Lindner v NYU Hosps. Ctr.
2020 NY Slip Op 33063(U)
September 14, 2020
Supreme Court, New York County
Docket Number: 805439/14
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

---------- X

MEGAN LINDNER and PETER LINDNER,

INDEX NO. 805439/14

Plaintiff,

-against-

NYU HOSPITALS CENTER, LUBA SOSKIN, M.D., HEIDI ROSENBERG, M.D., CARMIT ARCIBALD, M.D., CITYSCAPE OB/GYN P.L.L.C., MICHELLE HUANG, M.D., IGOR MUNTYAN, M.D., GILBERT GRANT, M.D., and BRENT LURIA,

Defendants.

----------X

JOAN A. MADDEN, J.:

In this medical malpractice action, defendants Luba Soskin, M.D. ("Dr. Soskin"), Heidi Rosenberg, M.D. ("Dr. Rosenberg) and Cityscape/OB/GYN, PLLC ("Cityscape") (together "the defendants")[1] move for summary judgment dismissing the complaint and all cross claims against them. Plaintiffs oppose the motion.

Background

Plaintiffs allege that defendants were negligent during the period from June 1, 2012 at approximately 3:00 am to June 5, 2012 at approximately 8:30 am, in failing to recognize that plaintiff Megan Lindner ("Ms. Lindner" or "plaintiff") had signs of urinary retention after the birth of her first child at NYU Medical Center ("NYU") on June 1, 2012 at 6:56 pm. Dr. Soskin and Dr. Rosenberg were employed by Cityscape, a medical practice which provided care to Ms.

[1] The action has been discontinued with prejudice as to the other defendants.

Lindner during and after her pregnancy, including pre-natal care, labor and delivery room care and post-partum care.

Ms. Lindner, who was discharged from NYU on June 3, 2012 at approximately 1:00 pm, was readmitted through the Emergency Department on June 5, 2012 at approximately 8:30 am for what was found to be urinary retention, and a catheter was inserted to relieve the pressure on her bladder and lower abdomen. Prior to her readmission, plaintiffs telephoned Dr. Rosenberg multiple times to report that Ms. Lindner was in pain and had pressure. Following her admission to NYU, plaintiff was provided with an in-dwelling catheter which remained in place for a period of time, and when it was removed, she was required to self-catheterize for a period of months.

In their Bill of Particulars plaintiffs allege that defendants (i) failed to properly evaluate plaintiff's condition post-partum to take into account the risks of urinary retention, (ii) failed to properly monitor hospital staff in connection with the measurement and documentation of fluid intake and output, (iii) failed to take adequate precautions against urinary retention developing in the course of the patient's care, (iv) failed to adequately examine plaintiff and take a history prior to discharge, and to diagnose plaintiff with urinary retention despite being told repeatedly of her complaints, and (v) discharged plaintiff from NYU prematurely. It is further alleged that defendants erroneously reassured Ms. Lindner before and after she was discharged that she was not suffering "from an emergent and dangerous condition in the face of severe abdominal pain and other symptoms," and that after her discharge from NYU defendants (i) ignored plaintiffs' complaints by telephone about Ms. Lindner's severe pain, (ii) failed to physically examine plaintiff or respond to plaintiff's complaints of increasingly severe pain, (iii) misdiagnosed her pain as the result of hemorrhoids. and (iv) failed to inquire and learn that plaintiff was unable to eat, had vomited and had not urinated. It is further alleged that as a result of these

failures/departures that Ms. Lindner suffered injuries including severe urinary retention leading to damage to her bladder and kidneys and long-term susceptibility to urinary tract infections.

Defendants move for summary judgment, arguing that defendants did not depart from accepted standards of medical practice, and that Dr. Soskin was not involved in the care treatment at issue including the decision to discharge plaintiff. In support of their motion, defendants submit an affidavit from Dr. Soskin and an expert affirmation from Henry Prince, M.D. In her affidavit, Dr. Soskin states that she was not present at NYU for Ms. Lindner's labor and delivery on June 1, 2012, and that her only involvement was approving Ms. Lindner's request for an epidural after being contacted at home 4:00 am, and that she did not see Ms. Lindner during her admission at NYU; that she was not involved in her discharge; and that after ordering the epidural, her next contact with Ms. Lindner was on June 5, 2012 when she was admitted to NYU at approximately 8:30 am for urinary retention.

Dr. Prince, a physician licensed to practice medicine in New York, who is Board Certified in obstetrics and gynecology, states that he has reviewed all pertinent medical records, the deposition transcripts of the parties, and that his opinions, which are stated with a reasonable degree of medical certainty, are based on his years of training, knowledge and experience in Obstetrics and Gynecology. Dr. Prince opines that "plaintiff's development of urinary retention was a common occurrence that can follow a normal uncomplicated vaginal delivery, such as the plaintiff had, and is more likely when epidural anesthesia is received, and this plaintiff received appropriate epidural anesthesia." He also opines that "during plaintiff's hospitalization from May 31, 2012 to June 3, 2012, she did not have any of the signs of urinary retention which would include an inability to void, or the voiding of small amounts of urine, pain, possible distended

abdomen or bladder, voiding insufficient quantities of urine, pain on urination or any indication that plaintiff was experiencing urinary problems."

According to Dr. Prince, "[a] review of the NYU…record of May 31, 2012 to June 3, 2012 notes, specifically in frequent entries by the nurses [indicate] that the patient was not experiencing any urinary difficulties and no complaints concerning urination were ever documented by the nurses or communicated to Dr. Rosenberg." Specifically, Dr. Prince states that the records show that on June 1, 2012, at 11:17 pm, almost five hours after delivery, plaintiff was "documented as voiding without difficulty," on June 2, 2012 at 6:21 am, it was noted that plaintiff 's "bladder and abdomen were both non-distended;" at 11:45 am it was "noted that plaintiff was voiding without difficulty and had no urinary complaints [and her urine was clear and yellow," at 4:11 pm it was noted that plaintiff had "good pain relief with Motrin and Percocet after receiving pain medication for post -delivery pain," and at 7:52 pm it was noted that "plaintiff's bladder and abdomen were non-distended." Dr. Prince further states that the records show that when plaintiff complained of rectal pain and pressure on June 2, 2012 and 8:00 pm and Dr. Rosenberg prescribed an Anusol suppository and Tucks "to alleviate the pain from a known documented hemorrhoid [and] plaintiff's pain level was decreased."

Dr. Prince opines that "plaintiff's development of the known complication of urinary retention after delivery of her child was not the result of malpractice [and that] when plaintiff became symptomatic of urinary retention treatment was instituted and plaintiff responded to treatment." As for allegations that there was a failure to take heed of plaintiff's increasing complaints of pain in the hospital and failing to use ultrasound or other diagnostic procedures in the hospital to determine the amount of urine, he opines that there was no reason to subject plaintiff to these or other procedures to determine the amount of urine in plaintiff's bladder

before discharge. In this connection, he opines that plaintiff's "only complaints of pain were properly attributed to the patient's known hemorrhoids [and that] there was no indication of any potential problem with the patient's post-partum urine output." Moreover, he opines that neither "the nursing observations nor the results of any physician's exams of plaintiff...exhibit any indication that [plaintiff] required testing as she simply had no urinary problems or complaints or signs of urinary retention prior to her discharge on June 3, 2012."

As for Dr. Soskin, Dr. Prince opines that her affidavit establishes that her only contact with the patient was outside the time frame of any alleged negligence.

With respect to causation, Dr. Prince opines that defendants did not depart from "any standards of care and no acts or claimed inactions by them were the proximate cause of the plaintiff developing urinary retention and her subsequent need for treatment with a urologist which concluded after a period of self-catheterizations approximately six weeks after the delivery." He also opines that "to the extent the plaintiffs' Bills of Particulars as to Dr. Soskin and Dr. Rosenberg and Cityscape can be said to include departures in care not specifically referenced in this affirmation, I do not find them to have merit."

Plaintiffs oppose the motion and in support of their opposition submit the affidavit of Barbralyn Donoghue, a registered nurse ("R.N. Donoghue"), Ms. Lindner's deposition, the telephone log of Mr. Lindner's cell phone calls to Dr. Rosenberg after plaintiff's discharge from NYU and excerpts from the medical records of Dr. Victor Nitti, a urologist who treated Ms. Lindner for urinary retention, which states that "her initial retention was probably due to prolonged anesthesia and reduced sensation."

In her affirmation R.N. Donoghue, a registered nurse who is licensed to practice nursing New York State, states that her experience includes practicing as general nurse for 22 years at

Long Island Jewish Hospital in New York, and beginning in 2004, working for ten years as a Home Care nurse. She further states that she has "treated many obstetric patients in hospital settings [and is] …familiar with the standards of care applicable to obstetric treatment from [her] nursing experience, working with gynecologists in the care of patients, and in delivering home nursing care for post-partum patients." She states that her opinions are made with a reasonable degree of medical certainty.

R.N. Donoghue opines that Dr. Rosenberg and Cityscape departed from the standard of care "in ignoring the signs and symptoms of urinary retention, failing to make the diagnosis prior to Ms. Lindner's departure from NYU on June 3, 2012, and discharging her from the hospital with undiagnosed and untreated urinary retention." In this connection she states that "[a]lthough the NYU chart contains references to 'voiding spontaneously,' and the like, it is common for patients in urinary retention to express small amounts of urine from time to time [and that][t]his is usually in response to a body movement involving the contraction of the abdomen or some other external pressure [and that][r]eferences in the notes to 'adequate' or 'sufficient' quantities of urine are suspect approximations because after the infant was delivered the NYU hospital staff did not measure urinary output [and] Ms. Lindner's small outputs of urine did not negate the possibility of urinary retention." R.N. Donoghue also opines that "[g]iven Ms. Lindner's increasing pain and the administration of multiple strong pain relieving drugs, the failure of Dr. Rosenberg or another member of the Cityscape practice to examine Ms. Lindner on June 3 was a departure [as was the failure] to order[] an ultrasound examination to check bladder status [and that]… [s]uch an examination would have revealed retained urine and allowed for treatment that Ms. Lindner did not receive."

Next, in support of allegations that plaintiff was prematurely discharged, R.N. Donoghue opines that "[d]uring the 15 hours after the discharge summary and orders were written, Ms. Lindner's pain increased and she received large amounts of pain medication…[and that] the increasing pain should have been a red flag for Dr. Rosenberg [and] …there should have been a further investigation by Dr. Rosenberg and Cityscape before plaintiff left the hospital."

With regard to Ms. Lindner's post discharge treatment, R.N. Donoghue opines that Dr. Rosenberg departed from the standard of care in failing to offer to physically examine plaintiff or direct her to immediately return to the hospital or the Emergency Department after receiving "repeated alarming phone messages" at her office from the plaintiffs, and instead referred her to a physical therapist. She opines that it was also a departure "to diagnose Musculo-skeletal back pain without conducted an examination… [and to] assure [plaintiff] that no medical was presented by her worsening constellation of symptoms without a basis for that advice."

As for causation, R.N. Donoghue opines that but for the departures from community standards by Dr. Rosenberg and Cityscape "Ms. Lindner would not have been discharged on June 3, 2012 without being treated for urinary retention [and]…the urinary retention should have been diagnosed in response to the [post-discharge] phone calls …[to] Dr. Rosenberg…[and that] [t]hese departures led to a prolonged urinary retention with concomitant extensive injury to Ms. Lindner."

In reply, defendants argue that summary judgment should be granted in favor of Dr. Soskin as plaintiffs do not refer to any departures by her in their opposition, and that as to defendants Dr. Rosenberg and Cityscape, R.N. Donoghue's affidavit is not probative as she is a nurse and not a medical doctor and is therefore unqualified to render an opinion as to whether these defendants departed from the applicable medical standards with respect to Ms. Lindner's

care and treatment during the period at issue, *citing e.g.* Mills v. Moriarty, 302 AD2d 436 (2d Dept), lv denied 100 NY2d 502 (2003); Novack v. South Nassau Community Hospital , 136 AD3d 999 (2d Dept 2016); Matott v. Lord, 48 NY2d 455 (1979).

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 (1st Dept. 2010). To satisfy this burden, a defendant must present expert opinion testimony that addresses the essential allegations in the Bill of Particulars. Id.

The expert opinion relied on by 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 (1st Dept. 2010). A defendant's expert opinion must also "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dept. 2003)). When the opinion of a defendant's expert is insufficient, the burden does not shift to plaintiff to submit evidence creating a triable issue of fact. Applewhite v. Accuhealth, Inc., 81 AD3d 94, 99 (1st Dept 2010).

Under this standard, the court finds that based on the record, the statements in Dr. Soskin's affidavit and Dr. Prince's affirmation, defendants have met their burden of showing that Dr. Soskin had no involvement in the care and treatment of Ms. Lindner during the alleged period of malpractice

As for Dr. Rosenberg and Cityscape, while these defendants have made a prima facie showing that they did not depart from the standard of care in connection with Ms. Lindner's pre-discharge treatment and, in particular, that based on plaintiff's condition and symptoms at NYU it was not a departure to discharge her without testing her for urinary retention, as Dr. Prince does not opine specifically with respect to the alleged departures related to Ms. Lindner's post-discharge treatment, defendants have not shifted the burden to plaintiffs to raise a triable issue of fact in this regard. See Wasserman v. Carella, 307 AD2d at 226 ("bare conclusory denials of negligence without any factual relationship to the alleged injuries, and the submission of the affidavit of a medical expert which fails to address the essential factual allegations set forth in the complaint, are insufficient to establish that defendant is entitled to summary judgment... regardless of the sufficiency of plaintiff's opposition"); Santiago v. Filstein, 35 AD3d 184, 186 (1st Dept 2006)(expert affidavit that "merely provides a factual account of defendant's appointments with and treatment of plaintiff, accompanied by broad statements such as 'at no point in time during my treatment of [plaintiff] did I depart from good and accepted medical practice,' ...were insufficient to meet defendant's initial burden on the motion for summary judgment").

As defendants have met their burden with regard to the alleged departures relating to Ms. Lindner's pre-discharge treatment by Dr. Rosenberg and Cityscape, with respect to these departures, the burden shifts to plaintiffs "to 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).

Defendants argue plaintiffs have not met their burden as plaintiffs' expert, a registered nurse, is not qualified to give an opinion as to the alleged departures from medical care by the

defendant doctor. While an expert need not be a specialist in a particular field to qualify as an expert (Limmer v. Rosenfeld, 92 AD3d 609, 609 [1st Dept 2012]), it must nonetheless be shown that the expert must possesses sufficient training, education and knowledge so that it can be inferred the information provided by that the expert is reliable. See Ozugowski v City of New York, 90 AD3d 875 (2d Dept 2011) (physician who was internist and cardiologist failed to establish foundation for his opinion regarding psychiatric treatment).

In this connection, it has been held that a nurse, like plaintiff's expert, is not qualified to render an opinion as to whether a medical doctor, such as Dr. Rosenberg, departed from good and accepted medical practice. See e.g. Elliot v. Long Island Home, Ltd., 12 AD3d 481, 482 (2d Dep't 2004) (registered nurse was not a medical doctor and lacked the qualifications to render a medical opinion); Collymore v. Montefiore Medical Center, 39 AD3d 237, 237 (1st Dept 2007)(plaintiffs failed to raise an issue of fact as to whether hospital deviated from the standard of care when it failed to designate patient as fall risk upon admission to hospital and "their reliance on the opinion of a registered nurse as to the hospital's alleged malpractice …was insufficient"); compare Schmitt v. Medford Kidney Center, 121 AD3d 1088 (2d Dept 2014)(affirmation of nursing expert was sufficient to make a prima facie showing that nurse practitioner's treatment of plaintiff was in accordance with good and accepted nursing practice and that any alleged departure was not a proximate cause of plaintiff's injuries).[2]

---

[2] The case law relied on by plaintiffs in opposition is inapposite as it does not address the issue of a nurse's qualifications to opine as to whether a medical doctor departed from the medical standard of care. See Galluccio v. Grossman, 161 AD3d 1049 (stating that a medical expert "need to be a specialist in a particular field in order to testify regarding the accepted practices in the field," but finding that the affirmation of plaintiff's expert, a physician who was board certified in internal medicine and infectious disease, lacked probative value as there was no indication in his affirmation that he had training in emergency medicine); Postlethwaite v United Health Services Hospitals, Inc., 5 AD3d 892,895 (3d Dept 2004)(trial court properly permitted expert testimony of board certified anesthesiologist "as to certain accepted medical practices in

Accordingly, as plaintiffs' expert is not qualified to render an opinion regarding defendants' alleged departures, plaintiffs have failed to controvert defendants' showing entitling them to summary judgment in connection with their pre-discharge care and treatment of Ms. Lindner. See Novick v. South Nassau Communities Hosp., 136 AD3d at 1001 ([t]he affidavit of a registered nurse, also submitted by the plaintiffs in opposition, was insufficient to raise a triable issue of fact, since the nurse was not a medical doctor and lacked the qualifications to render a medical opinion as to the relevant standard of care, and whether the defendants deviated from such standard. ")

Conclusion

In view of the above, it is

ORDERED that defendants' motion for summary judgment is granted to the extent of (i) dismissing the complaint and all cross claims against Dr. Soskin, and the Clerk is directed to enter judgment dismissing and severing the claims against Dr. Soskin, and (ii) dismissing the medical malpractice claim against defendants Dr. Rosenberg and Cityscape insofar as such claim is based on departures arising prior to Ms. Lindner's discharge from NYU; and it is further

ORDERED that the action shall continue against Dr. Rosenberg and Cityscape with respect to the medical malpractice claim arising out of alleged departures occurring after plaintiff's discharge from NYU; and it is further

ORDERED that based on the stipulations of discontinuance dismissing the action with prejudice as against defendants NYU Hospitals Center, Carmit Archibald, M.D., Michelle Huang, M.D., Igor Muntyan, M.D., Gilbert Grant, M.D., and Brent Luria, M.D., and the grant of

---

the fields of internal medicine, gastroenterology, general surgery and nursing based upon his medical training, a year-long residency in internal medicine and, most notably, his experience interacting with these professionals in the course of his anesthesiology practice").

summary judgment in favor of Luba Soskin, M.D., the caption is amended to remove these defendants from the caption; and it is further

ORDERED that the caption as amended shall read as follows:

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

---------- X

MEGAN LINDNER and PETER LINDNER, INDEX NO. 805439/14

Plaintiffs,

-against-

HEIDI ROSENBERG, M.D. and CITYSCAPE OB/GYN, PLLC,

Defendants.

----------X

and it is further

ORDERED that a pre-trial conference shall take place via telephone on November 5, 2020 at 11:00 am, and that court shall provide call in information to the remaining parties prior to such conference.

DATED: September 14, 2020

J.S.C.

HON. JOAN A. MADDEN
J.S.C