

Rhymes v Patel
2015 NY Slip Op 30368(U)
February 6, 2015
Supreme Court, Bronx County
Docket Number: 309692/09
Judge: Stanley B. Green
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

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MAE RHYMES, as the Administratrix of the Estate
of BEVIA RHYMES,

INDEX No. 309692/09

Plaintiff(s),

- against-

HEMANT K. PATEL, M.D., HARMEET SINGH,
M.D., VINOD G. BHAGAT, M.D. and HEMANT K.
PATEL, M.D., P.C.

Defendant(s)

DECISION

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HON. STANLEY GREEN:

The motion by Hemant K. Patel, M.D., Hemant K. Patel, M.D., P.C. and Vinod G. Bhagat, M.D. (Patel/Bhagat) is hereby consolidated for decision with the motion by Harmeet Singh, M.D. and upon consolidation, the motions are granted to the extent that: (1) plaintiff's Third Cause of Action, for lack of informed consent, is dismissed; (2) plaintiff is precluded from relying on the doctrine of res ipsa loquitur; (3) all claims other than the alleged failure to order or refer decedent for a CT scan of her chest are dismissed; (4) all claims against Dr. Singh for treatment rendered on October 30, 2006 are dismissed; (5) all claims against Dr. Patel, individually, are dismissed; and (6) all claims against the Patel PC of vicarious liability based on treatment rendered by Drs. Singh and Bhagat prior to May 30, 2007 are dismissed. (Plaintiff previously withdrew all claims against Dr. Singh for treatment rendered on May 12, 2007).

Plaintiff commenced this action to recover damages for personal injuries and wrongful death of decedent Bevia Rhymes, allegedly due to defendants failure to perform or order

radiological studies which would have revealed decedent's primary lung cancer before she developed metastatic cancer.

Decedent was first treated at the Hemant K. Patel, M.D., P.C. (Patel PC) in 1995. From 1997 to 2000, she was treated at Bronx Lebanon Hospital, then in 2000, she returned to the Patel PC and continued to receive routine medical care there until August 2009. She was treated for various ailments by various physicians, including Dr. Singh (a pulmonologist), who saw her on October 30, 2006, May 12, 2007 and November 9, 2007, Dr. Patel (an internist), who last treated her on February 23, 2007, and Dr. Bhagat (an internist), who treated her almost exclusively from November 2007 through August 2009.

Decedent was a cigarette smoker, one pack per day (1PPD) for 25 years before quitting in 2000. In January 2006, decedent presented to Dr. Patel with complaints of dyspnea (shortness of breath). He suggested that she undergo a pulmonary function test (PFT) to rule out chronic obstructive pulmonary disease (COPD). On February 23, 2006, Dr. Patel performed the PFT in his office. His preliminary diagnosis was COPD. He prescribed Spiriva, an inhaled bronchodilator that relaxes muscles in the airway and increases air flow to the lungs. A final interpretation, rendered by Dr. Singh, was that the PFT revealed moderately severe obstructive ventilatory impairment, which confirmed the diagnosis of COPD.

Decedent's first physical visit to Dr. Singh was on May 12, 2006, when she was treated for dermatologic complaints. Decedent's next visit to Dr. Singh was on October 30, 2006. At that time, decedent complained of shortness of breath. (Between May and October 2006, decedent was seen at the Patel PC five times, but made no complaints of dyspnea or shortness of breath). Dr. Singh noted decedent's medical history of gastroesophageal reflux disease (GERD),

hypertension, bronchial asthma, anxiety, and cigarette smoking 1PPD for 20-30 years with cessation several years prior. His physical examination of decedent revealed normal respiratory rate and clear percussion of the lungs bilaterally. Dr. Singh performed a repeat PFT and interpreted it as showing mild obstructive airway disease. Dr. Singh prescribed Albuterol, another inhaled bronchodilator, to address decedent's complaint of worsening dyspnea.

On November 21, 2006, decedent was seen by Dr. Patel with complaints of shortness of breath and "multiple somatic complaints. Possibly anxiety [disorder]." On November 27, 2006, decedent was seen by Dr. Bhagat with complaints of shortness of breath, but the symptoms were improving with exercise. (Between December 2006 through October 30, 2007, decedent was seen at the Patel PC twelve times for various complaints, none of which were lung-related). On February 20, 2007, decedent was seen by Dr. Patel with complaints of nasal congestion, hoarseness and sore throat of three days duration. This was her last visit with Dr. Patel.

On October 30, 2007, decedent was seen at the Patel PC with complaints of dyspnea that was worse with walking and exertion after two blocks. She reported that it began "approximately one week ago." Decedent was given a referral to a pulmonologist for a PFT and an EKG was performed. On November 9, 2007, decedent presented to Dr. Singh. She informed him that the "dyspnea began the past year." Dr. Singh performed a PFT in the office. His impression was that the test revealed a moderately severe obstructive impairment.

On November 14, 2007, decedent was seen by Dr. Bhagat with complaints of a right ear infection and nasal congestion, but no lung-related complaints. From that day until her final visit to the Patel PC on August 11, 2009, decedent was treated almost exclusively by Dr. Bhagat and at those visits, she was treated for various complaints, but none of them were lung-related.

On August 23, 2009, decedent was admitted to the Albert Einstein-Jack Weiler Hospital through the emergency room for complaints of headaches occurring on and off over eight months. A CT scan revealed multiple dense lesions bilaterally and a chest x-ray revealed a right retrocardiac mass in the right lower lobe. She was diagnosed with metastatic lung cancer. Decedent passed away on April 9, 2010.

Dr. Patel, Dr. Bhagat and the Patel PC seek dismissal of the complaint and all cross claims against them on the ground that the care and treatment they provided to decedent was at all times within good and accepted standards of practice and did not cause or contribute to the claimed injuries or death. They also contend that: (1) plaintiff cannot establish a cause of action for lack of informed consent; (2) the doctrine of res ipsa loquitur cannot be applied in this case; (3) any claims related to treatment rendered prior to May 2007 are barred by the statute of limitations; (4) Dr. Patel cannot be held personally liable for the alleged negligence of co-defendants; (5) the Patel PC cannot be held vicariously liable for the alleged negligence of Dr. Singh, if any, on November 9, 2007 because he was not an employee of the Patel PC at that time; (6) all claims alleged in the bills of particulars, such as negligent hiring and supervision, failure to perform chest x-rays and violation of unnamed statutes, ordinances and regulations, which are not addressed by plaintiff's expert, are waived; and (7) the remaining claim set forth in plaintiff's expert's opinion, that defendants failed to order a chest CT scan, must be dismissed because it is a new claim that was not alleged in the bills of particulars.

In support of the motion, Drs. Patel and Bhagat submit documents and testimony which show that defendant physicians were licensed to practice medicine and qualified to perform the duties they performed at the Patel PC, that Dr. Singh was last employed by the Patel PC in early

2007, and subsequently worked there as an independent contractor and that Dr. Patel last treated decedent in February 2007, more than 2 ½ years prior to commencement of this action on November 30, 2011. They also submit the affirmation of Dr. Douglas Prisco, who is Board Certified in Internal Medicine with a sub-specialty certification in Pulmonary Disease.

Dr. Prisco opines that Dr. Patel, Dr. Bhagat and the Patel PC did not deviate from good and acceptable medical practice in their care and treatment of decedent, that Drs. Patel and Bhagat were licensed and possessed the skill and training necessary to treat a patient as an internist, and Dr. Singh possessed the skill and training necessary to treat a patient as a pulmonologist. Dr. Prisco also opines that decedent was not misdiagnosed with COPD, that she was not inappropriately treated with Albuterol and Spiriva and that doctors at the Patel PC ordered the recommended periodic screening testing during the course of the treatment rendered to decedent. Dr. Prisco also opines that Drs. Patel and Bhagat had a right to rely on the diagnosis rendered by Dr. Singh, decedent's treating pulmonologist, and that just because a patient exhibits lung related symptoms, such as difficulty breathing, shortness of breath and chest tightness on inspiration, it cannot be assumed the symptoms are related to lung cancer.

Dr. Prisco states that no screening test for the early detection of lung cancer was recommended by the American Cancer Society the American College of Chest Physicians or any other medical/scientific organization and that, even in high-risk populations, no screening modality has been shown to alter mortality outcomes.

Dr. Singh seeks dismissal of all claims against him on the grounds that the care and treatment he provided to decedent was at all times proper and did not proximately cause or contribute to the claimed injuries or death. Dr. Singh also asserts that claims related to treatment

of decedent prior to May 30, 2007 are time-barred as there was no continuous treatment by him, continuous treatment is not alleged in the amended verified bill of particulars and plaintiff's opposition papers do not claim that the statute of limitations should be tolled as it relates to Dr. Singh.

In support of the motion, Dr. Singh submits his own affidavit, which shows that he terminated his employment with the practice in March 2007 and that he subsequently worked at the PC at the request of Dr. Patel, to assist in the examination and treatment of Dr. Patel's patients. Dr. Singh states that at no time was decedent his private patient nor did he consider himself to be her primary physician. Dr. Singh also submits the affirmation of Dr. Harry Steinberg, who is a Fellow of the American College of Physicians and is currently the Acting Chief of the Division of Pulmonary and Critical Care Medicine at Long Island Jewish Medical Center and North Shore University Hospital.

Dr. Steinberg opines that the care and treatment rendered by Dr. Singh was within good and accepted medical practice and did not proximately cause or contribute to the claimed injuries. He opines that decedent was correctly diagnosed with COPD based on the results of the February 23, 2006 PFT, that the initiation of Spiriva for COPD was appropriate and that no further treatment, diagnostic testing, medications, recommendations or referrals were required by the standard of care as of February 23, 2006. Dr. Steinberg also opines that the treatment rendered by Dr. Singh on October 30, 2006 and November 9, 2007 was proper and that no further treatment, diagnostic testing medications or referrals were medically indicated or required by the standard of care during the time Dr. Singh treated decedent. Dr. Steinberg states that the standard of care did not require a physician such as Dr. Singh to perform a chest x-ray on a

patient with presenting symptoms and a medical history such as decedent's on October 30, 2006 and November 9, 2007 and that a chest x-ray would only be required if the patient had also reported hemoptysis (coughing up blood), chest or other breathing pain, significant weight loss and /or an unrelenting cough, none of which was present on either date. Dr. Steinberg cites medical literature which establishes that screening with chest radiography has no proven effect on lung cancer incident or mortality. He also notes that after the last office visit on November 9, 2007, decedent continued to undergo 21 months of treatment at the Patel PC, without respiratory complaints, before being diagnosed with lung cancer in August 2009.

Plaintiff contends that defendants have failed to meet their prima facie burden on the motion because their experts opine that decedent was not "mis-diagnosed with COPD", ignore inaccuracies in the records which documented a history of "no past smoking", cite the American Cancer Society: Cancer Screening in the United States for 2009" article for the principle that testing for the early detection of lung cancer in *asymptomatic individuals* is not recommended (emphasis added), yet ignore the fact that decedent was symptomatic and he notes that "Doctors at the Patel MD PC ordered recommended periodic screening testing, but does not state whether such screening enabled doctors at the Patel PC to diagnose the decedent's primary lung cancer and fails to refute plaintiff's allegations that defendants failed to order radiology studies that would have revealed decedent's primary lung cancer before she developed metastatic cancer.

Plaintiff also contends that Patel PC has failed to establish that Dr. Singh was an independent contractor for whom it cannot be held vicariously liable.

In opposition to the motions, plaintiff submits the affirmation of Dr. Bottino, who opines that Dr. Patel, Dr. Bhagat, Dr. Singh and the Patel PC departed from good and accepted standards

of medical care and practice by failing to refer decedent for a CT scan of the chest that would have revealed a diagnosis of primary lung cancer and that as a result, decedent sustained stage four lung cancer with metastasis to the lymph nodes, right posterior sixth rib and brain, resulting in her death on April 9, 2009.

Citing medical literature, Dr. Bottino explains that it is “well documented that smoking increases your risk for lung cancer”, that COPD “is associated with an increased risk for lung cancer”, and that Spirometry (PFT) has “broad utility in identifying smokers who are at greatest risk for respiratory complaints and greatest benefit from prioritized screening, and dyspnea and abnormal spirometry remain independently associated with cancer.” Dr. Bottino opines that in light of decedent’s risk of lung cancer stemming from her smoking 1PPD for 20-30 years, her repeated complaints of exertional dyspnea, the diagnosis of COPD, and her abnormal PFT’s, the standard of care required that defendants order a CT scan of the chest to rule out lung cancer.

Dr. Bottino opines, based on studies which show that adenocarcinoma has a doubling time of approximately 250 days, that decedent’s tumor would have been detectable by CT scan as early as the first PFT studies conducted by Dr. Patel. He opines that had Dr. Patel ordered a CT scan of the chest at that time, had Dr. Singh ordered a CT scan of the chest at the time he performed the PFT’s, and had Dr. Bhagat ordered a CT scan of the chest at the times he treated decedent up to February 11, 2008, decedent’s primary lung cancer would not have metastasized and, with surgery and adjuvant therapy, she would not have died on April 9, 2010.

In a medical malpractice action, a defendant physician establishes prima facie entitlement to summary judgment when he establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of

the injuries alleged (Roques v. Noble, 73 AD3d 204). Once the defendant has met his prima facie burden, the burden shifts to the plaintiff to present competent evidence sufficient to show that the defendant departed from accepted standards of practice and that such departure was a proximate cause of the plaintiff's injuries (Kafka v. New York Hospital, 228 AD2d 332). In order to sustain this burden, the plaintiff must present expert testimony that the defendant's conduct constituted a deviation from the requisite standard of care (Berger v. Becker, 272 AD2d 565). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice do not suffice to defeat defendant physician's motion (Alvarez v. Prospect Hospital, 68 NY2d 320).

Despite plaintiff's contention to the contrary, the evidence presented is sufficient to establish, prima facie, that Dr. Patel, Dr. Singh, Dr. Bhagat and the Patel PC did not depart from good and accepted standards of medical care in their treatment of decedent and did not proximately cause the claimed injuries. Thus, the burden shifted to plaintiff to present competent evidence sufficient to raise a material issue of fact.

Initially, it is noted that plaintiff has not opposed defendants' motions insofar as they seek dismissal of the cause of action for lack of informed consent and contend that the doctrine of res ipsa loquitur is inapplicable to this case. Therefore, the cause of action for lack of informed consent is dismissed and plaintiff is precluded from relying on the doctrine of res ipsa loquitur. It is also noted that plaintiff has offered an expert opinion as to only one departure, the failure of Dr. Patel, Dr. Bhagat and Dr. Singh to order a CT scan of decedent's chest. Therefore all other claims, including the alleged failure to perform chest x-rays, are dismissed.

While plaintiff contends, citing Blaier v. Cramer (303AD2d 301), that the continuous

treatment doctrine tolls the statute of limitations against Dr. Patel with regard to his treatment of decedent on February 23, 2006, because he is the owner of the Patel PC and "continuous treatment may be provided by another practitioner who is acting as an agent of the first," this case is distinguishable from Blaier because Dr. Patel was not involved in the care and treatment of decedent at any time after he treated her for a runny nose on February 20, 2007. Therefore, Dr. Patel cannot be held personally liable for the acts of Dr. Singh or Dr. Bhagat under the continuous treatment doctrine. Furthermore, Dr. Patel cannot be held vicariously liable for the alleged acts or omissions of Dr. Singh or Dr. Bhagat, as the shareholder of a professional corporation cannot be held personally or vicariously liable for the malpractice of an other doctor that is an officer, director, shareholder or employee of the corporation (Hill v. St. Clare's Hospital, citing Connell v. Hayden, 83 AD2d 30). Accordingly, Dr. Patel's motion for summary judgment is granted to the extent that all claims against him, individually, are dismissed.

As to the Patel PC's contention that it cannot be held vicariously liable for the acts or omissions of Dr. Singh because he was an independent contractor, while vicarious liability generally depends on agency and control, apparent or ostensible agency has also been recognized as a predicate for malpractice liability when a patient, such as decedent, seeks medical care at a hospital or medical facility rather than from any particular physician (Mduba v. Benedictine Hosp., 52 AD2d 450). Accordingly, the Patel PC's motion is denied insofar as it seeks a ruling that it may not be held vicariously liable for the acts or omissions of Dr. Singh.

It is noted that plaintiff's expert opines that Dr. Singh departed from the standard of care on October 30, 2006. However, plaintiff's opposition papers do not address the continuous treatment doctrine with respect to Dr. Singh. Accordingly, Dr. Singh is entitled to dismissal of

any claims for treatment provided prior to May 30, 2007.

As to defendants' contention that plaintiff's remaining claim, the failure to order a CT scan of the chest must be dismissed because it is a new theory of liability that was impermissibly asserted in responsive papers, although the failure to order a CT scan of the chest is not specifically alleged in the bills of particulars, as the failure to perform a chest x-ray was, the failure to perform a CT scan of decedent's chest is encompassed within the allegations in the bills of particulars that defendants failed to determine the cause of decedent's complaints of exertional shortness of breath and failure to rule out potential etiologies, including lung cancer.

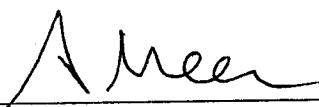
The case of Micciola v. Mittal (36 AD3d 869), which is cited by defendants, is distinguishable from the instant case because there, the court decided that the affidavit of the plaintiffs' medical expert was "conclusory, speculative and based on an incorrect understanding of the facts" because "Nowhere in the record was the plaintiff ever diagnosed with either "chronic obstructive pulmonary disease," "recurrent bronchitis," or "pulmonary osteoarthropathy," which the expert claimed are signs or symptoms of lung cancer. That is not the case here, where plaintiff not only had a history of smoking cigarettes 1PPD for 25 years, but also had been diagnosed with COPD and bronchitis, complained of dyspnea on exertion and had abnormal PFT's. In this case, the opinion of Dr. Bottino, that given decedent's medical history, diagnoses and complaints, defendants had a duty to order a chest CT scan to rule out lung cancer is sufficient to raise material issues of fact which preclude a grant of summary judgment to the Patel PC, Dr. Singh and Dr. Bhagat (Cregan v. Sachs, 65 AD3d 101).

It is noted that defendants contend that Dr. Bottino's opinion is based upon research and suggestions obtained from the Centers for Disease Control and the American Lung Association

made in 2012. However, the references in Dr. Bottino's affirmation to the CDC are cited with regard to the association between smoking cigarettes, the diagnosis of COPD and the increased risk of lung cancer. It is also noted that defendants' have not offered any expert opinion rebutting Dr. Bottino's opinion that a CT scan would have revealed the lung cancer if performed by defendants.

This constitutes the decision and order of the court.

Dated: February 6, 2015

A handwritten signature in black ink, appearing to read "A. Green", is written above a horizontal line.

STANLEY GREEN, J.S.C.