

**Hershberger v Queens Blvd. Extended Care Facility Corp.**

2022 NY Slip Op 35068(U)

September 22, 2022

Supreme Court, Queens County

Docket Number: Index No. 704381/2018

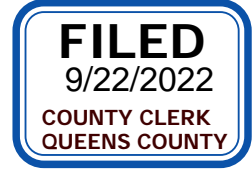
Judge: Peter J. O'Donoghue

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE Peter J. O'Donoghue IA Part MD  
Justice

ALEXANDRA HERSHBERGER, as Administratrix  
for ROBERT HERSHBERGER, Deceased and  
ALEXANDRA HERSHBERGER, Individually,

Index  
Number 704381/2018

Plaintiffs,  
-against-

Motion  
Date April 20, 2022

QUEENS BOULEVARD EXTENDED CARE  
FACILITY CORP. d/b/a QUEENS BOULEVARD

Motion Seq. Nos 4 & 5

EXTENDED CARE FACILITY; QUEENS  
BOULEVARD EXTENDED CARE FACILITY  
MANAGEMENT LLC d/b/a QUEENS BOULEVARD  
EXTENDED CARE FACILITY; MOHAMMAD  
JAWAID, M.D.; VISITING NURSE SERVICE OF  
NEW YORK; VISITING NURSE SERVICE OF NEW  
YORK HOME CARE; and VISITING NURSE  
SERVICE OF NEW YORK HOME CARE II,  
Defendants.

Defendants

The following numbered papers read on these motions: (1) the motion by the defendants Queens Boulevard Extended Care Facility Corp. d/b/a Queens Boulevard Extended Care Facility and Queens Boulevard Extended Care Facility Management LLC d/b/a Queens Boulevard Extended Care Facility, pursuant to CPLR 3212, for summary judgment dismissing the complaint insofar as asserted against them; and (2) the motion by the defendant Mohammad Jawaid, M.D., pursuant to CPLR 3212, for summary judgment dismissing the complaint insofar as asserted against him.

Papers  
Numbered

Seq #4  
Notice of Motion - Affidavits - Exhibits..... EF 93-108  
Answering Affidavits - Exhibits..... EF 139-141  
Reply Affidavits..... EF 147

Seq #5

Notice of Motion - Affidavits - Exhibits..... EF 109-121  
 Answering Affidavits - Exhibits..... EF 122-137  
 Reply Affidavits..... EF 145

Upon the foregoing papers it is ordered that the motions are consolidated for the purpose of a single order and are determined as follows:

In September 2015, Robert Hershberger (the decedent) underwent a right knee replacement procedure. Following the surgery, the decedent was transferred to Queens Boulevard Extended Care Facility (QBECF). During his rehabilitation period, the decedent's care was managed by the defendant Mohammad Jawaid, M.D., and he was prescribed, among other medications, Lovenox, Percocet/Oxycodone, Meclizine, and Aspirin. The decedent was discharged from QBECF on November 6, 2015, but he was readmitted to the hospital several days later after falling in his home. On November 17, 2015, the decedent was transferred to QBECF a second time. During this second admission at QBECF, the decedent's prescriptions for Percocet/Oxycodone and Aspirin were continued. The decedent was discharged from QBECF on December 14, 2015, and upon his discharge he was given another 30-day prescription for Aspirin. On January 28, 2016, the decedent was hospitalized suffering a stroke, and he was diagnosed with an intracerebral hemorrhage. As a result of the stroke, the decedent was paralyzed on the left side of his body. The decedent was discharged from the hospital on February 12, 2016, and ultimately passed away on October 13, 2019.

Prior to the decedent's death, the plaintiff Alexandra Hershberger (the plaintiff) and the decedent commenced this medical malpractice action against, among others, the defendants Queens Boulevard Extended Care Facility Corp. d/b/a Queens Boulevard Extended Care Facility and Queens Boulevard Extended Care Facility Management LLC d/b/a Queens Boulevard Extended Care Facility (the Queens Boulevard defendants), and Jawaid. The plaintiffs alleged that the administration of medications to the decedent, including Aspirin, was contraindicated based on the decedent's medical history. The plaintiffs further alleged that the administration of Aspirin was excessive in both dosage and duration and was a substantial factor in causing the decedent's hemorrhagic stroke. In addition, the plaintiffs alleged violations of Public Health Law §§ 2801-d and 2803-c against the Queens Boulevard defendants, which were predicated on 10 NYCRR 415.11(a)(2) and 10 NYCRR 415.12(1).

Following the decedent's death, the plaintiff continued this action in both her individual capacity and as administratrix of the decedent's estate. Discovery now having been completed, the Queens

Boulevard defendants and Jawaid separately move for summary judgment dismissing the complaint insofar as asserted against each of them.

"[T]he requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of medical practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*Rauci v Shinbrot*, 127 AD3d 839, 841 [2d Dept 2015]; see *Dixon v Chang*, 163 AD3d 525, 526 [2d Dept 2018]). "[A] defendant physician seeking summary judgment 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" (*Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]; see *Matthis v Hall*, 173 AD3d 1162, 1163 [2d Dept 2019]). "In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (*Mackauer v Parikh*, 148 AD3d 873, 876 [2d Dept 2017]; see *Kogan v Bizekis*, 180 AD3d 659, 660 [2d Dept 2020]). However, where a defendant's expert merely recounts the treatment rendered and provides a conclusory opinion that this treatment did not represent a departure from good and accepted medical practice, a defendant has failed to meet its prima facie burden (see *Barlev v Bethpage Physical Therapy Assoc., P.C.*, 122 AD3d 794, 784 [2d Dept 2014]; *Couch v County of Suffolk*, 296 AD2d 194, 198 [2d Dept 2002]). A defendant's failure to meet its prima facie burden requires denial of a motion for summary judgment, regardless of the sufficiency of the opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Conversely, the basis for liability under Public Health Law § 2801-d does not stem from either deviation from accepted standards of medical practice or breach of a duty of care (see *Schwartz v Partridge*, 179 AD3d 963, 965 [2d Dept 2020]). To the contrary, "Public Health Law article 28 authorizes a private right of action by patients of 'residential health care facilities' for the deprivation of rights conferred by statute, regulation and contract, including those enumerated by Public Health Law § 2803-c" (*Broderick v Amber Ct. Assisted Living*, 200 AD3d 840, 841 [2d Dept 2021]). These claims are subject to the defense that the facility exercised all care that was reasonably necessary to prevent and limit the deprivation and injury to the patient (see *Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 834 [2d Dept 2011]; *Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178, 179 [2d Dept 2002]).

Motion Seq. #4

In support of their position, the Queens Boulevard defendants submit, among other things, the pleadings, the decedent's medical records, the transcript from the deposition of the plaintiff, and an affirmation from their expert, Vincent P. Garbitelli, M.D. Based on these submissions, the Queens Boulevard defendants argue that they are entitled to summary judgment dismissing the complaint insofar as asserted against them because they did not depart from the standard of care in rendering treatment to the decedent, and in any event, their treatment of the decedent did not proximately cause his injuries. The Queens Boulevard defendants further assert that the evidence submitted establishes that no violation of Section 415 of Title 10 of the New York Administrative Code or Article 28 of the Public Health Law occurred here.

*The medical malpractice allegations*

Garbitelli is board certified in internal medicine, and asserts that he is familiar with the standard of care for the assessment, management, and treatment of strokes and the management of patients at extended care facilities. After reviewing the relevant facts and the plaintiff's allegations against the Queens Boulevard defendants, Garbitelli opined, within a reasonable degree of medical certainty, that the treatment rendered by the Queens Boulevard defendants did not constitute a departure from the standard of care. Garbitelli asserted that based on the decedent's risk factors, including his reduced mobility, advanced age, and cardiovascular diseases, the prescribing of 325mg of aspirin up to and including the day of the decedent's stroke was within the standard of care. Garbitelli further opined that the treatment rendered by the Queens Boulevard defendants did not proximately cause the decedent's injuries. In particular, Garbitelli asserted that the decedent's stroke was the natural result of the Decedent's advanced age and comorbidities which included chronic heart disease and arterial sclerosis. Finally, Garbitelli asserted that the medical records establish that the various statutory and regulatory violations alleged by the plaintiff are without merit.

The Queens Boulevard defendants failed to establish, prima facie, that they did not depart from the standard of care in rendering treatment to the decedent (see *Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 913 [2d Dept 2022]). In his affirmation, Garbitelli failed to address many of the allegations of negligence asserted against the Queens Boulevard defendants, including allegations that these defendants failed to appreciate the risks of prescribing Aspirin in conjunction with the decedent's prescriptions for Oxycodone, Percocet, and Lovenox, negligently prescribed Mictizine, and failed to appreciate the decedent's anemia diagnosis (see *Oliver v New York City Health & Hosps. Corp.*,

178 AD3d 1057, 1058-1059 [2d Dept 2019]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]). With respect to the allegations regarding the purportedly improper prescription for Aspirin, Garbitelli's explanations merely amount to conclusory assertions that the Queens Boulevard defendants did not depart from the standard of care, which are insufficient to rebut the plaintiff's specific allegations of negligence (see *Nodar v Pascaretti*, 200 AD3d 697, 699 [2d Dept 2021]; *Wei Lin v Sang Kim*, 168 AD3d 788, 788-789 [2d Dept 2019]). Notably, Garbitelli failed to set forth the relevant standard of care or substantively describe how the Queens Boulevard defendants adhered to this standard (see *Ojeda v Barabe*, 202 AD3d 808, 810 [2d Dept 2022]).

The Queens Boulevard defendants also failed to establish, prima facie, that any alleged negligence did not proximately cause the decedent's injuries (see *Smarkucki v Kleinman*, 171 AD3d 1118, 1119 [2d Dept 2019]; *Wodzinski v Eastern Long Is. Hosp.*, 170 AD3d 925, 926-927 [2d Dept 2019]). First, the assertion that the Queens Boulevard defendants are not responsible for determining the appropriateness of Jawaid's orders or recommending specific treatment is conclusory and unsupported by the record. In addition, while Garbitelli opined that Aspirin does not cause cerebral hemorrhages and that the decedent's stroke was caused by his advanced age and comorbidities, Garbitelli also noted that Aspirin can make the bleeding associated with a spontaneous hemorrhage worse, causing more significant damage. On this point, when viewing the evidence in the light most favorable to the plaintiff, the plaintiff is alleging not only that the prescription of Aspirin directly caused the decedent's stroke, but that it also exacerbated the decedent's stroke and the Queens Boulevard defendants failed to appreciate this risk. Under these circumstances, Garbitelli's assertions regarding proximate cause are insufficient to establish prima facie entitlement to summary judgment.

Thus, this branch of the motion by the Queens Boulevard defendants is denied, regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad*, 64 NY2d at 853). Finally, to the extent that the plaintiff requests that the court search the record and grant summary judgment in her favor as to liability against the Queens Boulevard defendants (see CPLR 3212[b]), the court declines to do so.

#### *The alleged Public Health Law violations*

In addition to the primary allegations of medical malpractice, the plaintiff's bill of particulars further alleged a cause of action under Public Health Law § 2801-d and Public Health Law §

2803-c based on alleged violations of 10 NYCRR 415.11(a)(2)(i), 10 NYCRR 415.11(a)(2)(v) and 10 NYCRR 415.12(l). To meet their prima facie burden to be entitled to summary judgment dismissing these allegations, the Queens Boulevard defendants rely on the decedent's QBECF records and Garbitelli's affirmation to assert that no statutory or regulatory violation took place while the decedent was under the care of the Queens Boulevard defendants.

As is relevant here, 10 NYCRR 415.11 requires nursing homes to create, maintain, and periodically update comprehensive assessments which address each resident's functional capacity (see 10 NYCRR 415.11[a][1]). Here, the QBECF records establish, prima facie, that comprehensive medical history and nutritional assessments were generated upon the decedent's admission to QBECF and were maintained throughout the course of the decedent's admission. In opposition to this branch of the motion, the plaintiff did not address the Queens Boulevard defendants' prima facie proof regarding the alleged violation of 10 NYCRR 415.11. The plaintiff, therefore, failed to raise an issue of fact on this point. Thus, this branch of the Queens Boulevard defendants' motion is granted.

Turning to 10 NYCRR 415.12, this regulation sets forth quality of care standards and requires, inter alia, that "[e]ach resident's drug regimen shall include only those medications prescribed to treat a specific documented illness or condition and not otherwise contraindicated for a given resident" (10 NYCRR 415.12[1][1]). To the extent that Garbitelli's affirmation addressed the allegations relevant to this regulation, his assertions were conclusory and insufficient to establish prima facie entitlement to summary judgment dismissing this claim (see *Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 AD3d 739, 741 [2d Dept 2017]). Thus, this branch of the Queens Boulevard defendants' motion is denied, regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad*, 64 NY2d at 853).

#### Motion Seq. #5

In support of his position, Jawaid submits, among other things, the pleadings, the decedent's medical records, and an affirmation from his expert physician, Charles L. Bardes, M.D. Bardes is board certified in internal medicine, and asserted that, by virtue of his training and experience in internal medicine, he is familiar with the standard of care for treating post-surgical patients with pain medication, anticoagulants, and antihistamines, and the standards for assessment, management, causation, and treatment of strokes. Based on the records he reviewed, including the pleadings and the decedent's medical records, Bardes opined, within a reasonable degree of medical certainty, that Jawaid did

not depart from the standard of care in treating the decedent, and that Jawaid's treatment of the decedent did not proximately cause his injuries. In particular, Bardes asserted that, under the standard of care, there is no contraindication for prescribing Meclizine, Lovenox, Percocet, or Aspirin to an anticoagulated patient, either individually or in conjunction with one another. Bardes further asserted that, based on the properties of each of these drugs, they were not the proximate cause of the decedent's hemorrhagic stroke.

Jawaid failed to establish prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against him (see *Martinez*, 203 AD3d at 913). First, in asserting that Jawaid did not depart from the standard of care, Bardes failed to address many of the allegations of negligence asserted against Jawaid, including allegations that he was negligent in prescribing aspirin in an excessive amount and for an excessive duration, failed to appreciate the decedent's history of anemia, and failed to properly appreciate and respond to the decedent's insufficient blood coagulation levels (see *Oliver*, 178 AD3d at 1058-1059; *Wall*, 78 AD3d at 1045). Moreover, Bardes's opinion that prescribing 325mg of Aspirin was appropriate for preventing clot formation is conclusory and insufficient to establish prima facie entitlement to summary judgment (see *Nodar*, 200 AD3d at 699).

Jawaid also failed to establish, prima facie, that his treatment of the decedent did not proximately cause the decedent's injuries. With respect to Meclizine, Percocet, Oxycodone, and Aspirin, Bardes made the following assertions. Meclizine has no anticoagulation properties and its use is not contraindicated in a patient who is also taking anticoagulation medication. Percocet and Oxycodone have no effect on blood thinning, and their uses are not contraindicated in a patient who is also taking anticoagulation medication. Aspirin, while not a blood thinning agent, can reduce the formation of blood clots. These medications, when taken individually or together, would not cause a hemorrhagic stroke. Bardes's assertions, however, are conclusory, as he failed to provide any details concerning the nexus - or lack thereof - between these medications and hemorrhagic strokes (see *Pullman v Silverman*, 28 NY3d 1060, 1062-1063 [2016]; *Stisi v Berlin*, 176 AD3d 888, 980 [2d Dept 2019]).

Thus, Jawaid's motion is denied, regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad*, 64 NY2d at 853). To the extent that the plaintiff requests that the court search the record and grant summary judgment in her favor as to liability against Jawaid (see CPLR 3212[b]), the court declines to do so.

Accordingly, it is

ORDERED that the branch of the Queens Boulevard defendants' motion for summary judgment dismissing so much of the plaintiff's Public Health Law § 2801-d claim as is predicated on an alleged violation of 10 NYCRR 415.11 is granted; and it is further,

ORDERED that the Queens Boulevard defendants' motion is otherwise denied; and it is further,

ORDERED that Jawaid's motion for summary judgment dismissing the complaint insofar as asserted against him is denied; and it is further,

ORDERED that all other relief not expressly granted herein is denied.

Dated: September 22, 2022

  
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PETER J. O'DONOGHUE, J.S.C.

