

**Perez v Metropolitan Jewish Home Care, Inc.**

2025 NY Slip Op 34353(U)

May 8, 2025

Supreme Court, Queens County

Docket Number: Index No. 704196/2020

Judge: Tracy Catapano-Fox

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
FRANCISCO PEREZ as Administrator of the Estate of  
SUSIE PEREZ, AND FRANCISCO PEREZ,  
Individually,

Index No. 704196/2020

Part MDP

Plaintiff,

Motion Date: April 2, 2025

-against-

Calendar No. 16

Sequence No. 1

METROPOLITAN JEWISH HOME CARE, INC.,  
METROPOLITAN JEWISH HOME CARE, INC. d/b/a  
MJHS HOME CARE, and NEW YORK-  
PRESBYTERIAN/QUEENS,

Defendants.

-----X

The following papers numbered EF-22 to EF-86 read on this motion by defendants METROPOLITAN JEWISH HOME CARE, INC. and METROPOLITAN JEWISH HOME CARE, INC. d/b/a MJHS HOME CARE for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

Papers  
Numbered

Notice of Motion, Affirmation, Exhibits.....	EF22-EF48
Affirmation in Opposition, Exhibits.....	EF63-EF73
Reply Affirmation.....	EF86

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants Metropolitan Jewish Home Care, Inc. and Metropolitan Jewish Home Care, Inc. d/b/a MJHS Home Care's (hereinafter referred to as "Metropolitan Jewish") motion for summary judgment and dismissal of plaintiff's Complaint is granted. (*See Vargas v. Barnabas Hosp.*, 168 A.D.3d 596 [2d Dept. 2019].)

Plaintiff commenced this action for medical malpractice, wrongful death and negligence against defendant Metropolitan Jewish for care and treatment rendered intermittently to decedent Susie Perez from September 14, 2017 through January 29, 2018. Plaintiff filed the Summons and

Complaint on March 10, 2020, and issue was joined by moving defendant via the filing of its Verified Answer on July 10, 2020. It is noted decedent Susie Perez passed away on March 10, 2018.

Defendant Metropolitan Jewish argues it is entitled to summary judgment and presents the pleadings, memorandum of law, the parties' deposition testimony, decedent's medical records, photographs and the affirmation of Dr. Paula Lester in support of its motion. Defendant argues there are no issues of fact based upon the above evidence, and defendant did not depart from good and accepted medical standards and no act or omission was a substantial factor in causing decedent's injuries.

Defendant Metropolitan Jewish presents the affirmation of Dr. Paula Lester in support of its motion. Dr. Lester affirmed to be a physician licensed to practice medicine in New York who is board certified in Hospice and Palliative Medicine, Geriatric Medicine and Internal Medicine. She affirmed to be fully familiar with the applicable standard of care and rendered opinions based upon her medical training and experience, as well as a review of the medical records, deposition testimony and photographs.

Dr. Lester opined within a reasonable degree of medical certainty that defendant Metropolitan Jewish's care and treatment of decedent at all times comported with good and accepted standards of care, and none of its acts or omissions proximately caused decedent's injuries. Dr. Lester reviewed decedent's medical records and noted decedent was accepted into Metropolitan Jewish on September 16, 2017 and was first evaluated on September 19<sup>th</sup> with a diagnosis of stage 4 breast cancer with metastasis to the brain. Dr. Lester noted decedent had previously been diagnosed with diabetes that was controlled by diet, and increased risk of falls and bilateral lower extremity edema and erythema. Dr. Lester opined Metropolitan Jewish's treatment of decedent was in accordance with the standard of care, and opined the lesions on decedent's foot were noted to be of unknown origin and were not at that time thought to be decubitus ulcers. She opined the standard of care did not require Metropolitan Jewish to do anything further, and none of its staff's actions or inactions proximately caused decedent's injuries.

Dr. Lester opined defendant Metropolitan Jewish's care and treatment of decedent from September 26, 2017 through October 7, 2017 was in accordance with the standard of care and did not depart from the standard of care. She noted there was no edema present, the wounds on decedent's toes and right lower leg were healing, and there was no evidence of tunneling, undermining or drainage. Dr. Lester opined decedent was discharged on October 5<sup>th</sup> as she was deemed clinically stable and her nursing goals were fully met. She further opined there were no pressure ulcers at that time, decedent's leg wounds remained free of infection, and the standard of care did not require Metropolitan Jewish to do anything further.

Dr. Lester noted decedent did not receive care from Metropolitan Jewish until December 14, 2017, following her hospitalization at co-defendant New York Presbyterian Hospital for severe sepsis and cellulitis. She opined no decubitus ulcers were noted during intake evaluation, and agreed with Metropolitan Jewish's care plan to provide skilled nursing visits, and there were no departures from the standard of care nor any injuries to decedent. Dr. Lester noted a skin evaluation was performed on December 19<sup>th</sup>, and no decubitus ulcers were present and decedent's skin was intact throughout. She noted decedent was readmitted to NYPQ on December 23, 2017 and was discharged on January 24, 2018 with a diagnosis of sepsis from C. Diff colitis and UTI treated with IV Vancomycin, Meropenem and Flagyl. Dr. Lester noted decedent's condition during hospitalization included chronic pain, persistent diarrhea, right frontal lobe ischemia, hydrocephalus and progressing breast cancer with brain and spine metastasis but no pressure ulcers or skin breakdowns were noted. Dr. Lester noted decedent's daughter took a picture of decedent's skin condition on January 18, 2018, and opined the skin was consistent with a moisture-associated skin irritation addressed by applying a protective foam dressing, barrier cream and frequent repositioning. Dr. Lester further opined there was no evidence of a pressure ulcer.

Dr. Lester opined Metropolitan Jewish's care and treatment of decedent on January 24, 2018 after discharge to home care was appropriate and did not depart from standard of care. She noted during decedent's admission at NYPQ, decedent developed a dime-sized pressure wound on her lower back which had increased in size. Dr. Lester opined within a reasonable degree of medical certainty that the appropriate treatment for a pressure wound would be using a foam dressing and padding for extra protection, applying moisture barrier cream, frequently turning and repositioning and providing proper nutrition. She further opined only yellow devitalized tissue and/or necrotic tissue require additional treatment containing debriding agents.

Dr. Lester opined upon decedent's discharge from NYPQ, the discharge orders did not include wound care measurements or medications, nor referenced any wound or skin care impairment. She noted no skin impairment except moisture-associated excoriation was noted by decedent's family. Dr. Lester opined despite the lack of skin directives in the discharge order. Allevyn foam dressing and butt paste were provided with other supplies at the time of discharged and used by decedent's family at home. Dr. Lester opined Metropolitan Jewish was not involved in decedent's care on January 24, 2018 and the standard of care did not require it to do anything further. Dr. Lester noted Nurse Del Tobias of Metropolitan Jewish evaluated decedent on January 25, 2018, and the clinical note indicated decedent's skin was intact and no decubiti ulcers were present. Dr. Lester opined within a reasonable degree of medical certainty that although Nurse Tobias did not document any skin impairments, her assessment, care and recommendations were appropriate and in accordance with good and accepted standards of care. She opined decedent received proper, efficient treatment including a thorough skin assessment from RN Del Tobias, and defendant ordered a specialty mattress, physical therapy was provided, and nursing visits were timely and consistent. She further opined RN Del Tobias checked decedent had all required

medications, explained to decedent's sister Lucy how they should be administered, provided Lucy with wound care instructions, advised her to how to apply a Fentanyl patch and recommended feeding decedent Ensure protein drinks. Dr. Lester opined defendant Metropolitan Jewish's treatment of decedent was in accordance with the standard of care and did not proximately cause decedent's injuries.

Dr. Lester opined the photograph taken on January 27, 2018 representing a sacral pressure injury was likely caused by decedent's end-of-life skin failure. She opined the family was properly instructed on turning and positioning every two hours, applying protective foam dressing and/or barrier cream, and maintaining good nutrition, and the family never reported any change in condition or worsening of the wound to Metropolitan Jewish. Dr. Lester opined decedent was at the end of her life and a proper candidate for hospice or palliative care due to her end-stage breast cancer metastasizing to her brain and spine. She further opined decedent developed an end-of-life pressure injury that can appear suddenly and rapidly progress. Dr. Lester further opined decedent's pressure ulcer was unavoidable and incurable considering her comorbidities and overall clinical condition in conjunction with a rapid and uncontrollable worsening wound. She further opined decedent received proper wound care at home, Metropolitan Jewish' treatment was in accordance with the standard of care and did not proximately cause decedent's injuries. Dr. Lester further opined it is impossible to separate decedent's pain and suffering attributable to the pressure ulcer from pain and suffering caused by cancer, which caused severe health decline and pain before the development of pressure injury. Dr. Lester opined Metropolitan Jewish's treatment of decedent was in accordance with the standard of care, it did not depart from the standard of care, and none of its actions or inactions proximately caused decedent's injuries and death.

Plaintiff opposes defendant's motion and argues defendant Metropolitan Jewish failed to eliminate all triable issues of fact with respect to whether it departed from accepted standards of care and proximately caused or contributed to the injuries. Plaintiff presents the medical records, deposition testimony and expert affirmation in support of his opposition. Plaintiff argues defendant failed to present a prima facie case, and there are issues of fact that warrant a jury trial. Plaintiff presents the affirmation of a physician licensed to practice medicine in New York who is board certified in Internal Medicine and Geriatric Medicine. Plaintiff's expert affirmed to be familiar with the accepted standards of practice in internal medicine and geriatrics as they existed in 2017-2018. The expert reviewed decedent's medical records, pleadings, the parties' deposition testimony and defendant's moving papers in rendering opinions.

Plaintiff's expert opined defendant Metropolitan Jewish's care and treatment of decedent from September 16, 2017 through January 29, 2018 was not in accordance with good and accepted practice and departed from accepted standards of care. The expert opined defendant's deviations and departures from the accepted standards of care were the proximate cause of decedent's injuries, including a sacral pressure ulcer, deep tissue injury, infection, necrosis, sepsis, dehydration,

malnutrition, emotional trauma, pain and suffering and death.

Plaintiff's expert opined defendant Metropolitan Jewish provided direct medical and/or nursing care and supervision to decedent, as it visited decedent, assessed and reassessed her medical condition, made decisions, coordinated and arranged for her care and treatment, and supervised decedent's care and treatment. The expert opined Metropolitan Jewish staff performed a pressure ulcer assessment, including a head-to-toe assessment and backside examination. Plaintiff's expert disagreed with defendant's argument that a twenty-hour per week home health aide was recommended but denied by decedent's family, and noted plaintiff and plaintiff's daughter testified they did not recall ever refusing a home health aide. Plaintiff's expert opined defendant Metropolitan Jewish failed to properly assess and obtain the level of care and supervision required for decedent.

Plaintiff's expert opined within a reasonable degree of medical certainty that defendant Metropolitan Jewish failed to properly address decedent's risk factors for development of pressure ulcers, and greater care should have been paid to her care and treatment. The expert opined decedent's discharge from co-defendant NYPQ on January 24, 2018 required interventions to prevent pressure ulcers be put in place, but the orders for discipline and treatments in the plan of care did not include implementing interventions for pressure ulcer prevention. Plaintiff's expert further opined there is no notation in Metropolitan Jewish records of an assessment or determination for HHA services. The expert opined defendant's failure to properly address decedent's risk factors for the development of pressure ulcers and subsequent failure to provide greater attention and assistance to decedent's care and treatment based upon the risk factors was a deviation from good and accepted medical practice that proximately caused the development and/or subsequent deterioration of decedent's pressure ulcer.

Plaintiff's expert opined within a reasonable degree of medical certainty that defendant Metropolitan Jewish was aware of decedent's sacral pressure ulcer following her discharge on January 24, 2018 from NYPQ but failed to note it in records and failed to implement proactive interventions to prevent further deterioration of the pressure ulcer. The expert disagreed with the skilled nursing assessment that noted decedent had no pressure ulcers and her skin integrity was intact, as decedent's sister and daughter testified decedent had a sacral wound after discharge from the hospital. Plaintiff's expert opined within a reasonable degree of medical certainty that defendant's failure to note the existence of a pressure ulcer in its records and implement proactive interventions to prevent the further deterioration of the pressure ulcer deviated from good and accepted medical practice and proximately caused the deterioration of decedent's pressure ulcer.

Plaintiff's expert opined defendant's failure to implement an appropriate care plan to account for decedent's high risk of skin breakdown while under its care was a deviation from good and accepted standards of medical care and a proximate cause of decedent's pressure ulcer. The

expert opined defendant providing a hospital bed and gel mattress for decedent from January 25, 2018 through January 29, 2018 does not alone address a patient who is at high risk for pressure sore development and deterioration. Plaintiff's expert opined a proper care plan in conjunction with appropriate supervision should have been implemented to address decedent's high risk of skin breakdown. The expert opined decedent was dependent upon defendant to provide her with proper care and treatment of her underlying conditions.

Plaintiff's expert disagreed with defendant's expert that a pressure ulcer was incurable due to decedent's cancer and comorbidities, and opined these conditions did not inhibit decedent's skin from healing as noted in NYPQ records. The expert further disagreed with defendant's expert that it is impossible to distinguish between decedent's pain and suffering from cancer and pain and suffering from the pressure ulcer, as plaintiff Francisco Perez, decedent's sister and daughter all testified with regard to decedent's pain and suffering in her back area. Plaintiff's expert opined within a reasonable degree of medical certainty that decedent sought ongoing, consistent and continuous treatment from defendant for prevention and treatment of skin impairment-related issues, including pressure ulcers, assistance with activities of daily living, and proper supervision, treatment and medical care. The expert further opined defendant's actions and inactions were clear deviations from good and accepted standards of medical care and proximately caused decedent's progression and deterioration of injuries and death. Based upon the above, plaintiff argues summary judgment is not warranted.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolina & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia*

*v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting with the scope of employment under the doctrine of *respondeat superior*. (See *Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

In an action to recover damages for wrongful death, the decedent's personal representative must establish that the defendant's wrongful act, neglect or default caused the decedent's death. (*Eberts v. Makarczuk*, 52 A.D.3d 772, 772-773 [2d Dept. 2008].)

Defendant Metropolitan Jewish established a prima facie entitlement to summary judgment. Defendant demonstrated through its production of the documentary evidence and affirmation of Dr. Lester that it rendered treatment to decedent in accordance with good and accepted standards of care and did not proximately cause or contribute to decedent's injuries or death. Dr. Lester demonstrated Metropolitan Jewish did not provide direct care to decedent, but provided instruction, evaluation and supervised decedent's family who provided direct care and treatment. Defendant demonstrated Metropolitan Jewish recommended a home health aide which was denied by decedent and family. It further demonstrated through the evidence that Metropolitan Jewish staff appropriately created and implemented a skin plan, and advised decedent's family with regard to skin impairment, care and treatment. Defendant demonstrated decedent's pressure ulcer was a result of her end-of-life skin breakdown, and not due to any actions or inactions by defendant. Defendant further demonstrated through Dr. Lester's affirmation that decedent's skin integrity was impacted by her cancer and other medical conditions, and it was impossible to distinguish between pain and suffering caused by the pressure ulcer and that from decedent's end-of-life cancer. Based upon the above, defendant demonstrated it did not depart from the applicable standard of care and none of its actions or inactions proximately caused decedent's injuries and death.

Plaintiff failed to raise triable issues of fact in dispute. Plaintiff's expert opinions were conclusory, vague and failed to demonstrate issues of fact with regard to plaintiff's claim for

wrongful death. (*See Bradley v. St. Barnabas Hosp.*, 227 A.D.3d 521 [1<sup>st</sup> Dept. 2024].) Plaintiff also failed to raise triable issues of fact with regard to medical malpractice and negligence. Plaintiff’s argument that defendant Metropolitan Jewish departed from the standard of medical care by failing to properly documented the medical records is not availing. (*Braunstein v. Maimonides Med. Ctr.*, 161 A.D.3d 675, 675 [1<sup>st</sup> Dept. 2018][“A failure to document each element of the skin care protocol does not equate to a failure to perform each element or to a cause of the ulcer itself”].) Plaintiff’s argument that defendant departed from accepted standards of care by failing to timely and properly implement a skin impairment plan is similarly without merit, as plaintiff’s expert failed to address the deposition testimony and records that demonstrate decedent’s family was properly directed and instructed on how to provide wound care and regular turning and positioning. Plaintiff’s expert also failed to sufficiently address decedent’s significant comorbidities and how they may have contributed to her injuries, and therefore failed to raise a triable issue of fact with regard to proximate cause. (*See Johnson v. Harlem Hosp.*, 2025 NY Slip Op 02645 [1<sup>st</sup> Dept. 5/1/2025].)

Accordingly, defendant Metropolitan Jewish Home Care, Inc. and Metropolitan Jewish Home Care, Inc. d/b/a MJHS Home Care’s motion for summary judgment and dismissal of plaintiff’s Complaint is granted. Plaintiff’s Complaint is dismissed as to defendant Metropolitan Jewish Home Care, Inc. and Metropolitan Jewish Home Care, Inc. d/b/a MJHS Home Care.

This constitutes the decision and Order of the Court.

Dated: May 8, 2025



Hon. Tracy Catapano-Fox, J.S.C.

