

APPENDIX

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APPENDIX A

**State of New York
Court of Appeals**

Mo. No. 2020-91

[Filed: June 11, 2020]

Thomas Gilewicz,)
Appellant,)
v.)
Brylin Hospital, &c., et al.,)
Respondents.)
)

Present, Hon. Janet DiFiore, *Chief Judge*, **presiding**.

Appellant having moved for reargument of a motion for leave to appeal to the Court of Appeals in the above cause:

Upon the papers filed and due deliberation, it is
ORDERED, that the motion is denied.

/s/ John P. Asiello
John P. Asiello
Clerk of the Court

APPENDIX B

**State of New York
Court of Appeals**

2019-796

[Filed: December 19, 2019]

Thomas Gilewicz,)
Appellant,)
v)
Brylin Hospital, Also Known as)
Brylin Hospitals, et al.,)
Respondents.)
_____)	

Motion, insofar as it seeks leave to appeal as against defendant Brylin Hospital, etc. dismissed as untimely (*see* CPLR 5513[b]; 2103[b][2]); motion, insofar as it seeks leave to appeal as against defendants Dr. Kang Balvinder, Buffalo General Psychiatric Unit, and Buffalo General Hospital, dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

APPENDIX C

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

CA 17-02032, 740

[Filed: June 8, 2018]

THOMAS GILEWICZ,)
PLAINTIFF-APPELLANT,)
V)
BRYLIN HOSPITAL, ALSO KNOWN AS)
BRYLIN HOSPITALS,)
DR. KANG BALVINDER,)
BUFFALO GENERAL PSYCHIATRIC)
UNIT AND BUFFALO GENERAL HOSPITAL,)
DEFENDANTS-RESPONDENTS.)
)

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY,
AND DEJOSEPH, JJ.

LAW OFFICE OF JOSEPH G. MAKOWSKI, LLC,
BUFFALO (JOSEPH MAKOWSKI OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (ADELA
APRODU OF COUNSEL), FOR DEFENDANT-
RESPONDENT BRYLIN HOSPITAL, ALSO KNOWN
AS BRYLIN HOSPITALS.

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RICOTTA & VISCO, BUFFALO (TOMAS J. CALLOCCHIA OF COUNSEL), FOR DEFENDANT-RESPONDENT DR. KANG BALVINDER.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ADAM P. DEISINGER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO GENERAL PSYCHIATRIC UNIT AND BUFFALO GENERAL HOSPITAL.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered August 7, 2017. The order denied plaintiff's motion for leave to renew and leave to reargue.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this medical malpractice action, defendants moved for, *inter alia*, summary judgment dismissing the second amended complaints against them. Supreme Court granted the motions, and plaintiff moved for leave to renew and reargue. Plaintiff now appeals from an order denying his motion. We dismiss the appeal from that part of the order denying that part of plaintiff's motion seeking leave to reargue inasmuch as no appeal lies therefrom (*see Kirchner v County of Niagara*, 153 AD3d 1572, 1574 [4th Dept 2017]). Contrary to plaintiff's contention, the court properly denied that part of the motion seeking leave to renew. Plaintiff failed to submit "new facts not offered on the prior motion[s]

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that would change the prior determination" (CPLR 2221 [e] [2]; *see Matter of Kairis v Graham*, 118 AD3d 1494, 1494-1495 [4th Dept 2014]). The alleged new facts were known to plaintiff and presented to the court at oral argument of defendants' motions.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

APPENDIX D

**STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE**

Index No.: 2012-1260

[Filed: August 7, 2017]

THOMAS GILEWICZ,)
)
Plaintiff,)
)
-vs-)
)
BRYLIN HOSPITAL)
(aka BRYLIN HOSPITALS),)
DR. KANG BALVINDER,)
BUFFALO GENERAL PSYCHIATRIC)
UNIT and BUFFALO GENERAL HOSPITAL)
)
Defendants.)
)

HON. PAULA L. FEROLETO, J.S.C. Justice Presiding.

At a Special Term of the Supreme Court, held in and for the County of Erie, at the Erie County Courthouse in the City of Buffalo, New York, on the 12th day of July 2017.

ORDER

Plaintiff, through his attorney Joseph G. Makowski, Esq., having moved this Court for an Order for leave to renew and leave to reargue, and upon Defendants, BUFFALO GENERAL PSYCHIATRIC UNIT and BUFFALO GENERAL HOSPITAL, by and through their attorneys, ROACH, BROWN, McCARTHY & GRUBER, P.C., and Defendant BRYLIN HOSPITAL (aka BRYLIN HOSPITALS), by and through its attorneys, FELDMAN KIEFFER, LLP, and Defendant DR. BALVINDER KANG (incorrectly sued as KANG BALVINDER), by and though his attorneys, RICOTTA & VISCO, all appearing in opposition.

NOW, upon reading and filing Plaintiff's Notice of Motion dated June 6, 2017, together with the Affadavit of Joseph G. Makowski, Esq., with exhibits, sworn to on June 6, 2017, the Affidavit of Adam P. Deisigner, Esq., sworn to on July 5, 2017, in opposition thereto, the Affirmation of Matthew J. Kibler, Esq., dated July 5, 2017, in opposition thereto, the Affirmation of Tomas J. Callocchia, Esq., dated July 5, 2017, in opposition thereto, and the Reply Affirmation of Joseph G. Makowski, Esq., dated July 10, 2017, in further support of the motion.

NOW, upon the appearance of Joseph G. Makowski, Esq., attorney for Plaintiff, in support of said motion, the appearance of defendants BUFFALO GENERAL PSYCHIATRIC UNIT and BUFFALO GENERAL HOSPITAL, by their attorneys, ROACH BROWN McCARTHY & GRUBER P.C. (ADAM P. DEISINGER, ESQ.), in opposition thereto, the appearance of defendant BRYLIN HOSPITAL (aka BRYLIN

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HOSPITALS), by its attorneys FELDMAN KIEFFER LLP (MATTHEW J. KIBLER), in opposition thereto, and the appearance of defendant Dr. BALVINDER KANG, by his attorneys RICOTTA & VISCO (TOMAS J. CALLOCCHIA, ESQ.), in opposition thereto, it is hereby,

ORDERED, that the Plaintiff's Motion for Leave to Renew and Leave to Reargue is hereby denied in its entirety.

/s/ Paula L. Feroleto, J.S.C.
Hon. Paula L. Feroleto, J.S.C.

GRANTED:

BY /s/ Mary Pazik
MARY PAZIK
COURT CLERK

APPENDIX E

**STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE**

Index No.: 2012-1260

[Filed: May 5, 2017]

THOMAS GILEWICZ,)
)
)
Plaintiff,)
)
vs.)
)
BRYLIN HOSPITAL,)
(aka BRYLIN HOSPITALS),)
DR. KANG BALVINDER,)
BUFFALO GENERAL PSYCHIATRIC)
UNIT, and BUFFALO GENERAL HOSPITAL)
)
Defendants.)
)

At a Special Term of the Supreme Court held in and for the County of Erie, 92 Franklin Street, Part 5, Buffalo, New York, on the 18th day of April, 2017.

The defendants, BRYLIN HOSPITAL (aka BRYLIN HOSPITALS), DR. BALVINDER KANG (named in this action as DR. KANG BALVINDER), BUFFALO GENERAL PSYCHIATRIC UNIT, and BUFFALO GENERAL HOSPITAL having moved this Court for an

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Order of this Court (1) granting summary judgment, (2) dismissing Plaintiff's Complaint, as well as any cross-claims on the merits and with prejudice, (3) for any further relief the Court determines just and proper.

NOW, upon reading the Notice of Motion dated April 5, 2017, and the supporting Affidavit of Adam Deisinger, Esq., sworn to on April 5, 2017, with the exhibits annexed thereto, the Affidavit of Alyson Spaulding, Esq., sworn to on March 30, 2017, the Expert Affirmation of Gary Johnson, M.D., F.A.C.E.P., dated April 6, 2017, and the Affidavit of Patricia Vorpal, sworn to on March 30, 2017, submitted in support of the motion on behalf of BUFFALO GENERAL PSYCHIATRIC UNIT, and BUFFALO GENERAL HOSPITAL, and upon reading the Notice of motion dated April 11, 2017, and the supporting affidavit of Tomas J. Callocchia, Esq., dated April 11, 2017, with the exhibits annexed hereto, submitted in support of the motion on behalf of DR. BALVINDER KANG (named in this action as DR. KANG BALVINDER), upon reading the Notice of Motion dated April 7, 2017, and the supporting Affirmation of Stephen A. Manuele, Esq., dated April 7, 2017, with the exhibits annexed hereto, and the Affirmation of Lauren A. Heimer, Esq., dated April 11, 2017, submitted in support of the motion on behalf of BRYLIN HOSPITAL, and;

NOW, upon reading the Order to Show Cause dated April 12, 2017, granted by the Hon. Joseph R. Glownia, J.S.C., and the supporting affirmation of Matthew J. Kibler, Esq., dated April 12, 2017, submitted on behalf

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of BRYLIN HOSPITAL, and upon reading the Order to Show Cause dated April 12, 2017, granted by the Hon. James Dillon, J.S.C., and the supporting affirmation of Tomas J. Callocchia, dated April 12, 2017, submitted on behalf of DR. BALVINDER KANG (named in this action as DR. KANG BALVINDER), and upon reading the Order to Show Cause dated April 12, 2017, granted by the Hon. Mark A. Montour, J.S.C. on April 12, 2017, and the supporting affirmation of Adam P. Deisinger, Esq., and

NOW, upon reading the affidavit of Thomas Gilewicz, requesting further time to respond to the pending motions, and

NOW, there being no opposition papers submitted to the substance of the motions;

NOW, upon appearances of Feldman Kieffer, LLP (Stephen Manuele, Esq., of counsel), attorneys for BRYLIN HOSPITAL, in support of the defendant's motion, and Roach, Brown, McCarthy & Gruber, P.C. (Adam Deisinger, Esq., of counsel), attorneys for BUFFALO GENERAL HOSPITAL AND BUFFALO GENERAL PSYCHIATRIC UNIT, in support of the defendant's motion, and Ricotta & Visco (Tomas Callocchia, Esq., of counsel), attorneys for BALVINDER KANG (named in this action as DR. KANG BALVINDER), in support of the defendant's motion, and the appearance of James P. Davis, Esq., counsel for Plaintiff Thomas Gilewicz and Plaintiff Thomas John Gilewicz, and

NOW, upon the oral argument of James P. Davis, Esq., noting his diligent efforts to pursue this matter

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and the Court acknowledging Mr. Davis' efforts, it is hereby

ORDERED that all defendants' motions for summary judgment, are hereby granted in all respects.

IT IS FURTHER ORDERED, that Plaintiff's Complaint, Amended Complaints, all claims, and all cross-claims against all defendants are hereby dismissed, on the merits, with prejudice.

SO ORDERED:

/s/ _____
Hon. Paula Feroleto, J.S.C.
by Mark A. Montour, J.S.C.

GRANTED:

BY /s/ Mary Pazik
MARY PAZIK
COURT CLERK

APPENDIX F

**STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE**

Index No.: 2012-1260

[Filed: June 6, 2017]

THOMAS JOHN GILEWICZ)
)
)
Plaintiff,)
)
v.)
)
BRYLIN HOSPITAL)
(aka BRYLIN HOSPITALS),)
DR. KANG BALVINDER,)
BUFFALO GENERAL PSYCHIATRIC)
UNIT and BUFFALO GENERAL HOSPITAL)
)
Defendants.)
)

NOTICE OF MOTION

Assigned Justice: Hon. Paula L. Feroleto, J.S.C.

PLEASE TAKE NOTICE, that upon that upon the attached Affirmation of Joseph G. Makowski, Esq., affirmed on June 6, 2017, with attached Exhibits thereto; the Memorandum of Law, dated June 6, 2016 served concurrently herewith; and all of the prior pleadings and proceedings had herein, plaintiff Thomas

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John Gilewicz will move this Court at a Special Term thereof, at 92 Franklin Street, Part 1, Buffalo, New York, Part 22, on the 21st day of June, 2017, at 1:00 p.m., or as soon thereafter as counsel for the parties can be heard, for an Order pursuant to CPLR 2221 (d) and (e) for leave to renew and leave to reargue, and upon granting leave to renew and/or to reargue vacating the prior Order entered in the Erie County Clerk's Office on May 5, 2017, which granted defendants', BryLin Hospital (aka BryLin Hospital), Dr. Kang Balvinder, Buffalo General Psychiatric Unit and Buffalo General Hospital, motions for summary judgment, setting a scheduling order by which plaintiff may retain a new attorney and oppose defendants' motions; and for such other and further relief as to this Court seems just and proper.

All answering affidavits, if any, are to be served upon the undersigned pursuant to CPLR 2214(b), seven (7) days prior to the return date of this motion.

DATED: June 6, 2017

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**STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE**

Index No.: 2012-1260

THOMAS JOHN GILEWICZ)
)
Plaintiff,)
)
v.)
)
BRYLIN HOSPITAL)
(aka BRYLIN HOSPITALS),)
DR. KANG BALVINDER,)
BUFFALO GENERAL PSYCHIATRIC)
UNIT and BUFFALO GENERAL HOSPITAL)
)
Defendants.)
)

ATTORNEY AFFIRMATION

Assigned Justice: Hon. Frederick Marshall, JSC

JOSEPH G. MAKOWSKI, ESQ., an attorney duly licensed to practice in the State of New York, hereby affirms the following under the penalties of perjury pursuant to CPLR 2106:

1. I am counsel for the plaintiff, Thomas J. Gilewicz. As such, I am familiar the facts and circumstances of this action and set forth in this affirmation. I submit this affirmation in support of plaintiff's motion, brought pursuant to CPLR 2221(d) and (e) for leave to renew and leave to reargue this Court's Order, granted May 4, 2017 and entered in the

Erie County Clerk's Office on May 5, 2017, which granted defendants' BryLin Hospital (aka BryLin Hospitals), Dr. Balvinder Kang (incorrectly sued as Dr. Kang Balvinder), Buffalo General Hospital Psychiatric Unit and Buffalo General Hospital (hereinafter collectively referred to as "defendants"), motions for summary judgment dismissing plaintiff's complaint, as well as any cross-claims, on the merits and with prejudice.

2. It is submitted that this Court should grant plaintiff's motion to for leave to renew and leave to reargue, and upon granting renewal and/or reargument, vacate the May 5, 2017 Order granting the defendants' motions for summary judgement, set a scheduling order by which plaintiff may retain a new attorney and oppose defendants' motions for summary judgment, on the grounds that the communication and representation between plaintiff and his prior counsel appears to have broken down but remained in effect, leading to a confusing scenario in which plaintiff's prior counsel did not submit opposition papers in response to defendants' summary judgment motions, request a continuance on the motion, or file a motion to withdraw, and plaintiff was not granted a continuance to have the opportunity to submit papers to the motions for summary judgment.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

3. Plaintiff commenced this action with the filing of a *pro se* Complaint in the Erie County Clerk's Office on April 12, 2012 against defendants BryLin Hospital (hereinafter referred to as "BryLin") and

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Dr. Balvinder Kang (incorrectly sued as Dr. Kang Balvinder, and hereinafter referred to as “Dr. Kang”) for medical malpractice, emotional distress, assault and memory loss. A copy of plaintiff’s *pro se* Complaint is attached hereto as **Exhibit A**.

4. By Notice of Motion dated 2, 2012, BryLin moved, *inter alia*, to dismiss plaintiff’s *pro se* Complaint for failure to state a cause of action.

5. By Order granted January 9, 2013

* * *

Number 2012-1260. A copy of plaintiff’s Second Amended Summons and Complaint against BryLin and Dr. Kang is attached hereto as **Exhibit C**.

7. Plaintiff’s Second Amended Complaint against BryLin and Dr. Kang contained causes of action sounding in medical malpractice, false imprisonment and negligent supervision (see Exhibit C).

8. Also on August 20, 2013, plaintiff, through counsel, filed a “Second Amended Summons Served With Complaint” naming Buffalo General Hospital Psychiatric Unit and Buffalo General Hospital (hereinafter collectively referred to as “Buffalo General Hospital”) as defendants, under Index Number 2012-1260 as well. A copy of plaintiff’s Second Amended Complaint against Buffalo General Hospital is attached hereto as **Exhibit D**.

9. Plaintiff's Second Amended Complaint against Buffalo General Hospital contains a cause of action for false imprisonment (*see Exhibit D*).

10. BryLin served as an answer to plaintiff's Second Amended Complaint, in which it denied plaintiff's substantive allegations and asserted twelve (12) affirmative defenses, on or about August 30, 2013. A copy of BryLin's Answer is attached hereto as **Exhibit E**.

11. Dr. Kang served an answer to plaintiff's Second Amended Complaint, in which he denied plaintiff's substantive allegations and asserted six (6) affirmative defenses, on or about September 9, 2013. A copy of Dr. Kang's answer is attached hereto as **Exhibit F**.

12. Buffalo General Hospital served an answer to plaintiff's Second Amended Complaint, in which it denied plaintiff's substantive allegations and asserted seventeen (17) affirmative defenses, on or about December 10, 2014. A copy of Buffalo General Hospital's Answer is attached hereto as **Exhibit G**.

13. On December 24, 2014, an Order Upon Stipulation to Consolidate Actions was filed in the Erie County Clerk's Office.

14. The Stipulation consolidate both of the actions that plaintiff filed on August 20, 2013 under Index Number 2012-1260 into one action, bearing the Index Number 2012-1260. A copy of the Order Upon Stipulation to Consolidate Actions is attached hereto as **Exhibit H**.

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15. The parties participated in discovery and in-depth settlement discussions with the assistance of the Court.

16. The parties believed that a settlement had been reached. However, plaintiff ultimately declined to accept the settlement offer and, by correspondence dated April 12, 2017, the Court advised all parties of the same.

17. Specifically, the Court's April 12, 2017 correspondence advised that plaintiff declined to execute any closing documents, that all dispositive motions were returnable April 18, 2017, and that if dispositive motions were unsuccessful, the trial of this matter would go forward as scheduled. A copy of the Court's April 12, 2017 correspondence is attached hereto as **Exhibit I**.

18. By Notice of Motion dated April 5, 2017, Buffalo General Hospital moved for summary judgment seeking to dismiss plaintiff's Second Amended Complaint in its entirety. The return date for the motion was April 18, 2017, and the papers contained a seven (7) day demand pursuant to CPLR 2214(b). A copy of Buffalo General Hospital's summary judgment papers, without exhibits, are attached hereto as **Exhibit J**.

19. By Notice of Motion dated April 7, 2017, BryLin moved for summary judgment seeking to dismiss plaintiff's Second Amended Complaint in its entirety. A copy of BryLin's summary judgment papers, without exhibits, are attached hereto as **Exhibit K**.

20. By Notice of Motion dated April 11, 2017, Dr. Kang moved for summary judgment seeking to dismiss plaintiff's Second Amended Complaint in its entirety. A copy of Dr. Kang's summary judgment papers, without exhibits, are attached hereto as **Exhibit L**.

21. In addition to the Notices of Motion, the defendants also secured orders to show cause to bring their motions for summary judgment motions, thereby shortening plaintiff's response time.

22. BryLin's Order to Show Cause, was granted on April 12, 2017; Dr. Kang's Order to Show Cause, was granted on April 12, 2017; and Buffalo General Hospital's Order to Show Cause, was granted on April 12, 2017. Copies of the defendants' Orders to Show Cause applications, without exhibits, are attached hereto collectively as **Exhibit M**.

23. By the time the Notices of Motion were filed and the Orders to Show Cause were granted, the relationship between plaintiff and his prior counsel, although continuing, appeared to be uncertain.

24. The uncertain state of plaintiff's professional relationship with his prior counsel, James Davis, Esq., became abundantly clear during oral argument of the defendants' motions for summary judgment on April 18, 2017.

25. Prior counsel indicated, on the record, asserted that he had been fired by plaintiff. Counsel also stated that he was going to file a motion to withdraw as counsel. However, despite claims of being "fired" by plaintiff and wanting to withdraw, prior

counsel appeared as counsel of record at oral argument for the motions for summary judgment, no motion to withdraw was ever filed by prior counsel. Therefore, plaintiff's prior attorney, James Davis, Esq., remained counsel of record and it was incumbent upon him to file papers in opposition to the defenses' summary judgment motions, request an extension of time to respond, or file a motion to withdraw. The granting of a motion to withdraw would have given plaintiff additional time to secure counsel to oppose defendants' summary judgment motions.

26. Given the extremely short period of time between the motions for summary judgment and the return date for the motions, plaintiff's confusion over the status of his counsel and prior counsel's failure to submit any opposition to the summary judgment motions or any formal request for an extension of time to respond, plaintiff submitted a *pro se* "Motion For Extension of Time to Respond to Motion of Summary Judgment", dated April 14, 2017. A copy of plaintiff's *pro se* motion for an extension of time is attached hereto as **Exhibit N**.

27. At oral argument of the motions for summary judgment, plaintiff's prior counsel, James Davis, Esq., appeared and made a verbal request for plaintiff to have "an opportunity to get another attorney and hold [the] summary judgment motions in abeyance". A copy of the oral argument transcript is attached hereto as **Exhibit O**, at p. 5.

28. Following Mr. Davis' colloquy the Court (Feroleto, J.) held that defendants' motion papers set forth sufficient facts to dismiss the case, denied

plaintiff's prior counsel's request for additional time and denied plaintiff's *pro se* motion for an extension of time (*see id.*, at p. 6-8).

29. The Order granting defendants' motion for summary judgment was granted by Justice Montour on May 4, 2017, filed in the Erie County Clerk's Office on May 5, 2017 and served on plaintiff via U.S. Mail on May 5, 2017. A copy of the Order, with Notice of Entry, is attached hereto as **Exhibit P**.

ARGUMENT

I. Plaintiff's Motion for Leave to Reargue

30. Pursuant to CPLR 2221(d)(2), a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion"

31. "Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (*Vaccariello v Meineke Car Care Ctr., Inc.*, 136 AD3d 890, 892 [2d Dept. 2016], quoting *Ito v 324 E. 9th St. Corp.*, 49 AD3d 816, 817 [2d Dept. 2008], additional citations omitted]; *see also Smith v. City of Buffalo*, 122 AD3d 1419, 1420 [4th Dept. 2014]).

32. “A judge on reargument need not have new material facts presented in order to grant leave to reargue.” (*Delcrete v Kling*, 67 AD2d 1099 [4th Dept. 1979]).

33. In the present case, it is submitted that this Court should grant plaintiff’s motion to reargue, and upon reargument, vacate the Order granting defendants’ summary judgment as the Court overlooked and misapprehended the clearly acrimonious and uncertain professional relationship between plaintiff and his prior counsel, prior counsel’s failure to withdraw as counsel, submit any opposition to defendants’ motions for summary judgment or formally request an extension of time to respond to defendant’ motions and plaintiff’s *pro se* request for an extension of time in which to respond to defendants’ motions for summary judgment.

34. During oral argument of defendants’ motions for summary judgment, plaintiff’s prior counsel stated that plaintiff “actually fired me, then he called my office to hire me back. Well, it doesn’t work that way. When you’re fired, you’re fired”, prior counsel then explained to the Court that it was his “understanding is that the case was at a point where it would be dismissed for several reasons, and because of those reasons, I was able to get some money with the help of” Justice Marshall’s confidential law clerk (*see Exhibit O*, at p. 3).¹

¹ This case had been assigned to Justice Marshall, who became ill, necessitating the motions for summary judgment being heard by

35. After explaining how he took this case to the Fourth Department and got it reinstated after it had been dismissed, prior counsel stated that “at some point I told . . . [plaintiff] I was going to withdraw. Well, I’m a sucker for tears. . . . [Plaintiff] begged me to stay on the case, I stayed on the case, did all I could to try to get the case settled.” (*see id.*, at p. 3).

36. Then, in open court and on the record, while noting that he had not filed either a motion to withdraw as counsel or a motion for an extension of time to oppose defendants’ motions for summary judgment, prior counsel went into detail about the “holes” in his client’s case, including his surprise that plaintiff was ever permitted to file a lawsuit in the first place, given the absence of a certificate of merit, and plaintiff’s lack of retained experts due to his gambling problem, prior counsel verbally requested an extension of time (*see id.*, at pp. 3-6).

37. Prior counsel’s verbal request for an extension, together with plaintiff’s *pro se* motion was, denied, with the court stating that the defendants’ motion papers set forth sufficient facts to dismiss the case (*see id.*, at p. 6).

38. It is submitted that the Court misapplied the standard for determining a motion for summary judgment in a medical malpractice case.

39. The standard was not whether “defendants’ motion papers set forth sufficient facts to dismiss the

Justice Feroleto, with the Order ultimately being signed by Justice Montour as duty judge.

case”, but whether plaintiff raised a triable issue of fact with respect to whether defendants’ conduct constituted a deviation or departure from accepted medical practice, whether this departure was a proximate cause of plaintiff’s alleged injury (*see generally Hayden v Gordon*, 91 AD3d 819, 820-21 [2d Dept. 2012]).

40. Prior counsel stated, on the record that, while plaintiff obtained funds in the amount of \$14,500, he advised plaintiff “I can’t do anything with it today. What happened to this money three months ago.” (*see id.*, at p. 4).

41. Notably, during prior counsel’s colloquy before the Court, he did not, at any point, indicate that he was unable to retain an expert because an expert was unwilling to execute an affidavit on plaintiff’s behalf. Rather, he blamed plaintiff’s inability to pay for an expert three (3) months ago (*see generally* Exhibit O).

42. Prior counsel indicated that he told plaintiff that an expert was needed to defend against summary judgment, but it appears that this conversation took place much earlier in prior counsel’s representation (*see Exhibit O.* at p. 4 “As to experts, I said to [plaintiff], we got to have an expert to defend against summary judgment. Early in the case, [plaintiff], through my help, borrowed \$15,000. After a month I called him, I said, [plaintiff], you know, you’re supposed to be putting some money into my escrow account for experts. He said, oh, Mr. Davis, I bought a car. And then we learned last Friday at settlement conference, a five-hour settlement conference, . . . [plaintiff] said,

oh, the rest of it, I gambled it away. I almost fell off the chair. I said, . . . [plaintiff], I put 8-\$9,000 of my own money in this case and now you're going to tell me at the eleventh hour you gambled the money away? Well, he had gone to Massachusetts and his grandfather gave him a check for \$14,000. I said, . . . [plaintiff], I can't do anything with it today. What happened to this money three months ago?").

43. It is clear that as of the week before oral argument, prior counsel had not retained an expert on plaintiff's behalf.

44. Despite prior counsel's unequivocal representations that he had been fired by plaintiff, as evidenced by his comments at oral argument, plaintiff's counsel and plaintiff both were very confused as to the status of the continuing professional representation.

45. Plaintiff made a statement to the Court in which he explained that he had been asked for additional monies for experts by prior counsel on April 8th, when he had supplied money for experts earlier in the case; that he was aware of the proceedings in April until time; that he felt pressured into settlement; that when he called prior counsel's office, he was told counsel was no longer on the case and would not speak to him; and that he felt confused and prejudiced (*see Exhibit O, at pp. 7-8*).

46. Prior counsel's failure to either properly withdraw from representation, submit an opposition to defendants' motions for summary judgment, or a move for an extension of time to respond to defendants' summary judgment motions on plaintiff's behalf,

irrevocably harmed plaintiff and denied him the opportunity to oppose defendants' summary judgment motions on the merits. Plaintiff is not merely an “ ‘unsuccessful party . . . [looking for] successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented’ ” (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept. 2014], *lv denied* 25 NY2d 964, quoting *Matter of Anthony J. Carter. DDS. P.C. v. Carter*, 81 AD3d 819, 820 [2d Dept. 2011]).

47. Accordingly, it is respectfully submitted that this Court enter an Order granting plaintiff's motion for reargument, vacating its earlier order granting defendants' motions for summary judgment, setting a scheduling order by which plaintiff may retain a new attorney and oppose defendants' motions.

II. Plaintiff's Motion For Leave To Renew

48. Pursuant to CPLR 2221(e)(2), a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e][3]).

49. “A motion pursuant to CPLR 2221 to renew ‘must be (1) based upon new facts not offered on the prior motion that would change the prior determination, and (2) set forth a reasonable justification for the failure to present such facts on the

prior motion’ ” (*Dovak v Finkelstein & Partners, LLP*, 90 AD3d 696, 700 [2d Dept. 2011]).

50. This requirement “is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made” (*Citimortgage, Inc. v. Espinal*, 136 AD3d 857, 858 [2d Dept. 2016], citations omitted).

51. Moreover, “even if the vigorous requirements for renewal are not met, such relief may properly be granted so as not to ‘defeat substantive fairness’ ” (*Tishman Const. Corp. of New York v City of New York*, 280 NY2d 375, 377 [1st Dept. 2001], quoting *Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept. 1996]).

52. As set forth above, plaintiff’s prior counsel did not file a motion to withdraw with the court, did not submit any opposition to defendants’ motions for summary judgment, and did he move for an extension of time for plaintiff to submit opposition papers to defendants’ motions for summary judgment (*see supra*, at ¶¶ 33-41).

53. Essentially, prior counsel stopped representing plaintiff but made no motion to formally withdraw from this case so that plaintiff, or the Court, would have a clear understanding that counsel had withdrawn (*see generally* Exhibit O, at pp. 3-5 “[Plaintiff actually fired me, then he called my office to hire me back. Well, it doesn’t work that way. When you’re fired, you’re fired” and then stating that he prepared a motion to withdraw, although never filed it;

indicating that he spoke to the confidential law clerk on the telephone, “she said file the note of issue and we would try to address everything today, so that’s what I did”; stating that “[n]ow, [plaintiff] called me up to yesterday. Now, either I’m on the case or I’m off the case. I cannot be out of the door sill. I’m in the kitchen or I’m in the dining room. So with all due respect, Judge, [plaintiff] needs another attorney, he needs one because he doesn’t follow my advice”).

54. It can be seen from the above that the relationship between plaintiff and his prior counsel was uncertain to the point where even prior counsel did not clearly know what the status of his representation of plaintiff was, even though he remained counsel of record.

55. This breakdown in communication and representation between prior counsel and plaintiff led to a situation where plaintiff required to attempt to file a *pro se* motion at the last minute for an extension of time in which to respond to the defendants’ motions for summary judgment, which left plaintiff without a defense to the defendants’ motions (see Exhibit N).

56. While plaintiff was aware at the time of the defendants’ motions for summary judgement that the communication between he and his prior counsel was breaking down, he was not aware, until it was too late, that prior counsel was simply not going to submit any opposition papers, and not move for an extension of time to respond.

57. Plaintiff has a reasonable justification for his failure to present these facts on the prior motion,

mainly he was unclear of the status of prior counsel's representation. Prior counsel had not made any motion to withdraw, but he had stopped representing plaintiff's interest in that he did not submit answering papers in opposition to defendants' motions for summary judgment or file a continuance motion.

58. Plaintiff asks for the opportunity to oppose defendants' motions for summary judgment on the merits, the interest of justice, encourage that cases be determined on the merits and plaintiff asks this court to grant his motion for renewal so as not to " 'defeat substantive fairness' " (*Tishman Const. Corp. of New York*, 280 NY2d at 377, quoting *Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept. 1996]).

CONCLUSION

59. In conclusion, plaintiff requests that this Court enter an Order: (1) granting his motion to reargue and, upon reargument, vacate the prior Order entered in the Erie County Clerk's Office on May 5, 2017, which granted defendants', BryLin Hospital (aka BryLin Hospital), Dr. Kang Balvinder, Buffalo General Psychiatric Unit and Buffalo General Hospital, motions for summary judgment, setting a scheduling order by which plaintiff may retain a new attorney and oppose defendants' motions; (2) granting his motion to renew and, upon renewal, vacate the prior Order entered in the Erie County Clerk's Office on May 5, 2017, which granted defendants', BryLin Hospital (aka BryLin Hospital), Dr. Kang Balvinder, Buffalo General Psychiatric Unit and Buffalo General Hospital, motions for summary judgment, and upon granting the motion for reargument, vacating its earlier order granting

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defendants' motions for summary judgment, setting a scheduling order by which plaintiff may retain a new attorney and oppose defendants' motions; and (3) such other and further relief as to this Court may seem just and proper.

DATED: June 6, 2017

/s/ Joseph G. Makowski
Joseph G. Makowski, Esq.

APPENDIX G

INDEX NO. 2012-1260

[Filed: April 14, 2017]

THOMAS GILEWICZ,	Plaintiff)
-Vs-)
BUFFALO GENERAL PSYCHIATRIC)
PHYCIATRIC (SIC) UNIT AND BUFFALO)
GENERAL HOSPITAL, & BRYLIN HOSPITAL)
(aka BRYLIN Hospitals) & DR. Kang Balvinder)
)

**Motion- For Extension of Time to Respond to
Motion for summary Judgment.**

Plaintiff and plaintiff-intervenor, pursuant to American Jurisprudence pleading and practice Forms section 34, move for an extension of time to respond to the motion for summary judgment against plaintiffs filed by Defendant, BUFFALO GENERAL PSYCHIATRIC PHYCIATRIC (SIC) UNIT AND BUFFALO GENERAL HOSPITAL, & BRYLIN HOSPITAL (aka BRYLIN Hospitals) & DR. Kang Balvinder. The opposition is now due I bielve on 4/18/17. It is requested that an extention be granted. The bases for the requested continuance are: (1) the additional discovery needed to respond to the motion from my experts. (2) the pendency of discovery motions relating to the issues raised by the motion for summary judgment (3) a misscommunication or conflict between

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representing counsel. (4) obtain affidavits, (5) just general more time to complete my responses. The request is not meant to cause delay but is necessary in order to complete response, WHEREFORE, Plaintiff respectfully request an extension within which to oppose defendants motion for summary Judgment.

Dated: 4/14/17

Thomas J Gilewicz. (Plaintiff)

APPENDIX H

**STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE:
PART 5**

Index No.: 1260/2012

[Dated: April 18, 2017]

THOMAS JOHN GILEWICZ,)
)
Plaintiff,)
)
vs.)
)
BRYLIN HOSPITAL,)
(aka BRYLIN HOSPITALS),)
DR. KANG BALVINDER,)
BUFFALO GENERAL PSYCHIATRIC)
UNIT, and BUFFALO GENERAL HOSPITAL,)
)
Defendants.)
)

MOTIONS

92 Franklin Street
Buffalo, New York
April 18, 2017

B E F O R E:

HONORABLE PAULA L. FEROLETO,
Supreme Court Justice.

A P P E A R A N C E S:

JAMES P. DAVIS, ESQ.
Appearing for the Plaintiff.

STEPHEN A. MANUELE, ESQ.
Appearing for Defendant Brylin Hospital.

TOMAS J. CALLOCCHIA, ESQ.
Appearing for Defendant Dr. Kang
Balvinder.

ADAM P. DEISINGER, ESQ.
Appearing for Defendant Buffalo General
Hospital.

P R E S E N T:

THOMAS JOHN GILEWICZ, Plaintiff.

COLLOQUY 4-17-17

THE COURT: Okay. Gilewicz. While we're waiting for Mr. Callocchia to come in, if you would all state your appearance for the record.

MR. DAVIS: James P. Davis on behalf of Mr. Gilewicz.

THE COURT: And, Mr. Gilewicz, you're here?

MR. GILEWICZ: Good morning, Your Honor. Mr. Gilewicz, for the record.

THE COURT: Okay. Thank you.

MR. MANUELE: Stephen Manuele for BryLin.

Mr. DEISINGER: Morning, Your Honor. Adam Deisinger on behalf of Buffalo General Hospital.

MR. CALLOCCHIA: Tomas Callocchia, for Dr. Balvinder Kang.

THE COURT: Okay. The defendants on this case have all moved for summary judgment.

MR. CALLOCCHIA: Correct, Your Honor.

MR. MANUELE: Correct.

THE COURT: You probably don't need to elaborate on what's in your papers since they measure about 12 inches. So, Mr. Davis --

MR. DAVIS: Your Honor, may it please the court. This case is at a difficult stage. Even though it's at summary judgment, we had settled this case, and Mr. Gilewicz spent five hours trying to get him to understand why the settlement was in his best interest. Mr. Gilewicz actually fired me, then he called my office to hire me back. Well, it doesn't work that way. When you're fired, you're fired. So my understanding is that the case was at a point where it would be dismissed for several reasons, and because of those reasons, I was able to get some money with the help of Amy Ziegler, who did a yeoman's jobs to get Mr. Gilewicz to look at the totality of the circumstances.

Number one, this was a pro se case that I shouldn't have taken on. I took it on, it was dismissed,

I went to the Fourth Department, I had it reinstated, Mr. Gilewicz went with me, and at some point I told Mr. Gilewicz I was going to withdraw. Well, I'm a sucker for tears. Mr. Gilewicz begged me to stay on the case, I stayed on the case, did all I could to try to get the case settled. These gentlemen will tell you I've written many letters, I've talked to them on many occasions about settling, Judge Curran was on the case, we talked about settling, but Mr. Gilewicz doesn't see the case for what it is. It has holes in it.

Number one, I'm surprised that they permitted him to file the lawsuit because he did not have an affidavit of merit -- a certificate of merit. My understanding of the law in New York State, when you file a malpractice, you must have an affidavit of merit attached to it. He didn't have that.

Secondly, as to completion of the discovery, I beg to differ with learned counsel, I believe we've completed all aspects of discovery but for giving them updated medical records. Other than that, I see discovery having been totally complete.

As to experts, I said to Mr. Gilewicz, we got to have an expert to defend against summary judgment. Early in the case, Mr. Gilewicz, through my help, borrowed \$15,000. After a month I called him, I said, Mr. Gilewicz, you know, you're supposed to be putting some money in my escrow account for experts. He said, oh, Mr. Davis, I bought a car. And then we learned last Friday at settlement conference, a five-hour settlement conference, he said, oh, the rest of it, I gambled it away. I almost fell out of the chair. I said, Mr. Gilewicz, I put 8- to \$9,000 of my own money in this case and now

you're going to tell me at the eleventh hour you gambled the money away? Well, he had gone to Massachusetts and his grandfather gave him a check for \$14,500. I said, Mr. Gilewicz, I can't do anything with it today. What happened to this money three months ago?

So to make a long story short, I'm asking this court at this juncture if it's feasible, I did prepare a motion to withdraw, I did prepare a motion for an extension, but when I talked to Amy on the phone, she said file the note of issue and we would try to address everything today. That's what I did. So I'm asking this court, out of abundance of caution and in the interests of justice, to give Mr. Gilewicz an opportunity to get another attorney and hold their summary judgment motions in abeyance.

Now, Mr. Gilewicz called me up to yesterday. Now, either I'm on the case or I'm off the case. I cannot be out on the door sill. I'm in the kitchen or I'm in the dining room.

So with all due respect, Judge, he needs another attorney, he needs one because he doesn't follow my advice, and I suspect that it's difficult at this point for him to get an attorney but I would like him to have the opportunity.

Thank you, Your Honor.

THE COURT: You're welcome.

Mr. Gilewicz, I do have an affidavit from you which requests some more time and other things. However, this case has a 2012 index number which is

approximately five years old. I'm not quite sure what time in 2012 it was filed. It was close to having a trial date, I believe, and the defendants have filed summary judgment motions. In a malpractice action, you do have to have an expert to establish a proximate cause and a deviation from accepted medical practice. Mr. Davis is a fine and excellent attorney and is very well aware of that and has apparently been trying to address that issue for well over a year that it needed expert testimony on this case. There has been more than ample time for you to obtain expert testimony and that has not happened.

The defendants' motion papers do set forth sufficient facts to dismiss this case. They have experts and there is no opposition to it, despite attempts to obtain experts in the past. So that granting more time, as far as this court can determine based upon all of the pleadings, the records, the past history of the case, would be an exercise in futility. So I am granting the defendants' motions for summary judgment.

And, sir, I'm going to return you the \$45 that was in your envelope with a letter that came to the court.

And, counsel, you can submit an order and it should reflect that this is absolutely no failure on Mr. Davis' part in terms of the case being dismissed.

MR. DAVIS: Thank you, Your Honor. Thank you.

THE COURT: Despite the yeoman effort on his part, it is going to be dismissed.

MR. DAVIS: Thank you.

THE COURT: Yes, sir.

MR. GIILEWICZ: May I have a chance to say something?

THE COURT: You certainly may say something.

MR. GILEWICZ: Okay. On April 8th I spoke to Mr. Davis, informed me that I needed money for the experts. It is also my understanding that I have already paid some money for an expert a few years back.

I was in Massachusetts for my birthday which was on the 5th of April, I was nearly 30 minutes away from Buffalo, I turned around and drove an additional 12 hours to grab the check I needed for the experts. A new trial was in May. I wasn't aware of any proceedings in April. I would have not gone to Massachusetts for my birthday if I knew I had court the next day.

I met with Mr. Davis on Monday, April 10th. Mr. Davis explained to me two times that he decided to settle the case.

On Tuesday, April 11th, Mr. Davis and I met with Amy Ziegler, I believe, and felt I was being forced and pressured to take the settlement. I was then told if I didn't take the settlement, Mr. Davis would no longer be my lawyer, and once I walked out the door, there would be a conflict and that it would have consequences.

On the 14th of April, I called Mr. Davis, Mr. Davis' office, and was told that he no longer was on the

case and that he could no longer speak to me. These attempts -- these attempts happened as early as Tuesday, April 11th. When I felt I was on my own at certain times, didn't know if I still had a lawyer and was confused, so I decided to file my own motion letting the courts know there may have been a conflict. I felt I was prejudiced in having the appropriate time to respond and opposed summary judgment because I didn't know if I had a lawyer or not.

THE COURT: Okay, sir. And these events were all in 2017 which has nothing to do with the five years that preceded it in terms of getting an expert. Thank you all very much.

MR. DAVIS: Thank you, Your Honor.

* * *

REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and accurate transcript of the stenographic minutes taken in the matter of Thomas John Gilewicz v Brylin Hospital, et., Index No. 1260/2012.

/s/ Barbara F. Cultrara
BARBARA F. CULTRARA, CSR, CMR, CRR
Official Supreme Court Reporter.