SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 30
NASSAU COUNTY

N. SCOTT BANKS, as Administrator of the Estate of EILEEN BANKS,

Plaintiff,

- against -

CENTRAL ISLAND HEALTHCARE,

Defendant.

Index No.: 613594/17
Motion Seq. No.: 02
Motion Date: 11/26/19

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Affirmation in Reply	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion.

Plaintiff commenced the instant medical malpractice action with the filing of a Summons and Verified Complaint on or about December 14, 2017. *See* Defendant's Affirmation in Support Exhibit A. Issue was joined on or about March 22, 2018. *See* Defendant's Affirmation in Support Exhibit B.

In support of the motion, counsel for defendant asserts, in pertinent part, that, "**EILEEN BANKS** is a ninety-year-old woman with a history of diabetes, hypertension, arthritis, heart failure and bilateral hip replacement in 2004.... On August 16, 2016, her daughter, Loraine Attias, called an ambulance and took her mother to Nassau Medical Center after plaintiff began experiencing back pain.... X-rays were taken, and plaintiff was instructed to participate in physical therapy.... From August 20, 2016 until September 15, 2016, plaintiff was a resident of Belair Nursing and Rehabilitation Center (hereinafter referred to as 'Belair').... On September 15, 2016, after experiencing significant pain while walking, plaintiff was transferred to NYU Winthrop Hospital (hereinafter referred to as 'Winthrop'), and was ultimately, diagnosed with Osteomyelitis, an infection, in her lower back.... Following the diagnosis of Osteomyelitis, plaintiff was unable to walk and was mostly wheelchair-bound.... Plaintiff continued to receive physical therapy at Belair and Winthrop for the next several weeks, until December 16, 2016, when she was admitted to **CENTRAL ISLAND**'s facility.... **CENTRAL ISLAND**'s facility is both a nursing home and rehabilitation center.... Each of the facility's five (5) units contains approximately forty (40) beds.... One nurse is assigned to twenty (20) patients, and five (5) Certified Nursing Aides (hereinafter referred to as 'CAN') assist eight (8) patients each.... Upon admission, an admission nurse completes an initial evaluation of each new patient.... Plaintiff's Initial Evaluation reflects that she was admitted with diagnoses of diabetes, back pain, Osteomyelitis, discitis, hypertension, hypothyroidism and recent Herpes Zoster also known as shingles.... Upon admission, plaintiff's skin was dry with a history of pressure ulcers.... Importantly, a pressure ulcer, measuring four (4) centimeters by two (2) centimeters was identified on plaintiff's sacrum and indicated on the body map.... [P]laintiff's skin scored a 15 on the Braden Scale, which represents a low risk for further ulcers.... Following plaintiff's

admission, Dr. Marc Levitt prepared a Plan of Care for her.... The treatment for her sacral wound consisted of cleansing it with saline, patting it dry, applying Hydrogel to it, and covering the area with a clean dressing twice daily.... Plaintiff's dressing would be changed every morning, evening, and in the event, she experienced a bowel movement. The treatments were done by licensed nurses as well as a nurse practitioner who actively participated in the assessment and care of her ulcer.... In order to treat her, two (2) **CENTRAL ISLAND** employees moved plaintiff onto her side in order to expose the wound.... **CENTRAL ISLAND** also imposed a wound protocol, wherein plaintiff's wound would be monitored every shift.... In particular, **CENTRAL ISLAND** staff evaluated the wound odor and drainage.... Adittionally (*sic*), plaintiff was also evaluated weekly by wound care specialist, Dr. Khan.... The Hydrogel treatment was utilized from her admission on December 16, 2016, to December 28, 2016.... On December 29, 2016, plaintiff's treatment was changed to include calcium alginate, which is a highly absorptive dressing manufactured from brown seaweed and forms a soft gel when mixed with wound fluid. It has multiple benefits including facilitation of autolysis (removal of slough) but the gel may have an odor which may be interpreted as 'foul' odor.... Plaintiff continued to receive calcium alginate until January 5, 2017, when Dr. Khan changed plaintiff's treatment to include Santyl ointment (Collagenase), which is an enzymatic debriding agent to remove the soft necrotic tissue noted as slough.... As of January 6, 2017, Dr. Khan noted that 'slough' or excess damaged tissue, was covering the wound, making it 'unstageable.' ... Therefore, the Santyl treatment was necessary in order to enzymatically debride the slough so that the depth can be visualized so as to accurately define the stage.... [P]laintiff's Santyl treatment continued from January 6, 2017, until her discharge on January 15, 2017.... In addition to treatment and monitoring, the progression of plaintiff's wound was documented weekly in

CENTRAL ISLAND's Skin Tracking form,... Upon admission on December 16, 2016, plaintiff's sacral ulcer was categorized as Stage III, and measured 4cm x 2cm, with a depth of 0.2 cm.... No odor or tunneling was documented, and plaintiff's tissue was described as '3', indicating slough was present.... On December 22, 2016, the category and dimensions of plaintiff's wound remained the same.... Therefore, Dr. Khan issued an order to continue the prescribed care.... On December 29, 2016, plaintiff's wound increased slightly in size to 7 cm x 8 cm, but decreased in category to Stage II, decreased in depth to 0.1 cm, and decreased in tissue type to '2' indicating pink/red tissue.... On January 5, 2017, the category, dimensions and tissue type remained the same.... Therefore, Dr. Khan recommended that plaintiff's treatment continue as planned.... On January 12, 2017, plaintiff's wound was unstageable, measured 7 cm x 11.5cm, with a depth of 2.5 cm, and exhibited necrotic (dead) tissue.... However, no tunneling or foul odor was noted.... Plaintiff did not have an elevated temperature and there was no indication of an infection.... On January 15, 2017, plaintiff's daughter, Loraine Attias, was present at **CENTRAL ISLAND** for a discharge meeting, since her mother's ninety (90) days of Medicaid covered rehabilitation had elapsed.... Ms. Attias and a private home health aide were instructed on proper wound care, including treatment and possible identifying factors for infection.... Ms. Attias decided to take her mother home, since a nurse from Winthrop was scheduled to evaluate plaintiff on January 17, 2017, at 10:00 a.m.... Upon the nurse's evaluation of **EILEEN BANKS**, she called for an ambulance to transport plaintiff to the hospital.... Plaintiff remained at Winthrop for four (4) weeks and underwent two (2) surgical debridement procedures on January 18, 2017, and January 25, 2017.... Plaintiff's health continued to decline and by April 2017, she was placed in hospice.... After several months, her

blood levels began to recover and her health stabilized." *See* Defendant's Affirmation in Support Exhibits F, G, I-M and O.

Counsel for defendant also asserts, in pertinent part, that, "[p]laintiff cannot establish a *prima facie* case of medical malpractice against **CENTRAL ISLAND**. Plaintiff's numerous illnesses and decreased mobility caused her to sustain a pressure ulcer on her sacrum prior to being admitted to **CENTRAL ISLAND**'s facility. Furthermore, the policies and procedures, including developing a plan of care, maintaining daily treatment logs, weekly wound assessments, and regular physician supervision establish that **CENTRAL ISLAND** rendered care well within the applicable standard. Therefore, plaintiff cannot make out a *prima facie* case of negligence against **CENTRAL ISLAND**."

In further support of the motion, counsel for defendant submits the Affidavit of Diane Yastrub ("Yastrub"), PhD, BSN, APRN-BC, MSC, MSN, CWCN, CDE. *See* Defendant's Affirmation in Support Exhibit P. Counsel for defendant states, in pertinent part, that, "Diane J. Yastrub, PhD, RN, BSN, APRN-BC, MSC, MSN, CWCN, CDE, reviewed **CENTRAL ISLAND**'s chart, plaintiff's relevant medical records, photographs of the wound, and the EBT testimony in order to render an opinion as to the care and treatment provided by **CENTRAL ISLAND** to plaintiff.... Dr. Yastrub opines, within a reasonable degree of medical certainty, that the treatment rendered by **CENTRAL ISLAND** was well within the appropriate standard of care. Dr. Yastrub's opinion is that the ulcer on plaintiff's coccyx, which was present upon her admission to **CENTRAL ISLAND**, was not in fact, caused by pressure. Rather, the ulcer was caused by skin changes at life's end (SCALE) and was related to the chronic destructive process at T-12 to L1 as a result of discititis (inflammation which develops between the intervertebral spaces of the spine), coupled with Osteomyelitis and Herpes Zoster. Osteomyelitis is a serious

infection of the bone, which also adversely affected the plaintiff's ability to produce healthy red blood cells, which are necessary for skin healing. Herpes Zoster is an autoimmune disease and for plaintiff was part of the reason that her body was breaking down. The condition of her skin was mirroring what was going on beneath the skin. She was suffering with multiorgan failure with the skin being the largest external organ of the body and therefore the only visible one. The Initial Assessment and Plan of Care reflects that **EILEEN BANKS** was diagnosed with high cholesterol, heart failure, diabetes, and Herpes Zoster (shingles), which all contributed to her skin breakdown.... Furthermore, it is clear that plaintiff did not develop any additional ulcers while at **CENTRAL ISLAND**.... It is Dr. Yastrub's opinion that the internal breakdown of plaintiff's spine, along with skin weakened by diabetes, shingles, and high cholesterol, and decreased mobility, caused a wound to form at plaintiff's coccyx, prior to her admission to **CENTRAL ISLAND**.... Dr. Yastrub's opinion with a reasonable degree of nursing certainty, is that the care and treatment rendered by the nursing staff at **CENTRAL ISLAND** fell well within the standard of care. As noted above, the plaintiff developed the wound prior to her admission to **CENTRAL ISLAND**. The defendant's staff inspected and cared for the wound daily with weekly wound care rounds performed by a MD. All pressure redistribution measures were in place including but not limited to: turning and positioning, specialty mattress, moisture barrier cream after cleansing, and floating of heels. The physician's orders regarding medications, supplements, and monitoring of laboratory tests were followed and implemented. There was an interdisciplinary approach to her care. Lastly, Dr. Khan's determination that plaintiff's wound did not require debridement on January 12, 2017, just six (6) days prior to plaintiff's admittance to Winthrop, was within the standard of care. Considering plaintiff's co-morbidities, including hypertension, diabetes and high cholesterol, debridement surgery could have exacerbated

plaintiff's condition. Surgical debridement is the removal of necrotic tissue from a wound by cutting open the wound to remove damaged, avascular tissue, it results in a larger wound. In this case, expanding the wound on her sacrum had the potential to led (*sic*) to further complications due to her multiple comorbidities resulting in impaired wound healing. Dr. Khan properly considered the risks and benefits of continuing with the use of an enzymatic debriding agent versus using a potentially destructive surgical method which posed additional risks, including increased bacteria and further breakdown of her thoracic and lumbar spine. Therefore, it is my opinion that any claim that Dr. Khan failed to properly and timely diagnose plaintiff or debride the wound, is without merit.... Any developments were recorded and the appropriate adjustments were made to plaintiff's Plan of Care.... At no point, did plaintiff's wound develop a foul odor or exhibit any signs of infection.... As a result, it was reasonable for Dr. Khan to continue the prescribed treatment according to Dr. Yastrub.... Prior to discharge, **CENTRAL ISLAND** educated Ms. Attias and a personal aide on appropriate wound care.... Following discharge, plaintiff was visited by a nurse from Winthrop in accordance with the Plan of Care..... In light of the extensive and appropriate treatment for the sacral ulcer, proper discharge procedure, and the fact no additional pressure ulcers formed while **EILEEN BANKS** resided at **CENTRAL ISLAND**'s facility, **CENTRAL ISLAND** did not depart from the applicable standard of care." *See* Defendant's Affirmation in Support Exhibits F, G and I-P.

In opposition to the motion, counsel for plaintiff argues, in pertinent part, that, "[m]ovant has not submitted an expert *medical affidavit* and therefore cannot make out a prima facie case of entitlement to summary judgment with regard to the *medical issues* raised herein. They (*sic*) submit only the affidavit of a Nurse Practitioner, PhD. This is insufficient as a matter of law. It has long been held that a Nurse Practitioner, who is not a medical doctor, lacks the qualifications

to render a medical opinion as to the relevant standard of care of a physician, and cannot opine whether or not a Defendant physician deviated from that standard of care, [citations omitted]. Accordingly, the Court need look no further, as without a physician's affidavit, Defendant has failed to establish its entitlement to summary judgment, and opposing papers need not be considered by the Court, [citation omitted]." *See* Defendant's Affirmation in Support Exhibit P.

Counsel for plaintiff adds, in pertinent part, that, "[w]ith all due respect to Diane Yastrub, Ph.D, R.N., she is not a doctor. She is not a physician nor is she a surgeon. She is not qualified to opine as to when surgery is or is not an appropriate treatment, [citations omitted]. She could not order surgery for this patient in a clinical setting, nor should she be allowed to opine when surgical treatment is called for in a Court of Law. It is simply beyond her level of expertise. Nor could she order IV antibiotic treatment or discontinue such treatment if she so desired. This too is beyond her level of expertise. 'Doctors (*sic*) Orders,' including medication orders, are written by doctors, not nurse practitioners. Such testimony from a nurse practitioner as to proper surgical standards of care to be applied to a physician is inadmissible at trial and similarly is inadmissible in a motion for summary judgment.... The Second Department has made this clear; medical issues must be challenged and addressed by medical doctors, not nurse practitioners. A nurse practitioner's affidavit is inadmissible as a matter of law."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To

obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

"In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider '"departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries."' *Schmitt v. Medford Kidney Ctr.*, 121 A.D.3d 1088, 996 N.Y.S.2d 75 (2d Dept. 2014) *quoting DiGeronimo v. Fuchs*, 101 A.D.3d 933, 957 N.Y.S.2d 167 (2d Dept. 2012) *quoting Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011) *citing Fink v. DeAngelis*, 117 A.D.3d 894, 986 N.Y.S.2d 212 (2d Dept. 2014).

"A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries." *Michel v. Long Is. Jewish Med. Ctr.*, 125 A.D.3d 945, 5 N.Y.S.3d 162 (2d Dept. 2015) *lv denied* 26 N.Y.3d 905, 17 N.Y.S.3d 86 (2015). *See also Barrocales v. New York Methodist Hosp.*, 122 A.D.3d 648, 996 N.Y.S.2d 155 (2d Dept. 2014); *Berthen v. Bania*, 121 A.D.3d 732, 994 N.Y.S.2d 359 (2d Dept. 2014); *Trauring v. Gendal*, 121 A.D.3d 1097, 995 N.Y.S.2d 182 (2d Dept. 2014); *Stukas v Streiter*, *supra* at 23; *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 947 N.Y.S.2d 148 (2d Dept. 2012). Expert evidence is required when evaluating the "performance of functions that are an integral part of the process of rendering medical treatment ... to a patient." *D'Elia v. Menorah Home and Hosp. for the Aged & Infirm*, 51 A.D.3d 848, 859 N.Y.S.2d 224 (2d Dept. 2008). *See also Koster v. Davenport*, 142 A.D.3d 966, 37 N.Y.S.3d 323 (2d Dept. 2016) *lv to appeal denied* 28 N.Y.3d 911, 47 N.Y.S.3d 227 (2016). Additionally, the conclusions reached by the defendant and his or her expert(s) must be supported by evidence in the record. *See Poter v. Adams*, 104 A.D.3d 925, 961 N.Y.S.2d 556 (2d Dept. 2013).

While a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge, or experience from which it can be assumed that the opinion rendered is reliable. *See Elliot v. Long Island Home, Ltd.*, 12 A.D.3d 481, 784 N.Y.S.2d 615 (2d Dept. 2004); *Mills v. Moriarty*, 302 A.D.2d 436, 754 N.Y.S.2d 901 (2d Dept. 2003); *Boltyansky v. New York Community Hospital*, 175 A.D.3d 1478, 108 N.Y.S.3d 188 (2d Dept. 2019). The Court concurs with plaintiff's argument that defendant's expert, who is not a medical doctor, lacks the qualifications to render a medical opinion as to the relevant standard of care, and whether defendant deviated from such standard.

Therefore, based upon the above, defendant's motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint, is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
November 3, 2021