

<b>Estate of Savage v Kredentser</b>
2017 NY Slip Op 32875(U)
July 13, 2017
Supreme Court, Albany County
Docket Number: 900156-2015
Judge: Gerald William Connolly
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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ESTATE OF JOYCE SAVAGE, HOWARD ALVIN  
SAVAGE, INDIVIDUALLY AND AS THE ESTATE  
REPRESENTATIVE,

**DECISION AND ORDER**

Index No.: 900156-2015

RJI No.: 01-15-117128

Plaintiffs,

-against-

DR. DANIEL C. KREDETSER, WOMEN'S  
CANCER CARE ASSOCIATES, LLC, ST. PETER'S  
HOSPITAL CENTER OF THE CITY OF ALBANY,  
INC., ST. PETER'S NURSING AND REHABILITATION  
CENTER, INC. and JOHN DOES 1 THROUGH 50,

Defendants.

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(Supreme Court, Albany County, All Purpose Term)

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Connolly, J.:

Plaintiffs in this medical malpractice action seek: (i) an order determining, that pursuant to common law and CPLR §§ 3124 and 3126, St. Peter's Hospital Center of the City of Albany, Inc. and St. Peter's Nursing and Rehabilitation Center, Inc. (the "St. Peter's Defendants") are liable for their negligence *per se* in failing to create and maintain medical records pursuant to state and federal laws and the St. Peter's Bylaws; (ii) finding that the St. Peter's Defendants and Dr. Kredentser's conduct in failing to create and maintain medical records pursuant to State and Federal Laws and the St. Peter's Hospital Bylaws constitutes moral culpability, reckless indifference, intentional and wrongful misdoing, and/or wanton disregard of the decedent Joyce Savage's well-being, supporting imposition of punitive damages against all defendants; and (iii) finding that, if the missing documents (including, but not limited to, the Discharge Report) were never created, were destroyed, or altered, that the failure to produce the Missing Documents and electronic metadata, separately or collectively, severely prejudice the plaintiffs in their ability to carry their burden of proof on issues including, but not limited to, negligent standard of care, lack of informed consent and pain and suffering, thus constituting spoliation warranting the striking of the defendants' respective answers and entry of an order awarding summary judgment against the defendants and in favor of plaintiffs. Dr. Kredentser opposes the motion. The St. Peter's Defendants oppose the motion and, in response, have produced numerous further documents responsive to plaintiffs' 2015 discovery demands.

Based upon the St. Peter's Defendants' production of scores of further documents, as discussed below, plaintiffs' motion, to the extent it seeks summary judgment based upon the St.

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Peter's Defendants' and Dr. Kredentser's alleged failure to create and maintain medical records, is denied as spoliation has not been established. However, to the extent plaintiffs seek other and further relief, the Court will again impose sanctions upon the St. Peter's Defendants and their counsel for their continued failure to comply with their discovery responsibilities and the orders of the Court.

### **Background**

The instant litigation was filed in February of 2015 to recover damages for the alleged medical malpractice of defendants in their care and treatment of decedent, Joyce Savage, rendered between August 8 and September 30, 2011, during which time a debulking surgery was performed to treat her ovarian cancer. Mrs. Savage was discharged from St. Peter's Hospital and transferred to St. Peter's Nursing and Rehabilitation Center on August 19, 2011. She was re-admitted to St. Peter's Hospital on August 22, 2011 where she remained until her discharge on September 16, 2011 to St. Peter's Nursing and Rehabilitation Center where she remained until September 30, 2011. Mrs. Savage passed away in March of 2013.

The Court hereby incorporates its prior Decision and Order of October 19, 2016, in which the Court imposed sanctions upon the St. Peter's Defendants and their counsel for failure to comply with the Court's discovery orders. The Court notes certain of the facts which gave rise to such sanctions below.

Discovery demands were served by plaintiffs in early May of 2015. Discovery conflicts arose early in the litigation. On November 16, 2015, due to such discovery conflicts, the Court held a

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second discovery conference after which the Court entered an Amended Discovery Stipulation & Order dated November 16, 2015 which provided, *inter alia*, that all paper discovery be completed on or before December 31, 2015.

In addition, at that conference (which was held in Chambers and not recorded) the Court directed that Counsel meet and confer regarding the exchange of document discovery. The St. Peter's Defendants' counsel subsequently informed plaintiffs' counsel that he would not engage in such conference. In addition, at such conference, the Court noted the St. Peter's Defendants' failure, in contravention of CPLR §3122, to provide a privilege log for any asserted privileged documents and directed the provision of same.

On December 21, 2015, the St. Peter's Defendants served plaintiffs with their Second Supplemental Response to Plaintiffs' Combined Discovery Demands, however, they provided no additional documents but annexed a privilege log in response to questions seeking certain documents. Plaintiffs filed a motion seeking sanctions in January of 2016 as they believed they were not in receipt of all documents responsive to plaintiffs' demands. The Court held oral argument on April 25, 2016 with respect to such motion, at which time the St. Peter's Defendants' counsel represented to the Court that such defendants had produced all documents demanded by the plaintiffs, subject to any noted objections.

Plaintiffs sent a May 20, 2016 letter setting forth those previously demanded documents they believed remained outstanding. Via a letter to the Court dated June 1, 2016, Mr. Ezick, Esq., counsel for the St. Peter's Defendants, noted that during the April 25, 2016 oral argument, plaintiffs' counsel stated that she believed there were additional medical records relating to the care and treatment of

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the plaintiffs' decedent in the possession of the St. Peter's Defendants which had not been produced, and that he had represented that

all the medical records in the possession of the [St. Peter's Defendants] had been produced with the exception of the quality assurance report that was identified in the privilege log... We are now in receipt of correspondence from plaintiff's counsel ... in which she asserts that it is her belief that we represented that all documents demanded in the plaintiff's Combined Document had been produced .... We would note that the plaintiff's Combined Document Demand contained 138 separate demands .... We apologize if there was any misunderstanding regarding [sic] my representation regarding what documents had been produced, but given the nature of the demands and the objections which had been specifically raised we certainly did not intend to suggest that all of the documents requested in the Combined Document Demand had been produced. ... .

On July 5, 2016, plaintiffs' counsel was notified by one of its retained experts that it appeared that responsive documents, including patient medical records from a hospital database called "Soarian" were not produced by the St. Peter's Defendants. Via email dated July 5, 2016, plaintiffs' counsel notified the St. Peter's Defendants' counsel of such missing documents.

Plaintiffs filed a second motion in July of 2016 (returnable August 9, 2016) seeking, *inter alia*, an order: (i) finding the St. Peter's Defendants and their counsel in contempt of Court orders and mandates, (ii) sanctioning them for such failures, and (iii) compelling such defendants to comply with the Court's orders concerning outstanding discovery. The St. Peter's Defendants cross-moved for, *inter alia*, costs and sanctions.

The St. Peter's Defendants and their counsel confirmed that such "Soarian" documentation did in fact exist and had not been provided to plaintiffs, allegedly due to the fact that the hospital was in the process of switching from a paper chart to an electronic chart and that the chart for the decedent Joyce Savage, was considered a hybrid chart where electronic records were kept separately

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from the electronic records given. Accordingly, the St. Peter's Defendants, for the first time, provided, as part of their opposition/cross-motion, a Third Supplemental Response to Plaintiffs' Combined Discovery Demands, which included electronic medical records for the decedent, along with copies of the accompanying Metadata. The Court notes that such records consisted of hundreds of pages of documentation.

At such time, counsel for the St. Peter's Defendants asserted that they did not deliberately ignore plaintiffs' request for medical records but, rather were unaware that the medical chart was missing additional medical records. They asserted that they immediately made a good faith effort to comply with plaintiffs' counsel's request when she noted that more medical records may exist. The St. Peter's Defendants' counsel argued, in reference to plaintiffs' separate complaint that the St. Peter's Defendants had failed to produce requested material, including policy and procedure guidelines, at oral argument of April 25, 2016, that a representation was made that all medical records in Maguire Cardona's possession of the St. Peter's Defendants had been produced with the exception of a quality assurance report identified in the privilege log and that such representation related to the actual medical records of the plaintiffs' decedent and was not intended to encompass all the other documents which did not specifically relate to that care and treatment. Counsel asserted that its offices had been provided with a certified copy of the chart and medical records of the plaintiffs' decedent and believed them to be complete.

The Court held oral argument with respect to the then-pending motions on September 7, 2016. At such time, the Court questioned counsel for the St. Peter's Defendants concerning prior representations to the Court that all of plaintiffs' discovery requests had been produced and Attorney

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Ezick's subsequent attempt to confine such representations to medical records already in such law firm's possession on such date. The Court raised its concerns that, *inter alia*, no affidavit from a person with actual knowledge from the St. Peter's Defendants had been produced with respect to the over 600 pages of electronic medical records that were then produced by the St. Peter's Defendants via their cross-motion, nor any explanation by such defendants' counsel as to the means they had used to ensure that all requested discovery had been produced by their clients. The Court also noted the St. Peter's Defendants' objections to plaintiffs' discovery demands as untimely under the discovery deadlines set by the Court.

At such oral argument, plaintiffs' counsel also noted that in her unauthorized sur-reply papers she had included the submission of Dr. Georgia Persky, upon which report plaintiffs largely base their present motion. Such sur-reply, though not considered by the Court as part of such motion for contempt, was provided to the counsel for the defendants and identified additional missing documents which had not been produced by the St. Peter's Defendants which included, *inter alia*, patient Medication Administration Records, a patient Nursing Plan of Care, Intake and Output Measurements and Critical Care Flowsheets. Plaintiffs generally referenced such missing documents at oral argument as well.

Via an Order of September 22, 2016, the Court confirmed its oral rulings of September 7, 2016 and, *inter alia*, ordered the St. Peter's Defendants to produce all documents in their possession, not already produced, that were requested in the plaintiffs' Combined Discovery Demand of May 4, 2015 with the exception of a two page Report, and denied the St. Peter's Defendants' cross-motion for costs and sanctions. Plaintiffs assert that on October 6, 2016, the St. Peter's Defendants' counsel



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sent additional documents.

The Court reserved decision with respect to plaintiffs' motion and thereafter, via its Decision and Order of October 19, 2016, the Court sanctioned the St. Peter's Defendants and their counsel for their failures to comply with Court-ordered discovery.<sup>1</sup> The Court determined that the St. Peter's Defendants had failed to offer a reasonable justification for failing to submit the electronic records in the Sorian database, but in light of the ultimate compliance, declined to strike such defendants' answer imposing instead monetary sanctions. The Court also sanctioned the St. Peter's Defendants' counsel based upon their misrepresentations to the Court that all discovery requests had been complied with and their failure to confirm that all necessary discovery items had been properly procured and submitted by their clients.

**Plaintiffs' instant application**

In the instant application, plaintiffs argue that the St. Peter's Defendants along with Dr. Kredentser have "destroyed, altered and/or concealed the deceased's medical records in St. Peter's possession, custody or control and/or failed to create and preserve the deceased's medical records pursuant to applicable statutes and St. Peter's internal policies", that such failures constitute spoliation, and as a result of such alleged spoliation, plaintiffs have been prejudiced in the action and accordingly seek an order striking such defendants' answers and awarding summary judgment in plaintiffs' favor against Dr. Kredentser and the St. Peter's Defendants (Savage Aff., pgs. 1, 28). Plaintiffs further request that "[i]n the event St. Peter's admits or the Court enters an order inferring,

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<sup>1</sup> Via Decision and Order of March 24, 2017, the Court directed sanctions of over \$8,000.00 to be paid by the St. Peter's Defendants and their counsel with respect to their failure to comply with Court-ordered discovery

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from the allegations herein, that St. Peter's violated statutory mandates and its own Bylaws and other protocols by failing to create and retain documents in connection with the Deceased's care, and said documents directly impact the standard of care of the Deceased" that the Court grant plaintiffs summary judgment against such defendants arising from such alleged negligence *per se*, finding that such event warrants an award of punitive damages and demonstrates a violation of Public Health Law §2801-d governing "Private Actions by Patients of Residential Health Care Facilities" (which affords a patient a right to assessment of punitive damages and attorneys' fees where the deprivation of any right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient).

In support of their contention that the St. Peter's Defendants and Dr. Kredentser have failed to produce all documents responsive to discovery demands, plaintiffs have submitted, *inter alia*, the expert affidavit of Dr. Georgia Persky, a nurse and legal consultant, who avers that a number of unproduced documents should have been created and maintained by the St. Peter's Defendants pursuant to unspecified "Federal and New York State statutes and regulations as applicable to Hospitals, and The Joint Commission Hospital Standards as they relate to Quality and Safety, Patients' Rights, Standards of Care, Hospital Administration, Nursing and Medical Care, (collectively, "Applicable Statutes and Regulations")", and internal standards (Persky Aff., ¶11).

Ms. Persky has averred that a study of the produced documents from the St. Peter's Defendants, in conjunction with application of the Applicable Statutes and Regulations governing the St. Peter's Defendants and its medical and nursing staff, "lead to no other possible conclusions except that St. Peter's either operates in gross and conspicuous violation of a series of Applicable

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Statutes and Regulations ... resulting in the wholesale failure to properly record and undertake the Patient's care, or has failed to produce, pursuant to the Plaintiffs' Combined Demands, a huge body of documentation applicable to Mrs. Savage's admission and treatment" (Persky Aff., ¶14). In particular, she notes that "information on Patient Location during her admission, patient Medication Administration Records, patient Nursing Plan of Care and Intake and Output Measurements, and patient Critical Care Flowsheets and quality of care controls have not been produced by St. Peter's (collectively, the "Missing Documents")." (Persky Aff., pgs. 10-11). Such expert opines that "[a]s stated above, these Missing Documents must exist or one may only conclude that St. Peter's operates its facilities in gross violation of applicable State and Federal laws" (*Id.* at pg.11). She further addresses the importance of the Missing Documents and what patient information the Missing Documents should disclose: for example, patient location would indicate the type of unit the patient is located in each day, however, such information is blank on the decedent's medical records; medication administration records would record what medications were ordered and received and should record the required response to medications and, accurate 24-hr measurement and recording of a patient's fluid intake and output, she avers, is an "essential part of patient assessment" however, they were not produced by the St. Peter's Defendants. (*Id.* at pg. 12).

Additionally, Ms. Persky opines that certain other documents that have been submitted appear to be incomplete; noting, *inter alia*, that: (i) the second set of Critical Care Flowsheets (8/19/11-8/25/11)<sup>2</sup> are incomplete; and (ii) there were only 8 nursing notes over the 78 shifts the

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<sup>2</sup>Ms. Persky avers that the Critical Care Flowsheets from 8/12-8/15 were not provided.

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patient was at the hospital.<sup>3</sup>

With respect to Dr. Kredentser, plaintiffs argue that such defendant has committed spoliation by failing to abide by the St. Peter's Hospital state mandated created bylaws and executing a discharge report almost a year after the decedent's discharge. Plaintiffs assert that the discharge report reflects a date of August 19, 2011, however, it appears that the discharge report was printed off on July 12, 2012 and was not signed by Dr. Kredentser until August 2, 2012. Plaintiffs assert that the bylaws require all medical records to be signed by medical staff within thirty (30) days of a patient's discharge or such staff is to be suspended.

Finally, as to metadata, plaintiffs argue that despite a demand to the St. Peter's Defendants for metadata underlying the discharge report, such metadata has not been produced and counsel has notified plaintiffs' counsel that it could not produce such metadata although the discharge report is derived from electronic documents. Plaintiffs assert that they are therefore unable to ascertain whether the discharge report was altered by Dr. Kredentser. Further, Dr. Kredentser has failed to produce an electronic "native file" of the progress reports created upon each of the decedent's office visits though plaintiffs have received "purported hard copy iterations of the reports" which do not identify the author or any alterations. Plaintiffs assert that such documents "go to the heart of the issue of whether the decedent received sufficient information to sign 'informed consent' forms".

#### **The St. Peter's Defendants' Opposition**

The St. Peter's Defendants assert, in opposition to the instant motion, that "certain additional documents were able to be located and retrieved which as the result of certain clerical errors, more

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<sup>3</sup> Of particular note on the within motion, the referenced affidavit of Ms. Persky was the same affidavit previously provided (on unauthorized sur-reply) on plaintiffs' motion for contempt and sanctions returnable on August 9, 2016.

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fully detailed hereinafter, were not previously produced which are responsive to the particulars [sic] issues raised by plaintiffs' counsel" (Cardona Aff., ¶4). The St. Peter's Defendants' counsel has extended his apology to the Court and plaintiffs' counsel personally and on behalf of his client for the previous failure to provide such documents, and has proposed a meeting with plaintiffs' counsel at St. Peter's Hospital to review the original records herein.

In support of their opposition, the St. Peter's Defendants have submitted the affidavit of Cherie Smith, Director of Health Information Management for St. Peter's Health Partners (which includes St. Peter's Hospital). She avers that in 2011 St. Peter's Hospital was in the process of switching from a paper hospital chart to electronic medical records and that the decedent's medical record consisted of a hybrid of electronic documentation in the electronic health record as well as paper documentation. As to electronic medical records, there were two separate modules: Soarian Clinicals and Soarian MAK along with "EDIMS", used by the Emergency Department.

In 2011, she avers, at the end of each day a staff member of St. Peter's medical records department was responsible for "rounding" each inpatient unit to collect the actual paper medical records pertaining to all patients who had been discharged from the hospital on a particular day. As to the electronic portion of a patient's chart, the Soarian System permitted staff members to print the corresponding electronic records. To print the records, a staff member would be required to manually click on menus and sub-menus pertaining to different portions of the electronic record to obtain a print-out of such records. With respect to the Medication Administration Records ("MARS"), at the end of each day, MARS for all patients discharged on the same day would automatically be printed out in batches and then manually sorted and manually placed in a patient's corresponding paper chart.

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As to the MARs, Ms. Smith avers that not all such records had been produced to plaintiffs and that such records for the August 22, 2011 through September 16, 2011 admission have now been produced as part of their opposition papers herein.<sup>4</sup> Ms. Smith avers that in July of 2016, the St. Peter's medical records department did not have a way to access the MARs and didn't realize that some of the plaintiffs' MARs were missing. Ms. Smith appears to assert that there was either a system failure whereby the MARS failed to properly print from the Soarian MAK or were not properly sorted and filed within decedent's medical records (*see* Smith Aff., ¶11).

Such defendants assert that because the electronic medical MARs were never manually merged with the decedent's paper records at the time of her discharge, they did not become part of her hybrid chart and "since the medical records department would not have had access to the MARS and would not have been given the option by way of a drop down menu to manually print the MARS" the staff member processing the request would not have been aware the records were missing. When alerted to the missing documents, Ms. Smith avers they were located and have been provided.

As to Intake and Output Records for the decedent's admissions, the St. Peter's Defendants and their counsel admit that such records were not included with the original electronic records produced. This failure is attributed to a clerical error by the staff member who printed the electronic records and "due to the complex system of having to click on different menus and sub-menus in order to access and print the plaintiff's electronic medical records that the individual working on the request failed to click on the specific sub-tab that pertains specifically to the portion of the electronic

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<sup>4</sup> Ms. Smith continues to reference July of 2016 as the date that plaintiffs requested electronic medical records. The Court's Amended Discovery Stipulation and Order of November 16, 2015 directed that all paper discovery, which would encompass, *inter alia*, written copies of electronic records, was to be completed on or before December 31, 2015.

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records relating to the plaintiff's input and output information. The only other explanation would be that the Input and Output records failed to print out due to some glitch with respect to the Soarian system" (Smith Aff., ¶15). Ms. Smith further asserts that such records have been certified and are annexed as Exhibit B to her affidavit.

As to the critical care flowsheets, Ms. Smith avers that a review of the decedent's original paper chart was made in order to locate such records. Upon such review it was determined that numerous pages of the flowsheet records were missing from the original discovery provided to plaintiffs as the "staff member in the medical records department, who was responsible for copying the flowsheets failed to ensure that both sides of each flowsheet were copied". She avers that the missing flowsheet records were located, copied, certified as part of the medical records chart and are annexed to the her affidavit as Exhibit C. The St. Peter's Defendant's review additionally disclosed that certain "other double-sided records from the plaintiff's paper chart had not been previously copied and produced" (Cardona Aff., ¶43). Ms. Smith averred that "the staff member in the medical records department, who at the time was responsible for copying the paper chart, failed to make sure that both the front and backside of those pages within the chart that were double-sided were actually copied" (Smith Aff., ¶18). Such records have been reviewed, certified and attached to the Smith affidavit as Exhibit "D".

Finally, as to the discharge summary, Ms. Smith avers that plaintiffs' claim that the defendant hospital must have altered the August 19, 2011 discharge summary in the absence of producing corresponding metadata is unfounded. She avers that in 2011 a patient's medical records consisted of both electronic and paper records and that the discharge summary existed as part of the decedent's paper chart and as such was dictated on August 19, 2011 by Dr. Kredentser. After it was dictated, the documentation reflects that a staff member transcribed it on the same day. She avers that since



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the discharge summary was part of decedent's paper chart and was then manually signed, there would be no metadata for such document.

The St. Peter's Defendants have also submitted the affidavit of Elizabeth Whitbeck, a Clinical Informatics Specialist at St. Peter's Hospital, pursuant to which position she provides support to all clinical nursing staff.

As to data regarding patient unit location and type, Ms. Whitbeck avers that the hospital chart reflects a patient's location via an abbreviated code and numbers that correspond to a patient's room number. Further, she avers that in 2011, St. Peter's Hospital did not have a policy requiring that a patient's room number and location be placed on every page of the hospital chart.

As to a Plan of Care, Ms. Whitbeck avers that the hospital chart reflects that there was a care plan in place for all three of the decedent's admissions under the heading "Interdisciplinary Focus Problem List" and copies of such for each admission are attached to her affidavit at Exhibit C.

With respect to the claim that St. Peter's Hospital failed to have nursing notes for each day of the decedent's admissions, Ms. Whitbeck avers that she has reviewed the handwritten progress notes and electronic nursing assessment notes and find that on their face they set forth the care and treatment provided to the decedent during her three admissions to St. Peter's Hospital and that no nursing notes have been concealed, destroyed or altered.

As to the alleged failure to document "patient hand-offs" when transferring care, Ms. Whitbeck avers that St. Peter's Hospital's policy entitled Patient Hand-Off, a copy of which is annexed to her affidavit, establishes that all patient hand-off reports were communicated verbally and accordingly would not be a part of the patient's chart.

As to policies relating to access to patient records, Ms. Whitbeck's affidavit includes a copy of St. Peter's Hospital's Release of Information policy. As to falls and sepsis records, Ms. Whitbeck



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has averred that such policies were provided to plaintiffs' counsel and were in effect in 2011.

As to the Missing Documents identified by plaintiffs, the St. Peter's Defendants and their counsel assert that all appropriate medical records at issue were created and maintained and that there is no factual basis for the allegations that any records were altered or destroyed and that there has been no prejudice to plaintiffs as they have not conducted depositions and their papers demonstrate that they possess sufficient information to prosecute the action.

### **Dr. Kredentser's Opposition**

In opposition, Dr. Kredentser argues that it appears plaintiffs contend that the decedent's St. Peter's Hospital discharge summary was spoliated because it was not timely signed. He asserts that a party seeking sanctions for spoliation of evidence must demonstrate, *inter alia*, that the party with control over the evidence had an obligation to preserve it at the time it was destroyed and that the records were destroyed with a culpable state of mind. Such defendant asserts that plaintiffs have not produced a single piece of proof establishing that Dr. Kredentser destroyed or altered medical records with a "culpable state of mind". Further, such defendant notes that the Women's Cancer Care Associates ("WCCA") chart contains a copy of the discharge summary that the hospital faxed to it six days after the discharge, that such unsigned discharge summary is exactly the same as the signed summary, and that plaintiffs' counsel has been in possession of the copy received by WCCA since May 22, 2015.

As to metadata from WCCA, defendant Kredentser argues that metadata has been disclosed (though not in electronic form) but that despite such fact, plaintiffs claim that as "electronic native files" have not been disclosed, they have been spoliated. Dr. Kredentser's counsel avers that she has advised plaintiffs' counsel that the native files cannot be exported electronically from the WCCA's electronic medical records ("EMR"), however, such files can be printed and have been provided.

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Counsel takes issue with the fact that plaintiffs' counsel has not delineated all of the good faith attempts that Dr. Kredentser's counsel has made to resolve this issue. In further support of the instant opposition, Dr. Kredentser has submitted an affidavit from the head of EMR support for MEDENT, the computer company that administers the WCCA's EMR, in which he avers that a "native file" cannot be exported from the system but can be printed. Dr. Kredentser's counsel has averred that the native file has been provided, in printed format, to the plaintiffs' counsel along with an Audit Trail that discloses when the subject documents were authored, dates of alteration and by whom the documents were altered.

Further, Dr. Kredentser argues that the plaintiffs have not proven "negligence per se" nor is such doctrine applicable in the medical malpractice action against him. Dr. Kredentser argues that the instant action as against him is a medical malpractice action where expert testimony is required to prove a deviation from accepted standards of care (and proximate cause) and there is no statute which imposes a specific duty on a health care professional so that a claim of statutory liability can be asserted.

As to plaintiffs' citation to 10 NYCRR §405.1, Dr. Kredentser argues that such regulation applies to hospitals and does not impose a specific duty with regard to the treatment of patients (as such is dictated by the accepted standards of medical care in the community) nor does it provide a private right of action against a physician. Dr. Kredentser argues that if plaintiffs seek to claim that he failed to timely sign the discharge note, than they must put forth a *prima facie* showing through expert testimony that the note was not timely signed and such deviation was somehow the proximate cause of decedent's alleged injuries, requirements not met herein.

### **Spoliation**

"A party that seeks sanctions for spoliation of evidence must show that the party having

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control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Atilas v Golub Corp.*, 141 AD3d 1055, 1055-1056 [3d Dept 2016])[internal citations and quotations omitted]).

In this case, plaintiffs have failed to make sufficient demonstration that any medical records or other documentation that it has been seeking have been altered or destroyed by either the St. Peter's Defendants or Dr. Kredentser.

As to the discharge report, plaintiffs have not demonstrated that Dr. Kredentser spoliated the discharge report nor that his signature of August 2012 amounts to spoliation. As to metadata with respect to the Dr. Kredentser and WCCA, plaintiffs counsel has failed to demonstrate that the failure to produce electronic metadata, where physical documentation has been provided, amounts to spoliation. Plaintiffs' counsel in reply has failed to address the affidavit provided by Dr. Kredentser and WCCA in support of their contention that the native files (i.e. "the original version of any note") cannot be "exported", nor his counsel's averments that she has been provided printouts of the native files along with a log which indicates who accessed or stated that original version and every subsequent version of the notes as well as who made changes on such subsequent versions.

As detailed above, the opposition of the St. Peter's Defendants have demonstrated the existence of Medical Administration Records, Intake and Output Records, Critical Care Flowsheets and Plan of Care Records. As to the metadata for the Discharge Summary and written patient oral hand-off communications, the affidavits of Ms. Whitbeck and Ms. Smith demonstrate that no documents exist. Additionally, while medical records material and relevant to certain of plaintiffs' claims are only now being produced, based upon the record before the Court a finding of spoliation

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is not warranted herein.

**Negligence Per Se**

Similarly, plaintiffs' claim for a finding of negligence *per se* has been based upon the failure of the defendants to produce records, however, with the St. Peter's Defendants' opposition, such finding is rendered moot by the delivery of medical records.

Further, the New York Court of Appeals has "long recognized a distinction between State statutes on the one hand, and local ordinances or administrative rules and regulations on the other, for purposes of establishing negligence. As a rule, violation of a State statute that imposes a specific duty constitutes negligence *per se*, or may even create absolute liability. By contrast, violation of a municipal ordinance constitutes only evidence of negligence." (*Elliot v City of New York*, 95 NY2d 730, 734 [2001][internal citations and quotations omitted]). A hospital's failure to abide by its own rule may constitute some evidence of negligence (*see Haber v Cross Country Hospital*, 37 NY2d 888 [1975]; *see also Petralia v Glenhaven Health Care Org.*, 143 AD3d 962 [2<sup>nd</sup> Dept 2016]).

In this case, while plaintiffs argue that the St. Peter's Defendants have violated state and federal law, they have failed to assert with specificity any statutory violations. To the extent they cite to state regulations governing hospitals, they have failed to demonstrate that a violation of such regulations constitutes negligence *per se*. Further, to the extent they argue that the St. Peter's Defendants may have violated their own bylaws, while such contentions may constitute evidence of negligence, they have not demonstrated that any such failure constitutes negligence *per se*. As to Dr. Kredentser, plaintiffs have failed to demonstrate that his alleged untimely signature of a discharge form mandates a finding of summary judgment against him with respect to plaintiffs' claims of medical malpractice, nor that summary judgment is appropriate as to such claims where discovery has yet to be completed.

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As to Public Health Law §2801-d, plaintiffs have not brought a cause of action premised on a violation of such statute (*see generally, Ciccotto v Fulton Commons Care Ctr., Inc.*, 149 AD3d 1030 [2<sup>nd</sup> Dept 2017]). Even were such claim sufficiently plead, as such claim is based upon missing documents which have now been provided, such claim is premature.

As to plaintiffs request for punitive damages, such request is denied as the Court can address the issue at hand with sanctions pursuant to CPLR §3126.

Accordingly, plaintiffs motion is denied to the extent it seeks summary judgment based upon allegations of spoliation, negligence *per se* and punitive damages. To the extent plaintiffs seek an order imposing sanctions for the alleged failure of defendants to comply with the Court's discovery orders, the application is granted as set forth below.

### Sanctions

As the Court noted in its Decision and Order of October 19, 2016, as to sanctions pursuant to CPLR § 3126, a court may impose an appropriate remedy when a party fails to comply with a discovery order, "the nature and degree of which is a matter committed to the court's sound discretion" (*see Pangea Farm, Inc. v. Sack*, 51 AD3d 1352 [3d Dept 2008]). The drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious (*see Pangea, supra* at 1354). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply", "or a failure to comply with court-ordered discovery over an extended period of time" (*Friedman, Harfenist, Langer & Kraut v Richard Bruce Rosenthal*, 79 AD3d 798 [2<sup>nd</sup> Dept 2010]).

The St. Peter's Defendants have acknowledged that additional responsive discoverable documents have been located and retrieved which were only recently produced to plaintiffs in

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opposition to the instant motion. After: (i) representations with respect to the plaintiffs' prior August 2016 motion for contempt and sanctions were made by the St. Peter's Defendants' counsel that all medical records of the decedent had been produced; (ii) defendants and their counsel were on notice of the Persky Affidavit since September of 2016 which delineated additional missing documents; and, (iii) another motion by plaintiffs' counsel which was dependent upon expert reports/affidavits, including the Persky submissions, the St. Peter's Defendants have again produced, well over a year after the deadline for paper discovery was closed via the Court's Discovery Order, scores of pages of additional medical records and documents responsive to, *inter alia*, plaintiffs' discovery demands.

The Court is troubled by the St. Peter's Defendants, as well as their counsel's, asserted justification for the failure to submit the additional records now further submitted in opposition to the instant motion, i.e. the apparent failure of every employee who touched such records to properly review and forward complete sets of such documents to the St. Peter's Defendants' counsel. Such assertions do not provide a reasonable justification for such failures.

Based upon the record before the Court, however, it has not been demonstrated that the St. Peter's Defendants were "... guilty of a deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay that would be deserving of the most vehement condemnation" (*Altu v. Clark*, 20 AD3d 749, 751 [3rd Dept 2005]) such that the drastic remedy of striking of the pleadings is appropriate herein. As previously stated, there has been no spoliation proven in the instant matter, and there is no evidence that the failure has prejudiced the plaintiffs' eventual ability to present their case. Moreover, the discovery failures, which should have been remedied earlier, do not evince, in light of the multiple productions already made, a bad faith attempt to prevent plaintiffs from utilizing certain documents; plaintiffs have made no allegation, on review of such documents, of new evidence, previously withheld, crucial to the proofs of their case, thereby

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providing circumstantial evidence of an intent to withhold. Further, some of the documents provided from the lengthy hospitalization of the decedent (e.g., those upon which only one side were copied; missing Critical Care Flowsheets) would appear to be clear evidence of inadvertent error in production, rather than willful behavior, as the absence of such documents would be (and were) readily identifiable upon careful review by plaintiffs' counsel.

However, as it is beyond cavil that plaintiffs have continued to endure lengthy delays and were again forced to seek judicial intervention to secure discovery of items to which plaintiffs are entitled, the imposition of a monetary sanction will be imposed (*see* CPLR § 3126; *Friedman, supra*; *Deans v. Jamaica Hosp. Med. Ctr.*, 64 AD3d 744 [2nd Dept 2009]; *Smith v NY Tel. Co.*, 235 AD2d 529 [2nd Dept 1997]; *Athanasidou v. First Nat'l City Bank US Corp.*, 225 AD2d 726 [2nd Dept 1996]; *Gamble v Anlyne, Inc.*, 199 AD2d 303 [2nd Dept 1993]; *see Fontanella v Fontanella*, 167 AD2d 185 [1<sup>st</sup> Dept 1990]).

Further, as to the St. Peter's Defendants' counsel, there has been no explanation regarding the failure of their office, upon review, to identify and correct the "clerical errors" in the medical records, well before the expiration of the Court's discovery deadline and certainly after the Court's last imposition of sanctions with respect to the exact issue at issue herein (i.e. the provision of an incomplete set of the decedent's medical records). In particular, the Court notes, as noted by plaintiffs' counsel, that many of the now provided "missing" documents (including MARS and ICU documents) were identified as missing in the Persky affidavit of August 29, 2016. Such counsel have failed to provide any explanation of their actions and/or inactions in reviewing the records that were provided by their clients nor addressed what responsibility they possess in verifying and reviewing such records.

"An attorney's neglect ... should not deprive his client of his day in court; and that it is



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proper to save the action for the client, while imposing upon the attorney, personally, a penalty for his neglect.” (*Moran v Rynar*, 39 AD2d 718, 719 [2<sup>nd</sup> Dept 1972]; *see also, Matter of Eagle Ins. Co. v Velasquez*, 253 AD2d 495 [2<sup>nd</sup> Dept 1998]; *Pica v Good Samaritan Hosp.*, 168 AD2d 612 [2<sup>nd</sup> Dept 1990]). CPLR §3126 permits penalization of an attorney by requiring such counsel to personally pay a monetary sanction to, in this case, plaintiffs, as a condition for nondismissal (*see, Anzalone v Scientific Exterminating Servs. Corp.*, 163 AD2d 348 [2<sup>nd</sup> Dept 1990]).

Again, because of the lengthy delays endured by plaintiffs and misrepresentations to the Court and plaintiffs’ counsel that all required documents had been provided along with the need of plaintiffs’ counsel to resort to seeking judicial intervention to secure discovery of items for which such extraordinary actions should not be necessary, as well as counsels’ conduct showing such a lack of appreciation for proper procedure and careful handling of this matter in confirming that all necessary discovery items had been properly procured and submitted by their clients (*see Iessi v Marino*, 42 AD2d 583 [2<sup>nd</sup> Dept 1973]), the Court will condition the denial of plaintiffs’ request to strike the answer upon counsels’ payment of a monetary sanction.

#### **Further Directives**

Additionally, the Court directs the St. Peter’s Defendants and their counsel to specifically address to plaintiffs’ counsel each item noted as missing in Exhibit 1 to the Persky reply affidavit of April 7, 2017 (and matters highlighted in red) and either provide such documentation or address why such information cannot be provided within thirty (30) days of the date a copy of this Decision and Order is served upon the St. Peter’s Defendants with Notice of Entry.

Otherwise, the Court has reviewed the parties’ remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court’s determination.

Accordingly, it is hereby



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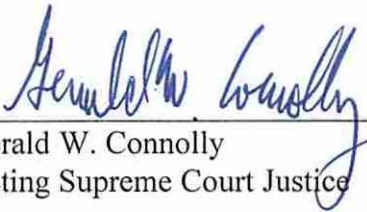
**ORDERED** that plaintiffs' motion is granted solely to the extent that the Court will order monetary sanctions in favor of the plaintiffs and against the St. Peter's Defendants and their counsel, each in the amount of \$7,500.00, payable to plaintiffs' counsel within thirty (30) days of the date a copy of this Decision and Order is served upon the St. Peter's Defendants with Notice of Entry; and it is further

**ORDERED** that the St. Peter's Defendants and their counsel specifically address to plaintiffs' counsel each item noted as missing in Exhibit 1 to the Persky reply affidavit of April 7, 2017 (and matters highlighted in red) and either provide such documentation or address why such information cannot be provided within thirty (30) days of the date a copy of this Decision and Order is served upon the St. Peter's Defendants with Notice of Entry.

This shall constitute the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for plaintiffs. The below referenced original papers are being transferred to the Albany County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.  
ENTER

Dated: July 13, 2017  
Albany, New York

  
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Gerald W. Connolly  
Acting Supreme Court Justice

Papers Considered:

1. Amended Discovery Stipulation & Order of November 16, 2015; Order of September 22, 2016; Decision and Order of October 19, 2016; Decision and Order of March 24, 2017;
2. Notice of Motion dated February 3, 2017 Affirmation of Denise L. Savage, Esq. and Memorandum of Law in Support of Plaintiffs' Motion dated February 3, 2017 with exhibits 1-12 annexed thereto;
3. Affidavit in Opposition by Anthony V. Cardona, Jr., Esq., sworn to March 24, 2017

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- with exhibits A-D annexed thereto and accompanying submissions; Affidavit in Opposition of Cherie Smith, MBA, RHIA, LPICS, sworn to March 21, 2017, with exhibits A-D annexed thereto; Affidavit in Opposition of Elizabeth Whitbeck, RN-BC, MSN, sworn to March 21, 2017, with exhibits A-F annexed thereto;
4. Attorney Affidavit of Mandy McFarland, Esq., sworn to March 27, 2017, with exhibits A-S annexed thereto; Memorandum of Law;
  5. Affirmation and Memorandum of Law in reply dated April 10, 2017 with accompanying exhibit 1 Affidavit of Dr. Georgia Persky dated April 7, 2017 with accompanying Exhibit 1.