

**Harding v Brookhaven Mem. Hosp. Med. Ctr. Home Health Agency**

2016 NY Slip Op 32548(U)

November 1, 2016

Supreme Court, Suffolk County

Docket Number: 12-36819

Judge: Denise F. Molia

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SHORT FORM ORDER

**COPY**

INDEX No. 12-36819  
CAL. No. 15-01136MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Acting Justice of the Supreme Court

MOTION DATE 11-19-15 (002)  
MOTION DATE 1-15-16 (003)  
ADJ. DATE 2-19-16  
Mot. Seq. # 002 - MotD  
Mot. Seq. # 003 - MG

-----X  
BARBARA HARDING, AS Administratrix of  
the Estate of KEVIN HARDING, and  
BARBARA HARDING, Individually,

HOROWITZ, TANNENBAUM & SILVER PC  
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2001 Marcus Avenue, Suite N-125  
Lake Success, New York 11042

Plaintiff,

KERLEY WALSH MATERA & CINQUEMANI  
Attorney for Defendants Brookhaven Memorial  
Hospital Med. Center Home Health Agency &  
Brookhaven Memorial Hospital  
2174 Jackson Avenue  
Seaford, New York 11783

- against -

DOPF, P.C.  
Attorney for Defendants Ritter & Advanced Ortho  
440 Ninth Avenue, 16th Floor  
New York, New York 10001

BROOKHAVEN MEMORIAL HOSPITAL  
MEDICAL CENTER HOME HEALTH  
AGENCY, MICHELLE BRADY, R.N.,  
RICHARD RITTER, M.D., ADVANCED  
ORTHOPEDICS, P.C., d/b/a ADVANCED  
ORTHOPEDICS, RACHEL FURNAS, RPA-C,  
MITUL R. PATEL, M.D., and BROOKHAVEN  
MEMORIAL HOSPITAL MEDICAL CENTER,

FUREY, FUREY, LEVERAGE, MANZIONE,  
WILLIAMS & DARLINGTON PC  
Attorney for Defendants Furnas  
600 Front Street  
Hempstead, New York 11550

Defendants.  
-----X

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RST

Harding v Brookhaven Memorial Hospital  
Index No. 12-36819  
Page No. 2

Upon the following papers numbered 1 to 61 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; 44 - 59; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 24 - 27; 28 - 3; 32 - 37; 60 - 61; Replying Affidavits and supporting papers 38 - 39; 40 - 43; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motions by defendants are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion by defendants Brookhaven Memorial Hospital Medical Center Home Health Agency and Brookhaven Memorial Hospital Medical Center for summary judgment in their favor dismissing the amended complaint is granted as to the claim of lack of informed consent, and is otherwise denied; and it is further

**ORDERED** that the motion by defendant Richard Ritter, M.D., for summary judgment in his favor dismissing the amended complaint as asserted against him is granted.

Plaintiff, as administratrix of her husband Kevin Harding's estate, and in her individual capacity, commenced this action to recover damages for personal injuries allegedly sustained by the decedent due to defendants' alleged departures from good and accepted medical practice. Plaintiff also asserts causes of action for lack of informed consent, wrongful death, and loss of consortium. Plaintiff alleges that defendants were negligent, *inter alia*, in discharging decedent from defendant Brookhaven Memorial Hospital Medical Center after surgery on his right ankle without a prescription for heparin. She alleges the decedent developed pulmonary thromboemboli from deep vein thromboses which caused his death. Issue has been joined, discovery is complete, and a note of issue has been filed.

Defendants Brookhaven Memorial Hospital Medical Center Home Health Agency and Brookhaven Memorial Hospital Medical Center now move for summary judgment on the basis that they did not deviate from the acceptable standards of medical practice in their treatment of plaintiff. In support of the motion, they submit copies of the pleadings; certified copies of plaintiff's medical records; the deposition transcripts of Barbara Harding, Richard Ritter, M.D., Michelle Brady, R.N., Rachel Furnas, RPA-C, Mitul Patel, M.D., and Sandra Davis, R.N.; an affidavit of their expert, Martin Bolic, M.D., and Michelle Brady's phone records. In opposition, plaintiff submits the deposition transcript of Yvette Pilla, P.A., and the autopsy report regarding decedent prepared by the Suffolk County Medical Examiner. Defendant Rachel Furnas submits her own affidavit and computer records. Defendants Richard Ritter, M.D., and Advanced Orthopedics, P.C. d/b/a Advanced Orthopedics submit an affirmation of counsel in opposition dated November 16, 2015, and a second "affirmation in response" dated January 12, 2016. Exhibits annexed to such sur reply include decedent's discharge plan and the deposition transcript of Sandra Davis.

Defendant Richard Ritter, M.D., also moves for summary judgment in his favor dismissing the amend complaint as asserted against him. In support of the motion, he submits an affirmation of expert witness John Feder, M.D., the pleadings, decedent's medical records, the medical examiner's report, and his own deposition transcript. The motion is unopposed.

The medical records and Barbara Harding's deposition testimony establish that on January 19, 2012, 62-year-old Kevin Harding presented at defendant Brookhaven Hospital after stepping over a baby-gate at home and falling, sustaining a right ankle fracture. Mr. Harding's past medical history included diabetes, essential thrombocytopenia, high cholesterol and hypertension. The emergency room physician diagnosed a trimalleolar fracture of the right ankle and attempted a closed reduction of the fracture. The emergency room physician then consulted Dr. Richard Ritter, an orthopedic surgeon with Advanced Orthopedics, who reviewed x-rays of the fracture and performed a second closed reduction. Dr. Ritter admitted Mr. Harding to the hospital and recommended a surgical open reduction. Upon admission, Dr. Ritter learned that Mr. Harding suffered from myelodysplastic syndrome with thrombocytosis, a platelet disorder which increased the risk of blood clotting. Dr. Ritter testified that he arranged for a consult by Mitul R. Patel, M.D., a primary care physician and an internist, for surgical clearance. On January 19, 2012, Dr. Patel testified he examined Mr. Harding, and after a telephone consult with a hematologist, Dr. Syali, he ordered the administration of heparin to reduce the risk of deep vein thrombosis. Dr. Ritter testified that on January 20, 2012, he examined Mr. Harding and noted that he had been seen by hematologist Dr. Syali and Dr. Patel. Dr. Ritter testified that surgery was scheduled for January 23, 2012, and not sooner, because Mr. Harding's leg was too swollen and his history of diabetes increased perioperative morbidity. Dr. Ritter did not treat Mr. Harding again.

The medical records reveal that on January 23, 2012, Dr. Itchak Schwarzbard, a surgeon with Advanced Orthopedic and Dr. Ritter's partner, performed the open reduction. On January 24, 2012, Mr. Harding was examined by Dr. Alexander Finger, a partner at Advanced Orthopedics. After the surgery, Dr. Patel testified that he strongly recommended that Mr. Harding be transferred to a subacute rehabilitation facility, and ordered heparin 5000 units every 12 hours until Mr. Harding was ambulatory more than 100 feet. The medical records indicate, and Dr. Patel testified, that on January 25, 2012, Mr. Harding was to be discharged home or to a subacute rehabilitation facility "if patient considers." Dr. Patel admits that he did not write a separate request to the nursing or medical staff at the hospital to ensure that the patient be given instruction on how to administer heparin. Dr. Patel also testified that it was his responsibility to give a written instruction to the hospital staff to advise the patient on how to administer heparin if the patient was going home, and if the patient was willing to be educated. On January 25, 2012, Mr. Harding was discharged to home. He was not instructed on the self-administration of heparin.

On January 27, 2012, Mr. Harding was seen at home by defendant Brookhaven Memorial Hospital Medical Center Home Health Agency home care nurse Michelle Brady. Brookhaven Home Health Agency records dated January 26, 2012 indicate that Mr. Harding's medications as "Heparin Q 12 HRS, Diovan, Senokot, Assuheck at meals, Colace, Hydrea, Zocor." Nurse Brady testified that her records dated January 27, 2012, indicate "clarification, patient does not need to take heparin daily as per Rachel, P.A. at Dr. Ritter's office. Only needs to take aspirin 25<sup>1</sup> milligrams daily and patient states understanding." Rachel Furnas, P.A., avers that this conversation never took place and she supplies Advanced Orthopedics practice management software records that supports her position. On January 29, 2012, Mr. Harding was seen again

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<sup>1</sup> The medical records differ from the deposition testimony and indicate 325 mg of aspirin daily.

Harding v Brookhaven Memorial Hospital

Index No. 12-36819

Page No. 4

at home by Nurse Brady. On February 2, 2012, Mr. Harding died. The autopsy report lists the cause of death as pulmonary thromboemboli due to deep vein thromboses following blunt impact injuries of right lower extremity.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant hospital or home care agency must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff's injuries (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see Roques v Noble*, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; *Ward v Engel*, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A hospital or home care agency owes a duty of reasonable care to its patients and will generally be insulated from liability where there is evidence that it conformed to the acceptable standard of care and practice (*see Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]). A hospital or home care agency is not a guarantor of a correct diagnosis or a successful treatment, nor is it liable for a mere error in judgment if it has considered the patient's best interest after careful evaluation (*see Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Oelsner v State of New York*, 66 NY2d 636, 495 NYS2d 359 [1985]; *Bernard v Block*, 176 AD2d 843, 575 NYS2d 506 [2d Dept 1991]).

Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 5088 NYS2d 923 [1986]). Once the defendant makes a prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, *supra*; *Kelley v Kingsbrook Jewish Med. Ctr.*, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; *Fiorentino v TEC Holdings, LLC*, 78 AD3d 911 NYS2d 146 [2d Dept 2010]). Specifically, in a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing (*see Bhim v Dourmashkin*, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Schichman v Yasmer*, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

Dr. Ritter has established his prima facie entitlement to summary judgment in his favor based upon the affirmation of his expert witness, Dr. John Feder, who avers that the care and treatment rendered by Dr. Ritter at all times was in accordance with good medical practice and the relevant standard of care. He avers that Dr. Ritter "correctly performed a closed reduction of the fracture such that an open reduction could be

performed,” and “correctly consulted Dr. Patel about a hematological disorder that was beyond Dr. Ritter’s expertise.” The expert avers, and the undisputed facts show, that Dr. Ritter relied on Dr. Patel to manage the platelet disorder and that Dr. Patel consulted with a hematologist. Dr. Ritter saw Mr. Harding for the last time on January 20, 2012, and the surgery was performed by another doctor from Advanced Orthopedics. Dr. Feder avers that although Dr. Ritter was the admitting physician he was not responsible for Mr. Harding’s discharge “because other physicians and personnel were doing this.” The motion is unopposed. Accordingly, Dr. Ritter’s motion for summary judgment in his favor dismissing the complaint as asserted against him is granted.

However, defendants Brookhaven Memorial Hospital Medical Center Home Health Agency and Brookhaven Memorial Hospital Medical Center have not demonstrated their entitlement to summary judgment in their favor on the cause of action relating to medical malpractice and Mr. Harding’s discharge and home care. Dr. Bolic, defendants’ expert, avers that Nurse Davis properly advised Mr. Harding on the medications that were outlined on the discharge instruction sheet. He admits that Nurse Davis did not instruct Mr. Harding on the administration of heparin, as the order was not incorporated in the discharge instructions “and/or the physician orders section of the chart.” Dr. Patel testified that he did not write a separate request to the nursing or medical staff at the hospital to ensure that the patient be given instruction on how to administer heparin. Dr. Patel also testified that it was his responsibility to give a written instruction to the hospital staff on instructing the patient how to administer heparin if the patient was going home, and if the patient was willing to be educated. Dr. Patel testified that the transfer order/discharge instructions he wrote on January 24, 2012 were still in effect on January 26, 2012, and that it was the duty of the hospital nursing staff to provide instructions to Mr. Harding with regard to the administration of the heparin by subcutaneous route. Dr. Patel testified that his order for heparin on January 23, 2012 was never discontinued, and remained in effect. Therefore, either the nursing staff or Dr. Patel had a duty to appropriately advise the decedent of medications that were to be continued upon his discharge, including heparin. Defendants’ expert opines that “[i]t is incumbent upon the attending physician to provide information in the chart, not the nursing staff.” Dr. Bolic, however, does not discuss the vicarious liability of defendant Brookhaven Memorial Hospital Medical Center for the acts or omissions of Dr. Patel. Although Dr. Patel testified that he billed “fee for services” through BGA, Inc., he also testified Mr. Harding never saw him in his private office, and that any of the services that he provided to Mr. Harding “would have been through Brookhaven Hospital.” Where the physician was not an employee of the hospital, the hospital ordinarily would not be vicariously liable for his or her malpractice (*see Quezada v O’Reilly-Green*, 24 AD3d 744, 806 NYS2d 707 [2d Dept 2005]; *Orgovan v Bloom*, 7 AD3d 770, 770-771, 776 NYS2d 879 [2d Dept 2004]). Yet an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient’s choosing (*see Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883, 800 NYS2d 6092005 [2d Dept 2005]; *Orgovan v Bloom, supra*). As such, defendant Brookhaven Memorial Hospital Medical Center has not established its entitlement to summary judgment in its favor on the issue of medical malpractice.

As to plaintiff’s claim in the fourth cause of action for lack of informed consent, Public Health Law § 2805-d (1) defines lack of informed consent as “the failure of the person providing the professional treatment \* \* \* to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would

Harding v Brookhaven Memorial Hospital  
Index No. 12-36819  
Page No. 6

have disclosed, in a manner permitting the patient to make knowledgeable evaluation.” To establish a medical malpractice claim based on lack of informed consent, a plaintiff must show (1) that the defendant failed to disclose alternatives to the proposed treatment and the foreseeable risks associated with such treatment, that a reasonable medical practitioner under similar circumstances would have disclosed, (2) that a reasonably prudent person in the patient’s position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (*see* Public Health Law § 2805-d [3]; *Manning v Brookhaven Mem. Hosp. Med. Ctr.*, 11 AD3d 518, 782 NYS2d 833 [2d Dept 2004]; *Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]; *Foote v Rajadhyax*, 268 AD2d 745, 702 NYS2d 153 [3d Dept 2000]). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (*see Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; *Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504; *Mondo v Ellstein*, 302 AD2d 437, 754 NYS2d 579 [2d Dept 2003]).

Here, the Brookhaven Hospital defendants’ submissions, particularly the expert affirmation of Dr. Bolic and the deposition testimony of Dr. Ritter, are sufficient to establish a prima facie case of entitlement to judgment in their favor as a matter of law on the cause of action for lack of informed consent (*see Kunic v Jivotovski*, 121 AD3d 1054, 995 NYS2d 587 [2d Dept 2014]; *Belak-Redl v Bollingier*, 74 AD3d 1110, 903 NYS2d 508 [2d Dept 2010]). In particular, Dr. Ritter testified, in relevant part, that decedent was advised that the plan was made for surgery and that “he understands and agrees.” The Brookhaven Hospital defendants have established their prima facie entitlement to dismissal of this cause of action and in opposition plaintiff has not raised a triable issue of fact. Accordingly, plaintiff’s fourth cause of action is dismissed as to such defendants.

A cause of action for wrongful death is predicated upon a death of a human being who was born alive which was caused by the wrongful act or omission of a person or corporation, who, by reason of that wrongful act or omission, would have been liable to the deceased for the injury had death not ensued (EPTL 5-4.1). Proximate cause of the death is required (*Dubi v Jericho Fire Dist.*, 22 AD3d 631, 803 NYS2d 103 [2d Dept 2005], *lv dismissed* 9 NY3d 906, 843 NYS2d 533 [2007]). Here, the Brookhaven Hospital defendants have not established their prima facie entitlement to dismissal of the second cause of action. Defendants’ expert opinion that “none of the alleged acts or omissions of both moving defendants is the proximate cause of plaintiff’s injuries” is both conclusory and unsupported by competent evidence. Generally, the issue of proximate cause is for the jury (*Howard v Poseidon Pools, Inc.*, 72 NY2d 972, 534 NYS2d 360 [1988]; *Riccio v Kid Fit, Inc.*, 126 AD3d 873, 5 NYS3d 521 [2d Dept 2015]). Accordingly, defendants’ application to dismiss the second cause of action is denied.

Defendant Brookhaven Memorial Hospital Medical Center Home Health Agency application for summary judgment in its favor is denied based upon factual issues. Brookhaven Hospital did arrange for home nursing services with the defendant Home Health Agency and did provide discharge orders that included a prescription for 5000 units of heparin pursuant to Dr. Patel’s order of January 24, 2012. On January 27, 2012, home health care nurse Michelle Brady, in an attempt to reconcile the discharge medications ordered, testified that she called Dr. Ritter’s office and spoke with P.A. Furnas, who advised that heparin was not part of the discharge plan, and as a result heparin, as ordered by Dr. Patel, was

Harding v Brookhaven Memorial Hospital  
Index No. 12-36819  
Page No. 7

discontinued. P.A. Furnas denied that this conversation took place. Defendants' expert bases his opinion that defendant Brookhaven Memorial Hospital Medical Center Home Health Agency acted at all times within good and accepted standards of care on nurse Brady's testimony. Dr. Bolic's expert's opinion is deficient in that he fails to consider P.A. Furnas' testimony that the alleged conversation with Brady never took place. Accordingly, defendant Brookhaven Memorial Hospital Medical Center Home Health Agency's application for summary judgment in its favor dismissing the complaint as asserted against it is denied.

Dated: 11-1-16

  
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A.J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION