STATE OF NEW YORK
SUPREME COURT : COUNTY OF OSWEGO

DESIREE PARO, As Administrator of the Estate of PATRICIA LEFEVERE, Deceased,

Plaintiff,

v.

KPH HEALTHCARE SERVICES, INC., and MARK PALMER,

Defendants.

DECISION
Index No.: EFC-2019-1383
RJI No.: 37-19-0421

HON. GREGORY R. GILBERT, JSC

Appearances: James L. Alexander, Esq.
Alexander & Associates
Attorneys for Plaintiff
6713 Collamer Road
East Syracuse, New York 13057

Zachary M. Mattison, Esq.
Sugarman Law Firm, LLP
Attorneys for Defendants
211 West Jefferson Street, Suite 20
Syracuse, New York 13202

BACKGROUND

This matter involves the death of Patricia LeFevere ("LeFevere") alleged to be due to a medication error. The action was commenced on September 5, 2019. The defendants were KPH Healthcare Services, Inc. ("KPH") and "John Doe" an unknown (at that time) pharmacist.

The complaint was met with a pre-answer motion to dismiss directed to all claims for punitive damages. The complaint was amended and a third cause of action separately stated for punitive relief was removed although punitive damages were still sought as part of the first two causes of action. The motion to dismiss was denied without prejudice to a motion for summary judgment at an appropriate time by Order of Hon. Norman W. Seiter, Jr. filed November 19, 2019.

Issue was joined by answer filed November 20, 2019. A Scheduling Order was entered on December 4, 2019 and the parties proceeded with disclosure. A disclosure motion was denied by Judge Seiter by letter Decision & Order filed June 15, 2020.

The matter was thereafter transferred to this Court on a motion for leave to serve a second amended complaint to add pharmacist, Mark Palmer ("Palmer") in replacement of the "Doe" defendant. Defendant objected based on the inclusion of claims for punitive damages. Leave was granted by Decision & Order filed December 3, 2020. This Court observed that the sufficiency of the claims for punitive damages had already been tested on the initial motion to dismiss and that the

previous Order by Judge Seiter constituted law of the case finding the pleading to be sufficient. This Court also noted pursuant to that previous Order, that defendants retained the right to file dispositive motions as to the claims for punitive damages following disclosure.

The trial note of issue was filed on March 25, 2021. The claim for punitive relief from KPH was withdrawn by stipulation [DKT# 64].This motion for summary judgment to dismiss the claims for punitive damages against Palmer followed. Plaintiff has filed a cross motion for summary judgment to dismiss various affirmative defenses and for determinations on liability and causation.

DISCUSSION

Summary judgment may be granted only where there are no triable issues of fact and the moving party is entitled to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v. City of New York, 49 NY2d 557 (1980). There is an affirmative obligation for the moving party to present the proof upon which it is claimed that relief must be granted. Voss v. Netherlands Insurance Co., 22 NY3d 728 (2014); Yun Tung Chow v. Reckitt & Colman, Inc., 17 NY3d 29 (2011). The motion or cross motion needs to be supported by sufficient evidence in admissible form to show the material and undisputed facts based on which judgment as a matter of law must be granted. Winegrad v. New York University Medical Center, 64 NY2d 851 (1985); Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Company, 25 NY3d 498 (2015). In the absence of such a showing, the motion or cross motion must be denied regardless of the sufficiency of the responding papers. Vega v. Restani Construction Corp., 18 NY3d 499 (2012); Smalls v. AJI Industries, Inc., 10 NY3d 733 (2008).

On the motion or cross motion, the Court is charged to view the evidence and inferences arising therefrom in a light most favorable to the responding party. Haymon v. Pettit, 9 NY3d 324 (2007); Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Management., LP, 7 NY3d 96 (2006). The motion or cross motion may only be granted where no material triable issue of fact has been identified. Panepinto v. New York Life Insurance Co., 90 NY2d 717 (1997); Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223 (1978). The function of the Court is the determination of whether a triable issue of fact exists and not one determining material fact or credibility issues. Vega v. Restani Construction Corp., 18 NY3d 499; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957).

MOTION AS TO PUNITIVE DAMAGES

The motion before the Court is one seeking summary judgment as to all claims of punitive damages against Palmer, individually. The standard for applying punitive damages is a strict one as punitive damages apply only in exceptional cases where the conduct manifests spite, malice or fraudulent or evil motivation or shows a conscious and deliberate disregard for the interests of others, or otherwise a high degree of immorality or wanton dishonesty as to imply criminal indifference to civil obligations. Marinaccio v. Town of Clarence, 20 NY3d 506 (2013); Dupree v. Giugliano, 20 NY3d 921 (2012) reargument denied 20 NY3d 1045; Burkhart v. People, Inc., (4th

Dept 2019): Fordham-Coleman v. National Fuel Gas Distribution Corp., 42 AD3d 106 (4th Dept 2007).

The determination of whether a plaintiff is entitled to an award of punitive damages resides in the sound discretion of a jury at trial. Nardelli v. Stamberg, 44 NY2d 500 (1978); Fordham-Coleman v. National Fuel Gas Distribution Corp., 42 AD3d 106 (4th Dept 2007); Baity v. General Electric Co., 86 AD3d 948 (4th Dept 2011). In professional malpractice cases, the standard for the award of punitive damages is the manifestation of evil or malicious conduct beyond any breach of professional duty. Dupree v. Giugliano, 20 NY3d 921 (2012). Plaintiff bears the burden at trial to show that Palmer's conduct was so intentional, malicious, outrageous or otherwise aggravated beyond mere negligence to warrant extraordinary sanction. McDougald v. Garber, 73 NY2d 246 (1989); Graham v. Columbia-Presbyterian Medical Center, 185 AD2d 753 (1st Dept 1992); Peltier v. Wakhloo, 20 AD3d 870 (4th Dept 2005); Marsh v. Arnot Ogden Medical Center, 91 AD3d 1070 (3rd Dept 2012). Assuming that the burden on the motion for summary judgment is properly shifted to plaintiff, plaintiff must show a question of fact that Palmer's conduct rises to the level required for a finding of punitive relief.

Punitive damages have been found to be appropriate where the medical provider willfully withholds medical records and information from a plaintiff in order to avoid a medical malpractice claim [Abraham v. Kosinski, 251 AD2d 967 (4th Dept 1998); Gomez v. Cabatic, 159 AD3d 62 (2nd Dept 2018)]; performs a procedure without plaintiff's consent [McCarthy v. Shah, 162 AD3d 1727 (4th Dept 2018)]; or intentionally exposes a patient to the risk of contracting hepatitis B [Williams v. Halpern, 25 AD3d 467 (1st Dept 2006)]. Absent wanton dishonesty, gross indifference to patient care or malicious or reckless conduct, punitive relief is not proper. Brown v. LaFontaine-Rish Medical Associates, 33 AD3d 470 (1st Dept 2006); Charell v. Gonzalez, 251 AD2d 72 (1st Dept 1998) motion for leave to appeal denied 92 NY2d 816.

This Court has carefully considered the case, Cleveland v. Perry, 175 AD3d 1017 (4th Dept 2019). In Cleveland, a claim for punitive damages was made against a doctor who abandoned a patient he had declared to be dead for a period of two hours and forty minutes despite the urging of the family and the coroner that the patient was, in fact, still alive, breathing, making eye contact and moving around. Even under these facts, the trial court granted summary judgment dismissing claims for punitive damages and this was affirmed. The trial level and appellate courts both found that the conduct did not manifest evil or malicious conduct beyond the breach of a professional duty or constitute reckless indifference equivalent to wilful or intentional misconduct.

The Cleveland case can be contrasted with the case, Marsh v. Arnot Ogden Medical Center, 91 AD3d 1070 (3rd Dept 2012). This is a case where plaintiff was administered insulin despite warnings that she was not diabetic and did not use insulin. The insulin was given without confirmation of the plaintiff's identity or that insulin had even been ordered. The physician was then alleged to have abandoned the patient after being told of the insulin error by not examining plaintiff and ordering that all monitoring of plaintiff's glucose level was to be discontinued. The medication error was not charted until four months after plaintiff died. The motion for summary

judgment dismissing punitive relief was granted by the trial court but reversed and the punitive damages claim was reinstated on appeal.

The deposition transcript of Palmer has been closely reviewed. Palmer acknowledges that there was no prescription for methotrexate and that the prescription for metolazone "was misinterpreted". [DKT# 76 pg. 29] Palmer indicates that he furthered the error because the two medications were "a common strength" measured at 2.5 milligrams. [DKT# 76 pg. 31] He acknowledged that the prescription was for metolazone and that he reviewed the submission by the pharmacy technician for methotrexate and failed to catch the error on his pre-verification. [DKT# 76 pg. 34] Palmer admitted that methotrexate "is generally not prescribed daily". [DKT# 76 pg. 43] Palmer was not able to independently recall what computer information he reviewed or the DUR warnings came up in this matter. Palmer indicated that he was not familiar with LaFevere, they "were working with limited information" and that LaFevere's patient profile was created at the time of the erroneous prescription. [DKT# 76 pg. 38-39]

Defendant's Statement of Facts Pursuant to 22 NYCRR 202.8-g(a) [DKT# 90] states as follows:

> "1. On January 4, 2019, decedent Patricia Lefever's ("decedent") medical provider sent a prescription for the decedent to the Kinney Drugs in Pulaski for Metolazone 2.5 mg, which is a diuretic. See Exhibit I to Affirmation of Zachary M. Mattison, Esq. ("Mattison Affirmation") ("Palmer Tr."), pp. 10, 28-30; Exhibit J to Mattison Affirmation ("Schepard Tr."), p. 20.
>
> 2. The decedent was, however, accidentally given Methotrexate 2.5 mg, which is used to treat cancer and rheumatoid arthritis. See Palmer Tr., pp. 29, 32-34, 38; Schepard Tr., p. 19-20; Affidavit of Mark Palmer ("Palmer Aff."), ¶ 4.
>
> 12. Ms. Schepard testified that she made a mistake because she selected Methotrexate from that list, rather than Metolazone. See Schepard Tr., pp. 20-21, 25-26; see also Palmer Tr., pp. 28-34.
>
> 14. For this prescription, the pre-verification was performed by Mr. Palmer. See Palmer Tr., pp. 32, 34-36; Schepard Tr., pp. 27, 44; Miller Tr., pp. 32, 42; Exhibit N to Mattison Affirmation ("Exhibit N"), p. 9; Palmer Aff., ¶ 6.
>
> 15. When Mr. Palmer reviewed the image of the decedent's prescription, which was written for Metolazone, he did not notice that Ms. Schepard had entered the name of the medication into the system incorrectly. See Palmer Tr., p. 34; Palmer Aff., ¶ 6; see also Miller Tr., pp. 25-26; Exhibit N, p. 8.
>
> 16. Mr. Palmer did not make an intentional error when he did not notice that the name of the medication had been entered into the system incorrectly. See Palmer

Aff., ¶ 6.

17. Mr. Palmer simply made a mistake, and accidentally failed to recognize that Ms. Schepard had incorrectly entered the name Methotrexate, rather than Metolazone, into the EnterpriseRx system. See Palmer Aff., ¶ 6.

28. Mr. Palmer performed the DUR for this prescription. See Miller Tr., pp. 32, 42-43; Exhibit N, p. 9.

30. Four DURs were generated for this prescription. See Miller Tr., pp. 22-25, 34, 45; Exhibit N, p. 11.

31. The first DUR was for "high dose," and indicated that two doses of Methotrexate per day exceeded the recommended dose; the second was for "drug interaction," and referenced a potential interaction between Methotrexate and aspirin; and the third was for "geriatric precaution," and indicated that Methotrexate should be used cautiously in geriatric patients. See Exhibit N, p. 11.

32. In this instance, Mr. Palmer spent at least two minutes in the DUR screen. See Miller Tr., p. 35.

33. Mr. Palmer completed a conflict detail screen for each of the first three conflicts, and resolved all of them. See Miller Tr., pp. 36-41; Exhibit N, p. 11.

34. For each of the first three conflicts, Mr. Palmer input that he consulted another source (which might include a package insert or various drug information resources) and resolved the conflicts by dispensing the prescription as is. See Miller Tr., pp. 36-41; Exhibit N, p. 11.

35. The fourth conflict related to an insurance issue and did not require Mr. Palmer to complete a conflict detail screen. See Miller Tr., pp. 34, 38; Exhibit N, p. 11.

38. This was an accidental mis-filling of a prescription. See Palmer Aff., ¶ 10.

40. A check is then performed to ensure that the product selected to be dispensed matches the label that has been generated by the EnterpriseRx system. See Schepard Tr., pp. 33-34, 42; Miller Tr., p. 43.

41. After the medicine has been dispensed, the pharmacist performs a final verification to confirm that the prescription that has been dispensed matches the information that was entered into the EnterpriseRx system when the prescription was received. See Miller Tr., pp. 17, 30, 43-44; Palmer Aff., ¶ 11.

42. For this prescription, Mr. Palmer performed the final verification. See Miller Tr., pp. 31-33, 44; Exhibit N, p. 10; Palmer Aff., ¶ 11.

43. Since the information in the system incorrectly stated that the decedent's prescription was for Methotrexate, the mis-filling was not discovered at the final verification stage. See Palmer Aff., ¶ 11."

The Court finds that defendant has met the initial motion burden and that the plaintiff now bears the burden to show a question of fact as to why the claim for punitive relief should not be dismissed.

Plaintiff notes that the medication that should have been given was metolazone at 2.5 mg two tabs daily as a diuretic. The prescription was erroneously filled with a cancer medication, methotrexate, at 2.5 mg two tabs daily.

Plaintiff's pharmacy expert opines that Palmer first erred in the pre-verification process by failing to correct the initial mistake of a pharmacy technician who read the prescription as methotrexate rather than the metolazone as intended. His error was compounded by a failure to properly review the drug information from the computer software program, Enterprise RX. As an experienced pharmacist, Palmer also should have but failed to recognize methotrexate as a toxic cancer drug not typically given to patients with end stage renal disease and that the dosing for the methotrexate as it was being filled was inappropriate.

Plaintiff's pharmacy expert then states that Palmer then should have had a warning from the computer system known as a drug utilization review (DUR) about the drug, the dosage and danger associated with the prescription and the manner in which he was giving it. Palmer does not recall the DUR but would have had to override it in order to dispense the prescription. He testified that he generally sees approximately 480 DUR's per shift.

Plaintiff's pharmacy expert lastly opines that Palmer acted with reckless indifference and gross negligence with deadly consequences to plaintiff by his conduct that also placed the public at risk. However, the issue of whether the facts of the case are sufficient to support a claim for punitive relief must be addressed as a matter of law.

The conduct of Palmer in this matter, taken as true for the purpose of this motion as to punitive damages, is that he failed to recognize a prescription error on pre-verification, failed to consider that the methotrexate was improper as a prescription and disregarded several DUR's indicating that the drug being given to plaintiff was improper. This conduct is not shown to have been spiteful or malicious or motivated by fraud or evil intent. Just as in Cleveland v. Perry, 175 AD3d 1017 (4th Dept 2019), the failure of Palmer to heed the DUR warning does not rise to the level of reckless indifference equivalent to wilful or intentional misconduct. Additional findings of dishonesty, abandonment, gross indifference and reckless conduct needed as a predicate for punitive damages as shown in Marsh v. Arnot Ogden Medical Center, 91 AD3d 1070 (3rd Dept

2012) are absent. See Dupree v Giugliano, 20 N.Y.3d 921 (2012).

Lastly, Palmer requested particularization of the claim for punitive relief as to Palmer by Amended Demand for Verified Bill of Particulars at paragraphs 30 and 31. [DKT# 83] No particulars were provided to support the punitive relief claim as paragraphs 30 and 31 went completely unanswered. [DKT# 83]. As a consequence, this Court is constrained to view the issue of punitive damages as being predicated solely on the stated claims of negligence. Darrisaw v. Strong Memorial Hospital, 74 AD3d 1769 (4th Dept 2010) affirmed 16 NY3d 729; DeMartino v. Kronhaus, 158 AD3d 1286 (4th Dept 2018).

Accordingly, defendant's motion for summary judgment to dismiss the claim for punitive relief from Palmer is granted in all respects.

PLAINTIFF'S CROSS MOTION

The cross motion has a number of different elements. The Court will first address those elements seeking the dismissal of various affirmative defenses.

8th Affirmative Defense - GOL §15-108.

There is no indication that plaintiff has entered into a settlement with any other tortfeasor pertaining to her death. Accordingly, there is no basis for a defense based on GOL §15-108. Defendant acknowledges that this is the case but notes that the defense can be triggered if there is a settlement between plaintiff and one or more defendants. [DKT# 102 pg. 13] Counsel represents both defendants in this matter and there are no other defendants.

Defendants bill of particulars simply note that plaintiff was a resident at the Cottages which was generally aware of plaintiff's prescriptions. [DKT# 86] There has been no proof submitted of any settlement as to The Cottages. The Cottages have not been made a party to this litigation either directly or by third party claim. Moreover, the defense (even assuming it to be applicable at some future point) would simply be re-constituted. Whalen v. Kawasaki Motors Corp., USA, 92 NY2d 288 (1998). The 8th Affirmative Defense will be dismissed on this basis.

9th Affirmative Defense - PHL §2805-d.

PHL §2805-d provides limitations on a medical malpractice action based on informed consent. Plaintiff has presented no cause of action based on informed consent. Defendants have made no specific argument in opposition to this part of the motion. The bill of particulars supplied by defendants merely note that they would be entitled to the defense "to the extent that plaintiff is asserting a claim of lack of informed consent". [DKT# 86] Accordingly, the defense will be dismissed.

10th Affirmative Defense - Personal Jurisdiction.

The claimed lack of personal jurisdiction was preserved by the answers filed December 17, 2020. CPLR §3211(e) allows for such a pleading but requires that the defense is waived unless followed by a motion to dismiss within sixty (60) days. No such motion was made and the defense is no longer applicable. Defendant also withdraws this defense. [DKT# 102 pg. 13] and the 10th Affirmative Defense is dismissed on this basis.

11th Affirmative Defense - Failure to State a Claim for Punitive Damages.

Under the facts presented by plaintiff, there is no basis for a punitive damages claim as a matter of law. Accordingly, there is no need to further address this aspect of the cross motion.

4th Affirmative Defense - Mitigation of Damages.

Plaintiff asserts that there is no proof that plaintiff failed to mitigate her damages. The Court finds no facts in the record that would support a mitigation of damages claim. Defendants would need to support this affirmative defense by some showing that plaintiff failed to use ordinary care to follow medical advice after the pharmacy negligence. Dombrowski v. Moore, 199 AD2d 949 (4th Dept 2002). Defendants point to no facts that would support a mitigation of damages defense. [DKT# 86] The bill of particulars supplied by defendants states no facts that would constitute a basis for mitigation of damages. The 4th Affirmative Defense is dismissed as a matter of law.

2nd Affirmative Defense - Failure to State a Claim.

Judge Seiter previously ruled on a motion to dismiss brought by defendants. [DKT# 23] The propriety of the amended summons and second amended complaint was tested on the plaintiff's subsequent motion to name Palmer in replacement of Doe defendants. [DKT# 60] The claims of negligence are sufficiently stated. The cross motion is granted but only in this regard and subject to the Court's review of the cross motion directed to liability and causation.

Plaintiff also seeks summary judgment as to the negligence of the pharmacy and Palmer and to establish proximate causation between the errant prescription and LeFevere's death.

Liability for Negligence.

The facts as to liability have already been summarized and are, for the most part, undisputed. The defendants gave LeFevere a prescription that was wholly improper and defendants have admitted the error. Plaintiff has met the burden on the motion which then passes to defendants to show what if any questions of fact exist to be considered at trial.

The Court understands and appreciates the technical arguments advanced by counsel in opposition to the motion. What is missing from the opposing papers is any substantive evidence to

show that the prescription for methotrexate was proper or that such a prescription was properly given to LeFevere when it was not ordered by her medical provider.

Defendants allege that the cross motion must be denied because plaintiff failed to comply with 22 NYCRR §202.8-g adopted February 1, 2021. While this is true in some respects, 22 NYCRR §202.1 permits a Court to waive compliance where good cause is shown and in the interest of justice. The Court so finds on both counts based on the record considered and reviewed on the motion regarding punitive damages. To require this motion to be denied on a technical basis and thereby submitted to a jury where defendants admit the prescription error would do nothing to further the interest of justice.

Defendants object to consideration of the expert affidavit of Pharmacist Richard Dew on the grounds that it is not accompanied by a certificate of conformity as required by CPLR §2309(c). While this is true, no substantial prejudice is shown and the error is disregarded. Edwards v. Myers, 180 AD3d 1350 (4th Dept 2020).

Defendants object to the expert affidavits for opinions as to causation but not liability. Expert opinion would usually be needed to establish that a defendant's conduct departed from the accepted standards of practice. Prince, Richardson on Evidence §7-315. This case falls within the narrow category of factually simple medical negligence cases where no expert proof is needed. Prince, Richardson on Evidence §7-302. The prescription error is plainly established by plaintiff and admitted based on Palmer's testimony and motion submissions without resort to expert affidavits. Defendants submit nothing to show any question of fact on the fundamental question of negligence.

Accordingly, the Court finds that there remain no questions of fact as to the negligence of the defendants and that the motion for summary judgment on this issue must be granted as a matter of law.

Proximate Causation.

Plaintiff submits the affirmation of Dr. Robert Sidlow arguing that plaintiff's death was directly linked to the medication error and toxic dose and effects of the methotrexate. Expert testimony is necessary to establish the symptoms and effects of a particular drug or poison. Prince, Richardson on Evidence §7-302. The precise opinion given is as follows:

> "In summary, PL died from well-recognized infectious complications of severe neutropenia and bone marrow failure (sepsis and likely neutropenic enterocolitis.) The severe neutropenia and bone marrow failure were a direct result of PL's having ingested a toxic dose of methotrexate over the week prior to her hospital admission, most likely the result of a pharmacy medication error. PL's older age, frailty, hypoalbuminemia, and renal failure all decreased PL's ability to metabolize and clear this medication and contributed to the marked toxic effects noted above.

> While PL had several underlying, chronic medical issues which at baseline severely reduced her chances of surviving a high-risk ICU admission, these conditions appear to have been stable and medically optimized at the time just prior to her presentation to the ER on 1/12/19 and did not directly cause her demise. Based on my review of the chart, PL's medical care throughout her ED and ICU course appears to have been of high quality; there were no obvious deviations from expected standards of care during her very complicated hospital stay."

Plaintiff argues that this is sufficient to carry the burden on the cross motion subject to a review of defendant's objections and any contrary evidence tending to raise a question of fact.

Defendant argues that Dr. Sidlow's affirmation should be disregarded because it lacks evidentiary foundation pursuant to Dziwulski v. Tollini-Reichert, 181 AD3d 1165 (4th Dept 2020) leave to appeal denied 2021 NY LEXIS 930. According to defendant, Dr. Sidlow "merely claims that he 'performed a chart review and analysis' and references a 'review of the chart'." Neither proposition is well founded. Dr. Sidlow's affirmation is detailed and specific in nature. It also plainly summarizes the medical evidence reviewed and states the basis for the opinion rendered. Amodio v. Wolpert, 52 AD3d 1078 (3rd Dept 2008); Rivera v. Albany Medical Center Hospital, 119 AD3d 1135 (3rd Dept 2014). Moreover, defendant does not suggest any issue with any aspect of the statement of medical fact made by Dr. Sidlow upon which his opinion is based.

One problem with plaintiff's presentation is that the medical record which forms the basis for the opinion has not been submitted in support of the cross motion. This issue is well noted by defendants in opposition to the motion.

The medical record is a foundational basis for the expert opinion. Without the medical record, the trier of fact is not able to tell if the facts stated by the expert possess an evidentiary basis and this renders the expert opinion unuseable. See Smith v. Squire Homes, Inc., 38 AD2d 879 (4th Dept 1972); Rupert v. Sellers, 65 AD2d 473 (4th Dept 1978) affirmed 50 NY2d 881; certiorari denied 449 US 901; Wheaton v. Guthrie, 89 AD2d 809 (4th Dept 1982); Daniels v. Meyers, 50 AD3d 1613 (4th Dept 2008); Piersielak v. Amyell Development Corp., 57 AD3d 1422 (4th Dept 2008).

The evidentiary basis being asserted by LeFevere must be properly laid out on the cross motion for summary judgment. Winegrad v. New York University Medical Center, 64 NY2d 851 (1985); Viviane Etienne Medical Care v. Country-Wide Insurance Company, 25 NY3d 498 (2015). Absent that evidentiary basis, the cross motion fails irrespective of defendant's submission in opposition. Vega v. Restani Construction Corp., 18 NY3d 499 (2012); Smalls v. AJI Industries, Inc., 10 NY3d 733 (2008).

The other problem with the cross motion is that the issue of proximate causation is generally an issue of fact for the jury at trial. Turturro v. City of New York, 28 NY3d 469 (2016); Hain v. Jamison, 28 NY3d 524 (2016); Newman v. RCPI Landmark Properties, LLC, 28 NY3d 1032 (2016).

In this case, LeFevere had a number of pre-existing chronic conditions which Dr. Sidlow does mention. Also, LeFevere had a surgical procedure leading up to her hospitalization and subsequent demise. There is no indication in the record that LeFevere took the methotrexate as prescribed, how long she took it or when and under what circumstances she stopped taking that medication. Even assuming that Dr. Sidlow perfectly summarized the medical record and the same was part of this record, Dr. Sidlow does not speak to the actual taking of the methotrexate nor does he rule out the surgery as causation.

Accordingly, the Court finds that plaintiff has failed to meet the burden on the motion for summary judgment with respect to proximate causation and this aspect of the motion must be denied.

Defendants will submit the Order in accordance herewith.

IT IS SO ORDERED.

ENTER

Dated: June 23, 2021
Oswego, NY

Gregory R. Gilbert

HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE