SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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MARIANA WATNICK, individually and as executor of the estate of JAY S. WATNICK, deceased,

Plaintiff,

- v -

ROBERT RAWDIN, DDS, FACP, and GALLERY 57 DENTAL, PLLC,

Defendants.

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INDEX NO. 805100/2020

MOTION DATE 04/01/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 195, 196, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 226, 227, 228, 229

were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

In this action, inter alia, to recover damages for dental malpractice based on alleged departures from good and accepted dental practice, lack of informed consent, and wrongful death, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the amended complaint. The plaintiff opposes the motion. The motion is denied.

II. FACTUAL BACKGROUND

The crux of the plaintiff's claim is that, on January 2, 2018, the defendants departed from good and accepted dental practice in providing dental services and performing dental procedures on her husband, the decedent Jay S. Watnick (hereinafter the decedent), despite the fact that, in light of his precarious medical condition at the time, the provision of those services and the performance of those procedures were contraindicated. She asserted that, as a consequence of that departure, her decedent aspirated fluids or solids into his lungs during

the treatment, sustained a life-threatening respiratory medical emergency, immediately was hospitalized in New York, experienced a swift deterioration of his respiratory health, and ultimately died in Florida on April 7, 2018. She further alleged that the defendants failed to obtain her decedent's fully informed consent to the procedures, since they did not inform him of the risks and benefits thereof, or the alternatives thereto.

On August 7, 2014, the decedent presented for an examination at Meeting House Lane Medical in Southampton, New York, where the examining physicians noted that he exhibited chest pain, cough, and dyspnea. On July 25, 2017, Allison Van Arsdale, D.O., a physician employed by Meeting House Lane Medical, made a house call to examine the decedent, upon which she memorialized the plaintiff's statements that the decedent had a history of heart disease; she also noted extreme weakness, dyspnea on exertion, dysphagia, and labored breathing. Dr. Van Arsdale made another house call on August 7, 2017, at which she noted that the decedent had worsening dyspnea despite ongoing physical therapy, and that he was supposed to be following up with a pulmonologist for his chronic obstructive pulmonary disease (COPD) and dyspnea that were related to congestive heart failure. According to Dr. Van Arsdale's chart, both the plaintiff and the decedent were aware of the severity of, and prognosis for, the decedent's multiple chronic illnesses, and that he was a candidate for hospice care, which both the plaintiff and the decedent refused at that juncture. On September 5, 2017, Dr. Van Arsdale made yet another house call to examine and assess the decedent, which included an "Assessment Encounter for palliative care (Z51.5)," based on dyspnea due to congestive heart failure and the decedent's appearance of being chronically ill and older than his stated age. On September 11, 2017, she made a subsequent house call for the same reason, and made the same assessment.

On January 2, 2018, when the decedent was 82 years old, he presented to the defendant Gallery 57 Dental, PLLC (Gallery 57), for a scheduled routine dental cleaning. According to the defendants, immediately prior to the cleaning, registered dental hygienist and

Gallery 57 employee Michelle Fernandez asked the plaintiff if there had been any significant changes in the decedent's medical history, to which she replied in the negative. Conversely, the plaintiff averred that neither she nor the decedent were provided with any forms by which they could update the decedent's medical history, despite the fact that it was the defendants' practice to provide those forms. She further asserted that, as a consequence, they were not given an opportunity to inform the defendants that the decedent been the taking blood thinner Coumadin (warfarin) after an earlier stroke, "yet they proceeded to provoke bleeding from his gums by probing and scaling." The defendants asserted that Fernandez noted at that time that the decedent had poor oral hygiene, and that she then cleaned the decedent's teeth by scaling, using hand instruments and a polisher, without employing any oral numbing or anesthetic medications or a Cavitron, and without using water for rinsing. The plaintiff disagreed with the defendants' contention that no machinery or water was employed, noting that another Gallery 57 dental assistant, Lilly Wang, confirmed that Fernandez had employed both a Cavitron machine and pressurized water for rinsing. The defendants alleged that the decedent was kept upright during the initial cleaning process, and needed frequent breaks due to his difficulty in breathing that was caused by his COPD.

The plaintiff contended that, at the commencement of his appointment, the decedent was not using, and did not need, the portable oxygen apparatus that the plaintiff had brought with her into the defendants' office. As the defendants recalled it, the decedent presented no signs or symptoms of respiratory distress as Fernandez began to clean the decedent's teeth, but, during the cleaning, he began to exhibit difficulty breathing. They asserted that Fernandez then stopped her treatment, and informed the defendant dentist Roberg Rawdin, DDS, FACP, of the decedent's difficulty in breathing, upon which Rawdin entered the operatory in which Fernandez was working, and checked on the decedent's condition. According to the defendants, the decedent informed Rawdin that it was okay to continue with the cleaning. They further alleged that, after Fernandez finished the cleaning, Rawdin examined the decedent while

the latter remained in an upright position, at which time the decedent began to use a portable oxygen unit that the plaintiff had brought with her to the defendants' office. The plaintiff disputes the contention that the decedent's oxygen apparatus was employed or that any oxygen had been administered during this phase of the treatment.

There is a dispute as to whether the decedent was being administered oxygen before or during Rawdin's deep cleaning and scaling treatment, with the defendants claiming that oxygen was administered, and the plaintiff claiming that it wasn't. Rawdin applied topical anesthetic to the decedent's gums, gave the decedent an injection of one carpule of 3% carbocaine, without vasoconstrictor, half in the upper left of his mouth and half in the upper right, and then sprayed a small amount of water with an air/water syringe, which he sprayed directly on the area being treated. The parties dispute whether Rawdin employed suction to remove any water, blood, or debris during the deep cleaning and scaling procedure, with the plaintiff claiming that he didn't. After Rawdin began that procedure, the decedent began to cough and show signs of labored breathing, upon which Rawdin stopped his treatment. The parties dispute whether Rawdin then administered straight oxygen to the decedent from a tank kept at the defendants' office, with the plaintiff denying that this occurred. According to the defendants, the decedent informed Rawdin that he felt better, but they noted that his breathing was still labored. Fernandez and another dental assistant accompanied the decedent into the waiting room, supporting him under his armpits and assisting him in ambulating. According to the plaintiff, it was only at this juncture that the decedent was administered oxygen from his own tank.

As the plaintiff described it, she went to retrieve Rawdin and informed him that she could not take him home because he was in respiratory distress. The plaintiff averred that Rawdin then placed the decedent bank in a dental chair, albeit in a supine position, and attempted to continue the cleaning. The plaintiff contended that she observed Rawdin's conduct at that time, and requested him to return the decedent to an upright position. She further asserted that, contrary to Rawdin's account of the occurrence, he could not locate the emergency tank of

oxygen that he claimed to have stored in the office. According to the plaintiff, Rawdin essentially admitted that the decedent was having trouble breathing because he had aspirated some water and that Rawdin had employed an air-water syringe during the treatment. Crucially, the plaintiff testified at her deposition that both Rawdin and Fernandez conceded that, in light of the decedent's condition, Rawdin should not have administered anesthesia and that the decedent never should have been placed in a supine position. In addition, dental assistant Wang testified at her deposition that Rawdin had called her in during his phase of the treatment to assist him with water.

The plaintiff, who then returned the defendants' office waiting room, called for an ambulance, which took the decedent to New York Presbyterian Hospital-Weill Cornell Medical Center (NYPH), where his chief complaint was that he had difficulty breathing. The plaintiff contended that, in the course of the defendants' treatment, the decedent aspirated either fluids or solids into his lungs, and that she was informed by emergency room personnel at NYPH that he had in fact aspirated water into his lungs during the course of his dental treatment. Those personnel took the decedent's medical history, noting a history of congestive heart failure, COPD, mitral heart valve replacement, and aortic heart valve replacement. The decedent was admitted for monitoring and was discharged to his New York home on January 3, 2018.

The decedent and the plaintiff thereafter travelled to their Florida home. On March 15, 2018, the decedent was admitted to Good Samaritan Medical Center (GSMC) in West Palm Beach, Florida, complaining of weakness and dyspnea. GSMC medical personnel noted his history of chronic atrial fibrillation, right heart failure, and valvular heart disease, also noting his status as post mechanical aortic valve and mitral valve replacement. They further noted that he had a history of unsteady gait, kyphoscoliosis, hyperlipidemia, and cerebrovascular disease. GSMC admitted the decedent to its telemetry department, and his initial chest x-ray revealed cardiomegaly without any pulmonary venous congestion. He aspirated either fluids or solids into his lungs during this admission, and required the use of a bilateral positive airway pressure

(BiPAP) machine. On March 16, 2018, the decedent sustained an episode of acute dyspnea after attempts were made to perform a swallow evaluation, after which GSMC medical personnel placed a face mask on him and transferred him to the intensive care unit. The decedent's GSMC chart indicated that the decedent's overall status prognosis was poor, due to his severe dysphagia with multiple comorbidities. GSMC discharged the decedent to his home in Florida, with home hospice and home BiPAP.

The decedent died at home on April 7, 2018. According to the death certificate issued by the Florida Bureau of Vital Statistics, the causes of the decedent's death were respiratory failure and ischemic cardiomyopathy.

III. THE PLAINTIFF'S CONTENTIONS

In her amended complaint, the plaintiff made general allegations that the defendants committed dental malpractice in cleaning the decedent's teeth, and failed to inform either the decedent or her of the risks and benefits of, or the alternatives to, a deep dental cleaning, or the use of topical and injectable anesthetics prior to the cleaning. She alleged that, as a consequence, the decedent had an unanticipated adverse respiratory event that caused his existing conditions to deteriorate over the next several months, ultimately leading to his death.

In her bills of particulars as to both of the defendants, the plaintiff alleged that, in light of the decedent's known medical conditions, the defendants departed from good and accepted dental practice because the cleanings and use of anesthesia were contraindicated. In this regard, she contended that the defendants failed to take reasonable medical history and failed to understand other medical providers' diagnoses of the decedent's existing medical conditions, thus providing improper and inappropriate treatment. The plaintiff also faulted the defendants for the use of improper dental and medical tools, equipment, implements, and medications, specifically, topical and injectable anesthesia, ultrasound cleaning devices, and copious water irrigation. She asserted that, in any event, they improperly used those tools, equipment, implements, and medications that they did employ, thus performing unreasonable and improper

scaling and root planing to treat the decedent's periodontal disease. The plaintiff additionally asserted that the defendants did not have oxygen or an emergency kit on hand with which to treat a patient who went into respiratory distress.

The plaintiff further alleged that the defendants failed to observe, recognize, appreciate, and diagnose the decedent's "rapidly deteriorating health and medical conditions," thus delaying responsive, remedial treatment. In addition, the plaintiff contended that the defendants departed from good practice in that they improperly positioned the decedent during his cleaning procedures.

The plaintiff averred that, given the decedent's presenting and developing health, his medical conditions, and other medical issues, the defendants departed from good practice in failing to recognize, appreciate, and comprehend the decedent's deteriorating condition during the course of his dental treatment, and in causing or permitting that condition to proliferate and intensify.

The plaintiff further alleged that the defendants failed to "develop, adopt, develop, enact, promulgate, promote, institute, provide, implement and enforce, reasonable, proper and necessary supervision, security and safety measures, policies, protocols, and rules and regulations" regarding the provision of reasonable, timely, and proper dental services to the decedent. She also asserted that the defendants were negligent in the hiring, training, and supervision of their employees and staff.

In addition, the plaintiff alleged in her bills of particulars that the defendants failed to advise and inform either the decedent or her of the foreseeably known risks posed by the services that were to be provided to the decedent, and that they thus failed timely, reasonably, and properly to obtain the decedent's fully informed consent to the services that they provided.

IV. THE SUMMARY JUDGMENT MOTION

In support of their motion, the defendants submitted the pleadings, the bills of particulars, relevant dental, medical, and hospital records, the transcripts of the parties'

deposition testimony, the note of issue, case management orders, a statement of undisputed material facts, an attorney's affirmation, and the expert affirmations of dentist Mark J. Heller, D.M.D., F.A.G.D., and internist, pulmonologist, and critical care medicine specialist Rajendra Rampersaud, M.D.

Dr. Heller opined that the treatment that Fernandez and Rawdin rendered to the decedent on January 2, 2018, and their responses and reactions to the decedent's coughing, difficulty in breathing, and signs of labored breathing, "were all consistent with the standards of good and accepted dental care." According to Dr. Heller, Fernandez properly elicited any changes in and updates to the decedent's medical and dental history, cleaned the decedent's teeth while he was in an upright position, used only hand instruments and a polisher, did not use a Cavitron or rinse the decedent's mouth with water, did not administer any anesthetic or numbing agents, and stopped her treatment when the decedent began having difficulty breathing, continuing it only after the decedent spoke to Rawdin and assured him he was okay.

According to Dr. Heller, Rawdin's treatment was also consistent with the standards of good and accepted dental care, as he properly tried to perform a deep cleaning of the decedent's teeth by administering oxygen through the decedent's portable unit during the cleaning. Dr. Heller also opined that Rawdin appropriately applied topical anesthetic and injected the decedent's gums with 1 carpule 3% carbocaine, without vasoconstrictor, half in the upper left of the mount and half in the upper right. As he characterized it, when the decedent began to cough and show signs of labored breathing, Rawdin properly stopped his treatment and began to administer the decedent straight oxygen from a tank kept at the defendants' office.

Dr. Heller concluded that no water was aspirated into the decedent's lungs during his dental treatment, as no water was employed during the cleaning, other than the spraying of a small amount of water with an air/water syringe directly on the area being treated. In this regard, he explained that "pharyngeal airway protective reflexes are triggered before the

maximum volume of water that the hypopharynx can safely hold without spilling into the airway is reached." Dr. Heller stated that these pharyngeal reflexes prevent aspiration even if only a small amount of water enters the hypopharynx, and would have precluded any aspiration of water during the treatment. Upon noting that suction was used to remove any water, blood, or debris, he concluded that, had water infiltrated the decedent's trachea or lungs, it would have caused "extreme violent coughing," which, based on his review of the deposition transcripts and relevant dental records, did not occur. Dr. Heller determined that the decedent's labored breathing during the course of his dental treatment was caused by his COPD, rather than by any water that he aspirated during the dental cleaning.

Dr. Rampersaud concluded that the decedent's death on April 7, 2018 had no causal connection to his January 2, 2018 treatment by the defendants. Rather, he concluded that the decedent's death was the result of "worsening dyspnea caused by his long-standing congestive heart failure."

As Dr. Rampersaud described it, the decedent suffered COPD, dyspnea, and congestive heart failure long before his January 2, 2018 dental cleaning, and those conditions continued unabated afterwards, up to and including the date of his death. Dr. Rampersaud explained that congestive heart failure causes water to collect in the lungs, which reduces the size of the area inside of the lung where the blood-oxygen exchange can take place, thus causing dyspnea, as the respiratory rate increases in an attempt to compensate for the reduced amount of oxygenated blood produced by the lungs. He noted that congestive heart failure is a progressive condition that gets worse with time, and is a condition that has no cure. He further explained that, in patients with congestive heart failure, the amount of water that has collected in the lungs and the resultant dyspnea ultimately reach the point where respiratory failure occurs, followed by death, which he opined was what happened to the decedent.

Based on his review of the NYPH chart, Dr. Rampersaud concluded that the decedent's admission to that hospital immediately after his dental treatment "was not made necessary

because Mr. Watnick had aspirated a small amount of water during his dental cleaning." According to Dr. Rampersaud, the emergency room assessment consisted of congestive heart failure, COPD, and "potential" brewing pneumonia, while the diagnosis at discharge was aspiration pneumonia secondary to food or vomit, although he noted that the chart did not specify the time when such food and/or vomit had been aspirated. He also noted that a pneumonia/infection workup reported negative results.

In opposition to the motion, the plaintiff relied on the same submissions that had been made by the defendants, and also submitted a counter statement of facts, an attorney's affirmation, a memorandum of law, the decedent's death certificate, the transcript of the deposition of nonparty Stefani Brannan, who had been Gallery 57's office manager on January 2, 2018, the transcripts of the deposition of nonparty Lilly Wang, who had been employed as a dental assistant by Gallery 57 on January 2, 2018 but had been produced by the defendants, and the expert affirmations of dentist and registered dental hygienist William A. Choby, D.M.D., MAGD, FICCMO, DICOI, and internist and pulmonologist James Pearle, M.D., the latter of which was supplemented by an affidavit from Dr. Pearle that reiterated the contents of his affirmation.

Dr. Choby opined that the defendants departed from good and accepted dental practice in treating the decedent, and that their departures were a substantial factor and proximate cause of the injuries claimed by the plaintiff. Specifically, he asserted that, in response to the decedent's labored breathing and coughing, Rawdin and Fernandez did not act consistently with the standards of good and acceptable dental care.

Dr. Choby averred that, in light of the conflicting statements of Rawdin and Fernandez as to the decedent's dental condition, there was a question as to whether "scaling deep areas" was justified after the Fernandez's periodontal evaluation. He stated that, inasmuch as neither Rawdin nor Fernandez nor anyone at Gallery 57 obtained an updated medical history from the decedent, no one in that office was aware that that the decedent had been placed on the blood

thinner Coumadin after sustaining a stroke, or suffered from COPD and anemia, yet both Rawdin and Fernandez proceeded to provoke bleeding from the decedent's gums by probing and scaling. Dr. Choby noted in this regard that delayed clotting of blood could be a source of fluids that the decedent aspirated during or immediately after these dental treatments. Dr. Choby went on to explain that, while the defendants' records reported that little or no water was used in cleaning the decedent's teeth, and that both Fernandez and Rawdin insisted that the amount of water "sprayed" with a syringe into the decedent's mouth could not have provoked the coughing or aspiration of that water, "there is no way to ascertain the validity of their statements. It is highly improbable that the polishing of the teeth that were described as having 'poor oral hygiene' with a prophylaxis paste or deep scaling of the periodontal pocket could be performed without some rinsing of the paste or debris without some water, and certainly more than 'a little water.'" In his capacity as former hygienist, Dr. Choby stated "with certainty" that it was "impossible to believe that prophylaxis paste could be removed by rinsing saliva alone. Either the paste remained, or it was flushed out with another fluid, e.g. water. If the paste remained in JAY's mouth, it would represent an even greater threat to the potential of aspiration of foreign material."

Dr. Choby referred to the deposition testimony of Rawdin's dental assistant, Wang, in which she indicated that Rawdin "called her to assist him because the patient had problems with the water," which he noted was in direct conflict with Rawdin's and Fernandez's testimony that no water was used. He further adverted to Wang's testimony, in which she asserted that Fernandez both employed the Cavitron machine and provided the decedent with water to rinse his mouth, which also contradicted Rawdin's and Fernandez's testimony.

With respect to the defendants' positioning of the decedent during the cleaning, Dr. Choby asserted that the placement of a patient with compromised swallowing functions in an upright position would have been helpful in preventing such a patient's aspiration of fluids or solids, but would not, in and of itself, negate the possibility that aspiration of fluids could occur.

He noted that coughing is a sign that some aspiration did occur, and that elderly patients with COPD do not have the same ability to cough up the fluids as one might expect in an otherwise healthy individual.

Ultimately, Dr. Choby asserted that both Fernandez and Rawdin departed from good and accepted practice in failing to review the decedent's medical condition at the time of treatment, failing to recognize potential hazards of treatment, failing to recognize a developing respiratory crisis during treatment, and continuing that treatment in spite of the decedent's obvious difficulty with his breathing.

Dr. Pearle asserted that, in light of the decedent's multiple medical problems, including both chronic cardiac and chronic pulmonary disease that was, at best, "marginally compensated," he was at risk for undergoing even minor procedures. Based upon the timing of his hospitalization for aspiration, which followed immediately after his dental procedure, Dr. Pearle asserted that "the likelihood that he aspirated during the dental procedure" was "extremely high," that "an aspiration event likely occurred during the procedure," and ultimately that "an aspiration event occurred during the dental visit in question."

As Dr. Pearle described it, aspiration occurs when water, other liquid, food, or any other material passes from the mouth and enters the airways and the lungs instead of being cleared by the structure of the mouth and upper airways. He explained that, when such matter obstructs the airways, breathing is blocked, respiration can become difficult, and pneumonia can follow. Dr. Pearle asserted that aspiration can be life-threatening in an individual with compromised respiratory status such as COPD and that, since aspirated material tends to travel to the dependent or lower parts of the lungs due to gravity, lower lobe x-ray findings, such as those observed at NYPH, and CT findings at GSMC, are characteristic of aspiration.

Although Dr. Pearle noted that the decedent survived his first hospitalization and that he was discharged to his New York home, within a few months he required a subsequent hospitalization at GSMC for respiratory failure, COPD, and likely an episode of aspiration

pneumonia during that admission. He opined that the decedent's marginal respiratory status was further weakened by his initial aspiration during his dental treatment and subsequent hospitalization, a weakening that was "a likely consequence of his [d]ental [t]reatment by defendants, superimposed on his underlying baseline COPD and comorbidities."

As Dr. Pearle explained it, the decedent was a fragile elderly individual clearly in the declining portion of his life and that, due to his fragility, any additional insult to his health "had the potential to be a tipping point to start his medical decline sooner than expected." He continued that,

> "[t]he aspiration event on January 2, 2018, appears to be that tipping point. Individuals such as Mr. Watnick, when suffering an insult like aspiration pneumonia, even if appearing mild, pay a toll in health and energy expenditure to recover from the illness, and often do not recover completely to baseline. This of course left Mr. Watnick in a weaker state to deal with his underling CHF and COPD. This left him, with vulnerability to exacerbation of these conditions. Mr. Watnick's course continued downhill after this aspiration event. By the time he was admitted to Good Samaritan Hospital on March 15, 2018, he was extremely weak, unable to swallow, with clear worsening of his cardiopulmonary status. He was so fragile that even in the hospital under secure conditions, he aspirated again as well. The inevitable outcome of this hospitalization was further decline."

He opined that, although the aspiration event of January 2, 2018 was not an "immediate terminal event," the "toll" of this episode on the decedent's strength and well-being contributed to his decline, subsequent development of later aspiration, his second hospital admission, candidacy for hospice care, and death, "likely sooner than would be expected had the aspiration not occurred." He thus concluded that the January 2, 2018 dental treatment "was causally connected to Mr. Watnick's death on April 7, 2018," which he described as "in part a belated complication of the initial aspiration that occurred in the dental office" that "ultimately hastened his respiratory failure and death." In other words, Dr. Pearle concluded that the decedent's respiratory failure was caused by the acute aspiration event that occurred during the dental cleaning at Gallery 57, superimposed upon the decedent's COPD and poor overall health.

In reply, the defendants submitted an attorney's affirmation, in which their attorney asserted, among other things, that Pearle's opinions were not submitted in admissible form,

since he was not licensed to practice medicine in New York, but nonetheless submitted an affirmation rather than an affidavit. They further asserted that, in any event, the plaintiff's experts' opinions were insufficient to raise a triable issue of fact as to whether any alleged departure from good and accepted dental practice proximately caused the decedent's hospitalization, exacerbation of COPD, physical deterioration, and ultimate death.

V. SUMMARY JUDGMENT STANDARDS

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively

establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

An expert who submits an affirmation in support of a summary judgment motion, however, may not rely on disputed facts when rendering his or her opinion (*see Reading v Fabiano*, 137 AD3d 1686, 1687 [4th Dept 2016] ["expert improperly relied upon a disputed fact" in his affidavit]; *Reiss v Sayegh*, 123 AD3d 787, 789 [2d Dept 2014]; *see also Hiegel v Orange Regional Med. Ctr.,* 219 AD3d 910, 913 [2d Dept 2023]; *Kubera v Bartholomew,* 167 AD3d 1477, 1480 [4th Dept 2018]; *Metcalf v O'Halleran,* 137 AD3d 758, 759 [2d Dept 2016]; *Edmonds v Checo*, 2023 NY Misc LEXIS 30305, *10-11 [Sup Ct, Suffolk County, Oct. 16, 2023]; *Gousgounis v Malkani*, 2018 NY Slip Op 30952[U], *12-13, 2018 NY Misc LEXIS 1861, *19-20 [Sup Ct, N.Y. County, May 15, 2018]; *Novacare Med., P.C. v Travelers Prop. Cas. Ins. Co.*, 31 Misc 3d 1205[A], 2011 NY Slip Op 50500[U], *2, 2011 NY Misc LEXIS 1320, *2 [Dist Ct, Nassau County, Apr. 1, 2011] [[movant for summary judgment cannot rely on an opinion premised upon "disputed or incorrect facts"]).

The court notes that Dr. Pearle is not licensed to practice medicine in New York. Although a medical expert need not be licensed to practice medicine in New York for his or her affidavit to be considered by a court in connection with a summary judgment motion (*see Grey v Garcia-Fusco*, 2020 NY Slip Op 32280[U], *20 n 19, 2020 NY Misc LEXIS 3270, *30 n 19 [Sup Ct, N.Y. County, Jun. 16, 2020]; *Solano v Ronak Med. Care*, 2013 NY Slip Op 30837[U], *7, 2013 NY Misc LEXIS 170, *8-9 [Sup Ct, N.Y. County, Apr. 22, 2013]), Dr. Pearle's initial affirmation did not constitute admissible evidence to oppose the summary judgment motion since, as a physician who is not licensed to practice medicine in New York, he may not avail himself of the option to submit an unnotarized affirmation in lieu of a notarized affidavit (*see* CPLR 2106[a] [limiting the option to employ an affirmation to a "physician . . . authorized by law

to practice in the state"]). Dr. Pearle corrected that defect, however, by refiling the text of his affirmation in the form of an affidavit. Although served and filed after the return date of the motion, the court rejects the defendants' contention that the affidavit should not be considered, and exercises its discretion to accept and consider that filing nunc pro tunc (*see* CPLR 2001; *Khurdayan v Kassir*, 223 AD3d 590, 591 [1st Dept 2024] [this court "properly exercised its discretion in allowing plaintiff to correct" that same "defect( ) nunc pro tunc"]; *Matos v Schwartz,* 104 AD3d 650, 653 [2d Dept 2013]; *Munoz v New York Presbyterian-Columbia Univ. Med. Ctr.,* 2023 NY Slip Op 31317[U], *19-20, 2023 NY Misc LEXIS 1950, *35-36 [Sup Ct, N.Y County, Apr. 10, 2023] [Kelley, J.]; *Winslow v Syed*, 2021 NY Slip Op 33230[U], *5-6, 2021 NY Misc LEXIS 9432, *13 [Sup Ct, Dutchess County, Apr. 20, 2021]). The court further notes that Dr. Pearle's affidavit is properly accompanied by a certificate of conformity, as required by CPLR 2309, which also may be filed nunc pro tunc (*see Khurdayan v Kassir*, 223 AD3d at 591; *Parra v Cardenas,* 183 AD3d 462, 463 [1st Dept 2020]; *Bank of New York v Singh*, 139 AD3d 486, 487 [1st Dept 2016]; *DaSilva v KS Realty, L.P.,* 138 AD3d 619, 620 [1st Dept 2016]; *Diggs v Karen Manor Assoc., LLC*, 117 AD3d 401, 402-403 [1st Dept 2014]; *Matapos Tech., Ltd. v Compania Andina de Comercio Ltda.*, 68 AD3d 672, 673 [1st Dept 2009]).

A. MEDICAL MALPRACTICE BASED ON ALLEGED DEPARTURES FROM GOOD PRACTICE

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *see Foster-Sturrup v Long,* 95 AD3d 726, 727 [1st Dept 2012]; *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]).

To make a prima facie showing of entitlement to judgment as a matter of law, a defendant physician moving for summary judgment must establish the absence of a triable

issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *Barry v Lee*, 180 AD3d 103, 107 [1st Dept 2019]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or establish that the plaintiff was not injured by such treatment (*see Pullman v Silverman,* 28 NY3d 1060, 1063 [2016]; *McGuigan v Centereach Mgt. Group, Inc*., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy his or her burden on a summary judgment motion, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital,* 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id*., quoting *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Moreover, as noted, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr*., 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and/or opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d

Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.,* 68 NY2d at 325; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24).

The defendants failed to establish their prima facie entitlement to judgment as a matter of law, since both of their experts relied for their opinions on several crucial facts that are in sharp dispute, namely, whether anyone at Gallery 57 took an updated history of the decedent's medical condition, whether Fernandez employed a Cavitron machine and pressurized water to clean the decedent's teeth, whether Rawdin employed pressurized water, whether the decedent was placed on oxygen at any time during his treatment, and whether Rawdin and Fernandez allowed the decedent to be placed in a reclining or supine position during the course of his treatment. In fact, the defendants' experts concluded that no significant aspiration had occurred during the treatment precisely because they *presumed* that no Cavitron machine or pressurized water was employed during the cleaning, and because they *presumed* that the decedent remained in an upright position throughout his encounter with the defendants. They further presumed that a proper updated medical history had been obtained, and that additional oxygen had been administered to the decedent from their emergency supply. Yet Wang, in what must be characterized as a party admission because she was produced by the Gallery 57 as a deposition witness, and spoke for them (*see Delgado v Martinez Family Auto*, 113 AD3d 426, 427-428 [1st Dept 2014]; *Dank v Sears Holding Mgt. Corp*., 93 AD3d 627, 628 [2d Dept 2012]), conceded that she observed Fernandez employ a Cavitron, and both Fernandez and Rawdin

employ pressurized water, while the plaintiff herself asserted that she had personally observed the decedent in a reclining position and that the defendants failed to provide him with supplementary oxygen. Similarly, the experts concluded that the deterioration of the decedent's health and respiratory condition in the months subsequent to the dental treatment could not have been caused by aspiration that occurred during dental treatment precisely because they presumed that no pressurized water was employed and that the decedent remained in an upright position.

In any event, by submitting Dr. Choby's affirmatino, the plaintiff raised triable issues of fact as to whether Fernandez and Rawdin departed from good and accepted dental practice by failing to obtain an appropriate history, by employing a Cavitron machine and pressurized water for rinsing, and by allowing the decedent to be placed in a supine position during a portion of his treatment. To the extent that any undisputed facts supported Dr. Rampersaud's conclusions that the decedent's immediate hospitalization was not caused by any aspiration during dental treatment, and that the subsequent deterioration of the decedent's health and respiratory condition could not have been premised on any such aspiration, the plaintiff raised a triable issue of fact with Dr. Pearle's affidavit, which expressly concluded that there was a significant aspiration during dental treatment, that this aspiration and consequent aspirations at NYPH contributed to that deterioration, which itself constituted an injury, and that this deterioration led ultimately to the decedent's premature death.

Hence, that branch of the defendants' motion seeking summary judgment dismissing the dental malpractice and wrongful death causes of action must be denied.

B. WRONGFUL DEATH

For the same reasons as apply to the dental malpractice cause of action, to the extent that the defendants established, prima facie, that any departure from good dental practice did not cause or contribute to the decedent's death, the plaintiff raised a triable issue of fact as to

whether aspiration during dental care contributed to the deterioration of the decedent's health and, ultimately, to his death (see *Roques v Noble*, 73 AD3d at 207).

C. LACK OF INFORMED CONSENT

The elements of a cause of action to recover for lack of informed consent are:

> "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]; *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst*., 211 AD2d 347, 350 [1st Dept 1995]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]).

In this regard, the court notes that the plaintiff's allegations that the defendants failed to obtain the decedent's complete, up-to-date medical history relate to the medical malpractice cause of action (*see Knish v Meehan*, 291 AD2d 647, 650 [3d Dept 2002] ["allegations of improper recordkeeping and inadequate history-taking . . . did not constitute separate theories of malpractice but were, instead, multiple interrelated deviations from accepted standards of medical care"]; *Hughson v St. Francis Hospital*, 93 AD2d 491, 492 [2d Dept 1983]). Thus, while such a failure may be relevant to the lack of informed consent cause of action, it is not an element of that cause of action.

In their affirmations, however, neither of the defendants' experts addressed the issue of whether the defendant explained either to the decedent or the plaintiff the risks and benefits of deep dental cleaning of an elderly patient with COPD and heart disease, or the alternatives to the methods that the defendants employed to perform the cleaning. Hence, they failed to make

a prima facie showing that the information that they provided, and any consent that they obtained to proceed with the treatment, were qualitatively sufficient. Since they failed to establish their entitlement to judgment as a matter of law with respect to the lack of informed consent cause of action, the burden never shifted to the plaintiff to raise a triable issue of fact as to the qualitative sufficiency of any consent. There is thus no basis upon which the defendants may be awarded summary judgment dismissing the lack of informed consent cause of action.

VI. CONCLUSION

In light of the foregoing, it is,

ORDERED that the defendants' motion is denied; and it is further,

ORDERED that the parties shall appear for an initial pretrial settlement conference before the court, in Room 204 of 71 Thomas Street, New York, New York 10013, on June 25, 2024, at 2:00 p.m., at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

5/22/2024
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**		**X**	**NON-FINAL DISPOSITION**		
		GRANTED	**X** **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**