

Assevero v Hamilton & Church Props., LLC.

2023 NY Slip Op 33592(U)

October 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 33051/2008

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : 66

-----X
HUGH ASSEVERO,

Plaintiffs,

**DECISION & ORDER FOR
MOTION IN LIMINE**

-against-

**Index No. 33051/2008
Mot. Seq. #'s 22, 23, 24,
25, 26, 27, 28, 29**

HAMILTON & CHURCH PROPERTIES, LLC.,

Defendants.

-----X
HAMILTON & CHURCH PROPERTIES, LLC.,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 75577/2009

CASTLE CONSTRUCTION GROUP

Third-Party Defendants.

-----X
HAMILTON & CHURCH PROPERTIES, LLC.,

Third-Party Plaintiff,

-against-

Second Third-Party
Index No. 75360/2010

SCOTTSDALE INSURANCE COMPANY,

Second Third-Party Defendants.

-----X
HAMILTON & CHURCH PROPERTIES, LLC.,

Third-Party Plaintiff,

-against-

INTEGRITY CONTRACTING, INC.,

Third Third-Party Defendants.

-----X
HAMILTON & CHURCH PROPERTIES, LLC.,

Third-Party Plaintiff,

-against-

INTEGRITY CONTRACTING, INC.,
INTEGRITY CONTRACTING OF NEW YORK, INC.
AND THE GRIFFITHS GROUP, INC.

Fourth Third-Party Defendants.

-----X
 The following papers NYSCEF Doc #'s 8 to 183 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	8-23; 52-84; 85-88; 92-94; 89-91; 136-142; 143-150; 127-135
Opposing Affidavits (Affirmations)_____	24-25; 26-33; 98-106; 113; 95-97; 107; 108-109; 110- 112; 113; 154-159; 166; 167; 160-165;168; 169; 170-171
Reply Affidavits_____	34-51; 115-123; 126; 125; 124; 174; 177-183; 175- 176;

After review of the foregoing submissions the Court finds as follows:

Plaintiff (decedent) moves this court by Motion in Limine, for an order to Preclude additional defense experts in the fields of addiction psychiatry and pain management at the damages phase of this trial. All Defendants Oppose the same. (MS#22)

Plaintiff (decedent) moves this court by Motion in Limine, for an Order, to preclude the opinion of Defense expert, Dr. Lloyd Saberski, that the traumatic injuries Plaintiff (decedent) sustained in the accident were limited to the site of the right-sided fractures of his ribs and transverse processes between T10 and L1. Plaintiff contends this opinion is both unsupported by the medical records as well as contradicted by them. Plaintiff also contends Dr. Saberski should further be precluded from asserting opinions that are wholly or partially derived from his unsupported opinion that Plaintiff (decedent) 's sole traumatic injuries were at the site of the rib and transverse process fractures, and are themselves unsupported, and contradicted, by the medical records, such as: (a) “. . .the lower lumbar region...is not associated with...any injuries allegedly caused by the subject accident.”

(Saberski Aff, Par. 8) (b) "The lower lumbar pain was bilateral, inconsistent with a higher, unilateral trauma; the accident-related injuries were higher up, on the right side." (Saberski Aff., Par. 9); "thoracic or upper lumbar, unilateral injuries" [describing the injuries sustained in the accident] (Saberski Aff., Par. 20). (c) "The records and materials reviewed in this case reflect that any on-going complaints of pain and chronic pain were associated with the lower lumbar region" (alone) (Saberski Aff., Par. 8) (d) "there is no record nor evidence of on-going pain, chronic pain or continuing pain treatment being rendered to alleviate pain associated with the injuries sustained in July 2007." (Saberski Aff., Par. 14). Plaintiff respectfully requests an order granting Plaintiff's motion in limine to preclude the opinions of Dr. Saberski that are unsupported and contradicted by the medical records, and from making assertions at trial, such as the statements listed as (a)-(d) above, which are wholly or partially derived from this faulty premise and are themselves unsupported by the medical records and contradicted by them. Defendants oppose the same. (MS#23).

Plaintiff (decedent) moves this court by Motion in Limine, for an order , to preclude defense expert, Lloyd R. Saberski, M.D., from proffering his opinion as to whether Plaintiff (decedent) 's conduct in connection with the use of his prescription medications was negligent, careless, grossly negligent, reckless, indifferent to consequences, irrational, impulsive, or otherwise deviated from that of a reasonably prudent person in like circumstances. Defendant's oppose the same. (MS#24)

Plaintiff (decedent) moves this court by Motion in Limine, for an order setting forth a date, convenient with all parties, to review the trial exhibits, and discuss their

admissibility, in accordance with the Uniform Civil Rules for the Supreme Court. Defendants oppose the same. (MS#25)

Plaintiff (decedent) moves this court by Motion in Limine, for an order, pursuant to CPLR §3211(b), to preclude Defendant Hamilton & Church Properties, LLC ("Defendant" or "H&C") and Second Third-Party Defendant Integrity Contracting, Inc ("Integrity") (collectively, "Defendants") from introducing evidence, or arguing to the jury, that Plaintiff (decedent) 's treating physicians were negligent, committed malpractice or were in any manner wrong in their treatment of Plaintiff (decedent) for the injuries caused by Defendant. Defendants oppose the same. (MS#26)

Plaintiff (decedent) moves this court by Motion in Limine, for an order to preclude Defendant Hamilton & Church Properties, LLC ("Defendant" or "H&C") and Second Third-Party Defendant Integrity Contracting, Inc ("Integrity") (collectively, "Defendants") and any expert from proffering testimony or expressing an opinion which ascribes an alternative causation theory to the pain management of 2011- 2012 (ie, gym incidents, car accidents, toolbox incidents) leading to Hugh Assevero's wrongful death, and not the accident of 2007. Defendants oppose the same. (MS#27).

Plaintiff (decedent) moves this court by Motion in Limine, for an order to preclude Defendant Hamilton & Church Properties, LLC ("Defendant" or "H&C") and Second Third-Party Defendant Integrity Contracting, Inc ("Integrity") (collectively, "Defendants") and any experts from proffering testimony or expressing any opinion that Plaintiff (decedent) 's pain was solely related to preexisting degeneration, a nontraumatic degenerative cause or etiology, and not the accident. Defendants oppose the same. (MS#28)

Plaintiff (decedent) moves this court by Motion in Limine, for an order pursuant to CPLR §3211(b) to preclude Defendant Hamilton & Church Properties, LLC from introducing, or arguing to the jury, evidence of Plaintiff (decedent) 's alcohol use disorder for the purpose of showing it predisposed Plaintiff (decedent) to overusing prescription. Defendants oppose the same. (MS#29)

ANALYSIS

The court notes that all previous Motion in Limine decisions are hereby recognized and incorporated herein. The current Motions in Limine come to the court after conclusion of the liability stage of the trial and before the damages stage of trial. One of the issues in this case is whether the injuries sustained in the July 9, 2007 accident are a proximate cause of the Plaintiff (decedent)'s death on June 24, 2012. It is Plaintiff (decedent)'s theory of the case that the injuries from the accident resulted in the Plaintiff (decedent) suffering from chronic pain syndrome which ultimately caused his death five (5) years later. In turn, Defendant's theory/argument during the damages phase of trial will be plaintiff's overdose and death on June 24, 2012, while tragic, had nothing to do with his work-related accident on July 9, 2007. Defendants will argue, in part, that plaintiff's own conduct – namely, his pattern of erratic, excessive, impulsive, and reckless use/misuse of his prescription medications, including opioids, was a proximate cause of his overdose and death.

Trial Courts have broad discretion in determining the admissibility of expert opinions, in whole or in part. A witness's qualification as an expert is a question to be determined by the court in the exercise of its reasonable discretion and will not be disturbed in the absence of a serious mistake, an error of law, an abuse of discretion or

an improvident exercise of discretion, *Werner v Sun Oil Co.*, 65 NY2d 839, 493 NYS2d 125, 482 NE2d 921 (1985); *Meiselman v Crown Heights Hospital*, 285 NY 389, 34 NE2d 367 (1941); see *Caprara v Chrysler Corp.*, 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545 (1981); *McGillvery v New York*, 22 AD3d 537, 802 NYS2d 235 (2d Dept 2005); *Maplewood, Inc. v Wood*, 21 AD3d 933, 801 NYS2d 60 (2d Dept 2005); *Steinbuch v Stern*, 2 AD3d 709, 770 NYS2d 106 (2d Dept 2003); *Karasik v Bird*, 98 AD2d 359, 470 NYS2d 605 (1st Dept 1984). "The admission of expert testimony on a particular issue is within the discretion of the trial court", *People v Inoa*, 25 NY3d 466, 13 NYS3d 329, 34 NE3d 839 (2015); *People v Brown*, 97 NY2d 500, 743 NYS2d 374, 769 NE2d 1266 (2002); *Price ex rel. Price v New York City Housing Authority*, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167 (1998); *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900, 647 NE2d 105 (1995); *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983); see *People v Williams*, 20 NY3d 579, 964 NYS2d 483, 987 NE2d 260 (2013); *People v Williams*, 97 NY2d 735, 742 NYS2d 597, 769 NE2d 343 (2002).

This case presents a classic "battle of the experts", and when there are conflicting interpretations by opposing experts, the remedy is not to "pre-try" the case in front of the judge, nor preclude one of the experts. Rather, after hearing all of the evidence, the decision is the province of the jury. This trial is a prototypical battle of the experts. Where, as here, one parties expert "squarely opposes" the other parties' expert, the result is "a classic battle of the experts that is properly left to a jury for resolution" see *Blendowski v. Wiese*, 158 AD3d 1284, 1286, 71 NYS3d 274 [4th Dept. 2018] [internal quotation marks omitted]; see also *Johnston v. Joyce*, 192 AD2d 1124, 596 NYS2d 625); *Rivera v. City of New York*, 80 AD3d 595, 596, 915 NYS2d 281, 283 (2011). The court notes this is not a

case in which defendant's experts "misstate[d] the facts in the record," nor is the affidavit "vague, conclusory, [or] speculative" see *Occhino v. Fan*, 151 AD3d 1870, 1871, 57 NYS3d 325 [4th Dept. 2017]; see also *Diaz v. New York Downtown Hosp.*, 99 NY2d 542, 544, 754 NYS2d 195, 784 NE2d 68 [2002].

As to the plaintiffs first motion (MS#22), to preclude additional defense experts in the fields of addiction psychiatry and pain management at the damages phase of this trial. Plaintiff contends that these additional unidentified experts lacks good faith and good cause among other contentions including prejudice. The court finds that there is no evidence in this record that defendants additional expert disclosure is untimely, prejudicial or that it was made in bad faith. Specifically, this trial is not scheduled until January 8, 2024, the additional experts were disclosed with plenty of time and there is no prejudice. Moreover, pursuant to CPLR 3101(d)(1) there are no time limits on expert disclosures. CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information 'at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of non-compliance with the statute' unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party." *Aversa v. Taubes*, 194 AD2d 580, 582 (2d Dept., 1993) (Expert disclosed in medical malpractice case "on the eve of trial"; motion to preclude denied.) Hence, even when there is a timeliness issue, and one does not exist in the present case, the courts and the Second Department have time and time again refused to preclude the expert.

Moreover, before the drastic step of preclusion is taken, there must be a clear and meritorious demonstration by the movant of (i) untimeliness, and then, only if the

disclosure is untimely, movant must prove both (ii) a willful and intentional failure to disclose, and (iii) prejudice. In the present case, plaintiff fails to establish the first element, of untimeliness. As such, the inquiry ends, and on this basis alone, the motion must be denied. However, we will also address the other two elements, willfulness, and prejudice. Defendants' additional 3101(d) expert disclosure, accompanied by the expert's affidavit, was served by email (and first-class mail) on June 30, 2022, which is twenty-eight weeks, or nearly seven months, prior to the date when this expert is expected. The court notes that the plaintiff plans to call over a dozen experts in the same fields that the plaintiff seeks to preclude defendants from calling. The CPLR does not put a cap on the number of experts that are allowed to be called during a trial and this court also declines to do so.

Accordingly, plaintiff's motion to preclude additional defense experts is hereby denied, defendants expert disclosure is not untimely, prejudicial, or made in bad faith. (MS#22).

As to the next motion (MS#23), for an Order, to preclude the opinion of Defense expert, Dr. Lloyd Saberski, that the traumatic injuries Plaintiff (decedent) sustained in the accident were limited to the site of the right-sided fractures of his ribs and transverse processes between T10 and L1. This court declines to put parameters on an expert's testimony. Defendants' expert may testify as to his opinion based on the medical records reviewed. There is nothing the defendants experts disclosure that is not based on facts in the record. This court will not preclude an expert on the basis that the opinion differs from an expert of the plaintiff. There is an abundance of facts in the record that support numerous other injuries occurring after the accident and defendants expert may opine as to which occurrences may or may not have caused which injuries. Moreover, as this court

has previously ruled plaintiff may cross-examine defendants' experts or object to testimony that plaintiff's counsel believes is not based on evidence in the record. It is also recognized that the scope and extent of cross-examination of expert witnesses' rests in the sound discretion of the trial court and "is not subject to exception unless wholly arbitrary, unreasonable and abusive, and the examination need not be extended to permit interrogation about collateral, immaterial or irrelevant matters." *Id.* at 1402; *see also United States v. 412.93 Acres, Carbon County, Pennsylvania*, 455 F2d 1242, 1247 (3d Cir. 1972); *6816.5 Acres of Land v. United States*, 411 F2d 834, 839 (10th Cir. 1969); *United States v. 10.48 Acres of Land*, 621 F.2d 338, 340 (9th Cir. 1980).

Accordingly, plaintiff's motion to preclude the opinion of Defense expert, Dr. Lloyd Saberski, that the traumatic injuries Plaintiff (decedent) sustained in the accident were limited to the site of the right-sided fractures of his ribs and transverse processes between T10 and L1 is hereby denied. (MS#23)

As to plaintiff's third motion (MS#24) to preclude defense expert, Lloyd R. Saberski, M.D., from proffering his opinion as to whether Mr. Assevero's conduct in connection with the use of his prescription medications was negligent, careless, grossly negligent, reckless, indifferent to consequences, irrational, impulsive, or otherwise deviated from that of a reasonably prudent person in like circumstances. This court declines to limit the opinions of qualified witnesses. Moreover, this is not the ultimate issue in the matter, and the expert can opine based on their qualifications. The disclosure was sufficient to apprise the defendant of the subject matter of the expert's proposed testimony, and was neither "so inadequate or inconsistent with the expert's testimony as to have been misleading, or to result in prejudice or surprise" *see Gagliardotto v.*

Huntington Hosp., 25 AD3d 758, 759, 808 NYS2d 430; see *CPLR 3101[d][1][i]*; *Rabinowitz v. Elimian*, 55 AD3d 813, 814, 866 NYS2d 286; *Popkave v. Ramapo Radiology Assoc., P.C.*, 44 AD3d 920, 921, 845 NYS2d 362); *Hoberg v. Shree Granesh, LLC*, 85 AD3d 965, 966–67, 926 NYS2d 578, 580 (2011). Even if it was the ultimate issue in this matter “expert opinion testimony on an “ultimate issue” is permissible where the testimony, as here, depends upon professional or scientific knowledge or skill not within the ken of the average juror. *Dougherty v. Milliken*, 163 NY 527, 533, 57 NE 757, 759 (1900); see also *Dufel v. Green*, 84 NY2d 795, 797–98, 647 NE2d 105, 107 (1995); *People v. Miller*, 91 NY2d 372, 379–80, 694 NE2d 61, 65 (1998). It is alleged by defendants the conclusions that plaintiff (decedents) conduct in taking his prescription medications, including opioids, “depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence” of the jury. This court agrees. See *Dougherty v. Milliken*, 163 N. at 533, 57 NE at 759; see also *Dufel v. Green*, 84 NY2d at 797–98, 647 NE2d at 107; *People v. Miller*, 91 NY2d at 379–80, 694 NE2d at 65.

Accordingly, plaintiff’s motion to preclude defense expert, Lloyd R. Saberski, M.D., from proffering his opinion as to whether plaintiff (decedents) conduct in connection with the use of his prescription medications was negligent, careless, grossly negligent, reckless, indifferent to consequences, irrational, impulsive, or otherwise deviated from that of a reasonably prudent person in like circumstances is hereby denied. Again, the plaintiff may cross-examine defendants’ experts or object to testimony that plaintiff’s counsel believes is not based on evidence in the record. (MS#24)

As to plaintiff’s fourth motion (MS#25), for an order setting forth a date, convenient with all parties, to review the trial exhibits, and discuss their admissibility, in accordance

with the Uniform Civil Rules for the Supreme Court. This motion is premature and wholly unnecessary as noted in the opposition. This damages trial is tentatively scheduled for January 8, 2024. There is plenty of time for the parties to meet and confer concerning the marking of trial exhibits. However, in the interests of justice this court will decide this motion as follows; once the parties have successfully picked a jury the parties shall stipulate to meet before the trial start date and mark the exhibits in accordance with the directives in the Uniform Rules. (MS#25)

As to plaintiff's fifth motion MS#26, for an order, pursuant to CPLR §3211(b), to preclude Defendant Hamilton & Church Properties, LLC ("Defendant" or "H&C") and Second Third-Party Defendant Integrity Contracting, Inc ("Integrity") (collectively, "Defendants") from introducing evidence, or arguing to the jury, that Plaintiff (decedent)'s treating physicians were negligent, committed malpractice or were in any manner wrong in their treatment of Plaintiff (decedent) for the injuries caused by Defendant. (MS#26)

It is well established, in order to make a prima facie showing of causation, a plaintiff must generally show that "the defendant's negligence was a substantial cause of the events which produced the injury." *Derdiarian v. Felix Contracting Corp.*, 51 NY2d 308, 315 (1980). The plaintiff need not demonstrate "that the precise manner in which the accident happened, or the extent of his injuries, was foreseeable," but must show the "general risk and character of injuries was foreseeable." *Id.* at 316-17. Additionally, "where the acts of a third person [including plaintiff] intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such case, liability turns on whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence (citations omitted) (emphasis added)."

Id. at 315. "If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus. *Id.* **Determining whether or not an intervening event is a superseding cause depends primarily on foreseeability and that is normally a question of fact for the jury.** See *Santaiti v. Town of Ramapo*, 162 AD3d 921, 927 (2d Dept. 2018) (whether an intervening act is foreseeable or extraordinary under the circumstances generally is for the fact finder to resolve); *Fishman v. Beach*, 237 AD2d 705, 706 (3d Dept. 1997) (whether an act of third party in pushing pedestrian into street in path of oncoming vehicle was an unforeseen intervening cause of harm was a question for jury). The foregoing case law demonstrates that when considering the issue of foreseeability, the jury considers the foreseeability of the acts performed by third persons and not whether the legal theories of negligence or medical malpractice by those third persons have been established. This is because any break in the nexus between a defendant's negligence and a plaintiff's injury that is caused by the act of a third person or plaintiff himself/herself may affect the liability of the defendant. See *Kush, supra* at 33 (question of fact for the jury to determine whether taking of chemicals by a third party was a foreseeable consequence of defendant's failure to secure the chemicals).

Defendant's state they are proffering this evidence not to prove that plaintiff's physicians committed malpractice. Rather such evidence is being proffered for the issue on the foreseeability of the acts committed by third person and/or decedent himself. In turn the plaintiff will proffer that decedent's prescription overdose/misuse was a foreseeable outcome of the ladder fall, as opposed to an intervening/superseding act of

the drug usage and manner-of-prescribing issues that was unforeseeable, this is precisely the type of question that is reserved for a trier of fact. See *Derdiarian, supra* at 315 (“because questions concerning what is foreseeable and what is normal may be subject to varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve.”); see also *Rice v. West 37thGroup, LLC*, 96 AD3d 500, 500-01 (1st Dept. 2012) (“the issue of whether the accidental overdose of prescribed pain medication was foreseeable consequence of the serious injuries suffered by plaintiff’s decedent is a question for the trier of fact.”); *Bikowicz v. Sterling Drug, Inc.*, 161 AD2d 982, 985-86 (3d Dept. 1990) (jury question as to whether illegal refilling of prescriptions by pharmacy at plaintiff’s behest was a foreseeable event absolving defendant physician from liability for prescribing drugs to which plaintiff became addicted).

Most notably, contrary to what plaintiff contends, whether the accidental overdose was foreseeable is appropriate for the jury. In fact, *Rice v. West 37thGroup, LLC*, 96 AD3d 500, 500-01 (1st Dept. 2012), is almost identical to the facts in the present case. In *Rice*, plaintiff (decedent) sustained injuries when he fell from a 15-foot ladder. The Appellate Court affirmed a finding of partial liability on the Labor Law §240 claim. As a result of the injuries sustained from the worksite accident, the decedent began seeing pain management specialists. However, two years after the underlying accident, decedent died and the autopsy ruled the cause of death to be accidental overdose of combined pain medications. Notably, the parties disputed whether the accidental overdose was foreseeable and the Appellate Court deemed the inquiry one that was appropriate for a trier of fact. See *id.* This court declines to limit the opinions of qualified witnesses.

Accordingly, plaintiff's motion for an order, pursuant to CPLR §3211(b), to preclude Defendant Hamilton & Church Properties, LLC ("Defendant" or "H&C") and Second Third-Party Defendant Integrity Contracting, Inc ("Integrity") (collectively, "Defendants") from introducing evidence, or arguing to the jury, that Plaintiff (decedent) 's treating physicians were negligent, committed malpractice or were in any manner wrong in their treatment of Plaintiff (decedent) for the injuries caused by Defendant is hereby denied. Once again, the court notes plaintiff may cross-examine defendants' experts or object to testimony that plaintiff's counsel believes is not based on evidence in the record. (MS#26)

As to plaintiff's sixth motion (MS#27) , for an order to preclude Defendant Hamilton & Church Properties, LLC ("Defendant" or "H&C") and Second Third-Party Defendant Integrity Contracting, Inc ("Integrity") (collectively, "Defendants") and any expert from proffering testimony or expressing an opinion which ascribes an alternative causation theory to the pain management of 2011- 2012 (ie, gym incidents, car accidents, toolbox incidents) leading to plaintiff (decedent)'s wrongful death, and not the accident of 2007. Defendants are entitled to elicit expert opinion testimony regarding the cause of Plaintiff (decedent) 's pain and pain management treatment during the entire five-year period between his 2007 accident and his 2012 overdose and death. Again, this court declines to limit the opinions of qualified witnesses. All proffered opinions are based on facts in evidence because plaintiff's experts opine differently does not warrant preclusion of the different opinion.

Additionally, there is no basis for preclusion of Dr. Saberski or Dr. Shimelman's testimony under the indivisible injury rule. The indivisible injury rule is inapplicable to the particular facts and circumstances in this case and there is no legal support for preclusion

of defense expert testimony under this rule. Notably, the indivisible injury rule provides no specific guidance on preclusion of expert testimony. Rather, the rule permits a finding of joint and several liability among multiple tortfeasors for separate and independent acts of negligence where each tortfeasor's negligence results in a single, inseparable injury; in such a case, each party is responsible for the entire injury because damages cannot be apportioned. See *Ravo by Ravo v. Rogatnick*, 70 NY2d 305, 308 (1987).

There is no basis for preclusion of Dr. Saberski or Dr. Shimelman's testimony under the Frye standard. The opinions of Defendants' experts are based upon facts in the record and their expertise as physicians in the fields of pain management and addiction psychiatry and are supported by peer-reviewed scientific/medical literature. Their conclusions on the issue of causation, while different from the conclusions of plaintiff's experts, are based on scientific principles or procedures that have general acceptance in the medical community; there is nothing "novel" about their anticipated testimony. Defendant in all trials are permitted to rebut the opinions of plaintiffs experts, with the testimony of their own experts this is what happens at a trial. Additionally, it is well established a causation theory that was proffered at a workers compensation hearing separate and apart from this trial is not binding on this court or this trial and this court declines to limit trial theories based on this contention. A conclusion reached by an administrative agency, characterized as an ultimate fact or a mixed question of fact and law, shall not be given preclusive effect in a subsequent lawsuit. See, e.g., *Akgul v. Prime Time Transportation*, 293 A. 2d 631 (2d Dept. 2002). Moreover, there is no evidence in the Worker's Compensation Board records that any formal fact finding proceeding or hearing was held on the issue of payment of Plaintiff (decedent) 's medical bills.

Moreover, plaintiff will suffer no prejudice as a result of the defense's expert testimony on causation. While plaintiff may disagree with Dr. Saberski's and Dr. Shimelman's opinions regarding the cause of his pain and pain management treatment in 2011-2012, plaintiff is free to cross-examine Defendants' experts at trial, and adduce different opinions through their own experts. *People v. Cronin*, 60 NY2d at 432. Issues of credibility just be left for the jury to determine. See *People v. Negron*, 91 NY2d 788, 792 (1998); *People v. Drake*, 7 NY3d 28, 33 (2006). Once again, the court notes plaintiff may cross-examine defendants' experts or object to testimony that plaintiff's counsel believes is not based on evidence in the record.

Accordingly, plaintiff's motion , for an order to preclude Defendant Hamilton & Church Properties, LLC ("Defendant" or "H&C") and Second Third-Party Defendant Integrity Contracting, Inc ("Integrity") (collectively, "Defendants") and any expert from proffering testimony or expressing an opinion which ascribes an alternative causation theory to the pain management of 2011- 2012 (ie, gym incidents, car accidents, toolbox incidents) leading to plaintiff (decedent)'s wrongful death, and not the accident of 2007 is hereby denied in its entirety, for the reasons stated above. (MS#27)

As to plaintiff's seventh motion (MS#28), for an order to preclude Defendant Hamilton & Church Properties, LLC ("Defendant" or "H&C") and Second Third-Party Defendant Integrity Contracting, Inc ("Integrity") (collectively, "Defendants") and any experts from proffering testimony or expressing any opinion that Plaintiff (decedent) 's pain was solely related to preexisting degeneration, a nontraumatic degenerative cause or etiology, and not the accident. This court declines to limit the opinions of qualified witnesses. The opinions being proffered by defendants as to these issues are based on

fact in evidence as well as medical records in evidence. Plaintiff will suffer no prejudice as a result of the defense's expert testimony. While plaintiff may disagree with the experts testimony, plaintiff is free to cross-examine Defendants' experts at trial, and adduce different opinions through their own experts. *People v. Cronin*, 60 NY2d at 432. Issues of credibility just be left for the jury to determine. See *People v. Negron*, 91 NY2d 788, 792 (1998); *People v. Drake*, 7 NY3d 28, 33 (2006). Once again, the court notes plaintiff may cross-examine defendants' experts or object to testimony that plaintiff's counsel believes is not based on evidence in the record.

Accordingly, plaintiff's motion for an order to preclude Defendant Hamilton & Church Properties, LLC ("Defendant" or "H&C") and Second Third-Party Defendant Integrity Contracting, Inc ("Integrity") (collectively, "Defendants") and any experts from proffering testimony or expressing any opinion that Plaintiff (decedent) 's pain was solely related to preexisting degeneration, a nontraumatic degenerative cause or etiology, and not the accident is hereby denied in its entirety, for the reasons stated above. (MS#28)

As to plaintiff's eighth motion (MS#29), for an order pursuant to CPLR §3211(b) to preclude Defendant Hamilton & Church Properties, LLC from introducing, or arguing to the jury, evidence of Plaintiff (decedent) 's alcohol use disorder for the purpose of showing (1) it predisposed Plaintiff (decedent) to overusing prescription drugs. This Court declines, at this time, to limit experts qualified opinions. The opinions being proffered by defendants as to these issues are based on medical records in evidence. While plaintiff may disagree with, plaintiff is free to cross-examine Defendants' experts at trial, and adduce different opinions through their own experts. *People v. Cronin*, 60 NY2d at 432. Issues of credibility just be left for the jury to determine. See *People v. Negron*, 91 NY2d 788, 792 (1998);

People v. Drake, 7 NY3d 28, 33 (2006). Once again, the court notes plaintiff may cross-examine defendants' experts or object to testimony that plaintiff's counsel believes is not based on evidence in the record.

Accordingly, plaintiff's motion, for an order pursuant to CPLR §3211(b) to preclude Defendant Hamilton & Church Properties, LLC from introducing, or arguing to the jury, evidence of Plaintiff (decedent) 's alcohol use disorder for the purpose of showing (1) it predisposed Plaintiff (decedent) to overusing prescription drugs is hereby denied in its entirety, for the reasons stated above. (MS#29)

This constitutes the Order of the Court on this Motion in Limine.

DATED: October 11, 2023
Brooklyn, New York

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ

Hon. Richard Velasquez, JSC

OCT 11 2023