

Felder v Fuzalov

2009 NY Slip Op 32520(U)

October 21, 2009

Supreme Court, Kings County

Docket Number: 26201/06

Judge: Gerard H. Rosenberg

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At an IAS Term, Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of October, 2009

P R E S E N T:

HON. GERARD H. ROSENBERG,
Justice.

-----X

BELLA FELDER, AS ADMINISTRATRIX OF THE
GOODS, CHATTELS AND CREDITS WHICH WERE
OF DINA PEK, DECEASED,

Plaintiff,

- against -

Index No. 26201/06

GAVRIEL FUZALOV, M.D., ET AL.,

Defendants.

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The following papers numbered 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____1_____
Opposing Affidavits (Affirmations) _____	_____2_____
Reply Affidavits (Affirmations) _____	_____3_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant Gavriel Fuzaylov, M.D. (Dr. Fuzaylov) moves:

- (1) pursuant to CPLR 3211(a)(3), for an order dismissing plaintiff's complaint based upon plaintiff's lack of capacity to sue;
- (2) pursuant to CPLR 3212, for an order granting summary judgment;
- (3) for an order dismissing plaintiff's complaint and any and all cross claims

and/or counterclaims against him; and (4) for an order severing him from the caption of this matter and directing the Clerk of the Court to enter judgment in his favor.

BACKGROUND

The above-captioned lawsuit was commenced by plaintiff Bella Felder, Administratrix, to recover damages for the medical malpractice and wrongful death of her decedent, Dina Pek (Ms. Pek). It arises out of the care and treatment of decedent dating from approximately April 14, 2004 until October 24, 2004, at co-defendants Resort Nursing Home (Resort), St. John's Episcopal Hospital (St. John's), and Peninsula Hospital Center (Peninsula). Plaintiff alleges that Dr. Fuzaylov was negligent from May 10, 2004 through May 16, 2004; June 4, 2004 through September 4, 2004; September 20, 2004 through October 8, 2004 and October 15, 2004 through October 19, 2004, while Ms. Pek was a resident at Resort. In essence, plaintiff alleges that Dr. Fuzaylov was negligent in failing to treat Pek's multiple pressure sores, resulting in osteomyelitis of the right heel, above-the-right-knee amputation, and death.

During the aforesated periods, Ms. Pek was in and out of Resort five times. She was evaluated in the St. John's emergency room once and admitted to St. John's four times. She was also admitted to Peninsula. Ms. Pek was first admitted to Resort on April 14, 2004 for long-term skilled nursing care. Dr. Fuzaylov, a board-certified physician, worked at Resort two days per week. He covered two floors, with up to 80 patients. His duties as the primary physician were to manage the patient's medical conditions, make referrals as needed, and

respond to treatment requests made by the nursing staff. According to his deposition testimony, he would generally see patients on a monthly basis, unless another physician was covering for him. A patient admitted on Dr. Fuzaylov's floors would be admitted under his name.

According to his progress note annexed to the moving papers, Dr. Fuzaylov met decedent on April 14, 2004. He spoke with her internist/private physician, Dr. Kazdin, to obtain her medical history, learning that at that time she had congestive heart failure, dementia, diabetes and hypertension, but that she did not have bedsores. Dr. Fuzaylov testified that her risk factors for developing bed sores at that time included diabetes, poor circulation and dementia.

Decedent's records indicate that on April 16th, she expressed suicidal ideations. She was evaluated at St. John's and returned to Resort. On April 27th, she displayed "inappropriate behavior" and was transferred to St. John's. On or about May 3, 2004, she fell and, among other injuries sustained, fractured her right humerus. A skin assessment dated May 5 noted that she was now at risk for pressure sores.

Decedent returned to Resort on May 10, 2004. She had developed several pressure sores, including a "Stage II" right heel decubitus ulcer. The ulcers were photographed and assessed, and treatment was commenced. It was noted that she had become high risk for pressure sores: she had become incontinent, her nutrition was fair to poor, and because of her newly acquired fractures and deteriorating mental state, her activities were limited.

On May 16, she was transferred to Peninsula by Dr. Irena Natalenko, another primary care physician at Resort, where she had an admitting diagnosis of a myocardial infarction, as well as congestive heart failure. A pacemaker was inserted, and she was given increasing amounts of beta blocking medications.

Upon her return to Resort on June 4, 2004, where, once again, Dr. Fuzaylov was her attending physician, decedent was noted as being at a very high risk for bedsore development. Numerous pressure sore ulcers, including a Stage II on the right chest, Stage II on the coccyx, as well as several other locations, were noted and daily treatment by the nursing staff was begun. The treatment was local. On June 25, Dr. Natalenko, covering for Dr. Fuzaylov, saw Ms. Pek and ordered a vascular surgical consult due to decreased pulses in both legs, and a podiatry consult.¹ A bilateral lower extremity ultrasound showed bilateral occlusive disease of decedent's superficial arteries, and the Doppler study indicated poor peripheral tissue blood flow.

On July 7, Dr. Fuzaylov reviewed the Doppler studies and ordered a vascular surgical evaluation for peripheral vascular disease. According to his testimony, the consult was never done, nor was Dr. Natalenko's prior vascular surgical consult completed.

On July 28, Dr. Fuzaylov examined decedent and completed a monthly progress note. The right heel ulcer, the right posterior leg ulcer, and the right anterior foot ulcers were now

¹According to Dr. Fuzaylov's testimony, at Resort, when a physician wanted a consultation, he or she would write an order which would be given to a nurse who was responsible for making the consultation request.

Stage IV. The left heel and the outer ankle ulcers were Stage II. However, he testified that there was no visible infection present.

On August 2, Dr. Fuzaylov requested a surgical consult. The consult was performed by Dr. Thomas Lubeski, a general surgeon, on August 4, 2004. Dr. Lubeski's diagnosis was multiple descubiti and his plan was for local wound care with Accuzyme to facilitate enzymatic debriding of the Stage IV decubiti to the right heel. Said treatment plan, which included chemical debridement and daily dressing changes, was ordered, effective August 4. In addition, pressure-relieving devices were used on both heels. On August 12, treatment of the coccyx decubitus was discontinued, as the ulcer had resolved.

On August 25, Dr. Fuzaylov examined decedent and completed a monthly progress note. As of that time, the ulcers showed no signs of improvement, but Dr. Fuzaylov noted no signs of infection. On August 31, in response to a call from a nurse, he ordered a culture and a surgical consult. Dr. Lubeski ordered her admission to St. John's on September 3. A calcaneotomy, and subsequently, an above-the-knee right amputation, was performed.

Decedent was returned to Resort on September 20, 2004. She was transferred to St. John's for removal of a thermometer cap on October 8, readmitted to Resort on October 13, and returned to St. John's on October 20, where, on October 23, 2004, she died.

Plaintiff commenced this action on or about September 1, 2006 by filing a Summons and Verified Complaint. Issue was joined as to Dr. Fuzaylov on October 18, 2006 by service of an answer wherein Dr. Fuzaylov denied all material allegations. Plaintiff filed a note of

issue on November 12, 2008. Discovery appears to have been completed. Plaintiff has discontinued the above-captioned lawsuit against Dr. Natalenko, Dr. Lubeski, St. John's, Peninsula, and Dr. Lawrence P. Horl, a podiatrist who was consulted at Peninsula to treat decedent's pressure ulcers and who performed the calcaneotomy that revealed the underlying gas gangrene that led to the amputation. As Resort has not moved for summary judgment, plaintiff directs her allegations on the present motion solely as to the negligence of Dr. Fuzaylov.

CONTENTIONS

Defendant

(a) Lack of capacity to sue

In support of that branch of its motion to dismiss the complaint under the provisions of CPLR 3211(c), defendant, referring to Felder's Petition for Letters of Administration, contends that her authority thereunder was limited to representing the decedent's estate "[t]o prosecute a cause of action for personal injuries and pain and suffering arising out of the negligence of Resort Nursing Home." It further cites the Decree Appointing Administrator dated April 21, 2005, which ordered that "the authority of such representative(s) be restricted in accordance with . . . the limitation, if any, which appears immediately below: in the Petition for Letters of Administration with Limitations. Defendant thus argues that based on

plaintiff's self-limiting authority to sue only Resort, plaintiff lacks capacity to sue him.²

(b) Appropriateness of treatment

Relying on his own deposition testimony and on an affirmation of Robert Slutsky, M.D., Dr. Fuzaylov contends that summary judgment is warranted because the care rendered by him was in accordance with good and accepted medical practice, and did not cause or contribute to any injuries allegedly sustained by decedent.

Dr. Slutsky's affirmation

Dr. Robert Slutsky, in an affidavit dated April 9, 2009, states that he is board certified in Internal Medicine and Emergency Medicine, and is Subcertified in Geriatric Medicine, Cardiology, and Critical Care Medicine. He further states that he is fully familiar with the applicable standards of practice relating to the treatment of patients in nursing homes with skin ulcers. Upon his review of all pertinent medical records and discovery materials, he opines, within a reasonable degree of medical certainty, that Dr. Fuzaylov rendered treatment to decedent which was in accordance with generally accepted medical practices, and that nothing Dr. Fuzaylov did or failed to do proximately caused the alleged injuries or damages.

Dr. Slutsky sets forth Ms. Pek's medical history as recited above, stating that she developed pressure sores while a patient at St. John's from April 27, 2004 through May 10, 2004. Upon her return to Resort, he alleges that she was in significantly more debilitated condition due to her deterioration – she was now immobile and incontinent, adding to her

²Defendant pled the defense of lack of capacity as an affirmative defense.

underlying condition of congestive heart failure, peripheral vascular disease, dementia, diabetes, and hypertension – and for that reason, despite the efforts of Dr. Fuzaylov and Resort, they were unable to prevent the spread and development of decubitus ulcers.

Dr. Slutsky opines that the healing rates for pressure sores are often exceedingly slow, and relatively resistant to most therapeutic interventions, and that they often occur in terminally ill patients where the goals of care limit the preventative procedures directed at pressure wounds. He indicates that “many studies” have shown that attention to specific details lower the amount and frequency of pressure wounds in acute and chronic care facilities, including (1) careful attention to turning and positioning; (2) specialty beds created to reduce the skin surface pressure; (3) special bony protectors such as for the heel and bony prominences; (4) reduction of moisture; (5) improvement in nutrition; (6) encouraging mobility; and (7) delineation of risk factors and high-risk patients. Noting that Ms. Pek developed ulcers while at St. John’s from April 27 - May 10, 2004, and that she developed additional ulcers while hospitalized at Peninsula from May 16 - June 4, 2004, Dr. Slutsky opines that decedent met every high-risk category for sores, and her “Braden Risk Prevention Score” (for pressure ulcers) was severely reduced. In rejecting the specific claims as set forth in plaintiff’s bill of particulars, he finds that decedent’s nutritional and metabolic (diabetic) health was carefully planned and well met, and that at times she had a “Foley” placed to minimize local pressure, plans were made and instituted for wound dressing/medication,

attempts to transfer/ambulate and reposition were done, and appropriate consults were ordered by Dr. Fuzaylov and done.

As to the development of ulcers through the period between April 27 to May 10, 2004, Dr. Slutsky opines that same can be ascribed to decedent's immobility, poor circulation and reduced cardiac output in conjunction with diabetes, and that the gas gangrene resulting in the amputation was provoked by her underlying diabetes and peripheral vascular disease (PVD). He states, in summary, that decedent's underlying medical problems and her inability to assist in her own care limited the ability of the staff to heal her wounds (although several did improve). He characterizes the attempts made to address and treat her sores as appropriate, and opines that fact that the attempts failed speaks more to her condition than anything else.

Based upon the foregoing submission, defendant has established, prima facie, that as a matter of law, he did not depart from the accepted standards of care and that, in any event, any alleged acts and omissions were not the proximate cause of decedent's injuries (*see Hernandez v Hochman*, 56 AD3d 427 [2008]). Accordingly, plaintiff is required to adequately rebut such showing by raising an issue of fact as to the existence of such departure, as well as a nexus between the alleged malpractice and the patient's injury (*see Merritt v Saratoga Hosp.*, 298 AD2d 802 [2002]).

Plaintiff

The essence of plaintiff's claim is that Dr. Fuzaylov failed to properly treat decedent's Stage II pressure ulcers, commonly referred to as blisters or abrasions, as found on her right foot, heel and leg, until they progressed to Stage IV ulcers, and then further failed to timely diagnose and treat a soft tissue infection of the ulcers until the infection spread to the bone, gas gangrene formed, and an amputation was the only way to save her life.³ In opposition to defendant's motion, plaintiff (1) relies on the deposition testimony of Dr. Horl, Dr. Lubeski, Dr. Natalenko and Nannette Legaspina, RN, and (2) provides an affirmation of her designated expert, a physician who states that he/she is Board Certified in Internal Medicine and has many years of experience in managing patients who were at risk for, or who developed, pressure ulcers, and who opines that Dr. Fuzaylov departed from good and accepted standards of care in a number of ways. Thus, the expert asserts that summary judgment must be denied as there is a sharp conflict between his/her findings and that of defendant's expert.

In addition, plaintiff contends that defendant's expert failed to consider the testimony of Dr. Lubeski and Lawrence P. Horl, DPM, when rendering his opinion, thus raising an issue of fact as to Dr. Fuzaylov's negligence. Finally, plaintiff rejects defendant's claim that

³In her bill of particulars, plaintiff alleges that Dr. Fuzaylov negligently treated decedent in that he failed to take into consideration her high risk factors for developing decubitus ulcers, that he negligently caused decedent to develop decubitus ulcers and/or pressure sores on her bilateral lower extremities and sacrum, and that he failed to provide proper medical management to prevent the progress of the ulcers.

she lacks capacity to sue, arguing that the terms of the Petition for Letters of Administration that was filed on her behalf included prosecution of “a cause of action for personal injuries and pain and suffering arising out of the negligence of Resort Nursing Home”, which would include the individual physicians and/or employees, including Dr. Fuzaylov.

Plaintiff's expert's affirmation

In setting forth his opinion, within a reasonable degree of medical certainty, that Dr. Fuzaylov committed multiple departures from customary and accepted medical practice in the treatment of decedent's pressure ulcers of her right foot and heel leading to her above-the-knee amputation, he/she indicates that he/she reviewed all of the relevant hospital and nursing home records, the deposition testimony, pressure ulcer regulations from St. John's and Resort, and the various motions for summary judgment and accompanying expert's affirmations. Plaintiff's expert sets forth, as specific departures:

(a) failing to order the use of suspension boots to off load pressure from the ulcers, contributing to the progression of the ulcers from a Stage II to a Stage IV;

(b) failing to order a podiatry (or similar) consult to manage her Stage II ulcers at the time of decedent's readmission to Resort on June 4, 2004, in contravention of the recommendations of the doctors managing her care at Peninsula;

(c) failing to order a surgical consultation at the end of June, when the ulcers first progressed to a necrotic Stage IV, preventing appropriate treatment;

(d) failing to follow up on the requested vascular consultations to evaluate and recommend treatment for decedent's PVD;

(e) only examining decedent on two occasions, the mandated monthly assessments, despite her multiple chronic medical conditions and infected Stage IV ulcers; and

(f) failing to timely diagnose and treat the foot and heel infections that developed in early August. By the time the infection was diagnosed in September, what had been a soft tissue infection had spread into the bone, had become gangrenous, and decedent was septic, requiring amputation to save her life.

In the expert's opinion, to a reasonable degree of medical certainty, these departures deprived Ms. Pek of a substantial opportunity to heal her ulcers before they became infected, permitted the infection to go untreated, and proximately caused the amputation of her leg.⁴

In setting forth the relevant history of the care rendered to Ms. Pek, the expert cites to Dr. Natalenko's testimony that it was the primary care physician, Dr. Fuzaylov, who was responsible for following up to ensure that the vascular and podiatric consultations, ordered by her on June 25, 2004, were held, but no vascular consultation was, in fact, held. He alleges that she was not seen by a podiatrist until early August, and according to the record, that visit was for the specific purpose of cutting her toe nails and not for the care or assessment of the decubitus ulcers. He further alleges that: (1) during the month of June, the ulcers were treated with betadine dressing but there are no progress notes from defendant,

⁴The expert opines that there were also departures by Resort, but was advised by counsel that such discussion is not germane to the instant motion.

and he did not see the patient; (2) on July 7, after reviewing the Doppler report indicating bilateral occlusive disease in the superficial femoral arteries, defendant wrote an order for vascular consultation to evaluate her PVD; (3) despite her having three Stage IV ulcers at that time, defendant neither visited to follow up to ensure that the vascular consult was held, instead managing decedent's care on the basis of a record review only; (4) examined Ms. Pek for the first time on July 28, almost two months after her readmission to Resort, at which time he dictated his first progress note, which contained his first descriptions of the Stage IV ulcers; and (5) first requested a general surgical consultation on August 2, but again failed to follow-up on his request for a vascular consultation to evaluate the PVD.

The expert further alleges that on August 6, there was a significant change with respect to the ulcers, including a foul odor, redness, and exudate. Although the weekly nursing descriptions, as reported, remain essentially unchanged, there is no significant reported change in treatment, no antibiotics are prescribed, and the vascular consult is not yet held. According to the expert, Dr. Fuzaylov does not see decedent again until August 25 for a regularly scheduled monthly assessment, but did not order a culture of the exudates, antibiotics or request a further consultation with Dr. Lubeski, who saw her on August 4.

Plaintiff's expert further indicates that on August 31, Dr. Fuzaylov was called by Wound Care Nurse Legaspina, regarding the right heel, that her note mentions a poor prognosis regarding the Stage IV ulcer and drainage, that Dr. Fuzaylov advises her to get a culture and sensitivity and arrange for a surgical consultation, but does not himself see the

patient, and that the culture reflected a foot infected with three organisms. Following her readmission to St. John's on September 3, she is found to be septic, the soft tissue infection at Resort was found to have spread to the calcaneus, two tendons were exposed, and Dr. Horl's discovery of underlying gas gangrene required amputation above the knee. He alleges that the fact that the left heel ulcer resolved following decedent's return to Resort indicates that there was adequate blood flow to the extremities to permit an uninfected pressure ulcer of the heel to resolve.

The expert states that pressure ulcers must be observed on a daily basis for signs of infection. If infection of the soft tissue is not treated effectively, it can spread into the underlying bone and can progress to gangrene. Timely consultations with a vascular surgeon are indicated so that the extent of the diminished circulation in a patient at risk can be adequately evaluated.

In discussing the various departures committed by defendant, plaintiff's expert, inter alia, notes that while Dr. Horl, the podiatrist at Peninsula who ordered the suspension boots, testified that it was necessary to keep the pressure off the heels so that the ulcers would not worsen, and the Rules and Regulations at St. John's likewise provide for their use, Dr. Fuzaylov failed to order them for decedent in June, when the ulcers were still at Stage II; that the ongoing pressure contributed to the progression of the ulcers to Stage IV, and Dr. Fuzaylov thus departed from acceptable standards of care.

Additionally, plaintiff's expert, discussing defendant's apparent failure to evaluate the decedent personally and follow through in obtaining a vascular consultation after receiving the results of the Doppler study and knowing, as of July 7, of her stage IV ulcers and PVD, cites defendant's deposition testimony that he "was expecting to get an opinion of the vascular surgeon what would be the best approach in treatment for this patient," and challenges the assertion that it was diminished circulation that caused the amputation where such testimony is tantamount to an admission that he did not do everything he could have done to save the leg. Similarly, he charges that the enzymatic debridement that Dr. Lubeski recommended on August 4 should have been ordered a month earlier, and that the clear signs of progression of infection in the ulcerated tissue mandated earlier and more frequent visits by defendant. In further support of said allegation, the expert refers to Resort's rules, which state that a physician is expected to round weekly on his patients with pressure ulcers.

Referring to the events of August 31, when defendant received a call from the treatment nurse with a report that she believed that there is a poor prognosis, the expert characterizes, as a departure, defendant's failure to see his patient. He states that at that time, Ms. Pek likely required hospitalization, intravenous antibiotics and debridement, but was not transferred to St. John's until September 3, 2004, following Dr. Lubeski's evaluation, at which time the presence of gas gangrene mandated amputation. In the expert's opinion, the delay in diagnosis and treatment of the soft tissue infection until it involved bone deprived Ms. Pek of any chance to save her leg, and to a reasonable degree of medical certainty, had

the infection been diagnosed in early August, and aggressive treatment instituted, she would have had a reasonable chance to avoid spread of the infection to her bone and amputation of her leg.

The expert cites Dr. Horl's testimony that the purpose of the September 9, 2004 partial calcaneotomy and surgical debridement was to "resect the infected tissue" and "take out all the bone that's infected so . . . she has a chance of healing," in support of his/her opinion that, to a reasonable degree of medical certainty, if the foot and heel had not become infected, the amputation would not have been necessary.

Finally, the expert sets forth his/her disagreement with several conclusions reached by Dr. Slutsky, particularly his attempt to minimize Dr. Fuzaylov's involvement and responsibility in the decedent's care under the circumstances, noting Dr. Fuzaylov's testimony that he would be present at Resort at least twice a week for six to eight hours a day. He also cites: (1) the Resort Rules and Regulations which provide for weekly pressure rounds to include the primary physician; (2) the testimony of Treatment Nurse Legaspina that the doctors would do such weekly rounds and would check the treatment book maintained at the nursing station to keep up with their patients' ulcers; and (3) the record of changes in decedent's condition indicating signs of infection which were recorded in the treatment book on August 6, regarding which Dr. Slutsky states that, on his regularly scheduled visit of August 25, Dr. Fuzaylov "noted no signs of infection."

He/she also assails Dr. Slutsky's opinion placing the blame for the vascular consult not being held on the nursing staff, citing the afore-mentioned testimony of Dr. Natalenko, also a physician at Resort, that the primary care physician had the responsibility to see that an order for a consultation was carried out. With respect to Dr. Slutsky's opinion that the need for amputation was caused by decedent's diabetes and PVD, plaintiff's expert asserts that he fails to address the evidence, including the St. John's record and the testimony of Dr. Lubeski and Dr. Horl, that the serious soft tissue infection with its sequellae necessitated the amputation. While he/she agrees that diminished circulation to decedent's legs would hinder the healing process of her pressure ulcers, he/she opines, within a reasonable degree of medical certainty, that the catalyst for development of the gangrene was the infection, suggesting that if the PVD was, as stated by Dr. Slutsky, the sole cause for the amputation, the outcome should have been the same for the left leg.

Capacity to sue

Plaintiff rejects defendant's claim that she lacks capacity to maintain the present lawsuit, arguing that defendant points to no authority which states that a Petition for Letters of Administration must specify the names of each individually named physician against whom the plaintiff contemplates commencing suit. She further asserts that it is the Decree, as opposed to the Petition, which is controlling, and that the only restriction placed upon plaintiff, as Administratrix, by the language of the Decree, pertains to the collection of any assets derived from any cause of action until further order of the Surrogate and upon filing

a satisfactory bond. She thus maintains that she was fully qualified to commence the present lawsuit.

Dr. Fuzaylov's reply

In his reply papers, Dr. Fuzaylov rejects each of the departures as alleged by plaintiff's expert.

In response to the allegation that he deviated from accepted standards of care by failing to order the use of suspension boots to off-load pressure from the ulcers in June, 2004, Dr. Fuzaylov argues that the plaintiff's expert disregards evidence which establishes that he was not responsible for ordering their use, citing the testimony of Dr. Natalenko:

Q [to Dr. Natalenko]: As a doctor do you order pressure relieving devices for patients. . . or is that something that's done by other people at the nursing home?

A: It's done by other people.

Defendant further points to Legaspina's testimony, who, when asked whether a charge nurse had the authority to decide what type of pressure relieving device was used, testified "It's usually the rehab nurse for pressure relieving devices."

As to the claimed departure of failing to order a consult to manage Ms. Pek's ulcers at the time of her readmission to Resort on June 4, 2004, defendant argues that Dr. Rajesh Rohatgi readmitted Ms. Pek to Resort and performed the admitting examination, and thus, according to the testimony of Dr. Horl, "would. . . call the consult if he felt it was necessary."

He contends that plaintiff's expert fails to acknowledge Dr. Rohatgi's responsibility for making appropriate orders in this regard.

Defendant further maintains, in reply, that plaintiff's expert was in error to argue that they were obligated to follow Peninsula's discharge instructions, since, according to Dr. Horl's testimony, said instructions stated that pressure ulcer care was to be carried out according to the nursing home's protocols. He argues that the expert's allegation that it was a departure for Dr. Fuzaylov not to order a surgical consultation at the end of June ignores the "undisputed" fact that Dr. Natalenko order a vascular surgery consultation.

Addressing the expert's allegation that it was a departure for defendant not to follow up on the two requested vascular consultations (one of defendant, the other of Dr. Natalenko), defendant refers to the deposition testimony of Nurse Svetlana Poltilova, who testified that at Resort, the nursing secretary, as supervised by the nursing supervisor, was responsible for contacting a particular physician. Noting that plaintiff's expert expressly reviewed the testimony of the witness prior to preparing his or her affirmation, defendant asserts that the claimed departure is based on invalid conclusions and must be rejected.

Defendant further disputes the opinion of plaintiff's expert stating that it was a departure for Dr. Fuzaylov to only examine decedent twice. He argues that said assertion fails to respond to Dr. Slutsky's description of defendant's duties, which, as primary physician, "were to manage the patient's medical conditions, make referrals as needed and respond to treatment requests made by the nursing staff. He would see patients generally on

a monthly basis, unless another physician was covering for him. As a part time physician at Resort, Dr. Fuzaylov was not involved with many events in Ms. Pek's treatment." He further disputes plaintiff's expert's reliance on the Rules and Regulations.

Defendant further rejects plaintiff's assertion that, based upon the testimony of Legaspina, it was established the doctors would do weekly rounds and that defendant did not attend these rounds. He argues that Resort's records fail to establish that any such rounds took place at Resort, since the only writing which appears on any treatment record pages is by the treatment nurse, and "if the supervising nurse, dietician and physician participated than it is likely that they would have signed off."

Defendant further rejects plaintiff's expert's opinion that it was a departure for him to fail to timely diagnose and treat the foot and heel infections that developed in early August of 2004, observing that Dr. Lubeski, in response to defendant's request for a surgical consult, noted no signs or symptoms suggestive of an infection on August 4, 2004; that although plaintiff's expert asserts that infections were present on August 6, there is no evidence that Legaspina notified any physician of a change in the character of decedent's pressure ulcers despite her testimony that it was her practice to do so.

As to proximate cause, defendant charges that plaintiff's expert, in stating that Dr. Slutsky states "PVD was the sole cause for the amputation," misrepresents Dr. Slutsky's opinion. He notes that Dr. Slutsky stated that "[i]t is my opinion that [the required debridement and amputation] can be ascribed to the patient's immobility, poor circulation

and reduced cardiac output in conjunction with diabetes[;] [t]he gas gangrene resulting in her amputation was provoked by her underlying diabetes and PVD. Without these latter two factors, these poor results would not have ensued,” thus explicitly opining that PVD was not the sole cause of the amputation.

DISCUSSION

Capacity to sue

That branch of defendant’s motion seeking dismissal under CPLR 3211(a)(3) for lack of capacity is devoid of merit. As properly contended by plaintiff, the language of the Surrogate’s Decree and the Letters of Administration issued pursuant thereto only required her to notify the Surrogate of the index number, county and title of any action commenced by her, and restricted plaintiff, as Administratrix, from collecting any assets derived from any cause of action until further order of the Surrogate and upon filing of a satisfactory bond. Her power to commence actions was not limited in any way (*see Haydamach v State*, 56 AD3d 612 [2008]). Accordingly, said branch of defendant’s motion is denied.

Summary judgment

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). In medical or dental malpractice cases, where the physician satisfies his or her initial burden of proof on the motion, a plaintiff, in opposition to a defendant’s summary judgment motion,

must submit evidentiary facts or materials to rebut the prima facie showing by the defendant that he or she was not negligent in treating a plaintiff or that his or her negligence was not the proximate cause of the injury so as to demonstrate the existence of a triable issue of fact (*see Boz v Berger*, 268 AD2d 453 [2000]).

The elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence, and that such departure was a proximate cause of injury or damage to the plaintiff (*see Cholewinski v Wisnicki* 21 AD3d 791 [2005]; *Amsler v Verrilli* 119 AD2d 786 [1986]).

Here, defendant has established his prima facie entitlement to judgment as a matter of law. Through the affirmation of Dr. Slutsky, defendant has demonstrated that decedent, who developed ulcers while at St. John's from April 27 through May 10, 2004, and while hospitalized at Peninsula from May 16 through June 4, 2004, met every high-risk category for sores; that decedent's nutritional and metabolic (diabetic) health was carefully planned and well met, that at times she had a "Foley" placed to minimize local pressure, plans were made and instituted for wound dressing/medication, attempts to transfer/ambulate and reposition were done, and appropriate consults were ordered by Dr. Fuzaylov and done. However, Dr. Slutsky alleges that despite all efforts made by Dr. Fuzaylov and the Resort co-defendants, they were unable to prevent the spread and development of decubitus ulcers due to decedent's then-advanced state of medical debilitation. Similarly, it is Dr. Slutsky's stated opinion that the gas gangrene resulting in the amputation was provoked by decedent's

underlying diabetes and PVD, and that “[w]ithout these later two factors, these poor results would not have ensued.”

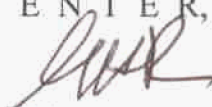
Thus, the burden shifts to plaintiff to produce evidence to raise a material issue of fact.

Plaintiff has met her burden of raising an issue of fact in opposition to defendant’s motion. Where an attending physician orders a treatment for a regimen for a person who, while staying in a medical facility, develops bedsores, and there is a factual disagreement over whether the patient was properly ministered to, “the ultimate responsibility for a patient’s treatment is borne by [her] physician” (*Cornish v DePalma*, 210 AD2d 35 [1994]; *but see Gamiel v University Hospital*, 216 AD2d 80, 81 [based upon evidence adduced at trial, including expert testimony, Appellate Division reversed trial court’s granting of motion to set aside verdict in defendant physician’s favor, finding language of *Cornish* inapplicable]).

In the instant case, plaintiff’s allegations against Dr. Fuzaylov, as Ms. Pek’s primary physician, stem from the negligent care and treatment he rendered to Ms. Pek during the period from June 4 to September 4, 2004 while admitted to Resort. The gravamen of her cause of action is that the multiple risk factors that made Ms. Pek susceptible to developing pressure ulcers – ulcers which were already present on June 4, 2004 when she was readmitted to Resort – were known to Dr. Fuzaylov, who was on the premises two days per week, and required frequent, meticulous and aggressive treatment to insure proper healing. Each of the six departures alleged by plaintiff’s expert are directed toward Dr. Fuzaylov’s negligent

treatment of decedent in his role as Ms. Pek's primary physician, alleging that he deviated from accepted medical practice in failing to effectively manage her deteriorating condition both by rendering inadequate care in his personal capacity, and in failing to follow-up in those instances where he issued directives delegating responsibilities. Although defendant's expert sharply disputes such allegations, and further rejects defendant's actions as proximately causing decedent's injuries, summary judgment cannot be granted where there is a factual disagreement over whether the decedent was properly ministered to (*see Cornish*, 210 AD2d at 35). In this regard, it is well-settled that "[s]ummary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution" (*Shields v Baktidy*, 11 AD3d 671, 672 [2004] [citations omitted]; *see also Feinberg v Feit*, 23 AD3d 517, 519 [2005]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2003]). Moreover, in general, causation is a factual issue to be resolved on a case-by-case basis by the fact finder (*see Eiseman v State of New York*, 70 NY2d 175, 187 [1987]; *Brown v Bowman*, 42 AD3d 390 [2007]). Accordingly, defendant's motion for summary judgment is in all respects denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

HON. GERARD H. ROSENBERG
J. S. C.