

Stewart v UPR Care Corp.

2019 NY Slip Op 34566(U)

June 3, 2019

Supreme Court, Nassau County

Docket Number: Index No. 608447/16

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

-----X PART 4

RODNEY STEWART as ADMINISTRATOR of
the Estate of MARJORIE STEWART, Deceased,

Plaintiff,

INDEX NO. 608447/16

-against-

MOTION DATE: 4/10/19

SEQUENCE NO. 001, 002

UPR CARE CORP. d/b/a COLD SPRING
HILLS CENTER FOR NURSING AND
REHABILITATION and OLAF BUTCHMA,
D.O.,

Defendants.

-----X

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Upon the foregoing papers, the motion by defendant, UPR Care Corp., d/b/a Cold Springs Hills Center for Nursing and Rehabilitation (hereinafter as “the nursing home”), for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint against it, or in the alternative, dismissing the plaintiff’s claim for punitive damages, and the motion by the defendant Olaf Butchma, D.O. (hereinafter as “Butchma”) for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint against him, are determined as provided herein.

The plaintiff seeks to recover for negligence, negligence *per se*, violations of the State and Federal Law, medical malpractice and the wrongful death of Marjorie Stewart, the decedent. Plaintiff alleges, *inter alia*, that the defendants failed to take adequate and proper measures to prevent and treat pressure ulcers and that the nursing home violated both Federal and State statutes and regulations by, *inter alia*, failing to do so which supports her cause of action for

negligence *per se* as well as an award of punitive damages. Plaintiff alleges that as a result of the defendants' negligence, the decedent developed Stage IV decubitus ulcers to her sacrum and right and left heels, Stage II bilateral buttocks ulcers, a Stage II right ear decubitus ulcer, a Stage II right posterior heel decubitus ulcer and a right lateral lower leg proximal ulcer. She is also alleged to have suffered skin loss, subcutaneous tissue loss, muscle loss, emotional harm and psychological harm and pain and suffering.

Defendant, Dr. Butchma, maintains that the plaintiff seeks to recover solely for the ulcers the decedent suffered which was not within the realm of care provided by him, as that care and treatment was the solely the responsibility of the nursing home. In addition, he maintains that even if the prevention and treatment of ulcers fell within his duties to the decedent, the care and treatment he provided her was well within the accepted standards of medical practice and was not a proximate cause of her injuries.

The facts pertinent to the determination of this motion are as follows: The decedent was a patient at the nursing home over the years prior to the admission that is the subject of this action. During that time she suffered from various ulcer. The admission at issue in this action spanned from July 22, 2014 until her death on March 17, 2016, excluding the periods of time she was hospitalized. The decedent was re-admitted to the nursing home on July 22, 2014 from Syosset Hospital where she had been treated for sepsis and pneumonia. Notably, in January 2014, she suffered a right ACA/MCA stroke which necessitated a craniotomy.

"Medical malpractice actions require proof that the defendant physician deviated or departed from the accepted community standards of practice, and that such deviation . . . was a proximate cause of the plaintiff's injuries (citations omitted)" (*Dixon v Chang*, 163 AD3d 525, 526-27 [2d Dept 2018]). "When moving for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (emphasis added) (citations omitted)" (*Dixon v Chang*, 163 AD3d at 526-27). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, . . . but only as to the elements on which the defendant met the prima facie burden" (quotations and citations omitted)" (*Dixon v Chang*, 163 AD3d at 526-27; see also, *Smarkucki v Kleinman*, __AD3d__, 2019 WL 1646003 [2d Dept Apr. 17, 2019]). "Although physicians owe a general duty of care to their

patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient” (*Dixon v Chang*, 163 AD3d at 526-27).

“ ‘To establish proximate cause, the plaintiff must demonstrate “sufficient evidence from which a reasonable person might conclude that it was more probable than not that” the defendant's deviation was a substantial factor in causing the injury’ ” (*Daniele v Pain Mgt. Ctr. of Long Is.*, 168 AD3d 672, 675 [2d Dept 2019], quoting *Flaherty v Fromberg*, 46 AD3d 743, 745 [2d Dept 2007], quoting *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881 [2d Dept 2005], citing *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [2d Dept 1998], lv denied 92 NY2d 818 [1999]). “ ‘[T]he plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased his injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his [or her] injury’ ” (*Daniele v Pain Mgt. Ctr. of Long Is.*, 168 AD3d at 675, quoting *Flaherty v Fromberg*, 46 AD3d at 745).

The plaintiff has alleged that Dr. Butchma negligently supervised the nursing home's staff, failed to call in specialists, failed to prevent injury or worsening thereof including her right and left heel pressure ulcers, her right ear pressure ulcer, her right posterior heel and her right lateral lower leg proximal pressure ulcer. She alleges that Dr. Butchma failed to prevent the ulcers and to promote their healing. More specifically, she alleges that there was a failure to properly turn and position the decedent, to order topical ointments and creams and to develop a comprehensive care plan. In addition, she alleges that Dr. Butchma failed to order heel floats, a proper mattress and fluids, to monitor the decedent's intake and output and to use proper pressure reducing devices including pads, cushions, pillows wedges, boots and heel protectors.

In support of his motion, Dr. Butchma has submitted the affirmation of Board Certified Internist Vincent P. Garbitelli. Having reviewed the pertinent medical records as well as the complaint, the Bill of Particulars and the testimony offered at the examinations-before-trial, Dr. Garbitelli opines within a reasonable degree of medical certainty as follows: that the care and treatment provided by Dr. Butchma to the decedent was at all times timely and appropriate; that it met the applicable standards of care; and that it was not a proximate cause of her injuries or demise. He opines that the standard of care here did not require Dr. Butchma as the decedent's

attending physician to assess her risk of developing decubitus ulcers; Rather, he opines that that task fell solely within the nursing staff's purview and was its responsibility. He opines that it was not Dr. Butchma's responsibility to perform routine or intermittent examinations of the decedent's skin to check for signs and/or symptoms of decubitus ulcers; Again, that task was entirely within the nursing's staff's domain and it was the nursing staff's responsibility to alert Dr. Butchma of any changes to the decedent's skin condition that warranted his involvement. Accordingly, Dr. Garbitelli opines that Butchma cannot be held responsible for the decedent's bed sore injuries or any role they may have played in her demise. More specifically, Dr. Garbitelli opines that the implementation and/or modification if warranted of a plan to prevent pressure ulcers was the nursing staff's responsibility. He explains that while doctors may become involved in plans to prevent pressure ulcers, they are not required to do so, and that doctors may become involved at the request of a nurse if a doctor's order is required for particular intervention or treatment, but notes that was not the case here as a doctor's order was not required for anything ordered for the decedent to prevent pressure ulcers. Thus, again, since Dr. Butchma's orders were not necessary here, Dr. Garbitelli opines that Dr. Butchma cannot be held responsible here.

Dr. Garbitelli further opines that in any event, Dr. Butchma inspected the decedent's skin condition every time there was a change in it in a timely manner. He was "quick to become involved each and every single time a new skin breakdown was documented" and "ordered appropriate measures and kept a close eye on [the decedent] despite her hopeless condition." He notes, too, that the skin treatment was remarkably successful considering the decedent's seriously degraded health and her prognosis. Dr. Garbitelli opines that the decedent's right heel, right posterior heel and right ear lesions were clinically unavoidable in view of her condition. He notes that the records indicate that her skin was monitored during daily care and that she was turned and positioned every two hours, she received air mattresses and pressure reducing cushions and bilateral heel floats. She also was provided dietary supplements per Dr.'s orders to stave off skin breakdown. Dr. Garbitelli notes that the plaintiff had numerous serious co-morbidities including congestive heart failure, hypertension, peripheral vascular disease and renal disease (which is not supported by the record), as well as significant brain damage, extensive encephalomalacia, loss of brain tissue, and severe vascular compromise, which

coupled with her inability to move, rendered the development of pressure ulcers to be only a matter of time. These conditions prevented the decedent from adjusting her position in bed and resulted in very poor circulation to her periphery. Thus, he opines that the development of pressure ulcers was inevitable. Dr. Garbitelli further notes that as a result of her extensive brain damage and CVA/craniotomy, the decedent had cerebral edema and received corticosteroids daily which predisposed her to developing pressure ulcers and hindered their healing. Her diminished blood flow caused her to develop superficial ulcers on her ears and heels. Dr. Garbitelli opines that the decedent was appropriately treated with heel pads and appropriate barrier creams, medications and dietary changes, however, she was ventilator dependant and was not going to improve. In fact, he opines that Dr. Butchma was attentive and acted within the standards of care at all times but there could not be any realistic expectation that the decedent would avoid skin breakdown under the circumstances. Finally, as for the decedent's alleged pain and suffering, Dr. Garbitelli opines that the decedent's significant neurological damage "would greatly have diminished her ability to feel pain." While she at time displayed reflexive movements, he opines that "*it does not appear* that there was any conscious awareness of pain and suffering (emphasis added)". He notes that per the nursing homes' records, she was in a vegetative state at all pertinent times. He therefore opines within a reasonable degree of medical certainty that the decedent was "unable to experience pain and suffering."

In conclusion, Dr. Garbitelli opines that Dr. Butchma and the nursing home's staff did an outstanding job in treating and caring for the decedent. He finds it impressive that they were actually able to heal the numerous ulcers and to keep her alive so long which he opines is not only surprising but indicative of very good and assiduous care.

Dr. Butchma did not establish that wound care was not his responsibility. His intense involvement in caring for the decedent's wounds indicates otherwise. Numerous wound care notes are found throughout the decedent's records clearly indicating his involvement in caring for her wounds, including staging and diagnosing them as well as treating them. Even if technically he was not responsible for wound care, his participation renders him responsible for his care of them. Dr. Garbitelli's conclusion that the decedent did not suffer any pain must be disregarded as conclusory in view of the persistent prescriptions for pain medication throughout the decedent's stay. In fact, even he only goes so far as to surmise the it does not appear that she

suffered conscious pain and suffering. Nevertheless, Dr. Garbitelli has established that Dr. Butchma's care and treatment of the decedent's bed sores was not a proximate cause of her demise. In addition, based on Dr. Garbitelli's analysis, Dr. Butchma has established that the care and treatment he provided the decedent conformed with the applicable standards of care and was not a cause of the development of bed sores or her pain and suffering. The burden accordingly shifts to the plaintiff to establish the existence of a material issue of fact with respect to that issue.

The nursing home has submitted an affirmation of Dr. Vincent Marchello, Board Certified in Geriatric medicine, in support of its motion for summary judgment. Dr. Marchello, based upon his review of the decedent's medical records, the plaintiff's allegations and the testimony given thus far regarding this case, opines within a reasonable degree of medical certainty as follows: That there were no departures from the accepted standards of nursing home care by the nursing home staff in their care and treatment of the decedent and that there were no failures to exercise reasonable care by the nursing home staff that proximately caused and/or contributed to her alleged injuries and/or her death; that the decedent did not sustain any injuries that were proximately caused by the nursing home's staff's violation of any specific duties imposed by statute; and that the nursing home's staff's care and treatment of the decedent did not amount to a deprivation of her nursing home rights or benefits and that there is no evidence of intentional or reckless conduct. Therefore, he opines that the request for punitive damages must be denied in any event. Dr. Marchello opines that the preventive measures that were in place on September 23, 2014, when the decedent developed the right heel blister and on June 2, 2015 when she developed the right posterior heel and right ear lesions conformed to the accepted standards of medical care and the applicable regulatory provisions applicable to pressure ulcers and that they were adequate, appropriate and reasonable. He also opines that the development of these lesions was "clinically unavoidable in view of [the decedent's] condition" and that once they arose, necessary treatment and services to promote healing were provided which in fact produced that result. Before these lesions developed, the nursing home staff had already developed and implemented the following practices to prevent lesions: monitoring decedent's skin during daily care; keeping her skin clean and dry; monitoring her weight; monitoring and evaluating her food intake; monitoring her blood work; changing her incontinence brief every

two hours and as needed; turning and positioning her every two hours and PRN (65); providing range of motion activities; using specialty mattress, pressure reducing cushions and bilateral heel floats; treating her skin as per MD's orders; following the pressure ulcer protocol; medications as ordered; assessing for changes at each shift change; diet and dietary supplements as per Dr.'s orders; protective/preventive skin care; monitoring pain level to assess relief; and, lab monitoring. Notwithstanding all of these efforts, the decedent developed the aforementioned injuries. He opines that the CNA Accountability records reflect that from her admission on July 22, 2014 until September 23, 2014, the proscribed turning and positioning was done, and that it continued after these lesions emerged. They also document that the decedent was on an air mattress and preventive bilateral heels were being used before these lesions developed. Dr. Marchello also opines that once these ailments developed, proper treatment orders were obtained and followed, the lesions were observed by the Wound Care Team weekly if not more frequently, and they eventually healed without becoming infected or re-emerging, which Dr. Marchello opines is evidence that the decedent was properly cared for.

Similarly, Dr. Marchello opines that the applicable federal and state regulations, i.e., 42 CAR 483.25 (c) and 10 NYCRR 415.12 (c) were not violated. Those regulations require the facility to ensure that a resident that enters the facility without pressure sores does not develop them unless they are "unavoidable" in light of his or her condition. The state regulation also requires that they were unavoidable "despite every reasonable effort to prevent them." Those regulations also require the facility to provide the resident with necessary treatment and services to promote healing, prevent infection and prevent new sores from developing. Dr. Marchello opines that the nursing home complied with the aforementioned requirements as the decedent's risk factors and risk of ulcers was known as indicated by the development and implementation of preventive care plans to prevent ulcers and skin breakdown. In addition, the decedent she was treated to prevent infection and new sores. Dr. Marchello opines that the lesions were clinically unavoidable in light of the decedent's myriad risk factors and medical co-morbidities which caused them. More specifically, he opines that the right heel lesions developed due to the decedent's long standing and progressively worsening vascular disease, her cardiac arrhythmia, her PEG dependence for feeding and nutrition, her arteriosclerotic heart disease and coronary artery disease, her hyperlipidemia, her congestive heart failure, her peripheral edema, her CVA

with tracheotomy and ventilator dependence, the effects of her CVAs and her resulting vegetative state and insulin-dependent diabetes. He opines that the decedent's vascular disease caused her right lateral leg ulcers and also inhibited the flow of oxygenated blood to her right heel which made the prevention and healing of lesions at those sites more challenging. In addition, the decedent's Diabetes Mellitus caused long term high blood glucose levels which results in damage to the linings of arteries carrying blood to the legs, resulting in arteriosclerosis which also complicates heel wound prevention and healing. Similarly, Dr. Marchello opines that arteriosclerotic heart disease caused narrowing of her arteries due to the plaque build up which compounded the problems with her oxygen rich blood flow to her body including her right heel. And, the decedent's peripheral edema which was a result of the diabetes, arteriosclerotic disease and/or her diabetes medications caused swelling in her lower right extremity further impairing heel wound prevention and lengthening the time to heal. The effects of the decedent's CVAs or strokes including her need for a ventilator, PEG feedings and hemiplegia which diminished her mobility also increased the risk of developing lesions as well as complicating their resolution. Dr. Marchello concludes that efforts were taken to prevent the lesions and they were treated effectively once they developed. Furthermore, they did not become infected nor did they recur.

Dr. Marchello opines that the ulcer on the decedent's right lower leg was a vascular ulcer, not a pressure ulcer and therefore it developed as the result of vascular insufficiency and poor blood circulation. Vascular ulcers cannot be prevented. He explains that the location of this ulcer is atypical since it is not over a bony area (like the lower back, sacrum and heel lesions) and is consistent with a lesion that developed due to poor blood circulation. He opines that the development of this ulcer given the decedent's medical status was unavoidable. Once again, he opines that appropriate preventive measures and the treatment rendered here conformed with the applicable standards. And, he notes that it was treated properly as it ultimately resolved. He notes that since this was not a pressure ulcer, the regulations cited previously do not apply.

Dr. Marchello opines that the bilateral and sacrum areas while pink, hypopigmented and fragile, never developed into ulcers as there is no evidence that their condition ever worsened. As for the alleged statutory and regulatory violations, he opines that the decedent's bilateral

injuries were immediately identified as were her risk factors, and the wounds were properly treated with Calazime as they never opened or worsened thereby negating the alleged violations.

Citing the documented cause of the decedent's death, Dr. Marchello opines that there is no evidence that anything the nursing home staff did or failed to do contributed to the decedent's demise.

Via the affirmation of Dr. Marchello, the nursing home has established its entitlement to summary judgment dismissing the causes of action for medical malpractice, wrongful death and claims for pain and suffering against it based on the fact that the care and treatment it provided conformed with the applicable standards of care and was not a cause of her alleged injuries or her demise.

Turning to the alleged violations of the decedent's nursing home rights and claim sounding in negligence *per se* "[l]iability under the Public Health Law contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient..." (*Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 834 [2d Dept 2011], quoting Public Health Law § 2801-d [1], [2]; citing CPLR 214 [2]). The nursing home has established its prima facie entitlement to judgment as a matter of law on that branch of its motion which was for summary judgment dismissing the cause of action which is based on Public Health Law § 2801-d as well as state and federal regulations via Dr. Marchello's affirmation. He has established, inter alia, that the preventive measures and care provided with respect to the decedent's ulcers conformed with the obligations imposed by those laws. The decedent's status was regularly evaluated and responded to. Nor is there evidence to support any of the other alleged regulatory violations including "quality of life," accidents, medication errors, nursing services, dietary services, infection control or clinical records. Dr. Marchello has accordingly established that the decedent's rights were not violated since the care and treatment provided by the nursing home did not violate the various federal and state regulations set forth in the plaintiff's bill of particulars as the basis for this cause of action. Furthermore, that even if any were violated, none of the alleged injuries was proximately caused by these violations (*Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d at 834 [citations omitted], citing Public Health Law § 2801-d [1]).

The nursing home has also established its prima facie entitlement to judgment as a matter of law dismissing the request for punitive damages both generally and under the Public Health Law by demonstrating that its “conduct did not evidence a high degree of moral culpability, was not so flagrant as to transcend mere carelessness and did not constitute willful or wanton negligence or recklessness” (*Rey v Park View Nursing Home, Inc.*, 262 AD2d 624 [2d Dept 1999] [citations omitted]) and that their conduct was not in willful or reckless disregard of the decedent's rights (*Valensi v Park Ave. Operating Co., LLC*, 169 AD3d 960, 962 [2d Dept 2019] [citations omitted]). The nursing home has established its entitlement to summary judgment dismissing the complaint against it. The burden accordingly shifts to the plaintiff to establish the existence of material issues of fact with respect to the foregoing matters.

The plaintiff has submitted the affirmations of Board Certified Internist Dr. Perry Starer in opposition to Dr. Butchma and the nursing home's motions. Dr. Starer has a subspecialty in geriatric care. Having reviewed all of the pertinent medical records as well as the defendants expert's affirmations, he opines to a reasonable degree of medical certainty as follows: that Dr. Butchma departed from good and accepted medical practice in his care and treatment of the decedent and that his departures were a cause of her injuries and her premature demise; that it was Dr. Butchma's responsibility to coordinate the decedent's medical care; that Dr. Butchma violated the applicable standard of care misdiagnosing the decedent's right heel and right proximal lower leg ulcer, in failing to examine her right ear for nearly two months after medication was prescribed for it pursuant to nursing staff and wound care nurses' concerns, and discounting the possibility of more aggressive treatment of her ulcers based upon his diagnosis that she was going to die in six months or less, especially since she lived considerably longer than that. Dr. Starer opines that the standard of care requires a physician to attempt to heal his or her patient and to minimize their pain and suffering. He opines that Dr. Butchma's conduct negated the possibility for a better outcome since he consistently disregarded the chance that she might recover despite the lengthy stability of her physical status.

Dr. Starer notes that Dr. Butchma refused to order debridement of the decedent's right heel ulcer based on his belief that she was in the end of her life but she lived for a considerable length of time after that diagnosis. He opines that ulcer debridement would have enhanced healing and decreased the risk of infection. Since debridement was not done, the decedent had

the wound for far longer than necessary when it could have healed far sooner and scar tissue could have been avoided. Dr. Starer opines that the standard of care here required Dr. Butchma to heal or minimize the decedent's heel wound and to minimize her pain, neither of which Dr. Butchma made efforts to do, instead believing that she would soon die and so that care was simply unnecessary. Dr. Starer also opines that Dr. Butchma violated the applicable standards of care when he misdiagnosed the decedent's right heel pressure ulcer and right proximal lower leg ulcer as vascular ulcers. He notes that pressure ulcers are preventable but vascular ulcers are not. He opines that there were clear indications that the decedent's right heel and right proximal lower leg ulcers were caused by pressure and that Dr. Butchma misidentified their etiology. He alleges that Medicaid and Medicare question pressure ulcers since they may be the result of poor care but they do not question vascular ulcers. He opines that Dr. Butchma was focused on protecting himself and the institution instead of correctly diagnosing and treating the decedent. Starer opines that Dr. Butchma focused on why the injuries developed as opposed to treating them. He notes that the decedent's physical condition was not consistent with vascular ulcers as her toes did not breakdown and her extremities were not blue, which are two indicia that peripheral vascular disease is affecting the area. He also notes that no tests were ever conducted to determine the severity of the decedent's peripheral vascular disease which obviously contributes to vascular ulcers and attests that those tests are far more accurate and reliable than pedal pulses, which are determined by doctors and/or nurses and are very subjective. He notes, too, that there is no record of the decedent ever lacking pedal pulses.

Dr. Starer also faults Dr. Butchma for violating the standards of care based on his failure to examine the decedent's right ear for nearly two months after medication was initially prescribed for it. In fact, Dr. Butchma signed off on a prescription on April 17th yet there is no record of him examining the decedent's right ear until June 2, 2015.

Dr. Starer disagrees with Dr. Garbitelli's opinion that the ulcers were inevitable; He opines that had proper interventions been put in place and followed through on, it is possible that the decedent may not have developed the right heel, right proximal lower leg or right ear ulcers. He also opines that they were not inevitable since they actually healed. He also opines that they could have been treated far more aggressively thereby hastening their healing and decreasing the decedent's suffering.

Furthermore, Dr. Starer opines that contrary to Dr. Garbitelli's conclusion that the decedent was unable to experience pain and suffering, the record speaks to the contrary: It reflects that she felt pain on occasion and more importantly, was often on significant pain medication which was routinely adjusted by Dr. Butchma. Dr. Starer opines that but for pain, this clearly would not have occurred.

Finally, Dr. Starer opines that Dr. Butchma's shortcomings individually and collectively were significant factors and proximate causes in the decedent's injuries and decreased her chances of a better outcome. He opines that a physician should not stop treating a patient as well as possible because their death is approaching. He opines that Dr. Butchma did only the bare minimum of care.

Dr. Starer has not established that Dr. Butchma's care of the decedent lead to the development of her ulcers. His opinion in that regard is either conclusory or contrary to the record. He fails to explain in adequate detail his broad statement that the decedent's pressure ulcers were preventable simply because they eventually healed. Nor has Dr. Starer established that Dr. Butchma's alleged mistreatment of the decedent played any role in her demise. While Dr. Starer has established that Dr. Butchma may have misdiagnosed two of the decedent's ulcers as vascular ulcers, that does not establish that those ulcers were a result of any negligence on Dr. Butchma's part. And, Dr. Starer has not articulated how that alleged misdiagnosis led to any form of mistreatment in the care provided to promote those ulcers' healing. Nor has Dr. Starer established the existence of material issues of fact with respect to Dr. Butchma's failure to attend to the decedent's right ear lesion sooner as well as his conservative treatment of the decedent's ulcers based upon his opinion regarding the decedent's likely brief life span. While Dr. Starer opines that these alternative sources of action should have been taken, he has not demonstrated that they would have altered the sequence of events here and resulted in a better outcome for the decedent. Any conclusion to the contrary would be entirely speculative.

In view of the foregoing, the plaintiff has not met her burden. Dr. Butchma's motion for summary judgment dismissing the complaint against him is granted and the complaint against him is dismissed.

Dr. Starer opines that the nursing home departed from good and accepted nursing home practice in its care and treatment of the decedent including acting in violations of Public Health

Law §§ 2801-d and 2803-c and that those acts were a substantial factor in her injuries including her premature demise. Dr. Stare opines and it is not disputed that the nursing home was obligated to prevent the development of pressure ulcers that were clinically avoidable, dehydration, a diminution of the activities of daily living, loss of dignity, and other general medical illnesses in order to achieve the highest level of the decedent's practical well-being. He opines that the nursing home staff failed to meet these obligations. More specifically, he opines that the staff was negligent in failing to prevent ulcers of the decedent's heels, right ear and right proximal lower leg and by failing to provide adequate preventive interventions. He opines that heel ulcers and the ear ulcer "should" not have developed had the decedent "been on an air mattress with a proper turning and positioning schedule and offloading heels in place." He opines that his "review of the care plans indicates failure of the [nursing home] to develop adequate care plans with measurable objectives and timetables to meet each resident's medical, nursing and mental and psychological needs," as required by 10 NYCRR 515.11 ©. He notes inconsistencies between various types of plans and an absence of goals in some which he opines impaired the measure of care provided and resulted in the neglect. He opines that "where there are no goals, there is no way to measure if the care is being given and several aspects of [the decedent's] overall health and wellbeing were forgotten." He opines that the nursing home's failure to appreciate the decedent's risk for developing pressure ulcers, to provide all care necessary to prevent them and its failure to keep and maintain accurate records of her evaluations and treatment and failure to adequately assess her constitute deviations of Public Health Law §§ 2801-d and 2803-c.

Dr. Starer opines that the decedent's Braden Score indicated a low risk for pressure ulcers but that it was incorrectly calculated and that she should have been put at moderate risk when the values provided on her admission skin assessment are examined. This misplacement he alleges resulted in insufficient interventions being implemented and was in violation of 42 CAR 483.20 (b). In addition, he notes that the position that the decedent was initially examined in is not reflected in her records, "which is important." He also notes the occasional absence in the decedent's medical records of various types of care being provided including turning and repositioning.

He alleges that neither heel floats or boots and an air mattress were implemented until February 2015. In addition, Dr. Stater also opines that while the care plan on admission called for bilateral heel floats and turning and positioning, the records do not reflect that those directives were followed, nor does the testimony of various witnesses at their examinations-before-trial. He opines that the failure to remove pressure completely from the decedent's heels and her proximal lower leg through elevation resulted in the worsening of her heel ulcers and the development of a right lower leg proximal ulcer. He opines that had the decedent been turned and repositioned with any regularity, she should not have developed her right ear and right leg posterior ulcers since pressure would have been relieved to her proximal lower leg at least partially. He opines that the ulcers that the decedent developed were not unavoidable and that the nursing home violated Public Health Law §§ 2801-d and 2803-c by failing to prevent them from developing. He opines that the resolution of the ulcers demonstrates that they were not unavoidable. The implementation of interventions after the ulcers developed shows that everything to prevent them was not done in the first instance. And, the decedent's right heel ulcer got worse before healing which he opines further reflects inadequate care. He opines that since the decedent entered the nursing home ulcer free, and the ulcers healed in response to the treatment when it was implemented, the nursing home staff acted in violation of Public Health Law §§ 2801-d and 2803-c as well as 10 NYCRR 412.12. He notes that although many interventions were supposed to be implemented upon the decedent's admission, her records reveal that not all of them were. One instance of record inconsistency is the fact that the decedent's right heel ulcer was not noted on her weekly skin integrity chart the same day it was reflected as being discovered on other records. Similarly, the right ear and right proximal lower leg ulcers were only first documented at Stage II which he opines called into question whether skin assessments were being performed as required. In fact, some of the records contain a notable absence of records of skin checks.

With respect to the decedent's right proximal lower leg ulcer, Dr. Starer disagrees with Dr. Marchello's conclusion that it was a vascular ulcer. It is not disputed that patients with vascular disease can develop pressure ulcers. As for the decedent, Dr. Starer explains that she had pedal and peripheral pulses on admission, did not develop hypoxemia or cyanosis which indicates a lack of oxygen or limited blood flow to the extremities; she did not have lesions on

her feet or toes which is expected with significant vascular disease; and, the ulcer's location is atypical for vascular ulcers. Furthermore, even Dr. Butchma noted the edges to be regular, which is indicative of pressure as the etiology and not venous in nature. In addition, the lack of depth, associated pain and evidence of minimal flow all indicate that the ulcer was a pressure ulcer. He explains that the heel floats which had been in place (ostensibly) since September 2014 lessened pressure to the heels but increased it in the decedent's lower leg. No breakdown of the decedent's right toes and the presence of pulses indicates that the blood flow was not that bad and so the ulcer was not vascular. Dr. Starer accordingly opines that the right proximal lower leg ulcer was misdiagnosed as a vascular ulcer by Dr. Butchma. He states however, that "[since treatment for vascular and pressure ulcers is basically identical, this misdiagnosis did not affect [the decedent's] ability to recover once the proper interventions were in place." He nevertheless opines that the misdiagnosis was violative of Public Health Law §§ 2801-d and 2803-c.

Dr. Starer repeatedly notes the omissions and inconsistencies in the decedent's records which he opines falls short of good and accepted nursing home practice. He notes that the decedent's records reflect care being provided post-death, including turning and repositioning. This, he opines, calls into serious question the accuracy and reliability of the records that exist.

In conclusion, Dr. Starer opines that while the decedent was at risk due to her medical status of developing ulcers, that standing alone does not make them unavoidable. In fact, the nursing home was well aware of the risks here. He opines that the nursing home staff was negligent in failing to take adequate measures to prevent the decedent's ulcers. It failed to track, document, check and perform interventions in a timely manner; to ensure heel floats were being used and that they were periodically removed to reduce pressure; and, to perform skin checks and to turn and reposition, which, he alleges were violations of her rights as a nursing home resident under the Public Health Law as well as state regulations. He further opines that the staff's failure to turn and reposition the decedent and to offload pressure to her heels and legs were competent causes of the pressure ulcers in those parts of her body. He notes Dr. Butchma's repeated references to her imminent death which turned out to be terribly inaccurate. He opines that the departures decreased the decedent's chances of a better outcome.

The nursing home has identified some discrepancies between the facts advanced by Dr. Starer and the record, including the use of an air mattress and heel floats long before February 2015, as alleged by Starer as well as the implementation of the September 23, 2014 care of the decedent's right heel ulcer. The records show that that order was timely implemented. It has also established that skin checks were better documented than alleged by Dr. Starer. Skin checks were recorded in a variety of records and while they might have been omitted from one set of records, they are in fact reflected in others. In any event, standing alone, a party's failure to document records in greater detail regarding skin care does not create an issue of fact as to whether a defendant caused a decedent's ulcer; the failure to document is not itself a proximate cause of ulcers (*Braunstein v Maimonides Med. Ctr.*, 161 AD3d 675 [1st Dept 2018]). "A failure to document each element of the skin care protocol does not equate to a failure to perform each element or to a cause of the ulcer itself" (*Braunstein v Maimonides Med. Ctr.*, 161 AD3d at 675, citing *Topel v Long Is. Jewish Med. Ctr.*, 55 NY2d 682, 684 [1981]; *Rivera v Jothianandan*, 100 AD3d 542, 543 [1st Dept 2012], lv denied 21 NY3d 861 [2013]).

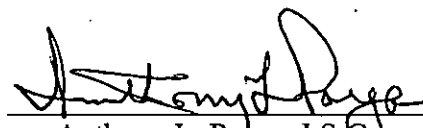
Furthermore, like his opinion regarding Dr. Butchma's care and treatment of the decedent, Dr. Starer has not established that the nursing home's care of the decedent lead to the development of her ulcers or that it acted negligently in treating them. His opinion in that regard is either conclusory or contrary to the record. He again has failed to explain in adequate detail his broad statement that the decedent's pressure ulcers were preventable since they eventually healed. While he faults the characterization of the decedent's risk of developing ulcers and opines that she should have been put at moderate risk, he has not stated how that affected the nursing home's care of the decedent or how that mistake affected her. Nor has Dr. Starer established that the nursing home's alleged mistreatment of the decedent played any role in her demise. Furthermore, Dr. Starer's opinion has not established the existence of material issue of fact regarding the nursing home's alleged violations of statutory or regulatory requirements, with the possible exception of record keeping, which nevertheless lacks any proximity to the decedent's alleged injuries, resulting in a lack of causation. While Dr. Starer has established that Dr. Butchma may have misdiagnosed two of the decedent's ulcers as vascular ulcers and that the nursing home treated them as such, that, does not establish that the development of those ulcers were a result of any negligence on the part of the nursing home. And, Dr. Starer has

essentially conceded that the alleged misdiagnosis had no affect on the manner in which the ulcers were treated.

The plaintiff has not met her burden of demonstrating the existence of a material issue of fact. The defendant UPR Care Corp., d/b/a Cold Springs Hills Center for Nursing and Rehabilitation's motion for summary judgment dismissing the complaint against it is granted and the complaint against it is dismissed.

This constitutes the decision and Order of this Court and any request for relief not expressly granted herein is denied.

Dated June 3, 2019


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