Gonzalez v Silverman
2023 NY Slip Op 34980(U)
November 2, 2023
Supreme Court, Nassau County
Docket Number: Index No. 611165/20
Judge: Erica L. Prager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: ERICA L. PRAGER, J.S.C.

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MARCO GONZALEZ, deceased, by CAROL GONZALEZ, as Executor of his Estate, and CAROL GONZALEZ, individually,

Plaintiffs,

-against-

ROBERT SILVERMAN, M.D., EVAN SCHWARZWALD, D.O., LONG ISLAND JEWISH MEDICAL CENTER, and PROHEALTH CARE,

Defendant.

---x

IAS/TRIAL PART 18

Motion Seq.: 001, 002, 003
Submission Date: 7/11/23

Index No.: 611165/20

DECISION AND ORDER

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GONZALEZ v. SILVERMAN
Index No.: 611165-20

Upon the foregoing papers, the motion of Defendants Robert Silverman, M.D. and Long Island Jewish Medical Center (*Mot. Seq. 001*) pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them, the motion of Defendant Evan Schwarzwald, D.O. (*Mot. Seq. 002*) pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against him, and the motion of Defendant Prohealth Care Associates LLP, s/h/a Prohealth Care ("Prohealth") (*Mot. Seq. 003*) pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it, are consolidated for disposition and determined as set forth hereinafter.

Background and facts

Marco Gonzalez (hereinafter "the decedent") began treating with Defendant Dr. Evan Schwarzwald ("Dr. Schwarzwald"), a cardiologist and internist, on September 28, 2015 (NYSCEF Doc. Nos. 47, 64). The decedent's history was significant for, inter alia, hypertension, which was being treated with Lisinopril. Dr. Schwarzwald continued to treat the decedent until the time of the decedent's death.

On October 23, 2018, the decedent went to Dr. Schwarzwald for an annual physical, and made no complaints at that time. His blood pressure and EKG were within normal limits. Dr. Schwarzwald noted that the decedent exercised/stretched 5 times per week. Plaintiff Carol Gonzalez ("Plaintiff") testified that the decedent walked for exercise every other day for approximately an hour and would do stretching exercises and use weights (NYSCEF Doc. No. 44, pages 54-55).

On December 28, 2018, at 9:58 a.m., the decedent called Dr. Schwarzwald's office and informed a staff member that he had a "a heart burn feel in the morning for the past week," and he was not sure what it was. At 10:38 a.m., the decedent told a staff member that he was having chest pressure/slight tightness that started around 4 a.m. accompanied by mild shortness of breath for the last two weeks. He denied dizziness or other symptoms, and stated it felt like "heartburn" that went away later each morning.The staff member advised the decedent to go to the Emergency Room ("ER") at Defendant Long Island Jewish Medical Center ("LIJ").

At 11:42 a.m. on December 28, 2018, the decedent presented to the ER at LIJ with complaints of two weeks of intermittent burning chest pain in the mornings, which was more intense that day with pain radiating to the left side of his chest and shortness of breath, which was relieved upon sitting upright.The decedent's past medical history was noted to be significant for hypertension, deep vein thrombosis, pulmonary embolism, coronary artery disease/right carotid endarterectomy in May 2017, traumatic splenectomy, and prostate cancer. His vital signs at triage were blood pressure of 139/59, heart rate of 67, respirations of 16.

Physician Assistant Mary Gorey ("PA Gorey") took a history from the decedent and examined him (NYSCEF Doc. No. 43). PA Gorey treated the decedent in the ER in conjunction with attending physician Defendant Dr. Robert Silverman ("Dr. Silverman"). The decedent told PA Gorey that he would wake up at around 4:00 a.m. each morning for the last two weeks with sharp chest pain that lasted one minute. He told PA Gorey he was able to complete his exercise routine, which included push-ups, without chest pain. PA Gorey noted that the decedent denied dizziness, shortness of breath, diaphoresis, or syncope. On cardiac exam, the decedent had a normal rate, and regular rhythm was present with no murmurs, rubs, or gallops. Breath sounds were clear and equal bilaterally. An EKG done at 1:47 p.m. showed normal sinus rhythm. Troponin was drawn at 12:50 p.m. The result was 17, which fell in the "indeterminate" range, so the test was repeated. The result of the second test was also 17, which, according to PA Gorey, indicated there were no acute changes, meaning it did not appear the decedent was having an acute cardiac event, such as a heart attack (NYSCEF Doc. No. 46, page 46).While in the ER, the decedent was continuously placed on a cardiac monitor, which found no evidence of an arrhythmia (NYSCEF Doc. No. 43, page 75).

Dr. Silverman's shift ended at 4:00 p.m., so he was not present when the decedent was discharged. Dr. Silverman's differential diagnosis included acute cardiac syndrome, atypical chest pain not related to myocardial ischemia, and gastrointestinal pain. PA Gorey noted at 5:30 p.m. that the decedent felt well and denied any chest pain or shortness of breath. An EKG repeated at 5:40 was normal. PA Gorey spoke to a doctor at Prohealth, who indicated it was "ok" to discharge the decedent from LIJ. PA Gorey reviewed the discharge instructions and results with the decedent. The final impression noted was chest pain. The plan was for the decedent to follow up with his primary doctor/cardiologist in one to two days, as well as for an outpatient stress test to be conducted. The decedent was instructed to return to the ER for any persistent/worsening or new symptoms, chest pain, shortness of breath, palpitations, dizziness or any concerning symptoms. The decedent was discharged from LIJ at 6:18pm.

Plaintiff testified that after the December 28, 2018 ER visit, the decedent continued his daily walks and exercises, and his nightly complaints continued through the time he next saw Dr. Schwarzwald in his office, although each episode lasted a little longer (NYSCEF Doc. No. 44, pages 74-75).

On January 2, 2019, the decedent presented to Dr. Schwarzwald and indicated he had been experiencing chest pain, rated as a 5/10, which occurred between 4 a.m. and 6 a.m. every day since the beginning of December; lasting 1-2 minutes; and which was relieved upon standing and moving around. His cardiac and lung exam were within normal limits. An EKG had non-specific ST changes. A venous duplex revealed no deep vein thrombosis in either lower extremity. Dr. Schwarzwald testified that his examination was essentially the same as his prior examinations and he did not believe the decedent had an arrhythmia at that time. A stress test was performed on January 9, 2019, and according to Dr. Schwarzwald the results were "Excellent. Normal." The stress

test revealed no evidence of myocardial injury or ischemia at the level of exercise achieved. Dr. Schwarzwald testified that the fact that the symptoms only occurred at night when lying down was more suggestive of a gastrointestinal cause than a cardiac cause.

The decedent returned to see Dr. Schwarzwald on January 14, 2019. The same history was noted, as were the complaints of chest pain or discomfort. The decedent indicated that the pain subsided if he took deep breaths. Dr. Schwarzwald testified that the EKG and physical exam were unchanged from prior visits. Dr. Schwarzwald noted that the decedent's symptoms were atypical for ischemic heart disease, noting that he had had a normal stress test and normal lower extremity venous doppler. The plan was for the decedent to have a CT angiogram, be referred to a gastroenterologist, and to take activated charcoal. The decedent was to return in two weeks to discuss the test results. Dr. Schwarzwald's impression was that the symptoms were atypical, but not cardiac in nature. He did not consider an arrhythmia and did not consider ordering a heart monitor at that time.

On January 18, 2019, at 2:23 a.m., the decedent was brought in to LIJ by EMS in cardiac arrest after Plaintiff found him face down on the floor of their bedroom. Attempts to resuscitate the decedent were unsuccessful, and the decedent was pronounced dead at 2:59 a.m. An autopsy revealed that the decedent "probably experienced a cardiac arrhythmia arising in his enlarged heart, which in turn reflected long-standing systemic hypertension." The cause of death was listed as "probable cardiac arrhythmia, due to, or as a consequence of cardiomegaly with myocardial hypertrophy and fibrosis, due to, or as a consequence of hypertensive cardiovascular disease."

On October 13, 2020, Plaintiff, individually and as executor of the decedent's estate, commenced this action to recover damages for medical malpractice and wrongful death against Dr. Silverman, LIJ (together the "LIJ defendants"), Dr. Schwarzwald, and Prohealth (NYSCEF Doc. No. 1).

The instant motions

It is well established that summary judgment may only be granted when it is clear that no triable issue of fact exists (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). A party seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury" (*Kim v N. Shore Long Is. Jewish Health Sys., Inc.*, 202 AD3d 653, 655 [2d Dept 2022] [internal quotation marks omitted]; *see Hayden v Gordon*, 91 AD3d 819, 820 [2d Dept 2012]). "On a motion for

summary judgment dismissing a cause of action alleging medical malpractice, the defendant bears the initial burden of establishing that there was no departure from good and accepted medical practice or that any alleged departure did not proximately cause the plaintiff's injuries" (*Carradice v Jamaica Hosp. Med. Ctr.*, 198 AD3d 863 [2d Dept 2021]; *see Mendoza v Maimonides Med. Ctr.*, 203 AD3d 715 [2d Dept 2022]). Once a defendant has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden (*see Kim v N. Shore Long Is. Jewish Health Sys., Inc.*, 202 AD3d at 655; *Dixon v Chang*, 163 AD3d 525, 527 [2d Dept 2018]). "General and conclusory allegations of medical malpractice, . . . unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician's summary judgment motion" (*Myers v Ferrara*, 56 AD3d 78, 84 [2d Dept 2008]; *see Kim v N. Shore Long Is. Jewish Health Sys., Inc.*, 202 AD3d at 655). "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" (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [internal quotation marks omitted]; *see Jacob v Franklin Hosp. Med. Ctr.*, 188 AD3d 838, 840 [2d Dept 2020], *affd*, 36 NY3d 1102 [2021]).

<u>The LIJ defendants' motion</u>

The LIJ defendants move for summary judgment dismissing the complaint insofar as asserted against them, contending that the care and treatment rendered by them on December 28, 2018 was within the standards of good and accepted medical practice and did not proximately cause the decedent's death on January 18, 2019. In opposition, Plaintiff contends that the LIJ defendants failed to establish their prima facie entitlement to summary judgment, since, inter alia, the affirmations of the LIJ defendants' experts submitted in support of their motion are conclusory. Plaintiff further contends that in any event, she has raised triable issues of fact through the affirmation of her expert, which requires a denial of the LIJ defendants' motion.

In the Bill of Particulars, Plaintiff alleges that the LIJ defendants were negligent, inter alia, in failing to: formulate a differential diagnosis; promptly and properly diagnose the decedent's condition; diagnose an arrhythmia; order continuous cardiac monitoring; properly document the decedent's chart; admit the decedent; perform cardiac testing; promptly obtain consultations; monitor the decedent's condition; prevent exacerbation of the decedent's condition; recognize the significance of the decedent's blood work; and order serial cardiac markers.

In support of their motion, the LIJ defendants have submitted, inter alia, transcripts of the deposition testimony of Dr. Silverman and PA Gorey, the medical records from LIJ and Prohealth, and affirmations of Dr. Robert Meyer, an emergency department attending who is board certified in emergency medicine (NYSCEF Doc. No. 48), and Dr. Malcolm Phillips , an attending cardiologist, who is board certified in internal medicine and cardiovascular diseases (NYSCEF Doc. No. 48).

Dr. Meyer and Dr. Phillips, having reviewed the pertinent records and legal documents in the case, opine to a reasonable degree of medical certainty, that all of the care rendered by the LIJ defendants was in accordance with the standards of good and accepted medical practice and did not cause or contribute to the decedent's death. According to Dr. Meyer and Dr. Phillips, the ER staff obtained a thorough and proper history from the decedent, performed a proper physical examination, which was essentially normal, ordered and performed all proper and indicated diagnostic testing, and properly acted upon all of the information obtained.

Both Dr. Meyer and Dr. Phillips personally reviewed the EKGs performed at the hospital and it was their opinion that the results were normal and not indicative of arrhythmia or imminent risk of sudden cardiac death. Moreover, in accordance with the standard of care, PA Gorey repeated the troponin to evaluate for any concerning trends in the results and confirmed that there were no dynamic changes and appropriately ruled out acute cardiac syndrome. It was Dr. Meyer's and Dr. Phillips' opinion that the troponin results were not indicative of increased risk for sudden cardiac death in light of the fact that the patient was pain free and the EKG did not show signs of ischemia.

According to Dr. Phillips, there was no reason or basis for the ER personnel or Dr. Silverman to suspect that the decedent was at risk for arrhythmia or sudden cardiac death based upon his presentation or findings on December 28, 2018, and he was properly discharged with appropriate follow up in place. It was further Dr. Phillips' opinion that given the decedent's presenting complaints of chest pain and shortness of breath and the absence of evidence of congestive heart failure, rhythm problems, ischemia, myocardial infarction, dizziness, palpitations, or syncope, the decedent was not at imminent risk for arrhythmia or sudden cardiac death and, therefore, could safely be discharged. Dr. Phillips noted that at the decedent's last visit with Dr. Schwarzwald on October 23, 2018, there were no risk factors or warning signs of arrhythmia and his condition was stable.

It was further Dr. Meyer's and Dr. Phillips' opinion that it was in accordance with the standard of good and accepted medical practice to discharge the decedent after consultation with his cardiologist's office and with a proper discharge plan and instructions for follow up with that doctor in place, given that the decedent had no complaints, was feeling well, and his EKGs, which were obtained at appropriate intervals, were normal and showed nothing that would lead to a suspicion for arrhythmia or imminent risk of sudden cardiac death. It was their opinion that there were no tests that needed to be ordered to be done while the decedent was a patient in the ER prior to discharging him that were not done based upon his presentation.

Dr. Meyer's and Dr. Phillips' also opined, within a reasonable degree of medical certainty, that the decision to discharge the decedent to the care of his private physician was entirely proper and did not cause the decedent's death. According to Dr. Phillips and Dr. Meyers, the timely follow up that was in place prior to the decedent's discharge, obviated the need for his admission to the hospital, which would have been to conduct a stress test. There was no medical reason to keep the

decedent in the hospital for that test, which could easily, safely, and appropriately be done in the private doctor's office, and which was done shortly after he left LIJ.

Given the length of time that passed from the time of the ER visit to the time of death, it was Dr. Phillips' and Dr. Meyers' opinion within a reasonable degree of medical certainty that the decision to discharge the decedent from the ER on December 28, 2018, did not cause his death. Admission to LIJ for a stress test would have yielded the same results as the January 9, 2019 stress test done by Dr. Schwarzwald, and would not have revealed anything that would have changed the outcome in this case.

Moreover, Dr. Meyer opined that the decedent was properly on continuous cardiac monitoring in the ER prior to being discharged and no arrhythmia was observed. Given that appropriate and timely follow up was confirmed to have been in place prior to discharging the decedent, Dr. Meyer opined that there was no need for the decedent to be seen by a cardiologist in the hospital prior to discharge and he was safe to be discharged to the care of his private cardiologist at that time. Moreover, based upon the length of time that passed between the ER visit and the decedent's death, as well as the test results obtained by Dr. Schwarzwald at the follow up visits, and the autopsy findings, it was Dr. Meyer's opinion, within a reasonable degree of medical certainty, that if the decedent had been admitted to LIJ on December 28, 2018, for testing, the results would not have revealed an imminent risk of sudden cardiac death and he would have been released to the care of his private doctor. A such, it was Dr. Meyer's opinion that the decision to discharge the decedent did not cause his death.

Contrary to Plaintiff's contention, the affirmations of Dr. Meyer and Dr. Phillips did not ignore reports of the decedent's complaints of chest pain documented in the medical chart. Dr. Silverman and PA Gorey both testified that the complaints of chest pain documented in the medical chart did not mean that the decedent was experiencing chest pain at that moment, but rather that the decedent indicated he had a complaint of chest pain at some point in time (NYSCEF Doc. Nos. 45, page 42-43; 46, page 28). In addition, the affirmations of Dr. Meyer and Dr. Phillips addressed the allegations, as set forth in the bill of particulars, that the LIJ defendants failed to consult a cardiologist and to admit the decedent (*see Bacalan v St. Vincents Catholic Med. Centers of New York*, 179 AD3d 989, 992 [2d Dept 2020]). Through their submissions, the LIJ defendants have established that they did not depart from accepted medical practice and that the care and treatment they rendered was not a proximate cause of the decedent's injuries (*see Mendoza v Maimonides Med. Ctr.*, 203 AD3d at 715).

"Where a defendant meets its prima facie burden as to both elements of a medical malpractice action, 'the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the departure element and the causation element'" (*Lamalfa v New*

York Methodist Hosp., 202 AD3d 665, 665-666 [2d Dept 2022], quoting *Stukas v Streiter*, 83 AD3d 18, 25 [2011]).

In opposition, Plaintiff submits the affirmation of a New York State licensed physician, board certified in internal medicine and sub-certified in cardiovascular disease, whose name has been redacted (NYSCEF Doc. No. 108). It was the expert's opinion, within a reasonable degree of medical certainty, that the decedent should have been admitted to LIJ, a cardiac consult should have been ordered, and a workup should have been performed for coronary artery disease and a potential arrhythmia. According to the expert, if the decedent had been admitted, he would have undergone a stress test promptly and have been placed on continuous cardiac monitoring. While the stress test would not have revealed coronary artery disease, it was the expert's opinion, with a reasonable degree of medical certainty, that continuous cardiac monitoring would have revealed an arrhythmia which could have been treated with surgical intervention and the placement of a defibrillator. Even if this opinion can be considered sufficient to raise a triable issue of fact as to whether it was a departure for the LIJ defendants to discharge the decedent on December 28, 2018, the expert's affirmation fails to raise a triable issue of fact as to causation. With respect to causation, the expert states: "[t]he failure to perform a proper workup was a departure from good and accepted medical practice. That failure was a cause of [the decedent's] continued complaints and ultimate passing on January 18, 2019." The expert's opinion is conclusory, speculative, and unsupported by competent evidence tending to establish proximate causation (*see Nisevich v Shorefront Ctr. for Rehabilitation and Nursing Care*, 216 AD3d 981, 983 [2d Dept 2023]; *see also Palazzolo v Green*, 189 AD3d 1056, 1059 [2d Dept 2020] [plaintiff failed to raise a triable issue of fact as to proximate causation because the conclusory and speculative opinion of the plaintiff's expert failed to explain how stopping antiplatelet therapy proximately caused the decedent's injuries]), since he or she fails to explain how the LIJ defendants discharge of the decedent on December 28, 2018, with instructions for the decedent to follow up with his private cardiologist for further testing within one to two days proximately caused the decedent's death on January 18, 2019.

Accordingly, Plaintiff has failed to rebut the LIJ defendants' *prima facie* showing.

Furthermore, dismissal of the direct claims of medical malpractice and wrongful death mandates dismissal of the derivative cause of action (*see Wijesinghe v Buena Vida Corp*, 210 AD3d 824, 826 [2d Dept 2022]).

Dr. Schwarzwald's and Prohealth's motions

Dr. Schwarzwald moves for summary judgment dismissing the complaint insofar as asserted against him contending that all of the care and treatment rendered by him was entirely appropriate under the circumstances and that no action or inaction on his part was the proximate cause of the injuries alleged. Prohealth separately moves for summary judgment arguing that there are no direct

allegations of negligence against it, only vicarious liability based on its employment of Dr. Schwarzwald. Plaintiff opposes both motions, contending that Dr. Schwarzwald's failure to formulate a differential diagnosis for the decedent on January 2, 2019, allowed his arrhythmia to remain undiagnosed.

In the Bill of Particulars, Plaintiff contends that Dr. Schwarzwald and Prohealth were negligent, inter alia, in failing to determine the cause of plaintiff's chest pain; in failing to order cardiac monitoring; in failing to perform an echocardiogram; in failing to promptly obtain consultations; in negligently interpreting the tests and procedures performed; and in failing to rule out an arrhythmia.

In support of their motions, Dr. Schwarzwald and Prohealth submit, inter alia, the affirmation of Dr. Stanley Schneller, a board certified cardiologist (NYSCEF Doc. No. 54). Dr. Schneller, having reviewed the pertinent records and legal documents in the case, opines to a reasonable degree of medical certainty, that the decedent died of sudden cardiac death that could not have been predicted or prevented. According to Dr. Schneller, it was likely that the decedent's first arrhythmia was a fatal arrhythmia. The decedent had no signs or symptoms of arrhythmia, such as palpitations, dizziness, and syncope, prior to his death.

Dr. Schneller opined that on each and every office visit, Dr. Schwarzwald appropriately examined the patient, took an appropriate medical history, appropriately and timely ordered lab work, cardiac and radiological testing, and medications, ordered appropriate consultations when indicated, and appropriately evaluated and treated the decedent. Dr. Schneller noted that on the nuclear stress test on January 9, 2019, the decedent was able to do 11 minutes, with a maximum heart rate of 138. There was no evidence of arrhythmia during this testing, and the very purpose of the study is to stress the heart and evaluate the response. According to Dr. Schneller, the decedent passed the stress test with "flying colors." In addition, every time the decedent was on a cardiac monitor or had an EKG done, there was no evidence of an arrhythmia. Dr. Schneller opined that no further cardiac monitoring was indicated and would not have prevented the sudden cardiac death in this case, and no further cardiac testing was indicated based upon the complaints made by the patient and the results of the extensive cardiac work-up performed. Based upon the studies performed, there was no reason to suspect an imminent cardiac death. There was no structural disease found, no coronary artery disease found, and after a normal nuclear stress test, sudden arrhythmic death would not be predicted.

Dr. Schneller further noted that arrhythmia was not diagnosed on autopsy.The report indicated "probably arrhythmia," because arrhythmia cannot be diagnosed on an autopsy. The autopsy report found no evidence of coronary artery disease. The only finding was the left ventricular hypertrophy. This finding is very common in patients with long-standing high blood pressure and

there is no treatment for this condition other than good blood pressure control. According to Dr. Schneller, Dr. Schwarzwald appropriately treated the decedent's blood pressure.

Dr. Schneller's affirmation was sufficient to demonstrate Dr. Schwarzwald's and Prohealth's prima facie entitlement to judgment as a matter of law (*see Valenti v Gadomski*, 203 AD3d 783 [2d Dept 2022]; *N.S. v Freedman*, 198 AD3d 702, 703 [2d Dept 2021]).

In opposition, Plaintiff has raised triable issues of fact through the affirmation of a New York State licensed physician, board certified in internal medicine and sub-certified in cardiovascular disease (NYSCEF Doc. No. 111), who opined, based upon his or her review of, inter alia, the decedent's medical records, that given the decedent's complaints and his history of longstanding hypertension and known left ventricular hypertrophy, an arrhythmia should have been included in Dr. Schwarzwald's differential diagnosis on January 2, 2019 (*see Kielb v Bascara*, 217 AD3d 756, 757 [2d Dept 2023]). According to the expert, with that diagnosis in the differential, a Holter monitor should have been given to the decedent on January 2, 2019, and it was the expert's opinion with a reasonable degree of medical certainty that the arrhythmia would have been diagnosed within a matter of days, even before the stress test was conducted on January 9, 2019. Had the diagnosis been made, the decedent would have been referred for a defibrillator and had a defibrillator been implanted, it would have prevented the decedent's cardiac arrest and death on January 18, 2019.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2019] [citation omitted]). Here, Plaintiff's expert disagreed with Dr. Schneller's opinion that the arrhythmia could not have been predicted or prevented, given that the complaints which lead the decedent to seek treatment at LIJ, as well as with Dr. Schwarzwald, i.e., chest pain and shortness of breath, were signs of arrhythmia. The expert further disagreed that an arrhythmia would present with medical complaints such as palpitations, dizziness, and syncope, since symptoms vary widely and the absence of these symptoms did not rule out an arrhythmia. Moreover, the fact that the EKG and stress test did not demonstrate arrhythmia did not rule it out since they were only conducted for brief periods of time and it might not be found in that short time span. Furthermore, the expert opined, the decedent was not monitored during the time of day when he was experiencing symptoms. "That the experts disagreed presented a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution" (*Mehtvin v Ravi*, 180 AD3d 661, 664 [2d Dept 2020] [internal quotation marks omitted]).

As such, the expert's affirmation was sufficient to raise triable issues of fact as to whether Dr. Schwarzwald and Prohealth departed from accepted standards of practice between January 2, 2019, and January 18, 2019, by failing to order a Holter monitor, and whether this failure proximately caused the decedent's death (*see Cox v Herzog*, 192 AD3d 757, 759 [2d Dept 2021]; *Hutchinson v New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1040 [2d Dept 2019]).

To the extent the pleadings can be read as asserting claims against Prohealth directly, Plaintiff concedes that she is only asserting that Prohealth is vicariously liable for the actions of Dr. Schwarzwald. By establishing the existence of triable issues of fact regarding the liability of Dr. Schwarzwald, Plaintiff has also raised triable issues of fact regarding the vicarious liability of Prohealth (*see Vichlenski v Schwartz*, 201 AD3d 773, 775 [2d Dept 2022]). However, as Dr. Schwarzwald and Prohealth contend, despite alleging in the bill of particulars that malpractice occurred between May 16, 2017, and January 18, 2019, Plaintiff's expert only alleges malpractice between January 2, 2019, and January 18, 2019. As such, Plaintiff has abandoned any claims for malpractice occurring prior to January 2, 2019 (*see 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 762 [2d Dept 2019]; *Faith v Town of Goshen*, 167 AD3d 986, 987 [2d Dept 2018]).

Accordingly, it is

ORDERED that the motion of Defendants Robert Silverman, M.D. and Long Island Jewish Medical Center for summary judgment dismissing the complaint insofar as asserted against them (*Mot. Seq. 001*) is **GRANTED**; and it is further,

ORDERED that the motion of Defendant Evan Schwarzwald, D.O. for summary judgment dismissing the complaint insofar as asserted against him (*Mot. Seq. 002*) is **GRANTED** with respect to allegations of medical malpractice occurring between May 16, 2017, and January 1, 2019, and the motion is otherwise **DENIED**; and it is further,

ORDERED that the motion of Defendant Prohealth Care Associates LLP, s/h/a Prohealth Care ("Prohealth") for summary judgment dismissing the complaint insofar as asserted against it (*Mot. Seq. 003*) is **GRANTED** with respect to allegations of medical malpractice occurring between May 16, 2017, and January 1, 2019, and is **DENIED** with respect to claims of vicarious liability for the conduct of Evan Schwarzwald, D.O. between January 2, 2019, and January 18, 2019.

ORDERED that all applications not specifically addressed herein are **DENIED**.

This shall constitute the Decision and Order of the Court.

Dated: November 2, 2023
Mineola, NY, 11501

E N T E R:

HON. ERICA L. PRAGER, J.S.C.

ENTERED
Nov 03 2023
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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