SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

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JAQUELINE NIXON, Administratrix of the Estate of GRACE NIXON, deceased,

Plaintiffs,

-against-

THE BROOKDALE HOSPITAL MEDICAL CENTER, PARKSHORE HEALTH CARE, LLC, FOUR SEASONS NURSING AND REHABILITATION CENTER, and THE NEW YORK COMMUNITY HOSPITAL OF BROOKLYN, INC.,

Defendants.

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Index No.: 509335/2016

DECISION/ORDER

Hon. Bernard J. Graham

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Defendant's Motion for Summary Judgment and Affirmation in Support……	_____
Plaintiff's Affirmation in Opposition……	_____
Defendant's Reply Affirmation……	_____

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendant New York Community Hospital of Brooklyn ("NYCHB") submits the instant motion for summary judgment pursuant to §3212 of the CPLR to dismiss the plaintiff's complaint on the grounds that they did not depart from accepted medical practice in the care and treatment rendered to the plaintiff's decedent, Grace Nixon ("decedent"), and that any alleged departure was not the proximate cause of the decedent's alleged injuries and death.

Plaintiff, Jaqueline Nixon on behalf of the decedent, by her attorneys, opposes the motion for summary judgment filed on behalf of NYCHB, asserting that there are triable issues of fact as to whether NYCHB departed from acceptable medical practice in the care and treatment

rendered to the decedent, and that those departures were a substantial factor in causing the alleged injuries sustained by the decedent, specifically multiple decubitus ulcers of varying stages and severities. Argument was heard in Part 36 of this Court on February 13, 2020 before the undersigned.

FACTS

The plaintiff's decedent was a seventy-three-year-old woman who first presented to the Brookdale Hospital Medical Center ("Brookdale") on December 11, 2013 via an ambulance to the Emergency Room with weakness and history of a fall. The decedent also had a history of dementia and was noted to be non-verbal and lethargic. Several pressure ulcers were recorded at this point, on the left hip, sacral area, right hip, left shoulder, and heels. A PEG tube was inserted, and she was discharged to the Four Seasons Nursing and Rehabilitation Center ("Four Seasons") on December 19, 2013. The same ulcers were observed upon arrival at Four Seasons, and she was noted to be dehydrated with altered mental state, hypernatremia, renal failure and urosepsis. She was also incontinent to both bowel and bladder and generally unresponsive. The record reflects that from December 19, 2013 through January 13, 2014, the decedent's ulcers were evaluated several times, and either remained stable or increased in severity and size, with several new ulcers developing in different locations. The decedent returned to Brookdale on January 15, 2014 with a fever and was diagnosed with a urinary tract infection, sepsis, dehydration, and an abnormal electrocardiogram. It was noted that she had several new foul-smelling ulcers in her buttocks region and was described as "contracted." Nurse Lawson performed a debridement of the left hip and right upper buttock ulcers on January 17, 2014. The decedent was transferred back to Four Seasons on January 23, 2014, with a discharge diagnosis

of altered mental status, hypernatremia, dehydration, renal failure, urinary tract infection, sepsis due to the urinary tract infection, and tachycardia, for which she was prescribed various antibiotics. The record reflects that Four Seasons staff observed her ulcers as either remaining the same or worsening in size or severity, noting several new locations.

The decedent was first admitted to NYCHB on February 1, 2014. She presented with a past history of dementia, anemia, and renal failure, was severely ill in appearance, and had contractures of all extremities, hypotension and shortness of breath. It was also noted that she had a significant chest wall deformity caused by chronic kyphoscoliosis and significant dementia with no cognitive higher intellectual function. Upon evaluation the decedent's Braden score was determined to be 8, requiring placement on skin breakdown prevention protocol, which includes placing the patient on a special pressure-relief mattress, turning the patient every two hours, and applying moisture barriers and lotions. The decedent was seen by multiple specialists, including Dr. Farhat (pulmonologist) and Dr. Avraham (infectious disease). Dr. Avraham noted that several of the decedent's decubitus ulcers were necrotic, including those on the joint of the hip, which were exposed with a slight pungent discharge but no foul odor, as well as ulcers on the sacrum. The decedent also had leukocytosis with an elevated white count of 23.6, for which she was on various antibiotics. The decedent was still being fed via a PEG tube and her wounds were being monitored and treated multiple times per day. On February 5, 2014 Dr. Gulmatico (surgery) performed a debridement of the sacral and left hip ulcers. Post-debridement, Dr. Avraham noted the decedent remained contracted, demented, but was more alert and afebrile. The decedent's ulcers continued to be monitored and the record reflects they either remained the same or increased in size or severity, noting several new locations.

The decedent was discharged from NYCHB and transferred back to Four Seasons on February 18, 2014. Her ulcers were initially assessed, and then re-assessed at various times, and remained essentially the same until readmitted to NYCHB on March 30, 2014. Upon re-admission to NYCHB, the decedent presented with the same co-morbidities, along with new illnesses such as clostridia difficile colitis, arteriosclerotic heart disease and hypophosphatemia. Her ulcers continued to be monitored, and she was seen by a nutritionist and various specialists, including podiatrists Dr. Rojis, Dr. Allen, and Dr. Zuniga, who were actively treating the decedent's bilateral toe, heel and ankle ulcers. On April 8, 2014 the decedent's fever abated and she returned to Four Seasons. Upon arrival at Four Seasons her ulcers were assessed as either remaining the same or worsening in size or severity, with several new locations noted, including left shin trauma, right shin trauma, and right big toe trauma. Her ulcers remained the same until her return to NYCHB on April 29, 2014. She was admitted with sepsis and multiple decubitus ulcers. The decedent was seen again by Dr. Avraham (infectious disease) who suspected the decedent had sepsis, a urinary tract infection, and possible urosepsis. The decedent was once again placed on skin breakdown protocol. Her ulcers continued to be monitored and she was transferred back to Four Seasons on May 13, 2014. Upon arrival at Four Seasons, several new ulcers were noted, including an unstageable ulcer on her right tuberosity and an unstageable ulcer on her mid back. According to the record, the decedent remained in essentially the same condition until she was transferred back to NYCHB on May 25, 2014. She was admitted with fever, a urinary tract infection, and multiple decubitus ulcers. As with her other admissions to NYCHB, the decedent was seen by a variety of specialists and house physicians and skin breakdown prevention protocol was implemented. On May 28, 2014 Dr. Gulmatico performed a debridement of the decedent's right hip ulcer. The decedent was transferred back to Four

Seasons on June 2, 2014. Her ulcers were monitored and remained essentially the same until she returned to NYCHB on June 12, 2014 due to a dislodged PEG tube. Dr. Honikman (gastroenterology) placed a new PEG tube, and the decedent returned to Four Seasons. The record reflects that the decedent's ulcers never improved, and she ultimately passed away on July 15, 2014.

PARTIES' CONTENTIONS

Here, the Court is presented with the issue as to whether the defendant, NYCHB, departed from accepted medical practice in the care and treatment rendered to the decedent, and if so, whether that departure from accepted medical practice was the proximate cause of the injuries that allegedly occurred.

In support of the motion for summary judgment by NYCHB and a dismissal of plaintiff's cause of action against it, counsel offers the affirmation of medical expert Michael Hundert, M.D. ("Dr. Hundert").[1]

The defendant argues that the care rendered to the decedent during her various admissions to NYCHB was appropriate and consistent with accepted medical practice, and was not the proximate cause of the decedent's injuries because the ulcers were not a result of the care rendered at NYCHB, but were already present prior to her first admission to NYCHB on February 1, 2014. Dr. Hundert opines that the NYCHB records document that appropriate care was rendered to the decedent, which includes the implementation of skin breakdown prevention protocol, placing the decedent on an air mattress, turning the plaintiff every one to two hours, feeding via PEG tube, administration of intravenous antibiotics, wound care (including two

[1] Dr. Hundert is board certified in internal medicine and geriatric medicine.

surgical debridements), nutritional assessments, and consultations with multiple physicians of different specialties. Dr. Hundert asserts that any progression of the ulcers was a result of the unavoidable consequences of the decedent's underlying illnesses, which included contractures and dementia with no cognitive function, and well as the severity of the ulcers at presentation. In addition to evaluating and providing treatment to help stabilize the decedent's ulcers prior to her return to Four Seasons, Dr. Hundert notes that NYCHB also always addressed the underlying reason for the decedent's presentation to NYCHB, including fever or infection, before discharging her to Four Seasons.

Dr. Hundert claims that NYCHB was not the proximate cause of the decedent's injuries, ulcers, or death. Dr. Hundert explains that bedbound patients such as the decedent, who have numerous comorbidities and underlying medical problems, typically develop these types of ulcers. According to Dr. Hundert's review of NYCHB's records, appropriate skin assessments and skin breakdown prevention protocol were implemented, including turning the decedent every one to two hours, providing a special mattress, and applying appropriate barriers in an attempt to prevent skin breakdown. Dr. Hundert maintains that, due to the decedent's comorbidities, the worsening of some of her ulcers was an unavoidable consequence of her overall condition.

The defendant also argues that plaintiff's claims against NYCHB sounding in general negligence is inappropriate and should be dismissed because these claims concern alleged inappropriate treatment and care rendered to the decedent, which would be under the auspices of a physician, and should therefore sound in medical malpractice.[2]

[2] Plaintiff's Bill of Particulars sets forth a cause of action for general negligence against NYCHB, alleging that the "medical and nursing care, diagnoses, treatment and services rendered to plaintiff/decedent by the defendant, [NYCHB], were rendered carelessly, unskillfully, negligently, and not in accordance with accepted standards of practices, diagnoses, treatment and services in the community…" (See Plaintiff's BP, annexed to Plaintiff's Opposition as Exhibit 1, para. 105). Plaintiff also sets forth a cause of action for medical malpractice against NYCHB at paragraph 162.

Plaintiff's Opposition to Defendant NYCHB's Motion for Summary Judgment

Plaintiff, Jaqueline Nixon, on behalf of the decedent, by her attorneys, opposes the defendant's motion for summary judgment, claiming that NYCHB departed from the accepted standards of medical care in their failure to treat and prevent the worsening of the decedent's bed sores. In opposition to the instant motion, plaintiff asserts there are numerous departures by NYCHB that were substantial factors in causing the decedent's alleged injuries and death. Specifically, plaintiff claims that NYCHB failed to adequately turn the decedent, as shown by the improper method of recordkeeping by the NYCHB staff.

Plaintiff's expert, Perry Starer, M.D. ("Dr. Starer"), explains that pressure ulcers are caused by prolonged pressure to an area of the body, and that these ulcers most often present on or near bony prominences like the sacral bone, heels, and coccyx. Dr. Starer also states that a pressure ulcer can develop anywhere on the body given enough time and pressure, due to skin breakdown. The amount of time it can take for these ulcers to develop or worsen depends on several factors, including the patent's nutrition, hydration, comorbidities, and mobility. Dr. Starer argues that, given the decedent's bed-bound state, turning and positioning was particularly important in her treatment. Dr. Starer asserts that the standard of care for turning and positioning a patient was set by NYCHB as every one to two hours, which NYCHB deviated from when staff failed to turn the decedent more frequently than once every two hours. Dr. Starer stresses the importance of turning and positioning, explaining that it relieves pressure to areas of the body and allows blood to flow to those areas, which is important for the prevention and resolution of pressure ulcers. Dr. Starer also asserts that NYCHB staff failed to provide measurements of the decedent's ulcers and identify the locations of the decedent's ulcers, due to the fact that several

ulcers were addressed on admission to NYCHB though not on discharge, or were assessed by Four Seasons but not NYCHB.

Dr. Starer also addresses the alleged improper recordkeeping by the nurses Darnell Browne ("Nurse Browne") and Joann Warner ("Nurse Warner"), who signed off on turning and repositioning before the care was performed.[3] Dr. Starer asserts that the practice of pre-filling turning and positioning charts is not within the standard of care because it was not done consistently or with any actual pattern, and there are instances in the record where some nurses did document turning and positioning each time it was done. Further, it is Dr. Starer's opinion that a medical professional should never document care prior to providing that care, especially when it is care at regular intervals, such as turning and positioning. The plaintiff also alleges that, during the decedent's admission to NYCHB from March 30, 2014 through April 8, 2014, there were only two documented nights of the decedent being turned, from which the plaintiff infers that these were the only two nights the decedent was turned during that admission period.

According to Dr. Starer, the standard of care, due to the decedent's compromised state, required the hospital to implement care and treatment individualized to the decedent's needs. Dr. Starer asserts that, ideally, turning and positioning should have been ordered with an aim to avoid placing the decedent on any existing ulcers (such as side to side positioning when a patient has a sacral ulcers) but that when a patient such as the decedent has ulcers in several areas, avoiding positioning on an ulcer may be impossible, and if that is the case more frequent turning and positioning should be implemented, such as every hour rather than every two hours. It is Dr. Starer's opinion that if more frequent turning was implemented, NYCHB would have prevented

[3] Nurse Browne signed off on turning the decedent at 11:20am for turning her at 2:00pm, 4:00pm, and 6:00pm. Similarly, Nurse Warner signed off on turning the decedent at 8:00am for turning her at 8:00am, 10:00am, 12:00pm, 2:00pm, and 4:00pm.

the worsening of the decedent's sacral, left hip, and left shoulder ulcers and would have prevented new ulcers from developing. Dr. Starer further asserts that, according to NYCHB's records, several of the decedent's ulcers were remaining stable or healing, which demonstrates that the pressure ulcers were not unavoidable, as NYCHB claims. Dr. Starer does concede that, at a certain point, healing was impossible, but he argues that this is only because proper care was not implemented by NYCHB in a timely fashion. According to Dr. Starer, NYCHB deviated from the standard of care by failing to revise the care plan to include more frequent turning and positioning, which caused the decedent's pressure ulcers, and as a result, the decedent suffered infections, worsening pressure ulcers, and sepsis, complications of which ultimately caused her death.

In reply to plaintiff's opposition, defendant NYCHB asserts that, because plaintiff's expert Dr. Starer makes numerous misstatements of facts, the conclusions he draws from those facts that NYCHB rendered substandard care are without merit. Specifically, NYCHB argues that, based on an affidavit provided by Nurse Warner (annexed to Defendant NYCHB's Reply as Exhibit A), Nurse Warner did in fact turn the decedent every two hours. In the affidavit, Nurse Warner states that she would leave the note open at the beginning of her shift, which would allow her to contemporaneously initial next to the times she turned the decedent, and the fact that her initials appear on the chart next to the times 8:00am, 10:00am, 12:00pm, 2:00pm, and 4:00pm reflects that she actually turned the decedent at each one of these times. Nurse Browne also submitted a similar affidavit (annexed to Defendant NYCHB's Reply as Exhibit B), which in which he states his signature next to each time he turned and repositioned the decedent, like Nurse Warner's initials explained above, reflects that he actually turned the decedent at each one of these times. Based on the testimony provided in these affidavits, NYCHB argues that Dr.

Starer's conclusion that the decedent was not turned every two hours because of inappropriate recordkeeping practices is baseless and unfounded. NYCHB also argues that Dr. Starer's conclusion that the decedent was only turned and repositioned on two nights during the decedent's admission from March 30, 2014 through April 8, 2014 is false, due to NYCHB records documenting the decedent was turned on multiple occasions during that admission period. (See NYCHB records, annexed to Defendant NYCHB's Reply as Exhibit C).

DISCUSSION

A defendant moving for summary judgment in a case sounding in medical malpractice "must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the plaintiff's injuries." Guctas v Pessolano, 132 AD3d 632, 633 [2d Dept 2015], quoting Matos v Khan, 119 AD3d 909, 910 [2d Dept 2014]. This Court finds that the defendant NYCHB has presented evidence sufficient to meet this burden.

Once the movant has made a prima facie showing, the plaintiff must submit evidence in opposition to rebut the movant's prima facie showing. Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Poter v Adams, 104 AD3d 925 [2d Dept 2013]; Stukas v Streiter, 83 AD3d 18 [2d Dept 2011]. The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such a departure was a proximate cause of injury." Sheridan v Bieniewicz, 7 AD3d 508, 509 [2d Dept 2004]; Gargiulo v Geiss, 40 AD3d 811-812 [2d Dept 2007]. In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from accepted

standards of medical care and to establish proximate cause." Nicholas v Stammer, 49 AD3d 832-833 [2008]. In addressing the issue of proximate cause, the Court notes that "[i]n a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant." Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2d Dept 2005]. "A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiffs chance of a better outcome or increased [the] injury." Semel v Guzman, 84 AD3d 1054, 1055-1056 [2d Dept 2011]. "The issue is whether a doctor's negligence is more likely than not a proximate cause of [a plaintiff's] injury is usually for the jury to decide." Polanco v Reed, 105 AD3d 438, 439 [1st Dept 2013]. It has also been held that where "a failure to treat is alleged, the plaintiff simply must show that it was probable that some diminution in the chance of survival had occurred." Borawski v Huang, 34 AD3d 409, 410 [2d Dept 2006]. "[T]he evidence presented by the plaintiff need not eliminate every other possible cause of the resulting injury." Clarke v Limone, 40 AD3d 571, 571-572 [2d Dept 2007], *lv denied* 9 NY3d 809 [2017].

This Court finds the plaintiff has raised triable issues of fact as to the treatment rendered to the decedent which conflict with defendant's experts' opinions, sufficient to warrant denial of summary judgment and a dismissal of the causes of action pertaining to claims of malpractice as to NYCHB. See Contreras v Adeyemi, 102 AD3d 720, 721 [2d Dept. 2013]; Shahid v NYC Health & Hosps. Corp., 47 AD3d 798 [2d Dept. 2008]).

It is well settled that where parties to a medical malpractice action offer conflicting expert opinions on the issue of malpractice and causation, issues of credibility require resolution by the factfinder (see Loaiza v Lam, 107 AD3d 951, 953 [2013]; Omane v Sambaziotis, 150 AD3d 1126, 1129 [2d Dept. 2017]; Dandrea v Hertz, 23 AD3d 332, 333 [2005]). Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions (see Elmes v Yelon, 140 AD3d 1009, 1011 [2d Dept. 2016], Feinberg v Feit, 23 AD3d 517, 519 [2d Dept. 2005]; Shields v Baktidy, 11 AD3d 671, 672 [2d Dept. 2014]). Here, the plaintiff's medical expert, Dr. Starer, has pointed to several possible departures by NYCHB and has also offered conflicting opinions as to the required frequency of turning the decedent and whether the NYCHB records accurately reflect the care administered to the decedent, as well as the size, severity, and location of the decedent's various pressure ulcers.

Vicarious liability for medical malpractice generally turns on agency or control in fact (see Hill v St. Clare's Hosp., 67 NY2d 72, 79 [1986] Hylton v Flushing Hosp. & Med. Ctr., 218 AD2d 604, 606 [1995], *lv denied* 87 NY2d 807 [1996]). "Under the doctrine of respondeat superior, a hospital may be vicariously liable for the medical malpractice of physicians who act in an employment or agency capacity." Deltoro v Arya, 44 AD3d 896 [2d Dept 2007]; Mendez v White, 40 AD3d 1057 [2d Dept 2007]; Boone v North Shore Univ. Hosp., 12 AD3d 338, 339 [2d Dept 2004]. As the physicians and medical staff that were providing care to the decedent were employees at the time the decedent was admitted to NYCHB, NYCHB is vicariously liable for any and all alleged malpractice. NYCHB is not, however, liable for general negligence, as the allegations made by the plaintiff challenge the hospital's assessment and supervisory treatment needs of the decedent, which constitutes medical treatment and sounds in medical malpractice. Scott v Uljanov, 74 NY2d 673 [1989].

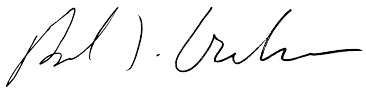
CONCLUSION

While the defendant NYCHB has met its burden for establishing a prima facie case for summary judgment, the plaintiff, in opposition, has met its burden to offer admissible evidence raising a question of fact as to whether NYCHB departed from good and accepted medical practice in the treatment of the decedent. The issue of credibility regarding conflicting expert testimony must be submitted to the trier of fact. Accordingly, the motion by defendant NYCHB for summary judgment and a dismissal of plaintiff's complaint, pursuant to CPLR §3212, is denied.

This shall constitute the decision and order of this Court.

Dated: May 8, 2020
Brooklyn, NY

E N T E R



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County