

Webster v Chmelicek
2019 NY Slip Op 34464(U)
August 5, 2019
Supreme Court, Onondaga County
Docket Number: Index No. 5727/2017
Judge: Gregory R. Gilbert
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF ONONDAGA

SARAH H. WEBSTER as Executrix of the
Estate of DAVID C. WEBSTER, deceased,

Plaintiff,

vs.

THOMAS V. CHMELICEK, M.D. and
IMMEDIATE MEDICAL CARE OF CNY, P.C.,

Defendants.

DECISION & ORDER
Index No.: 5727/2017
RJI #: 33-18-0070

HON. G. GILBERT, JSC

This medical malpractice/wrongful death action was commenced by summons and complaint filed October 25, 2017. Issue was joined by answer filed January 5, 2018. A trial note of issue was filed November 21, 2018. Defendant has timely filed a motion for summary judgment based on the affirmation of defendant, Thomas V. Chmelicek, M.D. without a supporting expert. The motion may properly be supported by the defendant physician's expert opinion submitted by affidavit. Moyer v. Roy, 152 AD3d 1188 (4th Dept 2017); Webb v. Scanlon, 133 AD3d 1385 (4th Dept 2015). Plaintiff opposes the motion with an expert affidavit from a board certified emergency medicine physician.

The motion was argued before the Court on July 11, 2019 at which time counsel for defendants affirmatively stated several times that questions of fact had been raised on the issue of medical negligence. Even if that were not the case, the affirmation provided by defendant was conclusory and failed to shift any burden to plaintiff on the motion. Winegrad v. New York University Medical Center, 64 NY2d 851 (1985); Viviane Etienne Medical Care v. Country-Wide Insurance Company, 25 NY3d 498 (2015); Vega v. Restani Construction Corp., 18 NY3d 499 (2012); Smalls v. AJI Industries, Inc., 10 NY3d 733 (2008).

Defendant's affirmation does not take into account the certified death certificate or autopsy report for Mr. Webster submitted under affirmation. Defendant

fails to explain why Mr. Webster's history, reflected by Defendant's records as to high blood pressure, high cholesterol and high pulse rate were not suggestive of a cardiac issue. The medical record shows that Mr. Webster had an elevated blood pressure on defendant's examination despite his medications for that condition and this is not explained. Mr. Webster had a high normal heart rate of 90 beats per minute according to the examination record and this is not explained. Instead, defendant states that he listened to Mr. Webster's heart and felt his pulse and both were "normal". Defendant's diagnosis included "nausea and malaise" both of which may be related to a cardiac issue and these findings are not explained so as to dismiss the cardiac issue. Defendant notes that he had an EKG machine as well as the ability to perform CBC blood work onsite and fails to explain why use of either was not considered.

Defendant affirmatively states that there were no signs of an issue with the appendix or gallbladder. The abdominal examination described by defendant at paragraph 20 can be best described as benign indicating "no acute issue" while Mr. Webster was reporting significant pain and no explanation is provided as to how defendant reached the diagnosis that he did. Mrs. Webster has testified that the entire examination, including the history and nursing assessment undertaken by the nursing staff, took less than five minutes and the brevity of the examination is not explained. [See Webster Transcript page 68 lines 10 to 16.] Defendant simply states in conclusory fashion that there was no indication for "further" cardiovascular workup. No burden has been shifted on the motion to plaintiff as to a deviation from the standard of care.

Even if a question of fact was not conceded, defendant's affidavit was not conclusory and the burden on the motion had passed to plaintiff, plaintiff's expert affirmation was sufficient to raise a question of fact as to Mr. Webster's care and treatment. That affirmation references defendant's records, relevant pleadings, deposition transcripts but also the certified death certificate and autopsy report under affirmation. Plaintiff's expert identifies the standard of care based on the symptoms defendant admits were described as well as the deviation from that standard of care. In the presence of competent and conflicting expert opinion, summary judgment is not appropriate. O'Connor v. Kingston Hospital, 166 AD3d 1401 (3rd Dept 2018); Moyer v. Roy, 152 AD3d 1188 (4th Dept 2017); Cummings v. Brooklyn Hospital Center, 147 AD3d 902 (2nd Dept 2017).

During the course of oral argument on the motion, the focus by defendants shifted to proximate causation arguing that plaintiff had failed to met her burden to demonstrate a question of fact. Defendant bears the initial burden on the motion to demonstrate that *either* there was no deviation from the applicable standard of care *or* that any claimed deviation did not proximately cause plaintiff injury. Hope AL v. Unity Hospital of Rochester, 2019 NYAppDiv LEXIS 4552 (4th Dept 2019); Webb v. Scanlon, 133 AD3d 1385 (4th Dept 2015); Bagley v. Rochester General Hospital, 124 AD3d 1272 (4th Dept 2015); Cole v. Champlain Valley Physicians' Hospital Medical Center, 116 AD3d 1283 (3rd Dept 2014) and Aliosha v. Ostad, 153 AD3d 591 (2nd Dept 2017). Defendant must demonstrate a prima facie right to summary judgment in one respect or the other before any burden shifts to plaintiff.

The affirmation by defendant addresses only the standard of care. At no point does the defendant opine that his care caused no injury to Mr. Webster. Defendant had the burden to demonstrate, under the circumstances of this case, that his care and treatment did not cause injury to Mr. Webster. Winegrad v. New York University Medical Center, 64 NY2d 851 (1985). Even if such an opinion was to be inferred, based on the claimed denial of chest pain and shortness of breath attributed to Mr. Webster on defendant's examination, there is no detailed examination of Mr. Webster's cause of death in relation to the treatment that defendant provided. Moreover, the Court is charged to view evidence and inferences arising therefrom in a light most favorable to the responding party when addressing the motion for summary judgment. Haymon v. Pettit, 9 NY3d 324 (2007); Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., LP, 7 NY3d 96 (2006). Thus, it would be improper to infer a causation opinion to defendant.

Aliosha v. Ostad, 153 AD3d 591 (2nd Dept 2017) demonstrates the point being made. In that case, no issue was presented as to deviation from the standard of care. The defendant, however, provided a detailed expert affirmation showing that the plaintiff did not experience testicular torsion as had been claimed pointing to specific testing done during the defendant's care that negated plaintiff's claimed injury. This was found to create a prima facie case for summary judgment showing that any departure from the applicable standards of care did not proximately cause the plaintiff's alleged injuries. With this finding, and only then, was any burden shifted to plaintiff.

In DiLorenzo v. Zaso, 148 ADd3d 1111 (2nd Dept 2017), defendant's papers

demonstrated a question of fact and did not meet the prima facie burden on the departure element. However, defendant was able to meet the motion burden that any failure of care was not a proximate cause of plaintiff's injury by pointing out that both of his experts established that plaintiff's strep infection predated defendant's treatment. With this finding, and only then, was any burden shifted to plaintiff.

In Shashi v. South Nassau Communities Hospital, 104 AD3d 838 (2nd Dept 2013), the hospital's expert was able to demonstrate that despite the failure to diagnose a fracture, plaintiff nonetheless received appropriate care for the fracture by immobilization and instruction to follow up with an orthopedist. With this finding, and only then, was any burden shifted to plaintiff.

In Kubera v. Barholomew, 167 AD3d 1477 (4th Dept 2018), defendants' expert affirmations as to deviation from the standard of care were rejected. Defendants separately addressed the issue of proximate causation and this was separately rejected. Plaintiff's expert opinion in opposition wasn't even reached because no burden shifted to plaintiff.

Contrary to defendant's assertion there was no burden that ever shifted to plaintiff on the motion for summary judgment as to the issue of proximate cause. Given the concession of a question of fact as to deviation and the conclusory nature of defendant's affirmation as to deviation, it was incumbent on defendants to establish that there was no issue of fact present as to proximate cause for a deviation to lead to Mr. Webster's demise. Defendants completely failed to negate such a link. This causes the motion to be denied regardless of plaintiff's papers in opposition. Vega v. Restani Construction Corp., 18 NY3d 499 (2012); Smalls v. AJI Industries, Inc., 10 NY3d 733 (2008).

Even if this wasn't the case and somehow a burden was shifted to plaintiff, that burden was fairly met by plaintiff's expert affirmation. Although the expert affirmation is succinct on the issue of proximate cause, it is based on a review of the medical records, deposition transcripts and the certified death certificate and autopsy report under affirmation and is sufficient to provide a link between the alleged deviations and the death of Mr. Webster. Longtemps v. Olivia, 110 AD3d 1316 (3rd Dept 2013); Conto v. Lynch, 122 AD2d 1136 (3rd Dept 2014); Plourd v. Sidoti, 69 AD3d 1038 (3rd Dept 2010).

This matter does not involve any differentiation between the Second Department and the other Departments as to burden shifting between the issues of deviation and proximate causation noted by the Court of Appeals in Pullman v. Silverman, 28 NY3d 1060 (2016). Defendants have demonstrated neither element so as to meet their burden on the motion. It would be improper, as a matter of law, to impose any motion burden on plaintiff simply because defendants have made a motion for summary judgment that has no prima facie merit. Vega v. Restani Construction Corp., 18 NY3d 499 (2012); Smalls v. AJI Industries, Inc., 10 NY3d 733 (2008).

Accordingly, the motion by defendants, Thomas V. Chmelicek, M.D., and Immediate Medical Care of CNY, P.C., for summary judgment is **DENIED** in all respects.

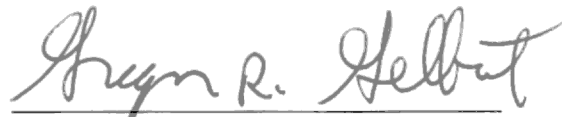
There are other issues raised in a second motion by defendants to strike the trial note of issue and compel further disclosure. Plaintiff affirmatively shows that all disclosure, including Aarons authorizations, has been addressed. The non-party deposition of Mr. John Enright has been completed. No reply on these points was provided and the issue was not mentioned by the parties at argument. Defendants' complaints as to the sufficiency of the disclosure provided and request to preclude proof at trial are more properly left to motions in limine when and if the trial is reached.

Accordingly, the motion by defendants, Thomas V. Chmelicek, M.D., and Immediate Medical Care of CNY, P.C., to strike the trial note of issue and to compel further disclosure is **DENIED**.

IT IS SO ORDERED.

ENTER

Dated: August 5, 2019
Syracuse, NY


HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE