SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDITH MCMAHON** **PART** **30M**

Justice

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LISSETH HAZIM, AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS OF BIBIANA MARTINEZ TAVAREZ, DECEASED,

Plaintiff,

- v -

JUAN CARLOS GARCIA, LONGKAT KESMAN, THE NEW YORK AND PRESBYTERIAN HOSPITAL, COLUMBIA UNIVERSITY VAGELOS COLLEGE OF PHYSICIANS AND SURGEONS

Defendant.

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INDEX NO. 805318/2020

MOTION DATE 04/19/2023, 04/19/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 57, 58, 59, 60, 61, 62, 69

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 63, 64, 65, 66, 67, 68, 70

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

Upon the foregoing documents, the motions for summary judgment of defendants Juan Carlos Garcia, M.D. (Motion Seq. No. 001), Longkat Kesmen, P.A., s/h/a Longkat Kesman, P.A., and The New York and Presbyterian Hospital and The Trustees of Columbia University in the City of New York, s/h/a Columbia University Vagelos College of Physicians and Surgeons (hereinafter "NYPH") (Motion Seq. No. 002) are denied.

This matter arises out of alleged medical malpractice rendered to the 49-year-old decedent during emergency room visits to NYPH on October 23, 2019, and October 25, 2019.

It is claimed that decedent's death on October 27, 2019, was a result of the defendants' failure to timely diagnose and treat her for a subarachnoid hemorrhage ("SAH")[1], failure to order additional testing during her first ER presentation (*e.g.*, a CT angiogram, lumbar puncture, MRA), and decedent's premature discharge from NYPH on October 24, 2019, which necessitated her return to the emergency department one day later. Defendants maintain that their care and treatment was within the appropriate standard of care, and that decedent did not suffer a SAH until hours after her second admission on October 25, 2019.

FACTUAL BACKGROUND

Bibiana Martinez Tavarez, age 49, presented to NYPH's emergency room at 6:49 p.m. on October 23, 2019, complaining of a headache for several hours, with a significant increase in pain at 4:00 p.m. that day,[2] accompanied by blurry vision. She was triaged within forty minutes of her arrival and was seen in the Rapid Medical Evaluation of the emergency department where she was assigned to defendant, P.A. Kesmen. The P.A. interviewed decedent at 8:10 p.m. and noted that her headache initially started in the back of the head and gradually radiated towards the front, becoming significantly more painful at 4:00 p.m. A physical examination was normal, decedent did not exhibit nystagmus during the neurological portion of the exam, and she was

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[1] According to plaintiff's neurological expert (*see* NYSCEF Doc. No. 58) "one of the most common causes of a SAH is the rupture of a brain aneurysm. A brain aneurysm is a bulging weakened area in the wall of an artery in the brain. The weakened blood vessel bulges out, causing the vessel to become thin and more likely to rupture or break. Brain aneurysms can occur in any part of the brain, but they are most common in the areas where the blood vessels branch out" (*id.*, para 13).

[2] There is a discrepancy in the NYPH chart of when the headache began (one week or 17 hours prior to the first hospital visit), but decedent reported to staff that the headache worsened at approximately 4:00 p.m. This is relevant because, according to defense expert Dr. Marshall (*see* NYSCEF Doc. No, 29), the standard of care dictates that a CT scan that is negative **taken within six hours** of an acute onset of a headache does not require further intervention or workup: "This is because initially, once a bleed in the brain occurs, the blood is liquified…[but] once it begins to clot [it] can be difficult to distinguish on a CT scan, **after the six-hour mark**" (*id.*, para. 22).

oriented to person, place, and time. The P.A.'s plan included a CT scan of the head to rule out SAH, Tylenol for pain, Zofran for nausea, and IV hydration.

The head CT scan without contrast was performed at 9:39 p.m. and revealed "no evidence of intracranial hemorrhage, mass effect or large acute infarct." Ms. Martinez Tavarez was given one dose of Tylenol (975 mg) at approximately 9:00 p.m. and a 30 mg IV drip of Ketorolac, also for pain, at 10:18 p.m. She reported that her pain had decreased from 9/10 to 0/10 and she was deemed stable for discharge by 1:00 a.m. on October 24, 2019. The diagnosis was migraine, and decedent was instructed to follow-up with her primary care physician and return to the ED if her headache worsened.

Twenty-four hours later, at 2:00 a.m. on October 25, 2019, Ms. Martinez Tavarez returned to the emergency department with complaints of extreme headache associated with two episodes of nausea and vomiting. This time she was seen by Emergency Medicine attending, Dr. Marissa Nadeau, whose physical exam included a comprehensive neurological evaluation which was non-focal. Dr. Nadeau's assessment was a thunderclap headache, and the plan was to rule out SAH. A repeat CT scan of the head was ordered. If the CT scan was negative, then the more invasive lumbar puncture would be performed.

The CT scan was performed at 4:22 a.m. and, compared to the prior study, revealed no interval changes or evidence of intracranial hemorrhage, mass effect or large acute infarct. Decedent underwent the lumbar puncture at 7:16 a.m. and the results were grossly negative.

At 8:45 a.m. on October 25, 2019, decedent suffered a seizure and went into cardiac arrest requiring five minutes of resuscitation, followed by another episode of pulseless electrical activity requiring ten minutes of resuscitation. At 10:00 a.m. another CT scan of the head

revealed a diffuse SAH and cerebral edema. Neurology and neurosurgery were called STAT to be made aware. Decedent was transferred to the Neuro ICU for further management.

A brain death study was performed at 1:26 p.m. on October 26, 2019, after a further CT scan revealed the presence of a Grade IV SAH. At this point, Ms. Martinez Tavarez had fixed and dilated pupils and was not responsive to noxious or painful stimuli. She was declared brain dead, taken off life support, and passed away on October 27, 2019. An autopsy revealed vertebral artery dissection with aneurysm on the right measuring 0.9 by 0.8 by 0.6 cm.

MOTIONS FOR SUMMARY JUDGMENT AND EXPERT OPINIONS

Dr. Garcia, the supervising attending physician of NYPH's emergency department, moves for summary judgment on the grounds that he never saw the decedent during her October 23, 2019 admission, and that his involvement was limited to cosigning P.A. Kesmen's note on October 24, 2019, after decedent's first discharge. Dr. Garcia maintains that his signature on a note authored by P.A. Kesmen merely reflects that he agreed with and approved the P.A.'s assessment and treatment plan.

In support of the motion, Dr. Garcia submits, *inter alia*, the affirmation of an emergency medicine physician, John P. Marshall, M.D. (*see* NYSCEF Doc. No. 29) who opines within a reasonable degree of medical certainty, that all care and treatment rendered during decedent's October 23, 2019 ED presentation to NYPH was within the accepted standards of emergency medicine, that no action or omission on the part of Dr. Garcia was a proximate cause of plaintiff's alleged injuries and, critically, that decedent "did not have a sentinel bleed or SAH during the October 23, 2019 ED presentation" (*id.*, para. 31), as evidenced by the findings of the cerebrospinal fluid extracted on the morning of October 25, 2019.

According to Dr. Marshall, (1) "good and accepted medical practice within the standard of care" requires that the "attending physician [Dr. Garcia] only be available, on site, for consultation, should [the P.A.] have any questions regarding the treatment plan" (*id.*, para 19[3]); (2) there was no indication for P.A. Kesmen to consult Dr. Garcia and Dr. Garcia appropriately cosigned the note, reflecting his agreement with and approval of the P.A.'s plan; (3) P.A. Kesmen appropriately ordered a CT scan of the head to rule out SAH; (4) the negative CT scan, performed within the six-hour window of onset of severe headache, indicated that no further intervention, inclusive of a lumbar puncture or additional testing, was necessary; (5) it was medically appropriate to give decedent 975 mg of Tylenol and a 30 mg injection of Ketorolac for pain; (6) decedent was appropriately monitored for over two hours prior to her discharge, and (7) there was no reason to admit decedent to the hospital, since her complaints of headache had been addressed, her condition had improved, and the only imaging study that was indicated yielded a negative result.

In support of their motion for summary judgment, P.A. Kesmen and NYPH submit, *inter alia,* the expert affirmations of Andrew Wackett, M.D. (emergency medicine; NYSCEF Doc. No. 42) and Nirit Weiss, M.D. (neurosurgeon; NYSCEF Doc. No. 43).

For his part, Dr. Wackett opines, within a reasonable degree of medical certainty, that these defendants did not depart from good and accepted medical practice, and that (1) the non-contrast CT scan of the head is the "appropriate first diagnostic tool" to rule out SAH when the onset of the headache is within 6 hours of the study; (2) the negative CT scan and decedent's report that her headache had improved obviated the need for a lumbar puncture, MRI or CT

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[3] In this regard, Dr. Marshall informs that patients could be assigned to either a P.A. or an attending physician, and that no requirement exists for an attending to see a patient himself. According to Dr. Marshall, "this practice is wholly within the standard of care, due to the sheer volume and variety of patients who present to EDs on a daily basis." (*id.*, para 19).

angiogram; (3) discharge by P.A. Kesmen was appropriate at 1:00 a.m. on October 24, 2019; (5) Dr. Nadeu's plan on October 25, 2019, to repeat the CT scan and compare it to the prior study before proceeding with the more invasive lumbar puncture, was appropriate; (6) the negative results of the lumbar puncture on October 25th indicate that had a lumbar puncture been performed on October 23rd, it too would have been negative; (7) decedent was appropriately managed in the ED when she suffered a seizure and went into cardiac arrest (*i.e.*, NYPH staff called a code, commenced CPR, intubated decedent and administered epinephrine), and (8) when the repeat CT scan of the head at 10:00 a.m. revealed a diffuse SAH and cerebral edema, neurology was appropriately called and decedent was timely transferred to the Neurological ICU for further management. Dr. Wackett concludes that the care rendered to decedent in the ED was in accordance with good and accepted medical practice and did not proximately cause or substantially contribute to plaintiff's claimed injures.

Dr. Weiss sets forth to a reasonable degree of medical certainty that the decedent (1) was appropriately evaluated and treated for her complaints of headaches at NYPH by its staff including PA Kesmen during her presentations on October 23, 2019 and October 25, 2019; (2) PA Kesmen appropriately ordered a CT scan of the head for further evaluation to rule out a SAH; (3) the negative CT scan and unremarkable physical exam as well as decedent's relief from pain obviated the need to perform a lumbar puncture or additional studies such as an MRI or CT angiogram to rule out a hemorrhage or sentinel bleed; (4) decedent was appropriately discharged with instructions to return if her symptoms changed; (5) decedent was appropriately and timely referred for a work-up to rule out SAH during her second visit to the ER; (6) the CT scan was timely performed within two and one half hours of her second presentation on October 25th; (7) given the two negative CT scans, it was appropriate to perform a lumbar puncture to

effectively rule out a SAH; (8) the CT scan performed on October 23rd could not be relied upon on October 25th in order to bypass a second CT scan and proceed to a lumbar puncture; (9) based on the negative CT scan and negative lumbar puncture there was no indication for a CT angiogram or MRI prior to 8:45 a.m. on October 25th, and an earlier admission to the Neuro ICU would not have changed the course of treatment which would always include a CT scan followed by a lumbar puncture depending on the results, and (10) decedent did not develop the SAH until she seized and then arrested at 8:45 a.m. on October 25, 2019, as evidenced by the two negative CT scans and the negative lumbar puncture.

In opposition to both motions for summary judgment, plaintiff submits the redacted expert affirmation of a neurologist (*see* NYSCEF Doc. No. 58, 64), who opines, *inter alia,* that "defendants departed from the standard of care in failing to order a timely CTA on October 23, 2019, and October 25, 2019, and that this failure was a substantial factor in allowing the aneurysm to go unrecognized and untreated.[4]" Plaintiff's expert provides a thorough explanation of the types of brain aneurysms and treatments available (surgical intervention versus endovascular therapy), including vertebral artery dissection, before concluding that "a CTA would have certainly demonstrated the vascular pathology which was demonstrated two days later and would have led to further evaluation of her vessels, leading to treatment of her aneurysm and prevention of any further damage to her brain via bleeding." The neurologist is unequivocal that "had a CTA been performed on October 23, 2019, or earlier on October 25, 2019, the dissection with the aneurysm would have been identified and endovascular treatment of the aneurysm would have prevented the catastrophic bleed of October 25, 2019" (*id.*, para 42).

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[4] Plaintiff's expert disagrees with Dr. Weiss, who "ignores the fact that if a provider was concerned enough about the severity of the patient's symptoms that he recorded that a SAH needs to be ruled out, if the CT comes back negative, it was incumbent upon the provider to further investigate the cause of the headache with a CTA" (*see* NYSCEF Doc. No. 64, para 39).

Plaintiff maintains that under these facts, New York law bars an award of summary judgment in favor of Dr. Garcia, based upon Title 10 of the Compilation of Codes, Rules and Regulations of the State of New York, specifically 10 NYCRR Section 94.2 "**Supervision and scope of duties**" at (f), which reads as follows: "A physician supervising or employing a licensed physician assistant or registered specialist assistant shall remain medically responsible for the medical services performed by the licensed physician assistant or registered specialist assistant whom such physician supervises or employs" (*see* 10 NYCRR 94.2[f]).

To the extent relevant, plaintiff's expert further opines that Dr. Garcia should have seen and evaluated decedent himself to ensure appropriate medical treatment, before signing the P.A.'s note, and that NYPH hospital policies, to the extent of discouraging this practice, are improper and constitute a departure from acceptable standards of medical care[5]. According to the expert, under the circumstances presented on October 23, 2019 (*i.e.,* the onset of a sudden severe [9/10] headache, no history of prior headaches, etc.), decedent should have been sent for an immediate neurological consult.

APPLICABLE LAW AND ANALYSIS

In an action premised upon medical malpractice, a defendant doctor or hospital establishes *prima facie* entitlement to summary judgment when he or she establishes 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. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept. 2008]).

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[5] Dr. Garcia replies, *inter alia*, that plaintiff's neurological expert is unqualified to render an opinion as to the standard of care in emergency medicine.

Once a defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's *prima facie* showing (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v. New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept. 2008]; *Koppel v. Park,* 228 AD2d 288, 289 [1st Dept. 1996]). To meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Myers v. Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008]; *Rebozo v. Wilen,* 41 AD3d 457, 458 [2d Dept. 2007]).

Here, defendants have made a *prima facie* showing of entitlement to judgment as a matter of law, by submitting the expert affirmations of Drs. Marshall, Wackett and Weiss, who opined, among other things as hereinbefore set forth, that decedent was rendered appropriate care, and that her death was caused by an SAH that occurred at 8:45 a.m. on October 25, 2019 (*see Balzola v. Giese,* 107 AD3d 587 [1st Dept. 2013]).

In opposition, the plaintiff's expert raised a triable issue of fact as to whether defendants departed from acceptable standards of care when they failed to order the minimally invasive computer tomography angiography (CTA) during the October 23, 2019 and October 25, 2019 emergency room visits, which "would have revealed her aneurysm, and which was treatable with an endovascular repair" (*see* NYSCEF Doc. No. 58, paras 47-49). The conclusion of plaintiff's expert that the defendants' failure to order the CTA was a substantial factor in allowing the aneurysm to go unrecognized and untreated, in causing it to progress and to eventually result in

Ms. Martinez Tavarez's death is a question to be resolved by the trier of fact. When competing experts present adequately supported, but differing opinions as to the propriety of the medical care, summary judgment is not warranted (*see Florio v. Kosimar*, 79 AD3d 625, 626 [1st Dept. 2010]).

While the Court recognizes the limited involvement of Dr. Garcia in this case, as well as defendant's argument that plaintiff's neurology expert failed to lay the proper foundation to opine about the conduct of an emergency room physician like Dr. Garcia, it remains undisputed that as attending emergency medicine physician on the evening of October 23, 2019, Dr. Garcia was charged with the supervision and control of P.A. Kesmen, for whom he was "medically responsible" pursuant to 10 NYCRR 94.2 (f).

Accordingly, it is

ORDERED that defendants' motions for summary judgment are denied; and it is further

ORDERED that the parties appear for a virtual pre-trial conference via Microsoft Teams on **July 10, 2023 at 11:00 a.m.**

4/21/2023
DATE

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

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE