

Pessolano v Richmond Univ. Med. Ctr.
2021 NY Slip Op 32469(U)
November 22, 2021
Supreme Court, New York County
Docket Number: Index No. 805338/2015
Judge: Judith N. McMahon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDITH MCMAHON PART 30M

Justice

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<p>JOANNA PESSOLANO,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>RICHMOND UNIVERSITY MEDICAL CENTER, MOUNT SINAI HEALTH SYSTEMS, INC., LUCIA PALLADINO, EDWARD ARSURA, KEITH DIAZ, FIDENCIO DAVALOS, SAFET LEKPERIC, ANATOLIY VAYSBERG,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>INDEX NO. <u>805338/2015</u></p> <p>MOTION DATE <u>N/A</u></p> <p>MOTION SEQ. NO. <u>006</u></p>
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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

Defendants' motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendants, Richmond University Medical Center, Lucia Palladino, M.D., Edward Arsura, M.D., Keith Diaz, M.D., Fidencio Davalos, M.D., Safet Lekperic, M.D., and Anatoliy Vaysberg, M.D., is granted in part and denied in part as detailed herein.

The claims in this case arise from the discontinuation of a medication for hypothyroidism, Synthroid, that occurred between July 31, 2013 and September 20, 2013 while Plaintiff Decedent Teresa Pessolano was admitted to Defendant Richmond University Medical Center, which Plaintiff alleges resulted in injuries to Plaintiff Decedent that caused conscious pain and suffering and Ms. Pessolano's death on December 2, 2013. Notably, Ms. Pessolano had a more than 25 year history of hypothyroidism, for which she was taking Synthroid (synthetic thyroid hormone) daily.

Defendants Richmond University Medical Center, Lucia Palladino, M.D., Edward Arsura, M.D., Keith Diaz, M.D., Fidencio Davalos, M.D., Safet Lekperic, M.D., and Anatoliy Vaysberg, M.D. now move for summary judgment to dismiss Plaintiff's case as against them.

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted standard of care and evidence that the deviation or departure was a proximate cause of injury or damage. In order to establish prima facie entitlement to judgment as a matter of law, a defendant in a medical malpractice action must negate either of these two elements.” *Arocho v. Kruger*, 110 A.D.3d 749, 973 N.Y.S.2d 252 (N.Y.A.D. 2nd Dept 2013).

Defendants established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Loren Wissner Greene. *See Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008); *See also Bamberg-Taylor v. Strauch*, 192 A.D.3d 401, 142 N.Y.S.3d 537 (N.Y.A.D. 1st Dept. 2021).

In support of Defendants' motion, Dr. Greene opined “that decedent's medications were managed within the standard of care at all times. This patient had numerous comorbidities, including obesity, atrial fibrillation, pulmonary hypertension and hypothyroidism. Her potassium level was also elevated. She had an ejection fraction of only 35% on August 7, 2013. A normal ejection fraction is above 50%. It is vital for a patient to maintain a normal ejection fraction to support his or her heart and other vital organs. Thus, it is appropriate for that patient's treating providers to investigate the source of the problem.”

Dr. Greene also opined “that holding Synthroid did not proximately cause the patient's demise, or other claimed injuries in this case. Severe hypothyroidism can cause bradycardia and pericardial effusion, among other things. There is no evidence that decedent suffered from bradycardia or pericardial effusion in this case after Synthroid was held. While she did have a

temperature of 94.1 degrees before Synthroid was restarted, her temperature returned to normal after she received Synthroid again. There were also signs of infection, which are not associated with hypothyroidism, but might have caused a low temperature.”

Dr. Greene elaborated “[Plaintiff Decedent] had signs and symptoms consistent with congestive heart failure and infection, along with morbid obesity, leading to poor perfusion of the kidneys. The possible signs of hypothyroidism, such as hypothermia, resolved with antibiotics, and are more likely due to infection. Moreover, her TSH levels quickly corrected with Synthroid replacement and returned toward a more normal level by September 9, 2013. It is therefore my opinion, to a reasonable degree of medical certainty, that hypothyroidism was mild and did not cause or contribute to the patient’s demise.”

As to the testing performed, Dr. Greene stated, “that the defendants ordered appropriate testing at all times during their care and treatment of the patient. Hospital staff frequently and properly monitored decedent, including frequently testing her TSH levels, T4, BUN, creatinine and hematocrit, among other things. This allowed the hospital to measure the patient’s thyroid and renal function. As indicated above, these tests revealed that any renal failure was unrelated to hypothyroidism. The rate of atrial fibrillation was noted and medications were properly adjusted.”

As to the resident and intern Defendants, Dr Greene opined that, “Drs. Davalos, Lekperic, and Vaysberg, should not be held responsible for the decisions made by attendings. In the hospital setting, while a resident or intern may examine a patient and enter notes, the resident or intern will be acting under the direct supervision of an attending. It is the responsibility of the attending to co-sign those notes and ensure the appropriate orders were made. As indicated above, it is my opinion that the appropriate orders were made in this case.”

Lastly, Dr. Green stated, “that the defendants obtained a proper informed consent in this case. Decedent executed an informed consent form, authorizing the hospital to treat her. She in fact refused cardioversion on two separate occasions. Moreover, this case concerns allegations surrounding the failure to treat, rather than an alleged improper bodily invasion. Thus, the hospital properly obtained informed consent in this case.”

“Once this showing has been made [by Defendant], a Plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the Defendant met the prima facie burden.” *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Accordingly, the burden shifts to Plaintiff, “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 N.Y.2d 320, 501 N.E.2d 572 (1986). In a medical malpractice action, this requires that a plaintiff, “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.*

“A plaintiff’s expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Rosario v. Our Lady of Consolation Nursing &*

Rehab. Care Ctr., 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2nd Dept. 2020); *See also Boston v. Weissbart*, 62 A.D.3d 517, 879 N.Y.S.2d 108 (N.Y.A.D. 1st Dept. 2009).

Plaintiff submitted an Affirmation from Dr. Susan D. Grossman in Opposition to Defendants' motion.

Dr. Grossman opined "that there was a direct relationship between withholding Synthroid and Ms. Pessolano's kidney injury and death. That is because Thyroid Hormone (Synthroid/Levothyroxine) affects cardiac output (heart rate). Too little thyroid hormone, the heart pumps blood too weakly and too slowly and the patient will have hypotension (low blood pressure). As a result of the hypotension, the patient's kidneys now have poor perfusion (blood flow) which leads to a necrosis of the kidney. Accordingly, after Synthroid is held for such a prolonged period of time, Ms. Pessolano suffers myxedema coma and her kidneys began to deteriorate and became necrosed and could not recover once Synthroid was restarted."

Dr. Grossman further opined, "that the failure of defendants Dr. Palladino, Dr. Arsura, Dr. Diaz, Dr. Davalos, Dr. Vaysberg, and Dr. Lekperic to monitor Ms. Pessolano's thyroid hormone levels after holding and/or discontinuing her Synthroid medication given her history of hypothyroidism was a substantial factor in causing Ms. Pessolano's severe hypothyroidism, myxedema coma, and death... defendants Dr. Palladino, Dr. Arsura, Dr. Diaz, Dr. Davalos, Dr. Vaysberg, and Dr. Lekperic all deviated and departed from good and accepted medical care and practice by withholding Ms. Pessolano's Synthroid medication for an egregious period of time and failed to reinstate, reintroduce, and/or readminister Ms. Pessolano's Synthroid medication in a timely manner prior to Ms. Pessolano suffering severe hypothyroidism and myxedema coma, a medical emergency with a high mortality rate."

Dr. Grossman elaborated that, "While it may be a proper exercise of medical judgment to withhold Synthroid in a hypothyroid patient to determine its impact on atrial-fibrillation, the

medical records show that the neglect or failure of the defendants to reinstitute Synthroid is more consistent with a mistake, rather than ‘intentionally’ withholding Synthroid for this extended period of time with no plan to reinstitute it.”

As to the residents and interns, Dr. Grossman opined that, “defendants Dr. Davalos, Dr. Lekperic, and Dr. Vaysberg were independently negligent and departed from good and accepted medical practice by failing to accurately record, document, and confirm that the plaintiff’s medication orders were correct and accurate and not in contradiction of the actual administration of medication and that these departures were a substantial contributing factor in causing Ms. Pessolano’s injuries and death.”

Dr. Grossman did not offer any opinion as to Plaintiff’s allegations related to a lack of informed consent. Since Plaintiff’s Expert did not refute Defendants’ Expert’s opinions regarding allegations related to a lack of informed consent, those claims must be dismissed.

“In opposition, Plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that Defendant departed from the accepted standard of care.” *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017); See also *Hernandez v. Eachempati*, 190 A.D.3d 552, 140 N.Y.S.3d 225 (N.Y.A.D. 1st Dept. 2021).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Joyner v. Middletown Med., P.C.*, 183 A.D.3d 593, 123 N.Y.S.3d 169 (N.Y.A.D. 2nd Dept. 2020); See also *Castro v. Yakobashvilli*, 187 A.D.3d 403, 129 N.Y.S.3d 763 (N.Y.A.D. 1st Dept. 2020).

However, regarding Dr. Grossman’s opinions attributing departures to the residents and interns, “A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor’s

directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene.” *Quille v. New York City Health & Hosp. Corp.*, 152 A.D.3d 808, 59 N.Y.S.3d 131 (N.Y.A.D. 2nd Dept. 2017); *See also Irizarry v. St. Barnabas Hosp.*, 145 A.D.3d 529, 43 N.Y.S.3d 45 (N.Y.A.D. 1st Dept. 2016); *Murphy v. Drosinos*, 179 A.D.3d 461, 117 N.Y.S.3d 34 (N.Y.A.D. 1st Dept. 2020). This does not relieve the hospital or those doctors responsible for supervising the residents and interns from vicarious liability, but does mean that Plaintiff’s direct claims against Defendant Doctors Davalos, Lekperic, and Vaysberg must be dismissed.

ORDERED that those portions of Defendants’ motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendants, Fidencio Davalos, M.D., Safet Lekperic, M.D., and Anatoliy Vaysberg, M.D. is granted; and it is further

ORDERED that Plaintiff’s direct allegations against Defendants, Fidencio Davalos, M.D., Safet Lekperic, M.D., and Anatoliy Vaysberg, M.D. are severed and dismissed. Plaintiff’s claims against the remaining Defendants of vicarious liability for the actions of Defendants, Fidencio Davalos, M.D., Safet Lekperic, M.D., and Anatoliy Vaysberg, M.D. remain in the case; and it is further

ORDERED that Defendants’ motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against the remaining Defendants, Richmond University Medical Center, Lucia Palladino, M.D., Edward Arsura, M.D., Keith Diaz, M.D., is granted only as to Plaintiff’s allegations related to a lack of informed consent; and it is further

ORDERED that Plaintiff’s allegations related to a lack of informed consent are severed and dismissed; and it is further

ORDERED that the remainder of Defendants' motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendants is denied; and it is further

ORDERED that any and all other requested relief is denied; and it is further

ORDERED that all parties shall appear for a conference, to be conducted via Microsoft Teams, on January 13, 2022 at 9:30 am; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

11/22/2021
DATE

JUDITH MCMAHON, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

Hon. Judith N. McMahon
J.S.C.