

Casazza v Poughkeepsie Crossings, LLC
2023 NY Slip Op 35307(U)
February 16, 2023
Supreme Court, Dutchess County
Docket Number: Index No. 2018-53505
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

CAROL CASAZZA, Deceased, by and through
CHERYL WINTERHALT, as Executrix of the Estate
of CAROL CASAZZA,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 2018-53505

POUGHKEEPSIE CROSSINGS, LLC,
POUGHKEEPSIE CROSSINGS, LLC d/b/a THE
PINES AT POUGHKEEPSIE CENTER FOR
NURSING AND REHABILITATION, THE PINES
AT POUGHKEEPSIE CENTER FOR NURSING
AND REHABILITATION and NATIONAL
HEALTHCARE ASSOCIATES INC.,

Motion Sequences: 3, 4, 5, 6, 7

Defendants.

The following papers were read on Defendants' three motions seeking *in limine* relief (Motion Seq. Nos. 3, 4, and 5), as well as Plaintiff's two motions, the first seeking *in limine* relief (Motion Seq. No. 6) and the second seeking a consolidated trial of liability and damages (Motion Seq. No. 7):

<u>Document:</u>	<u>NYSCEF Doc. No(s):</u>
NOTICE OF MOTION – Seq. #3.....	71
AFFIRMATION IN SUPPORT	72
EXHIBITS A–D.....	73–76
 AFFIRMATION IN OPPOSITION.....	 96
EXHIBITS A–B.....	97–98
 NOTICE OF MOTION – Seq. #4.....	 77
AFFIRMATION IN SUPPORT	78
EXHIBITS A–D.....	79–82

AFFIRMATION IN OPPOSITION.....	99
EXHIBITS A-E ¹	100-104
NOTICE OF MOTION – Seq. #5.....	83
AFFIRMATION IN SUPPORT	84
EXHIBITS A-C	
AFFIRMATION IN OPPOSITION.....	105
EXHIBITS A-B.....	106-107
NOTICE OF MOTION – Seq. #6.....	92
AFFIRMATION IN SUPPORT	93
AFFIRMATION IN OPPOSITION.....	109
EXHIBIT A.....	110
NOTICE OF MOTION – Seq. #7.....	94
AFFIRMATION IN SUPPORT	95
AFFIRMATION IN OPPOSITION.....	108

This is an action for alleged nursing home neglect/abuse and wrongful death while Decedent, Carol Casazza, was a resident at Defendant nursing home facility (“The Pines”) from October 31, 2016 through November 27, 2016. Plaintiff commenced this action on November 6, 2018, asserting violations under Public Health Law §§ 2801-d and 2803-c, as well as claims for negligence, gross negligence and wrongful death.

A trial on liability only is scheduled to commence on February 27, 2023. Although the Court’s Part Rules state that motions *in limine* seeking to exclude potential evidence must generally be filed so as to be returnable not less than 30 days prior to the commencement of trial, on January 27, 2023 the Court granted the parties an opportunity to file such motions not later than February 3, 2023, with a return date of February 13, 2023. The Court received five motions prior to said return date. The following are the Court’s determinations with respect to each such motion.

Motion Seq. #3: Defendants’ Motion In Limine Seeking to Preclude Certain Photographs Allegedly Depicting Plaintiff’s Decedent

Defendants move for an order precluding the introduction of four photographs allegedly depicting certain skin injuries suffered by Decedent while in Defendants’ care.² Defendants argue that these photographs appear to show injuries other than the single pressure ulcer on Decedent’s

¹ The exhibits contain an Affidavit from the Plaintiff at Exhibit 102.

² While Defendants appear to have attached a duplicate copy of their Exhibit D in place of the Exhibit C, which Defendants indicated were the photographs, the Court disagrees with Plaintiff’s argument that this omission is, by itself, fatal to the motion. Moreover, although Plaintiff has supplied copies of the photographs as her opposition Exhibit A, a viewing of the photographs is not essential to the Court’s determination of this motion.

coccyx/sacral area set forth in Plaintiff's Verified Bill of Particulars; and, as a result, these photographs should be precluded from being offered into evidence at trial because their probative value as to said pressure ulcer is heavily outweighed by the likelihood of confusing and prejudicing the jurors with depictions of different injuries.

In opposition, Plaintiff argues that the photographs were taken at Vassar Brothers Medical Center ("VBMC") the day following Decedent's stay at The Pines; that they were kept as part VBMC's medical records for Decedent; and that they are relevant to Plaintiff's claims of Defendants' violations of the New York Public Health Law and implementing regulations insofar as they depict Decedent's physical condition shortly after leaving The Pines.

As the Court previously stated in this matter:

The basis for liability under the [Public Health Law] is neither deviation from accepted standards of medical practice nor breach of a duty of care. Rather, it contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule.

Decision and Order dated March 16, 2022 (NYSCEF Doc. No. 67) (*quoting Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation*, 147 AD3d 739, 741 [2d Dept 2017]).

More specifically, Public Health Law §2801-d provides, in relevant part:

Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation . . . For the purposes of this section, "injury" shall include, but not be limited to, physical harm to a patient.

Upon a finding that a patient has been deprived of a right or benefit and that said patient has been injured as a result of said deprivation, and unless there is a finding that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient, compensatory damages shall be assessed in an amount sufficient to compensate such patient for such injury

Public Health Law §2801-d(1)–(2).

As Plaintiff's Verified Complaint and Verified Bill of Particulars both allege violations of this provision of the Public Health Law, and as the photographs are said to depict physical harm to Decedent that she suffered at The Pines, the Court finds that the probative value of the photographs is not so slight in relation to their potential to prejudice the minds of the jurors that

they should be precluded on that basis. *D'Andraia v Pesce*, 103 AD3d 770 [2d Dept 2013]. Accordingly, it is hereby

ORDERED that Defendants' motion *in limine* (Motion Seq. #3) seeking the preclusion of the four photographs e-filed as NYSCEF Doc. No. 97 is DENIED for the reasons set forth above.³

Motion Seq. #4: Defendants' Motion In Limine Seeking to Preclude Notes Made by Plaintiff Regarding Decedent's Care

In their second motion *in limine*, Defendants move for an order precluding certain notes written by Plaintiff regarding Decedent's alleged treatment at The Pines from being admitted into evidence. Defendants argue that these documents and their contents should be precluded because they would either be impermissibly cumulative or constitute inadmissible hearsay.

In her opposition, Plaintiff argues that the notes are admissible because they constitute her "Account" of the Decedent's treatment at The Pines, at least some of which may have been recorded contemporaneously with the reported events. A portion of the notes is asserted to have been co-authored or co-reported by Decedent's husband, Raymond Casazza. The Court notes that Plaintiff's opposition submissions are not fully clear as to which portions of Plaintiff's "Account," if any, represent information recorded contemporaneously by Plaintiff, versus what portions may have been "completed following the decedent's discharge and passing." See Affirmation of Levi Lipton dated February 8, 2023 (NYSCEF Doc. No. 99) at ¶¶ 8–10; and Affidavit of Cheryl Winterhalt sworn to February 8, 2023 ("Plaintiff Aff.," NYSCEF Doc. No. 102) at ¶¶ 2–3.

The subject document, attached to Defendants' motion as Exhibit D (NYSCEF Doc. No. 82) consists of approximately 8 pages of single-spaced, computer-typed text. The first six pages contain the statement, "Account of Carol Casazza the Pines Nursing Home," at the top. The last two pages do not contain that statement; but on the first of the two pages, there appears to be a handwritten date at the top left, "11/7/16", a crossed-out and illegible handwritten notation at the top-middle, and an additional handwritten notation at the top-right which appears to be, "12/23/16 complaint by client's daughter faxed to [sic]." The second page bears a signature at the end, and the names "Cheryl Winterhalt-Daughter" and "Raymond Casazza-Husband." These two pages are identical to the document annexed to Plaintiff's opposition as Exhibit B (NYSCEF Doc. No. 101), and asserted by Plaintiff in her affidavit to be a "Complaint" . . . "memorialized in writing and faxed to the Pines on or about November 7, 2016." Plaintiff Aff. at ¶4.

Contrary to Plaintiff's assertions, there do not appear to be any indicia on either Defendants' Exhibit D or Plaintiff's Exhibit B that either document, or any portion thereof, was actually transmitted to The Pines, such as a fax confirmation sheet or a sent email. This appears to be inconsistent with both Plaintiff's affidavit (at ¶4) and the following sentence in Plaintiff's "Account:" "On 11/8/16 I faxed the letter to all 3 above [employees of The Pines] and received confirmation of fax and emailed all three as well." Defendants' Exhibit D at p. 3.

³ The Court renders no decision as to the overall admissibility of the photographs. The foregoing decision is limited solely to consideration of Defendants' arguments on this motion.

The Court further observes that the documents contain extensive hearsay, as well as what appear to be Plaintiff's personal thoughts and generalizations of questionable evidentiary value (e.g., "I was still in shock that this transpired right in front of us. It was disturbing to me that these people are supposed to be professionals this [sic] is their job to care for others that cannot care for themselves." *Id.* at p. 2).

The notes sought to be precluded by Defendants and the parties' submissions thereon raise a number of evidentiary issues. "As a general rule, the issue of whether evidence should be excluded as cumulative rests within the sound discretion of the trial court." *Rucigay v Wyckoff Hgts. Med. Ctr.*, 194 AD3d 865, 867 [2d Dept 2021] (quoting *Bergamaschi v Gargano*, 293 AD2d 695, 696 [2d Dept 2002]). Additionally, hearsay contained in a writing authored by a witness, whether as to statements or to nonverbal conduct, is generally inadmissible both under the rules governing hearsay (57 N.Y. Jur. 2d Evidence and Witnesses § 272; e.g., *Thompson v Manhattan Ry. Co.*, 11 AD 182 [2d Dept 1896]), as well as the requirement that witnesses provide live testimony at trial from their own personal knowledge (*Nappi v Gerds*, 103 AD2d 737 [2d Dept 1984]).

That said, a witness's written account of events underlying a lawsuit is not *per se* inadmissible, even if it contains hearsay. *Zupan v Price Chopper Operating Co., Inc.*, 132 AD3d 1211 [3d Dept 2015]. Nevertheless, "[a] witness' trial testimony ordinarily may not be bolstered with pretrial statements" (*People v McDaniel*, 81 NY2d 10, 16 [1993]); and "[e]specially objectionable as evidence is a private memorandum of a self-serving nature." 58 N.Y. Jur. 2d Evidence and Witnesses § 529.

Presuming that Plaintiff will be personally testifying at the upcoming trial, the Court finds that the notes document is not independently admissible into evidence in this matter. The document appears to contain extensive statements by Plaintiff and purportedly from others concerning Defendants' alleged liability and Plaintiff's alleged damages, making the document cumulative of Plaintiff's own knowledge and observations, as well as a vehicle for the presentation of a significant amount of potentially inadmissible hearsay to the jury. Plaintiff's own testimony is therefore the proper vehicle to present such information to the jury, subject to any appropriate objections to hearsay or other evidentiary issues.

However, the document remains available to Plaintiff for the purpose of refreshing the Plaintiff's (or any witness's) recollection (*Zupan v. Price Chopper Operating Co.*, *supra*; *Nappi v. Gerds*, *supra*), and to Defendants for cross-examination.

Based on the foregoing, it is hereby

ORDERED that Defendants' motion *in limine* (Motion Seq. #4) seeking the preclusion of Plaintiff's notes e-filed as NYSCEF Doc. No. 82 is GRANTED to the extent set forth above.

Motion Seq. #5: Defendants' Motion In Limine Seeking to Preclude Plaintiff's Expert from Testifying Regarding Medical Causation of Plaintiff's Injuries

In their third motion *in limine*, Defendants move for an order precluding Plaintiff's expert, a Registered Professional Nurse and Certified Legal Nurse Consultant disclosed on January 20, 2023, from testifying as to medical causation of Plaintiff's injuries due to lack of physician's qualifications. Plaintiff argues in opposition that this expert has over thirty years of "experience in acute care and geriatric/nursing home care settings," and that she is therefore qualified to serve as an expert on causation in this matter.

This issue appears to be a purely legal one. Defendants rely on precedents out of the First and Second Departments for their position that only a medical doctor is qualified to give expert opinion as to causation in a negligence action based upon allegedly improper medical care. *E.g.*, *Elliot v Long Is. Home, Ltd.*, 12 AD3d 481 [2d Dept 2004]; *Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]. Plaintiff instead relies on a recent precedent out of the Third Department which upheld Plaintiff's use of a registered nurse expert to establish a causal relationship between the defendant hospital's allegedly improper nursing care and the plaintiff's injuries (*O'Connor v Kingston Hosp.*, 166 AD3d 1401 [3d Dept 2018]).

It does not appear that the Second Department has cited or addressed the seemingly inconsistent holding in *O'Connor v. Kingston Hospital* in the five-and-a-half years since that decision was rendered. It does not appear that any other Appellate Division has adopted the Third Department's holding in that matter, either.

Of particular relevance to this issue is that Plaintiff's complaint does not assert any causes of action for medical malpractice, but only claims based on the Public Health Law (described above) and general / gross negligence. Although the Second Department has not yet ruled on the particular expert issue addressed by the Third Department in *O'Connor*, in factually similar and more recent cases, the Second Department has indirectly upheld the use of a nurse expert in residential care facility cases where improper nursing and Public Health Law violations were alleged. *See Ciccotto v Fulton Commons Care Ctr., Inc.*, 2014 WL 12750669 [N.Y. Sup Ct, Nassau County 2014], *affd*, 2017 N.Y. Slip Op. 03149 [2d Dept 2017] (both plaintiff and defendants relied on nurse experts on summary judgment motions); *Domoroski v Smithtown Ctr. for Rehabilitation*, 2011 N.Y. Slip Op. 30997[U] [N.Y. Sup Ct, Suffolk County 2011], *affd sub nom. Domoroski v Smithtown Ctr. for Rehabilitation and Nursing Care*, 2012 N.Y. Slip Op. 03978 [2d Dept 2012] (defendant granted summary judgment based on, *inter alia*, an affidavit from a nurse expert). *See also Novick v S. Nassau Communities Hosp.*, 136 AD3d 999 [2d Dept 2016] (affidavit of registered nurse rejected for being "conclusory," not for failing to be supported by physician's credentials).

Thus, there does not appear to be any bar in this Judicial Department to the use of a registered nurse expert to support claims of the sort asserted by Plaintiff in this action. Since this is the sole objection raised by Defendants to Plaintiff's expert on this motion, it is hereby

ORDERED that Defendants' motion *in limine* (Motion Seq. #5) seeking to preclude Plaintiff's expert (NYSCEF Doc. Nos. 87, 106) from testifying on issues of medical causation is DENIED.

Motion Seq. #6: Plaintiff's Motion In Limine Seeking to Preclude Defendants' Expert from Testifying

In her first motion, Plaintiff seeks an order precluding Defendants' expert, a physician first disclosed anonymously on February 6, 2023, from testifying in this matter entirely, for failure of Defendants to comply with CPLR §3101(d). Defendants argue in opposition that the identity of the expert was disclosed on February 10, 2023, rendering Plaintiff's application moot.

CPLR §3101(d) notably provides no limitation on the time for disclosing an expert. This Court's Part Rules, however, do provide an expert disclosure procedure, which no party has complied with in this matter. As the Court is nevertheless allowing Plaintiff's expert to testify at trial as set forth above, Defendants will be allowed to introduce testimony of their expert. Plaintiff's application has otherwise been mooted by Defendant's disclosure of their expert's identity.

Based on the foregoing, it is hereby

ORDERED that Plaintiff's motion *in limine* (Motion Seq. #6) seeking to preclude Defendants' expert from testifying at trial is DENIED.

Motion Seq. #7: Plaintiff's Motion to Join the Issues of Liability and Damages for Trial

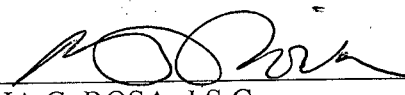
In her second motion, filed February 8, 2023, Plaintiff seeks an order pursuant to 22 NYCRR §202.42 effectively reversing this Court's recent determination, made on a prior stipulation of the parties, that the trial of this matter will be bifurcated. Defendants filed opposition to this motion on February 10, 2023.

As this application is not within the scope of the Court's grant of leave to file late motions *in limine* on or before February 3, 2023, was not filed timely, and does not articulate any sound basis for reversing the recently agreed-upon bifurcated format for trial, it is hereby

ORDERED, that Plaintiff's motion (Motion Seq. #7) for a consolidated trial is DENIED. The foregoing constitutes the decision and order of the Court.

Dated: February 16, 2023
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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