COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2023-P-0961

MIDDLESEX, ss.

Yu-Fen Liu, Plaintiff/Appellant

V.

Tufts Medical Center, Inc, Et Al.,

Defendants/Appellees

On Appeal From Middlesex Superior Court's Judgement of Dismissal

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Appeal Brief of Plaintiff Yu-Fen Liu

Date: Nov. 3, 2023

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Statue

STATEMENT OF ISSUES

1. Whether the judge erred in concluding that the plaintiff's current general tort claims are barred by Plaintiff's prior medical malpractice complaint against Tufts Medical Center (TMC) and Dr Kaplan;
2. Whether the judge erred that the plaintiff's prior dismissal was with prejudice;
3. Whether the judge erred in concluding that the plaintiff's current complaint derives from the same cause of actions as that in Plaintiff's prior medical malpractice claim;
4. Whether the judge erred in concluding that the defendants of current complaint were mere employees and agents of TMC and therefore non-mutual claim preclusion applies.

STATEMENT OF THE CASE

Appellant Yu-Fen Liu Jin filed a six Count Complaint on Nov. 22, 2022 against Tufts Medical Center, Inc (TMC) and 16-20 other defendants, including nine MD doctors and five nurses, 6 to 8 security guards, R.A.I 24. Plaintiff had withdrawn her consent numerous times. Statement 32, R.A.I 19; Statement 32, R.A.I 19; Statements 37, 38, R.A.I 20;

Statements 43, 44, 45, R.A.I 21; Statement 47, R.A I 21; Statement 48, R.A I 22; Statement 51, R.A I 22. Count I Medical Fraud is based on the fact that there exist two medical registration numbers (MRN) for plaintiff regarding the same medical visitation. R.A.I 26. Count II Assault is based on the fact that after Plaintiff's withdrawal of her consent, Plaintiff was subjected to 5-6 hours of repeated psychiatric evaluation with numerous threats of imminent death. R.A.I 27. Count III claims False Imprisonment based on the fact that after Plaintiff's withdrawal of her consent, plaintiff was physically restrained from leaving the hospital and even was re-captured from outside the hospital into the hospital by force. Statement 58, R.A.I 23; R.A.I 28. Count IV claims Battery based on the fact that after Plaintiff's withdrawal of her consent plaintiff was injected unknow substance, and was taken for CT scan, was kicked by security guards. R.A.I 28. Count V claim Negligence based on the fact that there was no supervision doctor during plaintiff's 10-hour ordeal. R.A.I 30. Count VI Civil Rights Violation based on the fact that plaintiff was false imprisoned in a room for 4-5 hours with security guards, subjected her to

prolonged and repeated psychiatric evaluation in the middle of the night without sleep. R.A.I 31.

Plaintiff's previously complaint was a single medical malpractice claim against TMC and Dr. Kaplan filed March 4, 2022 in Middlesex Superior Court, R.A.III 8; during the course, she waived medical tribunal, R.A.III 12; but failed to pay $6000 bonds in time, R.A.III 91; her complaint was dismissed on July 28, 2022, R.A.III 97.

Based on the previous dismissal, Judge Bloomer dismissed all 6 counts of current claims with prejudice based solely on the doctrine of claim preclusion. R.A.I 154.

STATEMENT OF THE FACTS

References are given to R.A.I 17-25. On Sunday November 24, 2019, at approximately 9-10 am, Plaintiff felt a sharp back pain, she walked-in to Tufts Medical Center Emergency Department at 860 Washington St, Boston, MA 02111. She was treated there with IV infusion by a nurse named Jennifer. During the treatment Plaintiff suddenly felt unable to breath, the symptom was relieved after Jennifer gave her some pills. Then a doctor came and measured her ECG, and

Plaintiff was told her ECG was good. Plaintiff was told that she needed to be admitted into the inpatient department of TMC to be observed. The plaintiff disputes that her blood was withdrawn for testing, and she also disputes that she was visited by any other doctors except three other student doctors who came to inform her to leave her possessions to her son, whereas the medical records had extensive deletions R.A.I 71-74, listed numerous doctors and nurses, R.A.I 78.

Jennifer told Plaintiff that she needed to be CT scanned. Plaintiff immediately protested and objected to having another CT scan because she just had one about two weeks before, she wanted to be released immediately. She was wheelchaired to the impatient department anyway. Her most recent CT scan was November 20, 2019 and others in 2018 conducted in TMC, TMC could have easily verified the information. R.A.III 61. But the CT radiologist report says that 0 CT Scan record. R.A.I 79.

Nurse Linda Cotter was assigned to Plaintiff in inpatient department, Plaintiff again told her that she did not want a CT scan and wanted an interpreter

but was refused. Around 8:20 PM, Linda Cotter came to plaintiff's room and asked her to lift up her hospital pajamas, and in flash seconds, Linda Cotter struck a syringe on her stomach without saying another word. Plaintiff suffered excruciating pain and could not stand up. The plaintiff was then wheelchaired to the building's basement to be CT scanned. Statements 37, 38, R.A.I 20.

At CT scan room, Plaintiff was injected several times on her arms by two women and Plaintiff felt her body was burning, she screamed for help, the two women would not stop, plaintiff had to roll down from the carrier cart to the floor to stop the injections. CT scan report noted that the plaintiff did refuse to have further examinations. R.A.I 79.

Once back to her room, Plaintiff no longer felt the hospital was safe, she asked her Uber driver friend to come to be her interpreter to get her home. After her friend came to the hospital and interpreted for her, Linda Cotter said no to her, she called in resident doctors Dr. Kaplan and Dr. Arhant Rao to prevent the plaintiff from leaving. R.A.I 82; R.A.I 147.

When Dr. Kaplan and Dr. Arhant Rao arrived, while Dr. Kaplan questioned the plaintiff, Dr. Rao physically blocked the room's door. The plaintiff assured both doctors that she understood the health risk and was willing to sign the leave against medical advice paper. Dr. Kaplan then called resident psychiatrist Dr. Augustadt. R.A.I 148.

Dr. Augustadt asked plaintiff's questions and told the plaintiff repeatedly that she would have imminent death if she left the hospital, with the assistance of a tele-remote Mandarin interpreter, for 1.5 hours. After the plaintiff clearly and unequivocally told them that she did not want to stay in the hospital and she would take the risk, the three resident doctors decided that that Mandarin interpreter could not be trusted, they engaged another Mandarin interpreter and repeated the death warnings for another 1.5 hrs. Around 12:40 am, Dr. Augustadt finally agreed that Plaintiff could leave if she signed the leave against medical advice papers. At hearing, defendant counsel agreed that there are factual disputes, R.A.II 29 and there was repeated

evaluation. R.A.II 30. The counsel admitted that she was forcefully restrained by security. R.A.II 30.

The plaintiff immediately signed the papers and went out of her room. Before she and her friend reached the elevator, three doctors changed their minds, they commanded the plaintiff to return to her room, but determined to leave, plaintiff and her friend started running. 6-8 Security guards were called in and they chased the plaintiff outside the hospital on the street. After the guard surrounded the plaintiff, one of the guards kicked her from the back and the plaintiff dropped to the floor. The guards then dragged the plaintiff onto a wheelchair and wheeled her back to her room and guarded the room door. R.A.III 46 and R.A.III 48. At R.A.III 48 it is a meeting recording attendance after the plaintiff was dragged back to the hospital, attended by various actors with their signatures. From the act of the meeting recording, plaintiff was mentally alert and capable of making decisions, such as she decided to make a meeting record.

The security guards interrogated plaintiff's reason to leave the hospital and they decided to call

in a Vietnamese Mandarin interpreter because the previous two interpreters were originally from China.

The Vietnam interpreter did not arrive until 3am in the morning of Nov. 25, 2019. When he arrived, the plaintiff was asked to sign an agreement not to sue and was released into the dark and cold 3 AM November morning, wearing a single layer of hospital pajamas and socks. R.A.III 50.

For the next few weeks, the plaintiff's body was entirely swollen from the allergic reactions to the injections, and she suffered severe pain from the injection in her stomach. R.A.I 39-41. Highly traumatized, she did not dare to go back to Tufts Medical Center to even see her primary physicians. Because her medical records were controlled by TMC, other doctors refused to take her in as a new patient. She could not obtain prescriptions to alleviate her symptoms and pains. She resorted to Chinese medicine to help her sleep.

Because she signed the agreement not to sue, the Plaintiff tried to keep her word and forget. But the pain in her stomach gradually exacerbated and she could not receive prescriptions from other doctors,

she could not walk and go to work, she suffered high emotional distress and felt TMC was responsible. During COVID many law offices were closed, it prevented her from seeking out an attorney to help her in time. After almost two years had passed, many law firms of medical malpractices refused to represent her. In March 2022, the plaintiff filed a complaint *pro se*. The complaint was against Tufts Medical Emergency Center and Dr. Leah Kaplan for medical malpractice. She waived the medical tribunal and was ordered to pay $6000 bonds which she could not pay in time and was late. Her complaint was dismissed on July 28, 2022.

On November 22, 2022, this attorney was sympathetic to her sufferings and helped her file the current lawsuit.

The current complaint was dismissed on June 23, 2023 solely on the basis of claim preclusion by the plaintiff's prior *pro se* medical malpractice claims. R.A.I 154. Hence the appeal. R.A.I 159-160.

SUMMARY OF THE ARGUMENT

Claim preclusion applies when the moving party satisfies three required elements: "(1) the identity

or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." *Baby Furniture Warehouse Store, Inc. v. Muebles D&F Ltee*, 75 Mass. App. Ct. 27, 33 (2009).

"It does not apply in circumstances where a party has neither the incentive, nor the opportunity, to raise the claim in an earlier lawsuit." *Longval v. Cmmssner. of Corrctn*, 448 Mass. 412, 417 (Mass. 2007).

Many jurisdictions treated the medical malpractice claims as distinct from general tort claims, and not every negligent act of a nurse or a doctor would be medical malpractice. *See Bleiler v. Bodnar*, 65 NY2d 65, 72 (N.Y. 1985).

This Appeals Court also concluded that "consent to have one's body touched or positioned for an X-ray is not a matter beyond the common knowledge or experience of a layperson and does not require expert medical testimony." *Zaleskas v. Brigham & Women's Hosp.*, 97 Mass. App. Ct. 55, 64 (Mass. App. Ct. 2020).

The superior court judge erred by applying the claim preclusion doctrine because the prior lawsuit is

a single claim of medical malpractice that is governed by special procedure under MGL CH 231 §60B. The causes of actions in the present lawsuit are not subject to medical tribunal jurisdiction because Plaintiff had unequally withdrawn her consent. Statement 32, R.A.I 19; Statement 32, R.A.I 19; Statements 37, 38, R.A.I 20; Statements 43, 44, 45, R.A.I 21; Statement 47, R.A I 21; Statement 48, R.A I 22; Statement 51, R.A I 22. Even the radiologist recorded such withdrawal of consent. R.A.I 79. Dr. Kaplan also recorded her withdrawal of her consent. R.A.I 147-148. Dr. Kaplan's statement of her mental status is contradicted by other doctors' records. R.A.I 71. The time interval of the two photos indicated for 37 minutes Dr. Kaplan and Rao refused to honor her withdrawal by force. R.A.I 80. And a medical malpractice claim is subject to special procedure and requires posting $6000 cash bonds. As much as the purpose of MGL CH 231 §60B is to discourage medical malpractice claims, *see Polanco v. Sandor*, 480 Mass. 1010, 1011 (Mass. 2018). Plaintiff had no incentive to raise the current general tort claims in the prior medical malpractice lawsuit. The superior court judge erred in not recognizing plaintiff's current claims as general tort claims.

The superior court judge also erred in concluding all three elements of claim preclusion. (1) There is no privity in wrongdoings as the individual defendants did their individual wrongs independent of each other; (2) the causes of actions are independent of previous medical malpractice cause of action; (3) there was also no final judgment on merits. Prior judgment of dismission based on failure to pay bond in time without a medical tribunal decision is not a final judgment on merits.

STANDARD OF REVIEW

The judge's allowance of a motion to dismiss is reviewed *de novo*. *O'Connell v. White*, 13-P-1826, at *5 (Mass. App. Ct. Apr. 1, 2015).

The defendants have the burden of establishing all elements of claim preclusion. *See Kobrin v. Board of Registration in Med.*, 444 Mass. 837, 843 (2005).

"The doctrine bars a subsequent action when "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or

could have been, raised in the prior action." *Jinks v. Credico (USA) LLC.*, 177 N.E.3d 509, 524 (Mass. 2021).

The doctrine only operates, however, to bar further litigation of "all matters that were or should have been adjudicated in the [original] action." *Heacock v. Heacock*, 402 Mass. 21, 23, 24 (1988) (explaining doctrine as ramification of policy considerations underlying rule against splitting cause of action). *See O'Neill v. City Manager of Cambridge*, 428 Mass. 257, 259 (1998). "It does not apply in circumstances where a party has neither the incentive, nor the opportunity, to raise the claim in an earlier lawsuit." *Longval v. Cmmssner. of Corrctn*, 448 Mass. 412, 417 (Mass. 2007).

ARGUMENT

I. LOWER COURT JUDGE ERRED IN NOT DISTINGUISHING THE RPESENT GENERAL TORT CLAIMS WITH THE PRIOR MEDICAL MALPRACTICE CLAIM

Claim preclusion "does not apply in circumstances where a party has neither the incentive, nor the opportunity, to raise the claim in an earlier lawsuit." *Longval v. Cmmssner. of Corrctn*, 448 Mass. 412, 417 (Mass. 2007).

In *Longval* the court held that "in circumstances where the unique experiences of potential members of a plaintiff class would defeat the 'commonality of interests' requirement for class certification pursuant to G. L. c. 93A, principles of claim preclusion would not operate to bar a class member from future pursuit of claims for personal injury unsuitable for class treatment." *Id.*

Many jurisdictions recognize that "not every negligent act of a nurse would be medical malpractice," and "it is the duty owed by St. Peter's nurses to Mr. Gosse, in relation to the acts alleged, that determine whether a claim sounds in medical malpractice or ordinary negligence. *See Gosse v. Saint Peter's Hosp. of City of Albany*, 2009 N.Y. Slip Op. 31941, 7 (N.Y. Sup. Ct. 2009).

"A physician's duty to convey medical information already ascertained may, as it does in this action, constitute ordinary negligence because the physician's professional skill and judgment has already been exercised." *Id* at 8.

This Appeals Court held "that if a patient unambiguously withdraws consent after medical

treatment has begun, and if it is medically feasible to discontinue treatment, continued treatment following such a withdrawal may give rise to a medical battery claim." *Zaleskas v. Brigham & Women's Hosp.*, 97 Mass. App. Ct. 55, 63 (Mass. App. Ct. 2020). The court also concluded that "[w]e also conclude that consent to have one's body touched or positioned for an X-ray is not a matter beyond the common knowledge or experience of a layperson and does not require expert medical testimony." *Id* at 64.

The present general negligence claims arise from defendants in conveying medical information already ascertained in medical records (Claim I) and treatment after plaintiff's unambiguous withdrawal of consent (Claims II, III, IV, V and VI), these claims are ordinary negligence claims that even a lay person can understand and decide. For Claim I, Plaintiff was assigned MRN 2256001 at her visitation. R.A.I 43. Yet her medical record MRN is 2870892 by Dr. Weinstock, R.A.I 45-53. Her medical record by Dr. Ostrow bears MRN 2870892, but the admission time became 03/17/2021 which the plaintiff totally disputes. R.A.I 58. Other records bearing MRN 2256001 record that she had a

known cardiac history and positive stress test which the plaintiff totally disputes. R.A.I 67. At hearing, defendant counsel stated that Dr. Ostrow never met the plaintiff and never treated her. R.A.II 28. But TMC produced medical records bearing his name. R.A.I 58. Dr. Ostrow is indispensable party for the plaintiff to find the truth about the medical records.

Defendants argued that plaintiff should have bundled the ordinary negligence claims in the prior medical malpractice lawsuit.

However, many jurisdictions recognize that "trying Plaintiff's Eighth Amendment and Medical Malpractice claims together may confuse jurors if the case proceeds to trial (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966)." *Santini v. Farris*, 2:21-cv-13045, at *16 (E.D. Mich. Feb. 15, 2022). "Both claims apply independent standards that 'often overlap,' and jurors would have difficulty 'delineating the differences' between both claims. (quotation omitted). With these concerns in mind, Plaintiff's medical malpractice claim might not survive dispositive motions." *Id.*

The "confusing terminology has been found to invite jurors to skip the factual causation inquiry altogether." *Doull v. Foster*, 487 Mass. 1, 15 (Mass. 2021).

Requiring plaintiff to bundle her medical malpractice claim with her general tort claims under claim preclusion is improper, unjust and unfair, and will confuse jurors in deciding factual causation. Hence plaintiff had no incentive to raise it in her prior *pro se* medical malpractice complaint. *Longval, supra,* should apply.

II. THE JUDGE ERRED IN DECIDING THAT THERE ARE COMMON CAUSE OF ACTIONS

In *O'Connell v. White*, 13-P-1826, at *8 (Mass. App. Ct. Apr. 1, 2015), the Court held that "claim preclusion applies when facts contested by a party in first case were same facts supporting a party's claims in second case, and each time these facts were essential to resolving claim. "Under an alternative approach, we can also 'inquire into the commonness' of the facts and evidence required to prove the claims or defenses in both adjudications." (emphasis added)

Bradford v. Richards, 11 Mass. App. Ct. 595, 599 (1981).

Count I Medical Fraud is based on the fact that there are two sets of medical records that do not bear her real medical registration number(MRN) 2256001 assigned at her visitation (R.A.I 43). Plaintiff denies that she had blood withdrew from her for testing, while these two medical records show blood test results.

One medical record (MRN 2870892, Account 198115703), R.A.I 45-53 bears Dr. Weinstock's name with admission time of 11/24/2019. Another almost identical record bears Dr Ostrow's name (MRN 2870892, Account 210957430), but an admission time of March 21, 2012. R.A.I 58-65. Comparing with medical record under Dr Ostrow with no patient admission time. R.A.I 79-80. At hearing, defendant counsel stated that Dr. Ostrow never met the plaintiff and never treated her. R.A.II 28.

The produced medical records bearing her assigned MRN 2256001 have extensive deletions, R.A.I 72-74, and were signed by Defendant Dr. JONATHAN WEINSTOCK and other signatories PATRICE STEWART, MICHAEL WISER,

JAMES M STEPHEN, and several other nurses. R.A.I 78. What these individual defendants did to the medical records have no relation to prior defendant Dr. Leah Kaplan. Leah Kaplan was not in privity to JONATHAN WEINSTOCK, PATRICE STEWART, MICHAEL WISER, JAMES M STEPHEN or Peter Ostrow or Sara Zelman. There are also medical records signed by SARA ZELMAN (not shown).

Count II Assault based on the fact that Plaintiff was subjected to 5-6 hours of psychiatric evaluation after Plaintiff's withdrawal of her consent and plaintiff was threatened with numerous times of imminent death by Dr DANIEL AUGUSTADT, what Dr DANIEL AUGUSTADT did was independent of what Dr. Leah Kaplan did. R.A.I 147-148.

Count III False Imprisonment based on the fact that several defendants physically restrained plaintiff from leaving the hospital after her withdrawal of her consent and re-captured her back from outside the hospital by force after releasing her. The actors were Dr ARRANT RAO, Dr LEAH I KAPLAN, Dr. DANIEL AUGUSTADT, nurses LINDA A COTTER, NORA BOSTEELS, JOHN DOE ANTHONY and 6-8 other security guards. Their names were not in the first complaint

except Dr LEAH I KAPLAN. The key facts of violations were not stated in the prior complaint. Dr ARRANT RAO, Dr. DANIEL AUGUSTADT, nurses LINDA A COTTER, NORA BOSTEELS, JOHN DOE ANTHONY and 6-8 other security guards did their individual wrongs to Plaintiff independent of Dr LEAH I KAPLAN. R.A.I 82; R.A.I 147-148; R.A.III 50.

Count IV claims Battery based on the fact that plaintiff was injected unknow substance after her withdrawal of her consent (R.A.I 41) and was kicked by the security guards (R.A.III 46). Nurses LINDA A COTTER, JENNIFER JANE DOE, JANE DOES (2), JOHN DOE ANTHONY and JOHN DOES were the actors, their identities were not in the prior complaint, their wrong doings were independent of that of Dr LEAH I KAPLAN.

Count V claim Negligence based on the fact that there was no reporting to supervision doctors during plaintiff's 5-6 hour ordeal. Defendants violated their general duty to be under proper supervision. This key fact was not in the prior complaint. R.A.I 147-148.

Count VI Civil Rights Violation based on the fact that plaintiff was forcefully restricted from leaving

the hospital and was subjected to repeated and redundant psychiatric questioning and interrogation by the security guards in the hospital for more than 10 hours. The key facts were not described in the prior complaint. R.A.I 147-148, R.A.III 50.

III. THERE WAS NO AJUDICATION ON MERITS REGARDING THE CURRENT CLAIMS

As stated above, the prior medical malpractice claim is distinct from the current claims and are based on different causes of actions, the current defendants could not be bound by the adjudications of the prior complaint against Dr. Kaplan if she was found liable. The prior claim dismissal based on the required medical malpractice procedure cannot preclude their independent liabilities.

IV. THE JUDGE ERRED IN DECIDING THAT THE CURRENT DEFENDANTS ARE MERE EMPLOYEES AND AGENTS WHO TOOK DIRECTIONS FROM MEDICAL PERSONNEL

Judge decided that the additional defendants are entitled to no liability under *Capizzi v. Verrier*, No. 95-1753-G, at *1 (Mass. Cmmw. July 23, 1996), in which "Verrier and Kelly have shown that the same subject matter was involved in the binding arbitration between

Capizzi and TAT and in the c. 93A claim currently before the Court," the court held that "[t]he doctrine does not require identity of the parties concerned; instead, the parties need only be in privity or in a relationship, such as that between agent and principal and employer and employee, in which one party is vicariously liable for the acts of the other." This applies only if the same subject matter has been in both lawsuits.

As stated previously, different causes of actions are involved in the two complaints, even though they occurred largely in the same period of time. Judge erred in applying *Capizzi v. Verrier*.

In deciding *res judicata*, "[i]t therefore becomes necessary to compare the two suits and determine whether they are for the same cause of action." *Newhall v. Enterprise Mining Co.*, 205 Mass. 585, 587 (Mass. 1910). "As was said in *Norton v. Huxley*, 13 Gray, 285, 290, and in *Harlow v. Bartlett*,170 Mass. 584, 592, it does not follow that the causes of action in two cases are the same because they 'both originated in the same series of transactions, and in the conversations and communications which took place

between the parties concerning them.'" *Id* at 588. "The question is whether the substantive causes of action relied on are essentially the same, not whether they grow out of transactions which occurred at the same time and had a close relation to one another." *Id*.

Because the two lawsuits have different causes of actions, *Capizzi v. Verrier* does not apply.

CONCLUSION

The judge errored in dismissing plaintiff's present complaint solely based on claim preclusion by prior dismissal of her medical malpractice claim.

Respectfully submitted,

/s/ Jie tan

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Date: 11/03/2023

ADDENDUM

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C

After hearing and review of Allowed in part & denied in part. See the court's expanded endorsement and order. (Paper No. 24) Bloomer, J. 06.20.23

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
CIVIL ACTION NO. 2281CV04021

YU-FEN LIU,
PLAINTIFF,
v.

TUFTS MEDICAL CENTER, INC.
JENNIFER JANE DOE, Individually and as a Nurse at Tufts Medical Center, Emergency Dept.
PATRICE STEWART, Individually and as a RN at Tufts Medical Center, Emergency Dept.
MICHAEL WISER, MD, Individually and as an Internal Medicine Resident at Tufts Medical Center, Emergency Dept.
JAMES M. STEPHEN, MD, Individually and as a Medicine Physician at Tufts Medical Center, Emergency Dept.)
SARA ZELMAN, MD, Individually and as a Resident Physician at Tufts Medical Center
PETER OSTROW, MD, Individually and as a Medicine Physician at Tufts Medical Center
JONATHAN WEINSTOCK, MD, Individually and as a Medicine Physician at Tufts Medical Center, Cardiac Dept.
JANE DOES (2), Individually and as Radiologists at Tufts Medical Center,
NEIL HALIN, DO, Individually and as Radiologist at Tufts Medical Center,
LEAH I KAPLAN, MD, Individually and as an Internal Medicine Resident and at Tufts Medical Center,
ARHANT RAO, MD, Individually and as an Internal Medicine Resident at Tufts Medical Center,
LINDA A COTTER, RN, Individually and as a Registered Nurse at Tufts Medical Center,
NORA BOSTEELS, RN, Individually and as a Registered Nurse at Tufts Medical Center,
DANIEL AUGUSTADT, MD, Individually and as a Psychiatry Resident at Tufts Medical Center, and
JOHN DOE ANTHONY and JONE DOES (1-4), Individually and as security officers at Tufts Medical Center,

DEFENDANTS.

3/6/2023
AM

RECEIVED

Middlesex, ss. Superior Court
The within matter is set down for hearing on June 14, 2023 at 2:30 in Courtroom 1740
Assistant Clerk
Bloomer

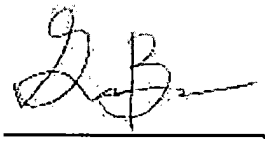
Date Filed 3/6/2023 5:23 PM
Superior Court - Middlesex
Docket Number 2281CV04021

THE DEFENDANTS' CONSOLIDATED MOTION TO DISMISS THE PLAINTIFF'S COMPLAINT WITH PREJUDICE

The Defendants, who have been served, including TMC, Dr. Kaplan, James M. Stephen, M.D., Linda A. Cotter, R.N., Peter Ostrow, M.D., and Daniel Augustadt, M.D., now move to dismiss the Plaintiff's Complaint with prejudice under Mass. R. Civ. P. 12(b)(6) and the doctrine of claim preclusion. On separate grounds, the Defendants, who have not yet been served, including Jennifer Jane Doe, Patrice Stewart, R.N., Michael Wiser, M.D., Sara Zelman, M.D., Jonathan Weinstock, M.D., Jane Does (2), Neil Halin, D.O., Arhant Rao, M.D., Nora Bosteels, R.N., John Doe Anthony, and John Does (1-4), now move to dismiss the Plaintiff's Complaint under Mass. R. Civ. P. 12(b)(5) for insufficient and untimely service of process. The Defendants, moving on a consolidated basis, hereby incorporate their Memorandum of Law, filed herewith, including exhibits, in support of the instant Motion to Dismiss.

WHEREFORE, for the reasons stated in the accompanying Memorandum of Law, the Defendants respectfully request that this Court dismiss the instant Complaint.

All Defendants,
By Their Attorneys,



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2281CV04021
Yu-Fen Liu v. Tufts Medical Center, et.al

Expanded Endorsement and Order on Defendants' Motion to Dismiss (Paper No. 11):

After hearing and careful evaluation of the papers filed in connection with the above motion as well as the complaints filed in the instant case and in civil case number 2281CV01401, Defendants' Motion to Dismiss is **ALLOWED**.

Plaintiff, Yu-Fen Liu, has sued Tufts Medical Center, Inc. ("TMC") and Leah I. Kaplan, M.D. ("Dr. Kaplan"), a second time for claims arising from the same operative facts. The first lawsuit (case number 2281CV01401), based on a complaint filed *pro se* and seeking $9,319,352 in damages, was dismissed for failing to file a bond pursuant to G.L. c. 231, § 60B. Undeterred, the plaintiff sued TMC and Dr. Kaplan again, along with seven other medical doctors and numerous other hospital personnel, including radiologists, nurses, resident physicians, a resident psychiatrist, and security officers.

This court concludes the plaintiff's claims against Dr. Kaplan, TMC, and the remaining defendants are barred by the doctrine of claim preclusion. "The doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the [prior] action" even if "the claimant is prepared in a second action to present different evidence or legal theories to support [her] claim, or different remedies." *Heacock v. Heacock*, 402 Mass. 21, 23 (1988).

To prove claim preclusion applies, the moving party must satisfy three required elements: "(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." *Baby Furniture Warehouse Store, Inc. v. Muebles D&F Ltee*, 75 Mass. App. Ct. 27, 33 (2009). With respect to the third requirement, on 07.29.2022, a final judgment entered in case number 2281CV01401 for failure to file a $6,000 bond pursuant to G.L. c. 231, § 60B, and the case was dismissed.[1] Such a dismissal "must be with prejudice." *Farese v. Connolly*, 422 Mass. 1010, 1010 (1996). With respect to the second requirement, the plaintiff has essentially expanded her first complaint and rebranded it with claims that, at their core, derive from the same acts and seek redress for the same wrongs, that is, medical negligence and actions taken in connection with her care and treatment. See *Saint Louis v. Baystate Med. Center, Inc.*, 30 Mass. App. Ct. 393, 399 (1991) (citations omitted), ("[a] claim is the same for purposes [of claim preclusion] if it is derived from the same transaction, act, or agreement, and seeks redress for the same wrong."). A "statement of a different form of liability is not a different cause of action, provided it grows out of the same transaction, act, or agreement, and seeks redress for the same wrong." *Mackintosh v. Chambers*, 285 Mass. 594, 596 (1934). Finally, with respect to the first requirement, Dr. Kaplan and TMC are named parties in both the present and prior actions. The remaining defendants are employees and agents of TMC, including the security guards who took direction from medical personnel, and therefore "non-mutual claim preclusion" applies. See *Capizzi v. Verrier*, 1996 WL 414034 at *4 (Mass. Super. 1996) (non-mutual claim preclusion "does not require identity of the parties concerned; instead, the parties need

[1] In dismissing the plaintiff's first lawsuit, the court further concluded, "based on the complaint, it does not appear that additional time would aid the plaintiff in supporting her claim for negligence."

No. 3768-08
Supreme Court of the State of New York, Albany County

Gosse v. Saint Peter's Hosp. of City of Albany

2009 N.Y. Slip Op. 31941
Decided Aug 28, 2009

3768-08.

1 August 28, 2009. *1

Supreme Court Albany County All Purpose Term, August 3, 2009, Assigned to Justice Joseph C. Teresi.

Rosenblum, Ronan, Kessler Sarachan, LLP, Bruce A. Sutphin, Attorneys for Plaintiffs, Albany, New York.

Carter, Conboy, Case, Blackmore, Maloney Laird, Adam Cooper, Esq., Attorneys for Defendants Eric S. Korenman, M.D., and Lee Ratner, M.D., Albany, New York.

Thorn, Gershon, Tymann and Bonanni, LLP, Mandy McFarland, Esq., Attorneys for Defendants Saint Peter's Hospital of the City of Albany d/b/a St. Peter's Hospital and Lee Stetzer, M.D., Albany, New York.

2 DECISION and ORDER *2

TERESI, J.:

By this action, Plaintiffs seek damages due to Defendants claimed ordinary negligence, medical malpractice and statutory duty violations relative to medical treatment Mr. Gosse received between September 3rd and 6th, 2005 and again on July 31st, 2006. On July 23, 2008, this Court issued a Decision and Order (hereinafter "Decision and Order #1"), which held that the portion of Plaintiffs' complaint sounding in medical malpractice against Dr. Clift, Albany Gastroenterology Consultants, PC, Erick S. Korenman, M.D. and Lee Ratner, M.D. was barred by the statute of limitations. Thereafter, on February 11, 2009, this Court issued a second Decision and Order (hereinafter "Decision and Order #2"), which in part relevant to this motion, denied defendants Lee Ratner, MD and Eric Korenman, MD's (hereinafter collectively the "Ratner Defendants") motion seeking summary judgment of Plaintiffs' ordinary negligence claims. Both decisions outlined the relevant facts, which are incorporated in this decision by reference and need not be restated.

Here, the Ratner Defendants again move for summary judgment of Plaintiffs' ordinary negligence claims, and Plaintiffs oppose the motion. Because the Ratner Defendants have, on this record, demonstrated that they breached no ordinary negligence duty of care to Plaintiffs, and no issue of fact is raised, their motion is granted.

Additionally, Saint Peter's Hospital of the City of Albany d/b/a St. Peter's Hospital (hereinafter "St. Peter's") and Lee Stetzer, M.D. also move to dismiss, as time barred, portions of Plaintiffs' claims and for summary judgment. Plaintiffs oppose St. Peter's motion, but have stipulated to discontinue the action against Dr. Stetzer. As Plaintiffs have discontinued their action against Dr. Stetzer, his motion for summary judgment is denied as
3 moot. St. Peter's *3 motion is granted, in part, dismissing all of Plaintiffs' claims based upon the treatment Mr. Gosse received between September 3-6, 2005, and is otherwise denied.

Summary Judgment Standard

This court is mindful that "summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869 [3d Dept. 1996]). The movant must establish, by admissible proof, their right to judgment as a mater of law. (Alvarez v. Prospect Hospital, 68 NY2d 320). If the movant establishes their right to judgment, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Id. at 562).

The Ratner Defendants

The Ratner Defendants established their entitlement to judgment as a matter of law by demonstrating the extent of their ordinary negligence duty and showing that they did not breach such duty. As was discussed in Decision and Order #2, a medical professional has a duty, sounding in ordinary negligence, to relay important medical information after "a risk of harm has been identified through the exercise of medical judgment." (Caracci v. State of New York, 178 AD2d 876 [3d Dept. 1991]; Mosezhnik v. Bernstein, 33 AD3d 895 [2d Dept. 2006]).
4 However, each individual physician's duty is limited "to those medical functions undertaken by the *4 physician and relied upon by the patient." (Dombroski v. Samaritan Hosp., 47 AD3d 80, 84 [3d Dept. 2007]; Markley by Markley v. Albany Medical Center Hosp., 163 AD2d 639 [3d Dept. 1990]).

Here, the Ratner Defendants' ordinary negligence duty was limited by the functions they undertook in the care of Mr. Gosse. Dr. Ratner and Dr. Korenman are both radiologists, who interpreted Mr. Gosse's ultrasound and CT scan, respectively. They demonstrated that upon their reviewing an ultrasound or CT scan, the established practice and procedure was (and still is) to dictate a report into the hospital's phone transcription system. The treating physician had access to the dictated report, and once the dictation was transcribed the report was included in the patient's hospital chart and a copy of the report faxed to the patient's treating physician. Only in cases where the requesting physician specifically requests immediate communication of the findings, or where an "immediate threat to the life and limb of the patient" was found, would the radiologist telephone the ordering physician or primary care doctor. The Ratner Defendants affidavits demonstrated that in no event would the radiologist contact the patient directly, as the radiologist has insufficient information about the patient's whole medical history to engage in such communication.

The foregoing established practice and procedure for a radiologist to communicate their findings, amply define the limits of their ordinary negligence duty. Because of the lack of radiologist-patient contact, it is eminently reasonable for the radiologist to communicate their report through a dictation system. The system directs a copy of that report to both the hospital chart, i.e. treating physicians at the hospital, and the patient's primary care physician. The patient's treating doctors then have sufficient knowledge of both the report and the patient
5 to *5 effectively communicate the report's contents. On this record, the Ratner Defendants demonstrated that the limit of their ordinary negligence duty was to communicate their findings to other medical professionals caring for Mr. Gosse, in accord with the established practice and procedure.

The Ratner Defendants, by their affidavits and supporting documentation, demonstrated that they did not breach their ordinary negligence duty to Mr. Gosse. Each of the Ratner Defendants, upon reviewing the ultrasound and CT scan, communicated their findings into the hospital's phone dictation system. Their reports were thereafter transcribed. A copy of each report was inserted into Mr. Gosse's hospital chart, with a copy of

each forwarded to his treating physician. Neither Ratner Defendant had a duty, sounding in ordinary negligence or otherwise, to communicate their findings directly with Mr. Gosse nor to telephone Mr. Gosse's treating physician. As such, the Ratner Defendants demonstrated their entitlement to judgment as a matter of law.

In opposition, Plaintiffs have raised no issue of fact. Plaintiffs characterize this Court's Decision and Order #2, as previously finding the existence of fact issues relative to the Ratner Defendants. Contrary to Plaintiffs' contention, however, this Court did not find that issues of fact existed in its Decision and Order #2. Rather, on that record, the Ratner Defendants failed to demonstrate their entitlement to judgment as a matter of law. Decision and Order #2 did not reach an issue of fact determination. On this record, Plaintiffs have raised no issue of fact, and the Ratner Defendants have demonstrated their entitlement to judgment as a matter of law.

6 Accordingly, the Ratner Defendants' motion for summary judgment is granted. *6 St. Peter's

Plaintiffs' claims against St. Peter's are based upon Mr. Gosse's treatment at St. Peter's from September 3rd through September 6th, 2005 and again on July 31st, 2006. Plaintiffs claim that St. Peter's is liable due to its nurses' discharge of Mr. Gosse on September 6, 2005, due to the negligence and medical malpractice of the doctors who treated Mr. Gosse in 2005 and 2006 under the doctrine of ostensible/apparent agency, due to St. Peter's failure to comply with Public Health Law § 2803-c (Patient's Bill of Rights) in both 2005 and 2006, and under a lack of informed consent theory[1] . St. Peter's seeks dismissal of such claims under statute of limitations and summary judgment theories. Because St. Peter's demonstrated that the statute of limitations expired on Plaintiffs' medical malpractice claims arising from Mr. Gosse's September 2005 treatment (inclusive of St. Peter's nurses' treatment of him), it is dismissed. St. Peter's also demonstrated that the statute of limitations expired on Plaintiffs' Public Health Law § 2803-c September 2005 claim, but not on Plaintiffs' July 2006 claim. Similarly, St. Peter's demonstrated its entitlement to judgment as a matter of law on plaintiffs' causes of action arising from its alleged ostensible/apparent agency relationship with the doctors who treated Mr. Gosse in September 2005, but not in July 2006.

[1] As Plaintiffs' opposition papers neither address nor oppose this portion of St. Peter's motion, its motion for summary judgment of Plaintiffs' "informed consent" cause of action is granted and the cause of action dismissed. Moreover, as "the wrong [Plaintiffs] complain of [do not arise] out of some affirmative violation of plaintiff's physical integrity" they have failed to set forth a viable claim. (Iazzetta v. Vicenzi, 200 AD2d 209 [3d Dept. 1994]; Schel v. Roth, 242 AD2d 697 [2d Dept. 1997]).

Turning first to St. Peter's motion to dismiss the Plaintiffs' medical malpractice causes of action arising from

7 Mr. Gosse's September 2005 treatment, St. Peter's duly demonstrated their *7 entitlement to judgment. As set forth in this Court's Decision and Order #1 "[w]hen a party moves pursuant to CPLR § 3211(a)(5) for a judgment dismissing a claim on the ground that it is barred by the Statute of Limitations, it is that party's burden initially to establish the affirmative defense by prima facie proof that the Statute of Limitations had elapsed." (Hoosac Valley Farmers Exchange. Inc. v. AG Assets, Inc., 168 AD2d 822, 823 [3d Dept. 1990], Gravel v. Cicola, 297 A.D.2d 620 [2d Dept. 2002]). Decision and Order #1 held that the Plaintiffs' medical malpractice action against numerous doctors who treated Mr. Gosse in September 2005 was "time barred by CPLR § 214-a." The medical malpractice claim accrual and commencement analysis in Decision and Order #1, are equally applicable to Plaintiffs' medical malpractice claims against St. Peter's. As such, just as the medical malpractice claims of the co-defendant doctors were time barred by the statute of limitations, so too are Plaintiffs' claims sounding in medical malpractice arising from the treatment Mr. Gosse received at St. Peter's in September 2005.

While medical malpractice claims against St. Peter's are clearly time barred, unresolved is whether St. Peter's nurses discharge of Mr. Gosse in 2005 constituted ordinary negligence or medical malpractice. "[N]ot every negligent act of a nurse would be medical malpractice, but a negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice." (Bleiler v. Bodnar, 65 NY2d 65, 72). It is the duty owed by St. Peter's nurses to Mr. Gosse, in relation to the acts alleged, that determine whether a claim sounds in medical malpractice or ordinary negligence. (See generallyBleiler, supra; Weiner v. Lenox Hill Hospital, 88 NY2d 784).

8 *8

On this record, St. Peter's demonstrated that its nurses' conduct toward Mr. Gosse constituted medical malpractice, not ordinary negligence. The nurses' allegedly negligent act was their failure to inform Mr. Gosse that the results of a CT scan, taken while Mr. Gosse was admitted at the hospital, were not complete at the time of his discharge. The St. Peter's nurse who discharged Mr. Gosse admitted, at her deposition, that the discharge process includes educating and informing the patient about their "plan of care". She testified that this included, relative to Mr. Gosse, the fact "that the results of the CT scan were not available". It is not disputed on this record that the St. Peter's discharging nurse did not inform Mr. Gosse about the unavailability of the CT scan results at the time of his discharge. However, the nurse's communication of such information falls directly within her medical duties.

The nurse's medical duty, in part, was to discharge Mr. Gosse with specific information. The nurse was to use her medical judgment and skill in conveying such information, and her failure to do so constitutes medical malpractice, not ordinary negligence. Whether the nurse is conveying discharge information or (as in Bleiler) taking a patient's medical history, both "unquestionably constitute medical malpractice." (Bleiler, supra at 72). A physician's duty to convey medical information already ascertained may, as it does in this action, constitute ordinary negligence because the physician's professional skill and judgment has already been exercised. A nurse's duty to convey discharge information, however, specifically requires the use of that nurse's professional skill and judgment, in her nursing capacity. It accordingly constitutes medical malpractice not ordinary negligence. As such, Plaintiffs' cause of action premised upon the acts of St. Peter's nurses in September 2005

9 are time barred under CPLR § 214-a, and dismissed. *9

St. Peter's also demonstrated that it is not liable for the care Mr. Gosse received in September 2005 under an ostensible/apparent authority theory. While "a hospital is not ordinarily liable for the negligent acts of an independent treating physician who is not an employee of the hospital . . . a hospital may be held vicariously liable for the acts of [an] independent physician[] if the patient enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician." (St. Andrews v. Scalia, 51 AD3d 1260, 1261-62 [3d Dept. 2008] quoting Citron v. Northern Dutchess Hosp., 198 AD2d 618 [3d Dept. 1993][internal quotations omitted]). St. Peter's submits the deposition transcripts of Dr. Gerety and Dr. Esposito. Dr. Gerety testified that he was treating Mr. Gosse, as his primary care physician, prior to his September 2005 hospitalization. Dr. Esposito testified that he admitted Mr. Gosse to the hospital, under the care of Dr. Gerety, because he was covering for Dr. Gerety at St. Peter's when Mr. Gosse was admitted. Additionally, Mr. Gosse's September 2005 hospital chart indicates that, upon his admission, he was "Admit[ted] to Gerety". Based upon the foregoing, St. Peter's made a prima facie showing that Mr. Gosse was admitted to St. Peter's, through its emergency room, seeking treatment from his physician, Dr. Gerety, not the hospital itself. Nor, on this record, have Plaintiffs raised any issue of fact relative to St. Peter's ostensible/apparent authority in September 2005. As such, Plaintiffs' ordinary negligence claims against St. Peter's for care provided Mr. Gosse in September 2005, based upon an alleged ostensible/apparent authority theory, are dismissed.

St. Peter's failed to demonstrate, however, that it is not liable under an ostensible/ apparent authority theory for the care Mr. Gosse received in July 2006. In July 2006 Mr. Gosse again entered St. Peter's through their
10 emergency room. For this treatment, however, St. Peter's *10 made no showing that Mr. Gosse sought treatment from his "particular physician". St. Peter's offers the deposition testimony of Dr. Forrest and Dr. Stetzer, who both acknowledged their treatment of Mr. Gosse on July 31, 2006. Neither doctor, however, offered any testimony that Mr. Gosse had come to see them individually, as opposed his simply seeking and receiving treatment from the hospital. Nor did they testify that they were covering for a different doctor, from whom, Mr. Gosse sought care. Thus, because St. Peter's "failed to submit prima facie proof entitling it to summary judgment on plaintiff[s'] claim against it premised upon its vicarious liability for [the] alleged negligen[t]" medical treatment Mr. Gosse received on July 31, 2006, its motion in this regard is denied. (St. Andrews, supra at 1263).

Nor did St. Peter's demonstrate its freedom from liability by establishing that Dr. Forrest's treatment of Mr. Gosse, in July 2006, was not negligent. Dr. Forrest's deposition testimony establishes that, while he was treating Mr. Gosse in July 2006, he reviewed Mr. Gosse's 2005 CT scan which stated "this could be a tumor" and "worrisome for a focal liver lesion." Dr. Forrest acknowledged that the 2005 CT scan report was abnormal and contained life threatening information. In July 2006, Dr. Forrest did not see, however, the "tumor" or "liver lesion" notations when he scanned the report. As he explained, Mr. Gosse's July 2006 complaint of back pain led Dr. Forrest to limit his review of the 2005 CT scan to a "scan" of the document for the words "aortic aneurysm". Dr. Forrest acknowledged that if a physician in the emergency department thought a patient had a "potential liver tumor, it was the physician's job to inform the patient of that". It is uncontested on this record that Dr. Forrest did not so inform Mr. Gosse. St. Peter's expert opines that Dr. Forrest's scanning of Mr. Gosse's September 2005 CT Scan was appropriate. Such expert opinion is wholly speculative, inadequately explained,
11 unsupported by *11 any factual demonstration, and insufficient to demonstrate St. Peter's lack of liability and entitlement to judgment as a matter of law.

Lastly, St. Peter's demonstrated that Plaintiffs' cause of action alleging a violation of Mr. Gosse's Public Health Law § 2803-c rights in September 2005 is time barred. A cause of action alleging a violation of a hospital Patient's Bill of Rights (Public Health Law § 2803-c) "actually pleads a medical malpractice action" and is thus governed by CPLR § 214-a's two and a half year statute of limitations. (Catapano v. Winthrop University Hosp., 19 AD3d 355 [2d Dept. 2005]). As such, as has been previously discussed with Plaintiffs' other causes of action arising from his September 2005 medical treatment, this cause of action is also time barred and dismissed. Notwithstanding Plaintiffs' characterization of St. Peter's motion, it neither argued nor factually demonstrated entitlement to summary judgment of Plaintiffs' cause of action alleging a violation of Mr. Gosse's Public Health Law § 2803-c rights in July 2006. As such, this Decision and Order declines to address the viability of such claim.

St. Peter's remaining contentions have been examined and found to be lacking in merit.

This Decision and Order is being returned to the attorneys for the Ratner Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

12 So Ordered. *12

PAPERS CONSIDERED:

1. Notice of Motion, dated June 30, 2009, Affidavit of Mandy McFarland, dated July 1, 2009, with attached Exhibits "A" — "Y".

2. Affirmation in Opposition of George Sarachan, dated July 24, 2009, Affirmation of Roger Malebanche, dated July 21, 2009.

3. Affidavit of Mandy McFarland, dated July 30, 2009.

4. Notice of Motion, dated June 30, 2009, Affidavit of Adam H. Cooper, dated June 30, 2009, with attached Exhibits "A" — "Q"; Affirmation of Eric Korenman, dated June 28, 2009, with attached Exhibits "1" — "2"; Affirmation of Lee Ratner, dated June 25, 2009, with attached Exhibits "1" — "3".

5. Affirmation of Bruce A. Sutphin, dated July 24, 2009

6. Affidavit of Adam H. Cooper, dated July 31, 2008.

No. SJC-09675
Supreme Judicial Court of Massachusetts. Suffolk

Longval v. Cmmssner. of Corrctn

448 Mass. 412 (Mass. 2007) · 861 N.E.2d 760
Decided Feb 23, 2007

No. SJC-09675.

January 3, 2007.

February 23, 2007.

Present: GREANEY, IRELAND. SPINA. COWIN, SOSMAN, CORDY, JJ.

Res Judicata. Due Process of Law, Class action, Prison classification proceedings, Prison regulation. *Governmental Immunity. Imprisonment*, Reclassification of prisoner, Transfer of prisoner. *Constitutional Law*, Imprisonment. *Administrative Law*, Regulations.

Principles of claim preclusion did not bar inmates, members of a certified plaintiff class in a successful action for declaratory and injunctive relief, from bringing a subsequent action seeking compensatory and punitive damages for particularized personal injury unsuitable for class treatment. [416-418]

In actions filed by inmates at a State prison, seeking compensatory and punitive damages for time spent in segregated confinement for nondisciplinary reasons, the judge did not err in allowing motions to dismiss in favor of the defendant government officials on the grounds of qualified immunity, where, at the time the defendants had assigned the inmates to segregated confinement, it remained a legitimate factual question whether the conditions under which the plaintiffs were held were sufficient to make compliance with the relevant regulations mandatory, as a matter of clearly established State law, before inmates were placed there. [418-424]

CIVIL ACTIONS commenced in the Superior Court Department on April 24, 1998, and October 28, 2002.

Motions to dismiss were heard by *Thomas P. Billings*, J.

The Supreme Judicial Court on its own initiative transferred the cases from the Appeals Court.

413 *Stephen B. Hrones (Michael Tumposky* with him) for Norman L. Longval another. *413 *Julie E. Daniele (Wendy Weber* with her) for Commissioner of Correction another.

James R. Pingeon, for Massachusetts Correctional Legal Services, amicus curiae, submitted a brief.

GREANEY, J.

The plaintiffs in these cases were members of the certified plaintiff class in *Haverty* v. *Commissioner of Correction*, 437 Mass. 737 (2002) (*Haverty*), an action for declaratory and injunctive relief, in which we held that inmates at the Massachusetts Correctional Institution at Cedar Junction (Cedar Junction) must be afforded

the due process procedures set forth in the regulatory scheme governing the former departmental segregation unit (DSU), 103 Code Mass. Regs. §§ 421.00 (1994) (DSU regulations), before being segregated in restrictive conditions in the so-called East Wing of the prison for non-disciplinary reasons. *Id.* at 762-763. In separate actions filed in the Superior Court, the plaintiffs sought compensatory and punitive damages for the time they spent confined in the East Wing alleging that they had been deprived of the procedural safeguards to which they were entitled. The defendants raised, by means of motions to dismiss filed pursuant to Mass. R. Civ. P. 12 (b), 365 Mass. 754 (1974), the affirmative defenses of res judicata and qualified immunity. After hearing arguments on both motions, a judge in the Superior Court concluded that the plaintiffs' claims for damages were not barred by their prior class action for declaratory and injunctive relief. The judge, however, allowed the defendants' motions on the ground of qualified immunity, concluding that the defendants had not violated "clearly established statutory or constitutional rights" when they assigned prisoners to the East Wing in disregard of the DSU regulations. The parties filed cross appeals, and the appeals were consolidated in the Appeals Court. We transferred the cases here on our own motion and now affirm the judgments of dismissal.

1. A description of the background events precipitating these appeals is recited in full in *Haverty.* See *id.* at 741-747. We summarize the material facts. Litigation challenging conditions in the State correctional system, in which inmates were held in near solitary confinement in the DSU at Cedar Junction and at the Massachusetts
414 Correctional Institution at Norfolk, for *414 indeterminate periods of time and for reasons other than disciplinary sanctions, resulted in a single justice of this court directing the department to promulgate new regulations, applicable to all State correctional facilities, governing the transfer of inmates from the general prison population to any DSU unit. See Hoffer *vs.* Fair, No. SJ-85-0071 (Mar. 3, 1988). In 1993, those regulations were enacted and are now codified at 103 Code Mass. Regs. §§ 421.00.[3]

[3] The new regulations, which replaced regulations formerly applicable to the DSU, "establish rules whereby an inmate may be confined to a Departmental Segregation Unit [DSU] because his continued presence in a general institution population would be detrimental to the program of the institution." 103 Code Mass. Regs. § 421.01 (1994). The provisions set forth substantive criteria that must be met before placement of any prisoner in a DSU, see 103 Code Mass. Regs. §§ 421.07, 421.09 (1994), and set forth procedural rights that must be afforded any prisoner so placed. See 103 Code Mass. Regs. §§ 421.10, 421.11 (1994) (right to written notice and representation by counsel at a hearing before DSU board; right to assistance in preparing for hearing, in some instances when counsel not obtained; right to tape recording of hearing). See also 103 Code Mass. Regs. §§ 421.18, 421.19 (1994) (right to review of status every ninety days; right to written monthly evaluations summarizing behavior and recommendations for release from DSU). In *Haverty* v. *Commissioner of Correction*, 437 Mass. 737 (2002) (*Haverty*), we noted that the regulations were specifically designed to "cabin the power of the prison officials to isolate any prisoner (including those in maximum security conditions) from other prisoners based solely on the subjective evaluation of the prisoner by the prison authorities." *Id.* at 745 n. 16.

In 1995, in response to escalating levels of gang-related incidents, and an increasingly violent prison population throughout the department, the commissioner decided to eliminate use of the DSU and to divide Cedar Junction (at that time the Commonwealth's only maximum security prison) into two "wings," the East Wing and the West Wing.[4] The East Wing consists of eight units, each with forty-five one-man cells; the West Wing has three units, each with seventy-two one-man cells. Conditions are materially more restrictive in the East Wing. There, inmates are held in virtual solitary confinement for twenty-two and one-half hours each day; have only limited
415 recreational time and few job opportunities; and eat all meals in *415 their cells.[5] Inmates housed in the West Wing, by contrast, are allowed out of their cells for as much as fifteen hours each day (all day on weekends) and interact with other prisoners throughout those times. They eat meals in a communal dining hall and enjoy greater visitor privileges than those in the East Wing. Assignment to the East Wing generally is not imposed for

a specific disciplinary offense, but rather to allow prison officials to maintain control of the prison population and to secure the safety of prisoners and staff. Until the time of our decision in *Haverty*, no procedural protections were provided before a prisoner was placed in the East Wing, or during the time he remained there, beyond the six-month classification review received by all prisoners in the system pursuant to 103 Code Mass. Regs. § 420.09 (1995) (entitling all prisoners housed in any correctional facility in Commonwealth, no matter the level of security, to receive review of their status every six months). Placement in the East Wing, and the amount of time a prisoner remained there, was solely at the discretion of the superintendent of Cedar Junction. See *Haverty, supra* at 746. The *Haverty* plaintiffs, certified as a class of "all prisoners who are now confined or may at some point be confined at [Cedar Junction] in any housing unit other than the DDU" (see note 5, *supra*), sought injunctive relief against the practice of placing prisoners in segregated confinement in the East Wing for nondisciplinary reasons, absent compliance with the DSU regulations. Relying on numerous decisions of this court, and of the Appeals Court, suggesting, in essence, that, where conditions in a segregated unit, however named by correction officials, are substantially similar to those in the DSU, the unit must be dealt with as a DSU, at least for purposes of procedural requirements, the plaintiffs contended that the conditions of isolation
416 in the East Wing were nearly identical to those in the DSU and, therefore, *416 that the department's failure fully to comply with DSU regulations before placing or transferring an inmate to the East Wing was unlawful. See, e.g., *Longval* v. *Commissioner of Correction*, 404 Mass. 325, 330 (1989) (to prevail on State due process claim, plaintiff required to show substantial similarity between DSU and administrative segregation unit at the Massachusetts Correctional Institution at Concord); *Kenney* v. *Commissioner of Correction*, 393 Mass. 28, 34 (1984) (inmate may be transferred to DSU only in compliance with departmental regulations); *Royce* v. *Commissioner of Correction*, 390 Mass. 425, 429-430 (1983) (prison officials may not abuse discretion by confining inmates in restrictive housing under "awaiting action status" as means to accomplish punishment immune to procedures set forth in [former] DSU regulations); *Gilchrist* v. *Commissioner of Correction*, 48 Mass. App. Ct. 60 (1999); *De-Long* v. *Commissioner of Correction*, 46 Mass. App. Ct. 353, 355-358 (1999); *Martino* v. *Hogan*, 37 Mass. App. Ct. 710, 721 (1994). We agreed with this position and, in a divided decision, held that the department may not lawfully place prisoners in the East Wing without first affording them the procedural protections required by the DSU regulations. See *Haverty, supra* at 740.[6] In order to effectuate our decision in "an orderly and safe manner," we remanded the case to the Superior Court to determine the timing and manner of implementing the procedures required by the regulations. See *id.* at 764.[7]

4 When the commissioner then sought to repeal the DSU regulations, the single justice who had ongoing jurisdiction in the case of Hoffer *vs.* Fair, No. SJ-85-0071 (Sept. 26, 1995), allowed a motion by the plaintiffs in that case to enjoin the proposed repeal.

5 Separate from the East and West Wings at Cedar Junction is a department disciplinary unit (DDU), where prisoners may be confined for disciplinary reasons in conformance with 103 Code Mass. Regs. §§ 430.00 (1993). The DDU is not part of these cases, nor are other segregation units, in both the East and West Wings, where inmates may be housed pending the outcome of disciplinary hearings. See *Haverty, supra* at 739, 742-743 n. 11. See also *Hudson* v. *Commissioner of Correction*, 431 Mass. 1, 4-5 (2000) (commissioner has broad discretion to transfer inmates, within prison system or within particular institution, for disciplinary reasons or as investigative tool).

6 The *Haverty* plaintiffs also argued that the conditions of confinement in the East Wing rose to the level described by the Supreme Court of the United States, in *Sandin* v. *Conner*, 515 U.S. 472 (1995), as an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," which, the *Sandin* Court recognized, might create a liberty interest under the Fourteenth Amendment to the United States Constitution. *Id.* at 484 (setting forth new standard for determining whether there has been deprivation of liberty interest in State prison context). Our conclusion

that the relief sought was warranted by the defendants' unlawful disregard of required procedures set forth in the DSU regulations made unnecessary our consideration of the plaintiffs' alternative argument based on constitutional principles set forth in the *Sandin* decision.

[7] A judge in the Superior Court subsequently ordered that "good time credit" be awarded to compensate inmates who had been unlawfully confined in the East Wing. This order was struck down by this court in *Haverty* v. *Commissioner of Correction*, 440 Mass. 1, 7 (2003).

417 2. As the parties moving for dismissal on res judicata grounds, *417 the defendants have the burden of establishing the elements of claim preclusion. See *Kobrin* v. *Board of Registration in Med.*, 444 Mass. 837, 843 (2005). The defendants have not met their burden in this case. Although our cases in this area are few, we see no reason why the doctrine of claim preclusion would not apply to class action litigation, so that a valid, final judgment is conclusive on all of the members of a plaintiff class. See *Aspinall* v. *Philip Morris Cos.*, 442 Mass. 381, 397 n. 19 (2004). The doctrine only operates, however, to bar further litigation of "all matters that were or should have been adjudicated in the [original class] action." *Heacock* v. *Heacock*, 402 Mass. 21, 23, 24 (1988) (explaining doctrine as ramification of policy considerations underlying rule against splitting cause of action). See *O'Neill* v. *City Manager of Cambridge*, 428 Mass. 257, 259 (1998). It does not apply in circumstances where a party has neither the incentive, nor the opportunity, to raise the claim in an earlier lawsuit. See *id.*, and cases cited. In *Aspinall* v. *Philip Morris Cos., supra*, we suggested that, in circumstances where the unique experiences of potential members of a plaintiff class would defeat the "commonality of interests" requirement for class certification pursuant to G. L. c. 93A, principles of claim preclusion would not operate to bar a class member from future pursuit of claims for personal injury unsuitable for class treatment. The same principles of fairness and judicial efficiency hold true with respect to a class certified, as was the *Haverty* class, under Mass. R. Civ. P. 23, 365 Mass. 767 (1974), a rule which, like G. L. c. 93A, does not allow a member of a certified class not wishing to be bound by the class litigation to "opt out." See J.W. Smith H.B. Zobel, Rules Practice § 23.2, at 94 (1975) ("the standard for binding absentees by a class action judgment is simply fundamental fairness").[8]

[8] We note that the plaintiff Longval did attempt to intervene in the *Haverty* lawsuit, ostensibly to litigate an asserted damage claim. The motion appears to have been filed in the Superior Court ten months after the case was argued before this court and one month before the *Haverty* decision was released. It is hardly surprising that the motion was denied.

This position accords with Federal law.[9] In fact, it appears that "every federal court of appeals that has
418 considered the *418 question has held that a class action seeking only declaratory or injunctive relief does not bar subsequent individual suits for damages." *Hiser* v. *Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996), cert. denied, 520 U.S. 1103 (1997). See *Former* v. *Thomas*, 983 F.2d 1024, 1030-1032 (11th Cir. 1993) ("It is clear that a prisoner's claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a pending class action"); 18A C.A. Wright, A.R. Miller, E.H. Cooper, Federal Practice and Procedure § 4455, at 460-464 (2d ed. 2002) ("an individual who has suffered particular injury as a result of practices enjoined in a class action should remain free to seek a damages remedy even though claim preclusion would defeat a second action had the first action been an individual suit for the same injunctive relief").

[9] We have noted that Mass. R. Civ. P. 23, 365 Mass. 767 (1974), "`was written in the light of the Federal rule,' *Baldassari* v. *Public Fin. Trust*, 369 Mass. 33, 40 (1975), hence case law construing the Federal rule is analogous and extremely useful." *Weld* v. *Glaxo Wellcome Inc.*, 434 Mass. 81, 86 n. 7 (2001). There is some dissimilarity, however, between the

two rules. One difference, which has relevance to (but does not alter) the above analysis, is that the Federal class action rule, unlike our own, permits a judge to allow members of the class to exclude themselves. See Fed.R.Civ.P. 23 (c) (2) (B).

3. We turn now to the defendants' claim of qualified immunity. "[Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Rodriques* v. *Furtado*, 410 Mass. 878, 882 (1991), quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). See *Shedlock* v. *Department of Correction*, 442 Mass. 844, 859 (2004). The standard is entirely objective. See *Harlow* v. *Fitzgerald, supra* at 815-816 (subjective standard incompatible with policy rationale of precluding insubstantial lawsuits from proceeding to trial); *Clancy* v. *McCabe*, 441 Mass. 311, 322-323 (2004), quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 n. 2 (1987) (objective standard promotes policy that "insubstantial claims against government officials be resolved prior to discovery and on summary judgment if possible").[10] In
419 order to overcome an asserted defense of qualified immunity, the right *419 must be clearly established at the time of the alleged violation. See *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). To be "clearly established" for purposes of qualified immunity, the contours of the right allegedly violated must be sufficiently definite so that a reasonable official would appreciate that the conduct in question was unlawful. See *Shedlock* v. *Department of Correction, supra*, citing *Anderson* v. *Creighton, supra* at 640. The United States Court of Appeals for the First Circuit has noted that "qualified immunity sweeps so broadly that `all but the plainly incompetent or those who knowingly violate the law' are protected from civil rights suits for money damages." *Hegarty* v. *Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995), quoting *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991).

10 The matter of qualified immunity usually is decided on a motion for summary judgment. As has been indicated, these cases were decided on the defendants' motion to dismiss pursuant to Mass. R. Civ. P. 12 (b), 365 Mass. 754 (1974). This is acceptable in circumstances, as here, where the applicability of the qualified immunity defense is clear from allegations contained in the complaint. See *Gutierrez* v. *Massachusetts Bay Transp. Auth.*, 437 Mass. 396, 404 (2002).

Analysis of the qualified immunity defense generally requires a two-part inquiry into whether, "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional right," and, if so, whether the right was clearly established so that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Gutierrez* v. *Massachusetts Bay Transp. Auth.*, 437 Mass. 396, 403-404 (2002), quoting *Saucier* v. *Katz*, 533 U.S. 194, 201, 202 (2001). In light of our holding in *Haverty*, only the second inquiry is in issue here.

As far back as 1983, a reasonable prison official would have known that a prisoner could not lawfully be assigned to the DSU without abiding by mandatory language contained in regulations, then in effect, governing the placement of prisoners in the DSU. See *Royce* v. *Commissioner of Correction*, 390 Mass. 425, 427-428 (1983) ("Once an agency has seen fit to promulgate regulations, it must comply with those regulations," citing regulations governing DSU placement then in effect, 103 Code Mass. Regs. §§ 421.01 et seq. [1978]). See also *Kenney* v. *Commissioner of Correction*, 393 Mass. 28, 34 (1984) (inmate may be transferred to DSU only in
420 compliance with departmental *420 regulations). In 1989, we reaffirmed this principle and extended its application to a challenge, brought by the plaintiff Longval, to his transfer, on two occasions, to an administrative segregation unit at the Massachusetts Correctional Institution at Concord (Concord), without a hearing and the prior authorization of the commissioner, as required by G. L. c. 127, § 39, and by DSU regulations then in effect. See *Longval* v. *Commissioner of Correction*, 404 Mass. 325, 327 (1989). We held that, in order to prevail on that aspect of his summary judgment motion concerned with violations of DSU regulations, the plaintiff was required to show that there was no dispute of material fact as to the "substantial

similarity" between the DSU and the administrative segregation unit in which he had been held. See *id.* at 330. We cautioned that "[c]ertainly, the department and the commissioner may not sidestep statutory and regulatory provisions stating the rights of an inmate as to his placement in a DSU by assigning as a pretext another name to such a unit." *Id.* at 328-329, citing *Royce* v. *Commissioner of Correction, supra* at 429-430.[11] In *Hoffer* v. *Commissioner of Correction*, 412 Mass. 450 (1992), we again clarified that departmental compliance with DSU regulations, before removing a prisoner from the general prison population and isolating him in the DSU, is constitutionally required and emphasized that the department's failure to so comply would, in appropriate cases, entitle a prisoner to "compensation, beyond nominal damages, for the loss of liberties which resulted from the deprivation of due process." *Id.* at 455.

[11] We affirmed the denial of the defendants' motion for summary judgment based on the ground of qualified immunity not, as suggested by the plaintiffs in their brief, "because the facts, taken in a light most favorable to Longval, were sufficient to show a violation of his clearly established rights," but because a determination on the qualified immunity issue "would not bar a court from declaring that Longval's rights under [State law] had been violated or from granting injunctive relief. It would only preclude the recovery of damages against the defendants." *Longval* v. *Commissioner of Correction*, 404 Mass. 325, 332 (1989). In the instant appeals, of course, it is only damages being sought by the plaintiffs.

In 1995, in *Sandin* v. *Conner*, 515 U.S. 472 (1995), the Supreme Court of the United States abandoned its prior methodology for analyzing claims brought by State prisoners alleging that conditions of their confinement
421 amounted to an *421 unconstitutional deprivation of due process, and concluded that the due process clause is implicated only when the challenged deprivation involves an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. See *DeLong* v. *Commissioner of Correction*, 46 Mass. App. Ct. 353, 355-358 (1999) (providing in-depth *Sandin* analysis). In subsequent actions brought by prison inmates alleging due process violations for noncompliance with procedures allegedly due them, the plaintiffs generally attempted to demonstrate, as a factual matter, that the conditions of their confinement imposed an "atypical and significant hardship" that created a protected liberty interest under *Sandin* v. *Conner, supra*, or that the conditions were substantially the same as those in the former DSU and, thus, compliance with DSU regulations was mandatory under State law.

In 1996, on consideration of a motion for summary judgment filed by the plaintiff in *Gilchrist* v. *Commissioner of Correction*, 48 Mass. App. Ct. 60 (1999), a judge in the Superior Court issued a declaratory judgment stating that placement of prisoners in the so-called "Phase III" unit of the East Wing (a designated restrictive unit that, apparently, was the product of organizational changes preceding the 1995 reorganization at Cedar Junction), absent compliance with the DSU regulations, was unlawful. See *id.* at 62. The judge enjoined the commissioner and prison officials from placing the *Gilchrist* plaintiff in the Phase III unit without affording him those rights contained in the DSU regulations. See *id.* In 1999, the Appeals Court vacated the declaration and the injunction, concluding that there was a genuine issue whether conditions in the Phase III unit were, in fact, the "substantial equivalent" of the DSU and remanded the case to the Superior Court for such a determination. *Id.* at 64-66 ("the factual material upon which the judge based her conclusion . . . while indicating that the restrictions imposed on the two groups of inmates may be equally harsh, does not present a sufficiently full picture of their living conditions to justify the award of summary judgment"). In another case decided by the Appeals Court earlier that year, *DeLong* v. *Commissioner of Correction*, 46 Mass. App. Ct. 353, 355, 357
422 (1999), the focus was on whether the plaintiff's "punitive segregation" in *422 a "modular unit" at Cedar Junction imposed an "atypical and significant hardship" that would create a liberty interest under *Sandin* v.

Conner, supra. The Appeals Court again remanded the case to the Superior Court for a factual analysis of the particular conditions of the plaintiff's confinement. See *DeLong* v. *Commissioner of Correction, supra* at 357-358. See also *Martino* v. *Hogan*, 37 Mass. App. Ct. 710, 721 (1994).

Consideration of the above cases leads us to conclude that, at the time that the plaintiffs were held in segregated confinement in the East Wing, in 1996 and throughout October, 2002, it was "clearly established" that the law required department officials to afford inmates the procedural protections contained in the DSU regulations before placing them in segregated conditions that were substantially similar to those in the former DSU. It remained a legitimate factual question, however, whether the *conditions* in the East Wing, under which the plaintiffs were held, sufficiently mirrored those in the former DSU so as to make compliance with the DSU regulations mandatory, as a matter of "clearly established" State law, before prisoners were placed there.[12] While *Haverty* resolved that question, the defendants could have reasonably (but we now know mistakenly) concluded, prior to October 10, 2002, the date the *Haverty* opinion was issued, that the law did not compel their
423 compliance with the DSU regulations.[13] Even then, in a strongly worded dissent in *Haverty*, three Justices *423 of this court stood by the position that DSU regulations were not applicable to the East Wing and that the court's holding otherwise was, in fact, "contrary to their purpose and the judicial and regulatory history leading to their enactment." *Haverty, supra* at 764 (Cordy, J., dissenting, with whom Cowin and Sosman, JJ., joined). Although the dissenting Justices acknowledged points of similarity between conditions in the East Wing and the DSU, they also argued the existence of what were, in their views, significant and material differences between the two units. See *id.* at 767-768 (Cordy, J., dissenting, with whom Cowin and Sosman, JJ., joined).

12 In August of 1996, a judge in the Superior Court found the defendants in contempt for having transferred the plaintiff in *Gilchrist* v. *Commissioner of Correction*, 48 Mass. App. Ct. 60 (1999), to a "restrictive confinement" in the "Phase III" unit at Cedar Junction in defiance of her prior order enjoining the defendants from doing so without compliance with the DSU regulations. The contempt order was stayed pending appeal. See *id.* at 62. As stated above, the Appeals Court concluded that summary judgment had not properly entered on the plaintiff's claims and, in remanding the case to the Superior Court, suggested that the contempt order be vacated. See *id.* at 66. Even assuming identical conditions in the Phase III unit and the East Wing, for purposes of this case, we can state with confidence that the applicability of DSU regulations to the East Wing was not a "clearly established" principle of law before, or after, any of the cases decided before *Haverty.* As we explained in *Shedlock* v. *Department of Correction*, 442 Mass. 844, 861 n. 13 (2004), "the issue whether a statutory right is `clearly established' for purposes of overcoming qualified immunity is not a matter of counting up the number of decisions that have gone each way and treating as `clearly established' whichever position has garnered the greatest number of opinions in support." *Id.* at 861 n. 13.

13 We take note of the fact, as did the Superior Court judge in *Haverty*, that decisions in Superior Court cases alleging substantial similarities between conditions in the East Wing and in the DSU had been split and, thus, cannot stand for the proposition that the law in this area was "clearly established." The judge stayed his decision requiring the defendants to provide procedural protections pursuant to the DSU regulations and, so that the defendants could appeal from his decision, issued an order for entry of a separate and final judgment. In his order, the judge acknowledged that he had "been informed that the due process issues in this case are similar to the due process issues raised in another case heard in the Superior Court, Tibbs v. Duval (Superior Court No. MICV 1997-05295 [May 11, 1998]), where the judge made a ruling contrary to my decision in this case." See Johnson *vs.* Dubois, Superior Court No. MICV1995-01385 (Sept. 24, 1996) (finding that inmates' confinement in West Wing segregation unit, pending outcome of disciplinary hearings, did not offend due process clause because, among other reasons, that unit was not "functional equivalent" of DSU).

In *Haverty*, we declared in unambiguous terms that compliance with DSU regulations is mandatory, under State law, before prison officials may transfer a prisoner to the East Wing. See *id.* at 762-763. If Justices on this court reasonably could differ as to whether conditions in the East Wing call DSU regulations into play, however, it cannot fairly be said that a reasonable official would have understood their applicability. In the wake of *Haverty*, when a different member of the *Haverty* plaintiff class, Kevin Dahl, sought monetary compensation, pursuant to 42 U.S.C. § 1983 (2000), for his invalid confinement in the East Wing absent compliance with DSU regulations, the Appeals Court, in an unpublished memorandum of decision, concluded that qualified immunity was available to the defendants because the law, before our decision in *Haverty*, was not "clearly established." See *Dahl* v. *Commissioner of Correction*, 61 Mass. App. Ct. 1118 (2004). This result was so
424 obvious that the *424 Justices on the panel decided the appeal under the court's rule 1:28, a matter of disposition reserved for cases and issues lacking substantial merit. The conclusion in the *Dahl* case was correct. Based on the law discussed, the defendants have the benefit of qualified immunity.

4. The judgments of dismissal are affirmed.

So ordered.

425 *425

Supreme Judicial Court of Massachusetts. Suffolk

Newhall v. Enterprise Mining Co.

205 Mass. 585 (Mass. 1910) · 91 N.E. 905
Decided May 18, 1910

March 3, 1910.

May 18, 1910.

Present: KNOWLTON, C.J., MORTON, HAMMOND, LORING, BRALEY, JJ.

Res Judicata. Contract, Rescission. *Fraud.*

The question, whether the cause of action in an action at law is essentially the same as that in a suit in equity, previously brought, which after a hearing upon the merits was dismissed, so that the final decree in the suit in equity is a bar to the later action at law as to every issue in the earlier suit that in fact was or in law might have been litigated, is not determined solely by the fact that both the suit in equity and the action at law originated in the same series of transactions and in conversations and communications which took place between the parties concerning them.

The plaintiff in a bill in equity against a mining corporation alleged that one W., who was the promoter, treasurer and a director of the defendant, by false and fraudulent representations of fact induced the plaintiff to purchase certain of the capital stock of the defendant which it owned, and sought a rescission of the purchase and a return of what he paid therefor. At the hearing of the suit upon its merits the plaintiff for the first time discovered from admissions of officers of the defendant that only about one third of the stock which had been sold to him was stock which the defendant had owned and the proceeds of the sale of which had gone into its treasury. The judge who heard the suit found that the plaintiff had not established his allegations of fraud, and that at any rate his suit was brought too long after the sale, and dismissed the bill. Thereafter the plaintiff elected to rescind the sale and brought an action at law to recover back what he had paid for the stock to the defendant's agent because, while he had agreed to purchase stock owned by the defendant, the proceeds of the sale of which would have gone into the corporation's treasury, only one third of the stock which the defendant's agent had sold to him was what he had agreed to purchase, the remaining being stock of the agent himself, the proceeds of the sale of which did not go to the corporation. The defendant set up as a defense the final decree in the suit in equity, and the judge, who heard the case without a jury, ruled that the defense was adequate and found for the defendant. Upon exceptions by the plaintiff, it was *held,* that the decree in the suit in equity was not a bar to the action at law, since, although the different causes of action related to the same transaction, they
586 were founded upon *586 different features of it which had no necessary relation to each other and were very different in their nature.

One, who through an agent of a corporation has bought shares of the capital stock of the corporation which it has in its treasury, cannot be compelled without his knowledge and against his will to receive and retain stock that belongs to the agent personally, thus leaving himself and the corporation without the benefit for corporate use of the money, which the corporation would have received from him if its agent had done his duty.

P.H. Kelley, for the plaintiff.

590 *S.H. Tyng,* for the defendant. *590

KNOWLTON, C.J.

One Woodin was the promoter, the treasurer and a director of the defendant mining corporation, whose capital stock was ten thousand shares, of a par value of $100 each. Of these shares ninety-three hundred and ninety-one had been issued to Woodin in payment for his interest in certain mines, nine shares had been issued to other corporators, and six hundred shares were not issued nor subscribed for. Woodin conveyed one thousand of his shares to one Prince as a trustee for the corporation, under a stipulation, agreed to by the board of directors, that he, Woodin, should be appointed the fiscal agent for the sale of them or of any portion of them, with authority to take a commission of not more than thirty-three and one third per cent from the selling price, this selling price to be such as the board should determine, and the proceeds of the sales to be placed in the treasury of the corporation, to be expended in the discretion of the directors, with a proviso that the balance due upon the bond given for the purchase price of the mining property should be paid in accordance with its terms. Woodin, as agent for the defendant, contracted to sell to the plaintiff and the plaintiff's wife stock belonging to the company at three different times, amounting to one hundred and thirty-four shares in all, for thirty-three and one third dollars per share. The plaintiff's wife has deceased and the plaintiff has succeeded to her rights. The plaintiff brought a bill in equity against the defendant, alleging that these sales were made upon false representations by Woodin of matters of fact, which, if true, would have shown that the stock was very valuable, and that the purchases were made by the plaintiff and his wife in reliance upon these false and fraudulent representations. He attempted to rescind the contracts on account of these alleged frauds, and to
587 obtain a decree for a return of the money paid to Woodin for the defendant. Upon a hearing in the Superior *587 Court this bill was dismissed on the ground that the alleged frauds were not sufficiently supported by evidence, and that, if they were, the plaintiff had delayed too long before attempting to rescind the contracts.

Subsequently the plaintiff brought this action at law on the ground that all the sales, according to their terms, were of a part of the one thousand shares of stock belonging to the defendant and held by the trustee, called in the plaintiff's declaration treasury stock, and that the plaintiff and his wife paid Woodin for this stock, and that Woodin, in executing the contract, failed to deliver the defendant's stock, except to the amount of forty-five shares, and delivered his own stock instead. For this reason, as the property was not that which the plaintiff bought, he elected to rescind the contract and reclaim the money paid to the defendant's agent, which this agent had never paid over to his principal, but had kept as his own. The defendant's answer was a general denial, and a plea of *res judicata* founded on the decree dismissing the bill in equity. At the hearing the judge– made the following finding: "In the above action, the court finds for the defendant. I find the defendant's agent did not represent that he was selling any of the original treasury stock of six hundred shares, but he agreed to sell the syndicate stock referred to in the bill in equity held in trust by James P. Prince, and that the plaintiff agreed to buy such stock; that for relief for any misrepresentations by Woodin in such sale the plaintiff could have obtained a remedy in the bill in equity referred to in the answer, and should have sought it by the proper allegations in the bill." This so called syndicate stock was the one thousand shares above referred to. The plaintiff made many requests for rulings, and the case comes before us on his exceptions to the refusal of the judge to grant them.

– *Hardy,* J.

The finding indicates a decision by the judge that the dismissal of the bill in equity was a bar to this suit. The argument of the defendant's counsel upon the exceptions before us was upon this ground only. It therefore
588 becomes necessary to compare the two suits and determine whether they are for the same cause of action. *588

It is not contended that the principal issue presented in the present case was decided in favor of the defendant in the suit in equity. Indeed, the matter relied upon by the plaintiff as his cause of action in this case was not averred or put in issue in the former suit. The plaintiff testified, and the other evidence tends to corroborate him, that he did not know the facts upon which he now relies until he discovered them during the former trial.

The defendant relies upon the principle that, as between the same parties, a judgment on the merits in an earlier suit is a bar to a later suit for the same cause of action as to every issue that in fact was, or in law might have been, litigated. *Foye* v. *Patch,* 132 Mass. 105, 110. *Newburyport Institution for Savings* v. *Puffer,* 201 Mass. 41, 46. It is to be noted that the proposition is limited to a suit for the same cause of action. As was said in *Norton* v. *Huxley,* 13 Gray, 285, 290, and in *Harlow* v. *Bartlett,* 170 Mass. 584, 592, it does not follow that the causes of action in two cases are the same because they "both originated in the same series of transactions, and in the conversations and communications which took place between the parties concerning them." On the other hand, it does not follow that they were not the same because there is a difference in the form of stating them, or an omission in the statement of one to include one or more of the matters that are merely incidental or in aggravation of damages. The question is whether the substantive causes of action relied on are essentially the same, not whether they grow out of transactions which occurred at the same time and had a close relation to one another.

The plaintiff's claim in his bill in equity was founded entirely on the defendant's alleged fraudulent representations made as inducements to contracts of purchase. The claim in the present case is for a failure to perform a contract according to its terms, and for a performance which was so far a departure from the contract as to justify the plaintiff in rescinding it altogether. The cause of action in the first suit, while cognizable at law was one proper for jurisdiction in equity. The right which the plaintiff seeks to enforce in this action is strictly legal, and cannot be made the subject of a suit in equity. The evidence required to support the cause of action in
589 the present suit is very *589 different from that required to maintain a suit in equity. Although the different causes of action relate to the same transaction, they are founded upon different features of it, which have no necessary relation to each other and which are very different in their nature. The present suit depends entirely upon a contractual right, and the liability of the defendant rests solely upon a breach of contract. The case is like *Allen* v. *Storer,* 132 Mass. 372, in that it could not have been made the foundation of a suit in equity. It is like *Norton* v. *Huxley, Harlow* v. *Bartlett* and *Newburyport Institution for Savings* v. *Puffer, ubi supra,* in that the decision in the previous bill in equity is not a bar to the maintenance of the plaintiff's present claim. The principal ruling requested by the plaintiff on this branch of the case should have been given.

We do not deem it necessary to consider the plaintiff's requests for rulings in detail. It is plain that the plaintiff, who bought the stock of the defendant, which it had in its treasury, could not be compelled, without his knowledge or against his will, to receive and retain stock that belonged to another party, thus leaving himself and the corporation without the benefit of the money, for corporate use, which the defendant would have received from him if its agent Woodin had done his duty.

While the evidence strongly indicates that the plaintiff is entitled to recover, we do not think the case is exactly within the plaintiff's request that a judgment be directed in his favor under the St. 1909, c. 236, § 2.

Exceptions sustained.

No. 18-P-1076
Appeals Court of Massachusetts

Zaleskas v. Brigham & Women's Hosp.

97 Mass. App. Ct. 55 (Mass. App. Ct. 2020) · 141 N.E.3d 927
Decided Feb 11, 2020

No. 18-P-1076

02-11-2020

Margaret V. ZALESKAS & another v. BRIGHAM AND WOMEN'S HOSPITAL & others.

Kara M. Zaleskas for the plaintiffs. Brian H. Sullivan & Amy E. Goganian, Needham (Rebecca A. Cobbs & Kara A. Bettigole, Boston, also present) for the defendants.

HENRY, J.

Kara M. Zaleskas for the plaintiffs.

Brian H. Sullivan & Amy E. Goganian, Needham (Rebecca A. Cobbs & Kara A. Bettigole, Boston, also present) for the defendants.

Present: Rubin, Henry, & Wendlandt, JJ.

57 HENRY, J.*57 This case arises out of an X-ray exam conducted on a terminally ill cancer patient. The plaintiffs' second amended complaint stated twelve counts against the defendants, including battery and intentional infliction of emotional distress. On cross motions for summary judgment, a judge of the Superior Court entered judgment in favor of the defendants.

We are required in this case to consider whether there is a viable cause of action for battery, in the medical context, based on withdrawal of consent. We conclude that there is. In a case such as this, which involves a claim that the patient asked X-ray technologists to stop amidst the taking of X-rays, we also conclude that expert testimony about the feasibility of stopping is not required. Because there are factual disputes as to
933 whether the patient withdrew *933 her consent during the X-ray exam, the judgment is reversed as to the claim of battery under a theory of withdrawal of consent. Because the same facts also support claims for intentional infliction of emotional distress, violation of G. L. c. 111, § 70E, and breach of warranty, the judgment on those claims is also reversed. In all other respects, the judgment is affirmed, as are the orders on appeal.

Background.[3] On August 4, 2011, Donna Zaleskas, a terminal cancer patient receiving care at Brigham and Women's Hospital (hospital), was experiencing severe pain in her left leg and knee. Her doctor ordered X-rays. Several radiology technologists -- James Connors, Yingbo Zhang, Carlo Valentin, Rade Boskovic, and Ahmed Mohammed (collectively, the technologists) -- participated in the X-ray exam. Connors, the lead technologist, told Donna's sister, Kara, and her mother, Margaret, that if Donna experienced too much pain, he would stop.[4] Connors denied Kara's request to remain in the X-ray room during the exam, but Kara and Margaret remained just outside.

[3] "[W]here both parties have moved for summary judgment, the evidence is viewed in the light most favorable to the party against whom judgment [has entered]." Boazova v. Safety Ins. Co., 462 Mass. 346, 350, 968 N.E.2d 385 (2012), quoting Albahari v. Zoning Bd. of Appeals of Brewster, 76 Mass. App. Ct. 245, 248 n.4, 921 N.E.2d 121 (2010).

[4] Because the plaintiffs and the decedent share a surname, we refer to the decedent and the plaintiffs individually by their first names and to the plaintiffs collectively as the plaintiffs.

It is undisputed that Connors informed Kara and Margaret that he had ended the exam early -- after five X-ray images, instead of the six the doctor ordered. The judge recited that "Donna's *58 x-rays were in fact stopped prior to completion." However, in the light most favorable to the plaintiffs, the technologists took all six X-rays ordered.[5] Indeed, the defendants argued in response to the plaintiffs' motion for summary judgment that "[a] genuine issue of material fact exists regarding whether the x-rays were timely terminated."

[5] The plaintiffs argue, and the record indicates, that six X-ray images were taken, thereby demonstrating that the exam did not cease prior to completion. To the extent the defendants cited a question asked of Connors at his deposition, questions are not evidence. See Commonwealth v. Gomez, 450 Mass. 704, 713, 881 N.E.2d 745 (2008).

As we discuss infra, an open question exists whether there is additional admissible evidence of what happened during the X-ray exam. At a deposition taken on March 30, 2017, over five years after the day in question, Kara testified about her observations of Donna's symptoms of pain and hearing Donna pleading and begging during the X-ray exam but stated that she was "not sure whether [Donna] ever said 'stop.' " Similarly, Margaret, at her deposition over five years later, could not recall if she heard Donna say, "stop."

However, the record includes three documents that may be admissible to prove that Donna asked the technologists to stop, provided the required evidentiary foundation is laid. First, as soon as Kara returned home from the hospital after the X-ray exam, in the early morning hours of August 5, 2011, she wrote a summary of the events in question and e-mailed that summary to her mother and other sister (August 5 e-mail summary or summary). In that summary, Kara stated that she and her mother heard "Donna's plaintive pleading -- 'please, please, please, please, please, please ...,' " and that "Donna continued to wail and beg for them to stop" and that ten minutes later, the X-rays were done. Kara adopted this summary, *934 swearing to it, in a declaration dated April 8, 2015, which was before the date of the deposition.

The second document is the hospital's redacted patient family relations report (family relations report). On August 5, 2011, the day after the X-rays were taken, the plaintiffs reported their concerns about the X-ray exam to hospital staff. The family relations report, written by Stacey Bukuras, the person who investigated the plaintiffs' concerns, documented that Kara and Margaret reported that after the door to the X-ray room closed, "for the following 20 minutes, they heard [Donna] 'wailing,' 'begging to "please stop." ' "*59 The third document is Kara's contemporaneous handwritten notes (Kara's notes) of a call with Bukuras. Kara's notes stated that nursing director Eileen Molina "acknowledged that [Donna] asked to stop" and the "exam could've been stopped." Kara's notes also reflected that the technologists "cut [the X-ray exam] short -- not as short as it should've been."

Connors recalled Donna's X-ray exam and responded in discovery that "at no point did she request that the x-ray be stopped." He also testified that "[i]t is never reasonable or appropriate to continue an X-ray procedure after a patient has indicated that [they] wish the technician to stop." In their opposition to the plaintiffs' motion for summary judgment, the defendants stated that the "technologists [also] testified that it is their custom and practice to stop an X-ray if a patient asks them to stop." The defendants also acknowledged in their opposition that whether Donna withdrew her consent was a material dispute of fact.

The X-rays revealed that Donna did have a new fracture in her left femur, and she was treated with an immobilization brace. Donna died on August 10, 2011.

The plaintiffs filed this action on August 4, 2014.[6] A medical malpractice tribunal was held on December 11, 2015; the tribunal found for the hospital and technologists (collectively, defendants). The plaintiffs timely posted a bond, and the parties proceeded with discovery. After extensive motion practice regarding discovery, the plaintiffs moved for summary judgment, asserting two theories of battery: withdrawn consent and lack of informed consent. Shortly thereafter, the defendants moved for summary judgment on all twelve counts. The defendants' motion characterized the claim for battery as an informed consent claim. The judge granted the defendants' motion and denied the plaintiffs' motion.

6 The second amended complaint alleged twelve causes of action: battery; violations of G. L. c. 111, § 70E ; negligence; negligent infliction of emotional distress; intentional infliction of emotional distress; breach of express warranty; loss of consortium; conscious pain and suffering; wrongful death; and gross negligence. Both Kara and Margaret alleged intentional infliction of emotional distress and negligent infliction of emotional distress.

The judge's summary judgment decision, understandably, focused on the plaintiffs' failure to produce expert testimony on any issue. As for the issue of withdrawn consent, the judge determined, without elaboration, that there was no competent evidence that Donna asked to stop the X-rays. The judge did not address the
60 admissibility of the documents previously described (i.e., *60 Kara's August 5 e-mail summary, the family relations report, and Kara's notes). He noted that an affidavit cannot be used to contradict a deposition. He also stated that "to the extent that the plaintiffs' case depends upon the credibility of their witnesses, the Court
935 cannot assume that a jury would find them credible." The plaintiffs' motions for reconsideration *935 and vacatur were denied. The plaintiffs appealed.

Discussion. 1. Summary judgment standards. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56(c), as amended, 436 Mass. 1404 (2002); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734 (1991). We review a decision to grant summary judgment de novo. See Ritter v. Massachusetts Cas. Ins. Co., 439 Mass. 214, 215, 786 N.E.2d 817 (2003). Before turning to the merits of the appeal, we address several issues that arose during resolution of the parties' motions for summary judgment.

a. Deposition testimony differing from prior declaration. It is well-settled that one cannot create an issue of fact sufficient to defeat summary judgment by submitting a later affidavit that contradicts one's own prior deposition testimony. See Hanover Ins. Co. v. Leeds, 42 Mass. App. Ct. 54, 58, 674 N.E.2d 1091 (1997). This is not such a case, however, for two reasons. First, Kara's declaration, which adopted her August 5 e-mail summary that Donna said to stop during the X-ray exam, came before -- not after -- the deposition. Second, in the light most favorable to the plaintiffs, the declaration and the later deposition are not in conflict with one another. Rather, in the required light, Kara's deposition spoke to her memory at the time of the deposition over five years after the fact, rather than what she knew earlier.[7] Thus, her declaration should not have been disregarded simply because it differed from her deposition testimony. Palermo v. Brennan, 41 Mass. App. Ct. 503, 508, 672 N.E.2d 540 (1996) (conflict between affidavit made prior to deposition and deposition, absent election between versions, must be resolved at trial).

7 Indeed, the plaintiffs take this position in their briefing -- the contemporaneous summary adopted by Kara in her declaration was accurate and their memories faded over the intervening years.

Kara's declaration standing alone, however, was not sufficient to defeat summary judgment unless the facts it contained would be admissible in evidence. Rule 56(e) of the Massachusetts Rules of Civil Procedure, 365 Mass. 824 (1974), requires that affidavits supporting and opposing summary judgment shall present
61 information *61 upon "personal knowledge," and that they "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The problem for the plaintiffs is that Kara, in her later deposition, testified that she could not recall if Donna said to stop.[8] Because Kara and Margaret bore the burden of proof, the defendants relied on the plaintiffs' depositions admitting that they could not recall if Donna had said, "stop," to argue that the plaintiffs could not meet their burden of proof. A party seeking summary judgment may satisfy its burden of demonstrating the absence of triable issues, see Pederson v. Time, Inc., 404 Mass. 14, 17, 532 N.E.2d 1211 (1989), by showing "that the party opposing the motion has no reasonable expectation of proving an essential element of [its] case." Kourouvacilis, 410 Mass. at 716, 575 N.E.2d 734. To defeat the defendants' motion, Kara and Margaret needed to offer admissible evidence that Donna withdrew consent during the X-ray exam or evidence supporting a
936 reasonable inference that she withdrew consent.*936 b. Credibility is for the trier of fact. As a general matter, in ruling on a motion for summary judgment, "[t]he court is not to pass on the credibility of the witnesses or on the weight of the evidence." Attorney Gen. v. Brown, 400 Mass. 826, 832, 511 N.E.2d 1103 (1987). A motion judge is not free to determine that a nonmoving party's testimony is not to be believed. Attorney Gen. v. Bailey, 386 Mass. 367, 370, 436 N.E.2d 139 (1982) ("In considering a motion for summary judgment, the court does not 'pass upon the credibility of witnesses or the weight of the evidence [or] make [its] own decision of facts' "). Thus, in this case, to whatever degree the judge's allowance of the defendants' summary judgment motion rested upon his statement that "to the extent that the plaintiffs' case depends upon the credibility of their witnesses, the Court cannot assume that a jury would find them credible," it was in error. Indeed, we assume that facts set forth by the nonmoving party are true. See Patsos v. First Albany Corp., 433 Mass. 323, 324, 741 N.E.2d 841 (2001). At the same time, where the party with the burden of proof at trial provides unrebutted testimony, summary judgment for that party may still be precluded because credibility is for the fact finder and the fact finder is free to disbelieve the testimony. See Wilmington Trust Co. v. Manufacturers Life Ins. Co., 624
62 F.2d 707, 709 (5th Cir. 1980) (where party *62 moving for summary judgment bears burden of persuasion on factual issue and information bearing on that issue falls within their exclusive knowledge, "prospective impeachment of the movant's evidence, without more, can suffice to preclude summary judgment"); Rotondi v. Ocean Spray Cranberry Juice, Inc., 682 F. Supp. 397, 398 (N.D. Ill. 1988) ("where questions of fact turn exclusively on the credibility of a party who bears the burden of persuasion, ... [t]o grant plaintiff's motion for summary judgment would be to usurp the factfinder's crucial role").

[8] At her deposition, Kara acknowledged that she had reread her declaration and did not say that it refreshed her recollection.

c. Deficient affidavits/evidence. The hospital submitted documents titled "Affidavit" from Bukuras and from David Seaver, the hospital's risk manager, addressing certain issues discussed below. The hospital acknowledges that the so-called "affidavits" are signed but do not contain the requisite attestation language. However, the plaintiffs did not move to strike the affidavits.[9] Therefore, the judge was permitted, though not required, to credit these defective affidavits. Patsos, 433 Mass. at 324 n.2, 741 N.E.2d 841 (summary judgment affidavit made entirely on information and belief could be considered in its entirety in absence of motion to strike); Sweda Int'l, Inc. v. Donut Maker, Inc., 13 Mass. App. Ct. 914, 430 N.E.2d 439 (1982) (in considering "affidavit" that failed to show affiant was competent to testify, judge was permitted, though not required, to overlook deficiencies).

9 Instead, the plaintiffs argued in a footnote in their reply to the hospital's opposition to the plaintiffs' motion to compel that the affidavits should be disregarded. The plaintiffs deposed Bukuras after the defendants filed her affidavit and did not identify any conflict with the statements in her affidavit. In addition, the summary judgment record included interrogatory responses attested to by Seaver that asserted peer review privilege and the plaintiffs had opportunity to depose Seaver.

2. Withdrawn consent battery. a. Standard of proof. "[M]edical treatment of a competent patient without [her] consent is said to be a battery."[10] Matter of Spring, 380 Mass. 629, 638, 405 N.E.2d 115 (1980). *937 See Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 745-746, 370 N.E.2d 417 (1977) (in Massachusetts there is "a general right in all persons to refuse medical treatment in appropriate circumstances" and that right extends to "an incompetent, as well as a competent, patient"). Although our courts have not previously considered a claim of battery on the basis of withdrawal of consent in the medical context, several other States have permitted *63 such claims, adopting the two-prong test articulated in Mims v. Boland, 110 Ga. App. 477, 483-484, 138 S.E.2d 902 (1964). That court held that a medical provider could be liable for battery if a patient withdraws consent during a treatment in progress so long as the following conditions exist:

10 The plaintiffs argue the battery claim under both the theory of withdrawn consent and lack of informed consent. We reserve our discussion of lack of informed consent for later in this decision.

> "(1) The patient must act or use language which can be subject to no other inference and which must be unquestioned responses from a clear and rational mind. These actions and utterances of the patient must be such as to leave no room for doubt in the minds of reasonable men that in view of all the circumstances consent was actually withdrawn. (2) When medical treatments or examinations occurring with the patient's consent are proceeding in a manner requiring bodily contact by the physician with the patient and consent to the contact is revoked, it must be medically feasible for the doctor to desist in the treatment or examination at that point without the cessation being detrimental to the patient's health or life from a medical viewpoint."

Id. See Coulter v. Thomas, 33 S.W.3d 522, 524 (Ky. 2000) ; Yoder v. Cotton, 276 Neb. 954, 960, 758 N.W.2d 630 (2008) ; Hartman vs. LeCorps, Tenn. Ct. App., No. 89-188-II, 1989 WL 115181 (Oct. 4, 1989) ; Pugsley v. Privette, 220 Va. 892, 899-900, 263 S.E.2d 69 (1980). Contrast Linog v. Yampolsky, 376 S.C. 182, 187, 656 S.E.2d 355 (2008).

We now hold that if a patient unambiguously withdraws consent after medical treatment has begun, and if it is medically feasible to discontinue treatment, continued treatment following such a withdrawal may give rise to a medical battery claim. Complaints of pain and discomfort are not sufficient. Yoder, 276 Neb. at 961, 758 N.W.2d 630 (where plaintiff complained of discomfort during exam but did not establish unequivocal withdrawal of consent, no battery claim lies). To withdraw consent, "[t]he patient must act or use language which can be subject to no other inference" and "leave no room for doubt in the minds of reasonable [listeners] that in view of all the circumstances consent was actually withdrawn." Mims, 110 Ga. App. at 483, 138 S.E.2d 902. Here, a reasonable jury could find that saying stop or words to that effect, in the particular factual context at issue, was sufficient to withdraw consent. Hester v. Brown, 512 F. Supp. 2d 1228, 1232-1233 (M.D. Ala. 2007) (consent may be revoked at any time; plaintiff's battery claim against medical provider turns on whether she effectively revoked *64 consent when she screamed for medical provider to stop inserting intravenous line); Pugsley, 220 Va. at 899-900, 263 S.E.2d 69 (affirming jury verdict on battery claim against surgeon where jury could have found patient revoked consent when she told him that she did not want to undergo surgery without presence of named second surgeon).[11]

11 In some cases, whether cessation of treatment is feasible may require expert testimony.

We also conclude that consent to have one's body touched or positioned for an X-ray is not a matter beyond the common knowledge or experience of a layperson and does not require expert medical testimony. Nothing about
938 an X-ray exam *938 inherently raises the question whether cessation of treatment was feasible and the defendant technologists contend that they stopped the X-ray exam before completion, demonstrating that it was feasible to complete fewer X-rays. See Pitts v. Wingate at Brighton, Inc., 82 Mass. App. Ct. 285, 289, 972 N.E.2d 74 (2012), quoting Bailey v. Cataldo Ambulance Serv., Inc., 64 Mass. App. Ct. 228, 236 n.6, 832 N.E.2d 12 (2005) ("where a determination of causation lies within 'general human knowledge and experience,' expert testimony is not required"); Montgomery v. Bazaz-Sehgal, 568 Pa. 574, 589-590, 798 A.2d 742 (2002) (during surgery on plaintiff's penis, doctor implanted prosthesis without consent; laypersons could comprehend, without assistance of expert, plaintiff's emotional damages; expert testimony was necessary to prove any physical injuries resulted from implantation of device).[12]

12 See also Shine v. Vega, 429 Mass. 456, 465-466, 709 N.E.2d 58 (1999) (medical professionals must respect refusal of treatment by patient who is capable of providing consent -- even in emergency and where treatment could be life-saving); Grabowski v. Quigley, 454 Pa. Super. 27, 34-37, 684 A.2d 610 (1996) (expert testimony is not necessary to prove battery where different surgeon performed surgery than surgeon to whom plaintiff consented).

b. Evidence of withdrawn consent. Kara and Margaret assert that Donna withdrew her consent during the X-ray exam when she said, "stop." Viewing the evidence in the light most favorable to the plaintiffs, a jury could find that the X-ray technologist took the six X-rays ordered, but falsely told the plaintiffs that he stopped early, taking only five. From this, the jury could reasonably draw an inference that Donna said to stop, but that the X-ray technologists did not, falsely reporting otherwise to her waiting family who had been promised the X-rays
65 would stop if Donna asked, and who might have heard her say to stop, to allay the *65 family's concerns and avoid liability. Indeed, the defendants admitted in response to the plaintiffs' motion for summary judgment that "[a] genuine issue of material fact exists regarding whether the x-rays were timely terminated." These disputes of material facts were sufficient to defeat summary judgment on the claim of battery.

In addition, a jury could find that there is documentary evidence demonstrating that Donna said to stop. Specifically, the plaintiffs rely on three aforementioned documents in the record: (1) Kara's August 5 e-mail summary; (2) the redacted family relations report; and (3) Kara's notes taken during a telephone call with Bukuras. There are, however, unresolved questions raised by the defendants about the admissibility of these documents.[13] Where the "proper disposition of the [summary judgment] motion depends on the admissibility of evidence, and admissibility depends, in turn, upon the resolution of questions of fact, the judge's decision should reflect that he or she has confronted and resolved those questions." Thorell v. ADAP, Inc., 58 Mass. App. Ct. 334, 340, 789 N.E.2d 1086 (2003). Here, the judge should have, but did not, resolve the questions about the admissibility of these documents. And, although we have concluded that, even without this evidence,
939 the defendants' motion for summary judgment on *939 this claim should have been denied, because the evidentiary issues with respect to these three documents are likely to arise on remand, we address the matter now to the extent the record allows.[14]

13 The defendants also assert that generally, when a patient asks for an X-ray exam to stop, technologists stop and assess the patient. The defendants further argue that the plaintiffs could not hear any conversations that occurred during the exam, nor did they speak to Donna about what transpired. However, we note again that the task of assessing witness credibility is one designated for the jury and cannot be resolved on a motion for summary judgment.

14 If evidentiary issues cannot be resolved prior to ruling on a motion for summary judgment because the admissibility of the evidence turns on questions of fact, the admissibility of the evidence should be assumed in favor of the nonmoving party because on summary judgment we consider the evidence in the light most favorable to the nonmoving party.

Because Donna's "stop" statements are in the documents, we address them first. Donna's "stop" statements are not hearsay because their utterance has independent legal significance and a jury could find they provided notice to the defendants. See Commonwealth v. Fourteen Thousand Two Hundred Dollars, 421 Mass. 1, 5, 653
66 N.E.2d 153 (1995), quoting Liacos, Massachusetts Evidence *66 438 (6th ed. 1994) (out-of-court statement is not hearsay when it is "offered to prove that the person to whom it was addressed had notice or knowledge of the contents of the statement"); Charette v. Burke, 300 Mass. 278, 280-281, 15 N.E.2d 194 (1938) (father's command to child was "verbal act" and not hearsay). See also Mass. G. Evid. § 801(c) (2019). Donna's "stop" statements, as contained in the documents offered by the plaintiffs, would be admissible to prove notice of Donna's withdrawal of consent, as long as the documents reporting the statements are also independently admissible.[15] We turn now to the documents that report that Donna said "stop" or the like.

15 "[E]xpressions and complaints of pain" are not hearsay. Bacon v. Charlton, 7 Cush. 581, 586, 61 Mass. 581 (1851).

(i) August 5 e-mail summary and the family relations report. Kara's and Margaret's statements in the family relations report that Donna said "stop," or the equivalent, are potentially admissible as their past recollection recorded, or prior consistent statements. The fact that Kara's and Margaret's statements were recorded by the hospital rather than by Kara or Margaret is beside the point. The recollections were recorded. See Commonwealth v. Bookman, 386 Mass. 657, 663, 436 N.E.2d 1228 (1982) (past recollection recorded may be in memorandum made or adopted by the witness).

To the extent the plaintiffs argue that the August 5 e-mail summary or the statements in the family relations report are admissible as a past recollection recorded, the judge must make a determination as to whether Kara's memory of the August 4 X-ray exam is insufficient to "testify fully and accurately." Mass. G. Evid. § 803(5) (2019) ("A previously recorded statement may be admissible if [i] the witness has insufficient memory to testify fully and accurately, [ii] the witness had firsthand knowledge of the facts recorded, [iii] the witness can testify that the recorded statement was truthful when made, and, [iv] the witness made or adopted the recorded statement when the events were fresh in the witness's memory"). See Commonwealth v. Nolan, 427 Mass. 541, 544, 694 N.E.2d 350 (1998) (past recorded statement may be admitted even if witness has some memory of events about which they are testifying). It is difficult on this record to see how the plaintiffs could not meet this standard, but this is a determination for the judge in the first instance. On remand, the judge will have to
67 determine whether Kara's August 5 e-mail summary or any part thereof is admissible.*67 To the extent the plaintiffs offer the family relations report as the hospital's business record or a statement of a party opponent,
940 the judge must determine *940 whether the report qualifies as such. See Beal Bank, SSB v. Eurich, 444 Mass. 813, 815, 831 N.E.2d 909 (2005), citing DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 105, 449 N.E.2d 1189 (1983). See also Mass. G. Evid. § 803(b). This, too, is a determination for the judge on remand.

(ii) Kara's handwritten notes. This document requires a two-step analysis, first analyzing Bukuras's alleged statements and then analyzing Kara's out-of-court notes. As to Bukuras, a statement is not hearsay if it is "offered against an opposing party and ... was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Mass. G. Evid. § 801(d)(2)(D) (2019). Kara's handwritten notes contain statements that Bukuras made to Kara regarding Bukuras's investigation into Donna's X-ray exam, which Bukuras conducted within a week or two of Donna's death. In the notes, Kara writes that Bukuras (1) "acknowledged that [Donna] asked to stop," (2) the "exam could've been stopped," and (3) that the exam was

"cut ... short [but] not as short as it should've been." Bukuras made such statements while she was employed by the hospital, within the scope of her job as a member of the patient family relations department, and the plaintiffs offered the statements against the hospital. Accordingly, Bukuras's statements constitute statements of an opposing party and are not hearsay. See Mass. G. Evid. § 801(d)(2) (2019).[16] On the second step of the analysis, the plaintiffs can offer Kara's notes only if they can demonstrate that the notes are admissible as a past recollection recorded. As with Kara's August 5 e-mail summary, a determination of this issue will have to be made on remand.

16 We acknowledge that other Massachusetts cases treat a party opponent's out-of-court statement as hearsay, subject to an exception. See Commonwealth v. DeBrosky, 363 Mass. 718, 724, 297 N.E.2d 496 (1973) ; Commonwealth v. McKay, 67 Mass. App. Ct. 396, 403 n.13, 853 N.E.2d 1098 (2006).

If the judge finds that any of the three aforementioned documents is admissible, they amount to additional evidence with regard to the battery claim pursuant to a theory of withdrawn consent. Whether Donna said, "stop," whether the technologists stopped the exam prior to completion, and whether they could have stopped sooner than they did are genuine issues of material fact which must be determined by the trier of fact.
68 Accordingly, we reverse so much of the summary judgment on count one that *68 alleges battery under the theory of withdrawn consent.[17]

17 If the plaintiffs prevail on this claim at trial, the correct measure of damages must exclude any pain inherent in the X-ray exam in view of her health at the time prior to any withdrawal of consent, including returning Donna to her bed.

3. Intentional infliction of emotional distress suffered by Kara and Margaret.[18] The judge's conclusion that there was no evidence of extreme and outrageous conduct was based on the incorrect premise that the defendants
941 stopped the *941 X-ray exam early because of Donna's pain. Putting, as summary judgment requires, "as harsh a face on [the technologists'] actions ... as the basic facts would reasonably allow," Richey v. American Auto. Ass'n, Inc., 380 Mass. 835, 839, 406 N.E.2d 675 (1980), on this record the plaintiffs have offered enough evidence to defeat summary judgment with respect to the claim for intentional infliction of emotional distress. Viewed in the light most favorable to the plaintiffs, a jury could find that the technologists understood Kara's and Margaret's concern, as family members, about Donna's extremely vulnerable state and then-current level of pain; the technologists denied their request to allow a family member to assist or remain in the room in order to minimize any additional pain Donna might experience during the X-ray exam; the technologists gave an assurance that they would stop if Donna asked; failed to stop despite a plea from Donna to stop; knew that Kara and Margaret waited outside the X-ray room and could hear Donna's screams of agony; returned Donna to a soiled bed; and lied about stopping the X-ray exam early in an apparent attempt to hide wrongdoing. These facts and circumstances, if proved, would permit the jury to find in favor of the plaintiffs on their claims of intentional infliction of emotional distress. Compare Simon v. Solomon, 385 Mass. 91, 95, 97, 431 N.E.2d 556 (1982) (upholding jury verdict because landlord's conduct showing continuing pattern of indifference to
69 repeated flooding of tenant's apartment with raw sewage was extreme and outrageous); *69 Boyle v. Wenk, 378 Mass. 592, 593-595, 392 N.E.2d 1053 (1979) (conduct of private investigator repeatedly harassing woman just released from hospital with newborn baby was extreme and outrageous); Agis v. Howard Johnson Co., 371 Mass. 140, 141-142, 355 N.E.2d 315 (1976) (complaint should not have been dismissed where it was alleged that defendant, which employed plaintiff as waitress, held meeting at which supervisor stated that someone had been stealing and that he would begin firing all waitresses, in alphabetical order, until identity of that person could be established; he then summarily fired plaintiff, as result of which she sustained emotional distress). Accordingly, we reverse the summary judgment on counts five and seven for intentional infliction of emotional distress.

18 To sustain a claim of intentional infliction of emotional distress, a plaintiff must prove "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community; (3) that the actions of the defendant were the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe and of a nature that no reasonable man could be expected to endure it" (quotations and citations omitted). Agis v. Howard Johnson Co., 371 Mass. 140, 144-145, 355 N.E.2d 315 (1976).

4. Other claims based on withdrawn consent. To the extent the plaintiffs assert claims of breach of express warranty and violation of G. L. c. 111, § 70E, based on the withdrawal of consent, summary judgment is reversed because there are material disputes of fact as to whether Donna withdrew consent and whether the defendants then stopped the X-ray exam.

5. Other claims. a. Negligence-based claims and wrongful death. The plaintiffs also contend that the judge erred in granting the defendants' motion for summary judgment on the plaintiffs' negligence-based claims -- battery (lack of informed consent), negligence, gross negligence, and conscious pain and suffering,[19] as well as the wrongful death claim.

19 A health care provider may be held liable only for the pain and suffering that occurred as a result of their negligence. Matsuyama v. Birnbaum, 452 Mass. 1, 26 n.41, 890 N.E.2d 819 (2008).

(i) Medical battery (lack of informed consent), negligence, conscious pain and suffering, and gross negligence. Where a plaintiff makes a claim for medical battery under a lack of informed consent theory,[20] such conduct
942 relates to the *942 appropriate standard of care in the medical context and our courts "prefer to treat informed consent liability solely as an aspect of malpractice or negligence" (quotations omitted). Feeley v. Baer, 424 Mass. 875, 880, 679 N.E.2d 180 (1997) (O'Connor, J., concurring), quoting 1 F. Harper, F. James, & 0. Gray, Torts § 3.10, at 3:45-3:46 (3d ed. 1996). "To prevail on a claim of medical malpractice, a plaintiff must establish the applicable standard of care and demonstrate both that a defendant [health care provider] breached
70 that standard, and that this breach caused the patient's harm." *70 Palandjian v. Foster, 446 Mass. 100, 104, 842 N.E.2d 916 (2006). The standard of care is "what the average qualified [health care provider] would do in a particular situation." Id. at 105, 842 N.E.2d 916. Expert testimony is generally required to prove medical malpractice. Id. at 105-106, 842 N.E.2d 916.[21]

20 "The doctrine of informed consent has its foundations in the law of battery." Feeley v. Baer, 424 Mass. 875, 880, 679 N.E.2d 180 (1997) (O'Connor, J., concurring).

21 "It is only in exceptional cases that a jury instructed by common knowledge and experience may without the aid of expert medical opinion determine whether the conduct of a [health care provider] toward a patient is violative of the special duty which the law imposes." Haggerty v. McCarthy, 344 Mass. 136, 139, 181 N.E.2d 562 (1962), quoting Bouffard v. Canby, 292 Mass. 305, 309, 198 N.E. 253 (1935).

The summary judgment record here contains no expert witness testimony on the issue of informed consent to the X-ray exam or that the X-ray exam was performed negligently. Instead, the plaintiffs assert that there is no need for an expert witness because there is sufficient evidence for the jury to determine the appropriate standard of care, such that expert testimony would have been redundant. We disagree.

The defendants' alleged negligence was not so obvious that it lay within the common knowledge of the jurors. See Haggerty v. McCarthy, 344 Mass. 136, 139, 181 N.E.2d 562 (1962). Donna was terminally ill and suffered from metastatic cancer, as well as several bone fractures. As the defendants asserted, how to properly conduct

an X-ray exam on such a patient is not within the common knowledge of jurors. An expert witness would be needed to establish whether and how to move a patient in Donna's condition and how to position such a patient for multiple X-ray images. Moreover, the jurors would not be able to determine, without expert testimony, whether the technologists' actions caused Donna to experience an undue amount of pain, as opposed to the existence of the cancer or the fractures, and what damages, if any, were caused by the defendants. See Held v. Bail, 28 Mass. App. Ct. 919, 921, 547 N.E.2d 336 (1989) ("if the causation question involves questions of medical science or technology, the jury requires the assistance of expert testimony"). Cf. Pitts, 82 Mass. App. Ct. at 290, 972 N.E.2d 74 ("No expert testimony is necessary for lay jurors to appreciate that allowing a nursing home patient to fall to the floor could cause a broken bone").

Without expert testimony, the plaintiffs' negligence-based claims, which include lack of informed consent battery, negligence, gross negligence, and conscious pain and suffering, fail.

(ii) Wrongful death. The plaintiffs' claims under the wrongful death statute also fail. "The wrongful death
71 statute imposes liability on anyone who 'by his negligence causes the death of a *71 person.' " Matsuyama v. Birnbaum, 452 Mass. 1, 20, 890 N.E.2d 819 (2008), quoting G. L. c. 229, § 2. See Correa v. Schoeck, 479 Mass. 686, 693, 98 N.E.3d 191 (2018) ("To prevail in [their] wrongful death suit, [the plaintiffs] must prove that the defendants were negligent"). The plaintiffs argue that the defendants' negligent performance of the X-
943 ray *943 exam hastened Donna's death, thereby causing her a loss of chance to survive, pursuant to G. L. c. 229, § 2. See Renzi v. Paredes, 452 Mass. 38, 44-46, 890 N.E.2d 806 (2008). However, under the loss of chance doctrine, the plaintiffs were required to present expert testimony supporting such a claim. See Matsuyama, supra at 28, 890 N.E.2d 819 (calculating damages under loss of chance doctrine "is a matter beyond the average juror's ken; the evidence will necessarily come from experts"). The plaintiffs did not do so here.

In sum, the judge properly granted summary judgment on the plaintiffs' battery claim under the theory of lack of informed consent (count one), their other negligence claims (counts three, four, six), and their conscious pain and suffering, wrongful death, and gross negligence claims (counts ten, eleven, and twelve).[22]

22 For the same reasons, to the extent the plaintiffs assert that their claims of breach of express warranty (count eight) and violation of G. L. c. 111, § 70E (count two), were based on acts of negligence, summary judgment was properly granted.

b. Medical malpractice tribunal. Pursuant to G. L. c. 231, § 60B, "[e]very action for malpractice, error or mistake against a provider of health care shall be heard by a tribunal consisting of a single justice of the superior court, a [representative of the field of medicine in which the alleged malpractice occurred] and an attorney authorized to practice law in the commonwealth."[23] A provider of health care is defined in the statute and includes a hospital, but the statute does not specifically include radiology technologists. See G. L. c. 231, § 60B.[24]

23 At the tribunal hearing, the tribunal determines whether the plaintiff's offer of proof "if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result." G. L. c. 231, § 60B. See Polanco v. Sandor, 480 Mass. 1010, 1010, 103 N.E.3d 747 (2018).

24 "[A] person, corporation, facility or institution licensed by the commonwealth to provide health care or professional services as a physician, hospital, clinic or nursing home, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, social worker, or acupuncturist, or an officer, employee or agent thereof acting in the course and scope of his employment." G. L. c. 231, § 60B.

After the medical malpractice tribunal ruled in favor of the defendants, the plaintiffs filed the statutorily
72 required $6,000 bond *72 to pursue their claims in the Superior Court. See G. L. c. 231, § 60B (where tribunal finds for defendant, "plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of [$6,000] in the aggregate").

On appeal, the plaintiffs make two arguments concerning the tribunal. First, they argue that under G. L. c. 231, § 60B, the tribunal did not have jurisdiction to review the claims against the technologists, as radiology technologist is not an occupation listed within the statutory definition of health care provider. We need not decide this issue, however, as it is undisputed that the tribunal had jurisdiction over the hospital. See G. L. c. 231, § 60B (listing licensed hospital as within definition of health care provider). Therefore, the plaintiffs' singular $6,000 bond payment was proper as to their claims against the hospital and the tribunal's findings with regard to the technologists, whether proper or not, did not require an additional bond payment and thus caused the plaintiffs no prejudice.

Second, the plaintiffs argue that the tribunal's composition was improper because it contained a radiologist,
944 instead of a radiology technologist. However, as the defendants correctly assert, the plaintiffs *944 waived that argument by failing to raise it prior to the commencement of the tribunal. See Blood v. Lea, 403 Mass. 430, 435-436, 530 N.E.2d 344 (1988).

c. Discovery motions. The plaintiffs also assert several discovery issues. We review discovery rulings for abuse of discretion. See Buster v. George W. Moore, Inc., 438 Mass. 635, 653, 783 N.E.2d 399 (2003).

(i) Motion to compel production of hospital policies. On August 21, 2015, the plaintiffs served the hospital with requests for production of documents. Request no. 8 sought "[a]ll documents ... concerning ... the hospital's policies or procedures relating to patient care" from August 4, 2005, to August 21, 2015. In response to the plaintiffs' subsequent motion to compel, the hospital stated it would produce the "[r]adiology department protocol/policies in effect on August 4, 2011." The judge denied the plaintiffs' motion to compel as to request no. 8 on February 23, 2016.

On October 6, 2017, the hospital, through its attorney, informed the plaintiffs that after due diligence, it was unable to locate any such policies.[25] On October 18, 2017, the plaintiffs again moved to compel the hospital to
73 provide appropriate responses to the *73 outstanding discovery requests. After hearing, the judge denied the plaintiffs' motion "based on the representations of defense counsel at the hearing which shall be binding, and which shall be observed in the future if it turns out that additional production is needed to conform to those representations."

25 However, on November 29, 2017, the hospital learned of two radiology policies and produced them to the plaintiffs.

The plaintiffs argue that the judge erred by denying their motion to compel. However, the plaintiffs failed to include the transcript from the relevant hearing, which contains defense counsel's representations upon which the judge relied as the basis for his denial. Therefore, we are unable to conduct a meaningful review of this claim. See Cameron v. Carelli, 39 Mass. App. Ct. 81, 84, 653 N.E.2d 595 (1995), quoting Shawmut Community Bank, N.A. v. Zagami, 30 Mass. App. Ct. 371, 372-373, 568 N.E.2d 1163 (1991), S.C., 411 Mass. 807, 586 N.E.2d 962 (1992) ("An appellant's obligation to include those parts of the trial transcript and copies of motions 'which are essential for review of the issues raised on appeal ... is a fundamental and longstanding rule of appellate civil practice' ").

(ii) Peer review privilege. In response to the plaintiffs' request for production of documents, the hospital claimed that portions of the family relations report and certain e-mail communications regarding the investigation into the X-ray exam at issue were privileged, pursuant to G. L. c. 111, §§ 203, 204, 205. Twice, the plaintiffs moved to compel the hospital to produce such documents. The judge denied both motions, determining, as to the first motion, that the requested material was protected by peer review privilege.[26]

26 The judge denied the plaintiffs' second motion on different grounds.

General Laws c. 111, § 205(b), protects "[i]nformation and records which are necessary to comply with risk management and quality assurance programs established by the board of registration in medicine and which are necessary to the work product of medical peer review committees." The party asserting privilege over such materials must demonstrate "(1) that the information and records sought are 'necessary to comply' with risk
945 management and quality assurance programs established by the board, and (2) that the *945 information and records 'are necessary to the work product' of 'medical peer review committees' " (footnote omitted). Carr v. Howard, 426 Mass. 514, 522-523, 689 N.E.2d 1304 (1998), quoting G. L. c. 111, § 205(b). "The existence of a claimed privilege is essentially a question of fact for the trial judge." Miller v. Milton Hosp. & Med. Ctr., Inc.
74 54 Mass. App. Ct. 495, 498-499, 766 N.E.2d 107 (2002). *74 Determining whether the privilege applies "turns on the way in which a document was created and the purpose for which it was used, not on its content." Id. at 499, 766 N.E.2d 107, quoting Carr, supra at 531, 689 N.E.2d 1304.

On appeal, the plaintiffs argue that the judge erred in denying their motions seeking to compel production of six pages that were redacted from the family relations report and e-mails that the hospital claimed were protected by the peer review privilege. Specifically, the plaintiffs argue that the hospital's proof of the privilege failed because its "affidavits" did not contain an oath or attestation declaring that the statements made were true.[27] Both the Bukuras and Seaver affidavits confirmed that the documents the plaintiffs sought were created in connection with the investigation related to Donna's X-ray exam, and the Seaver affidavit stated that those documents were "reports and records" of a medical peer review committee under the relevant statutes and "therefore privileged." As explained supra, in the absence of a motion to strike, the judge could rely on the defective affidavits. See Carr, 426 Mass. at 525, 689 N.E.2d 1304, quoting G. L. c. 111, § 205(b) ("a hospital need only show that the information at issue is of a type that is generally used by [peer review] 'committees' "); Miller, 54 Mass. App. Ct. at 501, 766 N.E.2d 107 ("the applicability of the medical peer review privilege to particular documents frequently will be clear from the purpose for which, and process by which, the documents were prepared").

27 The plaintiffs also argue that the hospital failed to demonstrate that the materials did not fall within one of the exceptions to the privilege. However, the plaintiffs cite no authority supporting this proposition; thus, we deem it waived because it does not rise to the level of appellate argument. See Mass. R. A. P. 16(a)(4), as amended, 367 Mass. 921 (1975); K.A. v. T.R., 86 Mass. App. Ct. 554, 567, 18 N.E.3d 1107 (2014).

(iii) Spoliation of evidence. At a meeting on August 5, 2011, the plaintiffs reported their concerns about the August 4 X-ray exam to Eileen Molina, Stacey Bukuras, and Amanda Moment. Viewed in the light most favorable to the plaintiffs, Bukuras took notes during the meeting. The plaintiffs' statements are reflected in the family relations report, which Bukuras authored. On June 14, 2016, the plaintiffs moved to compel production of Bukuras's notes, among other documents, and for sanctions. After hearing, the judge found that the requested notes no longer existed and ordered the hospital to "produce all documents and information setting forth observations of what occurred and was said in the presence of any of the plaintiffs." The defendants then
75 produced a redacted version of the family relations report.*75 A judge may impose sanctions for the spoliation

of evidence if a party "negligently or intentionally loses or destroys evidence that the [party] knows or reasonably should know might be relevant to a possible action." Scott v. Garfield, 454 Mass. 790, 798, 912 N.E.2d 1000 (2009). See Kippenhan v. Chaulk Servs., Inc., 428 Mass. 124, 127, 697 N.E.2d 527 (1998) ("The threat of a lawsuit must be sufficiently apparent ... that a reasonable person in the spoliator's position would realize, *946 at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute"); Mass. G. Evid. § 1102 (2019).

On appeal, the plaintiffs argue that the hospital knew or should have known that Bukuras's notes would be relevant to subsequent litigation.[28], [29] In her affidavit, Bukuras stated that it was her "custom and practice to destroy" handwritten notes after the relevant family relations report was written and that any notes she may have taken during the August 5 meeting were destroyed prior to the commencement of litigation.

[28] To the extent that the plaintiffs argue that the destruction of Bukuras's notes constitutes a violation of the hospital's statutory obligation to retain treatment records under G. L. c. 111, § 70, we disagree. As we have concluded, the notes Bukuras took during the August 5 meeting were part of the investigation into Donna's X-ray exam, which was conducted pursuant to the hospital's medical peer review obligations, and such notes are exempt from this statute. See G. L. c. 111, §§ 1, 70.

[29] The plaintiffs also argue that the judge found spoliation, ordered the hospital to "produce all documents and information setting forth observations of what occurred and was said in the presence of any of the plaintiffs" as a remedy for the resulting prejudice, and that the hospital still refused to produce certain relevant e-mails. This argument is unavailing, as the judge found neither that there was spoliation of the notes, nor that the plaintiffs were prejudiced.

We conclude that the judge did not abuse his discretion by denying the plaintiffs' motion for sanctions with regard to the spoliation issue. See Gath v. M/A-COM, Inc., 440 Mass. 482, 490-491, 802 N.E.2d 521 (2003). Even assuming spoliation, the plaintiffs did not demonstrate how the spoliation allegedly prejudiced them, nor what remedy was warranted. See Santiago v. Rich Prods. Corp., 92 Mass. App. Ct. 577, 582, 91 N.E.3d 1166 (2017), quoting Keene v. Brigham & Women's Hosp., Inc., 439 Mass. 223, 235, 786 N.E.2d 824 (2003) ("As a general rule, a judge should impose the least severe sanction necessary to remedy the prejudice to the nonspoliating party"). The plaintiffs, as witnesses to the August 4 X-ray exam and attendees of the August 5 meeting, could testify to what occurred and what was *76 discussed during the meeting.[30] Moreover, the plaintiffs deposed both Bukuras and Moment regarding the meeting.[31] In addition, the plaintiffs are free to argue that a trier-of-fact should hold the hospital's failure to retain Bukuras's notes against the hospital.

[30] The plaintiffs also assert that Molina indicated that the technologists' conduct did not comport with the hospital's policies and practices, citing Kara's declaration for support. However, Kara also declared that Molina made such statements before Bukuras entered the room; therefore, if she is correct, Molina's statements could not have been memorialized in Bukuras's notes.

[31] The record contains only excerpts of Moment's and Bukuras's depositions.

(iv) Motion for sanctions on motion to compel. Allowing the plaintiffs' motion to compel responses to their outstanding requests for admissions, the judge found that "[i]t is not likely that [the] defendants can truthfully deny all the requested facts" and ordered the hospital to comply with Superior Court Rule 30A and eliminate the boilerplate objections. The hospital complied with the judge's order and supplemented its responses. Almost two years later, the plaintiffs filed a motion for entry of contempt against the hospital and for award of sanctions pursuant to Mass. R. Civ. P. 37(b)(2), as amended, 390 Mass. 1208 (1984), for violating Mass. R. Civ. P. 36, 365 Mass. 795 (1974).[32] The judge denied the plaintiffs' motion, stating: *947 "Defendant did supplement answers to admissions and is not in contempt. The plaintiffs' disagreements with the [a]nswers just reflects, in

large part, their own conclusions from documents that both sides have seen. No extreme accusations are warranted. Nor is further litigation over responses to written discovery." We discern no abuse of discretion in the judge's order denying sanctions on the motion to compel. See Campana v. Directors of the Mass. Hous. Fin. Agency, 399 Mass. 492, 503, 505 N.E.2d 510 (1987).[33]

[32] The requested sanctions included reimbursement of all costs and fees incurred by the plaintiffs, an order stating that all admission requests were deemed admitted, and entry of judgment in favor of the plaintiffs.

[33] The plaintiffs' arguments regarding their claims for loss of consortium, and their argument regarding the "habit evidence" upon which the judge purportedly relied in his decision are unsupported by authority or factual analysis and do not rise to the level of reasoned appellate argument; thus, these arguments are also waived. See Mass. R. A. P. 16(a)(4) ; K.A., 86 Mass. App. Ct. at 567, 18 N.E.3d 1107 (court will not consider claims that "do not rise to the level of reasoned appellate argument as contemplated by [the rules]").

6. Conclusion. The portion of the judgment that dismisses so much of count one that pleads a claim of battery
77 under the theory of withdrawn consent, as well as counts five and seven for intentional *77 infliction of emotional distress, is reversed. In all other respects, the judgment is affirmed, as are the orders on appeal.

So ordered.

Mass. Gen. Laws ch. 231 § 60B

Section 231:60B - Malpractice actions against providers of health care; tribunal

Every action for malpractice, error or mistake against a provider of health care shall be heard by a tribunal consisting of a single justice of the superior court, a physician licensed to practice medicine in the commonwealth under the provisions of section two of chapter one hundred and twelve and an attorney authorized to practice law in the commonwealth, at which hearing the plaintiff shall present an offer of proof and said tribunal shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result.

Said physician shall be selected by the single justice from a list submitted by the Massachusetts Medical Society representing the field of medicine in which the alleged injury occurred and licensed to practice medicine and surgery in the commonwealth under the provisions of section two of chapter one hundred and twelve. The list submitted to the single justice shall consist only of physicians who practice medicine outside the county where the defendant practices or resides or if the defendant is a medical institution or facility outside the county where said institution or facility is located. The attorney shall be selected by the single justice from a list submitted by the Massachusetts Bar Association. The attorney and physician shall, subject to appropriation, each be compensated in the amount of fifty dollars.

Where the action of malpractice is brought against a provider of health care not a physician, the physician's position on the tribunal shall be replaced by a representative of that field of medicine in which the alleged tort or breach of contract occurred, as selected by the superior court justice in a manner he determines fair and equitable.

Where there are codefendants representing more than one field of health care the superior court justice shall determine in his discretion who shall represent the health care field on the tribunal.

Each such action for malpractice shall be heard by said tribunal within fifteen days after the defendant's answer has been filed. Substantial evidence shall mean such evidence as a reasonable person might accept as adequate to support a conclusion. Admissible evidence shall include, but not be limited to, hospital and medical records, nurses' notes, x-rays and other records kept in the usual course of the practice of the health care provider without the necessity for other identification or authentication, statements of fact or opinion on a subject contained in a published treatise, periodical, book or pamphlet or statements by experts without the necessity of such experts appearing at said hearing. The tribunal may upon the application of either party or upon its own decision summon or subpoena any such records or individuals to substantiate or clarify any evidence which has been presented before it and may appoint an impartial and qualified physician or surgeon or other related professional person or expert to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report or to testify as a witness thereto. Such a witness shall be

allowed traveling expenses and a reasonable fee to be fixed by the tribunal which shall be assessed as costs. The testimony of said witness and the decision of the tribunal shall be admissible as evidence at a trial.

If a finding is made for the defendant or defendants in the case the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of six thousand dollars in the aggregate secured by cash or its equivalent with the clerk of the court in which the case is pending, payable to the defendant or defendants in the case for costs assessed, including witness and experts fees and attorneys fees if the plaintiff does not prevail in the final judgment. Said single justice may, within his discretion, increase the amount of the bond required to be filed. If said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed. Upon motion filed by the plaintiff, and a determination by the court that the plaintiff is indigent said justice may reduce the amount of the bond but may not eliminate the requirement thereof.

For the purposes of this section, a provider of health care shall mean a person, corporation, facility or institution licensed by the commonwealth to provide health care or professional services as a physician, hospital, clinic or nursing home, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, social worker, or acupuncturist, or an officer, employee or agent thereof acting in the course and scope of his employment.

The expenses and compensation of said tribunal shall be paid by the commonwealth, provided, however, that the pro rata percentage of such expenses and compensation engendered by actions brought against providers of health care registered under chapter one hundred and twelve shall not be in excess of the amounts received by the commonwealth for registration fees for such providers of health care under said chapter one hundred and twelve, less the amount expended for expenses and compensation of the respective boards of registration of said providers of health care under said chapter one hundred and twelve.

Whenever the tribunal makes a finding, the clerk of the court shall, no later than fifteen days after such finding, send a copy of the complaint and finding to the board of registration in medicine.

Upon entry of judgment, settlement, or other final disposition at trial court level, the clerk shall, no later than fifteen days after such entry, send a copy of the judgment, settlement or other final disposition, to the board of registration in medicine. The terms of such judgment, settlement, or other final disposition shall not be sealed by agreement of the parties or by any other means and shall be available for public inspection, except, however, the identity of the plaintiff may be kept confidential by the board.

Mass. Gen. Laws ch. 231, § 60B

Amended by Acts 2006, c. 217,§ 1, eff. 11/7/2006.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, _Jie Tan__, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

Use only if producing brief in a proportional font/word limit: I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Courier New at size _12, and contains _4760_words, total non-excluded words as counted using the word count feature of Microsoft Word.

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on November 3, 2023, I have made service of this Appeal Brief upon the attorney of record for each party, by email and the Electronic Filing System on: Nov. 3, 2023

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