

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 22-00831

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND OGDEN, JJ.

EMMETT HARRIS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL),
FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (MARTIN P. DUFFEY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered May 10, 2022. The order, insofar as appealed from, denied in part the motion of defendant Rome Memorial Hospital for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendant Rome Memorial Hospital seeking summary judgment dismissing the second amended complaint, as amplified by the bills of particulars, insofar as it asserts claims against that defendant based on an alleged violation of 42 CFR 482.12 (c) (4) and the alleged malpractice of Rosa Padro, RN and Abigail Peckham, NP, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action against several defendants, including Rome Memorial Hospital (defendant), alleging, inter alia, that defendant and its agents and employees failed to timely diagnose and treat his spinal infection with epidural abscesses that ultimately rendered him quadriplegic. Defendant appeals from an order insofar as it denied in part its motion for summary judgment seeking dismissal of the second amended complaint against it.

Preliminarily, plaintiff has consented in his brief on appeal to the dismissal of the second amended complaint, as amplified by the bills of particulars, insofar as it asserts claims based on an alleged violation of 42 CFR 482.12 (c) (4) and the alleged malpractice of Abigail Peckham, NP, and we therefore modify the order accordingly (see generally *Sochan v Mueller*, 162 AD3d 1621, 1622 [4th Dept 2018]). Next, we agree with defendant that it satisfied its initial burden on its motion with respect to both deviation and causation related to

claim against it based on the alleged malpractice of Rosa Padro, RN, and that plaintiff failed to raise a triable issue of fact in opposition (see *Wicks v Virk*, 198 AD3d 1315, 1315 [4th Dept 2021]). We therefore further modify the order accordingly. We have considered defendant's remaining contentions, however, and conclude that none warrants reversal or further modification of the order.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court