

**Rosario v Our Lady of Consolation Nursing &
Rehabilitation Care Ctr.**

2017 NY Slip Op 30415(U)

January 17, 2017

Supreme Court, Suffolk County

Docket Number: 11-18180

Judge: Denise F. Molia

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INDEX No. 11-18180
CAL. No. 15-02084MM

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 4-12-16 (002)
MOTION DATE 4-21-16 (003)
ADJ. DATE 7-1-16
Mot. Seq. #002 - MD
#003 - MD

-----X
ROXANNE ROSARIO, as Administratrix of the
Goods, Chattel, and Credits of MARTHA
ROSARIO, deceased,

Plaintiff,

- against -

OUR LADY OF CONSOLATION NURSING
AND REHABILITATION CARE CENTER,
CATHOLIC HEALTH SERVICES OF LONG
ISLAND, CATHOLIC HEALTH SYSTEM OF
LONG ISLAND, DIOCESE OF ROCKVILLE
CENTER and IMTIAZ A. KHOKHAR, M.D.,

Defendant.
-----X

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Upon the following papers numbered 1 to 111 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 51 ; 61 - 106; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 52 - 57 ; 107 - 111; Replying Affidavits and supporting papers 58 - 60; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions by defendant Imtiaz A. Khokhar, M.D. and defendants Our Lady of Consolation Geriatric Care Center, d/b/a Our Lady of Consolation Nursing and Rehabilitation Care Center, and Roman Catholic Diocese of Rockville Centre, Inc. are consolidated for the purposes of this determination; and it is

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ORDERED that the motion by defendant Imtiaz A. Khokhar, M.D., for summary judgment dismissing the complaint as against him is denied; and it is

ORDERED that the motion by defendants Our Lady of Consolation Geriatric Care Center, d/b/a Our Lady of Consolation Nursing and Rehabilitation Care Center, and Roman Catholic Diocese of Rockville Centre, Inc. for summary judgment dismissing the complaint as against them is denied.

This is a medical malpractice action to recover damages for injuries allegedly sustained by plaintiff's decedent, Martha Rosario during her admission to defendant Our Lady of Consolation Geriatric Care Center, d/b/a Our Lady of Consolation Nursing and Rehabilitation Care Center from May 11 to May 30, 2009. From April 30 to May 11, 2009, Mrs. Rosario was admitted under the service of defendant Imtiaz Khokhar, M.D., her primary care physician, to nonparty Good Samaritan Hospital as a result of falling at her home and hitting her neck. During her admission at Good Samaritan Hospital, Mrs. Rosario developed swelling and redness of her left lower extremity. She was evaluated by an infectious disease consultant, who diagnosed her with cellulitis, and she was treated with the antibiotics clindamycin and Bacid. On May 11, Mrs. Rosario was transferred and admitted to defendant Our Lady of Consolation Geriatric Care Center's subacute unit for gait and strength training under the direction and service of nonparty Dr. Alice Kolasa. Upon her admission, Mrs. Rosario had a stage II pressure ulcer between the 4th and 5th toes of her left foot, an intact blister, and two scabbed areas on her left lower extremity; the next day, a red, blanchable skin condition on Mrs. Rosario's sacrum was noted. On May 13, an initial assessment of Mrs. Rosario was performed, indicating a moderate risk for nutritional deficiency and pressure ulcers. As Mrs. Rosario's food and liquid intake was insufficient, supplementation was required. In addition, there was an order in place that required the Nursing Home staff to perform a skin check daily, with preventative skin care and a special chair pad and mattress. On May 15, Mrs. Rosario was examined by nonparty Dr. Sanji, a pain management specialist. He noted that she was experiencing difficulty swallowing and he recommended that a swallow evaluation be performed. On May 21, Mrs. Rosario's children made an appointment for a throat evaluation. On May 22, Mrs. Rosario underwent endoscopy at nonparty Massapequa Gastroenterology Associates, and she was diagnosed with grade IV esophagitis, gastritis, and esophageal candidiasis (throat infection). On the same day, at the nursing home, nurse Linda Kay noted that she observed a fungal rash on Mrs. Rosario's sacral area and ordered an anti-fungal cream. On May 26, nonparty cardiologist Dr. Maureen Corry examined Mrs. Rosario. In her report to Dr. Kolasa, Dr. Corry noted that Mrs. Rosario appeared to be clinically dehydrated and that Mrs. Rosario reported a buttock decubiti (ulcer).

On May 27, 2009, Mrs. Rosario was seen by Dr. Khokhar with complaints of neck and right rib pain. Dr. Khokhar noted that Mrs. Rosario was alert and oriented during his examination, that there was a mild muscular spasm in her neck, and that there was tenderness at the right lower ribs anteriorly. Dr. Khokhar also noted that Mrs. Rosario's lungs were clear and that her cardiovascular system appeared to be regular. As a result of his examination, Dr. Khokhar ordered a complete blood count (CBC) test and repeat x-rays of the cervical spine and right ribs. He also ordered that Mrs. Rosario continue receiving physical therapy treatment. The CBC test results revealed that Mrs. Rosario's white blood cell count was normal. On May 30, 2009, Mrs. Rosario began to exhibit increased fatigue, periods of forgetfulness and confusion, and a fever. She was discharged to Good Samaritan Hospital for further evaluation, where she was diagnosed with a urinary tract infection with sepsis, hypotension, pneumonia, a stage II

pressure ulcer on the sacrum, and an unstageable pressure ulcer on her buttocks. A blood culture was performed at the hospital and the results were positive for methicillin-resistant staphylococcus aureus (MRSA). On June 6, 2009, Mrs. Rosario died at Good Samaritan Hospital. Her death certificate lists her cause of death as cardiopulmonary arrest as a consequence of coronary artery disease and hypertension, with urosepsis as contributing factor.

Plaintiff alleges that Martha Rosario was injured as a result of defendants' medical malpractice. As relevant to the instant motions, by her complaint, as amplified by her verified bills of particulars, plaintiff alleges that defendants were negligent in, among other things, failing to monitor Mrs. Rosario's high fever, failing to assess and maintain proper hydration for Mrs. Rosario, failing to properly assess Mrs. Rosario's throat infection, ignoring signs and complaints of Mrs. Rosario's altered mental status, failing to protect Mrs. Rosario against bed sores, and failing to test for and diagnose a urinary tract infection. In addition, plaintiff alleges that Our Lady of Consolation Geriatric Care Center and Roman Catholic Diocese of Rockville Centre, Inc. (hereinafter referred to as "the Nursing Home defendants") were negligent in, among other things, failing to provide appropriate supervision, control, and observation of its medical practitioners and staff, failing to properly train its employees, and by depriving Mrs. Rosario of her rights under Public Health Law § 2801-d. Plaintiff further alleges that, as a result of defendants' malpractice, Mrs. Rosario suffered various injuries, including urosepsis, dehydration, pressure ulcers, and a MRSA infection, all of which contributed to her death.

Dr. Khohkar and the Nursing Home defendants now move for summary judgment in their favor, arguing that they did not depart from good and accepted medical practice in their treatment of Mrs. Rosario. The Nursing Home defendants further argue that they properly trained, supervised, and controlled their employees who rendered medical treatment to Mrs. Rosario, and that they did not deprive her of any rights in violation of Public Health Law § 2801-d. In support of his motion, Dr. Khohkar submits, among other things, transcripts of the parties' deposition testimony, Mrs. Rosario's medical records during her admissions at Good Samaritan Hospital and the Nursing Home from April to June 2009, and the affidavit of Dr. Randolph P. Dilorenzo, a board-certified physician of internal medicine. In support of their motion, the Nursing Home defendants submit, among other things, the affirmation of Dr. Poonam Alaigh, a board-certified doctor of internal medicine.

Plaintiff opposes both motions, contending that there are triable issues of fact as to whether Dr. Khohkar and the Nursing Home defendants deviated or departed from good and accepted medical practice in their treatment of Mrs. Rosario, whether the Nursing Home defendants were negligent in supervising, training, and controlling their employees, and whether the Nursing Home defendants deprived Mrs. Rosario of her rights as enumerated under the Public Health Law. In opposition, plaintiff submits, among other things, the affirmation of Dr. Emily Yurberg, a doctor of internal medicine and infectious disease, with a certificate in geriatric medicine. In reply, Dr. Khohkar submits an affirmation of his attorney and a copy of Mrs. Rosario's death certificate.

As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see Dupree v Giugliano*, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; *Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015], quoting *Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d

369 [1989]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused the plaintiff's injuries (*see Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 16, 24 NYS3d 689, 692 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 23, 918 NYS2d 176 [2d Dept 2011]). To establish its entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that the plaintiff was not injured as a result (*see Bongiovanni v Cavagnuolo, supra; Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; *Faccio v Golub*, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). After making this prima facie showing, the burden shifts to the plaintiff patient to submit evidentiary facts or materials that raise a triable issue as to the element or elements on which the defendant has met its initial burden (*see Michel v Long Is. Jewish Med. Ctr.*, 125 AD3d 945, 5 NYS3d 162 [2d Dept 2015]; *Rivers v Birnbaum*, 102 AD3d 26, 953 NYS2d 232 [2d Dept 2012]; *Stukas v Streiter, supra*). However, summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see Leto v Feld*, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]; *Gressman v Stephen-Johnson*, 122 AD3d 904, 998 NYS2d 104 [2d Dept 2014]; *Moray v City of Yonkers*, 95 AD3d 968, 944 NYS2d 210 [2d Dept 2012]).

Under the doctrine of respondeat superior, an employer may be held vicariously liable for injuries resulting from intentional torts or negligence committed by an employee acting within the scope of his or her employment (*see Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 693 NYS2d 67 [1999]; *Hoffman v Verizon Wireless, Inc.*, 125 AD3d 806, 5 NYS3d 123 [2d Dept 2015]; *Gui Ying Shi v McDonald's Corp.*, 110 AD3d 678, 972 NYS2d 307 [2d Dept 2013]). An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his or her employer, or if his or her act may be reasonably said to be necessary or incidental to such employment (*see Scott v Lopez*, 136 AD3d 885, 25 NYS3d 298 [2d Dept 2016]; *Gui Ying Shi v McDonald's Corp., supra; Pinto v Tenenbaum*, 105 AD3d 930, 963 NYS2d 699 [2d Dept 2013]). A necessary element of a cause of action for negligent hiring or negligent retention is that the employer knew or should have known of the offending employee's propensity to commit the conduct that caused the plaintiff's injury (*see DeJesus v DeJesus*, 132 AD3d 721, 18 NYS3d 103 [2d Dept 2015]; *John B. v Allegro Vivace Music School, Inc.*, 113 AD3d 800, 979 NYS2d 531 [2d Dept 2014]; *Evans v City of Mount Vernon*, 92 AD3d 829, 939 NYS2d 130 [2d Dept], *lv denied* 20 NY3d 852, 957 NYS2d 689 [2012]).

Public Health Law § 2801-d provides, in relevant part, that “[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation.” A “right or benefit” of a patient is defined as “any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation . . .” (Public Health Law § 2801-d [1]). The statute further provides that “[n]o person who pleads and proves, as an affirmative defense, that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted shall be liable under this section” (Public Health Law § 2801-d [1]). The basis for liability under the statute is not a deviation

from accepted standards of medical practice or a breach of a duty of care; rather, the statute contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code, or rule (*see Moore v St. James Health Care Ctr., LLC*, 141 AD3d 701, 35 NYS3d 464 [2d Dept 2016]; *Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 26 NYS3d 182 [2d Dept 2016]; *Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 935 NYS2d 597 [2d Dept 2011]).

Here, Dr. Khohkar's submissions establish his entitlement to summary judgment by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment he rendered to Mrs. Rosario, and that such treatment was not a substantial contributing factor in causing her injuries (*see Bongiovanni v Cavagnuolo, supra; Mitchell v Grace Plaza of Great Neck, Inc., supra; Faccio v Golub, supra*). In his affidavit, Dr. Dilorenzo opines, within a reasonable degree of medical certainty, that Dr. Khohkar appropriately performed a focused examination on Mrs. Rosario for her chief complaint of neck and rib pain; that Mrs. Rosario did not exhibit any signs or symptoms of a urinary tract infection or a fever during Dr. Khohkar's examination; that Mrs. Rosario did not display any signs or symptoms of altered mental status during the examination; and that the results of the CBC test ordered by Dr. Khohkar showed a normal white blood cell count, indicating the absence of any infection on the date he examined Mrs. Rosario. Dr. Dilorenzo further opines, within a reasonable degree of medical certainty, that Dr. Khohkar appropriately deferred the management and monitoring of Mrs. Rosario's hydration and nutrition status, as well as her throat infection, to her primary care team at the Nursing Home, and that, as bed sores were already present on Mrs. Rosario upon her admission to the Nursing Home, Dr. Khohkar could not have failed to protect her from developing same.

The Nursing Home defendants' submissions demonstrate their entitlement to summary judgment as to the absence of a deviation or departure from good and accepted medical practice, and that their medical treatment of Mrs. Rosario was not a substantial factor in causing her injuries (*see Bongiovanni v Cavagnuolo, supra; Mitchell v Grace Plaza of Great Neck, Inc., supra; Faccio v Golub, supra*). By his affirmation, Dr. Alaigh opines, within a reasonable degree of medical certainty, that a skin check and nutritional assessment were properly and appropriately performed on Mrs. Rosario following her admission to the Nursing Home; that Mrs. Rosario was at high risk for skin breakdown due to her underlying catabolic state and her complicated medical condition; that Mrs. Rosario's multidisciplinary team of physicians at the Nursing Home placed her on a suitable pressure ulcer plan because staff regularly monitored Mrs. Rosario's skin integrity; and that all appropriate steps were taken by the Nursing Home staff to protect Mrs. Rosario against bedsores, including appropriate orders to have Mrs. Rosario's skin checked daily, to apply Solosite gel as needed to the ulcer on her left foot, and to provide preventative skin care, including the use of a special chair pad and mattress.

In addition, Dr. Alaigh opines, within a reasonable degree of medical certainty, that Mrs. Rosario's food intake was monitored in accordance with good and accepted medical practice; that the Nursing Home staff took the proper steps in maintaining Mrs. Rosario's nutrition and hydration via nutritional assessments, verbal encouragement, and intravenous fluids; that the Nursing Home physicians properly ordered a swallow study in response to Mrs. Rosario's complaints of difficulty swallowing and a sore throat; and that Mrs. Rosario was timely and appropriately transported to Massapequa Gastroenterology Associates to assess her condition. Dr. Alaigh further opines, within a

reasonable degree of medical certainty, that elderly patients are especially prone to developing urinary tract infections suddenly and without warning; that Mrs. Rosario did not show any signs of a urinary tract infection before May 30, 2009, as she was afebrile until that date and on a course of antibiotics that she began while admitted to Good Samaritan Hospital; and that Mrs. Rosario was appropriately transferred back to Good Samaritan Hospital for further treatment that day when her temperature rose to 101.2 degrees. As Dr. Dilorenzo and Dr. Alaigh base their conclusions upon plaintiff's medical records and the parties' deposition testimony, in addition to their education, knowledge, and medical experience, Dr. Khohkar and the Nursing Home defendants have met their initial burden on the issue of whether the medical care they rendered to Mrs. Rosario departed or deviated from good and accepted medical practice (see *Makinen v Torelli*, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; *Parrilla v Buccellato*, 95 AD3d 1091, 944 NYS2d 604 [2d Dept 2012]; *Arkin v Resnick*, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]).

Further, the Nursing Home defendants' submissions demonstrate, prima facie, that they were not negligent in the supervision, training, or control of their staff who rendered medical treatment to Mrs. Rosario (see *Judith M. v Sisters of Charity Hosp.*, *supra*; *DeJesus v DeJesus*, *supra*; *Evans v City of Mount Vernon*, *supra*). Dr. Alaigh opines, within a reasonable degree of medical certainty, that the Nursing Home staff regularly observed and accurately reported all changes in Mrs. Rosario's medical condition, and that they implemented the proper treatment plans, as there were numerous progress reports taken throughout her admission which indicate her current skin condition, her food and liquids intake, her temperature, and her treatment plans. Moreover, the Nursing Home defendants' submissions do not indicate that they knew or should have known of any employee's propensity to commit conduct that caused Mrs. Rosario's alleged injuries (see *DeJesus v DeJesus*, *supra*; *John B. v Allegro Vivace Music School, Inc.*, *supra*; *Evans v City of Mount Vernon*, *supra*).

Finally, the Nursing Home defendants' submissions establish that they are not liable under Public Health Law § 2801-d (see *Moore v St. James Health Care Ctr., LLC*, *supra*; *Novick v South Nassau Communities Hosp.*, *supra*; *Gold v Park Ave. Extended Care Ctr. Corp.*, *supra*). These submissions demonstrate that the Nursing Home defendants exercised due care with respect to Mrs. Rosario's risk of skin injury by having its staff check her skin daily, apply Solosite gel as needed to the ulcer on her left foot, and provide her with a special chair pad and mattress. Moreover, the evidence shows that the Nursing Home staff maintained Mrs. Rosario's nutrition and hydration by taking nutritional assessments, giving her verbal encouragement, and administering intravenous fluids.

Dr. Khohkar and the Nursing Home defendants having met their initial burden on the motions, the burden shifted to plaintiff to submit admissible evidence raising a triable issue of fact (see *Michel v Long Is. Jewish Med. Ctr.*, *supra*; *Rivers v Birnbaum*, *supra*; *Stukas v Streiter*, *supra*). In opposition, plaintiff submits an affirmation of her expert, Dr. Yurberg. In her affirmation, Dr. Yurberg opines, within a reasonable degree of medical certainty, that Dr. Khohkar and the Nursing Home defendants departed from good and accepted medical practice in the following ways: by Nursing Home physicians failing to order that Mrs. Rosario see an ear, nose, and throat specialist before May 22, 2009, resulting in delayed treatment and increased severity of her throat infection; by Nursing Home staff failing to monitor Mrs. Rosario's food and liquid intake and output or to perform three calorie counts per day; by Nursing Home staff failing to enter notes into Mrs. Rosario's medical records of whether they frequently

turned and repositioned her or whether they treated her bed sores; and by Dr. Khohkar failing to conduct a proper examination of Mrs. Rosario on May 27, during which he should have positioned her so as to visualize the anterior and posterior ribs, revealing the existence of a stage II pressure sore on her sacrum. Dr. Yurberg further opines, within a reasonable degree of medical certainty, that these departures were substantial factors in causing Mrs. Rosario's injuries and, ultimately, her death. As Dr. Yurberg describes the applicable standard of care under the circumstances, how Dr. Khohkar and the Nursing Home defendants departed or deviated from such standard, and that these departures were competent causes of plaintiff's injuries, her affirmation is sufficient to raise triable issues of fact (*see Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Williams v Bayley Seton Hosp.*, *supra*; *Stukas v Streiter*, *supra*). As the parties have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred, an order granting summary judgment is not appropriate (*see Leto v Feld*, *supra*; *Gressman v Stephen-Johnson*, *supra*; *Moray v City of Yonkers*, *supra*).

In light of the foregoing, the motions by Dr. Khohkar and the Nursing Home defendants are denied.

Dated: 1.17.17


A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION