

**Gonzalez-Matos v Abraham Operations Assoc., LLC**

2023 NY Slip Op 35083(U)

September 20, 2023

Supreme Court, Bronx County

Docket Number: Index No. 32091/18

Judge: Joseph E. Capella

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*E#002*

**NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART 23**

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**JESSICA GONZALEZ-MATOS, as Administrator of  
the Estate of VIRGINIA VILLEGAS, Deceased,**

Index #: **32091/18**  
**DECISION/ORDER**

Plaintiff,

- against -

Present:  
**Hon. Joseph E. Capella**  
J.S.C.

**ABRAHAM OPERATIONS ASSOCIATES, LLC,  
SERGEI KOCHLATYI, M.D., CENTERS HEALTH  
CARE and ABRAHAM SERVICES f/k/a BETH  
ABRAHAM HEALTH SERVICES,**

Defendants.

-----X  
The following papers numbered 1 to 4 read on this motion dated November 15, 2022.

| <u>PAPERS</u>                       | <u>NUMBERED</u> |
|-------------------------------------|-----------------|
| NOTICE OF MOTION                    | <b>1</b>        |
| ANSWERING AFFIRMATION & MEMO OF LAW | <b>2 - 3</b>    |
| REPLY AFFIRMATION                   | <b>4</b>        |

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

Motion by defendant, Abraham Operations Associates, LLC (Abraham Associates), for summary judgment (CPLR 3212) and dismissal of plaintiff's complaint, which alleges medical malpractice, wrongful death, Public Health Law violation and gross negligence, is granted in part. Decedent was a residential patient on the long-term care floor of Abraham Associates. Co-defendant, Dr. Kochlatyi, who is neither an employee nor the attending physician of Abraham Associates, would see residents (including decedent) one per week, spending five to six hours per day seeing patients in response to a written or verbal consultation request. On January 2, 2018, after Nurse Practitioner (NP) John Bonagua, an employee of Abraham Associates, found decedent

hypoxic and unresponsive, she was transferred to Jacobi Hospital, where she was admitted for septic shock. Decedent died on January 21, 2018, at Calvary Hospital. According to plaintiff's bill of particulars, the improper wound care provided by Abraham Associates caused the development of multiple pressure ulcers, which in turn caused, *inter alia*, infection, sepsis and death. The initial burden is on Abraham Associates to make a *prima facie* showing of an entitlement to summary judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) If it does, then the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to create issues of fact to warrant a trial (*Alvarez*, 68 NY2d 320), and denial of summary judgment.

In support of the motion is an expert affidavit by Dr. Lawrence Diamond, a board certified family and geriatric physician. He essentially opines to a reasonable degree of medical certainty that the care and treatment rendered by Abraham Associates was appropriate and met the standard of care, and no act or omission on Abraham Associates's part proximately caused any of the injuries alleged. According to Dr. Diamond, Abraham Associates performed comprehensive, multi-disciplinary assessments of all clinical issues and created an appropriate plan of action for each of decedent's needs. Dr. Diamond notes that decedent was admitted with multiple wounds and several pre-existing scars that confirmed healed pressure injuries. Wound care consults, Silvadene Cream, turning and positioning, dietary measures and supplements were

utilized. Decedent's sacral wound, which healed by July 31, 2017, reopened on September 7, 2017. Dr. Diamond states that the tolerance of decedent's skin and underlying tissues were impaired due to, *inter alia*, circulatory and sensory impairments from diabetes and moisture from incontinence, and she continued to experience skin breakdown.

Dr. Diamond notes that in response to decedent's terminal decline, a palliative care consult was performed on December 2, 2017, and in addition to the curative and other treatments already in place, the goal of care would be to address serious, terminal illness. On January 2, 2018, decedent was noted with sudden onset of hypoxia, and emergently transferred to Jacobi Hospital, and on January 11, decedent was transferred to Calvary Hospital. Dr. Diamond then goes on to discuss the treatment rendered at Jacobi and Calvary Hospital. However, the medical records from these hospitals that are attached to the motion are not certified (CPLR 4518(c)), and Dr. Diamond does not state that he reviewed certified records from these hospitals. (*Banfield v NYC Transit Authority*, 36 AD3d 732 [2d Dept 2007].) As such, Dr. Diamond's statements and opinions regarding the treatment rendered at Jacobi and Calvary Hospital are inadmissible. (*Jajoute v NYC Health & Hospital*, 242 AD2d 675 [2d Dept 1997].) Dr. Diamond further opines that Abraham Associates did not violate any standard of care or the Public Health Law, and all of the care provided by Abraham Associates was appropriate, timely, specifically designed for decedent as an individual, and responsive to her needs. He also opines that

the alleged injuries were not due to any fault on the part of Abraham Associates, but rather, were the result of progressive illnesses, such as diabetes, hypertension, history of strokes, immobility and status-post falls resulting in tibial/fibular fractures requiring surgical repair.

On the issue of gross negligence, Abraham Associates argues that none of the conduct alleged by plaintiff could ever be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others. (*Vissichelli v Glen-Haven*, 136 AD3d 1021 [2d Dept 2016].) In order to establish a cause of action for gross negligence, plaintiff cannot merely state conclusory allegations, but must allege *facts* (emphasis added) that demonstrate and/or rise to the level of willful or wanton negligence or recklessness or smacks of intentional wrongdoing. (*Colnaghi v Jeweler*, 81 NY2d 821 [1993]; *Rosenberg v Mallilo*, 39 AD3d 335 [1<sup>st</sup> Dept 2007]; *Mancuso v Rubin*, 52 AD3d 580 [2d Dept 2008].) According to plaintiff, Abraham Associates assigned an inexperienced nurse who never considered ordering surgical debridement and wound vac, and the CNA staff failed to turn and position decedent on 28 days from September 12, 2017, through January 2, 2018. Although Abraham Associates used co-defendant, Dr. Sergei Kochlatyi, as decedent's wound care physician, plaintiff alleges that Abraham Associates' attending physician never examined decedent. Plaintiff alleges that the aforementioned allegations demonstrate gross negligence on the part of Abraham Associates. The Court disagrees. While these alleged facts may demonstrate negligence,

they do not rise to the level of willful conduct that evidences a high degree of moral culpability that is required to demonstrate gross negligence. (*Rey v Park*, 262 AD2d 624 [2d Dept 1999].) Based on the aforementioned, the Court is satisfied that Abraham Associates has met its burden for summary judgment (*Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Kaffka v NY Hospital*, 228 AD2d 332 [1<sup>st</sup> Dept 1996]), which now shifts to plaintiff.

In opposition, plaintiff provides an expert affirmation by Dr. Perry Starer, who is board certified in internal and geriatric medicine, and an expert affidavit by Nurse Eleanore Tache. Dr. Starer opines that based on decedent's history and presentation on January 2, 2018, the fever of 101.4 and the foul odor from the 100% necrotic sacral pressure ulcer was due to infection-caused bioburden, meaning the ulcer was infected and this infection was a substantial factor in decedent's sepsis and death. He opines that the standard of nursing care required NP Bonagua and/or Abraham Associates to switch treatment modalities, and order surgical debridement to remove the necrotic tissue - slough and/or eschar - to promote healing, treat the pressure ulcer and prevent infection. And the failure to do so was a substantial factor in the worsening of the pressure ulcers to the point of necrosis, infection and decedent's death. Dr. Starer also opines that defendants' use of Dakin's Solution can impair healing of pressure ulcers, and its use by NP Bonagua and Abraham Associates was a departure from the standard of care, and a substantial factor in injury and death.

Dr. Starer goes on to discuss the use of a wound vac (a/k/a negative pressure wound therapy), which pulls the edges of a wound together to promote healing, after a surgical debridement is performed. He opines that NP Bonagua's failure to recommend wound vac therapy (after debridement) was a departure and a substantial factor in causing injury and death. Lastly, Dr. Starer notes that defendants failed to turn and position decedent on 28 dates from September 12, 2017, through January 2, 2018. He opines that the failure to turn and reposition decedent every two hours during this time period was a departure and a substantial factor in causing injury and death.

Nurse Tache discusses New York State and Federal Rules concerning the treatment and healing of pressure ulcers and the prevention of infection. According to Nurse Tache, 10 NYCRR § 415.12(c)(2) and 42 CFR § 483.25(b)(ii) both provide that nursing homes must ensure that residents with pressure ulcers receive necessary treatment and services to promote healing, and prevent infection and new sores. Consistent with Dr. Starer's opinion, she opines that defendant's failure to consider surgical debridement and wound vac, their failure to turn and reposition every two hours during the relevant 28 days, and their use of Dakin's solution violated both rules. Nurse Tache also opines that Abraham Associates failed to have their attending physician exam decedent, and that this was a violation of 10 NYCRR § 415.15(b).<sup>1</sup> However, a review of said statute reveals that it does not specifically make reference to "attending" physician, and as previously

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<sup>1</sup> It appears that Nurse Tache erroneously refers to § 415.15(1)(I), but it is clear that she meant § 415.15(b).

mentioned, decedent was seen regularly by Dr. Kochlatyi. As such, the basis for this opinion by Nurse Tache is unsupported.

Viewing the evidence in a light most favorable to plaintiff, (*O'Sullivan v Presbyterian*, 217 AD2d 98 [1<sup>st</sup> Dept 1995]), the Court is satisfied that she has met her burden of producing evidentiary proof in admissible form sufficient to create issues of fact regarding medical malpractice, wrongful death and Public Health Law violations, but only as they pertain to the alleged failure to: (1) consider surgical debridement and (2) wound vac, (3) turn and reposition every two hours during the aforementioned 28 days, and (4) their use of Dakin's solution. (*Alvarez*, 68 NY2d 320.) Therefore, that portion of Abraham Associates' motion seeking dismissal of the aforementioned claims and departures is denied, and the balance of its motion is granted to the extent of dismissing all other claims and departures raised by plaintiff. Abraham Associates is directed to serve a copy of this decision with notice of entry by first class mail upon all sides within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

9/20/23

Dated

Hon.

Joseph E. Capella, J.S.C.

