SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ROSELIND SCHWARTZ,

Plaintiff,

- v -

NEW YORK-PRESBYTERIAN MEDICAL CENTER and NEW YORK-PRESBYTERIAN WEILL CORNELL HOSPITAL,

Defendants.

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INDEX NO. 805203/2024

MOTION DATE 02/04/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendants move pursuant to CPLR 3012-a to dismiss the complaint on the ground that the plaintiff, Roselind Schwartz, failed to serve and file a certificate of merit, despite due demand therefor. The plaintiff opposes the motion. The motion is granted only to the extent that, on or before August 13, 2025, the plaintiff shall serve and file the required certificate of merit, or shall be subject to sanctions upon further motion by the defendants, and the motion is otherwise denied.

CPLR 3012-a(a) provides that,

> "In any action for medical, dental or podiatric malpractice, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff, declaring that:
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> "(1) the attorney has reviewed the facts of the case and has consulted with at least one physician in medical malpractice actions, at least one dentist in dental malpractice actions or at least one podiatrist in podiatric malpractice actions who is licensed to practice in this state or any other state and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or

> "(2) the attorney was unable to obtain the consultation required by paragraph one of this subdivision because a limitation of time, established by article two of this chapter, would bar the action and that the certificate required by paragraph one of this subdivision could not reasonably be obtained before such time expired. If a certificate is executed pursuant to this subdivision, the certificate required by this section shall be filed within ninety days after service of the complaint; or
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> "(3) the attorney was unable to obtain the consultation required by paragraph one of this subdivision because the attorney had made three separate good faith attempts with three separate physicians, dentists or podiatrists, in accordance with the provisions of paragraph one of this subdivision to obtain such consultation and none of those contacted would agree to such a consultation."

The complaint filed by the plaintiff was not accompanied by a certificate of merit. On August 29, 2024, the defendants served the plaintiff with a demand that she serve and file the required certificate of merit within 20 days of the demand. When she failed to do so, the defendants made the instant motion to dismiss the complaint.

The purpose behind CPLR 3012-a, as explained when the statute was enacted in 1986, was to deter the commencement of frivolous actions by counsel on behalf of their clients, and to thereby reduce the cost of medical malpractice litigation and medical malpractice insurance premiums (*see* Mem of St Exec Dept, 1985 McKinney's Session Laws of NY at 3022-3027; *Tewari v Tsoutsouras*, 75 NY2d 1, 6 [1989]; *Sisario v Amsterdam Mem. Hosp*., 159 AD2d 843, 844 [3d Dept 1990]). Nonetheless,

> "CPLR 3012-a does not contain any language authorizing the dismissal of an action for the failure of the plaintiff's attorney to file a certificate of merit (*see Russo v Pennings*, 46 AD3d 795, 797 [2007]; *Grant v County of Nassau*, 28 AD3d 714 [2006]; *Dye v Leve*, 181 AD2d 89, 90 [1992]; *Casiano v New York Hospital-Cornell Med. Ctr.*, 169 AD2d 806, 807 [1991]; *cf. Tewari v Tsoutsouras*, 75 NY2d at 11 [analogous to noncompliance with CPLR 3406 (a)]). The statute is unlike CPLR 3012(b), which expressly permits the dismissal of an action where a plaintiff fails to serve a complaint that has been duly demanded under that statute"

(*Rabinovich v Maimonides Med. Ctr.*, 179 AD3d 88, 95-96 [2d Dept 2019]; *see Kolb v Strogh*, 158 AD2d 15, 16 [2d Dept 1990] ["A procedural default may be punished only by means which are specifically authorized by statute or by rule . . . and it is clear that neither statute nor rule authorizes dismissal of the action as a sanction for a violation of CPLR 3012-a."]).

Here, although the complaint was not accompanied by a certificate of merit, as required by CPLR 3012-a, and the plaintiff failed to respond to the defendants' demand therefor, the dismissal of the complaint is not warranted.

Nonetheless, the court rejects the plaintiff's contention that this action does not sound in medical malpractice merely because the complaint does not contain the word "malpractice" or the phrase "deviated or departed from good and accepted medical practice," or because it only refers to wrongdoing constituting ordinary negligence. The court also rejects her reliance upon CPLR 3012-a(c), which excuses a plaintiff represented by counsel from serving and filing a certificate of merit in a medical malpractice action where counsel "intends to rely solely on the doctrine of 'res ipsa loquitur'" to establish the defendants' liability. Hence, the court concludes that, contrary to the plaintiff's contention, she is required to serve and file a certificate of merit.

In her complaint, the plaintiff alleged that, in October 2022, when she was residing at Atria Assisted Living in Manhattan (Atria), she was knocked down by an elevator door, resulting in a broken pelvis and two broken ribs, and was thereupon transported by ambulance, first to Lenox Hill Hospital, and then to Weill-Cornell Medical Center (Weill-Cornell), where she was admitted and released two times over the following two-plus weeks. She alleged that she was not provided with physical therapy during those admissions. The plaintiff further alleged that the follow-up physical therapy provided to her was insufficient, thus causing her muscles to atrophy and rendering her "less and less ambulatory, which ultimately led to a cognitive decline."

The plaintiff further asserted that, on January 16, 2024, she fell while trying to stand up from a chair while in her apartment at Atria, that personnel at Atria called Emergency Medical Services (EMS), and that EMS personnel transported her to Weill-Cornell, where emergency room (ER) personnel took X-rays and a computed tomography (CT) scan that were negative for fractures. The plaintiff explained that the ER team nonetheless determined to admit her as an inpatient, and to provide her with physical therapy due to her inability to stand or walk. She alleged that Weill-Cornell finally assigned her to a room after she had waited for 30 hours, that

she had stopped eating, and that, despite her refusal or inability to eat, "no one tried to address the situation until her family requested pureed meals" on the evening of January 18, 2024.

As relevant to this motion, the plaintiff alleged in her complaint that, from her January 16, 2024 admission at Weill-Cornell through her January 22, 2024 discharge, she

> "endured the following *negligent medical treatment* from the Weill Cornell staff:
>
> "a. They failed to turn her in her bed at least once every four hours. As a direct consequence of that breach of the minimum standard of care, Dr. Schwartz developed a level-four bedsore, which are deep wounds that can reach the bones, muscles, or ligaments. The bedsores caused extreme pain and severe tissue damage and loss.
>
> "b. During her stay, Dr. Schwartz was never taken out of her bed. As a result, Dr. Schwartz often had to lie in her feces. *This breach of the expected standard of care* caused extreme stress, confusion, and emotional damage, and worsened the infection resulting from the bed sore.
>
> "c. During Dr. Schwartz' nearly six-day stay at Weill Cornell, no medical staff attended to her other than to check her vitals and put meals on a bedstand."

(emphasis added). The plaintiff further alleged that, on January 22, 2024, when she was supposed to be discharged from Weill-Cornell and transferred directly to Riverside Nursing Home (Riverside), Weill-Cornell's emergency medical technicians instead returned her to her apartment, where she had to wait more than four hours for another ambulance to be dispatched to transport her to Riverside, and an additional 30 minutes for her to be delivered thereto. According to the plaintiff, this "mis-delivery" and "treatment of her like a sack of potatoes" constituted a "*breach of standard care*" (emphasis added). In addition, she averred that, "[d]ue to the *negligent treatment*" (emphasis added) provided to her during her 30-hour stay in the Weill-Cornell emergency room, during her four days as an admitted patient, and during the almost five hours that she spent in her apartment awaiting transfer to Riverside, she suffered from pain and emotional anxiety due to her bed sore, was unable to engage in timely physical therapy, and lost so much muscle mass that she has been unable to resume walking.

In her first cause of action, the plaintiff alleged that, "[b]y the failure of the Weill Cornell ER staff *to provide the standard of care of turning Dr. Schwartz at least once every four hours*,

Defendants caused her to suffer a level-four bedsore, which resulted in severe pain and emotional pain" (emphasis added). In her second cause of action, the plaintiff alleged that, "[b]y the failure of the Weill Cornell hospital staff to remove Dr. Schwartz from her bed at any time during her stay as an admitted patient, often leaving her to lie in her own feces, *Defendants breached the standard of care*. *This breach of care* exacerbated the bed sore, and caused extreme stress, confusion, and emotional damage" (emphasis added). In her third cause of action, the plaintiff asserted that "[b]y Defendants' failure to properly transport Dr. Schwartz to the nursing-care facility that was expecting her, which left her unattended in her apartment for over five hours, and Defendants' failure to timely correct that unequivocal error, *Defendants breached the standard of care*. This failure caused severe emotional damage."

The plaintiff's attorney alleged, in his opposition papers, that

> "[t]here is no question that the failure of the Weill Cornell ER staff *to provide the standard of care of turning* [the plaintiff] at least once every four hours Defendants caused her to suffer a level-four bedsore, which resulted in severe pain and emotional pain. The fact that she had the bedsore when transferred to Riverside, and that Village Care attributed the bedsore to the 'hospital,' and that records show that she had the bedsore until at least late April 2024, is sufficient to allow this medical malpractice case to proceed.
>
> "By the failure of the Weill Cornell hospital staff to remove Dr. Schwartz from her bed at any time during her stay as an admitted patient, often leaving her to lie in her own feces, and to fail, for days to feed her, *Defendants breached the standard of care. This breach of care* exacerbated the bed sore, and caused extreme stress, confusion, and emotional damage. This too, is made clear from the admission records at Riverside, which found Plaintiff malnourished."

(emphasis added). He further alleged that the defendants' failure properly to transport the plaintiff "to the nursing-care facility that was expecting her, and leaving her unattended in her apartment for over five hours, and Defendants' failure to timely correct this unequivocal error," constituted breaches of the applicable standard of care, and that these departures caused the plaintiff to sustain "severe emotional damage."

An action sounds in ordinary negligence when jurors can utilize their common everyday experiences to determine the allegations of a lack of due care (*see Rabinovich v Maimonides*

Med. Ctr., 179 AD3d at 93). Conversely, a claim sounds in medical malpractice "when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician" or health-care provider (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996]; *see Scott v Uljanov*, 74 NY2d 673, 674 [1989]; *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]; *Bledsoe v Center for Human Reproduction*, 228 AD3d 96, 99 [1st Dept 2024] ["A cause of action for medical malpractice involves a matter of medical science or art requiring special skills not ordinarily possessed by lay persons" (internal quotation marks and citation omitted)]; *see also Bazakos v Lewis*, 12 NY3d 631 [2009]). The issues of whether the plaintiff needed additional monitoring or supervision, whether she should have been turned more frequently to avoid bed sores, and whether she immediately should have been discharged to Riverside rather than her apartment, involved the exercise of medical judgments beyond the common knowledge of ordinary persons. Hence, the claims that the plaintiff characterizes as sounding in ordinary negligence actually sound in medical malpractice (*see Rabinovich v Maimonides Med. Ctr.*, 179 AD3d at 93; *Jeter v New York Presbyt. Hosp.*, 172 AD3d 1338, 1340 [2d Dept 2019]; *Martuscello v Jensen*, 134 AD3d 4, 12 [3d Dept 2015] ["The assessment of a patient's . . . need for assistance, protective equipment or supervision, are medical determinations that sound in malpractice]; *Smee v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966, 967 [4th Dept 1994]). More specifically, all of the allegations of wrongdoing asserted by the plaintiff in connection with her bed sore sound in medical malpractice, since she averred that the defendants' employees were negligent in their care and treatment of her skin, including bed sores and pressure ulcers. The prevention as well as care and treatment of skin abrasions, ulcers and wound care falls within the realm of medical care, not ordinary negligence (*see O'Connor v Kingston Hosp.*, 166 AD3d 1401, 1402 [3d Dept 2018]; *Cummings v Brooklyn Hosp.* Ctr., 147 AD3d 902, 903 [2d Dept 2017]; *Messina v Staten Is. Univ. Hosp.*, 121 AD3d 867, 868 [2d Dept 2014]; *Pacio v Franklin Hosp.*, 63 AD3d 1130, 1131 [2d Dept 2009] [protocol for avoiding ulcerations and bedsores is substantially related to the rendition of medical treatment];

see also McCaffery v White Plains Hosp. Med. Ctr., 2024 NY Slip Op 51379[U], *8-9, 2024 NY Misc LEXIS 8358, *20 [Sup Ct, Westchester County, Oct. 7, 2024] [allegations that patient was at high risk of developing bedsores, that she was not turned frequently enough, and that such failure caused or contributed to the development of bedsores, sounded in medical malpractice, not ordinary negligence]; *cf. Zeides v Hebrew Home for Aged at Riverdale, Inc.*, 300 AD2d 178, 180 [1st Dept 2002] [plaintiff improperly mingled claims of medical malpractice with those alleging ordinary negligence]). Similarly, her claim that Weill-Cornell EMTs inappropriately transported her to her apartment rather than Riverside, and delayed in retrieving her from her apartment in order to transport her to Riverside, sounds in medical malpractice. As the Appellate Division, First Department, explained it in *Xenias v Mount Sinai Health Sys., Inc.* (191 AD3d 454, 455 [1st Dept 2021]),

> "Plaintiff does not meaningfully dispute that, to the extent her claim is based on first responders' alleged improper treatment of the decedent, such treatment involves specialized medical knowledge and bears a substantial relationship to the rendition of medical treatment, and therefore a medical malpractice framework should be applied (*see generally Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787-788 [1996]; *Rabinovich v Maimonides Med. Ctr.*, 179 AD3d 88, 93-94, [2d Dept 2019]). To the extent plaintiff's claim is based on defendants' delays in arriving at the scene, it still sounds in medical malpractice, as such issues of 'response time . . . speak[ ] directly to the question of patient care, which[,] in turn, bears a substantial relationship to a patient's over-all medical treatment' (*Zellar v Tompkins Community Hosp.*, 124 AD2d 287, 289 [3d Dept 1986])"

Moreover, the factual allegations made by the plaintiff here also do not fall within the ambit of claims that are subject to the doctrine of res ipsa loquitur

"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 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]). Although a plaintiff asserting a medical malpractice claim usually must demonstrate that the defendant physician or hospital deviated from acceptable medical practice,

and that such deviation was a proximate cause of the plaintiff's injury (*see Rivera v Kleinman*, 16 NY3d 757, 759, [2011]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24; *Terranova v Finklea*, 45 AD3d at 572; *Zellar v Tompkins Community Hosp.*, 124 AD2d 287, 288-289 [3d Dept 1986]), the theory of res ipsa loquitur may be applied to occurrences "[w]here the actual or specific cause of an accident is unknown" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]). Under such circumstances, "a jury may . . . infer negligence merely from the happening of an event and the defendant's relation to it" (*id.*; *see States v Lourdes Hosp.*, 100 NY2d 208, 211-212 [2003]; Restatement [Second] of Torts § 328D). To establish a prima facie case of negligence in support of a res ipsa loquitur charge, plaintiff must establish three elements:

> "[1.] the event must be of a kind that ordinarily does not occur in the absence of someone's negligence;
>
> "[2.] it must be caused by an agency or instrumentality within the exclusive control of the defendant; and
>
> "[3.] it must not have been due to any voluntary action or contribution on the part of the plaintiff"

(*Kambat v St. Francis Hosp.,* 89 NY2d at 494; *see James v Wormuth*, 21 NY3d 540, 545-546 [2013]; *Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]; Prosser and Keeton, Torts § 39 at 244 [5th ed]). Res ipsa loquitur, a doctrine of ancient origin (*see Byrne v Boadle*, 2 H & C 722, 159 Eng Rep 299 [1863]), derives from the understanding that some events ordinarily do not occur in the absence of negligence (*see id.; see also Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]). Once a plaintiff satisfies the burden of proof on these three elements, the res ipsa loquitur doctrine permits the jury to infer negligence from the mere fact of the occurrence (*see States v Lourdes Hosp.*, 100 NY2d at 211-212; *Kambat v St. Francis Hosp.,* 89 NY2d at 495). Thus, for example, where "a foreign object is left in the body of the patient, or the patient, while anesthetized, experiences an unexplained injury in an area which is remote from the treatment site" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 827 [2d Dept 2016] [citation omitted]), the invocation of the doctrine of res ipsa loquitur may be

warranted (*see id.; see also Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 2027 [3d Dept 2020]*; Swoboda v Fontanetta*, 131 AD3d 1042, 1045 [2d Dept 2015]; *DiGiacomo v Cabrini Med. Ctr.*, 21 AD3d 1052, 1054 [2d Dept 2005]; *Escobar v Allen*, 5 AD3d 242, 243 [1st Dept 2004]; *Leone v United Health Servs.*, 282 AD2d 860, 860-861 [3d Dept 2001]; *Hill v Highland Hospital*, 142 AD2d 955, 956 [4th Dept 1988]).

The defendants' alleged failure to turn the plaintiff with sufficient frequency so as to avoid the creation or exacerbation of bed sores, their alleged mistake in transporting her to her apartment rather than to Riverside, and their conduct in delaying the dispatch of an ambulance to her apartment to retrieve her and transfer her to Riverside, are not the type of claims to which the doctrine of res ipsa loquitur may be properly applied (*see D'Esposito v Haym Salomon Home for the Aged*, 23 Misc 3d 1116[A], 2009 NY Slip Op 50788[U], * 2, 2009 NY Misc LEXIS 952, *3 [Sup Ct, Kings County, Apr. 27, 2009] [in response to defendants' summary judgment motion in action arising from failure to frequently turn patient to avoid bedsores and properly monitor blood thinners, plaintiff withdrew res ipsa loquitur claim, but successfully defeated summary judgment as to medical malpractice claim based on failure to monitor blood thinners]; *Martino v Familusi*, 2022 NY Misc LEXIS 41362, *39 [Sup Ct, Nassau County, Oct. 21, 2022] [summarily dismissing res ipsa loquitur claim where defendants allegedly failed to diagnose and treat gangrene]; *Artemiou v City of New York*, 75 Misc 3d 567, 581 [Sup Ct, N.Y. County 2022] [recovery under doctrine of res ipsa loquitur is not available to plaintiff who alleged that her decedent was injured and died because EMTs did not provide timely and appropriate decisions in an emergency setting]).

An expert ultimately will be required for the plaintiff to establish that the defendants actually failed to turn her on a sufficiently frequent basis, that this failure constituted a departure from established and accepted standards of medical or nursing care, and that the failure caused the creation or exacerbation of a bed sore or sores. She also ultimately will be required to adduce expert testimony to establish that the delay in transferring her from Weill-Cornell to

Riverside constituted a breach of the standard of care applicable to hospitals and EMTs, and whether such a breach caused or contributed to any medically determined injury.

The service and filing of a certificate of merit is thus required in this action. The proper remedy at this stage is to extend, until August 13, 2025---or slightly more than 60 days after the entry of this decision and order---the plaintiff's time within which she must serve a certificate of merit upon the defendants (*see Rabinovich v Maimonides Med. Ctr.*, 179 AD3d at 95-96). Only if the plaintiff is recalcitrant in complying with *this order* could the court, in its discretion, then consider whether dismissal of the complaint would be an appropriate sanction (*see id.*; *Liang v Naturo-Medical Health Care, P.C.,* 2023 NY Slip Op 30567[U], *4-5, 2023 NY Misc LEXIS 808, *11 [Sup Ct, N.Y. County, Feb. 17, 2023]).

Accordingly, it is,

ORDERED that the motion is granted to the extent that, on or before August 13, 2025, the plaintiff shall serve and file the required certificate of merit or shall be subject to sanctions, upon further motion by the defendants, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

6/2/2025
DATE

JOHN J. KELLEY, J.S.C.

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