

**Klass v Haltrecht**

2020 NY Slip Op 32363(U)

July 20, 2020

Supreme Court, New York County

Docket Number: 155698/14

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

----- X Index No.: 155698/14

RICHARD KLASS, as Executor of the Estate of  
BERNARD WOLBERG and EVA KLASS-WOLBERG,

Plaintiff,

-against-

MARK HALTRECHT, D.O., ARSENIO MEDICAL, P.C.,  
THE MOUNT SINAI HOSPITAL, EDWARD KIM, M.D.,  
FRANCIS S. NOWAKOWSKI, M.D., and DANIEL  
M. LABOW, M.D.,

Defendants,

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JOAN A. MADDEN, J.:

In this action for medical malpractice and wrongful death, defendants Mark Haltrecht, D.O. (“Dr. Haltrecht”) and Arsenio Medical, P.C. (“Arsenio”) (together “the Haltrecht defendants”) move for summary judgment dismissing the third amended complaint and all cross claims asserted against them. Plaintiff opposes the motion.

Background

This action arises out of allegations that defendants failed to diagnose and treat plaintiff’s decedent, Bernard Wolberg (“Mr. Wolberg” or “decedent”) for liver cancer. Mr. Wolberg was a primary care patient of Dr. Haltrecht, an employee of Arsenio, from approximately 2005 to May 2014. Mr. Wolberg was diagnosed with Hepatitis C in or about 1993, with liver cancer in October 2013, for which he had exploratory surgery on April 28, 2014, and from which he died on July 28, 2014. The third amended verified complaint asserts causes of action for medical malpractice, loss of services, lack of informed consent and wrongful death.

The gravamen of the action against the Haltrecht defendants is that they departed from the standard of care in treating Mr. Wolberg by failing to adequately screen him for liver cancer. Specifically, plaintiffs allege that the Haltrecht defendants departed from the standard of care in their treatment of Mr. Wolberg from February 2011 to October 2013, in failing to (i) screen for liver cancer including by ordering and referring Mr. Wolberg for timely ultrasounds or other screening and MRI's and through blood tests to check his alpha-fetoprotein ("AFP") levels;<sup>1</sup>(ii) recognize the increased risk for liver cancer based on Mr. Wolberg's long standing Hepatitis C, and (iii) timely diagnose liver cancer. Plaintiffs allege that as a result of these departures, decedent was deprived of a chance of a cure due to the delayed diagnosis, resulting in the growth, spread and metastasis of liver cancer, and Mr. Wolberg's injuries and death.<sup>2</sup>

The Haltrecht defendants move for summary judgment, arguing that they did not deviate from the standard of care in connection with their treatment of Mr. Wolberg from February 2011 through October 2013, and that none of the actions taken by them were a proximate cause of the alleged injuries and Mr. Wolberg's death. In support of their motion, defendants submit the affirmation of Elias G. Sakalis, M.D., a physician licensed to practice medicine in New York, who is an attending staff physician in Internal Medicine Service at Bellevue Hospital, and whose opinions, which are stated with a reasonable degree of medical certainty, are based on his review of relevant medical records and the parties' deposition testimony.

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<sup>1</sup> According to plaintiff's expert, "AFP is a tumor marker for hepatocellular carcinoma [and that] AFP is released by regenerating hepatocytes [a main type of liver cell], malignant hepatocytes and extrahepatic sources, such as placental cells and germ cells."

<sup>2</sup> As the remaining departures alleged in the plaintiffs' Bill of Particulars, including those related to lack of informed consent, are not supported by plaintiff's expert, the court considers such departures to be abandoned.

Dr. Sakalis opines that Dr. Haltrecht timely referred Mr. Wolberg for a CT scan and GI consult in February 2011, when he exhibited symptoms of possible gastroenteritis and/or mild pancreatitis, and that as the CT scan was negative for any abnormalities to the liver, and that there was no evidence for cirrhosis, fibrosis or masses, Dr. Haltrecht appropriately deferred the management of the abdominal findings and the pancreatitis to Dr. Yitzhak Twersky, a gastroenterologist. Dr. Sakalis points to medical records showing that Mr. Wolberg's symptoms were noted to have resolved after being treated for an infection with antibiotics in the hospital, and his amylase and lipase levels returned to normal. He opines that had decedent had cancer in 2011 and 2012, his symptoms would not have resolved with antibiotic treatment and therefore there was no delay in the diagnosis of cancer during this time frame.

Dr. Sakalis further opines that Mr. Wolberg "underwent proper testing and examinations during the office visits at Arsenio Medical in 2011 through 2013 and at the hospital during his admission in February of 2011..[and] that there is no evidence whatsoever that Arsenio Medical P.C. and Dr. Haltrecht failed to properly and timely screen the patient to rule out cirrhosis or liver malignancy." In this connection, he states that from 2011 through 2013, "the decedent did not have significant weight loss, pain, abdominal pain on a constant basis, nor blood labs reflecting the possibility of cirrhosis [and that] ... [t]he decedent had normal bilirubin, albumin and platelet count, as well as normal prothrombin time." Therefore, he opines, "there were no signs or indications that decedent needed to be screened for liver cancer during this time."

Dr. Sakalis also opines that since Dr. Haltrecht was the decedent's primary care physician, he was "under no obligation to monitor his chronic Hepatitis C, which had been diagnosed in 1993, and that decedent advised Dr. Haltrecht that he was under the care of

Melissa Palmer, a gastroenterologist and hepatologist for his Hepatitis C, and that when Dr. Haltrecht asked Mr. Wolberg about his Hepatitis C on three occasions, he refused to see a gastroenterologist. Dr. Sakalis also opines that decedent's Hepatitis C did not fit the criteria of patients who require routine monitoring for liver cancer, and that according to the American Association for the Study of Liver Disease Guidelines for Screening for Liver Cancer, there are two types of patients who require routine monitoring for liver cancer. The first are patients with Hepatitis E, who are recommended to undergo liver cancer screening every six months. The second type are patients with cirrhosis of any cause. Dr. Sakalis opines that the decedent did not fall into either of these categories, since he had Hepatitis C not Hepatitis E, and decedent “never exhibited any signs or symptoms of cirrhosis, which would have included yellowing of the skin, weakness, loss of appetite, itching, or easy bruising.” In addition, he opines that in 2011 and 2012, there was neither any laboratory nor clinical suspicion indicating that decedent was suffering from cirrhosis of the liver or liver cancer.

According to Dr. Sakalis, in October 2013, when the decedent presented to Dr. Haltrecht with complaints of difficulty swallowing, Dr. Haltrecht immediately referred Mr. Wolberg to Dr. Twersky, who appropriately sent him for a CT scan of the abdomen, and that this CT scan prompted the diagnosis of liver cancer. Dr. Sakalis further opines that the Haltrecht defendants’ treatment and care of Mr. Wolberg during the relevant period was not a proximate cause of any his injuries or death.

Plaintiff opposes the motion and submits an affidavit from a physician licensed to practice medicine in California who is Board Certified in Internal Medicine, and whose identity is redacted (hereinafter “plaintiff’s expert”). Plaintiff’s expert states that the opinions are stated

within a reasonable degree of medical certainty and are based on a review of decedent's medical records, the pleadings, the deposition testimony of the parties, and the affirmation of the Haltrecht defendants' expert.

Plaintiff's expert opines that "defendants departed from the standards of good and accepted medical practice in their treatment of the decedent by failing to appropriately monitor the potential impact of hepatitis C on ... decedent's liver and his increased risk for developing hepatocellular carcinoma." Specifically, the expert opines that "[a]ccording to the American Association for the Study of Liver Diseases, which has been adopted by the greater medical community, screening with AFP blood tests and ultrasound, or other imaging such as an MRI or CT, should be performed every 6 months [so that]... the growth of cancer [can] be picked up between 2 screenings." And, while plaintiff's expert opines that the lack of appropriate screening before February 2011, when Mr. Wolberg underwent abdominal screening, did not delay any diagnosis of cancer, the expert also opines that defendants failed to appropriately monitor and screen every six months thereafter, particularly as the imaging performed in February 2011 showed that Mr. Wolberg had a fatty liver.

According to the expert, "Hepatitis C that continues over many years is known to cause significant complications including scarring of the liver/cirrhosis, liver cancer, such as hepatocellular carcinoma; and liver failure... [and that] [s]creening is of paramount importance in a successful strategy to treat hepatocellular carcinoma... because signs and symptoms do not usually appear until the disease is in an advanced stage." The expert opines that "six month ultrasound alpha-fetoprotein [AFP] tests are the backbone of the screening program for hepatocellular carcinoma [and that]... [a]n elevated AFP level in a patient already at high risk of developing

liver cancer is a strong indication that something is wrong [and that] [a]ll patients with an elevated AFP should be screened by abdominal [ultrasound], CT or MRI for hepatocellular carcinoma, especially if there has been an increase from the baseline levels.”

The expert next opines that “[t]he outcome of a patient with hepatocellular carcinoma is dependent on the stage of the disease at the time of diagnosis [and that] the main strategy for prolonging survival is diagnosis at the early stage so that effective therapy can be offered [including]...surgical resection [and], liver transplantation [but that]... later staged hepatocellular carcinoma, such as stage 4 or large tumors, such as in this case as 5 cm in diameter, are ineligible for resection or liver transplantation and have a high mortality rate.”

Plaintiff’s expert also opines that Dr. Haltrecht “failed to conform to accepted standards of medical care in managing” decedent based on his history of Hepatitis C, and onset of elevated liver enzymes, and which required the performance of recommended liver screening every six months by AFP blood test and ultrasound or other imaging modalities.” As for the opinion of defendants’ expert that laboratory studies performed were not indicative of cirrhosis and therefore no follow up was needed, plaintiff’s expert opines that studies performed in January and October 2012 “clearly revealed the presence of elevated liver enzymes, [and that] [t]his demonstrates the presence of active liver disease which can be attributable to the Hepatitis C infection and which warranted further work-up with AFP and imaging studies.”

In addition, contrary to the opinion of defendants’ expert, plaintiff’s expert opines that as the decedent’s primary care physician, Dr. Haltrecht was responsible for monitoring his Hepatitis C. In this connection, plaintiff’s expert points to Dr. Haltrecht’s testimony that he was aware of, and documented decedent’s Hepatitis C, and monitored decedent’s liver condition, including for

signs of end-state liver disease or cirrhosis. (Haltrecht EBT at 18, 28, 31-32). The expert also points to evidence that Mr. Wolberg was not under the care of a liver specialist, and that Mr. Wolberg last saw Dr. Palmer in or around 2008, before he started treating with Dr. Haltrecht (Klass-Wolberg EBT at 60-63), and that Mr. Wolberg had not seen Dr. Twersky between April 27, 2011 and October 3, 2013 (Dr. Twersky EBT at 60-61).

With regard to causation, plaintiff's expert opines that the Haltrecht defendants' "departures were a substantial factor in the delay in diagnosis of liver cancer resulting in an upstaging of his cancer with progression to stage 4, and were a substantial factor in the delay in providing medically indicated treatment, resulting in loss of a chance of a cure, a loss of prolonging his life, and his ultimate death." In particular, plaintiff's expert opines that defendants' failure to perform imaging studies or ATP testing every six months and, instead, waiting for more than 2.5 years following the February 2011 scan, until October 2013, when the CT was performed and liver cancer diagnosed, resulted in the liver cancer being diagnosed at stage 4 with evidence of metastasis.

In this connection he opines that "[t]he median doubling time for hepatocellular carcinoma is 117 days, roughly 4 months. Thus, had the recommended imaging been performed, roughly 6 months before, in April 2013, the tumors would have measured 2.5cm; and roughly one year before, in October 2012, the tumors would have measured 1.25 cm and in early 2012, roughly 1.5 years before his diagnosis they would have been even smaller, ...[and] that had the defendants performed the recommended screening testing every 6 months starting in August 2011 [roughly 6 months following the February 2011 CT], decedent's cancer would have been diagnosed at an earlier stage, before metastasis, leading to a better prognosis and outcome."

## Discussion

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 (1<sup>st</sup> Dept 2010). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the Bill of Particulars. Id. “When medical malpractice forms the basis of a wrongful death action, in establishing that he/she did not proximately cause the injuries alleged to have caused plaintiff’s death, a defendant establishes prima facie entitlement to summary judgment as to the wrongful death action as well.” Id. (internal citations omitted).

The expert opinion relied on by a defendant must be based on the facts in the record or those personally known to the expert. Defense expert opinion should specify “in what way” a patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1<sup>st</sup> Dept 2010). A defendant’s expert opinion must also “explain what defendant did and why.” Id. quoting Wasserman v. Carella, 307 AD2d 225, 226 [1<sup>st</sup> Dept 2003]).

Here, the Haltrecht defendants have met their burden based on their expert’s opinion that these defendants did not depart from the standard of care as (i) decedent underwent proper examination and testing by Dr. Haltrecht during office visits from 2011 through 2013, (ii) based on tests performing after decedent’s hospitalization in February 2011, there was no indication of liver cancer, (iii) as decedent’s primary care physician, Dr. Haltrecht was under no obligation to

treat decedent's Hepatitis C, particularly as decedent informed him that he was under the care of specialists, and (iv) decedent's condition did not warrant continued monitoring for liver cancer.

As defendants have met their burden, to survive summary judgment, plaintiff must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 NY2d 320, 324-325 (1986). Specifically, in a medical malpractice action, this requires that a plaintiff opposing a defendant's summary judgment motion to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant['s]... summary judgment motion." Id.

In addition, a plaintiff's expert's opinion "must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." Dallas-Stephenson v. Waisman, 39 AD3d 303, 307 (1<sup>st</sup> Dept 2007) (internal citations and quotations omitted). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation... the opinion should be given no probative force and is insufficient to withstand summary judgment." Diaz v. Downtown Hospital 99 NY2d 542, 544 (2002). On the other hand, summary judgment is not proper where "conflicting opinions of the parties' experts raise triable issues of fact." Boston v. Weissbart, 62 AD3d 517, 518 (1<sup>st</sup> Dept 2009).

As for the threshold issue of whether the Haltrecht defendants owed a duty of care with respect to monitoring Mr. Wolberg's for liver cancer in light of his Hepatitis C, the court notes

that “[w]hether a duty is owed in the first instance is a question for the court, and generally not an appropriate subject for expert opinion” Dallas-Stephenson v Waisman, 39 AD3d at 307 (internal citations omitted). “[T]he duty of a physician may be limited to those medical functions undertaken by the physician and relied upon by the patient...the question is whether the physician owes a duty under the circumstances of a particular scenario.” Burtman v. Brown, 97 AD3d 156, 161-162 (1<sup>st</sup> Dept 2012) (internal citations and quotations omitted). In this case, the record shows that Dr. Haltrecht was involved in monitoring and managing Mr. Wolberg’s overall care, including his liver function in light of his awareness of Mr. Wolberg’s long standing Hepatitis C. Moreover, even assuming arguendo that Mr. Wolberg was seeing a specialist during specialist for his Hepatitis C for any of the period in question, in view of evidence that Dr. Haltrecht continued to monitor Mr. Wolberg’s liver function during this period, it cannot not be said that he did not owe a duty to Mr. Wolberg. See e.g. Lindenbaum v Federbush, 144 AD3d 869, 870 (2d Dept 2016) (holding that defendant primary care physician owed plaintiff a duty of care when he spoke with plaintiff about test results and advised him to continue taking the prescribed medication).

Next, plaintiff’s expert opinion raises issues of fact as to whether Dr. Haltrecht departed from the standard of care in his treatment and care of decedent by failing to appropriately monitor plaintiff for liver cancer in view of his long standing Hepatitis C, including by having him screened every six months through blood and imaging testing, and whether such departures were a substantial factor in delaying the diagnosis of liver cancer and causing Mr. Wolberg’s resultant injuries and death.

Finally, while there are issues of fact precluding summary judgment dismissing the malpractice and wrongly death claims, as plaintiff has not submitted evidence supporting his claim for lack of informed consent, such claim must be dismissed.

Conclusion

In view of the above, it is

ORDERED that the Haltrecht defendants’ motion for summary judgment is denied except that the claim for lack of informed consent is dismissed; and it is further

ORDERED that the pre-trial conference shall be held remotely on August 6, 2020, at noon, and the parties shall email the court at [SFC-PART11@nycourts.gov](mailto:SFC-PART11@nycourts.gov) for call in information; and it is further

ORDERED that pursuant to CPLR 2103(e) a copy of this order may be filed and served.

DATED: July 20, 2020

**Joan  
Madden**  
J.S.C.

Digitally signed by Joan Madden  
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Court, O=NYSC Courts, CN=Joan Madden,  
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