

**McGregor v Buena Vida SNF LLC**

2023 NY Slip Op 33259(U)

September 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 512944/2021

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

**At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of Sept. 2023.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
GRACE MCGREGOR, as Administratrix of the Estate of  
GLASFORD WICKHAM,

Plaintiffs,

-against-

BUENA VIDA SNF LLC d/b/a BUENA VIDA CONTINUING  
CARE AND REHABILITATION CENTER and BUENA VIDA  
CONTINUING CARE AND REHABILITATION CENTER,

Defendants.

-----X  
**HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.**

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 18 – 21, 22 – 31, 34 – 35, 36 – 38, 39, 40 – 41

Defendant BUENA VIDA SNF LLC d/b/a BUENA VIDA CONTINUING CARE AND REHABILITATION CENTER and BUENA VIDA CONTINUING CARE AND REHABILITATION CENTER moves this court for an Order pursuant to CPLR §§ 3212 and 3211(a)(7) granting summary judgment to defendant and dismissing Plaintiff’s complaint as against them with prejudice and directing the Clerk to enter judgment in favor of Defendant. Plaintiff submitted opposition to this motion.

Plaintiff claims that Mr. Wickham developed pressure ulcers while receiving care and treatment at the defendant’s facility because Defendant failed to timely provide Mr. Wickham with a personalized care plan for his skin condition including turning and positioning him as required by the standard of care. Defendant contends that the pressure ulcer in Mr. Wickham’s sacral area was an unavoidable Kennedy Terminal Ulcer. Defendant further contends that the pressure ulcer discovered on his ear developed and resolved while he was receiving treatment at non-party Flushing Hospital. Furthermore, it is noted that Plaintiff has not asserted a wrongful death claim in the Summons and Complaint.

Mr. Wickham was admitted to Defendant's facility on December 28, 2017 and remained there under Defendant's care and treatment until December 8, 2018 when he was transferred to Flushing Hospital for a PEG tube placement. He returned to Defendant's facility on December 20, 2018, where he remained until his death on January 25, 2019. According to Plaintiff's expert's affirmation, October 26, 2018 was the first time a sacral pressure ulcer was noted as a pressure ulcer in a weekly wound care note. On November 25, 2018, Mr. Wickham was placed on hospice care. The right ear ulcer was noted upon admission to Flushing Hospital on December 8, 2018 and was not subsequently reflected in Defendant's records.

“In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries [internal citations omitted].” *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. “Thus, in moving for summary judgment, a physician defendant must establish, *prima facie*, ‘either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.’” *Hutchinson*, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. “In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party.” *Stukas*, 83 AD3d at 22. “Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted].” *Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept. 2022]. “When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.” *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal quotation marks omitted]. “Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve.” *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]. However, “expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted].” *Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019].

Defendant's expert, Lawrence Diamond, M.D., a physician board certified in family medicine and geriatric medicine, established his expertise to opine as to the care and treatment

rendered in this case. Plaintiff's expert, a physician board certified in internal medicine, established that they are qualified to opine as to the care and treatment provided to Plaintiff's decedent in this case.

Defendant's expert opines that "Buena Vida did not cause or contribute to the alleged skin breakdown or their sequelae" and that nothing could have been done to prevent Mr. Wickham's skin breakdown. Defendant's expert further opines that the sacral ulcer was a Kennedy Terminal Ulcer, which is not a pressure ulcer, and is unavoidable. As Defendant's expert explains, a Kennedy Terminal Ulcer is caused by organs and skin starting to fail during the dying process and not by unrelieved pressure on a bony prominence. Defendant's expert emphasizes that "[d]espite his declining health, worsening dementia, adult failure to thrive, dysphagia, and loss of mobility, decedent did not develop skin breakdown for almost ten months until he developed a Kennedy Terminal Ulcer during his dying process and shortly before entering hospice." According to Defendant's expert, a sacral area of concern was discovered on October 17, 2018, and although proper interventions were already in place the care plan was amended to include treatment to clean that area. Defendant's expert opines that the right ear ulcer, discovered at Flushing Hospital, developed, and resolved at Flushing Hospital and thus does not appear in Defendant's records. The expert further opines that this pressure ulcer is also an end-of-life condition that was caused by oxygen tubes or by Mr. Wickham being turned and positioned on his right side. Defendant's expert emphasizes that Plaintiff's own expert opines that it only takes two to six hours for a pressure ulcer to develop. Defendant's expert opines that Buena Vida timely provided appropriate care plans that included turning and positioning when appropriate. The expert highlights that, on October 20, 2018, a nurse "reported that the decedent was being positioned every two hours and as needed." Additionally, the expert states that per the October 25, 2018 Minimum Data Set a plan for turning and positioning the patient was in place and documented in the CNA accountability record on that date.

In opposition, Plaintiff's expert opines that record is inconsistent regarding whether the sacral wound is a pressure ulcer or a Kennedy Terminal Ulcer. According to this expert, throughout Defendant's records the sacral wound is referred to as a pressure ulcer, a possible Kennedy Ulcer, and a Kennedy Terminal Ulcer. Notably, on December 10, 2018, Flushing Hospital noted Mr. Wickham as having "sepsis due to infected pressure ulcer" in a consult note assessment. Then again on December 12, 2018, the sacral pressure ulcer was noted to be

infected and Mr. Wickham underwent a second debridement. Plaintiff's expert opines that Mr. Wickham's pressure ulcers were caused by unrelieved pressure. Further, as supported by the record, Flushing Hospital noted a right ear pressure ulcer that defendant Buena Vida had not previously or subsequently noted in their records. Plaintiff argues that if, as Defendant asserts, the right ear pressure ulcer developed and resolved at Flushing Hospital, this demonstrates that the patient's skin was capable of healing from pressure ulcers and the development of skin breakdown was therefore avoidable. The expert opines that Mr. Wickham's comorbidities such as "seizures, hypernatremia, abdominal pain, urinary tract infection, functional decline, gait disorder, impaired activities of daily living (ADL), and dementia did not make him incapable of healing from a pressure ulcer, and further did not make the development of a pressure ulcer clinically unavoidable."

Plaintiff's expert further opines that Defendant deviated from the standard of care by failing to turn and position Mr. Wickham at least every two hours, and by failing to maintain a usable record for caregivers to determine when and how the patient had been turned and positioned in violation of the standard of care. Specifically, the record does not indicate how many times the patient was turned and positioned during each shift. October 19, 2018 was the first time turning and positioning of Mr. Wickham was noted as "q 2 hrs" in a progress note. Plaintiff's expert states that there are several dates in the record in which there is no record of the patient being turned and positioned for hours. Such dates and times include October 1 – 25, 2018 between 7:00AM and 3:00PM, October 1 – 24, 2018 between 3:00PM and 7:00AM, and December 20 – 31, 2018, between 11:00PM and 7:00AM. Plaintiff's expert further opines that the standard of care requires the patient be turned and positioned at least every two hours and more frequently if needed where, as the expert claims occurred here, the two-hour turning schedule failed. The expert opines that the records also do not include measurements and/or staging of the ulcers, as well as what positions the patient was in or changed into when the patient was turned and positioned. Plaintiff's expert further opines that the defendant's failure to ensure that the patient was re-positioned more often than every two hours was a deviation from the standard of care and a proximate cause of the plaintiff's injuries.

Through their submissions, Plaintiff raises an issue of fact regarding whether Mr. Wickham was turned and positioned in accordance with the standard of care and whether the pressure ulcer was an inevitable Kennedy Terminal Ulcer. Additionally, Plaintiff's expert raises

an issue of fact regarding whether Defendant failed to maintain a usable record for caregivers to determine when and how the patient had been turned and positioned. Considering the foregoing conflicting opinions, which are detailed and not speculative, summary judgment is denied as to claims sounding in medical malpractice and negligence relating to defendant Buena Vida.

See *Shields v. Baktidy*, 11 AD3d 671, 672 [2d Dept. 2004].

Regarding Plaintiff's claims under New York Public Health Law ("NYPHL") Defendant's expert, Lawrence Diamond, M.D., opines that there is no basis for New York Public Health Law claims, or punitive damages. Plaintiff's expert opines that Defendant's failure to keep complete records of the care provided to the plaintiff up to the standard of care, as detailed above, was a violation of Mr. Wickham's rights under New York Public Health Law §2801-d, as codified by 10 NYCRR § 415.22, and 10 NYCRR § 415.11 and 42 C.F.R. § 483.20.

New York Public Health Law § 2803-c enumerates the rights of patients in certain medical facilities. New York Public Health Law § 2801-d (1) states in relevant part,

"Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation, except as hereinafter provided. For purposes of this section a 'right or benefit' of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority."

Defendant's expert, Dr. Diamond, opines that Defendant's records reflect that Mr. Wickham was appropriately evaluated and monitored under the NYPHL. Furthermore, the expert opines that Defendant Buena Vida maintained decedent's treatment records evidencing that Buena Vida "clearly exercised all care reasonably necessary to prevent any deprivation of decedent's rights pursuant to Public Health Law" and that the records "established that Buena Vida provided care and treatment according to medical standards and regulations." As discussed above, Plaintiff's expert opinions raise an issue of fact regarding whether Defendant, in violation of the Public Health Law, failed to maintain a usable record for caregivers to determine when and how the patient had been turned and positioned and whether such failure was a proximate cause of the injuries claimed. It was noted above, turning and positioning was not recorded for a

period immediately before the sacral ulcer appeared. Therefore, summary judgment must be denied as to Plaintiff's claims under NYPHL and common law.

Regarding Plaintiff's claim for punitive damages, Defendant's expert opines that there is "no evidence that any of the claimed injuries sustained during decedent's admission to Buena Vida developed or progressed due to any willful or reckless disregard for the decedent's rights or safety, or gross negligence and therefore does not meet the standard for gross negligence." In their reply, Defendant further argues that Plaintiff's opposing papers and decedent's chart are devoid of any evidence of wrongdoing that was "willful" or in "reckless disregard" of Plaintiff's lawful rights as a nursing home resident. Defendant argues that Plaintiff's expert's suggestion that "[d]efendant was reckless in failing to create and maintain a proper chart documenting the time and position of plaintiff's decedent's turning and positioning during his multiple admissions" is inadequate, baseless, and conclusory. Defendant cites to *Rey v. Park View Nursing Home, Inc.*, 262 A.D.2d 624, 627 [2d Dept. 1999], in which the Second Department ruled that punitive damages were not warranted because it could not be reasonably concluded that the nursing home's conduct evidenced "a high degree of moral culpability," was "so flagrant as to transcend mere carelessness," was "intentionally harmful," or constituted "willful or wanton negligence or recklessness."

In its opposition, Plaintiff's expert opines that Defendant was willful and reckless in its violations of Mr. Wickham's rights under the NYPHL. Plaintiff's expert further opines that Defendant's failure to "provide appropriate care, treatment, services and interventions in order to maintain the patient's health, safety and psychosocial wellbeing" constitutes neglect as defined by industry standards. According to Plaintiff's expert, neglect is the failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness. Plaintiff's expert opines that Defendant was reckless in its failure "to create and maintain a proper chart documenting the time and position of Plaintiff's decedent's turning and positioning during his multiple admissions." Plaintiff's expert further opines that Defendant's failure to adequately turn and position the patient, prevent infection of the patient's pressure ulcer, and prevent new pressure ulcers was a departure from the standard of care and violations of Mr. Wickham's rights under the NYPHL as codified by 42 CFR § 483.25. Plaintiff's expert further opines that Defendant's failure to adhere to an individualized care plan to prevent septic infection was a

violation of Plaintiff's decedent's rights under the Public Health Law and a proximate cause of Mr. Wickham's injuries.

The Second Department holds that

“(p)unitive damages may be assessed where a defendant's actions evinced a high degree of moral culpability which manifested a conscious disregard for the rights of others or conduct so reckless as to amount to such disregard (internal citations omitted). Such damages may be imposed for wanton or reckless disregard for the safety or rights of others where the conduct is “sufficiently blameworthy,” and the award of punitive damages ... advance[s] a strong public policy of the State by deterring its future violation” (internal citations omitted). The violation of rights must be “so flagrant as to transcend mere carelessness” (internal citations omitted). In addition, Public Health Law § 2801–d(2) permits punitive damages against a medical facility where a deprivation of a patient's rights is found to be willful or in reckless disregard to the patient's rights (internal citations omitted).” *Valensi v. Park Ave. Operating Co., LLC*, 169 AD3d 960, 961-962 [2d Dept. 2019].

The defendants established their prima facie entitlement to judgment as a matter of law dismissing the request for punitive damages under the Public Health Law by demonstrating that their conduct was not in willful or reckless disregard of the decedent's rights. A review of the record does not support a claim that defendants' conduct evidenced a high degree of moral culpability, or being so flagrant as to transcend mere carelessness, or intentionally harmful, nor does it constitute willful or wanton negligence or recklessness. Further, Plaintiff's expert's comments do not reflect willful, wanton negligence or reckless acts. As such, summary judgment is granted to Defendant as to Plaintiff's claims for punitive damages.

In conclusion, Defendant Buena Vida SNF LLC d/b/a Buena Vida Continuing Care and Rehabilitation Center and Buena Vida Continuing Care and Rehabilitation Center's motion for summary judgment is DENIED as to all claims of medical malpractice and negligence; and

Summary judgment is DENIED as to all claims regarding the New York Public Health Law; and Summary judgment is GRANTED as to all claims for punitive damages.

The constitutes the decision and order of the court.

ENTER.



Hon. Consuelo Mallafré Melendez

J.S.C.