

<b>Baidoe v Progressive Home Health Servs., Inc.</b>
2023 NY Slip Op 34792(U)
September 24, 2023
Supreme Court, Kings County
Docket Number: Index No. 525569/2018
Judge: Genine D. Edwards
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At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24<sup>th</sup> day of September 2023.

P R E S E N T:

HON. GENINE D. EDWARDS  
Justice.

-----X  
CHRISTINA BAIDOE as Administratrix of the Estate of  
CYNTHIA BLAIR, and CHRISTINA BAIDOE  
Individually,

Plaintiffs

-against-

Index No.: 525569/2018

PROGRESSIVE HOME HEALTH SERVICES, INC.,  
PREMIER HOME HEALTH CARE SERVICES, INC.,  
CENTERLIGHT HEALTHCARE, INC., CENTERLIGHT  
HEALTHCARE, INC. D/B/A PACE ROCKAWAY  
PARKWAY and KINGSBROOK JEWISH MEDICAL  
CENTER,

Defendants.

Decision & Order

Motion Sequences 3,4,5,6

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The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motions, Affirmations, Memorandum of Law, and Exhibits.....	60-78, 79-100, 101-125, 126-132
Opposing Affirmations.....	137-148, 149-150
Affirmations in Reply.....	151,153, 155, 157

Upon the foregoing papers in this action for negligence and medical malpractice, defendants Progressive Home Health Services, Inc. (“Progressive”), Premier Home Health Care Services, Inc. (“Premier”), Centerlight Healthcare, Inc., Centerlight Healthcare, Inc. d/b/a Pace Rockaway Parkway (“Centerlight”) and Kingsbrook Jewish Medical Center (“Kingsbrook”), each moved for summary judgment dismissing the complaint and all cross claims as against

them, pursuant to CPLR 3212. Christina Baidoe as Administratrix of the Estate of Cynthia Blair, and Christina Baidoe Individually, (collectively, “plaintiff”) oppose the defendants’ motions.

Ms. Blair, plaintiff’s decedent, died on January 28, 2018, at age 103. Plaintiff contends that due to the negligence and/or malpractice of the defendants, she suffered the following injuries: sacral pressure ulcer; left buttocks pressure ulcer; right buttocks pressure ulcer; sepsis; infection; deep tissue injury; dehydration; malnutrition; emotional trauma; pain and suffering, and death.

According to the deposition testimony of Christina Baidoe, the plaintiff and granddaughter of Ms. Blair, decedent had a stroke in or around 2013, and was also hospitalized in 2013 for shingles, which led to her total blindness, necessitating the assistance of home-health care aides initially provided by defendant Progressive. Plaintiff further testified that she saw lapses in the care provided by the Progressive aides, who rotated in caring for Ms. Blair; that on several occasions she found their hygiene care deficient; that they were lax about turning, washing and getting Ms. Blair out of bed; that overnight care was not provided as some of the aides slept through the night, and that she and her mother complained to the agency about these lapses. Plaintiff believed that her grandmother’s dementia became evident in or about 2016, but she was able to communicate and express her wishes by gestures until approximately a week before her death. During her visits, plaintiff read to her grandmother, helped with her care, and conversed with her. Ms. Blair maintained a social life by talking on the phone with friends. Around 2016-2017, Ms. Blair began withdrawing from social contact. The first time plaintiff noticed a pressure ulcer was in 2016.

Ms. Blairs’ daughter, Linda Blair, lived in the same building and visited decedent daily, except when she herself was hospitalized or unwell. Linda Blair and/or Christina Baidoe

prepared Ms. Blair's food and were present to view the home health care aids and visiting nurses. She testified that she wanted the aides to move her mother to the terrace for fresh air, but the aides did not do that as often as she wished, noting that her mother did not want to be moved as she was suffering pain from shingles. In 2016, it appeared that Ms. Blair's health declined. Ms. Blair's first pressure ulcer was found in June 2016, and her dementia was more notable. By 2017, Ms. Blair needed to have her food pureed to eat, and she ate less and less. She died in her sleep, at the hospital, in January 2018, at age 103.

Ms. Blair was seen by Dr. Hameed, the physician who attended to her in Kingsbrook and for appointments outside the home. The plaintiff and her mother were satisfied with the care provided by Dr. Hameed, although dissatisfied with what they felt was rough handling and insufficient care at Kingsbrook, and by all the defendants.

#### **Progressive's Motion**

Prior to October 31, 2015, Progressive was a licensed home care service agency that provided home health care aids to Ms. Blair. In support of its motion, Progressive argued that it ceased being responsible for Ms. Blair's care on October 31, 2015, when the business was sold to Premier, which as of that date assumed all responsibility for Ms. Blair's care. Progressive provided services from November 2013 to October 31, 2015. Ms. Blair suffered a Stage 1 pressure ulcer in August 2013 before Progressive began rendering care to her in November 2013. Progressive avers that the pressure ulcer healed prior to Progressive's care, and that during the period Progressive provided care, no new pressure ulcers emerged. When Ms. Blair's care transitioned to Premier on November 1, 2015, she was evaluated shortly thereafter, on November 9<sup>th</sup> and 17<sup>th</sup>, and her skin was found to be clean and intact without any pressure ulcers. A new

pressure ulcer did not emerge until approximately eight months after Ms. Blair's care transitioned from Progressive to Premier. That ulcer resulted in Ms. Blair's subsequent hospitalizations.

In opposition to Progressive's motion, plaintiff submitted an expert affirmation from a physician, board certified in internal medicine and geriatric medicine, who opined that a healed stage one pressure ulcer was noted after Progressive began providing services, that the likelihood of skin breakdown was noted during Progressive's care and Progressive did not provide records or notes to establish that all protocols of care were followed.

In reply, Progressive reiterated that Ms. Blair was not suffering from pressure ulcers during their period of care; that their records and closing plans upon the transfer to Premier were approved by the NYS Department of Health, and that as a Medicaid recipient, the plans for her treatment had to be developed by Centerlight (the provider of nursing care).

#### **Kingsbrook's Motion**

Ms. Blair presented to Kingsbrook Jewish Medical Center for three admissions: from June 28, 2016 through July 2, 2016; from July 7, 2016 through July 14, 2016; and January 21, 2018 through January 28, 2018. Plaintiff claims that Kingsbrook deviated from good and accepted standards of care in its failure to examine, treat, and perform proper risk assessment for the development of pressure ulcers, amongst other failures.

Kingsbrook moved to dismiss the claims against it, supported by its geriatric physician Dr. Michael J. Dolamore's expert affirmation, who opined that Kingsbrook at all times conformed to the standards of care in providing care and treatment to Ms. Blair and did not cause her alleged injuries or death. Dr. Delamore states that at the time of her admissions to Kingsbrook on June 28, 2016 and July 7, 2016, the 101-year-old decedent had a complicated medical history, which left her bedbound. Ms. Blair presented to Kingsbrook with pre-existing,

non-healing ulcers. The records and testimony support that she was properly assessed upon admission to Kingsbrook in June 2016 and July 2016, with a care plan put into place for her pre-existing pressure ulcers and infection, and that the treatment at Kingsbrook started the healing process, which led to Ms. Blair's pre-existing ulcers fully healing by April 2017. The plaintiff stated that she visited her grandmother daily during those admissions to Kingsbrook and that she observed the wound care provided. During Ms. Blair's subsequent admissions at Kingsbrook, Dr. Delamore opined that all proper care was provided, and the nutritional and wound care instructions issued at Kingsbrook at each admission were appropriate. Dr. Delamore contended that the ulcers that developed in January 2018 were unavoidable as they were due to her severely compromised medical status and the fact that she was experiencing multi-organ failure and in the active stage of dying.

In addition to Kingsbrook's contention that no malpractice or negligence occurred, it further contends that no action for negligent hiring or supervision was established as plaintiff failed to identify any employees who lacked the requisite skills or education or who allegedly failed to perform their duties.

In opposition, plaintiff proffered an expert affirmation from a physician board-certified in internal medicine and geriatric medicine. The expert concluded that the care and treatment rendered to Ms. Blair by Kingsbrook was not in accordance with good and accepted medical practice, and that there were departures and deviations from the accepted standards of care that were the proximate cause of Ms. Blair's injuries. Specifically, that allowing the development and deterioration of Ms. Blair's pressure ulcers, caused her pain, and suffering. The expert reviewed the records and concluded, inter alia, that Kingsbrook failed to properly stage and/or size the pressure ulcers throughout the medical records, as the proper sizing and staging are critical to

ensure that appropriate level of treatment is prescribed for the caregivers. The expert further opined that Kingsbrook's failure to maintain documentation consisting of a usable record that would allow each caregiver to determine when Ms. Blair had been positioned and into which position Ms. Blair was placed for every turn, i.e., left side, right side, or back; its failure to provide a proper plan of care that required turning more than every two hours and providing a proper nutritional plan for Ms. Blair constitute deviations from good and accepted medical practice and were the proximate cause of the development and deterioration of Ms. Blair's pressure ulcers.

In reply, Kingsbrook pointed out that plaintiff's expert concurred that the cause of Ms. Blair's death was cardiopulmonary arrest secondary to congestive heart failure. As such, Kingsbrook asserted that her death was due to old age and her comorbidities, and not caused by or contributed to by Kingsbrook. Moreover, plaintiff's expert affirmation failed to set forth any comment about, or causal connection between the pressure ulcers and Ms. Blair's cardiopulmonary arrest, but merely opined that the alleged departures were a substantial factor in causing Ms. Blair's death, without any supporting evidence.

#### **Premier's Motion**

Premier, the home healthcare aide provider from 11/1/15 until Ms. Blair's demise, asserts that it did not depart from good and accepted practices nor cause any injury to the decedent. Premier's expert, Dr. Vincent Garbitelli, opined that Premier was responsible for carrying out non-medical elements of Ms. Blair's care plan, including aiding with daily activities, incontinence care, turning and positioning. Dr. Garbitelli indicated that Premier's aides were supervised by Centerlight's nursing staff, who at all relevant times documented that the aides followed the plan of care. Dr. Garbitelli posited that since the records document that Premier's

aides adhered at all relevant times to Ms. Blair's plan of care, with respect to non-medical orders, all while under the supervision of Centerlight's nursing staff, there were no departures from the standard of care with respect to the care provided by Premier. Dr. Garbitelli further surmised that the development of Ms. Blair's claimed injuries, including pressure ulcers, deep tissue injury, infection, dehydration, and malnutrition, were unavoidable due to her extremely advanced age of over 100 years old, and numerous comorbidities during the dates of the alleged negligence including, but not limited, to anemia, prior stroke, hypertension, and peripheral vascular disease. Ms. Blair was also incontinent of bowel and bladder; was bedbound; required total assistance with all activities of daily living; suffered from generalized muscle weakness due to loss of fine motor skills; and had decreased food intake related to her advanced age. Dr. Garbitelli opined that these conditions all contributed to reduced blood flow to her skin, causing the skin tissue to be poorly oxygenated and failing to deliver the necessary nutrients to maintain her skin integrity, despite Premier's proper home health care. Moreover, Dr. Garbitelli noted that Ms. Blair had a history of shingles prior to the dates of alleged negligence, which he explained was further evidence of her compromised immune system and overall deteriorating condition and susceptibility to, inter alia, infection, dehydration, and malnutrition, which further buttressed the unavailability of the claimed injuries, notwithstanding the proper care provided by Premier.

In opposition, plaintiff's expert opined that Ms. Blair was not turned and positioned according to accepted medical standards of at least every two hours and more frequently if, as in the case of Ms. Blair the two-hour turning schedule failed. There were records that show instructions from a Centerlight nurse to turn and position Ms. Blair every 2-3 hrs. Additionally, there are no turning and positioning records in defendant's record. There are no flowsheets indicating when the Premier aides turned or repositioned Ms. Blair. Neither the frequency of the

turning and positioning nor the postural alignment was ever recorded by Premier. Plaintiff's expert indicated that Premier's failure to maintain documentation consisting of a usable record that allows each caregiver to determine when the patient had been positioned and into which position the patient was placed for every turn, i.e., left side, right side, or back, constituted a deviation from good and accepted medical practice and the proximate cause of the development and deterioration of Ms. Blair's pressure ulcers. Ms. Blair's ulcers notably improved between July 14, 2016 and April 28, 2017. Plaintiff's expert cited this fact to opine that the healing of the ulcers is evidence of the ability to heal despite Ms. Blair's medical conditions and further evidence that the development of skin breakdown and skin impairments was not unavoidable.

In reply, Premier counters that plaintiff's expert is speculating, with no supporting evidence that Premier's aides were non-compliant with turning and positioning and incontinence care. The aides were supervised by Centerlight's nursing staff, who at all relevant times documented that the aides followed the plan of care, and the development of pressure ulcers can occur even with proper care. Moreover, Premier was not responsible for formulating any plans for Ms. Blair, that was the responsibility of Ms. Blair's doctors and Centerlight's nursing staff.

#### **Centerlight's Motion**

Centerlight moved for permission to file a late motion for summary judgment pursuant to CPLR 3212(a) and *Brill v. City of New York*, 2 N.Y.3d 648 (2004), which gives the Court discretion to extend the time by which to file a motion for summary judgment on good cause shown. Here, Centerlight demonstrated good cause for the one-week extension requested, and no prejudice to any of the parties from this short delay occurred.

Centerlight supported its motion with the expert affidavit of Mary Brennan, a registered nurse, who is board certified in ostomy and wound care. She stated that Centerlight began

providing care for Ms. Blair in 2013. At that time, Ms. Blair was 99-years old. Her diagnoses included blindness of both eyes, senility, hypertension, stroke/paraparesis, and incontinence of bowel and bladder, she was assessed by Centerlight as being at risk for the development of decubitus ulcers.

On November 9, 2015, shortly after Premier replaced Progressive as the home health aide provider, Centerlight's semi-annual nursing assessment found that Ms. Blair, then 101-years-old, was alert and oriented to person and place only. She was bedbound and required 24-hour personal care secondary to blindness, total assistance with all activities of daily living, and diaper changes every two hours due to her incontinence of bowel and bladder. Her diagnoses were updated to include dementia, pure hypercholesteremia, peripheral vascular disease, constipation, and osteoarthritis. She was assessed by Centerlight as being at risk for ulcers due to her bedbound status and limited sensory perception, activity, and mobility. She had no skin breakdowns at the time of the assessment on November 9, 2015. As of November 2015, and thereafter at all relevant times during the dates of alleged negligence, Ms. Blair was receiving 24-hour, live-in care from Premier's aides.

Between December 2015 and April 2016, skin breakdown prevention orders included turning and positioning Ms. Blair at or about two-hour intervals, and the use of pressure relieving devices, including, but not limited, to an air mattress. During Centerlight's May 3, 2016 semi-annual nursing visit, Ms. Blair was documented as alert and oriented to person and place only, with blindness in both eyes, senility/dementia, and incontinence of both bowel and bladder. She continued to require total assistance with daily activities. It was noted that Ms. Blair preferred to stay in bed due to joint pain. She continued to be assessed by Centerlight as being at risk for skin breakdown due to bedbound status and limited sensory perception, activity, and mobility. The

Centerlight records indicate that skin breakdown prevention measures continued to be implemented by Premier, including diaper changes and turning and positions at or about two-hour intervals, and the utilization of pressure relieving devices.

According to the deposition testimony of Christina Baidoe and Linda Blair, Ms. Blair did not develop any pressure ulcers prior to June of 2016, which is consistent with Centerlight's records, and consistent with the records of Progressive, which showed only one ulcer that healed prior to their provision of services in 2013. Nurse Brennan noted that once the pressure ulcer was found, Centerlight went to Ms. Blair's home more frequently, vigilantly monitoring her condition; the nurses cleaned the wounds in accord with the doctor's instructions and instructed the aides and family as to pressure relief. She posits that the fact that most of the wounds healed demonstrates that the proper care was given, and as stated by all of the defendants' medical experts, given Ms. Blair's advanced age and many comorbidities, the development of ulcers was unpredictable and unavoidable. She avers that the pressure ulcers were unrelated to any act or omission on the part of Centerlight, and that nothing was omitted from the care provided by Centerlight that would have impacted the outcome.

In opposition, plaintiff's expert pointed out that on March 18, 2016, Ms. Blair was noted to be on a sinking air mattress and a new mattress was ordered. However, the first time the air mattress was noted to be in place after the initial request was on July 4, 2016, nearly four months later. Also, on March 18, 2016, the nursing note instructions were to turn and position Ms. Blair "Q2-3 HRS". This same turning instruction would be given on April 15, 2016, May 3, 2016, May 27, 2016, and June 8, 2016, but no turn positions were noted. On July 11, 2016, in a progress note it was indicated that Ms. Blair was turned "Q2hrs," but turn times and positions

were not indicated. The expert concluded that the care and treatment rendered to Ms. Blair by Centerlight was not in accordance with good and accepted medical practice.

During Centerlight's care, Ms. Blair's ulcers were examined often with only a staging noted with no corresponding measurement to track improvement or deterioration. Thus, plaintiff's expert opined that Centerlight's medical records have notes listing the pressure ulcers without accurately and consistently staging and/or sizing them. Moreover, there was a discrepancy between the prior Centerlight ulcer measurements and the ulcer measurements taken by Kingsbrook, including the deterioration of the sacral ulcer, and the development of a new wound on the right heel. Plaintiff's expert argues, even assuming arguendo that Ms. Blair was turned and repositioned every two hours (which plaintiff disputes), Centerlight's failure to maintain documentation consisting of a usable record so as to allow each caregiver to determine when the patient had been positioned and into which position the patient was placed for every turn, constituted a deviation from good and accepted medical practice, and supported plaintiff's position that this was the proximate cause of the development and deterioration of Ms. Blair's pressure ulcers. Accurate notation being essential to care and treatment, plaintiff's expert states that throughout Centerlight's care, the veracity of its records is questionable, leading to an inability to properly care for Ms. Blair's wounds.

The expert noted, as with all the defendants, that the improvement and healing of the ulcers, acknowledged by all the parties, demonstrated evidence of the ability of Ms. Blair to heal despite her medical conditions and provided further evidence that the development of skin breakdown and skin impairments was not unavoidable. The plaintiff's expert opined that Ms. Blair's skin breakdown and deterioration was caused by unrelieved pressure, rather than her clinical medical conditions since the etiology of pressure ulcers is pressure.

In reply, Centerlight concludes that plaintiff's expert is a physician who has only worked in hospitals and nursing homes, and therefore is not qualified to opine as to at-home nursing care. Even if plaintiff's expert was qualified, Centerlight, in accord with the other defendants' experts, declared that the opinions expressed by plaintiff's expert do not raise a triable issue of fact. Centerlight asserts that the expert's opinion that the only reason pressure ulcers develop is due to pressure, does not deal with the medical fact that Ms. Blair's co-morbidities effect the skin, an organ, and that is related to the development of pressure ulcers.

### Discussion

On a motion for summary judgment, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. *See Templeton v. Papatomas*, 208 A.D.3d 1268, 175 N.Y.S.3d 544 (2d Dept. 2022); *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011). In opposition, a plaintiff must submit a physician's affidavit attesting to a departure from accepted practice and containing the doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury or damage to the plaintiff. *See Alao v. Richmond Univ. Med. Ctr.*, 213 A.D.3d 722, 183 N.Y.S.3d 144 (2d Dept. 2023) ("Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions").

In support of their motions, each defendant submitted an expert affirmation/affidavit with medical records establishing that, Ms. Blair died on January 28, 2018, at age 103, and the cause of death was cardiopulmonary arrest secondary to congestive heart failure. The evidence submitted by the defendants demonstrated that plans of care for Ms. Blair's nutrition and pressure ulcers were properly implemented and that certain ulcers improved and healed during

their care. No pressure ulcers arose during Progressive's time of care, and the remaining defendants demonstrated that the ulcers that arose during the time frames set forth in the complaint were treated and improved, and in many instances, healed. Although pressure ulcers recurred, the defendants established that Ms. Blair's advanced age and medical conditions affected her skin along with her other organs, that she was declining over the last year of her life and that the pressure ulcers did not cause or contribute to the cause of her death. Based upon Ms. Blair's medical conditions, her advanced age and her health's decline, the defendants' experts concluded that the ulcer treatments prescribed and carried out by each did not depart from accepted standards of medical care and did not proximately cause Ms. Blair's death. The defendants thus satisfied their initial burdens. The burden then shifted to the plaintiff to lay bare her proof and demonstrate the existence of a triable issue of fact. *Zomber v. Forde*, 209 A.D.3d 935, 177 N.Y.S.3d 122 (2d Dept. 2022).

The plaintiff failed to raise a triable issue of fact regarding the standard of care sufficient to defeat the defendants' motions and failed to show how the results would have been different had other actions been taken. These failures are especially troublesome, given plaintiff's expert's concession that Ms. Blair's preexisting conditions placed her at an increased risk for the conditions at issue. Moreover, the expert failed to address the evidence supporting the contention that Ms. Blair's diseases and conditions were substantial factors in producing the injury.

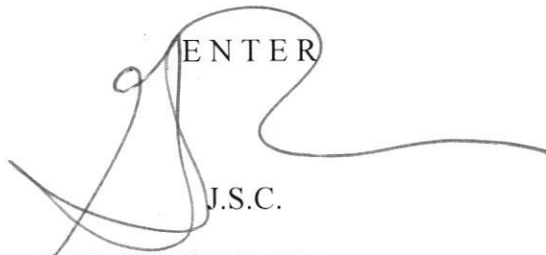
Nor was an issue of fact raised by plaintiff's experts' opinions that the defendants caused or exacerbated Ms. Blair's ulcers by not documenting their records in greater detail, or by the finding that the failure to document was itself the proximate cause of the ulcers. A failure to document each element of the skin care protocol does not equate to a failure to perform each

element or to a cause of the ulcer itself. *Braunstein v. Maimonides Med. Ctr.*, 161 A.D.3d 675, 78 N.Y.S.3d 344 (1<sup>st</sup> Dept. 2018).

It should be noted that this Court did not consider the supplemental affirmations annexed to the reply affirmation. *Pena v. Geisinger Community Medical Center*, 209 A.D.3d 663, 174 N.Y.S.3d 873 (2d Dept. 2022).

Accordingly, the defendants' motions for summary judgment are granted. The complaint and all cross claims are dismissed.

The foregoing constitutes the decision and order of this Court.

  
ENTER  
J.S.C.  
**HON. GENINE D. EDWARDS**