

Flowers v Altman

2015 NY Slip Op 32584(U)

December 21, 2015

Supreme Court, Erie County

Docket Number: 772/13

Judge: John M. Curran

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DAVID FLOWERS

Plaintiff

**MEMORANDUM
DECISION**

vs.

Index No. 772/13

DAVID J. ALTMAN, M.D.; ALTMAN
DERMATOLOGY, P.C. and ANIL K. MATHUR, M.D.

Defendants

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BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

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CURRAN, J.

Before the Court are defendants' motions for summary judgment.

Background

Plaintiff initially started treating with Dr. Altman in October of 2006 for various dermatology needs. In December of 2008 and December of 2009, plaintiff was treated for onychomycosis of multiple toenails (toenail fungus) on both feet. Plaintiff was next seen in

December of 2010 for complaints of age spots on the left temple, itchy arms and legs and a spot on the left chest.¹

Dr. Mathur was plaintiff's primary care physician from February of 1981 until early 2013. Plaintiff presented to Dr. Mathur on August 19, 2010 and November 19, 2010. Dr. Mathur's records from both visits indicate that there were no symptoms of peripheral arterial or vascular disease on those dates.²

Plaintiff returned to Dr. Mathur on January 27, 2011. During that visit, Dr. Mathur noted that plaintiff had a "blister on top of (L) 2nd toe 6 weeks ago" along with periodic pain. Dr. Mathur further noted "discoloration around L great toe and along medial aspect of foot" with no pain in the foot except for the second toe periodically. Dr. Mathur also observed patchy erythema (i.e., a red rash) on the dorsum, toe and along the medial aspect of the left foot. In light of those observations, Dr. Mathur suspected a fungal infection, prescribed Nizoral cream and referred plaintiff to a dermatologist.

Plaintiff then returned to Dr. Altman, his dermatologist, on January 31, 2011 with complaints of peeling feet. At that time, plaintiff was diagnosed with eczema, nummular/xerotic dermatitis secondary to soaps, and tinea pedis.

Plaintiff next saw Dr. Altman on July 25, 2011 with a complaint of a dark area under his left big toenail which had pain with pressure and some increased tenderness. Dr. Altman noted a paronychia (swelling and inflammation around the nail fold usually caused by

¹ Plaintiff's Bill of Particulars identifies the relevant treatment dates for Dr. Altman as follows: January 31, 2011, March 31, 2011, July 25, 2011, July 27, 2011, July 28, 2011 and August 1, 2011.

² Plaintiff's Bill of Particulars identifies the relevant treatment dates for Dr. Mathur as follows: January 27, 2011 through August 2, 2011.

an infection) of the left great toe with bilateral xerosis (but not red in color), a slight scaling and peeling of the feet and a subungual black/green color under the left big toenail. According to Dr. Altman, the symptoms and presentation were consistent with a combination of fungal infection and pseudomonas bacterial infection under the nail.

Between July 24, 2011 and plaintiff's next visit with Dr. Altman on August 1, 2011, there were several telephone calls between plaintiff and Dr. Altman's office. On July 27, 2011, plaintiff stated that his problem was getting worse and was advised to give the medication a chance to work and to call back on Monday (August 1, 2011) if the condition still was not improving. On August 1, 2011, plaintiff called to advise that there still had not been much change and to inquire whether he should come in for an appointment.

On August 1, 2011, plaintiff presented to Dr. Mathur requesting a "PPD test" for tuberculosis. According to Dr. Mathur, plaintiff made no complaints regarding his left toe or his lower extremities during this appointment. In fact, Dr. Mathur asserts that plaintiff made no complaints at all during this visit, so Dr. Mathur did not perform a full examination of plaintiff.

On August 1, 2011, plaintiff also returned to Dr. Altman with worsening of the left toe and foot, including increased tenderness and dark areas. Upon examination, Dr. Altman noted that the "dark area expanded over the left big toenail on to the distal nail fold and a necrotic and vascular pattern with a gray/black patters on the medial and dorsal left second toe and sides and dorsum of left great toe." Dr. Altman now believed that plaintiff's symptomology "involved the blood vessels, possibly a vascular/thromboembolic condition." According to Dr. Altman, he "advised plaintiff and his primary care physician of the seriousness of the change in diagnosis, that a vascular workup was required, and that if things progressed, he should go to the emergency room right away." Nevertheless, according to Dr.

Altman, plaintiff's symptoms did not warrant emergent treatment. Rather, he advised plaintiff "to see his primary care physician, Anil Mathur, M.D., as soon as possible." Dr. Altman sent a fax to Dr. Mathur that day referring plaintiff back to Dr. Mathur immediately for a vascular work-up. Dr. Altman had no further involvement in plaintiff's care.

Plaintiff did not return to Dr. Mathur's office after he left Dr. Altman's office on August 1, 2011. Instead, plaintiff contacted a surgeon, Dr. Buckley, who referred plaintiff to Kenmore Mercy Hospital for a duplex Doppler study on August 2, 2011, which confirmed occlusive/subocclusive arterial disease on the left with almost no blood flow in the left lower extremity. Following several further evaluations, on August 16, 2011 plaintiff ultimately underwent a left distal superficial femoral to posterior tibial artery bypass with Dr. Buckley. On September 19, 2011, plaintiff underwent amputation of the first through fifth toes of the left foot.

According to plaintiff, defendants' failures to timely recognize, diagnose and treat plaintiff's symptoms of peripheral arterial/vascular disease resulted in the loss of his left forefoot.

Discussion

In support of the motions, defendants submit the pleadings, bills of particulars, portions of the deposition testimony of the parties, portions of the medical records pertaining to the treatment of plaintiff and their own expert affidavits.

The bills of particulars contain broad allegations regarding defendants' alleged medical malpractice. Specifically, the bills of particulars allege in relevant part that defendants failed to perform a proper history; failed to perform a proper physical examination; failed to timely conduct a vascular exam; failed to timely conduct a pedal pulse assessment; failed to

timely diagnose vascular insufficiency; failed to diagnose Peripheral Arterial Disease; failed to timely and appropriately respond to problems; failed to provide appropriate treatment and follow up; failed to timely refer to a specialist; failed to timely schedule a vascular consult; failed to order appropriate diagnostic testing; failed to make an appropriate differential diagnosis; and misdiagnosed plaintiff's condition.

Altman

According to Dr. Altman, when plaintiff appeared in his office on January 31, 2011 with complaints of peeling feet, there were no lesions and no evidence supporting the need for an examination of plaintiff's pedal pulses (§ 13). Likewise, when plaintiff appeared in his office on July 25, 2011 with complaints of a dark area under his left big toenail, Dr. Altman "did not believe that [plaintiff] had signs or symptoms of peripheral arterial disease during this visit and there was no evidence supporting the need to check his pedal pulses" (§ 14).

Between July 24, 2011 and August 1, 2011, there were several phone calls between plaintiff and Dr. Altman's office. On August 1, 2011, plaintiff called to advise that there still had not been much change. Dr. Altman states that because he expected improvement by this point, his office scheduled plaintiff for an appointment that day. During that examination, plaintiff expressed concerned about the spreading of tenderness and dark areas on his left foot. On examination, Dr. Altman "noted that the dark area expanded over the left big toenail on to the distal nail fold and a necrotic and vascular pattern with a gray/black pattern on the medial and dorsal left second toe and sides and dorsum of left great toe" had developed (§ 17). According to Dr. Altman, "this was the first visit where [plaintiff's] symptoms were consistent with a vascular/thromboembolic issue." Dr. Altman states that he then urgently sent a note to the primary care physician advising of the seriousness of the change in diagnosis, that

a vascular workup was required, and that if things progressed, plaintiff should go to the emergency room right away. Nevertheless, Dr. Altman asserts that plaintiff's symptoms "did not warrant emergent treatment" at that time (§§ 18; 25).

Based upon the foregoing, Dr. Altman opines that he performed proper histories and physical examinations, properly diagnosed and treated plaintiff, and properly monitored plaintiff's condition (§§ 20-21). Dr. Altman further states that "it is not his general practice to include a check of pedal pulses as part of his dermatologic examination" and that he would only include a pulse check under certain circumstances, including but not limited to, patients with a history of blood clots, peripheral vascular disease, diabetes and autoimmune diseases, none of which were present in plaintiff (§§ 12; 22). Therefore, Dr. Altman opines "that at no time prior to August 1, 2011 was a vascular exam and/or a pedal pulse assessment required" (§ 22) and that he "diagnosed a vascular/thromboembolic issue as soon as possible under these circumstances" (§ 23). Finally, Dr. Altman opines that there is nothing he could or should have done differently and that "it is entirely speculative to claim that an earlier diagnosis would have improved the patient's outcome in any manner" (§ 33).

Mathur

According to Dr. Mathur, plaintiff's medical history did not place him at risk for developing peripheral vascular disease and plaintiff did not make any complaints or demonstrate any signs or symptoms suspicious for peripheral vascular disease when plaintiff presented to his office in 2010 and 2011. Specifically, Dr. Mathur notes that plaintiff did not have a history of diabetes, was not an active smoker (and had not smoked for over thirty years), had hypertension that was well-controlled with medication and was regularly being monitored for high cholesterol. Therefore, Dr. Mathur opines that he performed proper histories and

physical examinations and that no additional or alternative treatments, diagnostic exams or referrals were indicated or required (§§ 10-12). Dr. Mathur notes that on August 19, 2010, plaintiff's pedal pulses were normal, no edema was observed, and his physical examination of plaintiff "did not reveal any signs or symptoms of peripheral vascular disease, as plaintiff made no complaints of claudication [leg pain with walking that resolves upon rest], and no blisters, cyanotic discoloration, coldness or slow hair and nail growth of the lower extremities were found" (§ 13). He further states that although plaintiff had an elevated platelet count, it is more akin to a risk factor for peripheral arterial disease rather than a symptom, as an elevated platelet count may be present for a number of reasons wholly unrelated to vascular function (§ 14). Likewise, when plaintiff appeared in his office on November 19, 2010, plaintiff did not demonstrate any symptoms or complaints of peripheral vascular disease (§ 15).

On January 27, 2011, plaintiff reported having a blister on the top of the left second toe that had appeared and healed six weeks before. Dr. Mathur performed an examination of plaintiff's lower extremities and found no coldness or edema. Dr. Mathur opines that the patchy erythema (redness) observed on the dorsum toe and medial aspect of the left foot was not a symptom of peripheral vascular disease. Although plaintiff complained of periodic pain on the left second toe and at the site of the rash, Dr. Mathur opines that "periodic pain that presents spontaneously is distinguishable from intermittent claudication." While Dr. Mathur concedes that "in extremely advanced stages, a patient with peripheral vascular disease may have periodic pain in the affected area," he contends that "this was not the case for a patient like plaintiff, who had no current symptoms suggesting peripheral arterial disease, and who led an active lifestyle and was prone to sprains and strains" (§ 18). According to Dr. Mathur, ruling out a vascular insufficiency was not indicated by the standard of care because

plaintiff did not present any signs or symptoms indicating a vascular insufficiency (§ 19). Dr. Mathur further opines that because plaintiff did not have any signs or symptoms indicative of peripheral vascular disease, a pedal pulse assessment also was not indicated (§ 22).

On August 1, 2011, plaintiff presented to Dr. Mathur's office requesting a PPD test, which is a tuberculosis skin test that plaintiff needed for his work. Dr. Mathur did not perform a full history and physical examination, as the standard of care did not require that he do so and plaintiff did not complain of any symptoms of peripheral arterial disease on that date.

Based upon the foregoing, Dr. Mathur opines that the care and treatment he provided to plaintiff was in all respects reasonable, appropriate and within the standard of care and that there was nothing about plaintiff's condition on the relevant dates that indicated peripheral arterial disease (§ 25). Dr. Mathur further opines that even if plaintiff had been diagnosed with peripheral vascular disease on August 1, 2011, his outcome (i.e., the amputations that occurred in the subsequent months) would have been the same (§ 24).

Plaintiff's Opposition

In opposition to the motion, plaintiff submits an expert affidavit from a board certified vascular surgeon³ who opines that defendants deviated from good and accepted standards of care and treatment and that those deviations were a proximate cause of plaintiff's injuries. Specifically, plaintiff's expert opines that defendants "failed to diagnose, or even

³ Upon challenge to the expert's qualifications, plaintiff's expert attested that s/he regularly works in conjunction with dermatologists and internists treating patients both in the hospital and private practice setting and that peripheral vascular disease is a condition that clinicians are responsible for diagnosing and treating across specialties, including vascular medicine, internal medicine and dermatology (Supplemental Affirmation dated July 16, 2015). In any event, plaintiff's expert need not be in the same specialty as defendants in order to offer an opinion (*Diel v Bryan*, 57 AD3d 1493 [4th Dept 2008]; *Payne v Buffalo Gen. Hosp.*, 96 AD3d 1628 [4th Dept 2012]).

check for, a severely advanced Peripheral Vascular Disease (“PVD”) which would have been readily apparent as early as August 2010” (¶¶ 7; 9).

Altman

With regard to Dr. Altman, plaintiff’s expert points out that the peripheral vascular exam section of Dr. Altman’s January 31, 2011 notes was left entirely blank, making it appear that no assessment of pedal pulses was made despite hearing that the prior medication resulted in no improvement and that plaintiff had developed additional symptoms (¶ 9). According to plaintiff’s expert, Dr. Altman deviated from the standard of care when he failed to conduct a pedal pulse assessment at this visit, as a proper examination, which includes a pedal pulse assessment, would have confirmed, via weakened or absent pedal pulses, the need to order arterial dopplers and a vascular consult (¶¶ 9; 14; 17). Plaintiff’s expert opines that this failure to conduct a pedal pulse assessment, or even to touch plaintiff’s foot, resulted in a misdiagnosis and that the delay in treatment proximately caused the onset of gangrene and critical limb ischemia resulting in the need to amputate the left forefoot and toes (¶¶ 13; 16; 17).

Further, when plaintiff presented on July 25, 2011 with new and worsening symptoms (including signs of necrosis), Dr. Altman again misdiagnosed plaintiff’s condition as a fungal infection and again failed to assess plaintiff’s pedal pulses (¶ 10). According to plaintiff’s expert, when plaintiff “complained of no pain except with pressure,” Dr. Altman should have recognized it as “pain while walking” which is atypical of a fungal infection (¶ 20). Rather, the complaint, together with plaintiff’s other symptoms, was consistent with PVD.

Plaintiff’s expert opines that had a pedal pulse assessment been performed at any of these visits (particularly on January 31, 2011), Dr. Altman would have realized that plaintiff had significantly diminished blood flow to his left foot, and that upon conveying that finding to

the primary care physician, plaintiff would have been sent for immediate testing which would have revealed plaintiff's severe PVD (¶ 22).

Mathur

With regard to Dr. Mathur, plaintiff's expert opines that Dr. Mathur deviated from the standard of care when he failed to conduct a pedal pulse assessment on January 27, 2011 (¶ 24). According to plaintiff's expert, assessment of pedal pulses "is typically part of any medical doctor's examination of the foot or toes and is required by the accepted standard of care" (¶ 8; 24). Plaintiff's expert further opines that "based on the severity of [plaintiff's] PVD on August 13, 2011, if a pedal pulse was taken on January 27, 2011 it is medically impossible that it would have revealed a normal blood flow to [plaintiff's] left foot," and had plaintiff received proper treatment for his PVD in January of 2011, it is highly likely that he would have avoided the amputation of his left forefoot (¶ 24).

Analysis

As noted above, both Dr. Altman and Dr. Mathur have submitted their own affidavits in support of their motions. Even if the Court were to conclude that their affidavits carried their burden on these motions, the expert affidavit submitted by plaintiff raises triable questions of material fact as to the allegations of negligence, which include but are not limited to whether it was a deviation from the standard of care for defendants to fail to conduct pedal pulse assessments during their examinations of plaintiff in January of 2011. At a minimum, the record presents a contest between competing experts raising credibility issues requiring a trial (*Loaiza v Lam*, 107 AD3d 951, 953 [2d Dept 2013]; see also *Wilk v James*, 107 AD3d 1480 [4th Dept 2013]; *Selmensberger v Kaleida Health*, 45 AD3d 1435 [4th Dept 2007]).

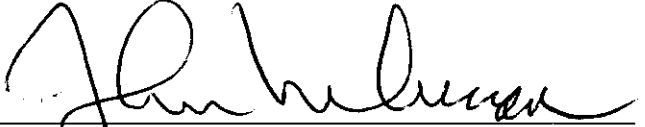
Further, while defendants characterize plaintiff's expert affidavit as engaging in "hindsight reasoning in an attempt to establish that defendants' failure to perform a pedal pulse assessment in January of 2011 was a proximate cause of the loss of the majority of plaintiff's left foot," defendants' expert affidavits are conclusory with regard to causation, and neither defendant definitively opined that discovery of plaintiff's PVD in January of 2011 would have nevertheless led to the same outcome. Rather, Dr. Altman merely contends that "it is entirely speculative to claim that an earlier diagnosis would have improved the patient's outcome in any manner," and Dr. Mathur only offers the opinion that even if plaintiff had been diagnosed with peripheral vascular disease on **August 1, 2011** [emphasis added], his outcome (i.e., the amputations that occurred in the subsequent months) would have been the same. Thus, defendants' reliance upon *Zawadzki v Knight* (76 NY2d 898 [1990]) is unavailing. Moreover, reasoning by a plaintiff's expert similar to that present here was recently upheld by the Fourth Department in *Wilk* (107 AD3d at 1486).

Finally, defendants repeatedly contend that, based upon their own medical records, plaintiff did not present with signs and/or symptoms of PVD in January of 2011. However, as was the case in *Wilk*, since the crux of plaintiff's case is that defendants failed to take an adequate history, conduct an appropriate exam, and pursue an appropriate diagnosis of peripheral vascular disease, "the absence of any reference in [plaintiff's] medical records to [PVD] is consistent with a claim of failure to diagnose" (107 AD3d at 1486).

Based on the foregoing, defendants' motions for summary judgment are denied.

Settle Order(s).

DATED: December 21, 2015



HON. JOHN M. CURRAN, J.S.C.