At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of July, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

LLOYD MITCHELL, as Administrator of the Estate of JACKIE MITCHELL, Deceased,

Plaintiff,

-against-

150 RIVERSIDE OP, LLC d/b/a THE RIVERSIDE PREMIER REHABILITATION AND HEALING CENTER,

Defendant.

----------X

Index No.: 521832/2021

DECISION AND ORDER

Mot. Seq. No. 2

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Affirmation/Memorandum of Law/ Statement of Material Facts/Exhibits	23 – 36
Affirmation in Opposition/Counter Statement of Material Facts/Exhibits	39 – 42
Reply Affirmation/Exhibit	44 – 45

Defendant 150 Riverside OP, LLC d/b/a The Riverside Premier Rehabilitation and Healing Center ("Defendant") moves for an order pursuant to CPLR § 3211 (a)(7), dismissing Plaintiff Lloyd Mitchell's ("Plaintiff") complaint on the grounds that Defendant is immune from liability pursuant to the New York Emergency or Disaster Treatment Protection Act (the "EDTPA") (Mot. Seq. No. 2); or, in the alternative, partial summary judgment, pursuant to CPLR 3212, on all claims related to the development of pressure ulcers, gross negligence, punitive damages, and wrongful death (Mot. Seq. No. 2). Plaintiff opposes the motion on the basis that the EDTPA does not apply due to Defendant's gross negligence and reckless misconduct in its administration of care for Jackie Mitchell ("Decedent").

On or about August 25, 2021, Plaintiff filed a summons and complaint against Defendant arising from the death of 67-year-old Jackie Mitchell. Decedent was initially admitted to Defendant's care in approximately April 2014 with end-stage renal damage, anemia, cervical myelopathy, and generalized weakness. However, the relevant time period at issue is April 2020

to July 2020. During that time, Plaintiff asserts that Decedent developed a pressure ulcer in early April 2020, which progressed to Stage III in June 2020. Plaintiff claims that although Decedent's wound was getting bigger and deeper, Defendant did not record the ulcer past Stage III. Plaintiff also alleges that Decedent experienced a fall injury on July 18, 2020. Specifically, Plaintiff asserts that Decedent fell from her bed while being assisted by Sharena Thomas ("Ms. Thomas"), a Certified Nursing Assistant employed by Defendant. This fall allegedly resulted in fractures, exacerbation of a sacral pressure ulcer, and Decedent's eventual death.

Prior to discussing the parties' arguments, it is first necessary to discuss the EDTPA. In response to the COVID-19 pandemic, the EDTPA was enacted on April 3, 2020, and retroactively effective as of March 7, 2020 (L 2020, ch 56, § 1; part GGG, § 2). The EDTPA was codified as Public Health Law ("PHL"), Article 30-D, Sections 3080-3082. It initially provided health care facilities and professionals immunity from any civil or criminal liability "for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services"[1] if: (a) the services were provided in accordance with applicable law or pursuant to a COVID-19 emergency rule; (b) the act or omission occurred in the course of providing the services and the treatment was impacted by the decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the State's directives; and (c) the services were provided in good faith (PHL former § 3082). However, immunity would not extend to harm or damages "caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm" (PHL former § 3082 [2]). The EDTPA was repealed on April 6, 2021 (L 2021, ch 96, §§ 1-2). The Second Department has found that the repeal does not apply retroactively (*Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618. 619 [2d Dept 2024]).

In the portion of its motion seeking dismissal, Defendant argues that it is immune from liability under the EDTPA and the exception to immunity does not apply. Since Plaintiff's claims "aris[e] from alleged injuries due to a fall and due to the development and deterioration of a sacral ulcer all occurred during the period of April 2020 through July 18, 2020," Defendant argues that its immunity under the EDTPA is triggered. Per the EDTPA, broad immunity applies if the

[1] Under the EDTPA, a nursing home or other licensed facility qualified as a health care facility (PHL former § 3081 [3]). In addition, the EDTPA defined "health care services" as services that related to the diagnosis or treatment of COVID-19, the assessment or care of an individual with a confirmed or suspected case of COVID-19, or the care of an individual who presented at a health care facility during the COVID-19 emergency (PHL former § 3081 [5]).

treatment of an individual is impacted by the healthcare facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives. Defendant maintains that it was a beneficiary of the respective statute because it experienced staffing shortages, alterations in company policy, enforcement of distance protocols, and frequent updates in policy, procedures, and staff education. In support, Defendant submits the affidavit of Caroll Morgan, Defendant's Director of Nursing. Ms. Morgan states that "floor and supervisory staff members (nurses, LPNs and CNAs) were regularly redirected away from the residence floors to attend or teach ongoing training seminars or classes, review newly implemented protocols, [and] handle extra duty fielding family telephone inquiries" (NYSCEF Doc No. 30, ¶ 9).

Plaintiff claims that during the period from April 2020 to July 2020, Decedent sustained a bilateral femoral fracture and a sacral pressure wound, which were a direct result of alleged negligence and violations on the part of Defendant. However, Defendant's expert witness, Dr. Paul Cavaluzzi, who specializes in geriatric medicine, opined that Defendant did not depart from good and accepted medical care in the treatment of Decedent nor did any alleged departures proximately cause injury to Decedent. According to Dr. Cavaluzzi, Decedent's wounds during her admission "are a known and accepted complication of decedent's numerous comorbidities and end stage condition" (NYSCEF Doc No. 32, ¶ 58).

Defendant further asserts that any claim for gross or willful neglect and punitive damages must be dismissed. According to Defendant, Plaintiff only presents "generic, non-specific claims, unsupported by any specific factual allegations which cavalierly claim that gross negligence occurred." Without specific facts, Defendant asserts that Plaintiff has failed to establish the existence of a viable claim that meets the exception to immunity under the EDTPA. For these reasons, Defendant avers that Plaintiff cannot maintain a claim for punitive damages. In addition, Defendant claims that the Public Readiness and Emergency Preparedness Act (the "PREP Act") provides it with immunity since it used "countermeasures" during the pandemic, such as treating residents suspected of having COVID-19 with antibiotics, supplemental oxygen and fever reducing medications.

Alternatively, Defendant argues that it has established prima facie entitlement to partial summary judgment on all issues relating to pressure ulcers, gross negligence, punitive damages and wrongful death. According to Defendant, there is no evidence of any negligence on its part.

Plaintiff opposes Defendant's motion to dismiss on the grounds that Defendant did not explain why or how its response to COVID-19 specifically prevented it from rendering the two-person assist Decedent required. Instead, Plaintiff argues that Defendant's motion and affidavits merely discuss how COVID-19 impacted the nursing home's operations generally. Plaintiff notes that during the pandemic, Decedent's care plan was updated at least three times amid the COVID-19 outbreak on April 25, 2020, May 3, 2020, and June 4, 2020. Plaintiff posits that if the pandemic necessitated any change in the care provided, it would have been noted in the care plan. In addition, Plaintiff argues that the EDTPA's qualified immunity provision does not apply to acts of gross negligence. Thus, Plaintiff argues that motions to dismiss under this provision cannot be granted where a colorable claim for gross negligence exists. Here, Plaintiff contends that the complaint and Bill of Particulars allege recklessness and gross negligence. Though Ms. Thomas knew that Decedent's care plan required a two-person assist, Plaintiff asserts that she consciously disregarded Decedent's medical chart and care plan. Based on Ms. Thomas's negligence, Plaintiff claims that there is an issue of fact with respect to gross negligence which should be left to the jury to decide.

With respect to Defendant's request for summary judgment, Plaintiff reiterates its arguments concerning gross negligence. However, Plaintiff withdraws the claim for wrongful death. Turning to Decedent's ulcer, Plaintiff asserts that Decedent developed a bed sore around April 23, 2020. Though Defendant contends that it rendered appropriate care, Plaintiff argues that they did not provide an affirmation of a wound care specialist. According to Plaintiff, Defendant downplayed the severity of the bedsore by listing it as Stage III ulcer, when upon her admission to the hospital on July 18, 2020, it was noted as Stage IV. Moreover, Plaintiff asserts that there are no photographs, drawings or diagrams of the bedsore in Defendant's record which could have allowed it to accurately and properly monitor its progression. Concerning Defendant's argument that it is immune from liability under the PREP Act, Plaintiff asserts that Decedent was never provided any "countermeasures" and no part of her claim involves anything that would fit within the PREP Act's definition of a countermeasure.

In reply, Defendant contends that the EDTPA's immunity comprises a legal inquiry rather than a fact-bound inquiry for a jury to decide. Defendant argues that it sufficiently met all three prongs of the EDTPA. First, Defendant maintains that its facility falls within the broadly defined "health-care services" offered to Decedent during the incident and the development of the subject right sacral ulcer, which occurred between the emergency declaration period from April 2020 and

July 2020. Second, Defendant argues that its care and services for its residents including Decedent were inevitably impacted due to employee illness and mandatory quarantine requirements, and employee redirection away from residence floors. Defendant asserts that through the affidavit of Ms. Morgan and the deposition testimony of Ms. Thomas, it has established that the care and services provided to Decedent were impacted by the pandemic and Defendant's response thereto. Third, Defendant maintains that it acted in good faith to provide the care and services Decedent needed for her sacral wound. In support, Defendant refers to Dr. Cavaluzzi's affirmation, in which he opined that Defendant did not deviate from the standard of care.[2]

According to Defendant, Plaintiff's opposition failed to show that Defendant's wound care rose to the level of gross negligence. Defendant notes that Plaintiff did not submit an expert opinion. With respect to Decedent's fall, Defendant concedes that Ms. Thomas failed to follow Decedent's care plan and wait for another nurse to assist her; however, Defendant argues that "this single incident or act does not rise to the level of gross negligence warranting excepting of the immunity provision" (NYSCEF Doc No. 44, ¶ 13). In addition, Defendant asserts that Plaintiff's opposition fails to raise an issue of fact as to the claims related to the care rendered for the ulcer, gross negligence and punitive damages. Defendant maintains that to rebut its prima facie showing of summary judgment, Plaintiff was required to submit an affidavit from a medical expert attesting to Defendant's departure from accepted medical practice and that such departure was the proximate cause of Decedent's alleged injuries. Further, Defendant claims that its expert Dr. Cavaluzzi has the relevant experience and qualifications to opine on Decedent's care.

The Court will first address the portion of Defendant's motion seeking dismissal under CPLR 3211 (a) (7). "On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]). "[T]he issue on a

[2] According to Dr. Cavaluzzi, Defendant

> met the standard of care as evidenced by the consistent, timely, and well documented wound rounding, application of treatments, necessary changes in order with respect to wound treatment and care planning when needed, and consultation with wound physicians. Such is evidenced by the placement of special mattresses, pillows, wedge cushions for positioning in bed, ROHO cushions on wheelchair, PT/OT evaluations, the increasing of turning and positioning from every 3 hours to every 2 hours, the routine measuring of the wounds, and application of all ointments and bandages/dressing (NYSCEF Doc No. 32, ¶ 46).

motion pursuant to CPLR 3211(a)(7) is limited to ascertaining whether the pleading states any cause of action, and not whether there is evidentiary support for the complaint" (*LoPinto v J.W. Mays, Inc.*, 170 AD2d 582, 583 [2d Dept 1991]). "Where, as here, the CPLR 3211(a)(7) motion is predicated on what is asserted to be a complete defense, and that motion is supported by evidence, the evidence of the defense must be *conclusive*" (*Holder v Jacob*, 231 AD3d 78, 88 [1st Dept 2024] [emphasis in original]). With respect to claims of immunity under the EDTPA, Defendant's proof on a motion to dismiss under CPLR 3211 (a) (7) "must conclusively establish the impact [of its COVID-19 response] on the treatment rendered to plaintiff, and suggestion is not conclusiveness" (*id.* at 88, citing *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 636, 389 NYS2d 314, 357 NE2d 970 [1976]).

Here, Defendant does not sufficiently illustrate how their acts, omissions, or decisions were the causal result of COVID-19 staffing shortages or adequately meet each section of the three-pronged test thereafter (*see Gonnelly v Newburgh Operations, LLC*, 229 NYS3d 592 [2d Dept 2025]; *Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618, 619 [2d Dept 2024]). Ms. Morgan's affidavit merely states in a conclusory fashion Defendant's efforts and activities implemented in response to COVID-19 "impacted Ms. Mitchell's and all residents' care" (NYSCEF Doc No. 30, ¶ 10). Defendant's assertions do not rise to level of suggestion, let alone conclusiveness. Since Defendant has not established entitlement to immunity under the EDTPA, it is unnecessary to discuss any exemption to immunity. Similarly, Defendant has failed to establish that an approved countermeasure under the PREP Act applies to Plaintiff's claims relating to the fall or the pressure ulcer (*see Kluska v Montefiore St. Luke's Cornwall*, 227 AD3d 690, 692 [2d Dept 2024]; *Sweatman v Hurlbut*, ___AD3d___, 2025 NY Slip Op 02522, *2 [4th Dept 2025]). Accordingly, Defendant's motion to dismiss on the basis of immunity is denied.

The Court next turns to the portion of Defendant's motion seeking partial summary judgment. It is well-established that on a motion for summary judgment, the burden rests with the movant to demonstrate, through admissible evidence, that there are no triable issues of fact and that it is entitled to judgment as a matter of law (*see Englington Med., P.C. v Motor Vehicle Acc. Indem. Corp.*, 81 AD3d 223, 230 [2d Dept 2011]). Once the movant has met its initial burden, summary judgment will only be granted if the opposing party fails to establish the existence of questions of fact (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal citation omitted]). "[M]ere conclusions, expressions of hope or unsubstantiated

allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"A hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety" (*D'Elia v Menorah Home & Hosp. for the Aged & Infirm*, 51 AD3d 848, 850 [2d Dept 2008]). "[M]edical malpractice is simply a form of negligence, no rigid analytical line separates the two" (*Scott v Uljanov*, 74 NY2d 673, 674 [1989]). "[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" (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996] [internal citations and quotation marks omitted]). Where "the gravamen of the action concerns the alleged failure to exercise ordinary and reasonable care to insure that no unnecessary harm befell the patient", the claim sounds in negligence (*Papa v Brunswick Gen. Hosp.*, 132 AD2d 601, 603 [2d Dept 1987]; *see Carthon v Buffalo Gen. Hosp. Deaconess Skilled Nursing Facility Div.*, 83 AD3d 1404, 1405 [4th Dept 2011] [finding that administratix's claims "sound in ordinary negligence inasmuch as they are based on allegations that defendants' employees failed to carry out the directions of the physicians responsible for decedent's care plan"]). Here, Plaintiff's complaint encompasses allegations of medical malpractice (pressure ulcers) and negligence (the fall).

The Court first turns to the claims of gross negligence and punitive damages relating to Decedent's fall. "[A] cause of action alleging gross negligence and a demand for punitive damages, [] requires a showing of reckless disregard for the rights of others, bordering on intentional wrongdoing" (*Jones v LeFrance Leasing LP*, 127 AD3d 819, 821 [2d Dept 2015]).

As the Second Department elaborated,

> Gross negligence differs in kind, not only degree, from claims of ordinary negligence. To constitute gross negligence, a party's conduct must smack[] of intentional wrongdoing or evince[] a reckless indifference to the rights of others. Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence (*Goldstein v Carnell Assoc., Inc.*, 74 AD3d 745, 746-747 [2d Dept 2010] [internal quotation marks and citations omitted]).

"A defendant moving for summary judgment dismissing a cause of action alleging gross negligence must show, prima facie, 'the absence of any conduct that could be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others' " (*Huang v Fort Greene Partnership Homes Condominium*, 228 AD3d 912, 916 [2d Dept 2024],

quoting *Vissichelli v Glen-Haven Residential Health Care Facility, Inc.*, 136 AD3d 1021, 1023, 25 NYS3d 639 [2d Dept 2016]). "An award of punitive damages is warranted where the conduct of the party being held liable 'evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness' " (*Pellegrini v Richmond County Ambulance Serv., Inc.*, 48 AD3d 436, 437 [2d Dept 2008], quoting *Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 585, 832 NYS2d 255 [2d Dept 2007]).

Here, Defendant demonstrated entitlement to summary judgment as a matter of law dismissing the cause of action alleging gross negligence and demand for punitive damages. It is undisputed that Decedent's care plan required a two-person assist. It is also undisputed that Ms. Thomas was aware of this requirement prior to the incident leading to Decedent's fall since she testified that she would normally change Decedent "when the treatment nurse . . . comes" and assists her (Thomas tr at 25, lines 5-76). However, on the date of Decedent's fall, Ms. Thomas stated that Decedent asked to be changed in the morning, "so [Ms. Thomas] changed her" (Thomas tr. at 26, lines 7-8). When asked if there was a reason for not getting help to move Decedent, Thomas responded, "I think we were working challenged at the time", which meant that there were not enough people to help (Thomas tr at 27, lines 13-20). Ms. Thomas' decision "was not so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of" Decedent (*Huang*, 228 AD3d at 916). Accordingly, Plaintiff's claims do not rise to the level of gross negligence (*see Rybsztajn v Elite Care LLC*, 2025 NY Slip Op 30329[U], at *8 [Sup Ct, Kings County 2025] [rejecting claim for gross negligence where there were no "factual allegations that [decedent's] injuries and death resulted from *intentional wrongdoing or reckless indifference* by [defendant's] employee(s), rather than a lack of ordinary care"] [emphasis added]).

Likewise, while it is uncontested that Ms. Thomas deviated from Decedent's care plan, her actions were "not wanton or malicious or activated by evil or reprehensible motives" to warrant imposition of punitive damages (*Anzolone v Long Is. Care Ctr., Inc.*, 26 AD3d 449, 450-451 [2d Dept 2006] [internal quotation marks omitted]). In opposition, Plaintiff failed to raise an issue of fact. Accordingly, dismissal of Plaintiff's claim of gross negligence and claim for punitive damages based on the cause of action alleging gross negligence is warranted.

Since Plaintiff has withdrawn the cause of action for wrongful death, the only remaining portion of Defendant's motion to address is the allegations sounding in medical malpractice relating to the pressure ulcers.

Defendant has established prima facie entitlement to summary judgement as to the pressure ulcer claims through the affirmation of Dr. Cavaluzzi.[3] It is undisputed that Decedent developed a pressure ulcer that progressed during her admission at Defendant's facility. However, in his affirmation, Dr. Cavaluzzi asserted that this "does not demonstrate or imply a deviation from good and accepted medical community medical standards" (NYSCEF Doc No. 32, ¶ 58). Further, Dr. Cavaluzzi referenced Decedent's medical records documenting multiple instances of Decedent's refusal to have her wound assessed or treated and refusal to turn or use positioning devices (*id.* at ¶¶ 26-27, 30-31, 34, 37). In addition, Dr. Cavaluzzi asserted that Decedent's co-morbidities (anemia, end-stage renal disease, heart disease, and myelopathy) are "significant risks factors for developing pressure ulcers" (*id.* at ¶ 50). Accordingly, Dr. Cavaluzzi opined that Decedent's "multiple, pre-existing medical conditions, and persistent non-compliance made it excessively difficult to prevent, improve and/or heal any skin breakdown that did occur regarding the right buttock ulcer" (*id.* at 48). Dr. Cavaluzzi then concluded "within a reasonable degree of medical certainty that the care and treatment rendered to the decedent by [Defendant] was at all times appropriate and within the standard of care, and that no act or omission on the part of [Defendant] was a proximate cause of any of decedent's alleged injuries or damages" (NYSCEF Doc No. 32, ¶ 59).

In opposition, Plaintiff relies solely on the U.S. Department of Health and Human Services' ("HSS") definition of a "never event," which are "particularly shocking medical errors…that should never occur" that includes "[a]ny stage 3, stage 4, or unstageable pressure ulcers acquired after admission/presentation to a health care setting" (NYSCEF Doc No. 42). This information is based on a printout of a website, which Defendant argues is inadmissible.[4] Even if the Court took judicial notice of the printout, it carries little to no weight in rebutting Defendant's prima facie showing. While HHS provides examples of what should never occur, it fails to attach any strict

[3] In his affirmation, Dr. Cavaluzzi stated that as part of his practice of geriatric medicine, he is "involved, inter alia, in the prevention, management, and treatment of pressure ulcers, wounds, and other skin conditions for the residents requiring short-term and long-term care and the prevention and treatment of residents who are fall risks" (NYSCEF Doc No. 32, ¶ 5). Thus, the Court rejects any argument related to Defendant's expert's qualifications (*see Cerrone v N. Shore-Long Is. Jewish Health Sys., Inc.*, 197 AD3d 449, 451 [2d Dept 2021]).

[4] Plaintiff did not request that this Court take judicial notice of the website.

liability or negligence if it does happen. Thus, Plaintiff failed to raise an issue of fact by "not submit[ting] an expert affidavit opining that [Defendant] deviated from accepted medical practice" (*D'Elia*, 51 AD3d at 851).

Accordingly, it is hereby

ORDERED, that Defendant's motion to dismiss pursuant to CPLR 3211 (a) (7) is denied; and it is further

ORDERED, that Defendant's motion for partial summary judgment pursuant to CPLR 3212 is granted to the extent that Plaintiff's claims of gross negligence, claims relating to the pressure ulcers, and demand for punitive damages are dismissed. Thus, the only remaining claims are ordinary negligence relating to Decedent's fall.[5]

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice

[5] As noted above, in his opposition, Plaintiff withdrew the claim of wrongful death.