against Amsterdam; it is further

**ORDERED** that the remainder of Motion No. 005 is hereby denied; and it is

**ORDERED** that Plaintiff's causes of action for wrongful death, loss of consortium and violation of the Public Health Law are marked as withdrawn; it is further

**ORDERED** that counsel for Plaintiff, NP Wen and Amsterdam must appear virtually

before this Court for a Microsoft Teams conference on **June 2, 2021 at 2:30 PM**; and it

is

**ORDERED** that any and all other requests for relief are hereby denied.

This is the decision and order of the Court.

4/28/2021

DATE

JUDITH REEVES MCMAHON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE