Douek v Lenox Hill Hosp.
2019 NY Slip Op 30112(U)
January 9, 2019
Supreme Court, New York County
Docket Number: 805301/14
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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LEORA Y. DOUEK and BENJAMIN J. DOUEK,

INDEX NO. 805301/14

Plaintiffs,

-against-

LENOX HILL HOSPITAL, LON S. WEINER, M.D., LON S. WEINER, M.D., P.C., KING STREET HOME,INC., and JONATHAN M. AROVAS, M.D.,

Defendants.

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JOAN A. MADDEN, J.:

In this action alleging medical malpractice in connection with the care and treatment of plaintiff Leora Y. Douek ("Mrs. Douek" or "plaintiff") for a left heel pressure sore, defendant Jonathan M. Arovas, M.D. ("Dr. Arovas") moves for summary judgment dismissing the complaint against him (motion seq 001). Defendant Lenox Hill Hospital ("Lenox Hill") separately moves for summary judgment dismissing the complaint against it (motion seq 002).[1] Plaintiffs oppose both motions. Defendants Lon S. Weiner, M.D. and Lon S. Weiner P.C. take no position as to the merit of the motions, except to assert that there are issues of fact as to when plaintiff's alleged left heel sore formed.

Background

This action arises out of allegations of malpractice, including that defendants failed to properly prevent, identify and treat plaintiff's left heel pressure sore/ulcer. Mrs. Douek was admitted to defendant Lenox Hill on January 28, 2013, for treatment of a left tibula/fibula fracture. Defendant Lon Weiner, M.D. performed an open reduction internal fixation ("ORIF")

[1]Motion sequence nos 001 and 002 are consolidated for disposition.

of the fracture on February 4, 2013, as well as bilateral releases of plaintiff's hamstrings. Thereafter, Mrs. Douek was fitted with bilateral Bledsoe braces that extended below her knees to her ankles Plaintiff was discharged from Lenox Hill on February 12, 2013 and, on that date, she was admitted to defendant King Street Home, Inc. ("King Street"),[2] where she stayed until March 6, 2013. Dr. Arovas was Mrs. Douek's assigned internist while plaintiff was at King Street.

Lenox Hill's Motion

The Bill of Particulars alleges that Lenox Hill departed from the good and accepted standards of care when it failed to appreciate that plaintiff was at high risk for skin breakdown through failure to appreciate swelling, decreased sensation in the legs, and leg spasms. It is further alleged that on or about January 28, 2013, and continuing thereafter, Lenox Hill failed to properly perform Integumentary Assessments, failed to properly monitor plaintiff's legs/feet, failed to utilize off-loading devices to prevent undue pressure, failed to use heel pads, failed to adequately turn and position plaintiff, and failed to implement a proper nursing plan. It is also alleged that had Lenox Hill acted in accordance with the standard of care, the left heel pressure ulcer would not have developed, and that as a result of the alleged malpractice/negligence, plaintiff suffered infection, left tibial wound necrosis, skin graft, surgical debridement, MRSA (i.e. Methicillin-resistant Staphylococcus aureus), a left heel decubitis ulcer, severe pain and suffering, emotional distress, and depression.[3]

Lenox Hill moves for summary judgment, arguing that it properly appreciated plaintiff's

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[2]By stipulation dated July 26, 2018, the action was discontinued with prejudice as against King Street.

[3]While the Bill of Particulars alleges that in addition to the left heel ulcer, Lenox Hill's departures resulted in plaintiff developing sacral/buttocks pressure ulcers, as plaintiffs' expert does not provide any opinion to support such allegations, the court will considered them to be abandoned.

risk of skin breakdown and instituted appropriate wound care and prevention from her admission to its facility on January 28, 2013, until her discharge on February 12, 2018, and that it acted in accordance with the standard of care by timely performing the surgery to repair the fracture on February 4, 2013, and monitoring and instituting wound care and wound care prevention. Lenox Hill asserts that upon admission, plaintiff presented with multiple co-morbidities, including, but not limited to, multiple sclerosis, nerve compromise in the left leg, as demonstrated by plaintiff's decreased sensation in the foot, osteoporosis, lack of mobility, prolonged steroid use for treatment of multiple sclerosis, and altered bone metabolism because of multiple sclerosis, and that in light of these conditions, plaintiff was considered at high risk for skin breakdown and measures were taken to prevent this breakdown, as described in the testimony of Nurse Diedre O'Flaherty ("Nurse O'Flaherty"), who was a Senior Administrative Director of Patient Care services at Lenox Hill. Lenox Hill also argues that the record shows there was no left heel ulcer at time of plaintiff's discharge from Lenox Hill.

In support of its motion, Lenox Hill submits the expert affidavit of John R Denton, M.D., a physician licensed to practice medicine in New York State. After reviewing the pertinent hospital and medical records, Dr. Denton opines, "within a reasonable degree of medical certainty, that the staff at [Lenox Hill] acted within the standard of care at all times when caring for the plaintiff..[and that] while admitted to [Lenox Hill] the plaintiff received timely and appropriate surgery, proper skin breakdown prevention care, and appropriate post-surgical care including wound care and wound prevention care" (Denton Aff. ¶ 6) Dr. Denton also opines "within a reasonable degree of medical certainty that a proper and appropriate nursing care plan for Pressure Ulcer Prevention was developed and implemented daily throughout the plaintiff's admission" (Id ¶ 10). In this connection he states that "plaintiff was considered high risk for skin

breakdown on admission to the hospital [and therefore a]... nursing plan was instituted on admission that included the following Pressure Ulcer Prevention interventions: skin check every nursing shift; application of skin moisturizer every shift; use of absorbent pads; avoidance of friction and shear; the use of pressure redistribution support surface; and the use of a HillRom bed" (Id). In addition, he states that "[t]hroughout the plaintiff's admission from 1/28/13-2/12/13 there was off loading with pillows as testified to by Nurse Deirdre O'Flaherty. Further, the plaintiff's rounding sheets indicated that she was regularly turned and repositioned every two hours. The nursing flow sheets also indicate that all of these modalities were consistently and vigilantly in place throughout the plaintiff's admission to [Lenox Hill]." (Id).

After the February 4, 2013 surgery, Dr. Denton states that:

> the plaintiff was placed into bilateral leg Bledsoe brace to maintain her knees in an extended position in order to improve bed and chair positioning of the patient and so that care of the left leg surgical wound/skin care to both legs could be facilitated. The nursing notes as well as Nurse O'Flaherty's testimony indicate that the plaintiff's heels were still able to be offloaded with the use of pillows while these braces were in place. As such, it is my opinion within a reasonable degree of medical certainty that the use of Bledsoe braces did not cause a heel pressure ulcer

(Id ¶ 11).

He also states that "there are multiple post-operative notes that document the monitoring the plaintiff's skin for breakdown and surgical wound infection. The hospital medical records in no way are lacking in documentation relative to the wound care prevention measures and the skin avoidance of pressure areas monitoring that took place on each nursing shift" (Id ¶ 12). He therefore opines that to "a reasonable degree of medical certainty that the plaintiff was daily evaluated for skin care needs and proper wound care prevention was carried out daily" (Id).

Lenox Hill also submits the affirmation of Nancy O'Loughlin Keelan, R.N. ("Nurse

Keelan"), a licensed registered nurse in New York State. Upon review of the pertinent medical records, including Lenox Hill's charts, the Bill of Particulars and deposition transcripts, Nurse Keelan opines "within a reasonable degree of medical certainty...that the staff at [Lenox Hill] acted within the standard of care at all times when caring for the plaintiff [and that]... while admitted to [Lenox Hill] the plaintiff received timely and appropriate skin breakdown prevention care and appropriate post-surgical care including wound care and wound prevention care" (Nurse Keelan Aff. ¶ 6). In particular, she states that "despite the likelihood for development of skin breakdown, the care and treatment provided to the plaintiff was such that no skin breakdown in the form of pressure ulcers occurred while admitted to [Lenox Hill] from 1/28/13-2/12/13 [and that] ... the records reflect that the nursing staff timely and appropriately evaluated the plaintiff for risk of skin breakdown immediately upon admission on 1/28/13 (Id ¶'s 8, 9).

Nurse Keelan further states that:

> The flow sheets in use at [Lenox Hill] at that time provided for a check off of the modalities in place for each shift. Upon admission, it was ordered that skin checks be instituted for every nursing shift, there be an application of skin moisturizer every shift, absorbent pads to reduce wetness which can lead to skin breakdown were to be used daily, all friction and shear was to be avoided, various pressure redistribution support surfaces as well as a HillRom bed were to be used, and offloading of the plaintiff s feet either with pillows or towels was to be implemented. The flow sheets indicated that "skin integrity maintained" was checked off daily for the plaintiff indicating that the above-mentioned interventions had been in place that day. Most importantly for pressure ulcer prevention, the plaintiff s rounding sheets indicated that she was regularly turned and repositioned every two hours. It is my opinion within a reasonable degree of medical certainty that a proper and appropriate nursing care plan for Pressure Ulcer Prevention was developed and implemented daily throughout the plaintiff s admission.

(Id ¶ 9).

She further states that:

> Throughout plaintiff s admission, the records reflect notations daily by both physicians and nursing staff properly documenting that the plaintiff s surgical wounds were assessed daily and that the full body skin checks were ongoing daily. Nurse O'Flaherty specifically testified that a head-to-toe skin assessment of each patient was done at every nursing shift The hospital medical records in no way are lacking in documentation relative to the wound care prevention measures and the skin avoidance of pressure areas monitoring that took place on each nursing shift. Therefore, it is my opinion to a reasonable degree of medical certainty that the plaintiff was daily evaluated for skin care needs and proper wound care prevention was carried out daily.

(Id ¶ 11).

Nurse Keelan also states that "daily skin assessments of plaintiff are evidenced by the state of documentation as to eschar to the wound site on 2/7/13 which was immediately treated with Silvadene. Following this initial note, there are several notes from 2/5/13-2/12/13 noting the progress of eschar at the surgical wound site. As such, this daily documentation is evidence that daily assessments of the plaintiffs skin condition were taking place" (Id). She then opines that "[g] iven that there are no notes documenting any type of blister or other skin breakdown to the plaintiff's left heel at any point during this admission, it is my medical opinion that...any subsequently noted blisters/ulcers were not the result of the care and treatment provided to the plaintiff at [Lenox Hill]" (Id at ¶ 12).[4]

Plaintiffs oppose Lenox Hill's motion, asserting that the expert affirmations on which Lenox Hill relies are inadequate as they fail to cite any specific entry on Lenox Hill's chart and that the statements made in the expert affirmations are "sweeping, and at times inaccurate" and that their "conclusory opinions are based upon these inaccurate statements." Plaintiffs argue that the record raises triable issues of fact as to whether, during plaintiff's last six days of

[4]The efiled document appears to be missing certain lines of the affidavit; which have therefore been omitted.

hospitalization (i.e. between February 7 and February 12, 2013), Lenox Hill's nursing staff failed to appreciate that plaintiff was at a high risk of developing a pressure ulcer based on Lenox Hill's records showing that during this period that plaintiff's Skin Risk Assessment, known as a Branden Score, which measures the risk of developing a pressure ulcer, was generally shown to be at low risk even though, as conceded by Lenox Hill, plaintiff was at high risk for pressure ulcers. Plaintiffs also argue that Lenox Hill's records during the period show that plaintiff was not turned or repositioned often enough to prevent the development of the left heel pressure wound, which medical records from King Street show existed when plaintiff was transferred there on February 12, 2013.

In support of their opposition, plaintiffs submit the affidavit of Lorraine Poliey, RN ("Nurse Poliey"), a nurse licensed to practice nursing in New York and New Jersey, who is currently the Wound Program Manager for Montefiore Hospital Home Health Agency. Upon her review, *inter alia*, of the Lenox Hill chart from January 28, 2013 to February 12, 2013, the Lenox Hill Hospital Protocols for Pressure Ulcer Prevention, Management and Assessment, the King Street Home Chart from February 12, 2013 to March 6, 2013 ("the King Street Chart"), Nurse Poliey opines to a reasonable degree of nursing certainty that Lenox Hill "departed from good and accepted nursing practice in [its] treatment of Mrs. Douek...[and that] Lenox Hill's departures were the proximate cause of Mrs. Douek developing a pressure injury and a proximate cause of the later deterioration of Mrs. Douek's left heel pressure ulcer and resulting sequalae" (Poliey Aff. ¶'s 7-9).

Nurse Poliey opines that Lenox Hill "deviated from good and accepted nursing practice in failing to properly assess Leora Douek's risk for the development of pressure ulcers as evidenced

by the Braden scoring; in failing to provide the reasonably prudent care which Mrs. Douek's presentation required as evidenced by the Daily Nursing Records; in causing Leora Douek to develop a pressure injury ulcer on her left heel; in failing to detect and treat the pressure injury; and in discharging Mrs. Douek to King Street Home with an untreated Stage II pressure ulcer" (Id ¶ 18) In support of her opinion, Nurse Poliey points the King Street Chart initiated on the date of plaintiff's February 12, 2013 admission there, in which Vladimir Sher, R.N. who did the initial nursing assessment of plaintiff, notes "under 'Skin Condition' a 'left heel blister.'" (Id ¶'s 12, 13). Nurse Poliey also points to a second notation made on the King Street Chart by Shibbon Tremblay, LPN, "who describes the pressure wound on the left heel as a 'closed''serum filled blister with darkening underlying tissue,' '4.5 cm length, 5 cm width; 0 deepest part of visible wound bed.'" (Id ¶ 14). Nurse Poliey states that "[a] serum filled blister is classified as a Stage II pressure ulcer" (Id ¶ 15).

She opines that the Lenox Hill nurse completing the February 7, 2013 Integumentary Assessment, which showed a Braden score of 17, "overscored Mrs. Douek's Skin Risk Assessment and thus underestimated her risk [of skin breakdown]...[which]... was a deviation from good practice of nursing at Lenox Hill. ..." and that "the total score should have been 13," explaining that "a score of 16 or less indicates higher risk." (Id ¶'s 24, 25). Moreover, she states that "[t]he scoring on [February 7, 2013] is typical of the scoring Mrs. Douek received during her hospital stay. During the last six days of her hospitalization, Mrs. Douek's Braden score was once 15. On the other 10 occasions the scores ranged from 17 to 20, which placed her in the mild risk category." (Id at ¶ 25). She further states that the deviation in assessing plaintiff as only have a mild risk for skin breakdown "is significant because the plan of care to prevent

pressure ulcers is based on the Braden scoring and the appreciation of risk [and]...if Mrs. Douek's risk for developing a pressure injury had been properly scored/assessed, then the Plan of Care should have been more rigorous" (Id ¶ 33).

After reviewing Lenox Hill's records from February 7 to February 12, 2013, including the Plan of Care: Prevention Interventions, which require check marks for the preventative interventions to be rendered during that shift;- The Rounds section, which documents turning and positioning; The Plan of Care: Intervention Checklist; and hand-written nursing notes, Nurse Poliey concludes that "there no documentation that [plaintiff's] heels were offloaded or otherwise protected at any time between February 9th at 9:00am until sometime after February 12th at 9:00 am." She further states that "the documentation indicates that Mrs. Douek was turned and positioned most night shifts but not during day shifts after February 7."

Nurse Poliey opines "that the Lenox Hill nursing staff deviated from good and accepted practice in failing to keep Mrs. Douek's heels elevated and to consistently turn and position her every two hours as the standard of care required for a person with high risk for developing a pressure injury as was Mrs. Douek. The failure to keep sustained pressure off the heel was the direct cause of the pressure injury" (Id ¶ 52) She also opines that "the nursing staff deviated from good and accepted practice in not observing the pressure injury which ... would have begun to manifest itself by February 9th or 10th [and that]...[i]f the nursing staff had been performing required head to toe skin assessments during every shift, they would have discovered the redness/erythema approximately 48 to 72 hours prior to discharge."(Id ¶ 53).

With respect to the timing and the development of the pressure injury ulcer, Nurse Poliey opines that "Mrs. Douek developed the pressure injury ulcer within the two to three days prior to

her discharge from Lenox Hill [and that] ..in [her] experience a serum filled blister such as the one Mrs. Douek presented with at King Street Nursing Home on February 12, 2013 is the evolution of a pressure injury that occurred 48 to 72 hours earlier" (Id ¶ 19). She bases her opinion on her "analysis of the Lenox Hill records from February 7, 2013 to February 12, 2013 which were the last six days of her admission." Nurse Poliey further opines that "the left heel pressure ulcer injury was entirely avoidable, had Lenox Hill nursing followed good custom and practices...[including] (1) keeping the heels offloaded (elevated off the mattress) ... and (2) turning and positioning Mrs. Douek every two hours...[both] for the purpose of relieving pressure" (Id ¶'s 65, 66).

In reply, Lenox Hill argues that the King Street records show that plaintiff had a pressure wound upon admission to King Street are unreliable and altered; that King Street's administrator Ms. Jennifer Wilner, could not provide an explanation for the alterations made to the certified records; that plaintiffs are aware they received two different sets of medical records from King Street; and that the second set contained handwritten notations not included in the first set. With respect to plaintiffs' expert's analysis of its medical records, Lenox Hill asserts that while plaintiffs' expert points to "excerpts of Lenox Hill's ...chart to show that 'no interventions' are in place, ...when looking at the whole chart...plaintiff was regularly checked on, progress notes were consistently prepared and proper interventions were in place." Lenox Hill also points to specific examples on plaintiff's Lenox Hill's chart showing that Mrs. Douek's heels were offloaded, her skin integrity was monitored, and that she was turned and positioned and monitored.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "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. Nobel, 73 AD3d 204, 206 (1st Dep't 2010). To satisfy this burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id.

In claiming that any treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. See Joyner–Pack v. Sykes, 54 AD3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio–Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dep't 2003)).

If the movant makes a prima facie showing in medical malpractice action, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 NY2d 320, 324-325. Specifically, this requires, in a medical malpractice action, that a plaintiff opposing a defendant's summary judgment motion "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact.... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical

malpractice, are insufficient to defeat defendant['s]... summary judgment motion." Id. at 324–25. "The law is well settled that when competing experts present adequately supported but differing opinions on the propriety of the medical care, summary judgment is not proper." See Rojas v. Palese, 94 AD3d 557 (1st Dep't 2012). In addition, a plaintiff's expert's opinion "must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." Dallas-Stephenson v Waisman, 39 AD3d 303, 307 (1st Dept 2007)(internal citations and quotations omitted).. If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment." Diaz v. Downtown Hospital, 99 NY2d 542, 544 (2002).

Here, Lenox Hill has made prima facie showing based on the expert opinions of Dr. Denton and Nurse Keelan, that its staff, including its nurses, acted within the standard of care in their care and treatment of plaintiff by providing proper skin breakdown prevention care, and appropriate post-surgical care, including wound care and wound prevention care, and that any ulcer or wound suffered by plaintiff was not the result of any lack care or deviation from the applicable standard of care by Lenox Hill. Moreover, these opinions are adequately supported by the evidence supporting Lenox Hill motion, including that testimony of Nurse O'Flaherty and Lenox Hill's records showing that various methods were used to prevent skin breakdown including in connection with wound care after surgery. The burden thus shifts to plaintiffs to controvert Lenox Hill's showing with evidentiary facts, including expert testimony.

The court finds that plaintiffs have met their burden of raising an issue of fact as to whether Lenox Hill departed from the standard of care with respect preventing skin breakdown

during the period between February 7, 2013 and February 12, 2013. Specifically, based on the expert opinion of Nurse Poliey which is supported by Lenox Hill's records, plaintiffs have raised factual issues as to whether during this period, Lenox Hill committed medical malpractice in failing to assess plaintiff at high risk for a pressure injury and to take sufficient measures to prevent her from developing pressure sores on her heels, including by keeping plaintiff's heels elevated and consistently repositioning her every two hours, and to assess plaintiff for redness which would have resulted in observing that a sore had developed. In this regard, while the Lenox Hill records show that certain preventive measures were taken, the issue raised by the records as interpreted by Nurse Poliey is whether such measures were sufficient in light of plaintiff's risk of developing pressure sores, and in light of the skin condition on her left heel showing that a sore was developing or had developed. This conclusion is supported by the King Street Chart showing that when plaintiff was admitted to King Street from Lenox Hill she had a "left heel blister" which is described as ''serum filled blister."

As for causation, plaintiffs have demonstrated that "the requisite nexus between the malpractice allegedly committed and the harm suffered" (Dallas-Stephenson v Waisman, 39 AD3d at 307), based on Nurse Poliey's opinion that Lenox Hill's deviations from the standard of care caused plaintiff's left heel pressure injury which developed two to three days prior to [plaintiff's] discharge from Lenox Hill, and later deterioration of the left heel pressure ulcer and resulting sequalae. Furthermore, her opinion as to causation is sufficiently supported by King Street Chart discussed above showing that upon admission, plaintiff had a "serum filled blister" on her left heel.

With respect to Lenox Hill's argument as to the lack of reliability of the King Street

records based on evidence that certain of these records were altered, after oral argument, pursuant to the court's request, plaintiffs efiled two sets of records received by King Street; the first set, consisting of 126 pages, was received by plaintiffs' counsel on February 25, 2014 (prior to the commencement of the action on August 29, 2014), and the second set, consisting of 316 pages, was received by all counsel on November 11, 2016. Plaintiffs' counsel states that after receiving the second set of records, "[she] noted that a number of the pages had additions/changes as compared to those originally received [and that she]...brought this to the attention of all counsel and exchanged the records we originally received." As pointed out by plaintiffs' counsel, however, the three pages of King Street records relied on by plaintiffs in opposition to Lenox Hill's motion, consisting of a two-page Admission Nursing Evaluation and the King Street Chart, indicating that when plaintiff was admitted to King Street on February 12, 2013 she had a left heel sore, were produced with both sets of records and there is no evidence that these records were altered. Under these circumstances, the consideration of these King Street records in connection with the summary judgment motions is warranted.

Accordingly, Lenox Hill's motion for summary judgment is denied to the extent that plaintiffs have raised triable issues of fact as to whether during the period between February 7, 2013 and February 12, 2013, Lenox Hill departed from the standard of care in connection with its treatment, assessment and monitoring of plaintiff for pressure sores, and whether these failures were a substantial factor in causing her to develop a pressure injury on her left heel and resulting sequelae.

Dr. Arovas' Motion

Plaintiffs allege in their Verified Bill of Particulars that Dr. Arovas, plaintiff's attending

physician at King Street, deviated from good practice in "causing, allowing [plaintiff] to suffer a worsening of the [left] heel ulcer which was identified upon her admission to [King Street]; in failing to "carefully assess plaintiff's condition and her needs;" in failing to properly assess and appreciate that plaintiff was "at high risk for skin breakdown;" in failing to properly monitor and treat plaintiff's condition; in failing to appreciate that plaintiff had swelling and decreased sensation in her leg/foot which increased her risk for skin breakdown; in failing to order offloading devices to prevent undue pressure on plaintiff; and in failing to recognize that leg spasm's increased the risk of skin breakdown; in failing to perform sufficient wound care rounds and order that plaintiff be turned and repositioned.

It is further alleged that as a result of the above negligence by Dr. Arovas, plaintiff sustained various injuries including an exacerbation and worsening of the pressure sore on her left hee, prolonged skin/tissue pressure; multiple heel sore debridements; surgery to graft heel wound and contemplated further surgery.

Dr Arovas moves for summary judgment, arguing that his care and treatment of Mrs. Douek was within the standard of care, and caused no harm to Mrs. Douek. In support of his motion, Dr. Arovas relies on his deposition testimony and his affidavit, regarding his assessment, care and treatment of Mrs. Douek, including her left heel sore, and an expert affirmation. At his deposition, Dr. Arovas testified that he performed the "admitting evaluation" of Mrs. Douek on February 15, 2013. (Arovas EBT at 77). According to Dr. Arovas' affidavit, before the evaluation and as per his custom and practice, he would have reviewed the available nursing notes and discussed Mrs. Douek with the nurse prior to performing his initial assessment.

As documented in Dr Arovas' notes regarding the physical examination, under skin Dr.

Arovas specified that plaintiff had a red area near the top of her incision site but did not note any blister or wound on her left heel (Id at 95-96). Dr. Arovas testified, however, that he was aware of the left heel blister by February 12 or 13 when he had a telephone conference with a nurse who contacted him regarding admissions orders (Id at 56-61). In fact, the King Street Chart shows that one of his admission orders was to "apply protective dressing to the left heel daily," and at his deposition he testified that the protective dressing was typically a piece of "dry gauze" taped into place to protect the heel blister from "unnecessary friction or contact with any surface underneath it" (Id at 64-65). Dr Arovas testified that he did not examine her left heel when he did the assessment of Mrs. Douek on February 15, since "[t]he nurse did not notify me that it was something that I, the physician need to see" and that he assumed that the nurses were handling the heel ulcer as he was not notified that it was something he needed to see (Id at 84-85). He also testified that "within the context of King Street ...pressure ulcers were generally the province of nurses and nursing care...meaning the nurses were the ones who managed these wounds, unless there was a complication such as a new infection" (Id at 87-88).

Dr. Arovas also testified that there would be follow-up with Mrs. Douek's private orthopedist, that she would be followed by the wound care consultant/specialist at King Street, and that he was relying on them with regard to any further treatment and care of the left heel blister or wound (Id at 36, 42, 98, 101, 127-130, 155, and 183-184).

On February 22, 2013, a nurse practitioner/wound care specialist who examined plaintiff and described the left heel wound "as 50% eschar 50% DTI (i.e. deep tissue injury)" (King Street Chart). Also, on February 22, 2013, Dr. Arovas signed a telephone order requesting a change in treatment to the lower left extremity to include cleaning with normal saline and using Silvadene

and a dry protective dressing on a daily basis (Id at 164).

On February 26, 2013, Mrs. Douek had an out-patient appointment with Dr. Weiner, her private orthopedist. Dr. Weiner recommended treating the heel ulcer with Silvadene once a day "to prevent bacterial contamination" with follow up in two weeks (Weiner EBT at. 218, 222). Dr. Weiner also testified that the notes from plaintiff's February 26, 2013 visit showed that his office "'debrided [plaintiff's left heel wound] to healthy scab'" which he explained means that "we take parts of the eschar away to determine if there is healthy tissue beneath [and] [a]t this stage there is healthy tissue underneath" (Id at 218, 219). The same day, there was a telephone order to discontinue the protective dressing to the left heel, and to start to cleanse the heel with normal saline, and apply Silvadene, which order was signed by Dr. Arovas (Dr. Arovas EBT at 168-174).

Dr Arovas saw Mrs. Douek again for follow up on March 3, 2013, and noted that she had seen a private attending orthopedist in between his seeing her; his plan was for continued therapy and rehabilitation; there is no indication that he examined the left heel ulcer which is not mentioned. (Id at 147-152). On March 6, 2013, there was a telephone order to discharge Mrs. Douek to home and Dr. Arovas countersigned the order (Dr. Arovas EBT at 153-154).

In support of his motion, Dr. Arovas submits the affirmation of Cameron R. Hernandez, M.D., a physician licensed to practice medicine in New York. Upon review of the pertinent medical records including at King Street, the Bill of Particulars and the deposition transcript of Dr. Arovas' deposition transcript and affidavit, Dr. Henandez opines that "Dr. Arovas acted within the standard of care in his role as the physician assigned to Mrs. Douek at King Street [and that]... as an assigned physician in a rehabilitative or nursing home setting, the standard of

care only requires Dr. Arovas to perform an initial assessment of the patient, follow-up with her on a monthly basis for medication review, and otherwise respond to issues brought to his attention by the staff at King Street ...[and that]... Dr. Arovas performed appropriate examination(s) and ordered appropriate treatment(s) for the plaintiff." (Hernandez Aff. ¶ 6)

Dr. Hernandez further opines that at the time of Dr. Arovas' February 15, 2013 assessment of Mrs. Douek, "based upon the nursing descriptions of the left heel blister or wound both in the [King Street] [C]hart and/or related to Dr. Arovas via conversations with the nursing staff, the standard of care did not require that Dr. Arovas personally re-examine the same blister or wound at the time" (Id ¶ 13). In addition, he opines that "[a]s of February 15, 2013, Dr. Arovas was appropriately relying upon the wound care consultants at King Street and potentially the plaintiff's private orthopedist with regard to any further care and treatment for the left heel blister or wound. He also appropriately relied upon the staff of King Street to contact him with regard to any need to re-examine or re-evaluate Mrs. Douek prior to her discharge." (Id ¶ 15). He also opines that "telephone request on February 22, 2013 requesting a change in treatment to the lower left extremity to include cleaning with normal saline and using Silvadene and a dry protective dressing on a daily basis [which] appears to be conformity with the recommendations of the non-party wound consultants and was ...countersigned by... the Director of Medicine at King Street did not require any further action or inaction on Dr. Arovas' part..." (Id ¶ 16).

He also opines that the February 26, 2013, "telephone order for a dry protective dressing to the left heel and to start daily cleansing of the left heel with normal Saline with the application of Silvadene... appears to be in conformity with the recommendations of [plaintiff's] private orthopaedist's offices (i.e. Dr. Weiner's office) who saw her the same day and was ultimately

countersigned by Dr. Arovas.. [and that] it was entirely appropriate for Dr. Arovas to rely upon the expertise and recommendations of Dr. Weiner and the non-party wound consultants" (Id at ¶ 17). He opines that "[t]he standard of care did not require any further action or inaction on Dr. Arovas' part" (Id).

As for the March 3, 2013 follow-up visit performed by Dr. Arovas, Dr. Hernandez opines that "[t]he short interval between examinations was not required without a specific request by the staff at King Street or some other triggering event, which did not occur [and that]... [t]herefore, Dr. Arovas' follow-up [visit], exceeded the standard of care applicable to his role as an assigned physician in a nursing home or rehabilitation setting (Id ¶ 18). He further states that during this visit, " Dr. Arovas appropriately noted that [plaintiff] had followed-up with her private attending orthopedist in between his seeing her. Clinically, he noted, *inter alia*, some lower extremity edema and that her surgical staples were taken out. His impression was status post tibula-fibula fracture on the left side and multiple sclerosis. His plan was for continued physical therapy and rehabilitation. This was entirely within the standard of care and the standard of care did not require any further action or inaction on Dr Arovas' part" (Id ¶ 19).

As for causation, Dr. Hernandez opines that "any higher Staging of the left heel wound or blister following the plaintiff's admission to King Street was in no way caused or contributed to by Dr. Arovas' actions or inactions [and that]... any change in the Staging of the left heel wound or blister after February 12, 2013, occurred in the absence of malpractice and could not be prevented" (Id ¶ 21) In support of his opinion he states that "since the wound is considered to be Stage II only until such time as the blister is un-roofed and once un-roofed it may prove to have been deep enough to be considered an uncovered Stage IV wound all along"(Id).

Assuming *arguendo* that Dr. Arovas met his burden of showing that he did not deviate from the accepted standard of care in connection with his care and treatment of plaintiff's left heel wound and/or that such deviations were not a proximate cause of plaintiff's injuries, plaintiffs, in their opposition, have controverted this showing based on the expert opinion of Luigi Capobianco, M.D. that Dr. Arovas departed from accepted medical practice in failing to assess and appropriately treat plaintiff's left heel pressure sore, and that malpractice was a substantial factor in causing plaintiff's injuries.

Specifically, with respect to his treatment of the heel sore, Dr. Capobiano, a physician licensed to practice medicine in the State of New York, opines, with a reasonable degree of medical certainty, that "Dr. Arovas departed from good and accepted practice on February 12th or 13th by ordering dry gauze to be applied to the [heel] blister and in failing to order good and accepted treatment for Mrs. Douek's Stage II pressure ulcer required" (Capobiano Aff. ¶ 21). He opines that "dry gauze is not an adequate device to protect the left heel from contact or friction and it did nothing to actually treat the pressure ulcer. Good and accepted practice required Dr. Arovas to order at least the 3 treatments set forth ... from the King Street protocol[5], none of which were ordered. Of particular importance was the use of a transparent dressing called for in

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[5]The King Street Protocol for the Treatment of a Stage II Pressure Ulcer (which required a doctor's order) was:

> 1.Cleanse area with Normal Saline and apply transparent dressing every three (3) days.
> 2. Pro stat, Multi Vitamins Daily, Vitamin C 1000mg OD.
> 3. Additional nutritional interventions as per dietician recommendations.

(Capbiano, Aff. ¶'s 16, 17).

the Protocol but not ordered by Dr. Arovas [and that] [a] transparent dressing treats and promotes healing by keeping heat within the pressure ulcer which allows auto debridement (removal of necrotic tissue) and encouragement of granulation" (Id ¶'s 22-24).

As for the assessment of plaintiff's heel sore, Dr. Capobianco opines that Dr. Arovas departed from good and accepted practice during his February 15, 2013 assessment of Mrs. Douek by failing to examine her left heel and "ceding all responsibility for the heel ulcer to the nursing staff unless requested otherwise..." (Id ¶ 28). He also states that as of February 15, 2013, "there was only one description in the chart of the heel blister, and that was made on February 12 by an LPN who was not certified in wound care [and that he] cannot envision a circumstance when it would be reasonable for a physician to rely on a 3-day old description of a condition he/she is required to assess" (Id ¶ 34).

He further opines that Dr. Arovas "deviated from good practice by not ordering a device to protect the heel by keeping it isolated within a boot or special padding to assist in heeling and prevent further damage" (Id ¶ 43). He also opines that "Silvadene [used on the wound] is not proper treatment for the necrotic pressure ulcer [and that]... [i]t is more likely than not that the Silvadene acted as a barrier to allow the underlying infection to worsen and stunted the granulation necessary for healing[6]" (Id ¶'s 47, 48). Dr. Capobiano further opines that Dr. Arovas deviated from the standard of care by not examining Mrs. Douek's foot on March 3, 2013.

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[6]Dr. Capobiano also opines that Dr. Arovas deviated from the standard of care in not "ordering debridement (removal of the necrotic tissue) either with a chemical enzyme or surgically" on February 26, 2013, once the pressure ulcer became necrotic which is a sign of infection (Id ¶ 47). However, as Dr. Arovas points out in reply, the record shows that the wound was debrided at Dr Weiner's office on February 26, 2018. Accordingly, this alleged deviation is not a basis for finding that Dr. Arovas did not adequately treat the wound.

With regard to causation, Dr. Capobiano opines that "Dr. Arovas' deviations from care were a cause of the deterioration of Mrs. Douek's heel wound; delayed necessary treatment; exposed the heel to continued friction; and deprived Mrs. Douek of the opportunity for a more timely and better outcome" (Id ¶ 53), He also states that while "Stage II pressure ulcer may in some instances reveal itself as a high stage once unroofed ... that certainly does not mean in any way that all Stage II pressure ulcer are doomed to worsen and therefore the care rendered, or the lack of proper care, is irrelevant"(¶ 54). In addition, he opines that "[w]hile Mrs. Douek was at King Street under the care of Dr. Arovas the pressure ulcer increased in size, necrosis developed, and there was deep tissue injury [and that]... none of these deteriorations was an unavoidable/ unpreventable of Mrs Douek's Stage II blister" (Id ¶ 55).

In reply, Dr. Arovas argues that he is entitled to summary judgment since Dr. Capobianco fails to address whether Dr. Arovas appropriately relied on the non-party wound care provider and/or the treating orthopedist to address plaintiff's heel issues such that he did not owe a duty of care to plaintiff with regard to her heel sores.[7] This argument with respect to duty is unavailing

[7]In reply, Dr. Arovas also argues that Dr. Capobianco's opinion ignores evidence that the pressure ulcer was treated with saline in accordance with the King Street protocols, and that the left heel wound was considered "unstageable" at the time of plaintiff's admission. However, these arguments do not provide a basis for disregarding Dr. Capobianco's opinion which is supported by other evidence in the record or to eliminate material issues of fact as to whether Dr. Arovas committed malpractice in connection with his care and treatment of plaintiff. Next, Dr. Arovas' reliance in reply on Dr. Capobianco's expert affirmation submitted in a different action to argue that his opinion in this action is invalid is unavailing as his opinion in that action, which involved different factual circumstances, is not controlling here. Dr. Arovas further argues in reply that plaintiffs' failure to use the word "examine" in their pleadings, including the Bill of Particulars, precludes them from claiming that Dr. Arovas departed from the standard of care in failing to examine plaintiffs' left heel. This argument is without merit since allegations in the Bill of Particulars, including that Dr. Arovas failed to "carefully assess [plaintiff's] condition" including for her "risk of a skin break down," are sufficient to put Dr. Arovas on notice of this departure.

as the question of whether Dr. Arovas owed a duty to plaintiff is "'a question of law, not medicine" and thus the expert opinions which address duty "transcend[] [the] bounds of [their] competence and intrudes upon the exclusive prerogative of the court.'" Sawh v. Schoen, 215 AD2d at 294, quoting Lipton v. Kaye, 214 AD2d 319, 322-323 (1st Dept 1995).

"The physician-patient relationship is a consensual one, and while it may arise out of a contract, the existence of the relationship does not depend upon the existence of any express contract. The relationship is created when the professional services of a physician are rendered to and accepted by another person for the purposes of medical or surgical treatment." Lee v. City of New York, 162 AD2d 34, 36 (2d Dept 1990), 78 NY2d 863 (1991). An implied physician-patient relationship can arise based on evidence that "a physician gave advice to a patient by communicating through another health-care professional." Rogers v. Maloney, 77 AD3d 1427 (4th Dept 2010). The general duty of care owed by physicians to their patients, however, "may be limited to those medical functions undertaken by the physician and relied upon by the patient." Dombroski v. Samaritan Hosp., 47 AD3d 80, 86 (3d Dept 2007).

Applying these principles to the instant case, the court finds that evidence that Dr. Arovas was the attending physician assigned to plaintiff's care at King Street, assessed her condition and signed orders regarding treatment, including of her left heel sore, is sufficient to raise factual issues as to Dr. Arovas' liability even though the record indicates that the wound care specialists and plaintiff's orthopedist were also involved in plaintiff's care and treatment, including of her heel sore. See Cole v. Champlain Valley Physician's Hosp. Medical Center, 116 AD3d 1283, 1287 (3d Dept 2014)(denying summary judgment to defendant physician on the ground that other physicians were treating plaintiff's conditions underlying the malpractice claim where there was

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see generally Tom v. Sundaresan, 107 AD3d 479 (1st Dept 2013)(finding issue of fact existed as to whether physician owed duty to patient under the circumstances of the action). Accordingly, Dr. Arovas is not entitled to summary judgment based on evidence that the wound specialist and Dr. Weiner were involved in the care and treatment of plaintiff's heel sore.

Conclusion

In view of the above, it is

ORDERED that Lenox Hill's motion for summary judgment by Lenox Hill is denied to the extent that issues of fact exist to whether during the period between February 7, 2013 and February 12, 2013, Lenox Hill departed from the standard of care in connection with its treatment, assessment and monitoring of plaintiff for pressure sores, and whether these failures were a substantial factor in causing her to develop a pressure injury on her left heel and resulting sequelae; and it is further

ORDERED that Dr. Arovas' motion for summary judgment is denied to the extent that issues of fact exist as to whether he committed malpractice in failing to assess, monitor and appropriately treat plaintiff's left heel pressure sore, and whether the alleged malpractice was a substantial factor in causing plaintiff's injuries; and it is further

ORDERED that the parties shall appear for a previously scheduled pre-trial conference on January 17, 2019 at 11:00 am, in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: January 9, 2019

J.S.C.

HON. JOAN A. MADDEN
J.S.C