

Anello v Coopersstone
2013 NY Slip Op 32226(U)
September 16, 2013
Supreme Court, Suffolk County
Docket Number: 05-16623
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-22-13 (#006)
MOTION DATE 6-11-13 (#007)
ADJ. DATE 7-2-13
Mot. Seq. # 006 - MD
007 - MD

-----X
VINCENT ANELLO as Administrator of the Estate :
of MARGUERITE E. ANELLO and VINCENT :
ANELLO, individually, :
:
Plaintiff, :
:
-against- :
:
LESTER M. COOPERSTONE, M.D., ANTONIA :
ROSS, AS EXECUTRIX OF THE ESTATE OF :
EDMOND J. ROSS, JR., JOHN MURATORI, :
M.D., ELIZABETH STURM, M.D. and THE :
ROSALIND AND JOSEPH GURWIN JEWISH :
GERIATRIC CENTER OF LONG ISLAND, INC., :
Defendants. :
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by defendants Ross as Executrix of the estate of Edmond J. Ross, Jr. and Muratori, M.D., dated April 22, 2013, and supporting papers (including Memorandum of Law dated 1-21); (2) Notice of Motion by defendants Sturm, The Rosalind and Gurwin Jewish Geriatric Center, dated April 29, 2013, supporting papers 22-48; (3) Affirmation in Opposition by the plaintiff, dated June 3, 2013, and supporting papers 49-55; (4) Reply Affirmation by the defendants dated June 26, 2013 and July 1, 2013, and supporting papers 56-61 and 62-63; (5) Other ____ ;(~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (006) by defendants, Antonia Ross, as Executrix of the Estate of Edmond J. Ross, Jr. and John Muratori, M.D., pursuant to CPLR 3212 for summary judgment dismissing the plaintiffs' complaint and any cross claims as asserted against them is denied; and it is further

ORDERED that motion (007) by defendants, Elizabeth Sturm, M.D. and The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, pursuant to CPLR 3212 for summary judgment dismissing the plaintiffs' complaint and any cross claims as asserted against them is denied.

In this action premised upon the alleged medical malpractice by the defendants, the plaintiff, Vincent Anello, as Administrator of the Estate of Marguerite E. Anello, alleges that the defendants departed from good and accepted standards of medical care and treatment of the plaintiff's decedent, a 53 year old female, causing her to sustain severe and continuous injuries, pain and suffering, and mental anguish of a permanent or lasting nature. The plaintiff was under the care and treatment of the defendants following gastric bypass surgery performed on October 1, 2002 by defendant Dr. Lester Cooperstone, M.D. Postoperatively, she was followed by Dr. Cooperstone, and treated by Antonia Ross's decedent, Edmond J. Ross, M.D., and his partner, John Muratori, M.D. from about April 1, 2002, continuing to March 25, 2003. It is alleged that defendant Elizabeth Sturm, M.D. treated the plaintiff's decedent from about February 25, 2003 through March 12, 2003 while she was a patient at the Rosalind and Joseph Gurwin Jewish Center (Gurwin). The gravamen of this complaint is that the defendants negligently departed from good and accepted standards of care and treatment by not properly treating the plaintiff's decedent for severe malnutrition, resulting in polyneuropathy, the inability to tolerate oral nourishment, need for a feeding tube, other associated complications, and her eventual death on July 8, 2008; and that they failed to provide informed consent.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (006) defendants, Antonia Ross, as Executrix of the Estate of Edmond J. Ross, Jr. and John Muratori, M.D., have submitted, inter alia, an attorney's affirmation; the affirmation of Jerome Lehrfeld, M.D.; copies of the summons and complaint, second amended complaint, their answer and answer to the second amended complaint with demands, plaintiff's verified bill of particulars, plaintiff's response to defendants' demands; copy of the order dated October 18, 2012 granting letters testamentary to Antonia Ross as the administrator of the estate of decedent Edmond J. Ross; a stipulation dated and so ordered (Mayer, J.) amending the caption of this action; certified copy of the plaintiff's decedent's medical records; certified copies of the Southside Hospital record; and an uncertified copy of the death certificate of Marguerite Anello dated July 8, 2008; copies of the unsigned but certified transcripts of the examinations before trial of plaintiff's decedent dated April 5, 2007, April 12, 2007, September 17, 2007, and September 18, 2007; the unsigned but certified transcripts of the examinations before trial of Vincent Anello dated November 16, 2007, January 7, 2008, February 1, 2008, and December 8, 2010; defendant Lester

Cooperstone dated November 8, 2011; and the unsigned but certified transcripts of the examinations before trial of Edmond J. Ross, M.D., dated December 13, 2011, John Muratori, M.D. dated February 9, 2012, and Elizabeth Sturm which is dated February 23, 2012 and considered there being no objection (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). The unsigned but certified transcripts of the moving defendants, Edmond Ross and John Muratori, M.D., are considered as adopted by accurate by them (*see Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

Motion (007) by defendants, Elizabeth Sturm, M.D. and The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island (Gurwin), is supported with, inter alia, an attorney's affirmation; the affirmation of Gary Burke, M.D.; the copies of the summons and complaint, amended complaint, and defendants' answers and answers to the second amended complaint, plaintiffs' verified bill of particulars; a copy of the order dated January 29, 2013 (Mayer, J.); certified copy of the decedent's Southside Hospital record, signed and certified transcript of the examination before trial of defendant Sturm, M.D., several pages of the transcripts of the examinations before trial of the plaintiff and plaintiff's decedent which are not in admissible form (*see Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]); uncertified medical records from North Shore University Hospital, Holy Name Hospital, Beth Israel Hospital, and St. Catherine of Siena, which are not in admissible form pursuant to CPLR 3212 and 4518, and are not considered (*Friends of Animals v Associated Fur Mfrs.*, *supra*). Expert testimony is limited to facts in evidence (*see also Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503[2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

In support of motion (006) defendants, Antonia Ross, as Executrix of the Estate of Edmond J. Ross, Jr. and John Muratori, M.D., have submitted the affirmation of Jerome Lehrfeld, M.D. who affirms that he is

licensed to practice medicine in New York State. He has not affirmed that he is certified in any area of medicine, and has not set forth his work experience as a basis for his expertise to opine as an expert in this matter, except to state in a conclusory and unsupported manner that he has experience as a specialist in Family Practice. It is Dr. Lehrfeld's opinion within a reasonable degree of medical certainty that the medical care and treatment rendered to plaintiff's decedent, Marguerite Anello, by Edmond Ross, M.D. was in accordance with acceptable medical practice, and his treatment was not the proximate cause of the injuries which are claimed she sustained, including her death.

Dr. Lehrfeld continued that in May and June 2002, the plaintiff's decedent, a fifty-three year old woman, was seen by Dr. Ross for the purpose of obtaining medical clearance in preparation for gastric bypass surgery. Dr. Ross cleared her for surgery after she was seen by a pulmonologist, cardiologist, and gastroenterologist. Dr. Cooperstone then performed the bypass surgery in October 2002, and followed her post-operatively. Dr. Cusa, a gastroenterologist, saw the plaintiff's decedent at Dr. Cooperstone's request for complaints of nausea, and there was a post operative concern of a narrowing or stricture, or retained food in the esophagus. Dr. Cusa removed esophageal strictures in January 2003. In the later part of 2002, the plaintiff's decedent also developed problems with her hands and legs, experienced difficulty walking, and extreme pain in her legs, and she was confined to a chair. Dr. Lehrfeld stated that Dr. Ross' note set forth that the plaintiff's decedent complained of being so weak that she could not stand, and suspecting she was dehydrated, malnourished, and had a neurological problem, he admitted her to Southside Hospital, ordered laboratory studies, and had her seen by a neurologist, Dr. Winnick, who saw her on February 12, 2003, and found her with malaise/diffuse weakness without focal neurological findings, and doubted a neurological etiology. Dr. Ross' partner, Dr. Muratori, followed her in the hospital with the working diagnosis of dehydration and malnourishment, and had her seen by a gastroenterologist, Dr. D'Silva on February 12, 13, 14, 2003. Dr. D'Silva's impression was that of status post dilation for likely esophageal stricture with malnourishment, now able to tolerate foods orally. At the time of her discharge, the plaintiff's decedent was improved but required physical reconditioning. She did not see Dr. Ross or Dr. Muratori again any time after her discharge from Southside Hospital.

Dr. Lehrfeld opined that although the plaintiff contended that TPN (temporaty parental nutrition) should have been supplemented intravenously, it is his opinion that it was not indicated, and that it was within the purview of the gastroenterologist to make such decisions, not Dr. Muratori or Dr. Ross. Once the gastroenterologist has been consulted about how the patient is to receive nutrition, it is not acceptable practice for the family practitioner to come to a different conclusion about the manner in which to administer nutrition. Dr. Lehrfeld opined that Dr. Ross appropriately cleared the plaintiff's decedent for pulmonary and cardiology consults prior to surgery, and based upon their opinions and the blood work results, medically clearing the plaintiff's decedent for surgery in June 2002, was appropriate. Dr. Lehrfeld further opined that Dr. Ross comported with the standard of care in admitting the plaintiff's decedent to Southside Hospital for further evaluation and consults on February 11, 2003. He added that there is nothing that Dr. Ross did or did not do which proximately caused her injuries or death which occurred five years later. Dr. Lehrfeld opined that when Dr. Muratori, Dr. Ross' partner, saw the plaintiff's decedent in the hospital on February 12, 2003, and assumed her care for Dr. Ross, that Dr. Ross did not thus abandon his patient. He continued that the plaintiff's decedent's death certificate stated that she suffered from chronic malnutrition, which he states is a known complication of gastric bypass surgery, and that Dr. Ross did not cause this condition. Dr. Lehrfeld continued that the plaintiff's decedent's immediate cause of death was from septic shock as a consequence of intestinal ischemic and perforation, as well as mesenteric thrombosis, just days following the surgery by Dr. Goodman to insert a feeding tube five years after Dr. Ross and Dr. Muratori saw her.

With regard to the care and treatment provided to the plaintiff's decedent by Dr. Muratori, Dr. Lehrfeld opined that his care and treatment was limited to treating her for a urinary tract infection, and contacting specialists as needed, ordering additional blood work, and ascertaining whether or not she was improving. His role, as a family practice physician, was to oversee and coordinate her care with the consulting specialists who were appropriately called, and upon whom Dr. Muratori relied for evaluations and recommendations. None of the specialists, including the gastroenterologist, ordered TPN feedings, and she was released in satisfactory condition, as supported by the blood work results prior to discharge, to a sub-acute facility. Dr. Lehrfeld stated that with gastric bypass surgery, patients frequently remain in a malnourished state even when in optimal condition due to the fact that portions of the small intestine are bypassed and cannot absorb certain nutrients. Dr. Lehrfeld opined that Dr. Muratori's treatment of the plaintiff's decedent was not the proximate cause of her claimed injuries or her death. Her neuropathy existed prior to her admission to Southside Hospital, and his treatment did not cause or contribute to any of her subsequent problems with oral intake. Her death certificate indicated that she suffered from chronic malnutrition, which he opined is a known complication of gastric bypass surgery. There is nothing that Dr. Muratori did or did not do that caused her to require a feeding tube, to have it replaced, or caused a lack of blood supply to the bowel, clots in the bowel, or a bowel perforation.

Based upon the foregoing, it is determined that Antonia Ross, as Executrix of the Estate of Edmond J. Ross, Jr., and John Muratori, M.D., have established prima facie entitlement to summary judgment dismissing the complaint asserted against them.

Turning to motion (007), defendants, Elizabeth Sturm, M.D. and The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, have submitted the affirmation of their expert, Gary Burke, M.D., a physician licensed to practice medicine in New York who is board certified in internal medicine. He set forth the materials and records which he reviewed and opined within a reasonable degree of medical certainty that defendants Gurwin and Elizabeth Sturm, M.D. did not depart from the appropriate standards of care and treatment, and did not cause or contribute to the plaintiff's decedent's death. He continued that she was appropriately admitted to Gurwin on February 25, 2003, from Southside Hospital, for short term subacute rehabilitation, with diagnoses of malnutrition and dehydration. An appropriate history was obtained, physical condition was properly documented, and laboratory studies were ordered. An appropriate comprehensive care plan was created, and she was scheduled for restorative therapy five times per week.

Dr. Burke continued that the care plan created upon her admission was aimed at treating her weakened condition, and provided for precautions to prevent falling, prevent and limit pain, support reintegration into society, account for proper oral intake, and detailed assistance with ADLs. Daily care records were maintained. Dr. Burke stated that Dr. Sturm saw the plaintiff's decedent on February 26, 2003 at which time she evaluated her, and recommended a neurological consult due to complaints of burning in the tips of her fingers and toes. The plaintiff's decedent refused to attend the neurological consultation, however, Neurontin and Vicodin were prescribed. Blood work was obtained that day, and indicated that the plaintiff's decedent was not dehydrated, however, low albumin levels indicated malnutrition, which was promptly diagnosed and treated by Dr. Sturm.

Dr. Burke opined that because the plaintiff's decedent had undergone neurological and gastrointestinal consultations while at Southside Hospital, that the standard of care did not require a further workup while at Gurwin. A podiatry consult was obtained. She was appropriately referred for occupational and physical therapy to treat paraparesis, with which she presented, as demonstrated by her inability to ambulate. This condition improved so that she was able to walk 50 to 75 feet with only minimal to

moderate assistance at the time of discharge. She was seen on dental, social worker, and psychiatry referrals while at Gurwin. Dr. Burke opined that a proper informed decision to discharge her on March 12, 2003 was made after a discussion was held with the treating "team" consisting of her medical doctor, social worker, dietician, recreational therapist and nursing staff. The plaintiff's decedent also requested to be discharged.

In opposing both motion (006) and (007), the plaintiff has submitted the affirmation of his expert physician who is licensed to practice medicine in New York State and is board certified in general and bariatric surgery. He affirms that he has been deeply involved in patients' post operative gastric bypass surgery for years. He set forth the records and materials which he reviewed in forming his opinions, as well as his personal experience in treating the plaintiff's decedent for chronic malnutrition and dehydration for several years from about March 2003 through July 2008. It is the plaintiff's expert's opinion that the moving defendants deviated and departed from good and accepted practice by failing to appropriately manage the decedent's persistent malnutrition for a period of approximately one month while she was confined to Southside Hospital and the Gurwin Center from February 25, 2003 to March 12, 2003, causing her extremity neuropathy condition to worsen along with her medical condition, stomach paralysis, and causing her esophageal dysfunction to become permanent and irreversible. He continued that it is also his opinion that the delay in appropriately treating her protracted nutritional deficiencies, extremity neuropathy and esophageal dysfunction caused her to develop a necrotic bowel, a bleeding ulcer, ruptured blood vessels, hemorrhaging, a severely compromised immune system, and eventual death several years later after she endured significant pain, suffering, and disability.

The plaintiff's expert stated that the treatment and standard of care of chronic malnutrition post-gastric bypass surgery is identical for bariatric surgeons as it is for internists or family medicine practitioners who undertake to treat a malnourished patient under similar circumstances. All physicians who treat chronically malnourished patients are required to consult with appropriate specialists, order repeat lab work, and potentially admit the malnourished patient to the a hospital for more aggressive intervention for possible insertion of a feeding tube, if necessary.

The plaintiff's expert stated that banded gastric bypass surgery was done on October 1, 2002 at North Shore University Hospital by Dr. Cooperstone. The plaintiff's decedent weighed 242 pounds, making her morbidly obese; her ideal weight was 128 pounds. Post operatively, and through January 23, 2003, the decedent was treated primarily by Dr. Cooperstone for complaints of persistent vomiting to the point of dehydration, vomiting with blood and/or white foam, constant nausea, inability to keep food down, dry heaves, progressive dysphagia, loss of teeth, lethargy, hair loss, weakness, malaise, and fatigue, among other things. On January 23, 2003, Dr. Cooperstone referred the plaintiff's decedent to Dr. Cusa, a gastroenterologist, for an upper GI series to determine the cause of the constant vomiting and nausea. On January 25, 2003, Dr. Cusa performed an upper endoscopy, biopsy, and balloon dilation for an anastomotic stricture, which caused the nausea, vomiting, dysphagia, and small bowel obstruction. Then, again, on January 28, 2003, Dr. Cusa performed a second surgery to reopen the stricture and ordered intravenous fluid to hydrate the plaintiff's decedent. He noted that she also had a fungus infection in the pouch area of the stomach. The plaintiff's expert also stated that the plaintiff's decedent was seen by Dr. Ross on February 11, 2003 relative to her complaints of being so weak she could not stand, was falling down, and losing her teeth. Dr. Ross suspected that she was malnourished, dehydrated, and deconditioned, and admitted her to Southside Hospital, where she was followed by Dr. Muratori, his partner, who thereafter discharged the plaintiff's decedent to Gurwin for rehabilitation on February 23, 2003, after obtaining a neurology consult with Dr. Winnick, a gastroenterology consult with Dr. D'Silva, and physical medicine and rehabilitation consult with Dr. Ng.

The plaintiff's expert stated that Elizabeth Sturm, M.D. was the decedent's admitting physician at Gurwin, and ordered a gastroenterology consult to address her nutritional deficiencies, an OT and PT consultation for treatment of weakness in her legs, a dentistry consult, podiatry consult, and a neurology consultation to address the extremity neuropathy. Dr. Sturm also ordered Neurontin to control decedent's burning and pain in her fingers and toes, and ordered various laboratory studies. The plaintiff's expert stated that upon her discharge, he began treating the plaintiff's decedent about March 25, 2003. At that time, she weighed 93 pounds, and had suffered from chronic malnutrition and dehydration for more than five months as a result of the anastomotic stricture. He continued that, by that time, she already developed irreversible neuropathies from chronic malnutrition and severe esophageal dysfunction, and that he continued to treat her for postoperative complications, including but not limited to, dehydration and malnutrition, until her death on July 8, 2008.

The plaintiff's expert prescribed injections of vitamins and placed her on TPN, however, these aggressive interventions did not significantly alleviate and/or reverse her longstanding, underlying, chronic condition, which he stated progressed to more serious complications, including rectal bleeding, severe vitamin K deficiency, sleep disturbances, sleep walking, altered mental status, blotches on her arms and chest, problems with her eyes, shingles, swelling of bilateral lower extremities, hemorrhaging, bleeding ulcer due to ruptured blood vessels caused by chronic malnutrition, and a seriously weakened immune system and/or nutritional system secondary to persistent and chronic malnutrition in the initial 4-5 month post-operative period. He described the additional care and treatment, including the insertion of a feeding tube on November 25, 2003; TPN administration via catheter and/or a PICC line at Holy Name Hospital; feeding tube placement with hospitalization from September 25, 2005 through October 2, 2005 at Holy Name Hospital; blood transfusion at Huntington Hospital in July 2003; placement of a Greenfield filter into the artery of her right lower leg due to a hemorrhaging ulcer; acid reflux diagnosed at Beth Israel Hospital Medical Center in March 2005; and St. Catherine of Siena Hospital on July 7, 2008 for a perforated viscus treated with a small bowel resection and removal of 10-12 feet of dead bowel, directly caused by longstanding malnutrition.

The plaintiff's expert opined that the decedent's extremity neuropathy, stomach paralysis, and malnutrition could have been reversed, and her risk of dying from severe malnutrition could have been reversed and significantly diminished or eliminated, had the defendants aggressively treated the plaintiff's decedent during the month period from February 11, 2003 thru March 12, 2003, when she was confined to Southside Hospital and Gurwin. He continued that the plaintiff's decedent was malnourished at that time as evidenced by the blood work taken at Southside Hospital on February 13, 2003, confirming abnormally low calcium and albumin levels, findings which indicate serious vitamin depletion and deprivation of essential nutrients. The plaintiff's expert stated that although the plaintiff's decedent received some nutritional supplementation consisting of Ensure twice a day, pudding, and vitamin B12 injections, she had not significantly improved during this confinement at Southside Hospital and Gurwin. She was still vomiting four days prior to her discharge from Southside Hospital and remained disorientated and lethargic throughout her admission, indicating ongoing electrolyte imbalances and vitamin depletion secondary to persistent malnutrition. There was no significant improvement in her ability to ambulate during this time and she continued to complain of neuropathy. The plaintiff's expert opined that TPN feedings, and regular high-potency vitamin shots should have been administered, with possible insertion of a feeding tube, as per the standard of care. The treatment plan was inconsistent with her needs.

The plaintiff's expert continued that the decedent's weight should have been monitored as she had dramatic and excessive weight loss and malnutrition in the months subsequent to October 1, 2002, as she

lost 78 pounds in three and three quarter months. Prealbumin levels should have been monitored but were never tested. He continued that Dr. Muratori failed to consult with Dr. Cooperstone and the gastroenterology and neurology specialists, and failed to order the EMG/NCV studies. She was prematurely discharged from Southside Hospital. Despite considering himself to be still involved in the plaintiff's decedent's care and treatment, Dr. Ross never saw her during her hospitalization at Southside, never followed with the consultations or laboratory work, which was a departure from the standards of care.

During her admission at Gurwin, Dr. Sturm never considered recommending TPN nor a feeding tube, solely because she could eat by mouth. The plaintiff's expert continued that this was a departure from the standard of care which required TPN feedings, administration of vitamin shots, or insertion of a feeding tube, due to her inadequate nutritional intake from persistent and unrelenting vomiting, nausea, and dysphagia. Had the lack of nutrition been treated earlier, and much more aggressively, the neuropathy could have been reversed. The only proper way to monitor malnutrition is to perform regular blood work to insure that the calcium, albumin, and prealbumin levels are within normal range, which was not done by Dr. Sturm and Gurwin, which constituted a departure from the standard of care. The plaintiff's expert continued that Dr. Sturm and Gurwin should have readmitted the plaintiff's decedent to a hospital again for proper treatment of the malnutrition and failed to do so. The slight improvement in ambulation did not constitute successful rehabilitation, and her neuropathy did not resolve at any point while at Gurwin. There was also a departure from the standard of care in that Dr. Sturm failed to obtain a full neurological workup due to the progressing neuropathy, decreased motor function, and paraparesis of the lower extremities, unrelenting pain and burning sensations in her toes and fingers. GI and neurological consultations which were ordered by Dr. Sturm were never done, constituting a departure from the standard of care.

Based upon the foregoing, it is determined that plaintiff's expert has raised factual issues sufficient to preclude summary judgment as to all of the moving defendants based upon his conflicting opinions with defendants' experts, Dr. Burke and Dr. Lehrfeld.

Accordingly, motions (006) and (007) are denied.

Dated: _____

9/16/13



PETER H. MAYER, J.S.C.