

**Rogers v Cimafranca**

2024 NY Slip Op 32770(U)

August 5, 2024

Supreme Court, Kings County

Docket Number: Index No. 526633/2021

Judge: Consuelo Mallafre Melendez

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**At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of August 2024.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
NEIMY ROGERS, as Guardian Ad Litem for LUCIENNE  
LAGUERRE,

Plaintiff,

-against-

DANIEL CIMA FRANCA, M.D., JAMELA PHILLIPS, L.P.N.,  
and FOUR SEASONS NURSING AND REHABILITATION  
CENTER,

Defendants.

-----X  
**HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.**

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: Seq. 4: 57 – 59, 60 – 69, 117 – 118, 119 – 127, 128 – 129, 145  
Seq. 5: 70 – 72, 73 – 95, 130 – 131, 132 – 140, 141 – 142, 146  
Seq. 6: 97 – 99, 100 – 115, 116

Defendant Four Seasons Nursing and Rehabilitation Center (“Four Seasons”) moves (Seq. No. 4) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor, dismissing all claims against them.

Defendant Daniel Cimafranca, M.D. (“Dr. Cimafranca”), separately moves (Seq. No. 5) for an Order, pursuant to CPLR 3212, granting summary judgment in his favor, dismissing the case against him.

Defendant Jamela Phillips, LPN (“Phillips”), separately moves (Seq. No. 6) for an Order, pursuant to CPLR 3212, granting summary judgment in her favor, dismissing the case against her.

Plaintiff commenced this action on October 19, 2021, alleging medical malpractice, negligence, lack of informed consent, and Public Health Law violations against the moving defendants, claiming that they failed to properly care for and treat Lucienne Laguerre’s risk of falling and proximately caused her acute, right subdural hematoma. A guardian ad litem for Ms. Laguerre was appointed on October 6, 2022.

This case involves Lucienne Laguerre, a 64-year-old woman who is suffering from dementia. On April 26, 2021, Ms. Laguerre was admitted to Four Seasons after being treated for a head injury at Kings County

Hospital. At the time of her admission, her diagnosis included a pre-existing closed head injury, hypertension, seizures, right zygomatic maxillary complex fracture, right orbital fracture, and subarachnoid hemorrhage. Ms. Laguerre required extensive assistance with performing bed mobility, locomotion, dressing, toileting, and bathing. Upon admission, she was seen by Dr. Cimafranca who described her as an alert and oriented person with periods of confusion. A Fall Risk Assessment was performed by the nursing staff, and she was assessed with a score of “65,” which meant she was at high risk for falls. Given Ms. Laguerre’s results, the records indicate that Palm Gardens created a fall care plan that set forth interventions such as ensuring proper use of footwear, using appropriate assistive devices as recommended, maintaining a safe environment by making sure the call bell was within easy reach, maintaining the bed was at the lowest position, and anticipating all nursing care needs.

On April 27, 2021, the nursing staff documented that Ms. Laguerre was observed on the floor mat near the door of her room. She stated that she lost her balance while trying to “get up and spit.” The Palm Gardens staff documented that at the time of the incident, Ms. Laguerre’s room was dry with no clutter, night lights were on, and her bed was placed in the lowest position. Dr. Cimafranca was notified of the fall and ordered an x-ray of Ms. Laguerre’s left wrist and left hip in light of Ms. Laguerre’s report of left wrist pain. The x-ray of the left wrist showed evidence of old fracture deformities but no acute fractures, however, the x-ray of the left hip was not conclusive to rule out a hip fracture. Ms. Laguerre was transferred to New York Community Hospital for a further evaluation of the hip. The hospital concluded that there was no evidence of a hip fracture. Nursing Rehab Protocol was ordered by Palm Gardens staff that required nursing staff assistance for all transfers of Ms. Laguerre, including sitting-to-standing, bed-to-chair, and chair-to-toilet.

On April 28, 2021, Ms. Laguerre was readmitted to Four Seasons from the hospital. On May 3, 2021, Ms. Laguerre was observed with multiple attempts to get out of bed without assistance and was described as restless and agitated. On May 4, 2021, Dr. Cimafranca examined Ms. Laguerre due to her notable restlessness, agitation, and waking at night. He documented her history of dementia and ordered that fall precautions be maintained. He further diagnosed Ms. Laguerre with insomnia and started her on a trial of Melatonin (3 mg).

On May 5, 2021, Ms. Laguerre was observed on the floor in front of her wheelchair in the dayroom. Upon assessment by staff, she had no visible injuries and denied pain. Nurse Francis documented that Ms. Laguerre attempted to get out of her wheelchair without assistance and fell. On May 7, 2021, Dr. Cimafranca evaluated Ms. Laguerre and found that she had no visible injuries and did not complain of pain. On May 13, 2021, the nursing staff documented that Ms. Laguerre was observed sitting on the floor mat next to her bed. No injuries were noted, and she was assisted to the toilet and back to bed. The record indicates that redirection and safety education were given to Ms. Laguerre. On May 14, 2021, Ms. Laguerre was observed ambulating without assistance inside her room. She was assisted and brought into the dayroom for close monitoring but refused to stay. She was brought back to her bed by the Palm Gardens staff.

On May 16, 2021, Ms. Laguerre was observed lying on her left side on the floor mat of her room. Upon assessment, redness was noted on the left side of her trunk, and she reported shoulder pain. An x-ray of the left trunk, hip, and shoulder, as well as neuro checks, were ordered by Dr. Cimafranca. Tylenol was administered for pain management and Ms. Laguerre was brought to the dayroom for close monitoring. The X-rays were negative for acute fractures. On May 18, 2021, Ms. Laguerre left the facility for a “personal appointment” with her son, Njemy Rogers. He testified that he did not notice any injuries to her face or head, but that his mother did not talk to him during the appointment. On May 20, 2021, nursing staff documented that Ms. Laguerre showed signs of left-sided weakness, slurred speech, and facial drooping. Ms. Laguerre was transferred to Maimonides Medical Center from New York Community Hospital. She was found to have a nontraumatic, right-sided subacute/chronic subdural hematoma and underwent a right-sided front temporoparietal osteoplastic craniotomy and drainage of the subdural hematoma.

Plaintiff alleges that Four Seasons and Dr. Cimafranca departed from good and accepted medical standards by failing to provide the proper fall precautions and claims that Four Seasons violated Public Health Laws by departing from accepted medical standards and that these departures were a proximate cause of Ms. Laguerre’s injuries.

Generally, “[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party” (*Stukas v. Streiter*, 83 AD3d 18, 22 [2d Dept. 2011]). “In order to

establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries [internal citations omitted]" (*Hutchinson v. New York City Health & Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019], quoting *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]). "Thus, in moving for summary judgment, a physician defendant must establish, prima facie, 'either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries'" (*id.*, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]); *Rosenzweig v. Hadpawat*, 2024 NY Slip Op 03838 [2d Dept. July 17, 2024]. If a defendant makes such a showing, "the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician" (*Stukas v. Streiter*, 83 AD3d 18 at 30). "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted]" (*Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept. 2022] [internal citations omitted]). "Any conflicts in the testimony merely raise an issue of fact for the factfinder to resolve" (*Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]). However, "expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted]" (*Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019]).

In support of its motion for summary judgment, Four Seasons submit an expert affirmation from Mark Lachs, M.D. ("Dr. Lachs), a physician licensed in Internal and Geriatric Medicine. The movant also submits medical records and deposition transcripts.

Based on his review of the records, pleadings, and testimony, Dr. Lachs opines that Four Seasons did not depart from good and accepted standards in rendering treatment to Ms. Laguerre, did not deprive Ms. Laguerre of any right or benefit under Public Health Law § 2801-d, and did not cause any alleged injury to Ms. Laguerre. In addition, it is Dr. Lachs' opinion that Four Seasons conformed to all applicable statutes, rules, and regulations to render treatment to Ms. Laguerre.

Dr. Lachs opines Ms. Laguerre's falls were unavoidable accidents. Dr. Lachs refers to Medicaid regulation (CFR) § 483.25(d) and opines that there were no environmental factors that caused Ms. Laguerre's

fall and that it was Ms. Laguerre's inability to follow safety directions that caused her to repeatedly fall.<sup>1</sup> Dr. Lachs opines that Four Seasons appropriately assessed Ms. Laguerre as "high risk" for falls and implemented proper nursing care. Further, he opines that Four Seasons addressed Ms. Laguerre's cognitive defects by initiating a care plan for communication which included speaking slowly and clearly, using communication boards and other assistive communication devices, allowing increased time for Ms. Laguerre to respond, providing cues to improve socialization, encouraging her to speak slowly, and providing an interpreter.

Dr. Lachs opines that the standard of care was to consistently redirect and reeducate a patient about safety awareness and Four Seasons followed this protocol. Dr. Lachs supports his opinion by referring to Nurse Fabros' testimony that a Creole-speaking nursing staff was available to appropriately communicate with Ms. Laguerre with regard to her safety needs and redirection.

Furthermore, Dr. Lachs opines that bed and chair alarms are not the standard of care because they do not prevent falls and can actually cause injury. He opines that when an alarm sounds, it means that the resident is already attempting to transfer, and it is speculative that a member of the nursing staff would be able to stop a self-transferring resident when they hear an alarm. Moreover, Dr. Lachs opines that alarms can be quite loud which can cause a highly anxious patient to become more anxious and confused. Lastly, he opines that alarms can also create complacency among staff members who may decrease their vigilance over patients because they believe the alarm would reduce falls. Therefore, Dr. Lachs opines that a bed, chair, or wheelchair alarm was not required.

Dr. Lachs opines that the use of bed rails on a patient's bed is not a standard medical practice in nursing homes. As to the plaintiff's Bill of Particulars, it is alleged that Four Seasons was negligent in failing to restrain Ms. Laguerre and/or otherwise secure her to the bed. However, Dr. Lachs opines that this is a direct violation of 42 CFR § 483.12 (a) (1-2), which provides that a facility must ensure the resident is free from physical or

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<sup>1</sup> The Centers for Medicaid and Medicare Services Regulation (CFR) § 483.25(d), as articulated in the States Operation Manual § F689, provides that an "unavoidable accident" means that an accident occurred despite sufficient and comprehensive facility designs and implementations.

chemical restraints imposed for the purpose of discipline or convenience. Dr. Lachs opines that the plaintiff ignores the federal regulations and the resident's right to autonomy.

Dr. Lachs further opines that Four Seasons appropriately monitored Ms. Laguerre during her residency. Dr. Lachs opines that nursing homes are not required to provide one-on-one supervision unless ordered by the physician in situations when the patient is a danger to themselves or others. Dr. Lachs opines this was not present in Ms. Laguerre's circumstance because she never expressed any statements of self-harm or intent to harm herself or others.

Moreover, Dr. Lachs opines that side rails are irrelevant to fall prevention. He opines that bedside rails are known to cause injury when residents attempt to go over them. Dr. Lachs further opines that nursing homes are not allowed to restrain residents physically or pharmaceutically which meant that not having side rails was within the standard of care. Dr. Lachs further opines that side rails are a type of physical restraint that nursing homes prohibit. It is Dr. Lachs' opinion that Plaintiff's argument that more fall precautions were necessary is "pure speculation and is not based on actual regulations that exist."

Dr. Lachs opines that Four Seasons properly documented Ms. Laguerre's multiple falls, completed analyses, assessed Ms. Laguerre for injuries, and monitored Ms. Laguerre for delayed injuries. Further, it is Dr. Lachs' opinion that more nursing rounds would have not prevented any of the falls. For example, Dr. Lachs points to a CNA Accident Report where Ms. Laguerre was observed on the floor two minutes after being observed by the nursing staff. The report also noted that the floor was dry, the call bell was on her pillow, and she was wearing non-skid socks. Thus, Dr. Lachs opines that the fall occurred despite reasonable interventions being in place.

In addition, Dr. Lachs opines that Ms. Laguerre was properly assessed by the nursing staff subsequent to her falls. The post-fall nursing full body assessment appropriately included range of motion (ROM) and muscle strength (MS) assessment of both upper and lower extremities, which were within normal limits. Dr. Lachs opines that the nurses followed the standard of care by assessing Ms. Laguerre's cognition, alertness, orientation, response to stimuli, and memory of the incident. The nurse's progress notes reflect that neuro checks were performed on an ongoing basis to monitor Ms. Laguerre's condition from a neurological

standpoint. It is Dr. Lachs' opinion that x-rays of the left hip, shoulder, and ribs were timely ordered and carried out. Further, he opines that Ms. Laguerre was appropriately and timely assessed in the days subsequent to the fall to ensure there were no delayed injuries. As for Ms. Laguerre's changed condition on May 20, 2021, Dr. Lachs opines that Ms. Laguerre's symptoms were immediately noticed, communicated to a physician, and timely ordered to a hospital. Before the event, the nursing notes do not document any acute change in Ms. Laguerre's condition, thus, it is Dr. Lachs' opinion that there is no evidence that Four Seasons failed to timely respond to her symptoms and transfer her to a hospital.

On the issue of proximate cause, Dr. Lachs opines that Plaintiff's assertion that Ms. Laguerre suffered a "head trauma" as a result of any incident that occurred during her residency at Four Seasons is speculative and not supported by the medical record. It is Dr. Lachs' opinion that the medical records support that Ms. Laguerre only suffered head trauma prior to being a resident at Four Seasons. He further opines that Ms. Laguerre's bleed and hematoma were not acute and therefore not caused by any act or inaction by Four Seasons.

Lastly, Dr. Lachs opines that there is no evidence that Four Seasons violated any Public Health Laws and regulations encompassed in § 2801-d. He opines that the plaintiff has simply cited these statutes in complete disregard of the facts of this case. As discussed above, Dr. Lachs opines that Four Seasons did not depart from any accepted medical standards as they implemented and fall prevention plan and repeatedly assessed Ms. Laguerre's condition. Therefore, he opines that Four Seasons could not have violated any Public Health Laws.

Based on these submissions, Four Seasons has established a prima facie case that its treatment of Ms. Laguerre was within good and accepted medical standards and that no act or omission of the Four Seasons staff caused or contributed to Ms. Laguerre's subdural hematoma.

In opposition to Four Seasons' motion, Plaintiff submits the affirmation of a licensed physician, certified in Emergency medicine, name redacted. The Court was presented with the unredacted and signed affirmation for *in camera* inspection. Despite Four Seasons assertion that Plaintiff's expert lacks specialty, Plaintiff's expert states that they are knowledgeable and familiar with the standards of care imposed upon physicians and nursing staff caring for patients who are residents of nursing homes and the precautions that are required to be taken to

prevent those at high risk for falling from suffering an injury through training, experience, and review of medical journals. An expert opinion need not be provided by a specialist, but the expert must demonstrate that they are “possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable” (*DiLorenzo v Zaso*, 148 AD3d 1111, 1112-1113 [2d Dept. 2017]). “Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered” (*Behar v. Coren*, 21 A.D.3d 1045, 1047 [2d Dept. 2005]; see *DiLorenzo*, at 1113). “Where no such foundation is laid, the expert's opinion is of ‘no probative value’” (*Id.*, quoting *Feuer v. Ng*, 136 A.D.3d 704, 707 [2d Dept. 2016]); see also *Kiernan v Arevalo-Valencia*, 184 AD3d 727, 729 [2d Dept 2020]. The Court finds that Plaintiff’s expert laid a sufficient foundation as to their training, education, and experience to render opinions on the medical issues in this case.

Plaintiff’s expert opines that the nursing staff of Four Seasons failed to take necessary precautions to prevent Ms. Laguerre from falling and suffering the injuries claimed despite being a known fall risk, with a history of falls, and dementia. As a result, it is Plaintiff’s expert opinion that Defendant’s negligence caused Ms. Laguerre to fall and suffer a subdural hematoma requiring a right-sided craniotomy and evacuation of the subdural hematoma.

Plaintiff’s expert opines that the failure to utilize a bed alarm was a departure from good and accepted medical practice. Plaintiff’s expert references the Four Seasons fall prevention policy which specifically states that bed alarms are among the safety devices available for use. They further opine that had a bed alarm been in place, the nursing staff would have had an opportunity to intervene and assist Ms. Laguerre prior to her falling and suffering injury by safely returning her to bed. Plaintiff’s expert disagrees with Dr. Lachs’ opinion that bed alarms are loud and can cause patients to be more anxious and confused. Plaintiff’s expert notes how different audio settings are available, and some versions can only be heard at the nursing station.

Moreover, Plaintiff’s expert opines that failing to properly monitor Ms. Laguerre by placing her on one-on-one monitoring was a departure from good and accepted medical practice. It is the expert’s opinion that a patient suffering from dementia cannot be relied on to remember an instruction, such as not getting out of bed. It was noted by the Four Seasons staff that their efforts of redirection and education had little to no effect. It is

Plaintiff's expert's opinion that given the numerous episodes of Ms. Laguerre attempting to get out of bed unassisted, it is clear the monitoring being provided was insufficient. Nurse Fabros testified that the unit Ms. Laguerre was on had forty-six beds and was staffed by four to five Certified Nursing Assistants (CNAs). It is Plaintiff's expert's opinion that it was impossible for a CNA to provide adequate monitoring of Ms. Laguerre while also caring for this large of a caseload. While Ms. Laguerre did not express self-harm, it is Plaintiff's expert's opinion that her repeated behavior demonstrated her inability to follow instructions and made her a risk to herself. Thus, it is Plaintiff's expert's opinion that one-on-one monitoring was required.

Plaintiff's expert opines that it was a departure from good and accepted medical practice to utilize floor mats for Ms. Laguerre. It is Plaintiff's expert's opinion that floor mats can be detrimental to patients who get out of bed and walk without assistance as they constitute a tripping hazard. It is Plaintiff's expert's opinion that given Ms. Laguerre's repeated attempts to get out of bed without assistance, the use of floor mats was improper as it increased her risk of tripping, falling, and suffering injury. Plaintiff's expert opines that the utilization of floor mats was a proximate cause and substantial contributing factor to Ms. Laguerre's injuries.

Furthermore, Plaintiff's expert opines Four Seasons departed from good and accepted medical practice in failing to timely evaluate Ms. Laguerre's neurological condition or transfer her to the hospital for evaluation. The records of New York Community Hospital reflect that Ms. Laguerre's symptoms of facial weakness and slurred speech began over seventeen hours prior to her transfer to the hospital. Plaintiff's expert noted that there is no evidence that Ms. Laguerre was evaluated by a physician at Four Seasons when these symptoms were first demonstrated or any explanation as to why she was not immediately transferred to a hospital. Further, Plaintiff's expert notes there is no documentation that the staff at Four Seasons observed the change in Ms. Laguerre's condition prior to May 20, 2021, despite the evidence showing she was progressively deteriorating. Plaintiff's expert opines that this delay was a proximate cause and substantial factor in Ms. Laguerre's injuries as it allowed for the condition to worsen.

Plaintiff's expert opines that Four Seasons violated 10 N.Y.C.R.R. 415.12(h)(1) & (h)(2) in ensuring a resident's environment remains free of accident hazards and receives adequate supervision. Plaintiff's expert opines that adequate measures were not undertaken to prevent Ms. Laguerre from suffering repeated falls and

ultimately the injuries herein. Plaintiff's expert disagrees with Dr. Lachs that the falls were unavoidable.

Plaintiff's expert opines that Four Seasons did not utilize all available measures as discussed above to prevent Ms. Laguerre from falling and therefore disagrees with Dr. Lachs' conclusory opinion. Moreover, Plaintiff's expert opines that giving patient education and redirection had little effect; it was necessary for these further measures to be implemented.

On the issue of proximate cause, Plaintiff's expert opines that the departures from accepted medical standards and the delay in assessments detailed above caused Ms. Laguerre's condition to worsen and lead to her injuries. Plaintiff's expert opines that the failure to implement a proper fall care plan resulted in Ms. Laguerre to repeatedly fall, causing Ms. Laguerre to suffer a subdural hematoma and require a right-sided craniotomy and evacuation of the subdural hematoma.

"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." (*Templeton v Papathomas*, 208 AD3d 1268, 1270-1271 [2d Dept. 2022]; see also *Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept. 2017]). Based upon the above detailed and starkly different submissions to the court, Plaintiff's expert has raised issues of fact as to the standard of care of Ms. Laguerre and the causation of her injuries. Both experts present contrary opinions as to the type of care that should have been included in Ms. Laguerre's fall prevention plan. Moreover, Plaintiff's expert opines that Four Seasons failed to timely and appropriately diagnose Ms. Laguerre's subdural hematoma, however, Dr. Lachs opines that there was no sign that Ms. Laguerre was suffering symptoms of a subdural hematoma until May 20, 2021. Likewise, Plaintiff's expert raises issues of fact as to the alleged violations of New York Public Health Law and regulations. These starkly different opinions present issues of fact to be decided by a jury.

In addition to the issues of fact raised by Plaintiff's expert opinion as discussed above, there is also a question of fact as to whether the hematoma was a result of the fall. Dr. Lachs opines that the hematoma was a result of Ms. Laguerre's prior head injury and that "the medical records support that Ms. Laguerre only suffered head trauma from an incident that prompted her emergent transfer to Kings County Hospital on April 14th,

which preceded her admission to Four Seasons” (Dr. Lachs affirmation, ¶ 75). However, Plaintiff’s expert opines that the alleged departures proximately caused the hematoma. Plaintiff’s expert disagrees with the opinion of Dr. Lachs that Ms. Laguerre did not suffer head trauma as a result of her May 16 fall and that the subdural hematoma diagnosed at New York Community Hospital was not acute. The Plaintiff’s expert opines that it is an inaccurate assessment that is contradicted by the evidence. Plaintiff’s expert supports this opinion stating that “(t)he radiologist who interpreted the CT Scan performed on May 20, 2021, specifically described the subdural hematoma as acute.” (Expert Affirmation Page 14). They further opine that “Ms. Laguerre’s fall on May 16, 2021, was proximately caused, singularly and/or in combination, the above-stated departures from good and accepted medical practice committed by defendants Dr. Cimafranca and Four Seasons and that the fall was a proximate cause of and/or significant contributing factor resulting in the subdural hematoma which required a craniotomy.” (*Id.* at 15). These contrary opinions as to the cause of Ms. Laguerre’s hematoma present a clear question of fact.

Plaintiff has raised an issue of fact that counters the Defendant’s *prima facie* case on both liability and proximate cause. Therefore, Four Seasons’ motion for summary judgment is **DENIED**.

Turning to the summary judgment motion of Dr. Cimafranca (Seq. No. 5), the movant submits an expert affirmation from Lawrence Diamond, M.D. (“Dr. Diamond”), a physician certified in Family Medicine and Geriatric Medicine. The movant also submits medical records and deposition transcripts.

Dr. Diamond opines that Dr. Cimafranca did not depart from any good and accepted medical standards when treating Ms. Laguerre. Dr. Diamond opines that assessing, implementing, and carrying out fall precautions at a nursing home is a nursing responsibility, not a physician’s responsibility. It is Dr. Diamond’s opinion that Dr. Cimafranca, as a physician, was not responsible for performing a fall risk assessment of the patients, and it was standard practice for Dr. Cimafranca to rely on the fall risk assessment performed by the nursing staff of Four Seasons. Dr. Diamond opines that Dr. Diamond followed the assessment of the staff at all times.

Moreover, Dr. Diamond opines that no additional fall precaution measures were indicated and that if any additional measures were enacted they would not have prevented Ms. Laguerre from falling. Dr. Diamond notes that the medical records and deposition testimony further establish that “Ms. Laguerre was regularly rounded on

every few hours, had a call bell within reach, had a night light and her bed was low to the ground and equipped with proper side rails as fall prevention measures” (Dr. Diamond affirmation, ¶ 22). In addition, Dr. Diamond notes how Ms. Laguerre was continuously instructed not to get out of bed without assistance. He also notes that Plaintiffs allege that Defendant was negligent in leaving Plaintiff unattended and failing to institute one-on-one care causing Plaintiff to ambulate unassisted, however, he states that the Four Seasons chart indicates that Plaintiff was provided with extensive assistance and supervision. Dr. Diamond further opines that Dr. Cimafranca acted in accordance with the standard of care when he approved many efforts suggested above by the nursing staff to respond to Ms. Laguerre’s repeated falls. It is Dr. Diamond’s opinion that Ms. Laguerre did not require an increased level of supervision because the appropriate fall precaution measures were already put in place.

Additionally, Dr. Diamond opines that there was no delay in diagnosing Ms. Laguerre’s subdural hematoma. Dr. Diamond notes that Ms. Laguerre did not appear to have hit her head during any of her falls at Four Seasons and that there was no evidence of facial or cranial head injury resulting from any of the reported falls. Dr. Diamond further opines that following Ms. Laguerre’s first fall on April 27, 2021, Dr. Cimafranca was notified, and he promptly ordered left wrists and left hip X-rays. Moreover, Ms. Laguerre was taken to New York Community Hospital to undergo further assessment, which ruled out any fracture. Thus, Dr. Diamond opines that Ms. Laguerre did not have a subdural hematoma following her first fall at Four Seasons.

Dr. Diamond opines that there was no indication by Ms. Laguerre’s condition that would have warranted Dr. Cimafranca to conduct further investigation and testing other than the tests he ordered. Dr. Diamond notes that Dr. Cimafranca examined Ms. Laguerre on April 29, 2021, and reported there were no abnormalities and that she was alert and responsive but confused. Dr. Diamond opines that an altered mental state is a non-specific symptom and is not diagnostic of traumatic brain injury such as a subdural hematoma. Further, he opines that Plaintiff was diagnosed with a small right intraventricular hemorrhage and small left subarachnoid hemorrhage during her prior admission at Kings County Hospital, and had a history of dementia and seizure disorder, and therefore it was reasonable for Dr. Cimafranca to attribute Ms. Laguerre’s altered mental state to her underlying dementia and other injuries sustained prior to her admission to Four Seasons.

It is Dr. Diamond's opinion that Dr. Cimafranca acted reasonably after Ms. Laguerre fell on May 17, 2021. Dr. Diamond opines that it was standard practice for Dr. Cimafranca to check Ms. Laguerre, order x-rays, and perform neuro checks. When Dr. Cimafranca evaluated Ms. Laguerre on May 17, 2021, he noted that she denied any pain and there were no visible signs of injury. Dr. Diamond notes that Ms. Laguerre had no neurological or behavioral changes until the morning of May 20, 2021, and that Dr. Cimafranca promptly ordered her transfer to New York Community Hospital for a full workup.

Based on these submissions, Dr. Cimafranca has established a prima facie case that his treatment of Ms. Laguerre was within good and accepted medical standards and that no act or omission of his care caused or contributed to Ms. Laguerre's subdural hematoma.

In opposition to Dr. Cimafranca's motion, Plaintiff submits the affirmation of a licensed physician, certified in Emergency medicine, name redacted. The Court was presented with the unredacted and signed affirmation for *in camera* inspection.

Plaintiff's expert opines that Dr. Cimafranca departed from good and accepted medical practice in failing to institute proper and necessary fall precautions for Ms. Laguerre. Plaintiff's expert opines that it was a deviation from good and accepted medical practice for Dr. Cimafranca to not participate in the development and implementation of a care plan for Ms. Laguerre to minimize the risk of her falling and suffering injury. Plaintiff's expert notes how the Four Seasons' policy (Exhibit I) states that the Interdisciplinary Care Team, including Medicine, are among the "Responsible Personnel" and that this portion of the policy is consistent with good and accepted medical practice in that the attending physician is the individual ultimately responsible for coordinating the patient's care and ensuring that all necessary steps are taken to ensure the patient's well-being. As Dr. Cimafranca was the attending physician, Plaintiff's expert opines that he should have been involved in the development and implementation of Ms. Laguerre's fall care plan. Plaintiff's expert disagrees with Dr. Diamond that Dr. Cimafranca was entitled to rely on the fall risk assessment performed by the Four Seasons staff. Plaintiff's expert opines that this ignores that the Four Seasons staff identified Ms. Laguerre as being high risk for falls and Dr. Cimafranca, as the attending physician, took no steps to prevent such falls, and instead removed himself from the formation of the plan, in contradiction to Four Seasons' fall prevention policy.

Plaintiff's expert further opines that Dr. Cimafranca departed from good and accepted medical practice in failing to order a CT scan of Ms. Laguerre's head following her fall on/or about May 16, 2021 or May 17, 2021. Since the fall was not witnessed, Plaintiff's expert opines that head trauma cannot be ruled out. Further, Plaintiff's expert opines that an elderly patient with a history of prior intracranial bleeding and thin bridging veins that are more susceptible to tearing makes the concern for a head trauma even greater. Plaintiff's expert opines that the consequences of an undiagnosed intracranial bleed, good and accepted medical practice required that a CT scan of the head be performed. It is Plaintiff's expert opinion that if the CT scan had been performed, the bleed that resulted in Ms. Laguerre's subdural hematoma would have been diagnosed four days earlier before any midline shift/subfalcine herniation occurred. Therefore, Plaintiff's expert opines that Dr. Cimafranca's failure to order a head CT was a proximate cause of Ms. Laguerre's injuries, requiring her to undergo a right-sided craniotomy and evacuation of the subdural hematoma.

Moreover, Plaintiff's expert opines that Dr. Cimafranca departed from good and accepted medical practice in failing to timely evaluate Ms. Laguerre's neurological condition or transfer her to the hospital for evaluation. The same opinions noted above against Four Seasons on this claim were asserted here.

Plaintiff's expert opines that the above departures caused Ms. Laguerre to repeatedly fall and to sustain a subdural hematoma and its sequelae. Plaintiff's expert opines that the departures led to her condition to worsen, requiring a right-sided craniotomy and evacuation of the subdural hematoma.

"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." (*Templeton v Papathomas*, 208 AD3d 1268, 1270-1271 [2d Dept. 2022]; see also *Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept. 2017]). Based upon these submissions to the court, Plaintiff's expert has raised issues of fact as to the standard of care of Ms. Laguerre and the causation of her injuries. Both experts affirm differing opinions as to whether Dr. Cimafranca, as a consulting physician at Four Seasons, should have been involved in the planning and implementation of Ms. Laguerre's fall prevention plan. Further, while Dr. Diamond opines that proper side rails were in place as a fall precaution measure, Four Seasons argues that their "Restraint Policy" (Exhibit N) requires that bed side rails are

a type of restraints that are prohibited by their facility. In addition, Dr. Diamond opines that Ms. Laguerre was repeatedly instructed to not get out of bed without assistance, however, Plaintiff's expert opines that a patient with dementia who continues to fall should have been provided additional fall prevention measures other than repeated instructions. Likewise, Plaintiff's expert raises issues of fact as to the alleged violations of New York Public Health Law and regulations. These contradictory opinions present issues of fact for a jury.

As Plaintiff raised an issue of fact that counters the Defendant's *prima facie* case of medical malpractice, Dr. Cimafranca's motion for summary judgment is **DENIED**.

Regarding the summary judgment motion of Phillips (Seq. No. 6), the movant submits an expert affirmation from Michael M. Fishkin, D.O (Dr. Fishkin), a physician certified in Osteopathic Medicine. The movant also submits medical records and deposition transcripts. This motion is unopposed by Plaintiff and is therefore **GRANTED**.

Lastly, it is noted that a guardian ad litem was appointed for Ms. Laguerre. The submissions in support and in opposition to this motion raise an issue regarding the extent of Ms. Laguerre's incapacitation. No authority exists for the guardian ad litem of an incapacitated person to petition for a court-approved settlement (*see Tudorov v. Collazo*, 215 AD2d 750 [2d Dept 1995]). Thus, even if the injured individual for whom settlement is sought has been duly represented by a guardian ad litem up to the date of settlement, it will be necessary to effect substitution of a fiduciary with the appropriate credentials. This may require, as a prerequisite, a petition for the appointment of a guardian pursuant to Article 81 of the Mental Hygiene Law (*see* CPLR 1206; 1207).

Accordingly, it is hereby:

**ORDERED** that Four Seasons' motion (Seq. No. 4) for an Order, pursuant to CPLR 3212, granting summary judgment to said defendant, dismissing all claims against them, is **DENIED**; and it is further

**ORDERED** that Dr. Cimafranca's motion (Seq. No. 5) for an Order, pursuant to CPLR 3212, granting summary judgment to said defendant, dismissing all claims against them, is **DENIED**; and it is further

**ORDERED** that the motion of Defendant Jamela Phillips, LPN (Seq. No. 6) for an Order, pursuant to CPLR 3212, granting summary judgment and dismissing all claims against them, is **GRANTED**, with prejudice; and it is further

**ORDERED** that Plaintiff shall file an Article 81 Petition within 90 days of entry of this Order; and it is further

**ORDERED** that the Clerk is directed to enter Judgment in favor of Defendant Jamela Phillips, LPN.

This constitutes the decision and order of this Court.<sup>2</sup>

**ENTER.**



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**Hon. Consuelo Mallafré Meléndez  
J.S.C.**

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<sup>2</sup> This decision was drafted with the assistance of legal intern Justin Murphy, Brooklyn Law School.