

Capici v Ottaviano

2020 NY Slip Op 30372(U)

February 3, 2020

Supreme Court, New York County

Docket Number: 805673/15

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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LAWRENCE CAPICI, As Executor of the Estate of
ANNA A. CAPICI, and LAWRENCE CAPICI,
Individually,
Plaintiff,

INDEX NO. 805673/15

-against-

PAUL G. OTTAVIANO, M.D., and VISITING NURSE
SERVICE OF NEW YORK HOME CARE,
Defendants.

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JOAN A. MADDEN, J.:

In this action asserting claims for medical malpractice, negligence and wrongful death, plaintiffs allege defendants failed to timely and properly prevent and treat decedent’s pressure ulcers. Defendant Paul G. Ottaviano, M.D. (“Dr. Ottaviano”) moves for moves for summary judgment. Plaintiffs oppose the motion and co-defendant Visiting Nurse Service of New York Home Care (“VNS”) supports the motion in part.¹

From 2008 to his last visit on July 9, 2014, Dr. Ottaviano provided care and treatment to decedent Anna Capici in her home. The treatment at issue in this action occurred from January 17, 2013 through August 7, 2014, when decedent was 84 and 85 years old. During that time, Dr. Ottaviano visited decedent several times a month; she was also treated at home by defendant VNS and had a home health aide 24/7 for all or part of that period. Decedent was bed-bound and

¹VNS does not cross-move or separately move for summary judgment, but submits an Affirmation in Partial Support seeking: 1) summary judgment in its favor, in the event Dr. Ottaviano’s motion is granted, and 2) if VNS is denied summary judgment, summary judgment should be denied to Ottaviano. VNS relies on Dr. Ottaviano’s papers, and does not submit its own exhibits or an affirmation or affidavit from its own expert.

suffered from numerous conditions including osteoarthritis of multiple joints, recurring cellulitis in her legs, chronic atrial fibrillation, chronic venous insufficiency with chronic edema and recurrent leg ulcers, obesity, congestive heart failure, chronic obstructive pulmonary disease, hypertension, poor mobility and incontinence of the bladder and bowel. It is undisputed that decedent was at high risk for the development of pressure ulcers. On July 11, 2014, decedent was admitted to New York Presbyterian Hospital, where she was diagnosed with several pressure ulcers, including a large stage IV infected sacral decubitus ulcer. The hospital records state that decedent was suffering from, inter alia, “severe sepsis thought to be 2/2 to sacral decubitus ulcer.” Decedent underwent two sacral surgical debridements and was discharged to home on July 25, 2014. She died at home on August 7, 2014.

Plaintiffs submit a redacted expert affirmation of a board certified internist with a speciality in geriatrics, who opines that as decedent’s “attending physician and internist” and the “doctor in charge,” Dr. Ottaviano departed from the standard of care by: 1) deferring to VNS, the responsibility for daily care and oversight of his patient; 2) failing to provide and supervise proper medical and nursing care so as to avoid the development and deterioration of pressure ulcers; 3) failing to accurately and consistently stage and size decedent’s pressure ulcers throughout his notes; 4) failing to ensure decedent was repositioned and turned at least every two hours, and to implement a care plan to turn her more frequently as needed; 5) failing to consider decedent’s postural alignment, distribution of weight, balance and stability; 6) failing to indicate the type of hospital bed and mattress used by decedent, and not timely ordering an air mattress; 6) failing to implement a system to record the turning of decedent and the position in which she was placed; 7) failing to evaluate on an on-going basis the frequency of and compliance with

repositioning and other interventions for preventing pressure ulcers; and 8) failing to timely transfer decedent to the hospital before severe sepsis set in and before the sacral pressure ulcer had grossly deteriorated. Plaintiff's expert opines that as a result of such departures, decedent suffered the "development, progression, and deterioration of pressure ulcers, sepsis and subsequent debridement procedures."

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 Dept 2010). To satisfy the burden, defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature. Id; see Joyner-Pack v. Sykes, 54 AD3d 727, 729 (2nd Dept 2008). Expert opinion must be based on facts in the record or those personally known to the expert, and the opinion of defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hospital, 69 AD3d 403, 404 (1st Dept 2010). Defendant's expert opinion must "explain 'what defendant did and why.'" Id (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

"[T]o avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries." Roques v. Nobel, supra at 207. To meet this burden, "plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the

departure was the proximate cause of the injuries alleged.” Id. Where the parties’ conflicting expert opinions are adequately supported by the record, summary judgment must be denied. See Frye v. Montefiore Medical Center, 70 AD3d 15 (1st Dept 2009); Cruz v. St Barnabas Hospital, 50 AD3d 382 (1st Dept 2008).

In support of the motion, Dr. Ottaviano submits the expert affirmation of Dr. Robert Kazenoff, a board certified internist, who reviewed the bill of particulars, the deposition testimony of Lawrence Capici, the medical records of Dr. Ottaviano and VNS, and the hospital records of New York-Presbyterian.² He opines that it is well documented that decedent had multiple co-morbidities and was at risk for various medical complications, including the development of pressure ulcers. He opines Dr. Ottaviano appropriately ordered and arranged for VNS to visit decedent daily and provide home health care as of October 2011, and that a wound care nurse and a skilled nurse provided care and treatment from October 2011 until her death. Dr. Kazenoff states that decedent repeatedly refused hospitalization and moving to a skilled nursing facility, and opines that “even under best of circumstances,” decedent was at high risk for developing pressure ulcers. He opines that in accordance with good an accepted standards of medical care, Dr. Ottaviano appropriately ordered wound care services and deferred all decision-making regarding prevention and management of the pressure ulcers to the wound care specialists. He opines that the development of pressure ulcers essentially became inevitable due to decedent’s immobility (requiring a Hoyer lift), significant venous stasis, bowel and bladder incontinence, and poor nutrition. He opines it is well documented decedent continually refused

²Lawrence Capici was the only party deposed. Plaintiffs waived the depositions of defendants Dr. Ottaviano and VNS.

treatment by specialists, refused tests and repeatedly refused transfer to the hospital.

Dr. Kazenoff opines that Dr. Ottaviano's care and treatment was appropriate and in accordance with acceptable standards of medical practice, as he was responsible for treating decedent's co-morbidities, and made appropriate orders for a hospital bed, Roho cushions, and an air mattress as per the recommendations of the wound care nurses. He opines that as an internist, Dr. Ottaviano discussed all care and treatment with the wound care and skilled nurses, as repeatedly reflected in the notes, and deferred treatment and management of pressure ulcers to the wound care specialists. He opines that skin breakdown can develop due to a patient's rapidly declining health status, diminished activity and co-morbidities, which contributed to decedent's impaired functional and nutritional status. He opines that decedent's medical condition over the years was declining as expected, and that she was at high risk of several severe complications, including pressure ulcers and complications of pressure ulcers, such as sepsis and death. He opines that Dr. Ottaviano repeatedly documented these issues with decedent and her son.

Dr. Kazenoff opines that the management of decedent's pressure ulcers was generally the function of the wound care nurses, and Dr. Ottaviano deferred to their recommendations, and wrote all appropriate orders as per their recommendations regarding wound care. He opines that VNS Assessments, Plan of Care and Treatment Plans were utilized for the management of decedent's pressure ulcers; and Dr. Ottaviano's notes document his evaluations of decedent's skin breakdowns, and orders for skilled nursing, wound care specialists, antibiotics, Roho cushions, an air mattress and hospital bed. He opines that the wound care specialists were treating decedent's skin breakdown with saline, the application of Iodosorb and Hydrocolloid and dressing changes, and that due to her multiple co-morbidities and her risk of developing complex

pressure ulcers, she required much more resources and medical care than could be given in a home environments.

Disagreeing with plaintiffs' allegation that Dr. Ottaviano departed from the standard of care by failing to perform skin examinations and proper treatment for pressure ulcers, Dr. Kazenoff opines that nurses performed those functions and Dr. Ottaviano's role as an internist was to care for decedent's numerous co-morbidities. Addressing plaintiffs' allegation that Dr. Ottaviano failed to order and follow up on consultations with surgeons, wound care specialists and vascular doctors and failed to order debridement procedures, Dr. Kazenoff opines that Dr. Ottaviano made numerous repeated referrals to many specialists, but they were all refused by decedent and her son. As to the wound care referral, he opines that since 2011, decedent was being treated by wound care nurses who managed her wound care, and that Dr. Ottaviano appropriately deferred to the skilled nursing specialists to manage her "skin regimen." Finally, Dr. Kazenoff opines that decedent's alleged injuries including her death "are in no way causally related to the alleged negligent care and treatment rendered by Dr. Ottaviano."

Dr. Ottaviano also submits his own affidavit,³ stating that on home visits from November 2008 to July 2014, he provided care and treatment to decedent at her home in an effort to treat her numerous, significant co-morbidities, and since approximately October 2011, decedent was treated contemporaneously by wound care nurses, skilled nurses and home health aides, who provided patient care at home, including wound care prevention and management. He states that he made all appropriate orders for medication, equipment and supplies as requested by the nurses and aides to prevent and treat the patient's pressure ulcers, and the nurses and aides provided

³As noted above, plaintiff did not depose Dr. Ottaviano or VNS.

wound care, including dressing, cleansings, and the application of medications to treat the pressure ulcers and prevent further skin breakdown. Dr. Ottaviano states that he spoke with Lawrence Capici often regarding his mother's care including the need to see specialists and to present to hospitals on multiple occasions, which were all "refused," and he also spoke to Mr. Capici about obtaining Medicaid for his mother. He states the medical records show that on multiple occasions he ordered appropriate treatment for decedent, including antibiotics, skilled nursing for wound care, and protective measures to prevent further skin breakdown.

In opposition to the motion, plaintiffs submit the redacted affirmation of a board certified internist with a speciality in geriatrics, who reviewed the medical records of Dr. Ottaviano and VNS, the New York-Presbyterian hospital records, the pleadings, the bill of particulars and the deposition of Lawrence Capici. Plaintiffs' expert opines that as the "doctor in charge," Dr. Ottaviano was charged with overseeing and making all final decisions as to decedent's care, and had the ability to make medical decisions and change the care plan to ensure she received the best care possible. The expert opines that decedent's daily care was within the scope of Dr. Ottaviano's responsibility; he departed from good an accepted medical practice by deferring responsibility to VNS; and his failure to assume the care and oversight of his own patient was a proximate cause of decedent's injuries.

Plaintiffs' expert opines that while Dr. Ottaviano examined decedent frequently in 2013 and 2014, his notes regarding her pressure ulcers contain omissions or contradict VNS's notes. The expert opines that accurate and consistent sizing and staging of pressure ulcers is essential to providing appropriate treatment, and that such sizing and staging insures that consistent and appropriate care is maintained by the various healthcare providers treating the patient. The

expert opines that Dr. Ottaviano departed from the standard of care by failing to accurately and consistently stage and size decedent's pressure ulcers throughout his notes, as his notes fail to consistently indicate the presence of pressure ulcers, and even where a pressure ulcer is indicated, the notes do not consistently indicate the location, size or stage.

Plaintiffs' expert opines that for patients, like decedent, who are susceptible to developing pressure ulcers, frequent turning and positioning are critical for distributing pressure to different parts of the body so that no one part receives pressure for any great deal of time. The expert opines that it is critical that pressure be kept off the parts of the body where a pressure ulcer is in danger of developing or has already developed, and here, the failure to do so led to unabated pressure on decedent's sacrum and buttocks, where her pressure ulcers appeared. Plaintiffs' expert opines that for a patient such as decedent, good and accepted medical practice would have been to re-position her more often than every two hours, and that consideration should have been given to her postural alignment, distribution of weight, balance and stability. The expert opines that there should have been a written repositioning schedule, and points to Dr. Ottaviano's records which contain no notes, orders or treatment charts regarding turning and positioning, and VNS's records which simply state "turn and position at least q2 hours." Plaintiffs' expert opines that decedent was not properly turned and repositioned every two hours, and Dr. Ottaviano's failure to ensure that she was turned and repositioned every two hours or more frequently as necessary, was a proximate cause of the development and deterioration of decedent's pressure ulcers.

Plaintiffs' expert opines that Dr. Ottaviano departed from the standard of care by not timely providing decedent with a special mattress designed for pressure ulcer patients, and that

such departure was a proximate cause of the development and deterioration of decedent's pressure ulcers. The expert opines that a progression of bed-type interventions and mattresses are available, which are based on a patient's level of risk for developing or preventing pressure ulcers, and that gel, foam and sheep skin surface-based mattresses and overlays are particularly useful for high risk patients. Plaintiffs' expert points to decedent's chart which fails to specify the type of bed or mattress provided to decedent, and refers only to a "hospital bed." The expert also points to VNS's records which show that a special air mattress was not ordered for decedent until July 10, 2014, the day she was admitted to the hospital with a stage IV infected sacral decubitus ulcer.

Addressing the opinions of Dr. Kazenoff, plaintiff's expert opines that he improperly attempts to blame the development of decedent's pressure ulcers on her co-morbidities and her refusal for certain treatment. Plaintiffs' expert opines that for the duration of Dr. Ottaviano's treatment, decedent's various co-morbidities were consistent and none of them causes pressure ulcers. Plaintiffs' expert opines that since Dr. Ottaviano and the nursing staff were fully aware that decedent's health issues increased her risk for developing pressure ulcers, they were also fully aware of what was necessary for decedent's proper care and treatment, and greater attention should have been paid to her care and treatment, including but not limited to turning, positioning and proactive care. Plaintiffs' expert opines that decedent's pressure ulcers could have been avoided with proper medical and nursing care, provided by and under the supervision of Dr. Ottaviano.

Plaintiffs' expert opines that Dr. Ottaviano departed from the standard of care by failing to timely transfer decedent to the hospital. The expert opines that the medical records show that decedent was not transferred to the hospital until she was already septic, which was the predisposing

condition that Dr. Ottaviano should have noticed, recorded and treated during his preceding visits.

The expert opines that by the time decedent received medical attention at the hospital, the severity of her wounds was already grossly deteriorated, and that Dr. Ottaviano's delay in transferring decedent to the hospital deviated from the standard of care, and was the proximate cause of her injuries.

Based on the foregoing, summary judgment is not warranted. Even if some of the opinions rendered by Dr. Ottaviano's expert are conclusory, the opinions of plaintiffs' expert are sufficient to raise issues of fact to defeat summary judgment. Moreover, the experts sharply disagree as to whether Dr. Ottaviano departed from the standard of care by deferring treatment and management of decedent's pressure ulcers to the skilled and wound care nurses, and failing to take an active role in observing, monitoring, diagnosing, treating and preventing the pressure ulcers. See Cummings v. Brooklyn Hospital Center, 147 AD3d 902 (2nd Dept 2017); Frye v. Montefiore Medical Center, *supra*; Cruz v. St Barnabas Hospital, *supra*.

Accordingly, it is

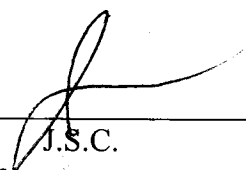
ORDERED that the motion by defendant Paul G. Ottaviano, M.D. for summary judgment is denied; and it is further

ORDERED the request by defendant Visiting Nurse Service of New York Home Care for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear to the pre-trial conference previously scheduled for March 26, 2020 at 11:30 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: February 3, 2020

ENTER:



J.S.C.
HON. JOAN A. MADDEN
J.S.C.