COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FAR No.

Appeals Court No. 2023-P-0961

MIDDLESEX, ss.

Yu-Fen Liu, Plaintiff/Appellant

v.

Tufts Medical Center, Inc, et al.,

Defendants/Appellees

PLAINTIFF'S APPLICATION FOR FURTHER APPELLATE REVIEW OF THE APPEALS COURT PANEL'S SUMMARY DECISION OF JUNE 6, 2024

Date: June 27, 2024

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Attorney for
Plaintiff-Appellant Yuefen Liu
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I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass. R. App. P 27.1 plaintiff-appellant Yu-fen Liu (a/k/a Yufen Liu) respectfully requests that the SJC grant further appellate review of Appeals Court's summary decision of June 6, 2024, for the reasons that *Farese v. Connolly*, 422 Mass. 1010 (1996) may have been grossly misinterpreted by the lower courts, affecting an important and fundamental public interest in constitutional protections of medical civil rights and rights to informed consent; and the fundamental interests of justice for injuries suffered from forced medical evaluation and treatments and false imprisonment and batteries by doctors, nurses and hospital securities.

II. STATEMENT OF PRIOR PROCEEDINGS: APPEAL COURT'S GROSS MISINTERPRETAION OF FARESE V. CONNOLLY, 422 MASS. 1010 (MASS. 1996)

Plaintiff filed a first suit in the Middlesex superior court on March 4, 2022 (**Docket No. 2281CV01401**), and Defendants Tufts Medical Emergency Center and Leah I Kaplan, MD, filed Answers on March 29, 2022.

On April 26, 2022, **Defendants filed Demands for Medical Malpractice Tribunal in accordance with superior court Rule 73.2**.

On May 19, 2022, the superior court decided that plaintiff waived her right to tribunal by untimely filing offer of proof and that she must post $6000 bond within 30 days.

But Rule 73.1(c) requires that Rule 73.2-6 procedures of tribunal must continue. On May 25, 2022, Defendants submitted their case-specific list of physicians for medical tribunal assembly. On May 31, 2022, Plaintiff submitted offer of proof. However, **no** medical tribunal was assembled. **The process of evidential review by a G.L.c. 231, § 60B medical tribunal never started.**

Because the superior court Rule 73.5: "If the plaintiff waives the tribunal, the court shall require posting of a bond in the statutory amount, **without prejudice** to the right of either party to move to increase or reduce the amount of the bond," (emphasis added), on July 7, 2022, Counsel of the plaintiff filed motion to reduce the bond and to extend the deadline. **EHXIBIT 1**. On July 12, 2022, this motion was

denied without prejudice due to lack of compliance with rule 9A.

The plaintiff made the $6000 bond payment on July 14, 2022 to her attorney and her attorney mailed a $6000 check to the court, this fact was stated in the Opposition to defendants' motion to dismiss. **Exhibit 2.**

On July 22, 2022, the defendants filed a motion to dismiss for failure to post bond together with the plaintiff's counsel's Opposition, which notified the court that **the bond was paid**. **Exhibit 2.**

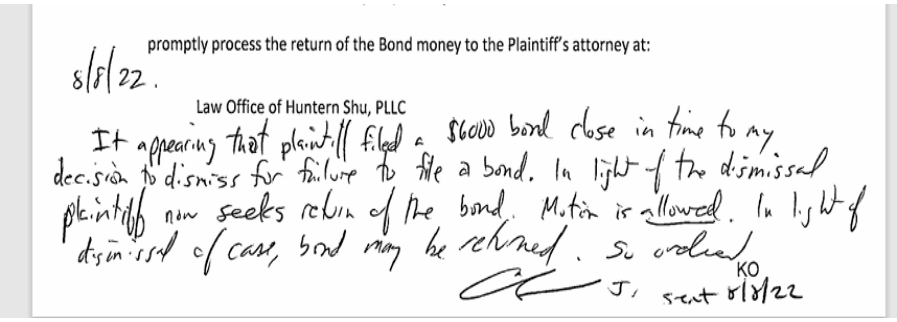
> Plaintiff, Yufen Liu (hereinafter as the "Plaintiff"), through her attorney, Huntern Shu, hereby requests the Court to deny the Defendants' MOTION TO DISMISS FOR FAILURE TO POST THE BOND REQUIRED UNDER M.G.L. Ch 231, §60B because the Plaintiff has submitted the required bond per the requirement of the law and the order of the Court. Moreover, the Court shall

On July 27, 2022, the superior court endorsed the defendants' motion to dismiss **solely** for plaintiff's failure to pay bond. This decision was made **without any inquiry** to plaintiff's counsel about his statement in his Opposition. **Exhibit 3.**

The entire decision is copied herein below:

> "Plaintiff asks for more time to obtain a diagnosis for the harm allegedly, caused by defendants, however, that request is denied because a) this incident occurred nearly three years ago; and b) medical malpractice plaintiffs are obligated to have support for their claim at the point of a medical malpractice tribunal, or face the consequences under the statute, namely, the bond requirement. Further, based on the complaint, it does not appear that additional time would aid the plaintiff in supporting her claim for negligence. Case shall be dismissed."

On August 4, 2022, the plaintiff's counsel filed a motion for returning the bond because the bond payment check **was cashed** by the court. **Exhibit 4.** On August 8, 2022, a Judge allowed the motion **acknowledging** that plaintiff "**filed** a $6000 bond close in time to his decision." **Exhibit 5.**



promptly process the return of the Bond money to the Plaintiff's attorney at:

8/8/22.

Law Office of Huntern Shu, PLLC

It appearing that plaintiff filed a $6000 bond close in time to my decision to dismiss for failure to file a bond. In light of the dismissal plaintiff now seeks return of the bond. Motion is allowed. In light of dismissal of case, bond may be returned. So ordered.

KO

J. sent 8/8/22

The above dismissal decision did not address whether the dismissal was with prejudice or not, although Superior court Rule 73.8 requires that "[a]fter considering the impact on prompt resolution of the case and all other equities,

the judge may waive any of these requirements or extend any of these deadlines" (emphasis added).

The superior court judge, in this dismissal decision, thus misused his discretion by **failing to make any inquiry to** the plaintiff's counsel regarding the bond status **and by refusing to extend time as an** alternative equitable solution under Rule 73.8 and 73.9. "[E]xcept in extreme cases, the "mere passage of time" is not enough to warrant dismissal." *Comley v. Lazaris*, 79 N.E.3d 1111 (Mass. App. Ct. 2017).

On November 22, 2022, the plaintiff filed the present complaint (**Docket No. 2281CV04021**) against Tufts, Kaplan and the other defendants for medical fraud, assault, false imprisonment, battery, negligence, and violation of civil rights.

On March 24, 2023, the defendants filed a motion to dismiss, alleging that **all** of plaintiff's present claims were barred by plaintiff's prior medical malpractice complaint (Docket No.2281CV01401) under claim preclusion.

On June 14, 2023, a hearing was conducted, during which the Defendant counsel acknowledged that Tufts

hospital security guards restrained Plaintiff. See page 30 of **Exhibit 6** the hearing transcript.

> And I think that's when she was restrained by security.
>
> She ended up being re-evaluated and cleared psychologically to be discharged. And that's what happened in the early morning hours of November 25th.

On July 14, 2023, the superior court judge dismissed **all** of the plaintiff's claims with prejudice, with conclusion below:

> 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).
>
> 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)

It distorted *Farese* case as a pure "failure to file $6000 bond" "must be with prejudice" citing *Farese v. Connolly*, 422 Mass. 1010 (Mass. 1996). **Exhibit 7.**

The plaintiff filed notice of appeal on July 24, 2023 (**Docket No. 2023-P-0961**). On June 6, 2024, the Appeal Panel made a summary decision denying the appeal, again holding that prior medical malpractice complaint "must be with prejudice" citing *Farese v. Connolly*, 422 Mass. 1010 (Mass. 1996). **EXHIBIT 8.**

> July 29, 2022, when a Superior Court judge dismissed the plaintiff's medical malpractice complaint for her failure to file a bond pursuant to G. L. c. 231, § 60B. That dismissal was with prejudice. See Farese v. Connolly, 422 Mass. 1010 (1996) (dismissal for failure to file bond pursuant to G. L. c. 231, § 60B, "must be with prejudice"). See also G. L. c. 231, § 60B

The *Farese v. Connolly*, 422 Mass. 1010 (Mass. 1996) asked only one question: "**Following a panel determination** in a physician's favor under G.L.c. 231, § 60B (1994 ed.), and the plaintiffs' failure **seasonably** to file a bond, must the judgment dismissing the action be entered with prejudice?"

The entire opinion is copied herein below:

> "Stripped of procedural aspects not significant to the result (including the plaintiffs' objections to the entry of a judgment from which they have not appealed), the appeal in this medical malpractice action presents a single straightforward issue. Following a panel determination in a physician's favor under G.L.c. 231, § 60B (1994 ed.), and the plaintiffs' failure seasonably to file a bond, must the judgment

> dismissing the action be entered with prejudice? In this case, the judge entered a judgment that dismissed the complaint without prejudice. The defendant physician's appeal, which we transferred here on our own motion, challenges the dismissal without prejudice. We conclude that dismissal of such an action must be with prejudice.
>
> Section 60B of G.L.c. 231 provides that, after a panel's finding for a defendant physician, "the plaintiff may pursue the claim through the usual judicial process only upon filing bond" and "[i]f said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed." The provision that the claim may be preserved judicially only if a bond is filed indicates a legislative intent that the claim may not otherwise be pursued. The purpose of the medical malpractice tribunal statute would be undercut if a plaintiff were to be allowed to start all over again. See *McMahon v. Glixman*, 379 Mass. 60, 64 (1979) (plaintiff who fails to file bond "runs the risk of being out of court entirely" in taking pretrial appeal from tribunal finding).
> The judgment is vacated, and judgment shall be entered dismissing the action with prejudice. So ordered."

It is clear to any reasonable person that the *Farese* Court only applies **after** the parties have gone through **the tribunal process and** the tribunal **made a finding**.

Here, in plaintiff's both filings, no medical tribunal was assembled and the process of evidential reviewing by the tribunal under G. L. c 231, § 60B did

not exist and still does not exist in both superior court cases.

Both the plaintiff's appeal brief and defendants' response brief acknowledged this basic key fact. **Yet both the superior court and the appeals court grossly disregarded this key fact.**

On June 20, 2024, Plaintiff filed a motion for reconsideration to the Appeals Court, and Plaintiff seeks FAR under Mass. R. App. P. 27.1 for the reasons stated in sections III-V.

III. THE DEFENDANTS HAVE BRUTALLY VIOLATED PLAINTIFF'S MEDICAL CIVIL RIGHTS IN THE FOLLOWING PLAINTIFF'S MEDICAL VISIT

In the Sunday morning of November 24, 2019, Plaintiff Yu-fen Liu (a/k/a Yufen Liu) had some back pain and she walked into Tufts Emergency Medical Center in downtown Boston. A nurse IV dripped some liquid into her vein. Within 10 minutes, Yufen Liu suddenly could not breathe as if her heart was stopping. After the nurse gave her some medicine the plaintiff felt better and wanted to leave. The nurse suggested that she be admitted into the inpatient ward to be examined by CT scan. Having had a CT scan a few weeks before Yufen Liu told the nurse that it might

not be a good idea to have another CT scan so soon. Plaintiff's son was contacted, and the nurse and some students had him take away all her belongings including all her clothing and shoes. The plaintiff was admitted into the inpatient ward in the evening regardless, without any personal clothing.

In the evening of November 24, 2019, in the inpatient ward, without asking nor advising the purpose, another nurse injected another long syringe of liquid into Yufen Liu's lower stomach. Yufen Liu immediately suffered burning pain, she fell on her bed. She was then wheeled to the CT scan room in the basement.

In the CT scan room, Yufen Liu was first injected with two syringes of material on each of her arms and pushed in and out of the CT scan machine. After the injections on her right arm, she felt her body exploding inside the machine, she screamed for help and received no response. When the two people attempted for the third set of injections, Yufen Liu felt imminent danger to her life. She rolled herself out of the carrier cart to the floor and threatened to

sue. The CT scan people stopped, Yufen Liu was wheeled back to her inpatient room.

Yufen Liu no longer felt safe in the hospital. She called her friend to come to check her out and be the translator. Upon her request, nurses and student doctors immediately filled her room and the door was blocked. But Yufen Liu insisted on checking out, a student psychiatrist was called in to evaluate her with a remote Chinese translator. Yufen Liu was repeatedly told that she was going to die if she left the hospital. The psychological evaluation lasted for several hours into the early morning of Nov. 25, 2019.

Around 12:40 AM, the student psychiatrist finally agreed that Yufen Liu was normal enough to leave. After signing the leave against medical advice papers, Yufen Liu and her friend walked out of the room. However, before they reached the elevator, the doctors and nurses changed their minds. They called in hospital security guards. A chase-and-catch ensued. Yufen Liu and her friend ran out of the hospital door like fugitives.

Once they arrived on the street, they were immediately surrounded by about 6-8 security guards,

one of the guards kicked Yufen Liu's legs from the back and she dropped to the ground. The guards dragged her onto a wheelchair and wheeled her back to a room. Three or four security guards guarded the door for another 2 hours until 3 AM in the morning of Nov. 25, 2019.

At 3 AM, with the arrival of a Vietnamese Mandarin translator, Yufen Liu was finally released into the cold darkness, alone, in the hospital pajamas no shoes and no other clothing on.

No one in the hospital contacted her son in her entire ordeal. The next day, Yufen Liu's entire back, mouth and face were swollen.

In 2021, Tufts provided two sets of Yufen Liu's medical records with two different Medical Identification Numbers.

IV. PRIOR PRECEDENTS THAT MEDICAL CIVIL RIGHTS ARE HUMAN RIGHTS

Appeals Court held 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 Appeals Court further 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." *Id* at 63. Therefore, **no bond was required by law** for Yufen Liu's first suit.

In *Matter of Spring*, 380 Mass. 629, 638 (1980), The SJC held that "[u]nless there is an emergency or an overriding State interest, medical treatment of a competent patient without his consent is said to be a battery."

A "competent individual may refuse medical treatment which is necessary to save that individual's life." *Norwood Hosp. v. Munoz*, 409 Mass. 116, 121 (1991). "Both the common law and constitutional bases for our recognition of the 'right of a competent individual to refuse medical treatment.'" *Id*. at 122. See also *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 430 (1986); *Superintendent of Belchertown*

State Sch. v. Saikewicz, 373 Mass. 728, 739, 742 (1977) (right to refuse medical treatment is rooted in common-law jurisprudence and guaranteed through constitutional right to privacy).

The emergency only comes into play "when the patient is unconscious or otherwise incapable of consenting, and harm from a failure to treat is imminent and outweighs any harm threatened by the proposed treatment. When a genuine emergency of that sort arises, it is settled that the impracticality of conferring with the patient dispenses with need for it. Even in situations of that character the physician should, as current law requires, attempt to secure a relative's consent if possible." *Shine v. Vega*, 429 Mass. 456, 465 (Mass. 1999).

Regarding the dismissal, "[i]nvoluntary dismissal is a drastic sanction which should be utilized only in extreme situations. As a minimal requirement, there must be convincing evidence of unreasonable conduct or delay. A judge should also give sufficient consideration to the prejudice that the movant would incur if the motion were denied, and whether there are more suitable, alternative penalties. Concern for the

avoidance of a congested calendar must not come at the expense of justice. The law strongly favors a trial on the merits of a claim. *Monahan v. Washburn*, 400 Mass. 126, 128-29 (Mass. 1987).

V. Conclusion

Justice and the fundamental public interest mandate further appellate review. If the present Appeals Court's summary decision is upheld, that means all the above precedents and the civil rights of a patient must be overturned.

Respectfully submitted,

/s/ Jie tan

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Date: June 27, 2024

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 the brief statement (part III-V) as to reasons contains _1091_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 June 27, 2024, I have made service of this Application for FAR upon the attorney of record for each party, by email and the Electronic Filing System on: June 27, 2024.

/s/ Jie Tan

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ADDENDUM

PAGE

EXHIBIT 1: P'S MOTION TO REDUCE BOND OF JUL. 7, 2022

COMMONWEALTH of MASSACHUSETTS

Middlesex, ss.

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT

CIVIL DOCKET NO. 2281CV01401

YUFEN LIU)
PLAINTIFF,)
v.)
TUFTS MEDICAL CENTER EMERGENCY IN)
BOSTON, &)
LEAH KAPLAN, M.D.)
DEFENDANTS,)

MOTION OF THE PLAINTIFF, YUFEN LIU, TO ASK THE COURT SUBSTANTIALLY REDUCE THE BOND REUQIRED UNDER MGL CH231, §60B AND TO GRANT THE PLAINTIFF MORE TIME TO SEEK MEIDCAL DIAGNOIS OF HER ILLNESS AND TREATMENT BEFORE RESUMING THE PROCEEDING

Defendant, Yufen Liu (hereinafter as the "Plaintiff"), through her attorney, Huntern Shu, hereby requests the Court to permit the Plaintiff to SUBSTANTIALLY reduce the required $6000 bond under M.G.L. Ch. 231, §60B due to the fact that she has not been able to work during the pandemic and her constant pain caused by the said treatment described in the Complaint also stopped her from being productive. Moreover, the Plaintiff could not find a proper medical facility to render her a diagnosis with respect to her medical conditions because of the serious backup of cases most reputable medical facilities now are facing. The Plaintiff's medical conditions are critical in adjudicating her Complaint against the defendants.

WHEREFORE, Plaintiff hereby requests the Court to:

1. allows Plaintiff to SUBSTANTIALLY reduce the $6000 bond requirement to ONE ($1.00) dollar due her economic difficulties;
2. modify the calendar to allow more time for Plaintiff to prepare for her medical evidence with respect to her case and meanwhile to seek treatment of her pain so that she may function properly.

In support of this Motion, the Plaintiff submits the following Memorandum of Law with exhibits.

The Plaintiff,

Yufen Liu

By her Attorney,

Huntern Shu, Esq.
BBO#569267
Law Office of Huntern Shu, PLLC
339 Hancock Street, #3
617-689-0070
hunternLAW@gmail.com

Certificate of Service

I hereby certify that a true copy of the above document was served upon the attorney of record for each of the Defendants of the Case# 2281CV01401 via mail.

Huntern Shu, Esq.
BBO#569267
Dated: July 7, 2022

COMMONWEALTH of MASSACHUSETTS

Middlesex, ss.

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT
CIVIL DOCKET NO. 2281CV01401

YUFEN LIU)
PLAINTIFF,)
v.)
TUFTS MEDICAL CENTER EMERGENCY IN)
BOSTON, &)
LEAH KAPLAN, M.D.)
DEFENDANTS,)

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE PLAINTIFF, YUFEN LIU, TO ASK THE COURT TO SUBSTANTIALLY REDUCE THE BOND REUQIRED UNDER MGL CH231, §60B AND TO GRANT THE PLAINTIFF MORE TIME TO SEEK MEIDCAL DIAGNOIS OF HER ILLNESS AND TREATMENT BEFORE RESUMING THE PROCEEDING

Defendant, Yufen Liu (hereinafter as the "Plaintiff"), through her attorney, Huntern Shu, hereby submit the Memorandum of Law in support of her Motion to waive the bond requirement pursuant to M.G.L. Ch. 231, §60B AND to implore the Court to grant more time for her to deal with her medical conditions that are critical in adjudicating the current Complaint against the Defendants.

BACKGROUND

Plaintiff filed a complaint against the Defendants on or about March 4, 2022 to claim that she has been mistreated medically AND personally by the staffs of the Defendants and has been

forced to be confined to the hospital against her will on or about November 24, 2019. See the Complaint, attached hereto as EXHIBIT A. Plaintiff also claimed that she has since suffered excruciating pains due to her fall caused by a staff of the hospital and other long lasting medical problems. Ibid. Moreover, the Plaintiff has since then felt a mass under her belly where she was injected with alleged painkiller (morphine??) by the staff of the hospital and that unidentified mass has caused her great discomfort. She has tried to seek diagnosis and treatment with the local medical facilities but was either shun off once the local medical facilities became aware of the potential dispute between the Plaintiff and the Defendants, or was told that she has to wait for a long time before her schedule is up.

ARGUMENT

1. With respect to the bond requirement of M.G.L. Ch.231, §60B:

   ¶6 of the aforementioned clause has said: "...*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.*" See EXHIBIT B. The Plaintiff could not work during the pandemic, not only because of the economy was dire but also because she suffered unbearable pains due to the mistreatment she received at the hospital. Plaintiff does not sit idly with her problems. Since the Plaintiff has no source of incomes in the States, she has to request her family support from China. Unfortunately, China has now a very strict foreign currency exchange policy and the wiring of money out of the country needs to wait for extensive period of time before government's approval. Thus, Plaintiff has not been able to pay the bond per

requirement of the law. The Defendants' request of the Plaintiff's Complaint to be dismissed is too harsh and per the same case that Defendants quoted in their Memorandum to Support the Motion to Dismiss, the Court said: "... *The plaintiff neither posted the bond required nor moved for a reduction of the penal sum of the bond in 30 days, nor did he appeal. His failure to pursue one of these courses was at his peril. Blood v. Lea, 403 Mass. 430, 432, (1988). In these circumstances, the district court judge had no option but to dismiss the action. Austin v. Boston University Hospital, 372 Mass. 654, 661 (1977).*" See Crowley v. Goddard Memorial Hosp., 1996 Mass App. Div. 201 at ¶6. As EXHIBIT C. The case quoted did offer some leeway to the bond requirement. As the said case suggested, the Plaintiff may either motion to reduce the bond or to appeal the decision to dismiss. Through either way, the resulting effect is to allow the Complaint to continue. The Plaintiff hereby implores the Court to consider a significant reduction of the $6000 bond required under M.G.L. Ch. 231, §60B due to the fact that she has not been able to work due to the pandemic and her constant pain caused by the said treatment described in the Complaint, which has stopped her TOATLLY from being productive. The Plaintiff would like to motion the Court to agree to reduce the bond to ONE dollar ($1.00) so that Plaintiff may continue to work on this case and seek further medical treatment.

2. With respect to the modify the Complaint's calendar:

Moreover, the Plaintiff could not find a proper medical facility to render her a diagnosis with respect to her medical conditions because of the serious backup of cases most reputable medical facilities now are facing. The Plaintiff's medical conditions are critical

in adjudicating her Complaint against the defendants. The Plaintiff has tried to make an appointment with MAYO Clinic in June but was told that they were fully booked and could not schedule to see her in two months. She has also tried to set up an appointment with a medical lab, which could provide equipment for diagnosis but requires a doctor's referral. Most local doctors that Plaintiff has contacted were reluctant to issue a referral for out-of-state treatment.

6(b) of Massachusetts Civil Procedure says: "... *(1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; or (3) permit the act to be done by stipulation of the parties.*" The Court has the discretion to properly extend the schedule so that Plaintiff may have sufficient time to seek proper medical diagnosis and treatment. The Plaintiff desperately needs the treatment of her pain caused by the fall sustained at the hospital, which has been clearly described in their complaint. See EXHIBIT A.

CONCLUSION

WHEREFORE, Plaintiff hereby requests the Court to:

1. allows Plaintiff to REDUCE the $6000 bond requirement to ONE dollar ($1.00) due to her economic difficulties and her pains, which has stopped her from being productive;
2. modify the calendar to allow more time for Plaintiff to prepare for her medical evidence with respect to her case and meanwhile to seek treatment of her pain so that she may

function properly. The Plaintiff would like to move the Court to grant an enlargement of three (3) months of current schedule.

In support of this Motion, the Plaintiff submits the following Memorandum of Law with exhibits.

The Plaintiff,

Yufen Liu

By her Attorney,

Huntern Shu, Esq.
BBO#569267
Law Office of Huntern Shu, PLLC
339 Hancock Street, #3
617-689-0070
hunternLAW@gmail.com

Dated: July 7, 2022

Certificate of Service

I hereby certify that a true copy of the above document was served upon the attorney of record for each of the Defendants of the Case# 2281CV01401 via mail.

Huntern Shu, Esq.
BBO#569267
Dated: July 7, 2022

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

DOCKET NO. 22-1401

Yufen, Liu

PLAINTIFF(S)

VS.

COMPLAINT

Tufts Medical Center Emergency in Boston
Leah I. Kaplan M.D.

DEFENDANT(S)

PARTIES

1) Plaintiff(s) reside at 200 Swanton St #L1 Winchester, MA 01890

in the County of Middlesex.

2) Defendant(s) reside at 860 Washington St. Boston, MA 02111

in the County of Suffolk.

FACTS

3) Medical Malpractice

1. Morning of November 24, 2019, The plaintiff felt a sharp pain in her chest and back. She proceeded to go to Tufts Medical Center Emergency in Boston. Instead, she left with long-lasting health problems.

* Why are the plaintiff's chest and back pain entering ER being diagnosed as an abdominal problem?

2. The MD (Medical Doctor refused to release his name) in charge instructed the security to violently detain the patient when she attempted to flee.

*An officer kicked the back of her knee, resulting in her toppling to the ground.

* Six securities proceeded to drag her onto a stretcher, when she lost strength in her legs, waist and knees.

* Witness at the scene

*On plaintiff's medical records, there is no mention of these events (roughly 10 pm —> 3am time she left)

3. Tufts Medical Center's records show that the entry on 11/24/2019 at 21:48 is the Final Result.

The patient requests to leave the hospital, only to be ignored. The plaintiff agrees to sign a release form, but is still rebuked. Around midnight, the patient's friend comes to bring her home;only to be met with similar results. They both try to leave but are surrounded by security. An offending officer kicks of her knee, and the patient crumples to the floor.

There are no records between 21:48 (9pm 11/24/2019 --> 3am 11/25/2019)

WHEREFORE, plaintiff demonds that:

This situation has had the effect of which the plaintiff has suffered irreparable loss to their body and mind. This has also resulted in lower wages leading to difficulty for her family. The relief tendered that is considered reasonable in relation to the injury the plaintiff has suffered as well as resulting consequences; is $9,319,352.00 USD.

DATED: March 03, 2022 SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY.

Yufen, Liu

Plaintiff(s)

Tel. 617-653-[illegible]

Physician's Name: Leah Kaplan Complainant's Name: Yufen Liu

Briefly describe your complaint

Who was involved: Yufen Liu

What happened: Felt sharp chest and back pain went to Tufts Medical Emergency in Boston left with a long-lasting health problems.

When did it happen: Around 9am Sunday. November 24th. 2019

Where did it happen: Tufts Medical Emergency Center at 860 Washington Street, Boston

Why did it happen: Why are chest and back pains entering ERbeing diagnosed as a abdominal problem.

How did it happen?

1. The nurse injected medicine to patient's abdominal area without telling patient what medication is being used after 30 minutes later patient's heart suddenly felt like it was being squeezed in a vice because of injection. Made patient immediately react putting patient out of control and entering emergency situation. The patient feels horrible staying in hospital and she wants to leave hospital as soon as possible. The interpreter keeps telling patient to not leave the hospital otherwise patient will enter emergency situations so the doctor have to retain patient in hospital. Patient is willing to sign hospital release fonn but the doctor does not let patient leave.

2. The patient escapes the hospital out onto street but the hospital securities still violently detain back to ER room at 6th floor. The treatmentteam is watching and waiting until 6 hours later finall allowing the patient to leave after signing papers.

3. Thereafter the injected medicine is the cause of patient's swollen skin and itches to extents to whole body for a few days. Next morning the patient went to Boston Medical ER exam doctor wants patient have to stay in hospital wait to exam the result but patient is afraid to stay so she leave. Thereafter patient keeps feeling abdominal pain and urine a very odd smell about a month or two. Urine was also a pink color.

4. The hospital medical record center does not have any patient's medical records on Nov 24. 2019. Now result the patient is abdominal pain at 9 with on a scale of 1-10. The patient even takes Tylenol pain relief. among other medications still suffering difficult to sleep everyday.

5. Leah Kaplan MD does not find on the Board of Registration in Medicine.

EXHIBIT B

Part III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

Title II ACTIONS AND PROCEEDINGS THEREIN

Chapter 231 PLEADING AND PRACTICE

Section 60B MALPRACTICE ACTIONS AGAINST PROVIDERS OF HEALTH CARE; TRIBUNAL

Section 60B. 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.

EXHIBIT C

1996 Mass. App. Div. 201 (1996)

William Crowley

v.

Goddard Memorial Hospital

Massachusetts Appellate Division, Southern District.

November 27, 1996.

Present: Aguiar, P.J., and Welsh, J.[*]

Mark V. Kenny for the plaintiff.

Jennifer E. Burke for the defendant.

Welsh, J.

This is a civil action in tort for personal injuries and consequential damages sustained when a crutch supplied by the defendant came apart, causing the plaintiff to fall.

The defendant denied negligence and asserted that the damages incurred were not the result of any fault on the part of the defendant.

Upon motion of the defendant, the case was transferred to the Superior Court on January 13, 1995 in order that a medical malpractice tribunal might be convened agreeable to G.L.c. 231, §60B. Notice was duly given to the parties at the hearing scheduled for March 20, 1996. The plaintiff was notified that if he intended to rely upon a written offer of proof, such written offer was to have been submitted seven days before the convening of the tribunal. At the hearing, the plaintiff offered an affidavit by Marlene Landa, a registered nurse. This affidavit was accepted by the tribunal. The plaintiff then sought to introduce a series of bills. None of these bills were incorporated in the offer of proof, nor was there compliance with that portion of the order that such materials be submitted at least seven days before the hearing. The judge conducting the tribunal rejected the bills sought to be introduced. The judge's action was neither arbitrary nor an abuse of discretion, especially in the light of no credible explanation from the plaintiff or his attorney for not complying with the rules of the tribunal as offers of proof.

The tribunal concluded that the offer of proof and the evidence presented by the plaintiff were not sufficient to raise a legitimate question of liability appropriate for further judicial inquiry and ordered that plaintiff post a bond for the penal sum of $6,000 within 30 days of the tribunal's Finding and Order. The plaintiff neither complied with the Order nor sought an enlargement of the time to comply. Upon remand to the district court, the trial court allowed the defendant's motion to dismiss and a judgment of dismissal was entered.

There was no error.

The statute states that a medical malpractice action "shall be dismissed" if bond is not posted in 30 days after an adverse
202 decision by a medical malpractice tribunal. "Shall" is *202 construed in its imperative sense. *Hanley v. Polanzak*, 8 Mass. App. Ct. 270, 273 (1979). The plaintiff neither posted the bond required nor moved for a reduction of the penal sum of the bond in 30 days, nor did he appeal. His failure to pursue one of these courses was at his peril. *Blood v. Lea*, 403 Mass. 430, 432, (1988). In these circumstances, the district court judge had no option but to dismiss the action. *Austin v. Boston University Hospital*, 372 Mass. 654, 661 (1977).

The plaintiff might have appealed the decision of the tribunal but did not do so. *McMahon v. Glixman*, 379 Mass. 60, 63-64 (1979).

If we assume arguendo that the appellate division of the District Courts has jurisdiction in these circumstances to review the decision of the tribunal, there would be no error. See *Police Commissioner of Boston v. Municipal Court of the Dorchester District*, 374 Mass. 640, 662-663, 664, 665, n. 18 (1978). It was incumbent upon the plaintiff in his offer of proof to demonstrate a causal connection between any supposed negligence by the defendant and his injuries. The affidavit of the

nurse merely opines that the better practice would be to inspect the crutches, but there was no credible evidence as to the standard of care or a breach of that standard by the defendant. There was an appreciable lapse of time from the departure from the hospital and the occurrence of the injury. The offer of proof utterly fails to show that it was more likely than not that the crutches were furnished the plaintiff in a defective condition. See *Little* v. *Rosenthal*, 376 Mass. 573 (1978). The tribunal's task is comparable to that of a trial judge in ruling on a defendant's motion for a directed verdict. *Id.* at 578. The *ipse dixit* of the nurse in her affidavit did not satisfy the plaintiff's burden in this regard.

The judgment dismissing the action is affirmed.

So ordered.

[*] Although a member of the panel, Judge Crimmins recused himself and took no part in the decision of this case.

EXHIBIT 2: P’s Opposition to Dismissal OF Jul. 22, 2022

COMMONWEALTH of MASSACHUSETTS

Middlesex, ss.

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT

CIVIL DOCKET NO. 2281CV01401

YUFEN LIU
PLAINTIFF,

v.

TUFTS MEDICAL CENTER EMERGENCY IN BOSTON, &
LEAH KAPLAN, M.D.
DEFENDANTS,

PPLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS, LEAH I. KAPLAN'S, M.D. AND TUFTS MEDICAL CENTER'S, INC., MOTION TO DISMISS THE COMPLAINT AND FOR ENTRY OF SEPARATE AND FINAL JUDGMENT

Plaintiff, Yufen Liu (hereinafter as the "Plaintiff"), through her attorney, Huntern Shu, hereby requests the Court to deny the Defendants' MOTION TO DISMISS FOR FAILURE TO POST THE BOND REQUIRED UNDER M.G.L. Ch 231, §60B because the Plaintiff has submitted the required bond per the requirement of the law and the order of the Court. Moreover, the Court shall deny the Defendants' request to enter a 'premature' and probably a 'piecemeal'[1] judgement

[1] Long v. Wickett, 50 Mass. App. Ct. 380

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per the Rule 54(b) of the Massachusetts Rules because the requirements of the application of Rule 54(b) are not met.

The Plaintiff further submits the attached Memorandum of Law and its Exhibits in support of this Opposition to Defendants' MOTION TO DISMISS and their request of ENTRY OF SEPARATE AND FINAL JUDGMENT.

The Plaintiff,

Yufen Liu

By her Attorney,

Huntern Shu, Esq.
BBO#569267
Law Office of Huntern Shu, PLLC
339 Hancock Street, #3
617-689-0070
hunternLAW@gmail.com

Certificate of Service

I hereby certify that a true copy of the above document was served upon the attorney of record for each of the Defendants of the Case# 2281CV01401 via mail.

Huntern Shu, Esq.
BBO#569267

Dated: July 20, 2022

COMMONWEALTH of MASSACHUSETTS

Middlesex, ss.

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT
CIVIL DOCKET NO. 2281CV01401

YUFEN LIU
PLAINTIFF,

v.

TUFTS MEDICAL CENTER EMERGENCY IN BOSTON, &
LEAH KAPLAN, M.D.
DEFENDANTS,

MEMORANDUM OF LAW IN SUPPORT OF THE PLAINTIFF, YUFEN LIU'S, OPPOSITION TO DEFENDANTS, LEAH I. KAPLAN'S, M.D. AND TUFTS MEDICAL CENTER'S, INC., MOTION TO DISMISS THE COMPLAINT AND FOR ENTRY OF SEPARATE AND FINAL JUDGMENT

Plaintiff, Yufen Liu (hereinafter as the "Plaintiff"), through her attorney, Huntern Shu, hereby submit the Memorandum of Law in support of her OPPOSITION TO THE DEFENDANTS' MOTION TO DISMISS AND FOR ENTRY OF SEPARATE AND FINAL JUDGMENT (hereinafter the MOTION TO DISMISS shall be quoted as "Motion" and the OPPOSITION TO THE MOTION TO DISMISS shall be quoted as "Opposition") to implore the Court to deny each and every request in the Defendants' Motion. To support the Plaintiff's Opposition, Plaintiff hereby submits the following along with accompanying Exhibits:

BACKGROUND

Plaintiff filed a complaint against the Defendants on or about March 4, 2022 to claim that she has been mistreated medically AND personally injured by the members and staffs of the Defendants and has been confined with force to the hospital against her will on or about November 24, 2019. Plaintiff also claimed that she has since suffered excruciating pains due to her fall caused by a staff of the hospital and other long lasting medical problems that could be triggered by the mistreatment by the members and staffs of the Defendants. Moreover, the Plaintiff has since then felt a mass under her belly where she was injected with alleged painkiller (morphine??) by the staff of the hospital and that unidentified mass has caused her great discomfort. She has tried to seek diagnosis and treatment with the local medical facilities but was either shun off once the local medical facilities became aware of the potential dispute between the Plaintiff and the Defendants or was told that she must wait for a long time before her schedule is up. That is, the Plaintiff's delay in making the bond was not intentional but was caused by the medical conditions that she suffered after the visit to the Defendants' medical facility.

ARGUMENT

1. **BOND HAS BEEN PAID.**

   The issue is moot. Thus, the Court should deny the Defendants' Motion to Dismiss, and other requests contained within.

2. **M.G.L. c. 231 §60B USED THE WORD 'SHALL' MANY TIMES, BUT THE DEFENDANTS OVERINTERPRETED THE MEANING OF THE WORD 'SHALL.'**

a. M.G.L. c. 231 §60B does say: "... If said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed. ..." Yet, the law also said: "... [e]ach such action for malpractice **shall** be heard by said tribunal within fifteen days after the defendant's answer has been filed." Since such a tribunal has been waived for now due to the Plaintiff's temporary inability to find proper treatment and diagnosis, the word 'SHALL' should not be interpreted in a sense that defeat the intent of the Legislature of the Commonwealth, which is to ensure the substantive rights of an injured person to seek justice. Hanley v. Polanzak, see 8 Mass. App. Ct. 270, 273 (Mass. App. Ct. 1979);

b. Defendants' Motion quoted Austin v. Boston Univ. Hosp., 372 Mass. 654 and claimed " finding that Section 60B "is clear that" if the bond is not posted within thirty (30) days, the action "shall" be be[1] dismissed.". However, at the bottom of the judgment, Judge Wilkins stated that: " [t]he fourth question asks whether a medical malpractice action must be dismissed if a tribunal finds that "the plaintiff's case is merely an unfortunate medical result" (§ 60B) **and** the plaintiff fails to file a bond in accordance with § 60B." The Court said 'YES' to the question. Therefore, in order for the Court to 'dismiss' the action, both conditions/prongs: (i) plaiintiff's case is merely an unfortunate medical result; and (ii) plaintiff fails to file a bond in accordance with §60B have to be met before the Court would dismiss the Plaintiff's action. Simply only one prong of the conditions met may not warrant the Court's dismissal of the current action.

[1] Copied from the original typo of Defendants' Motion;

3. **DEFENDANTS' MOTION QUOTED CROWLEY V. GODDARD MEMORIAL HOSP. (1996) BUT MISINTERPRET THE WORD 'IMPERATIVE.'**

   a. Crowley v. Goddard Memorial Hospital, 1996 Mass. App. Div. 201 (Mass. Dist. Ct. App. 1996) (hereinafter as "Crowley", see Exhibit B) was about a plaintiff used a failed crutch provided by the defendant. Plaintiff failed to pass the muster of medical tribunal's muster of raising a legitimate question of liability;

   b. In Crowley, the Court quoted Hanley v. Polanzak (1979, Exhibit A) and stated that "SHALL" is construed in its imperative sense. It also said that: "the plaintiff neither posted the bond required nor moved for a reduction of the penal sum of the bond in 30 days, nor did he appeal. His failure to pursue one of these courses was at his peril." Apparently, the Court repeatedly emphasized the importance of 'one of these courses': posting the bond, asking a reduction of the bond or appeal, which shall indicate that the Court would give the Plaintiff every chance to save its case at the tribunal as long as the Plaintiff may try. Actually, the Plaintiff has tried, despite her great suffering, to offer a self-drafted Offer of Proof on May 31, 2022[2] and to file a Motion to reduce the bond and to seek enlargement of time to seek medical diagnosis on July 7, 2022 (motion denied). The counsel for the Plaintiff got the Clerk's notice of the Bond on June 22, 2022 and to follow the gist of Hanley v.

[2] See Defendants' Motion to Dismiss, p.2

Polanzak, the thirty-day period of M.G.L. c231 §60B shall start to run from the Plaintiff's counsel's receipt of the notice of Bond.[3]

c. despite the Defendants' possible objection to the starting day of calculation of the 30-day period prescribed by §60B, in Hanley, the Court stressed in part that " The Legislature did not intend that the procedures of § 60B should unreasonably obstruct the prosecution of meritorious malpractice claims or that they should eliminate any substantive right of injured persons to sue for damages. *Paro* v. *Longwood Hosp.*, 373 Mass. at 652-655. Cf. *Damaskos* v. *Board of Appeal of Boston*, 359 Mass. 55, 60-64 (1971)." Plaintiff has used its best efforts to meet all the thresholds set up by the laws and orders issued by the Court while handling pro se. A simple procedural blunder in calculating the days of a procedural calendar shall not undermine the legislative intent to promote the medical rights of an injured patient.

d. In Hanley (1979), the hearing of Medical Tribunal was held more than 15 days after the filing of answer by the defendant[4] as required by §60B The tribunal's decision was docketed on March 29, 1977. Even though the Judge decided on the defendant's motion to dismiss on May 20, 1977, the court still allowed plaintiff 7 more days to post the bond.

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[3] See Hanley (1979): "We answer the reported question by stating that the thirty-day period in G.L.c. 231, § 60B, begins to run when the tribunal's decision has been docketed and notice of it has been sent to the plaintiff". Id.

[4] the answer was filed on December 30, 1976 and the tribunal's hearing was on March 22, 1977. Hanley (1979)

e. When it comes to the interpretation of the legislative intent of §60B, the court finds a balance between the technical dissect of the wording of the legislature and its role in promoting the justice sought by the injured patient and the medical service provider. The court made it clear that if a plaintiff actively sought his rights under §60B, the court would not throw out a case when a plaintiff might have missed step or two procedural wise.[5]

4. **PLAINTIFF HAS ENCOUNTERED GREAT FIANINCAL DIFFICULTIES DUE TO HER INABILIT TO WORK AND THE HARSH REALTIY OF THE PANDEMIC.**

The Plaintiff could not work during the pandemic, not only because of the economy was dire but also because she suffered unbearable pains due to the mistreatment she received at the hospital. Plaintiff does not sit idly with her problems. Since the Plaintiff has no source of incomes in the States, she has to request her family support from China. Unfortunately, China has now a very strict foreign currency exchange policy and the wiring of money out of the country needs to wait for extensive period of time before government's approval. Thus, Plaintiff has not been able to pay the bond immediately per requirement of the law.

Eventually the Plaintiff has posted the Bond of $6000 as the Notice of Tribunal required. Any unintended delay in meeting the Bond requirement of §60B was caused by the

[5] In Austin v. U. Bos. Hosp., Crowley v. Goddard Hosp and Hanley v. Polanzak, the courts kept emphasizing in their individual judgment that the plaintiff's case has been thrown out because the plaintiff did not take any action. In the current case, Plaintiff Yufen Liu has sought aggressively to meet the court's demands, yet due to the pandemic, and the overload of the medical facilities in the neighborhood, Plaintiff has encountered numerous difficulties in getting medical diagnosis and treatment for her sufferings.

exigent environment of the pandemic and her pain and suffering due to the medical incident with the Defendants. Thus, the Plaintiff implores the Court to take these factors into considering when making its decision toward Defendants' Motion.

5. **DEFENDANTS' REQUEST FOR THE COURT TO ENTER SEPARATE AND FINAL JUDGEMENT PURSUANT TO RULE 54(b) SHOULD BE DENIED**

A court should not grant a Rule 54(b) certification unless all four of the following factors are present: (1) the action must involve multiple claims or multiple parties; (2) there must be a final adjudication as to at least one, but fewer than all, of the claims or parties; (3) there must be an express finding that there is no just reason for delaying the appeal until the remainder of the case is resolved; and (4) there must be an express direction of the entry of judgment. *Long v. Wickett*, 50 Mass. App. Ct. at 385-86 (2000). *See also Yanis v. Paquin*, 96 Mass. App. Ct. at 137 (2019); *O. Ahlborg & Sons, Inc. v. Massachusetts Heavy Industries, Inc.*, 65 Mass. App. Ct. 385, 392 (2006).

The court regarded the application of Rule 54(b) as exceptional and narrow. The law is designed "to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all the parties until the final adjudication of the entire case by making an immediate appeal available.[6] The rule tries to balance the long-standing bedrock policy in Massachusetts against premature and piecemeal appeals

[6] See Rule 54(b) certification at https://lawyerslegalresearch.com/rule-54b-certification/#:~:text=Paquin%2C%2096%20Mass.,making%20an%20immediate%20appeal%20available. By Roger Manwaring of Lawyer's Legal Research

with the need for prompt appellate review to avoid delay and any resulting injustice or hardship. However, since:

i. There is not yet one final adjudication of any claim among all; and

ii. Any current delay in the procedure is minor and won't affect the rights of all parties hereto so far; and

iii. No final judgment on any issues pending;

Thus, Defendants' request of 'ENTRY OF SEPARATE AND FINAL JUDGMENT" should be DENIED.

CONCLUSION

WHEREFORE, Plaintiff hereby requests the Court to:

1. To deny Defendants' Motion to Dismiss and Entry of Separate and Final Judgment for the aforementioned reasons;
2. To allow Plaintiff time and opportunity to amend her minor procedural blunders and grant her time sufficient to seek diagnosis of her medical issues caused by the alleged incidents with the Defendants' members and staffs before moving the current case forward.

The Plaintiff hereby submits this Memorandum of Law with exhibits in support of the separately file Oppostion .

The Plaintiff,

Yufen Liu

By her Attorney,

Huntern Shu, Esq.
BBO#569267
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617-689-0070
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Dated: July 22, 2022

Certificate of Service

I hereby certify that a true copy of the above document was served upon the attorney of record for each of the Defendants of the Case# 2281CV01401 via mail.

Huntern Shu, Esq.
BBO#569267
Dated: July 22, 2022

9.

EXHIBIT A

Appeals Court of Massachusetts. Plymouth

Hanley v. Polanzak

8 Mass. App. Ct. 270 (Mass. App. Ct. 1979) · 393 N.E.2d 419
Decided Aug 16, 1979

May 16, 1979.

August 16, 1979.

Present: HALE, C.J., DREBEN, KASS, JJ.

Medical Malpractice. Negligence, Medical malpractice. *Notice. Words,* "Shall."

The thirty-day period within which a plaintiff may post a bond after an adverse decision by a medical malpractice tribunal convened pursuant to G.L.c. 231, § 60B, begins to run when the tribunal's decision has been docketed and notice of it has been sent to the plaintiff. [272-275]

CIVIL ACTION commenced in the District Court of Brockton on September 3, 1976.

On removal of the case to the Superior Court a motion to dismiss was heard by *Brown,* J., a District Court judge sitting under statutory authority, and a question of law was reported by him.

Wilson D. Rogers, Jr. (*Charles J. Dunn* with him) for M.L. Polanzak.

George N. Asack for the plaintiff.

HALE, C.J.

This medical malpractice case comes to us from the Superior Court on an interlocutory report under Mass.R.Civ.P. 64, 365 Mass. 831 (1974), of a question[2] following the judge's conditional allowance of a motion to dismiss. The report is 271 accompanied by a statement of *271 agreed facts. The issue presented for our consideration is whether the plaintiff's failure to post a bond within thirty days of an adverse decision by a medical malpractice tribunal convened pursuant to G.L.c. 231, § 60B, inserted by St. 1975, c. 362, § 5,[3] made mandatory the dismissal of her action even though no notice of the decision had been given to the parties.

[2] The question reported reads as follows: "The issue in this regard is whether or not the dismissal of this action is mandatory in accordance with the provisions of General Laws chapter 231, Section 60B, notwithstanding the fact that no written notification was forwarded to either the plaintiff or the defendant of the action of the tribunal and decision thereof entered on the court docket on March 29, 1977."

[3] General Laws c. 231, § 60B, as so inserted, reads, in pertinent part: "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. . . . Each such action for malpractice shall be heard by said tribunal within fifteen days after the defendant's

> answer has been filed. . . .
>
> "If a finding is made for the defendant the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of two thousand dollars secured by cash or its equivalent with the clerk of the court in which the case is pending, payable to the defendant 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" (emphasis supplied).

The plaintiff instituted this action in a District Court on September 3, 1976. The action was transferred to the Superior Court on October 25, 1976, following the motion of Polanzak (whom we shall hereinafter refer to as if he were the sole defendant) to remove, which was filed with his answer. Cushing filed an answer on December 30, 1976. Because it made a claim based on malpractice against providers of health care, the action was referred to a tribunal pursuant to § 60B. The tribunal held a hearing on the case on March 272 22, 1977, and took the matter *272 under advisement.[4] In its decision docketed on March 29, 1977, the tribunal found that the plaintiff had not submitted evidence sufficient to raise a legitimate question of liability appropriate for judicial inquiry and that the plaintiff's injury was "merely an unfortunate medical result." Under the statute the plaintiff could pursue her claim in the Superior Court only upon the filing of $2,000 bonds within thirty days of the decision.[5] None of the parties was notified by the clerk that a decision had been filed. The plaintiff's counsel first became aware of the decision when served on May 16, 1977, with the defendant's motion to dismiss the action for failure to post a bond within the thirty-day period. On May 20 a judge allowed the defendant's motion unless the plaintiff should post the bond within seven days. The plaintiff posted a $2,000 bond on May 27, 1977, fifty-nine days after the decision was filed. Following a hearing on the defendant's motion for rehearing on his motion to dismiss, the above stated issue was reported here.

[4] This hearing was held later than the statutorily specified fifteen days after the filing of the answers to the complaint. No issue is made of the possible effect of the delay, and we do not address it.

[5] In its decision the tribunal required Hanley to post "bonds" of $2,000 "each," payable to the defendants. No issue is before us concerning Hanley's action against Cushing.

General Laws c. 231, § 60B, is explicit on the point that "[i]f said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed." See *Austin* v. *Boston Univ. Hosp.*, 372 Mass. 654, 661 (1977). While "shall" is usually interpreted as a mandatory and imperative word[6] it has occasionally been construed as being discretionary in nature.[7] We note, however, that 273 *273 in § 60B the Legislature used the word "may" in the sentences appearing immediately before and after the governing sentence in this case. Those two sentences provided for a discretionary increase or decrease in the amount of the bond. It thus seems clear that the Legislature intended that "shall" be construed in its imperative sense. It was so construed in *Austin* v. *Boston Univ. Hosp.*, 372 Mass. at 661, and we do likewise. The question which remains to be resolved is at what point in the process the Legislature intended the thirty-day period to start. We conclude that it intended that point to be reached when the tribunal's decision is docketed and notice of the decision is sent to the plaintiff.

6 See *McCarty* v. *Boyden*, 275 Mass. 91, 93 (1931); *Opinion of the Justices*, 300 Mass. 591, 593 (1938); *Elmer* v. *Commissioner of Ins.*, 304 Mass. 194, 196 (1939); *Wind Innersole Counter Co.* v. *Geilich*, 317 Mass. 327, 329 (1944); *Johnson* v. *District Attorney for the No. Dist.*, 342 Mass. 212, 215 (1961); *Clark* v. *Water Sewer Commrs. of Norwood*, 353 Mass. 708, 710 (1968).

7 *Swift* v. *Registrars of Voters of Quincy*, 281 Mass. 271, 276 (1932). *Commissioner of Banks* v. *McKnight*, 281 Mass. 467, 472-473 (1933). *Murray* v. *Edes Mfg. Co.*, 305 Mass. 311, 313-316 (1940). *Home Owners' Loan Corp.* v. *Sweeney*, 309 Mass. 26, 29 (1941). *Boston* v. *Quincy Mkt. Cold Storage Warehouse Co.*, 312 Mass. 638, 644-647 (1942). *McLaughlin* v. *Rockland Zoning Bd. of Appeals*, 351 Mass. 678, 681-682 (1967).

Section 60B was enacted as part of a legislative package intended to avert an impending crisis in the area of medical malpractice insurance. *Salem Orthopedic Surgeons, Inc.* v. *Quinn*, 377 Mass. 514, 517 (1979). See the emergency preamble to St. 1975, c. 362. The Legislature aimed to guarantee the continued availability and to stabilize the cost of medical malpractice insurance by providing for a tribunal to screen all malpractice actions and by requiring a bond secured by cash or its equivalent for the further litigation of those claims found by the tribunal to lack merit. See *Aker* v. *Pearson*, 7 Mass. App. Ct. 552, 555 (1979). This procedure was intended "to discourage frivolous claims whose defense would tend to increase premium charges for medical malpractice insurance" (*Austin* v. *Boston Univ. Hosp.*, 372 Mass. at 655 n. 4; *Paro* v. *Longwood Hosp.*, 373 Mass. 645, 651 [1977]; *Little* v. *Rosenthal*, 376 Mass. 573, 577 [1978]; *Aker* v. *Pearson*, 7 Mass. App. Ct. at 555), and to insure that the costs incurred by malpractice insurers in
274 the defense of meritless *274 claims[8] would be at least partially defrayed by the amount of a cash bond. The Legislature did not intend that the procedures of § 60B should unreasonably obstruct the prosecution of meritorious malpractice claims or that they should eliminate any substantive right of injured persons to sue for damages. *Paro* v. *Longwood Hosp.*, 373 Mass. at 652-655. Cf. *Damaskos* v. *Board of Appeal of Boston*, 359 Mass. 55, 60-64 (1971).

8 That is, those claims found by the tribunal to be insufficient to raise a legitimate question appropriate for judicial inquiry and which the plaintiff, after posting a bond, loses at trial.

The thirty-day time period for the posting of a bond suggests a legislative intent "to promote method, system and uniformity in the modes of proceeding" (*Swift* v. *Registrars of Voters of Quincy*, 281 Mass. 271, 276 [1932], quoting from *Torrey* v. *Millbury*, 21 Pick. 64, 67 [1839]). A decision of which the plaintiff had no notice and the effect of which is to defeat an action in its entirety does not comport with the legislative scheme.

The clerk has a duty to notify the parties of the entry on the docket of the findings and order of the tribunal. Mass.R.Civ.P. 77(d), 365 Mass. 838 (1974).[9] When a plaintiff has received notice from the clerk of the adverse decision of the tribunal and fails to post the bond within the thirty-day period, we think it clear that the Legislature intended that the action should be dismissed. *Austin* v. *Boston Univ. Hosp.*, *supra* at 661. It is inconceivable that the Legislature intended that a failure to post a bond within thirty days of the tribunal's decision would require dismissal of an action where (as here) no notice of the decision was sent to the plaintiff. We consider that to hold otherwise would be contrary to the Legislature's intention not unduly to impair a plaintiff's right to
275 sue. *275 *Paro* v. *Longwood Hospital*, 373 Mass. at 654-655. Moreover, it would be manifestly unjust to punish the plaintiff for her reliance on the clerk to perform his legal duty.[10] See *Home Owners' Loan Corp.* v. *Sweeney*, 309 Mass. 26, 29 (1941); *Bogdanowicz* v. *Director of the Div. of*

Employment Security, 341 Mass. 331, 332 (1960); *Cohen* v. *Board of Registration in Pharmacy*, 347 Mass. 96, 99 (1964).

[9] Rule 77(d) requires the clerk of court to send parties notice of the entry of "an order or judgment" of the court. It applies with equal force, however, to the docketing of the tribunal's findings and order, for the tribunal is an arm of the court whose action can affect the rights of parties as much as the action of a judge acting alone.

[10] A daily check of the docket would have disclosed the fact that a decision had been filed and that the thirty-day period in which to post a bond had started to run, but Hanley was not remiss in awaiting notice of the decision from the clerk in apparent reliance on Mass.R.Civ.P. 77(d). Compare *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Inst.*, 500 F.2d 808, 809 (D.C. Cir. 1974); *Braden* v. *University of Pittsburgh*, 552 F.2d 948, 952-953 (3d Cir. 1977). Contrast *In re Morrow*, 502 F.2d 520, 522-523 (5th Cir. 1974).

We answer the reported question by stating that the thirty-day period in G.L.c. 231, § 60B, begins to run when the tribunal's decision has been docketed and notice of it has been sent to the plaintiff.[11] As the period thus measured had not run, the judge's order is affirmed.

[11] We leave for another day any expansion of this decision when we are presented a factual situation such as one where the notice has been sent but has not been received by the plaintiff.

So ordered.

276 *276

EXHIBIT B

Crowley v. Goddard Memorial Hospital

1996 Mass. App. Div. 201 (Mass. Dist. Ct. App. 1996)
Decided Nov 27, 1996

November 27, 1996.

Present: Aguiar, P.J., and Welsh, J.[-]

[-] Although a member of the panel, Judge Crimmins recused himself and took no part in the decision of this case.

Tort, Fall injury. *Negligence,* Medical malpractice action; Failure to post bond. *Evidence,* of defect in crutches.

Opinion affirming decision dismissing action, Motion to dismiss heard in the Stoughton Division by Paul E. Ryan, J.

Mark V. Kenny for the plaintiff.

Jennifer E. Burke for the defendant.

WELSH, J.

This is a civil action in tort for personal injuries and consequential damages sustained when a crutch supplied by the defendant came apart, causing the plaintiff to fall.

The defendant denied negligence and asserted that the damages incurred were not the result of any fault on the part of the defendant.

Upon motion of the defendant, the case was transferred to the Superior Court on January 13, 1995 in order that a medical malpractice tribunal might be convened agreeable to G.L.c. 231, § 60B. Notice was duly given to the parties at the hearing scheduled for March 20, 1996. The plaintiff was notified that if he intended to rely upon a written offer of proof, such written offer was to have been submitted seven days before the convening of the tribunal. At the hearing, the plaintiff offered an affidavit by Marlene Landa, a registered nurse. This affidavit was accepted by the tribunal. The plaintiff then sought to introduce a series of bills. None of these bills were incorporated in the offer of proof, nor was there compliance with that portion of the order that such materials be submitted at least seven days before the hearing. The judge conducting the tribunal rejected the bills sought to be introduced. The judge's action was neither arbitrary nor an abuse of discretion, especially in the light of no credible explanation from the plaintiff or his attorney for not complying with the rules of the tribunal as offers of proof.

The tribunal concluded that the offer of proof and the evidence presented by the plaintiff were not sufficient to raise a legitimate question of liability appropriate for further judicial inquiry and ordered that plaintiff post a bond for the penal sum of $6,000 within 30 days of the tribunal's Finding and Order. The plaintiff neither complied with the Order nor sought an enlargement of the time to comply. Upon remand to the district court, the trial court allowed the defendant's motion to dismiss and a judgment of dismissal was entered.

There was no error.

The statute states that a medical malpractice action "shall be dismissed" if bond is not posted in 30 days after an adverse decision by a medical
202 malpractice tribunal. "Shall" is *202 construed in its imperative sense. *Hanley v. Polanzak,* 8 Mass. App. Ct. 270, 273 (1979). The plaintiff neither posted the bond required nor moved for a reduction of the penal sum of the bond in 30 days.

nor did he appeal. His failure to pursue one of these courses was at his peril. *Blood v. Lea*, 403 Mass. 430, 432, (1988). In these circumstances, the district court judge had no option but to dismiss the action. *Austin v. Boston University Hospital*, 372 Mass. 654, 661 (1977).

The plaintiff might have appealed the decision of the tribunal but did not do so. *McMahon v. Glixman*, 379 Mass. 60, 63-64 (1979).

If we assume arguendo that the appellate division of the District Courts has jurisdiction in these circumstances to review the decision of the tribunal, there would be no error. See *Police Commissioner of Boston v. Municipal Court of the Dorchester District*, 374 Mass. 640, 662-663, 664, 665, n. 18 (1978). It was incumbent upon the plaintiff in his offer of proof to demonstrate a causal connection between any supposed negligence by the defendant and his injuries. The affidavit of the nurse merely opines that the better practice would be to inspect the crutches, but there was no credible evidence as to the standard of care or a breach of that standard by the defendant. There was an appreciable lapse of time from the departure from the hospital and the occurrence of the injury. The offer of proof utterly fails to show that it was more likely than not that the crutches were furnished the plaintiff in a defective condition. See *Little v. Rosenthal*, 376 Mass. 573 (1978). The tribunal's task is comparable to that of a trial judge in ruling on a defendant's motion for a directed verdict. *Id.* at 578. The *ipse dixit* of the nurse in her affidavit did not satisfy the plaintiff's burden in this regard.

The judgment dismissing the action is affirmed.

So ordered.

EXHIBIT 3: Judge's Judgment of Dismissal OF JUL.27, 2022

With 9A + 9C

H

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPT.
C.A. NO. 2281CV01401

YU FEN LIU,

PLAINTIFF,

v.

TUFTS MEDICAL CENTER EMERGENCY IN BOSTON[1],
LEAH I. KAPLAN, M.D.,

DEFENDANTS.

7/27/2022. After careful consideration of the parties' positions, the motion to dismiss for failing to post a bond, pursuant to G.L. c 231, §60B, is Allowed and this civil action is dismissed as to both defendants. Plaintiff asks for more time to obtain a diagnosis for the harm allegedly caused by the defendants, however, that request is denied because a) this incident occurred nearly three years ago; and b) medical malpractice plaintiffs are obligated to have support for their claim at the point of a medical malpractice tribunal, or face the consequences under the statute, namely, the bond requirement. Further, based on the Complaint, it does not appear that additional time would aid the plaintiff in supporting her claim for negligence. Case shall be dismissed.

KO

Sent 7/28/22

MOTION OF THE DEFENDANTS, LEAH I. KAPLAN, M.D. AND TUFTS MEDICAL CENTER, INC. TO DISMISS THE PLAINTIFF'S COMPLAINT FOR FAILURE TO POST THE BOND REQUIRED UNDER M.G.L. Ch. 231, § 60B AND FOR ENTRY OF SEPARATE AND FINAL JUDGMENT

NOW COME the Defendants, Leah I. Kaplan, M.D., and Tufts Medical Center, Inc. who hereby submit this Motion to Dismiss the Plaintiff's Complaint, with prejudice, because the Plaintiff has failed to post the $6,000.00 bond required under M.G.L. Ch. 231, § 60B. The Defendants further request that the Court enter separate and final judgment in the Defendant's favor pursuant to Rule 54(b) of the Massachusetts Rules of Civil Procedure.

In support of this Motion, the Defendants submit the accompanying Memorandum of Law with exhibits.

[1] The Defendant Tufts Medical Center, Inc., is misnamed in the Plaintiff's Complaint as Tufts Medical Center Emergency in Boston.

EXHIBIT 4: P'S MOTION FOR REFUND BOND OF AUG. 4, 2022

COMMONWEALTH of MASSACHUSETTS

Middlesex, ss.

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT

CIVIL DOCKET NO. 2281CV01401

YUFEN LIU)
PLAINTIFF,)
v.)
TUFTS MEDICAL CENTER EMERGENCY IN)
BOSTON, &)
LEAH KAPLAN, M.D.)
DEFENDANTS,)

PLAINTIFF'S MOTION TO REQUEST RETURN OF MEDICAL MALPRACTICE BOND OF $6000

Plaintiff, Yufen Liu (hereinafter as the "Plaintiff"), through her attorney, Huntern Shu, hereby requests the Court to return the said Medical Malpractice Bond check of SIX THOUSAND DOLLARS ($6000) issued by the Law Office of HUNTERN SHU, PLLC (Citizens Bank, check#1055). Because:

1. The said case has been DISMISSED by the Court on or about July 29, 2022;
2. The check has been cashed and deposited to the escrow account by the Court after the case is dismissed.

WHEREFORE, The Plaintiff hereby respectfully asks the Court to instruct the clerk's office to promptly process the return of the Bond money to the Plaintiff's attorney at:

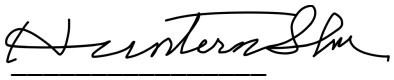
Law Office of Huntern Shu, PLLC

339 Hancock Street, #3, Quincy MA 02169

The Plaintiff,

Yufen Liu

By her Attorney,



Huntern Shu, Esq.
BBO#569267
Law Office of Huntern Shu, PLLC
339 Hancock Street, #3
Office: 617-689-0070
Cellphone: 857-389-1107
huternLAW@gmail.com

EXHIBIT 5: JUDGE'S ENDORSEMENT OF MOTION FOR REFUND OF AUGUST 8, 2022

COMMONWEALTH of MASSACHUSETTS

Middlesex, ss.

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT

CIVIL DOCKET NO. 2281CV01401

YUFEN LIU)
PLAINTIFF,)
v.)
TUFTS MEDICAL CENTER EMERGENCY IN)
BOSTON, &)
LEAH KAPLAN, M.D.)
DEFENDANTS,)

PLAINTIFF'S MOTION TO REQUEST RETURN OF MEDICAL MALPRACTICE BOND OF $6000

Plaintiff, Yufen Liu (hereinafter as the "Plaintiff"), through her attorney, Huntern Shu, hereby requests the Court to return the said Medical Malpractice Bond check of SIX THOUSAND DOLLARS ($6000) issued by the Law Office of HUNTERN SHU, PLLC (Citizens Bank, check#1055).

Because:

1. The said case has been DISMISSED by the Court on or about July 29, 2022;
2. The check has been cashed and deposited to the escrow account by the Court after the case is dismissed.

WHEREFORE, The Plaintiff hereby respectfully asks the Court to instruct the clerk's office to promptly process the return of the Bond money to the Plaintiff's attorney at:

8/8/22.

Law Office of Huntern Shu, PLLC

It appearing that plaintiff filed a $6000 bond close in time to my decision to dismiss for failure to file a bond. In light of the dismissal plaintiff now seeks return of the bond. Motion is allowed. In light of dismissal of case, bond may be returned. So ordered.

J. sent 8/8/22

KO

EXHIBIT 6: HEARING TRANSCRIPT OF MOTION TO DISMISS OF JUN 14, 2023

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Docket No. 2023-P-0961

MIDDLESEX, ss.

Yu-Fen Liu, Plaintiff/Appellant

V.

Tufts Medical Center, Inc, Et Al., Defendant/Appellees

On Appeal From Middlesex Superior Court's Judgement of Dismissal

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Record Appendix
Volume II of III
(Transcript)

Date: 11/03/2023

Jie Tan
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Woburn, MA, 01801
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JT Law Services, PC
978-335-8335
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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

****
YU-FEN LIU *
Plaintiff, *
*
vs. * Docket No. 2281CV04021
*
TUFTS MEDICAL CENTER, INC., *
ET AL. *
Defendant. *
****

RE: RULE 12 HEARING
BEFORE THE HONORABLE WILLIAM F. BLOOMER

APPEARANCES:

For the Plaintiff:
JT Law Services, P.C.
By: Jie Tan, Esquire
400 TradeCenter Drive, Suite 5900
Woburn, Massachusetts 01801
978.335.8335

For the Defendants:
Adler, Cohen, Harvey, Wakeman & Guekguezian, LLP
By: Alexander Terry, Esquire
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Woburn, Massachusetts
Courtroom 740
June 14, 2023

Court Transcriber: Lisa Marie Phipps, Certified Shorthand Reporter, Registered Professional Reporter, Certified Realtime Reporter

I N D E X

WITNESS:

(None.)

EXHIBITS:

(None.)

P R O C E E D I N G S

(Court called to order.)

(2:30 p.m.)

THE COURT OFFICER: Good afternoon, ladies and gentlemen. Y.

Ou may be seated.

Court is now in session.

THE CLERK: Your Honor, may we go on the record on the next matter?

THE COURT: Yes.

THE CLERK: Okay, we're on the record.

And for the record, this is Middlesex Superior Court Civil Action No. 2022-4021, Yu-Fen Liu, plaintiff, versus Tufts Medical Center and others, defendants.

The matter before the Court is the defendant's motion to dismiss.

Presiding over this matter is the Honorable William Bloomer.

Counsel, would you identify yourselves for the Court and the record, please.

MS. TAN: Jie Tan representing plaintiff, Yu-Fen Liu.

THE COURT: Good afternoon.

MR. TERRY: Good afternoon, your Honor,

Mr. Clerk.

Alex Terry for the defendants.

THE COURT: All right. Good afternoon.

MR. TERRY: Good afternoon.

THE COURT: All right. So we're here on Paper No. 11, and that is the defendants's collectively motion to dismiss the complaint with prejudice.

And this is the defendants's motion, so I'll hear first from the defense.

MR. TERRY: Thank you, your Honor.

The gist of this filing from earlier this year is despite the variety of counts and legal theories in this complaint, despite the number of defendants -- there are 20 -- it is the relitigation of a med mal claim filed in 2022.

The original case had fewer defendants. It had Tufts Medical Center, which remains a defendant in this action, and it had one individual provider, who was a defendant in this action, and also was in the original, Leah Kaplan, who was an internal medicine resident physician at Tufts Medical Center at the time she treated the plaintiff, November 24th overnight into November 25, 2019.

And so that claim has -- that case was adjudicated with prejudice.

There is a dismissal past the point of where the plaintiff was compelled to produce an offer of proof, which she did -- did not, did not produce informally or in the context of an offer of proof filing any expert support for the claim that she was rendered improper care overnight at Tufts Medical Center in November of 2019 in a way that, at least via the plaintiff's opposition in this case, has caused her substantial and ongoing injury.

And so, again, this is with new counsel refiling that original action with many more defendants, with many different, at least in their phrasing, claims and theories, but the law of claim preclusion in the Commonwealth is that sort of a superficial rebranding of the same claim is not an effective end around to the doctrine of claim preclusion.

That doctrine is that if you have a common identity or privy of the parties to the present and prior actions, identity of the cause of action and prior final judgment on the merits, the subsequent claim is precluded.

So, to take those elements backwards, we have a full and final judgment of the original case, a dismissal with prejudice, which is attached as an exhibit to our motion.

As to the identity of the cause of action, this is all -- again, there are different-phrased claims in the second complaint, but the case arises out of the same overnight admission to Tufts Medical Center in November of 2019. It is the same claim. It arises out of the same operative set of facts.

And, as to the identity of the parties, it is the same plaintiff who -- who has a slightly differently styled name in the caption in this case than in the original.

We have two identical defendants that were named in both cases; and as to the other, you know, 15 individual defendants, they're all privies of original defendants, they're all Tufts Medical Center employees or agents; and it is the alleged the way the caption is written, each individual defendant is identified explicitly by the plaintiff, by their relationship to a defendant in the original action, the relationship to Tufts Medical Center.

Jim Stephen, individually, and as a medicine physician at Tufts Medicine Center emergency department.

So we submit that the -- the three prongs of claim preclusion are satisfied, and that this type of refiling to hold in terrorem 20 defendants is improper and should be precluded, and we raise, as a sort of procedural matter, I think six defendants have been served.

THE COURT: Is it six or five?

MR. TERRY: I think we said five somewhere, because there are five individual defendants.

Tufts would be the sixth, and accepted service on its own behalf.

The way it works is a counsel shows up at Tufts; folks in risk management, you know, try to contact the individual providers and get authority to accept service. They were able to do that with five individuals.

It's an academic facility. A lot of these trainees -- Dr. Kaplan, for example, practices in New York.

I was her counsel in the prior case, so I was able to accept service on her behalf; but for

many others, they're unreachable, frankly, by the hospital.

And so there's an additional argument in the motion for dismissal with prejudice for lack of service of those remaining defendants, but just --

THE COURT: So it's six minus -- you had seven, but you accepted service for Tufts Medical Center?

I'm just going by what you had written in your motion.

MR. TERRY: Yeah. I'm going to fact check myself, your Honor.

THE COURT: I think you said there was no return service with respect to seven of 12 defendants.

MR. TERRY: Yeah. Sorry, where are you looking, your Honor?

THE COURT: In my notes.

MR. TERRY: In your notes, not in my motion. Let me see what I have on this.

Here it is. Sorry, your Honor.

I counted six. Tufts Medical Center; Dr. Kaplan; James Stephen, M.D.; Linda Cotter, RN; Peter Ostrow, M.D., and Daniel Augustadt.

That's six have been served, and the remaining defendants have not been. Some of those are Does.

THE COURT: All right. Do you have that on your memo or are you --

MR. TERRY: It's just -- it's in the motion, I think. It lists who has been served and who has not.

THE COURT: All right. Hold on.

(Pause.)

THE COURT: Well, I have one, two, three, four, five, six -- it's a little -- if you look at your motion, you say on separate counts the defendants would have not yet been served, including Jennifer Jane Doe, one; Patrice Stewart, two; Michael Wiser, three; Sara Zelman, four; Jonathan Weinstock, five; Jane Does, two. That would be six and seven.

MR. TERRY: Um-hum.

THE COURT: Neil Halin, eight.

You're listing all of them, so that's where I was a little confused. You listed all of the defendants.

MR. TERRY: That's -- that's a subgroup, so if -- to continue, nine, ten, eleven, and John

Does 1 through 4 make 15.

There are 15 not served defendants, and then the sixth. There are 14 non-served defendant, and then the six served defendants are above on the motion.

And this --

THE COURT: I see, all right.

MR. TERRY: The list actually also appeared on page -- the bottom of page 5 of the memo of law, identifies served defendants and the nonserved.

THE COURT: All right. Okay.

MR. TERRY: And so if I could just note, your Honor, as to the service argument.

We -- we would certainly, in the event they were served and active defendants in the case who retained me and on whose behalf I appeared, I would raise the same claim preclusion argument as to each of those defendants.

And so we would argue that a denial (inaudible), an allowance of the motion as to the served defendants on claim preclusion grounds and a denial of the motion as to the unserved defendants on service would be a -- would be a futile ruling in that the same argument we would

then raise as to claim preclusion for the defendants, even if service was secured; the same claim preclusion argument applies to all 20 of these defendants, your Honor.

THE COURT: Understood.

All right. Let me hear from the plaintiff's counsel.

MS. TAN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MS. TAN: This case is totally different from the complaint of 2022.

The plaintiff -- the defendants -- there are only two defendants that are common, but the -- and the cause of actions are totally different.

We have medical fraud, which arises from the two -- there are two medical records were obtained, and those two medical records are contradictory with each other and the -- but they describe the same cause -- the same events that occurred to my client.

But the --

THE COURT: So what is the -- what is the fraud?

MS. TAN: The fraud is that the -- they

are two set of doctors signing the medical records; and there are two medical record numbers, they're two different dates; and they're also two different procedures, and the drugs and -- listed in those documents.

And -- but they describe that my client had a back pain, entered into medical -- Tufts Medical Center emergency, walked in on a Sunday.

But -- but the medical records itself, the second record that she obtained on December 10, 2021, that describe that she was -- the -- the primary doctor overseeing this -- this -- her injury, the medical areas, was Ostrow Peter, and while the first set of doctor -- medical record, which was listed, Dr. Weinstock, and there is a -- a list of nurses that she never say -- she never see before.

That's why I list so many defendants, because she didn't even know there were so many nurses that was involved.

THE COURT: What -- I'm wondering, what is the fraud?

What is it --

MS. TAN: The fraud is the medical --

THE COURT: What did she rely on that

caused -- that resulted in harm in the records?

MS. TAN: Yeah, the medical records were fraudulent, made up afterwards, and she could not retain other doctors afterwards because other doctors could not rely on those medical records because she had -- she was -- in the medical records, they were like, two D -- they were like, testing of two D-dimers, which shows that you had a previous heart attack; but she was -- she never had a previous heart attack, and she never had a -- she had another test, heart test, that shows she is completely healthy.

She also had, afterwards, two D-dimer testing, which is, like, they -- in her medical records, she had 900 -- the number is 900; but then afterwards, she obtained another testing, it was, like, in 300, that's in a total, total very healthy range.

So the entire two medical records were fraudulent documents, and nobody could rely on the -- when she went to see other doctors, the doctors could not rely on those documents.

And there's also complete deletions -- there is deletions, change of timeline, and a lot of changes.

If you look at the medical records, there's crossover, there's change of timeline, this, like, she was dismissed, she was discharged at 11:00 a.m., then later they admit -- the second records saying she was not dismissed; she was dismissed -- she was -- then Dr. Kaplan also admitted that -- the timeline is totally messed up, so that -- the entire testing result in the medical record is total fraudulent.

No -- I mean, it's contradictory to her afterwards testing.

THE COURT: What -- let me ask you. I don't understand.

You're -- you sounded as if, you know, these doctors had it in for her.

She walked into the emergency room on her own volition, seeking medical treatment for some pain that she was having in her right back shoulder up through her ear.

So I guess what I'm saying is you're -- you're throwing out some, you know, highly charged words, saying that these doctors essentially intentionally, you know, committed fraud somehow in changing the records.

MS. TAN: I'm -- your Honor, I didn't say

the doctors -- I don't know who changed it, but their names are in the records.

I don't know whether those doctors are aware of it, but this -- this -- these medical records were produced, they were not reflecting her experience, and they were not matching with each other.

There were two medical records numbers, which is against the regulation of the medical industry.

They're supposed to -- only one patient and one medical number and -- medical record number.

There's also -- so during that 17 hours, there's a lot of -- there's other events.

It's not just malpractice, because this -- this -- doctors, they were not licensed yet, they were just students, those -- the bunch of students treated her without -- actually, if you look at the notes of Dr. Kaplan, she never mentioned she reported to the supervisor or there were anybody supervising this entire occurrence.

So she was -- she -- over her rejection, she was rolled over to do CT scan.

During that CT scan, she was repeatedly

injected some things into his -- her body, like --

THE COURT: She was given a CT scan?

MS. TAN: Yeah.

She was given --

THE COURT: And she was injected with something prior to the CT scan?

MS. TAN: Probably. I --

THE COURT: So it's probably, like, a type of barium solution, it's a dye --

MS. TAN: Yes.

THE COURT: - I don't know, that allows --

MR. TERRY: I can just speak briefly, Judge.

I think she was given a subdural injection of nitroglycerin --

THE COURT: All right.

MR. TERRY: -- which is medication she was on and had run out of, which caused her chest pain, which brought her to the ED, sort of --

MS. TAN: She was given a CT scan and during that procedure, it was six injections.

I don't know whether that's regular procedure, but she was allergic -- apparently allergic to that injection, and she was

protesting.

So after the first of four injections, she was protesting, but she was still given another two injections.

In the end, she had to roll. She fell herself to the ground to protest it, saying, I'm not going to that machine anymore. So that's -- they rolled her back.

So, now, that totally make her felt unsafe in this hospital, because in the morning when she walked in, they infused something, treated her, and she almost had a heart attack.

And then -- now she retain her -- in the hospital, and then give her a CT scan, that almost like it felt like she was going to die.

And then -- then when they wheeled her back to the inpatient sixth floor, she wanted to check out and she didn't want stay in the hospital.

She felt like she was going to die in the hospital if -- if she stay there.

So she -- so she requested to leave and the other doctor, Dr. Rao, and the -- Dr. Kaplan -- and there was no supervision doctors. Those are all students; they -- and the

two other nurses, they refused to let her leave.

And they rolled -- they called a psychiatrist student and repeated for three hours, telling her if she leave the hospital, she was going to die.

That was, like, into the middle night; and, by the way, they -- before she entered the hospital, before she entered the inpatient department, the inpatient department, they asked -- her son first, took away all her clothings, all her personal things, so she only have -- she only have one thing clothes of the hospital.

She could not leave the hospital without -- it's in November, wintertime. She doesn't even have shoes. She did not have her shoes with her.

So --

THE COURT: They gave them to her son?

MS. TAN: Yeah, asked her son to take it home; take them home.

And afterwards -- so -- so by the time when she went back to the inpatient place, they -- they -- Dr. Kaplan and Dr. Rao and the other, Dr. August [sic], the psychiatrist, they

drilled her, they told her that if she left this hospital, she was going to die, for three hours, and changed two interpreters and says those -- why interpreter say -- then, finish the one and a half-hour, and then they say, Oh, that interpreter cannot be trusted, and we have to use another interpreter.

So they use the other interpreter for the same thing, another one and half-hour.

Then afterwards, my client had to call her friend, say, I'm going to leave -- I need to leave. I don't want to be treated.

And her friend came to the hospital and pick her up and -- and the Dr. August [sic] -- the psychiatrist, Augustadt, she -- he finally said, Okay, you can leave, you can leave, because -- and they let her leave.

But -- but once they get out of the hospital, they -- her room, around the elevator, somehow the doctor changed her -- his mind.

He say, Oh, you can't leave, and then they call the safeguard, safety guard, chased her.

And she -- she and her friend say, No. They ran out to the street.

And the safety guard came out to the street and they're surrounding her and (indiscernible) -- and kicked her from the back and she fell onto the floor.

And then they picked her up and wheeled her back to the hospital, her room, and then guard the room with the guards, the -- six or eight, six to seven, eight guards, and they interrogated her, why she wanted to leave, why she didn't want to stay in the hospital, and -- and then they called another interpreter.

This time this interpreter is from (indiscernible), they says, Oh, okay, we're going to have to wait until that interpreter come in. That's, like, they waited until 3:00 in the morning.

THE COURT: Does this relate to her treatment?

MS. TAN: No.

THE COURT: No?

MS. TAN: No, these are not related to her treatment.

These are -- these are related to my -- my cause of actions -- assault, false imprisonment, and battery, negligence, because

there was -- no licensed doctors are involved, only --

THE COURT: Medical negligence.

MS. TAN: Huh?

THE COURT: Medical negligence?

MS. TAN: Yeah.

THE COURT: That's --

MS. TAN: Medical negligence or whatever the hospital is doing, and -- because they have a duty to my client to his -- to her safety.

And there's also bias, a civil rights violation.

THE COURT: So let me -- let me ask you, so I just want to understand your argument, though.

Let's go back to the fact that there was a suit that was previously filed and dismissed.

MS. TAN: That -- yeah.

So --

THE COURT: And your argument, I think I understand it, you're saying, Well, this is a different suit because you're -- you've brought in two of the same defendants, but additional defendants, and you're alleging, at least in your complaint, instead of medical malpractice, you

have assault and battery and some other claims; is that right?

MS. TAN: Right.

THE COURT: And what about the individuals who were not served process?

MS. TAN: We did file -- because we don't have their contact information, so we filed -- we asked -- we served the subpoena to defendant Tufts Medical Center, and they did not respond until -- they filed a motion to quash, but that's what -- like, our return date is March 26th, and they filed a motion to quash March 24th.

So the court says it's moot because one --

THE COURT: I thought that the return service had to be perfected sometime in February.

Is that -- am I wrong? I might be wrong.

MS. TAN: The -- the last day for service --

THE COURT: I thought the deadline was February 21st.

MS. TAN: Right.

THE COURT: February 21st, not March.

MS. TAN: Right.

No, we served -- we served the subpoena

February 21st. We served the same day, the last day.

THE COURT: The last day of the --

MS. TAN: February.

THE COURT: You had 90 days.

When was the complaint filed?

MR. TERRY: She's speaking about service of the subpoena on Tufts Medical Center, asking them to identify last-known addresses, contact information for the individual (inaudible) --

THE COURT: Oh, no, I'm not talking about that. I'm talking about when the -- return of service with respect to the summons and complaint that apparently wasn't served on a number of the defendants.

MS. TAN: They -- all of the -- all of the complaints on the assignments were served to Tufts through Tufts, so all of them.

THE COURT: If they're not -- if they're not -- if some of them aren't employed there --

MS. TAN: Yeah, but, so that's why when we get the return, the sheriff told us -- so sheriff first called us saying, Tufts is deciding whether they're -- whether they're going to accept the summons or not for the defendants.

And then after -- after the -- the deadline, sheriff told us, Oh, Tufts decided not to serve -- not to accept for those defendants.

So that's why we immediately served a subpoena to Tufts and told them provide all the information, contact information.

THE COURT: What happened with that subpoena?

MR. TERRY: We filed, I think which is technically on for today, a motion to quash and stay discovery pending the outcome of this hearing.

So if -- if Tufts is in the case, or if it's not, and it's duly issued a subpoena, I suppose we would have a duty to respond to it.

Our thinking was this whole case is going to be -- is subject to a Rule 12 motion that's pending, and I think we may have had a hearing date at the time the motion to quash was filed, so --

THE COURT: All right.

MR. TERRY: -- let's take it up at the hearing.

Judge, can I speak just to one issue?

THE COURT: Sure.

MR. TERRY: So I'm happy to talk as much as the Court is interested in the care and treatment.

Plaintiff's description of her position was a lot about care and treatment, and our position is that that's been litigated; but I'm reminded, because his name was mentioned, to speak about Dr. Peter Ostrow, just briefly.

It was mentioned that there must be a fraud in the medical records because he appears somewhere as an attending physician where Jonathan Weinstock appears also as an attending physician.

Dr. Ostrow is a pulmonologist, an allergy medicine specialist. He's been practicing for 34 years without a claim or lawsuit; he's retiring at the end of June, until he was sued in this case.

And he was sued in this case, your Honor, because at the time the plaintiff requested her records in 2021, she had an appointment, an allergy and pulmonology appointment, on the books with Dr. Ostrow.

So when your records get printed out, at a certain point when you have an appointment

upcoming, the attending physician of record in the hospital's chart changes.

So Dr. Ostrow is a patient [sic] for whom at the time the plaintiff obtained her records had an appointment scheduled; did not see her in November of 2019. Then that appointment got canceled.

So he didn't see her in November of 2019, has not met her, doesn't know who she is, has never had a physician treatment -- physician-patient relationship with her, and yet at the end of his nearly four-decade career in medicine, certain patients who walk in off the streets, seeking care, like the plaintiff, he's being sued in this case because his name appears, allegedly fraudulently, in a chart for a visit that was canceled and never happened and has nothing to do with, again, the care and treatment, which is the root of all the claims, however they be titled in this case.

THE COURT: What happened --

MS. TAN: Your Honor --

THE COURT: -- generally with the -- this -- if you can tell me, the security -- security guards?

MR. TERRY: So the whole -- the -- the threats about, You're going to die if you leave, she was advised to be admitted to the cardiology service, and she walked in at 10:30 p.m.

So there are certain things that aren't going to be done on that service overnight.

So, Stay here, let's watch you, you'll be safe, and tomorrow, when the full service comes on board, we'll do XYZ to make sure you're safe from a cardio perspective to be discharged.

And so, in the meantime, while waiting for that is when she becomes distraught and interested in leaving.

So if you're going to leave and your providers think you're in -- a risk to yourself or others by leaving, you need to communicate that you understand those risks, that you're taking on those risks.

That is why psych got involved, because they had concerns that -- competency concerns that she wasn't understanding the risk to herself by leaving.

So it's a factual dispute, and it's evident in the records that she was not psychologically cleared.

She didn't demonstrate competency to the satisfaction of the psych service at Tufts that she understood the risks she was taking by leaving, and was told that, and attempted to flee the hospital against medical advice.

And I think that's when she was restrained by security.

She ended up being re-evaluated and cleared psychologically to be discharged. And that's what happened in the early morning hours of November 25th.

THE COURT: All right.

MS. TAN: Your Honor, may I -- may I add one more --

THE COURT: Briefly. Okay.

MS. TAN: Yeah. So the -- the defendant counsel says the case was -- the first complaint was adjudicated.

It was never adjudicated. It was -- it was dismissed because the judge -- because the plaintiff failed to pay the $6,000 bond and -- in time.

But that complaint was so poorly drafted, the judge just felt that based on the complaint, it does not appear that additional time would aid

to -- the plaintiff in support her claim for negligence, so that's -- the case was dismissed without prejudice.

The case was dismissed because the complaint was not sufficient to -- against the --

THE COURT: But it was also dismissed because she failed to pay -- post the bond, right?

MS. TAN: Yes.

There was no tribunal -- there was no tribunal decision on the merit. There was never a tribunal decision on the merit.

That's why the Court post the bond to her.

And so defendant counsel was not being honest on this, but the case -- the -- the previous judge was clear about you heard this -- in his decision, that because both sides asked for more time and he felt that additional time would not help her because of the poor quality of the complaint submitted last year, 2022.

It was basically just two sentence of the facts.

Like, there was never this fact -- the

facts that we -- occurred later in the cause, the medical records were contradictory with each other; the doctors were not -- the listed doctors never showed up.

She never saw those doctors. There were only several student doctors.

And -- and the student doctor treated her horribly. She now -- she could not even move.

She walked into the hospital; now she could not walk without a cane.

She -- and she searched for -- all over the country for doctors, doctors who would not accept her because, first, her medical records are messed up; secondly, nobody would want treat her because -- they also give her injection on her -- on her stomach that is now causing her pain.

THE COURT: So all of this, though, is related to her treatment.

MS. TAN: I don't know.

There's, like -- there's, first, in the morning there's infusion to her that almost caused her a heart attack, and then there is a -- one injection on her stomach before she went to -- before they sent her to the CT scan.

And then they went -- sent her to the CT scan, give her six additional injections.

And then when she -- rolled her up, she was drilled five or six hours of psychiatrist's counseling.

And they basically just telling her repeatedly the same thing.

Would you -- would you -- I mean, nobody -- everybody would feel like -- go mad, I would go mad, under those kind of circumstances.

And then afterwards, when she run from the hospital, six or eight safety guards dragged her back and first lay -- dragged her on the floor, which could -- which have possibly injured her back, and then pulled her on the wheelchair and -- and dragged -- dragged back inside the hospital and guarded her inside that room, interrogated her and -- until she -- until she agree that she will not charge -- she will not file complaint against them, and they signed agreement.

THE COURT: Okay. What I'm going to do is I'm going to take this under advisement.

I want to read the submissions.

I also want to look at the -- the

previous -- the previous action that had been dismissed and take a look at that complaint, but I'm going to need a little time to make a decision. Okay?

MS. TAN: Thank you, Judge.

THE COURT: Thank you very much.

THE CLERK: Are we off the record, your Honor?

THE COURT: Yes.

THE CLERK: We're off the record.

(At 3:08 p.m. proceedings concluded.)

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I, LISA MARIE PHIPPS, AN APPROVED COURT TRANSCRIBER, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT FROM THE AUDIO RECORDING PROVIDED TO ME OF THE PROCEEDINGS IN THE MATTER OF YU-FEN LIU V. TUFTS MEDICAL CENTER, INC., ET AL., HELD ON JUNE 14, 2023.

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RE: YU-FEN LIU V. TUFTS MEDICAL CENTER, INC. ET AL

Daniel P Flaherty <daniel.flaherty@jud.state.ma.us> Mon, Aug 28, 2023 at 1:15 PM
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Received, thank you.

Daniel P. Flaherty

First Assistant Clerk

Middlesex County

(781) 939-2802

From: Lisa Phipps <lmpreporting@gmail.com>
Sent: Monday, August 28, 2023 12:29 PM
To: Jie Tan (JTLAW Office) <jie.tan@jtlawservices.com>; Alexander E. Terry <aterry@adlercohen.com>; Michael A Sullivan <michael.sullivan@jud.state.ma.us>; Middlesex Clerks Office <Middlesex.clerksoffice@jud.state.ma.us>
Subject: RE: YU-FEN LIU V. TUFTS MEDICAL CENTER, INC. ET AL

[Quoted text hidden]

Gmail

Jie Tan (JTLAW Office) <jie.tan@jtlawservices.com>

RE: YU-FEN LIU V. TUFTS MEDICAL CENTER, INC. ET AL

Alexander E. Terry <aterry@adlercohen.com> Mon, Aug 28, 2023 at 12:38 PM
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Received thanks.

Adler | Cohen | Harvey | Wakeman | Guekguezian LLP
Massachusetts | Rhode Island | New Hampshire

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EXHIBIT 7: JUDGE'S JUDGMENT OF DISMISSAL OF JUL. 14, 2023

C

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 740
Assistant Clerk
Bloomed

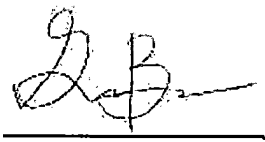
After hearing and review, Allowed in part. See the court's expanded endorsement and order. (Paper No. 21) Bloomed J. 06.20.23

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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21

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).

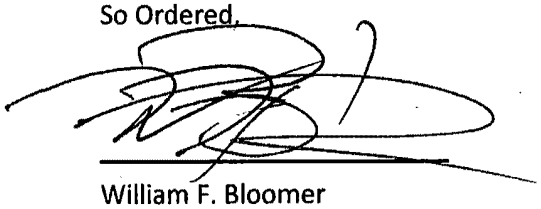
To prove claim preclusion applies, the moving party must satisfy three required elements: "(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." *Baby Furniture Warehouse Store, Inc. v. Muebles D&F 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."

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 another").

For the above reasons, Defendants' Motion to Dismiss is **ALLOWED**. The case is **DISMISSED** with prejudice.[2]

So Ordered,



William F. Bloomer
Justice of the Superior Court
06.21.2023

[2] Because application of the doctrine of claim preclusion resolves this motion, the court does not address defendants' motion to dismiss pursuant to Rule 12(b)(5) for failure to perfect service of process under Rule 4 for approximately sixteen defendants (including Jane Does and John Does).

EXHIBIT 8: APPEALS COURT SUMMARY DECISION OF JUN. 6, 2024

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

23-P-961

YU-FEN LIU

vs.

TUFTS MEDICAL CENTER INC., & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Yu-Fen Liu, appeals from a Superior Court judgment dismissing her complaint. She argues that the Superior Court judge erred in concluding that the doctrine of claim preclusion bars her claims in this case. We affirm.

Background. On November 24 and 25, 2019, the plaintiff was treated at the emergency department of defendant Tufts Medical Center Inc., (Tufts) for chest pain and a rash. Based on the care she received during that visit, on March 4, 2022, the plaintiff filed a complaint against Tufts and defendant Leah I.

[1] Jennifer Jane Doe, Patrice Stewart, Michael Wiser, James M. Stephen, Sara Zelman, Peter Ostrow, Jonathan Weinstock, Jane Does 1-2, Neil Halin, Leah I. Kaplan, Arhant Rao, Linda A. Cotter, Nora Bosteels, Daniel Augustadt, John Doe Anthony, and John Does 1-4. All individual defendants are sued in their individual capacities and as employees or agents of Tufts Medical Center Inc.

Kaplan, an internal medicine resident, alleging medical malpractice and abuse by security officers. However, the plaintiff did not timely file an offer of proof as required by Rule 73 of the Rules of the Superior Court. As a result, a Superior Court judge concluded that the plaintiff had waived her right to a medical malpractice tribunal and had failed to "present sufficient evidence to raise a legitimate question of liability appropriate for judicial inquiry." See Rule 73 of the Rules of the Superior Court (2020). The judge ordered the plaintiff to post a bond pursuant to G. L. c. 231, § 60B, to pursue her claim in court. On July 28, 2022, a different Superior Court judge dismissed the plaintiff's complaint for failure to post that bond and a judgment to that effect entered the following day.

On November 22, 2022, the plaintiff filed the present complaint against Tufts, Kaplan, and the other defendants, alleging claims of medical fraud, assault, false imprisonment, battery, negligence, and violation of civil rights. These claims, like the claims alleged in the previous complaint, derived from the treatment the plaintiff received at Tufts on November 24 and 25, 2019. A Superior Court judge allowed the defendants' motion to dismiss the present complaint, concluding that "the plaintiff's claims against Dr. Kaplan, [Tufts], and

the remaining defendants are barred by the doctrine of claim preclusion."

Discussion. We review the allowance of a motion to dismiss de novo. See Ryan v. Mary Ann Morse Healthcare Corp., 483 Mass. 612, 614 (2019). The doctrine of claim preclusion "makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the [original] action" (citation omitted). Kobrin v. Board of Registration in Medicine, 444 Mass. 837, 843 (2005). The party invoking claim preclusion must establish three 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" (citation omitted). Laramie v. Philip Morris USA Inc., 488 Mass. 399, 405 (2021). The defendants established all three elements in this case.

There was a prior final judgment on the merits entered on July 29, 2022, when a Superior Court judge dismissed the plaintiff's medical malpractice complaint for her failure to file a bond pursuant to G. L. c. 231, § 60B. That dismissal was with prejudice. See Farese v. Connolly, 422 Mass. 1010 (1996) (dismissal for failure to file bond pursuant to G. L. c. 231, § 60B, "must be with prejudice"). See also G. L. c. 231, § 60B ("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" [emphasis added]).

Causes of action are identical if they derive from a "common nucleus of operative facts." Laramie, 488 Mass. at 411, quoting Restatement (Second) of Judgments § 24 comment b (1982). See Mackintosh v. Chambers, 285 Mass. 594, 596 (1934) ("The 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"). The plaintiff's claims in this case derive from and seek redress for the treatment she received at Tufts on November 24 and 25, 2019. Because the claims in the plaintiff's present complaint arise from the same treatment as the claims in her previous complaint, the causes of action are identical.

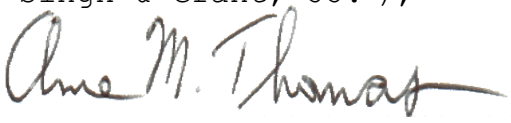
As for the first requirement, the parties in the present action are either identical to or in privity with the parties in the first complaint. In both complaints, Liu is the plaintiff, and Tufts and Kaplan are named as defendants. The remaining defendants were not named in the previous complaint, but all are in privity with Tufts. Privity is "an elusive concept" which "represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion" (citations omitted). DeGiacomo v. Quincy, 476 Mass.

38, 43 (2016). Whether the remaining defendants are in privity with Tufts "turns on (i) the nature of the [defendants'] interest, (ii) whether that interest was adequately represented by [Tufts], and (iii) whether binding the [defendants] to the prior judgment is consistent with due process and common-law principles of fairness." Laramie, 488 Mass. at 405-406. Each of the defendants named in the present complaint was either named in the medical malpractice complaint, or, if not, is an employee or agent of Tufts, in which capacity the plaintiff sued them for actions committed while acting within the scope of their employment at Tufts. Therefore, there is privity between each of the defendants in the present action and Tufts, a named party in the prior action.

We discern no error in the Superior Court judge's order dismissing the plaintiff's complaint on the grounds of claim preclusion.

Judgment entered July 14, 2023, affirmed.

By the Court (Massing, Singh & Grant, JJ.[2]),



Assistant Clerk

Entered: June 6, 2024.

[2] The panelists are listed in order of seniority.