

Valitutto v Staten Is. Univ. Hosp.

2022 NY Slip Op 32147(U)

January 19, 2022

Supreme Court, Richmond County

Docket Number: Index No. 150762/2017

Judge: Charles M. Troia

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

_____ X
**ELENA VALITUTTO and ROBERT VALITUTTO, as
Co-Guardians of the Person and Property of ERIC
STEVEN VALITUTTO, an incapacitated Person,**

Plaintiff,

-against-

**STATEN ISLAND UNIVERSITY HOSPITAL,
ROSEMARY PITKIN, M.D., ANTHONY ALASTRA,
M.D., and HEALTHCARE ASSOCIATES IN
MEDICINE, P.C.**

Defendants.

_____ X

DCM PART 1

Present:

**HON. CHARLES M.
TROIA**

DECISION AND ORDER

Index No. 150762/2017

The following papers numbered 1 to 3 were marked fully submitted on the 10th day of December, 2021.

Notice of Motion by Defendants with Supporting Papers and Exhibits.....1

Affirmation in Opposition by Plaintiffs, with Supporting Papers and Exhibits.....2

Affirmation in Reply Defendant.....3

Upon the foregoing papers, defendant Rosemary Pitkin, MD., individually and Staten Island University Hospital's motion (003) pursuant to CPLR 3212 for summary judgment dismissing the complaint and severing the moving defendants from this action is granted.

This matter arises out of an alleged malpractice suffered by plaintiff, Eric Valitutto, an Incapacitated Person. The action was brought on his behalf by his parents and Co- Guardians, Elena and Robert Valitutto.

On November 25, 2016, at approximately 2:30 PM, plaintiff arrived with his father at the SIUH Emergency Department with a chief complaint of non-traumatic leg and flank pain. An assessment documented that approximately three weeks earlier he had begun feeling generalized lower back pain with mild swelling, right leg numbness and weakness. Plaintiff's father noted that he had an unsteady gait and was dragging his leg.

Plaintiff was next seen in the ER by defendant Dr. Pitkin. Plaintiff reported that he had been seen by an orthopedist the week before and despite having x-rays taken, the orthopedist was unable to determine the cause of plaintiff's problem. A physical exam by Dr. Pitkin noted local spinal tenderness and a slight decrease in strength of the right lower extremity, at which point Dr. Pitkin ordered blood work and a CT scan of the brain/head which showed no evidence of acute intra cranial pathology. Non-Party PA, Ana Contarino, contacted Plaintiff's Primary Care Physician's (Dr. Wortman) office who approved plaintiff's admission to SIUH at 6:22 PM under the care of Dr. Seth Brum, a private physician who admits patients for Dr. Wortman's group, for a MRI/neurosurgery consult. Plaintiff was admitted at 7:20 PM (see, Exhibit "S", Part 1). At 7:00 AM the next morning (November 26, 2016) plaintiff was diagnosed with hyperreflexia which ultimately led to a diagnosis of cervical cord compression.

To prevail on a cause of action for medical malpractice, the plaintiff must prove that defendant "deviated or departed from accepted community standards of practice,

and that such departure was a proximate cause of the plaintiff's injuries" (*Stukas v. Streiter*, 83 AD3d 18, 23,). On a motion for summary judgment, defendant must "make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Iulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697). Once the defendant meets its burden, "the burden then shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit attesting to a departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent producing cause of the injury" (*Johnson v. Queens-Long Is. Med. Group, P.C.*, 23 AD3d 525, 526) . Conclusory allegations that are "unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat defendant physician's summary judgment motion" (*Deutsch v. Chaglassian*, 71 AD3d 718, 719). Where the parties have submitted conflicting expert reports, summary judgment should not be granted; "[s]uch credibility issues can only be resolved by a jury" (*Feinberg v. Feit*, 23 A.D.3d 517, 519, *Williams v Nanda*, 177 A.D.3d 938).

According to plaintiff's, Dr. Pitkin and SIUH departed from good and accepted standards of care from the time of plaintiff's admission to the Emergency Room on November 25, 2016 through his discharge to the SIUH Rehabilitation Unit on January 3, in *inter alia*, (1) failing to perform a neurological examination including a lumbar and cervical MRI in the ER, which would have timely diagnosed a cervical cord compression, resulting in prolonged hospitalization and the development of a pulmonary embolus; (2) administer inflammation reducing steroids to plaintiff beginning on December 26, causing avascular necrosis in both his hips and shoulder that will

ultimately require further surgery;(3) failing to document upper arm weakness which would have also alerted defendant, Dr. Pitkin , to an earlier diagnosis of cervical cord compression. Plaintiff claims, that these alleged deviations resulted in permanent cervical myelopathy with resulting quadraparesis, permanent inability to ambulate independently, as well as avascular necrosis of the bilateral hips and shoulders resulting from the use of corticosteroids.

Here, defendant, Dr. Rosemary Pitkin has successfully established a prima facie showing of entitlement to judgment as a matter of law through the expert affidavits of Dr. Michael Corvini, Board Certified in Emergency Medicine and Dr. Yousaf Ali, Board Certified in Rheumatology. Both experts opined that the defendant, Dr. Pitkin, did not depart from accepted medical practice during her treatment of Plaintiff in the Emergency Room and that any alleged departure was not a proximate cause of the plaintiff's injuries (see *Russell v Garafalo*, 189 AD3d 1100, *Jacob v Franklin Hosp. Med. Ctr.*, 188 AD3d 838, 840) The defendants' experts addressed and rebutted the specific allegations of malpractice set forth in the complaint and bill of particulars (see *Sheppard v Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235). They explained how and why the defendants did not depart from good and accepted practice. Their affirmations contained factual detail with respect to the alleged injuries, and contained more than bare conclusory assertions (cf. *Garcia-DeSoto v Velpula*, 164 AD3d 474, 77 N.Y.S.3d 887)..

Based upon his review of the circumstances in their entirety, Dr. Corvini conclusively established that there were no deviations or departures from accepted standards of care by Dr. Pitkin or any of the Emergency Department staff at SIUH and

that Dr. Pitkin appropriately and properly evaluated plaintiffs medical history, ordered blood work, urinalysis and CT of the head and brain to rule out life threatening emergencies including acute cranial hemorrhage. Dr. Corvini further asserts that the failure to diagnose the cervical cord compression or myelopathy in the ED was not a departure from any standard of care and that once Dr. Pitkin ruled out any life threatening emergency, she appropriately admitted plaintiff to SIUH under the care of his private attending physician for a full inpatient work up ,neurosurgery consult and MRI.

Dr. Pitkin also relies upon the affirmation of a board certified Rheumatologist, Dr. Yousaf Ali, M.D. to establish within a reasonable degree of medical certainty that "there is no causative link between relatively low doses of corticosteroids over a short period of time and the future development of avascular necrosis". Dr. Ali asserts that plaintiff's daily dose, total cumulative dose and duration of steroid treatment administered to plaintiff during the admission was certainly insufficient to have proximately caused avascular necrosis. After reviewing all of plaintiffs pertinent medical records, including those submitted by Dr. Alejandro Leali at Hospital for Special Surgery, he concludes , in agreement with Dr. Leali,, that plaintiff's " ... bilateral hip AVN, bilateral shoulder AVN secondary to hypercoagulable state with history of DVT..."(see, Exhibit "U") . The court notes that there is no mention of corticosteroid treatment anywhere in Dr. Leali's report.

In opposition, plaintiffs failed to raise any triable issues of fact which preclude granting summary judgement to Dr. Pitkin. The opinions offered by plaintiff's expert, who has "clinical practice managing and supervising the care of emergency department

patients”, but does not appear to be board certified in either emergency medicine or rheumatology, is insufficient to demonstrate the existence of any triable issue of fact. “Although conflicting expert opinions may raise credibility issues which can only be resolved by a jury (see *Feinberg v. Feit*, 23 A.D.3d 517, 519), expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact (see *Bowe v. Brooklyn United Methodist Church Home*, 150 A.D.3d 1067, 1068, *Kerrins v. South Nassau Communities Hosp.*, 148 A.D.3d 795). The expert opines that “had Dr. Pitkin and/or SIUH personnel examined Mr. Valitutto’s reflexes, it would have revealed evidence of hyperflexia...leading to a cervical CT scan and timely diagnosis of cervical cord compression”. This speculative opinion is unsupported and fails to address that a diagnosis of hyperflexia was made 12 hours later and in fact did not result in an emergent CT scan upon plaintiff’s admission to SIUH. Consequently, the plaintiff’s expert failed to rebut the opinions of the defendant’s expert or articulate how the defendant’s alleged deviations from the accepted standard of care were a proximate cause of the plaintiff’s injuries (see, *Messeroux v Maimonides Med. Ctr.*, 181 AD3d 583, 585).

Finally, “...although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient”(see, *Cooper v. City of New York*, 2021 N.Y. App. Div. LEXIS 7053 December 15, 2021, *Elstein v Hammer*, 192 A.D.3d 1075, at 1078) *Aaron v Raber*, 188 AD3d 967, 968,). The existence and scope of a physician’s duty of care is a question of law to be determined by the court (see, *Elstein v. Hammer*, 192 Ad3d 854). Here, defendant, Dr. Pitkin’s, board certified Emergency Room expert determined that

based upon the knowledge of the time frame of plaintiffs developing symptoms, Dr. Pitkin “performed a thorough evaluation...ruled out potentially life threatening causes for his complaints and determined that it was safe to admit him to SIUH to undergo an MRI neurosurgery consult on an inpatient basis. It has been held that “...expanding and continuing an emergency physician's duty to patients in this manner is contrary to the purpose and scope of emergency medicine, and could be detrimental to the effectiveness of the services that emergency physicians provide” (see, *Dombroski v. Samaritan Hosp.*, 47 A.D.3d 80, at 86).

Accordingly, plaintiffs failed to raise a triable issue of fact in response to Dr. Pitkin's prima facie showing of entitlement to summary judgment as a matter of law.

With regards to SIUH, the plaintiffs failed to raise a triable issue of fact in opposition to the motion, as their expert affirmation was insufficient.

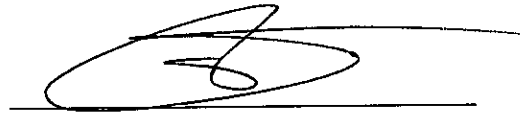
The expert affirmation submitted by plaintiff's expert is of no probative value since the expert failed to lay the requisite foundation for his asserted familiarity with the applicable standards of care. While a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the expert should be possessed of the requisite skill, training, education, knowledge, or experience from which it can be assumed that the opinion rendered is reliable (see, *Cerrone v. N. Shore-Long Is. Jewish Health Sys.*, 197 A.D.3d 449, *Noble v Kingsbrook Jewish Med. Ctr.*, 168 AD3d at 1079-1080). Here, the professional background of the defendants' expert was insufficient to support any inference that he was possessed of the requisite skill, training, education, knowledge, or experience from which it can be assumed that the opinion rendered was reliable (*Romano v Stanley*, 90 NY2d 444, 452)

Accordingly, it is hereby,

ORDERED, that the motion for summary judgment is granted and the complaint is dismissed in its entirety as to Rosemary Pitkin, M.D. and Staten Island University Hospital.

ENTER,

JAN 19 2022



J.S.C.

Hon. Charles M. Troia
Acting Supreme Court Justice