

Villani v Salisbury

2019 NY Slip Op 34304(U)

September 16, 2019

Supreme Court, Dutchess County

Docket Number: Index No. 2017-50604

Judge: Christi J. Acker

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

-----X

WESLEE VILLANI AND JOHN VILLANI,

Plaintiffs,

DECISION AND ORDER

INDEX NO. 2017-50604

SEQ. NO. 2

-against-

JANET M. SALISBURY N.P., SAMUEL KOSZER M.D.,
KATRINA KNOWLES M.D. AND
VASSAR BROTHERS MEDICAL CENTER,

Defendant(s).

-----X

ACKER, J.

Defendant KATRINA KNOWLES, M.D. moves for an order, pursuant to CPLR §3212, granting her summary judgment and dismissing Plaintiffs' complaint as well as all cross-claims against her.

The following papers were considered:

PAPERS	NUMBERED
Notice of Motion/Affirmation of Carol C. Poles, Esq./Exhibits A-Q	1-19
Affirmation in Opposition of Laurence M. Deutsch, Esq./Exhibits A-F	20-27
Affirmation in Reply of Carol C. Poles, Esq./Exhibits R-T	28-31

This is a medical malpractice action where Plaintiffs allege that the negligent care of Defendants SAMUEL KOSZER, M.D. and KATRINA KNOWLES, M.D. caused Plaintiff WESLEE VILLANI¹ to suffer serious physical injuries. According to Plaintiffs, WESLEE VILLANI suffered injuries as a result of a delay in administering tissue plasminogen activation (“tPA”), a thrombolytic or “clot breaking” medication. Plaintiffs did not oppose the motion of Janet Marie Salisbury, NP for summary judgment and that application was granted by a separate order. The cause of action against Vassar Brothers Medical Center (hereinafter referred to as “VBMC”) is based on its vicarious liability for the Defendants.

It is well established the moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]. “In order to obtain summary judgment, there must be no triable issue of fact presented...even the color of a triable issue of fact forecloses the remedy.” In re Cuttitto Family Trust, 10 AD3d 656 [2d Dept. 2004], quoting LNL Constr. v. MTF Indus., 190 AD2d 714, 715 [2d Dept. 1993]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. Zuckerman, v. City of New York, supra; Alvarez v. Prospect Hosp., 68 NY2d 320 [1986].

On a motion for summary judgment, the court’s function is to determine if a factual issue exists. “[T]he court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine.” Brown v. Kass, 91 AD3d 894, 895 [2d Dept. 2012] [*citations omitted*]. It is not the court’s function on a motion for summary judgment to assess credibility, Chimbo v. Bolivar, 142 AD3d 944 [2d Dept. 2016]; Garcia v. Stewart, 120 AD3d 1298, 1299 [2d Dept. 2014], or to engage in the weighing of evidence. Scott v. Long Is. Power Auth., 294 AD2d 348 [2d Dept. 2002]. A motion for summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” Ruiz v. Griffin, 71 AD3d 1112, 1115 [2d Dept. 2010].

¹ Plaintiff John Vilanni is the husband of Weslee Vilanni and is suing derivatively.

“In order to establish liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff’s injuries.” M.C. v. Huntington Hosp., --AD3d --, Lexis 6189, 2019 NY Slip Op 06186 [2d Dept. 2019]. “On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby.” Burns v. Goyal, 145 AD3d 952 [2d Dept. 2016], *citing* Leavy v. Merriam, 133 AD3d 636 [2d Dept. 2015]. “Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause.” Burns, supra, citing Koehler v. Schwartz, 48 NY2d 807 [1979].

Discussion

At approximately 1:15 p.m. on September 23, 2014, Plaintiff WESLEE VILLANI presented to the emergency department at VBMC. She was transported by ambulance. Upon Mrs. VILLANI’s arrival at VBMC, DR. KNOWLES was the emergency department attending physician and DR. KOSZER was the on-call neurologist. Mrs. VILLANI was immediately seen by DR. KNOWLES and the triage nurse. At that time, Mrs. VILLANI was unresponsive, with left side hemiplegia and a fixed right gaze.

The VBMC medical records set forth the timeline of Mrs. VILLANI’s treatment there. She was ultimately transferred, at approximately 4:15 p.m., to Westchester Medical Center for further treatment.

The Bill of Particulars sets forth Plaintiffs’ allegations as to DR. KNOWLES’ departure from the standard of care. According to the Bill of Particulars, DR. KNOWLES departed from accepted standards of care by failing to secure timely consultation with a neurologist, neurosurgeon or other physician with sufficient training or experience to evaluate stroke; negligent application of NIH Stroke Scale; negligently concluding patient was ineligible for tPA treatment; delay in tPA administration; failure to provide a timely, appropriate referral to the Plaintiff upon receipt of history, clinical findings and/or radiographic results consistent with large and evolving occlusive stroke; failure to secure timely second opinion on stroke treatment;

failing to adequately appreciate and chart Plaintiff's neurological status; misdiagnosis of stroke symptoms; failing to appreciate optimal time window for tPA therapy; failing to treat evolving stroke with required urgency; failing to coordinate care with neurology and/or neurosurgical attending and improperly concluding patient was ineligible for tPA therapy.

Determination of DR. KNOWLES' motion largely requires resolution of the question of who was responsible for certain aspects of Mrs. VILLANI's care. The submissions focus on two particular spheres of decision-making by the physicians, to wit: the administration of tPA and transfer to Westchester Medical Center for possible intra-arterial tPA administration.² In her motion, DR. KNOWLES contends that these decisions reside with the consulting neurologist.

In support of the motion to dismiss, DR. KNOWLES submits her own affirmation, her attorney's affirmation, the pleadings, Plaintiff's medical records, the VBMC stroke protocol, transcripts from the examinations before trial of both Plaintiffs and their family members, Ms. Salisbury, Dr. KNOWLES, Dr. KOSZER, Dr. Krakowski, a radiologist, and Martin Haag, a registered nurse at VBMC. Dr. KNOWLES details her treatment of the patient from the time she arrived at the emergency department to the transfer to Westchester Medical Center, arguing that her treatment of Mrs. VILLANI was appropriately timely and within the standard of care.

In opposition, Plaintiffs submit the affirmation of their expert, Dr. Isaac Silverman, a neurologist. Dr. Silverman sets forth his qualifications and the materials reviewed by him. He concludes that Mrs. VILLANI suffered "additional and unnecessary brain damage" due to delay and inaction on the part of Dr. KNOWLES. See Affm. of Isaac Silverman, M.D., dated May 6, 2019 at paras. 11-14. In his opinion, Dr. KNOWLES departed from the standard of care by "abandoning" her responsibility as the patient's attending physician to an "absent" neurological consultant when she failed to recommend administration of tPA. Dr. Silverman further opines that Dr. KNOWLES should have timely considered endovascular interventions at a stroke institution with a higher level of care. He concludes that the "delay" in contacting Westchester Medical Center constitutes a deviation from the standard of care by Dr. KNOWLES. Dr.

² Intra-arterial administration of tPA was not available at VBMC.

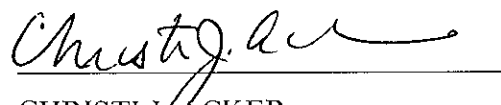
Silverman also sets forth other alleged delays on the part of Dr. KNOWLES, including a delay in obtaining a second imaging study.

Where medical malpractice is alleged, and, as here, there are conflicting experts' opinions of a non-conclusory nature that raise issues of credibility, then the matter must be resolved by the trier of fact, and not the court by way of a summary judgment. Henry v. Sunrise Manor Ctr. For Nursing & Rehabilitation, 147 AD3d 739 [2d Dept. 2017]; Keesler v. Small, 140 AD3d 1021 [2d Dept. 2016]; Guctas v. Pessolano, 132 AD3d 632 [2d Dept. 2015]. It is clear from the submissions that the medical experts have differing opinions as to the responsibility of the emergency medicine physician regarding the administration of tPA and the transfer of a patient to Westchester Medical Center. The Plaintiff's expert affidavit conflicts with the Defendant's affirmation as to an alleged departure from the standard of care on the part of DR. KNOWLES. As such, summary judgment is not appropriate and Dr. KNOWLES' motion must be denied. Henry v. Sunrise Manor Ctr. For Nursing & Rehabilitation, *supra*; Guctas v. Pessolano, *supra*.

Defendant KNOWLES requests on reply that the Court deem certain facts "established" pursuant to CPLR 3212(g). A conference/oral argument is scheduled for October 30, 2019 at 9:30 so that the Court may address this request.

This shall constitute the Decision and Order of this Court.

Dated: September 16, 2019
Poughkeepsie, New York



CHRISTI J. LACKER
Justice of the Supreme Court

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