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

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CA 24-00940

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND KEANE, JJ.

PATRICIA M. CARUSO, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF PHILIP P. CARUSO, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ST. ELIZABETH MEDICAL CENTER, SHWE WIN, M.D., LEV GOLDINER, M.D., SLOCUM-DICKSON MEDICAL GROUP, P.C., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

ROBERT F. JULIAN, P.C., UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

NAPIERSKI, VANDENBURGH, NAPIERSKI & O'CONNOR, LLP, ALBANY (COURTNEY L. ALPERT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ST. ELIZABETH MEDICAL CENTER AND SHWE WIN, M.D.

GALE GALE & HUNT, LLC, FAYETTEVILLE (JOHN K. PENMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS LEV GOLDINER, M.D. AND SLOCUM-DICKSON MEDICAL GROUP, P.C.

Appeal from an order of the Supreme Court, Oneida County (Julie G. Denton, J.), entered May 16, 2024, in a medical malpractice action. The order, among other things, granted the motion of defendants Lev Goldiner, M.D., and Slocum-Dickson Medical Group, P.C., for summary judgment and granted in part and denied in part the motion of defendants St. Elizabeth Medical Center, Mohawk Valley Health System, and Shwe Win, M.D., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendants Slocum-Dickson Medical Group and Lev Goldiner, M.D. in part and reinstating the malpractice, wrongful death, conscious pain and suffering, and derivative causes of action against them, denying that part of the motion of defendants St. Elizabeth Medical Center, Mohawk Valley Health System and Shwe Win, M.D. with respect to the malpractice, wrongful death, conscious pain and suffering, and derivative causes of action against Win and reinstating those causes of action against Win, denying those parts of that motion with respect to the claims of vicarious liability against St. Elizabeth Medical Center based on Win's conduct and the claims that St. Elizabeth Medical Center deviated from the accepted standard of care by failing to ensure that decedent was seen by a neurologist soon after his

admission or, alternatively, by failing to alert decedent's primary care physician that his order for a neurological consult could not be completed until three days later and reinstating those claims against St. Elizabeth Medical Center and as modified, the order is affirmed without costs.

Memorandum: Plaintiff commenced this action on behalf of decedent seeking damages for his wrongful death and conscious pain and suffering allegedly caused by defendants' delay in detecting and properly treating decedent's stroke following his admission to defendant St. Elizabeth Medical Center (SEMC). Defendants Slocum-Dickson Medical Group (SDMG) and Lev Goldiner, M.D. (collectively, Goldiner defendants), and defendants SEMC, Mohawk Valley Health System and Shwe Win, M.D. (collectively, SEMC defendants) separately moved for summary judgment dismissing the complaint against them. Supreme Court granted the motion of the Goldiner defendants in its entirety, and granted in part the motion of the SEMC defendants by dismissing all claims against those defendants except for certain direct claims against SEMC.

We agree with plaintiff that the court erred in granting the motion of the Goldiner defendants with respect to the malpractice, wrongful death and conscious pain and suffering causes of action against Goldiner, and we therefore modify the order accordingly. "It is well settled that a defendant moving for summary judgment in a medical malpractice action has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020]). Once such a defendant meets the initial burden, the burden shifts to the plaintiff to raise a triable issue of fact, but "only as to the elements on which the defendant met the prima facie burden" (*Bubar*, 177 AD3d at 1359 [internal quotation marks omitted]; *see Bristol v Bunn*, 189 AD3d 2114, 2116 [4th Dept 2020]). Here, although the court properly determined that the Goldiner defendants met their initial burden on their motion with respect to the issues of deviation from the accepted standard of medical care and causation, plaintiff raised triable issues of fact in opposition through the submission of the affidavit of an expert (*see Cooke v Corning Hosp.*, 198 AD3d 1382, 1383 [4th Dept 2021]; *Thompson v Hall*, 191 AD3d 1265, 1267 [4th Dept 2021]). Indeed, plaintiff's expert raised issues of fact as to when decedent began experiencing symptoms of a stroke and whether, at the time Goldiner was informed about decedent's condition, decedent was still within the period of efficacy for certain treatments such that Goldiner should have promptly ordered those treatments. Where, as here, a nonmovant's expert affidavit "squarely opposes" the affirmation of the moving parties' expert, the result is "a classic battle of the experts that is properly left to a jury for resolution" (*Blendowski v Wiese*, 158 AD3d 1284, 1286 [4th Dept 2018] [internal quotation marks omitted]). This is not a case in which plaintiff's expert "misstate[d] the facts in the record," nor is the affidavit " 'vague, conclusory, [or] speculative' " (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]; *see also Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]).

Inasmuch as the causes of action against SDMG alleged vicarious liability for the actions of Goldiner, we further conclude that the court erred in granting the Goldiner defendants' motion with respect to the medical malpractice, wrongful death, and conscious pain and suffering causes of action asserted against SDMG (*cf. Behar v Cohen*, 21 AD3d 1045, 1047 [2d Dept 2005], *lv denied* 6 NY3d 705 [2006]), and we therefore further modify the order accordingly. Additionally, we reject the assertion of the Goldiner defendants, raised as an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Verdugo v Fox Bldg. Group, Inc.*, 218 AD3d 1179, 1181-1182 [4th Dept 2023]; *Melgar v Melgar*, 132 AD3d 1293, 1294 [4th Dept 2015]), that they are entitled to summary judgment because they established that Goldiner did not share a doctor-patient relationship with decedent. We conclude that questions of fact exist regarding that issue (*see generally Rogers v Maloney*, 77 AD3d 1427, 1428 [4th Dept 2010]; *Croscutt v Aldridge* [appeal No. 2], 309 AD2d 1143, 1144 [4th Dept 2003]).

We also agree with plaintiff that the court erred in granting the motion of the SEMC defendants with respect to the medical malpractice, wrongful death, and conscious pain and suffering causes of action asserted against Win, and we further modify the order accordingly. Even assuming, arguendo, that the SEMC defendants met their burden on their motion to that extent, we conclude that plaintiff raised issues of fact whether decedent may have had a better chance of recovery had Win immediately informed Goldiner about decedent's condition and the results of the relevant MRI (*see generally Finnegan v Kasowitz*, 239 AD3d 1337, 1338 [4th Dept 2025]; *Clune v Moore*, 142 AD3d 1330, 1331-1332 [4th Dept 2016]). Because Win is not entitled to summary judgment with respect to the malpractice, wrongful death, and conscious pain and suffering causes of action, we conclude that the court erred in granting the motion of the SEMC defendants with respect to the claims against SEMC premised on the theory of vicarious liability for Win's conduct (*cf. Behar*, 21 AD3d at 1047), and we therefore further modify the order accordingly.

Regarding SEMC's direct liability, even assuming, arguendo, that the SEMC defendants met their initial burden on their motion to that extent, we nonetheless conclude that plaintiff's expert raised triable issues of fact in opposition as to whether SEMC, through its nursing staff, deviated from the accepted standard of medical care by failing to ensure that decedent received a neurological consult on the day he was admitted to SEMC or, at a minimum, that decedent's primary care physician was informed that there was no such consult available during the weekend and that his order for a neurological consult would not be honored until three days after decedent's admission (*see generally Cooke*, 198 AD3d at 1383; *Thompson*, 191 AD3d at 1267). We therefore further modify the order accordingly.

In light of our determination, we conclude that the court also erred in granting the motions of the Goldiner and the SEMC defendants with respect to the derivative cause of action against them, and we further modify the order accordingly (*see generally O'Mara v Ranalli*,

191 AD3d 1494, 1495 [4th Dept 2021]; *Ingutti v Rochester Gen. Hosp.*, 145 AD3d 1423, 1425 [4th Dept 2016]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court