

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE**

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**FELICIA ALLICINO, as Proposed Administrator of the  
Estate of DOMINICK SANTIVASCI, deceased,**

**Plaintiff(s),**

**-against-**

**OZONE ACQUISITION, LLC, OZONE ACQUISITION,  
LLC d/b/a CENTRAL ISLAND HEALTHCARE,  
CENTRAL ISLAND HEALTHCARE,**

**Defendant(s).**  
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**TRIAL/IAS PART 11**

**INDEX # 600130/16**

**Motion Seq. 1**

**Motion Date 11.7.18**

**Submit Date 1.28.19**

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The following papers were read on this motion:

Documents Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	24
Answering Affidavit .....	38
Reply Affidavit.....	58

Defendants move for summary judgment pursuant to CPLR 3212 and for an order dismissing the plaintiff's complaint in its entirety.

Plaintiff Felicia Allicino brings this action on behalf of the estate of Dominick Santivasci. Mr. Santivasci was a resident of defendant Central Island Healthcare nursing facility from August 2013 until the time of his death in January of 2014 at the age of 94. By her amended complaint, plaintiff contends that the defendants allowed the decedent to develop skin breakdown and decubitus ulcers, leading to severe infection, sepsis, and death. The complaint alleges causes of action sounding in (i) violation of New York Public Health Law § 2801-d, (ii) negligence, (iii) gross negligence, and (iv) wrongful death. Plaintiff also advances a claim for punitive damages.

Article 28 of the Public Health Law allows patients of residential care facilities to bring an action of the deprivation of any right or benefit enumerated in Section 2803-c of the statute. Additionally, liability may be based on deprivation of a right conferred by contract, statute, regulation, code or rule. *Gold v. Park Avenue Extended Care Center Corp.*, 90 AD3d 833 (2d Dept. 2011); *Zeides v. Hebrew Home for the Aged at Riverdale*, 300 AD2d 178 (1st Dept. 2008). An action pursuant to the Public Health Law is distinct from and may be asserted in conjunction with claims of negligence.

In this case, plaintiff's bill of particulars asserts that defendants failed to comply with rules and regulations set forth in Title 42, Part 483 of the Code of Federal Regulations and Title 10, Part 415 of the New York Compilation of Codes, Rules, and Regulations (NYCRR), both of which establish standards for nursing facilities directed to quality of life, care, nursing, and dietary services. Relevant here, 10 NYCRR 415.12[c][1] provides that medical facilities must ensure that pressure ulcers or sores do not develop unless the individual's clinical condition demonstrates that they were unavoidable. *See Vargas v. St. Barnabas Hosp.*, 168 AD3d 596 (1st Dept. 2019).

In support of this motion, defendant submits the expert affirmation of Dr. Barbara Tommasulo, who is board-certified in internal medicine and geriatrics as well as a certified medical director in post-acute and long-term care and a certified wound care specialist. Dr. Tommasulo states that based on her review of the depositions and medical and hospital records, it is her opinion that the medical care and treatment rendered to the decedent at Central Island was appropriate and within the standards of care for skilled nursing facilities. She further opines that Central Island complied with the standards set forth in all federal and state regulations governing residential health care facilities, and there were no departures from accepted practices that caused or contributed to the pressure wounds or other medical conditions claimed in the plaintiff's bill of particulars. Dr. Tommasulo opines that the pressure ulcers that Mr. Santivaschi developed were a clinically unavoidable result of his advanced age and end-stage dementia with an associated inability to maintain nutritional and hydration states, a failure to thrive and the inevitable end of life organ-system failure.

Dr. Tommasulo explains that due to his multiple severe and pre-existing co-morbidities, decedent was unable to ambulate prior to his admission at Central Island and was incontinent to bowel or bladder. Additionally, he had sustained a significant weight loss of 14 pounds in the three months prior to his admission at Central Island. He was unable to sit unsupported and a tilt-in-space high back chair was provided to him for additional head support. He was unable to respond to verbal cues but instead required hand-to-hand assistance to obtain his participation with restorative occupational, swallowing and physical therapy.

According to Dr. Tommasulo, upon admission to Central Island, Mr. Santivaschi was evaluated for potential skin breakdown and an individual care plan was devised, including turning and repositioning every two hours, use of a pressure-relieving mattress and pressure-relieving Roho seat cushion for his wheel chair, use of protective heel pads, use of daily moisture barriers and moisturizing lotions, incontinence care, daily skin assessments and weekly complete skin examinations. Dr. Tommasulo states that relevant records document the implementation of

these measures. Dr. Tommasulo opines that the design and implementation of the individual care plan was appropriate and within the standard of skilled nursing care.

With respect to the decedent's nutritional status, Dr. Tommasulo states that upon admission, Mr. Santivacsi was consuming only 25% of his meals. He was placed on a puree and honey-thick liquid diet due to aspiration precaution and dysphagia, or the loss of swallow function. A course of dysphagia therapy was undertaken by a speech therapist at Central Island. With one-to-one assistance during meals, his diet was upgraded and monitored. Vitamin and protein supplements were added to his diet, as well as Ensure® pudding to add calories and protein. His hydration levels were also monitored, including daily intake and output. Dr. Tommasulo opines that Central Island implemented a program of nutritional support that was appropriate and within the standard of care in New York.

Dr. Tommasulo notes that despite the significant nutritional support, Mr. Santivasci's protein levels and nutritional markers continued to remain low throughout his residency at Central Island and up until his death. She states that these markers demonstrated declining nutritional status and poor prognosis despite a well-designed nutritional program, which suggests that nutritional sources were not being properly utilized by his body.

With respect to the development of decubitus ulcers, Dr. Tommasulo states that a heel wound developed in September of 2013, which subsequently healed. In October of 2013, a small open wound was identified on the decedent's gluteal fold/ischium area. Wound treatments were implemented and a wound care doctor was requested to evaluate the wound. Dr. Slepian evaluated the wound in mid-October and found it unstageable. He recommended to continue the existing treatments with a different dressing. Despite the wound care, nutritional support and interventions in place, Dr. Tommasulo states that the ischium wound progressively increased in size and depth, ultimately showing signs of infection and causing him to be transferred to the hospital on October 31, 2013, where the wound was debrided and infected tissue removed. Vacuum assisted wound closure was implemented but was discontinued on December 5, 2013. Dr. Tommasulo states that the wounds Mr. Santivasci acquired were both clinically unavoidable and unresponsive to therapy. She states that this is consistent with the aging of the skin and the dying process, where wound healing is not expected. She finds no indication that Central Island breached the standard of care and concludes that the defendants complied with the standards set forth in all federal and state regulations.

In opposition, plaintiff submits substantial medical records including Central Island's skin tracking and tool sheets, CNA care plans and accountability records, treatment administration records, and nursing and physician's notes. In addition, plaintiff submits the deposition transcript of decedent's son, Pasquale Santivasci and the expert affirmation of Dr. Martin A. Grossman.

Pasquale Santivasci testified that he was an active participant in his father's home care prior to a hospitalization at Plainview Hospital for a fall, followed by his admission to Central Island. He would bath and dress his father every day, including using adult diapers. He would apply lotions and creams to protect his diaper area. After the decedent was admitted to Central Island, he visited his father every day and had a daily routine that including feeding him lunch.

He would also volunteer to wheel in and bib other residents at the facility at lunchtime. Pasquale Santivaschi testified that he would arrive everyday at 9:10 a.m. and leave around 1:30 p.m. He also stated that after a short time at the facility, physical therapy ceased, and he complained about his father lying in bed "all the time." He also complained at the nurses' station about his father not being out of bed in the morning and not having at least some physical therapy.

Pasquale Santivaschi stated that his father was initially given a standard wheelchair, in which he saw no cushions or padding. He then requested several times that his father be given a high back wheelchair for comfort, which was provided, but again without cushions or padding. He testified that neither he nor anyone at Central Island positioned his father in the wheelchair. He never observed his father moving himself in the wheelchair. He also complained about his father not being properly dried after bathing.

Pasquale Santivaschi was out of town for a week in October. When he returned, his father was sent to the hospital with a high fever and had "something that looked like a crater was growing on his butt." He stated his belief that the wound would not have developed if his father had been properly cleaned and dried. He accompanied his father to the hospital for treatment of the wound. He had a stroke in December of 2013 and was unable to visit for two weeks, and was not able to visit everyday anymore.

Plaintiff's expert Dr. Grossman states that he is board certified in internal medicine with a sub-specialty in hospice and palliative care medicine. He is currently the medical director for two nursing facilities and is familiar with the applicable rules and regulations as well as the appropriate standard of care with regard to caring for nursing home residents. Upon review of the relevant records and deposition transcripts, he opines that Mr. Santivaschi's medical condition was not such so as to render the onset and progression of the left ischium pressure ulcer unavoidable or the infection unpreventable. Rather, it is his opinion that the decedent's infected pressure wound to the left ischium was the result of haphazard and reckless care at Central Island.

Dr. Grossman states that Dr. Tommasulo, although noting that Mr. Santivaschi lost 14 pounds prior to his admission to Central Island, fails to note that he had gained 8 pounds as of October 29, 2013 and only began to lose additional weight after he was admitted to the hospital for surgical debridement of the infected pressure ulcer. Dr. Grossman states that the decedent was eating well through the middle of October and that is not consistent with a terminally ill patient. Additionally, Dr. Grossman states that Dr. Tommasulo does not address the increase in the decedent's albumin level after his stay in the hospital or the absence of physician or nursing assessments of the ischial wound, which should be done at least daily. Further, Dr. Grossman states that the CNA documentation does not show dressing changes corresponding to incontinence episodes, which is the required procedure. He notes that a stool-based bacterium was isolated in the wound.

Dr. Grossman indicates that there are three records that dispel the notion that Mr. Santivaschi's condition rendered the development of wounds unavoidable. First, Dr. Grossman points to a photograph of the wound taken at the hospital following debridement, which,

according to Dr. Grossman shows significant viable tissue and the surrounding skin looks healthy. Dr. Grossman states that this does not reflect a terminally ill patient. Second, Dr. Grossman states that Central Island's skin tracking tool sheets show that the wound first deteriorated while the decedent was a resident at Central Island but decreased in size following debridement at the hospital, only to deteriorate again. Third, Dr. Grossman opines that Mr. Santivasci's weight records show that he was capable of weight gain and that is inconsistent with a terminally ill patient.

Dr. Grossman states that the infection of the wound was avoidable and caused by failures and neglect that occurred prior to October 31, 2013, including failure to implement cleaning of the wound and reapplication of lotions and treatments following episodes of incontinence, limiting time in the wheelchair, failure to have a proper turning and position system in place to ensure repositioning at least every two hours, and failure to have a physician assess the wound as it devolved prior to October 31, 2013. Dr. Grossman further states that the wound doubled in size following Dr. Slepian's visit and points to a nurse entry made on October 23, 2013, which indicated that the ulcer was unstageable and necrotic with odor. He finds no indication that this finding was timely communicated to a physician.

Dr. Grossman takes particular issue with the documentation that shows that wound treatment and dressing changes were performed only daily from October 8<sup>th</sup> to October 14<sup>th</sup>, with no additional treatments on an asneeded basis, which would include incontinence episodes. The protocol was changed on October 14<sup>th</sup>, but again was performed only daily save for two occasions of "as needed" changes done on October 14<sup>th</sup> and October 23<sup>rd</sup>. Dr. Grossman finds this significant as other CNA records indicate more than one bowel movement per day. He states that the lack of additional dressing changes explains (1) how the ulcer deteriorated so quickly and became infected, (2) the odor first assessed on October 23<sup>rd</sup>, and (3) the presence of e. coli faceacium in the wound.

Dr. Grossman also points to the deposition testimony of Pasquale Santivasci, who testified that there was no cushion on decedent's wheelchair, he observed no repositioning, and that he complained about the discontinuance of the decedent's Ensure® pudding. Additionally, Dr. Grossman opines that the nutritional assessments were inadequate in that they did not consider both pre-albumin and albumin levels and that the decedent was allowed to become dehydrated.

Dr. Grossman concludes that Central Island recklessly deprived Mr. Santivasci of every reasonable effort to prevent the development of pressure ulcers and the necessary treatment and services to promote healing and prevent infection, as well as proper nutritional and medical care. Dr. Grossman opines that formation of an infected wound was not unavoidable due to decedent's clinical condition and Central Island's failures resulted in his loss of dignity, malnutrition, dehydration, multiple pressure sores, including a deep pressure sore on the buttocks, infections and death.

As an initial matter, the court finds that plaintiff's negligence and Public Health Law claims survive the instant motion. Contrary to defendants' assertions, Dr. Grossman's opinions concerning the proximate cause of Mr. Santivasci's injury are neither conclusory nor speculative.

Although Dr. Grossman does not impugn the wound prevention program designed by Central Island, he does contest that it was properly implemented and that repositioning was not properly carried out. Additionally, Dr. Grossman finds that once the wound did develop, efforts to promote healing and prevent infection, including sufficiently frequent dressing changes, were severely lacking. Despite the dispute regarding the consistency of decedent's weight loss and a dispute concerning whether the October 23/24<sup>th</sup> nursing note indicated an odor emanating from the wound, Dr. Grossman's opinions concerning the adequacy of wound prevention and care as supported by record evidence and Pasquale Santivasci's testimony are sufficient to withstand summary judgment. All questions of credibility are specifically reserved to the trier of fact.

With respect to the plaintiff's claims of gross negligence and for punitive damages, the case law makes clear that only actions that rise to the level of a reckless disregard of the likelihood of harm will give rise to extraordinary damages.

"Punitive damages may be assessed where a defendant's actions evinced a high degree of moral culpability which manifested a conscious disregard for the rights of others or conduct so reckless as to amount to such disregard (*see Welch v. Mr. Christmas*, 57 N.Y.2d 143, 150; *Walker v. Sheldon*, 10 N.Y.2d 401, 404; *Greenberg v. Meyreles*, 155 A.D.3d 1001, 1003). Such damages may be imposed for wanton or reckless disregard for the safety or rights of others where the conduct is 'sufficiently blameworthy,' and the award of punitive damages . . . advance[s] a strong public policy of the State by deterring its future violation" (*Randi A.J. v. Long Is. Surgi-Ctr.*, 46 A.D.3d 74, 81, quoting *Doe v. Roe*, 190 A.D.2d 463, 475 [other internal quotations omitted]; *see Giblin v. Murphy*, 73 N.Y.2d 769, 772; *Serota v. Mayfair Super Mkts., Inc.*, 15 A.D.3d 385). The violation of rights must be 'so flagrant as to transcend mere carelessness' (*Zabas v. Kard*, 194 A.D.2d 784, 784). In addition, Public Health Law § 2801-d(2) permits punitive damages against a medical facility where a deprivation of a patient's rights is found to be willful or in reckless disregard to the patient's rights (*see Hairston v. Liberty Behavioral Mgt. Corp.*, 138 A.D.3d 467, 468).

*Valensi v. Park Ave. Operating Co., LLC*, No. 2016-02044, 2019 WL 692985, at \*2 (2d Dept. Feb. 20, 2019); *see also Vissichelli v. Glen-Haven Residential Health Care Facility, Inc.*, 136 A.D.3d 1021, 1023-24 (2d Dept. 2016). In this case, crediting Pasquale Santivasci's testimony, the plaintiff's claims based upon a reckless disregard for the rights of the decedent must stand. In particular, decedent's son testified that he was present on a daily basis and observed no wheelchair cushion nor repositioning of the decedent. An appropriate plan of care that goes substantially unexecuted can certainly rise to the level of gross negligence or recklessness.

Finally, with respect to the wrongful death cause of action, the decedent's death certificate indicates that the immediate cause of death was cardiac arrest as a consequence of

atherosclerotic heart disease with end stage dementia being a significant contributing condition. There is no indication of ulcers or infection being a contributing factor to his death, nor does Dr. Grossman provide a non-conclusory explanation of the basis for his conclusion that the decubitus ulcer resulted in Mr. Santivaschi's death. *See Vissichelli v. Glen-Haven Residential Health Care Facility, Inc.*, 136 A.D.3d 1021, 1023–24. [“In opposition, the plaintiff's expert made only a conclusory statement that the defendants' conduct ‘caused and increased [the decedent's] risk of injury . . . and ultimately his death.’”].

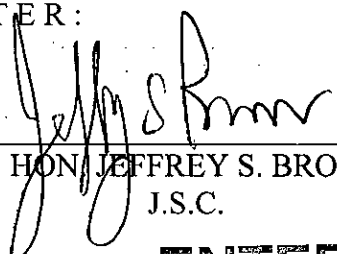
For the foregoing reasons, it is hereby

**ORDERED**, that the defendants' motion for summary judgment is **granted** with respect to the wrongful death cause of action and is otherwise **denied**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
March 7, 2019

ENTER:

  
HON. JEFFREY S. BROWN  
J.S.C.

**ENTERED**

MAR 12 2019

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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