

Graham v Bhatt

2024 NY Slip Op 30791(U)

March 11, 2024

Supreme Court, Kings County

Docket Number: Index No. 526587/2021

Judge: Consuelo Mallafre Melendez

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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 11th day of March
2024.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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CHRISTOPHER GRAHAM, as Administrator of the Estate of
ELVIA GRAHAM, deceased, and CHRISTOPHER GRAHAM,
individually,

Plaintiff,

-against-

UTPAL K. BHATT, M.D. and WYCKOFF HEIGHTS
MEDICAL CENTER,

Defendants.

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

DECISION & ORDER

Index No. 526587/2021
Mo. Seq. 1 & 2

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

NYSCEF #s: 22-50

Defendant Uptal K. Bhatt, M.D. (“Dr. Bhatt”) moves (Seq. No. 2) for an Order, pursuant to CPLR 3212, granting summary judgment on the grounds that there are no triable issues of fact as to any of Plaintiff’s claims against him. Defendant Wyckoff Heights Medical Center (“Wyckoff Heights”) separately moves (Seq. No. 3) for an Order, pursuant to CPLR 3212, granting summary judgment on behalf of Wyckoff Heights. Plaintiff opposes the motions as to both defendants.

Plaintiff Christopher Graham commenced this action as administrator of the estate of Elvia Graham (“Ms. Graham”) on October 19, 2021, asserting claims of medical malpractice, lack of informed consent, negligent hiring, and wrongful death, in connection to medical care and treatment rendered to Ms. Graham on July 18, 2019, by Dr. Bhatt at Wyckoff Heights Medical Center.

At the time of the treatment at issue, Ms. Graham was 83 years old and had been diagnosed with multiple chronic pulmonary conditions, including advanced COPD (chronic obstructive pulmonary disease), chronic bilateral lung disease, left lower lobe pleural thickening, left upper lobe cavitating disease, and extensive bilateral bronchiectasis. She had been treating with a private pulmonary specialist, Jang Chadha, M.D. (“Dr. Chadha”),

and saw him two to four times each year from March 26, 2010, through July 3, 2019.

Ms. Graham was also seen by Dr. Bhatt at Wyckoff Heights in January 2018, at which time she was being treated for hemoptysis (coughing up blood), bronchiectasis, and chronic interstitial lung disease. Dr. Bhatt performed a fiberoptic bronchoscopy at that time, and Ms. Graham received antibiotic therapy. After Ms. Graham was discharged, she resumed treating with Dr. Chadha on February 21, 2018.

On May 7, 2018, Ms. Graham was seen for a follow-up at Wyckoff Heights by non-party Dr. Parvez Mir. On this visit she tested positive for a mycobacterium abscessus chelonae (MAC) infection and was prescribed the antibiotic Rifampin for one year. She was scheduled for a follow-up visit with Wyckoff Heights after completion of Rifampin. In the intervening time, she was also seen regularly by Dr. Chadha and New York Family Practice.

On June 25, 2019, Ms. Graham presented at New York Family Practice with 85% oxygen saturation before albuterol nebulizer and could only speak three sentences at a time (Exhibit D, at 126-127). She was referred to follow up with Dr. Chadha, who she saw the following week. On July 3, 2019, Dr. Chadha recorded that she was “fairly stable” and “in no acute distress at rest using her oxygen,” but she also appeared “frail,” she had been coughing up yellow phlegm in the morning, and she was using around-the-clock supplemental oxygen at five liters per minute. He advised her to continue supplemental oxygen and various medications, including a new 10-day course of the antibiotic Levaquin (Exhibit C, at 104-105).

On July 18, 2019, Ms. Graham returned to Wyckoff Heights for follow-up on her lung disease and her completed one-year course of Rifampin. She was examined by attending physician Dr. Bhatt, who recorded that her oxygen saturation was measured at 82% at 2:43 p.m. and 87% at 3:10 p.m. According to Dr. Bhatt’s notes, she reported no acute symptoms of “chest pain, palpitations, fever, chills, weakness, or wheezing.” Dr. Bhatt determined by auscultation that her lungs were clear, and that her complaints of coughing and shortness of breath were solely attributable to her chronic conditions. He advised her to continue supplemental oxygen and medication, and to follow up with her pulmonologist. Ms. Graham was also “instructed to go stat to ER” if she experienced “any shortness of breath [or] spitting blood,” according to the nurse’s notes (Exhibit G-1, at 4-6).

On the morning of July 21, 2019, three days after her examination by Dr. Bhatt, Ms. Graham had difficulty breathing and was taken back to Wyckoff Heights by ambulance. She was admitted to the ICU, intubated, and diagnosed with pneumonia, acute hypoxemic/hypercapnic respiratory failure, and sepsis secondary to pneumonia. Over the course of her three-week admission, she was given a tracheostomy, placed on a feeding tube, and treated for other conditions including hyperglycemia, hypernatremia, and hypokalemia. She was ultimately discharged on August 15, 2019, to Schulman and Schachne Center, a nursing home where she remained dependent on a ventilator for the remainder of her life. She died on August 11, 2020, at the age of 84.

Plaintiff alleges that Dr. Bhatt deviated from good and accepted standards of medical care by failing to timely diagnose and treat Ms. Graham for pneumonia on July 18, 2019. Plaintiff alleges that this departure

worsened Ms. Graham's condition and was a substantial factor in her continued health problems until and including her death.

Generally, "[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party" (*Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). "Any conflicts in the testimony merely raise 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 AD3d 830, 832 [2d Dept 2015]). In evaluating a summary judgment motion in a medical malpractice case, the Court applies the burden shifting process as summarized by the Second Department:

"The elements of a medical malpractice cause of action are a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries. When moving for summary judgment, a defendant provider has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. 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. In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden. General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant's summary judgment motion. Although summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 898-899 [2d Dept 2023] [internal quotation marks and citations omitted]).

In support of his summary judgment motion (Seq. No. 2), Dr. Bhatt submits an expert affirmation from Mark S. Silberman, M.D. ("Dr. Silberman"), a board-certified physician of internal medicine, emergency medicine, pulmonary disease, and critical care medicine, as well as supporting medical records and deposition transcripts.

Based on his review of the records and relevant expertise, Dr. Silberman opines that the care and treatment rendered by Dr. Bhatt at Wyckoff Heights was in accordance with good and accepted medical standards. Specifically, the patient did not exhibit any acute symptoms or "evidence signs of pneumonia," such as "fever or a change in cough or sputum" when she saw Dr. Bhatt. Her chest was "clear to auscultation bilaterally with no rhonchi, rales, wheezing, or any abnormal lung sounds," which the expert opines "demonstrated no evidence of any acute change in symptoms." The expert opines that based on these results, a chest x-ray, pulmonary function test, or any other diagnostic tests were not warranted during this follow-up visit, and Dr. Bhatt appropriately advised her to continue management of her chronic conditions with her pulmonary specialist.

The expert concurs with Dr. Bhatt's impression at the time that Ms. Graham's 87% oxygen saturation was "consistent with her advanced stage lung disease and progressively worsening hypoxia, which were being

managed by her private pulmonologist Dr. Chadha for nearly a decade.” To counter Plaintiff’s argument that Dr. Bhatt should have accessed Dr. Chadha’s records of her prior oxygen saturation levels for comparison, Dr. Silberman reviewed the records at issue and noted that her July 18 oxygen saturation was “in the range of several of the patient’s prior readings,” such as her measurement of 89% on March 27, 2019, her measurement of 85% on June 25, and her “room air” measurements as low as 83% on two visits to Dr. Chadha in 2018.

In his deposition, Dr. Bhatt testified that the lower of the two oxygen saturation readings on July 18 was most likely the result of a “mechanical defect” such as a misplaced nasal cannula. Dr. Silberman opines that this was “more likely than not” the explanation for the difference in the readings within a short period of time, and that Dr. Bhatt appropriately repeated the test for a more accurate result of 87%, which did not indicate a new or acute change in her condition.

Dr. Silberman opines that the treatment and care rendered to Ms. Graham by Dr. Bhatt was at all times in accordance with good and accepted medical practice. Notwithstanding, he noted that the primary reason for Ms. Graham’s visit to Wyckoff Heights was a follow-up on her MAC infection and Rifampin prescription one year earlier. Based on her history and the lack of “any symptoms suggestive of an acute pulmonary infection,” Dr. Silberman opines that Dr. Bhatt had no reason to perform a more extensive work-up or develop any “plan of care that deviated from that of [her] primary pulmonologist.” Therefore, he opines that Dr. Bhatt appropriately advised her to continue treating with Dr. Chadha and to go to the emergency room if her shortness of breath became more severe than usual.

Additionally, Dr. Silberman opines Ms. Graham’s alleged injuries and death cannot be attributed to any negligence of Dr. Bhatt. Based on the records from her private pulmonologist, Dr. Silberman opines that Ms. Graham had end-stage lung disease that was worsening over time, and both her hospitalization and ultimate demise were “unavoidable.” By March 2019, Ms. Graham required five liters of supplemental oxygen per minute (an increase from three liters in February 2018, and four liters in April through December 2018). Dr. Silberman noted that this type of at-home oxygen “maxes out at six liters per minute,” and Ms. Graham’s medical history demonstrates that she was already on a “progressive downhill course” toward hospital care and intubation. He further opines that she “suffered an acute change in symptoms subsequent to her visit with Dr. Bhatt,” based on the July 21, 2019, hospital note that she experienced “shortness of breath since last night” (Exhibit G-3, at 59). Dr. Silberman opines that her symptoms of new onset pneumonia did not develop until after her evaluation by Dr. Bhatt, and that his care was not a proximate cause or substantial factor in her overall declining health.

Relying on the facts in the record and Dr. Silberman’s expert opinion, Dr. Bhatt makes a *prima facie* case that the treatment rendered to Ms. Graham on July 18 was within good and accepted medical standards, and that her prolonged hospital stay, nursing home care, and eventual death in 2020 were the result of her well-documented geriatric and pulmonary health conditions, not the alleged negligence of Dr. Bhatt in detecting an acute pneumonia

infection.

In opposition, Plaintiff submits an expert affirmation from a licensed physician certified in internal medicine and pulmonary disease, (name of expert redacted). The Court was presented with the signed, unredacted affirmation for *in camera* inspection. Plaintiff also relies on the medical records and deposition testimony that were submitted in the moving papers.

Plaintiff's expert opines that Dr. Bhatt deviated from good and accepted medical practice by failing to compare her oxygen saturation to her previous treatment records, order a chest x-ray, and/or refer her to the emergency department. Plaintiff's expert opines that even in the context of Ms. Graham's preexisting chronic conditions, she exhibited "alarming" oxygen saturation and respiratory rate measurements during her July 18 appointment. Plaintiff's expert acknowledges that patients with chronic lung conditions typically have lower "baseline" of oxygen saturation than healthy adults, but the expert opines that Dr. Bhatt could have contacted Dr. Chadha's office to obtain her previous records, some of which measured her oxygen saturation at 90% or above while using five liters of supplemental oxygen.

However, the expert's opinion that Ms. Graham's July 18 readings were "well below" her normal status is incomplete and unsupported by the evidence. The 82% reading, corrected for mechanical defect, was not far below the patient's "room air" saturation of 83% on previous occasions. The 87% reading was at or above the level of other readings as she progressed from requiring four liters to five liters of oxygen. Crucially, Plaintiff's expert does not address these oxygen saturation levels in the context of her June 25 oxygen saturation of 85%, at which time she also had difficulty speaking more than three sentences at a time. At that time, her provider handled her care similarly to Dr. Bhatt: advising her to follow up with her primary pulmonologist, which she did on July 3. These records show similar results and a similar course of treatment. Plaintiff's expert does not counter Dr. Silberman's opinion that, even when compared to her full medical history, Ms. Graham's July 18 oxygen saturation levels and respiratory rate alone did not evince an acute or emergent condition.

The expert opines that "at minimum" Dr. Bhatt should have performed a chest x-ray or referred Ms. Graham to the emergency department for additional testing, but the expert does not address the notations in the record that Ms. Graham's lungs were clear to auscultation on July 18, and there were no signs of wheezing or any other abnormal lung noises pointing toward onset of pneumonia at that time. Furthermore, the expert does not account for the nursing notes from July 18 stating that she was advised to go to the emergency department if she experienced worsening shortness of breath. The expert's argument that her son's testimony that Ms. Graham's subjective complaints were severe enough for an ER referral when she saw Dr. Bhatt is therefore contrary to the facts in the record.

Plaintiff's expert addresses Ms. Graham's lack of fever by pointing out that patients over 65 years old often experience no fever with pneumonia, and she still did not have a fever on her admission to the ICU.

However, as noted above, the expert offers no facts in opposition to the defendant's argument that Ms. Graham's lungs were clear to auscultation on July 18, and there were no signs of wheezing or any other abnormal lung noises pointing toward onset pneumonia at that time, in addition to the absence of fever. Christopher Graham's testimony that his mother was feeling generally unwell and lethargic in the week leading up to the visit, standing alone, does not raise a genuine issue of fact as to whether any symptoms that warranted a chest x-ray/radiological study were present in Ms. Graham on July 18.

An expert opinion must be based upon proper evidentiary foundation to have probative value and withstand summary judgment (*see Palagye v Loulmet*, 203 AD3d 724 [2d Dept 2022], citing *Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]). Plaintiff's expert opines that Dr. Bhatt's alleged deviations from good and accepted medical practice "resulted in this patient losing almost three days of treatment" for what was ultimately diagnosed as pneumonia on July 21, 2019. Here, Plaintiff's expert has not made an adequate showing that any symptoms pointing toward pneumonia were present at the time of Ms. Graham's July 18 visit which warranted additional testing. An expert opinion which is "conclusory, speculative, and based largely on hindsight reasoning" to support the argument that additional testing should have been performed cannot withstand summary judgment (*Ortiz v Wyckoff Hgts. Med. Ctr.*, 149 AD3d 1093, 1095 [2d Dept 2017]; *see also Micciola v Sacchi*, 36 AD3d 869 [2d Dept 2007]).

Accordingly, Plaintiff fails to raise a genuine issue of fact to withstand summary judgment on claims that Dr. Bhatt deviated from the standard of care and that any departure was a substantial factor in causing injury and death to the decedent.

Plaintiff's complaint also asserts a cause of action for "lack of informed consent," which is not applicable to the case herein. The theory of lack of informed consent is limited to cases involving performance of a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (*Deutsch v Chaglassian*, 71 AD3d 718, 720 [2d Dept 2010], quoting Public Health Law § 2805-d [2]). This cause of action does not arise where, as in Ms. Graham's case, there was no undertaking of any procedure or "affirmative violation of the plaintiff's physical integrity" during the treatment and care at issue (*Samer v Desai*, 179 AD3d 860, 864 [2d Dept 2020]). Therefore, Dr. Bhatt's motion is granted to the extent of dismissing any claims for lack of informed consent.

For the reasons above, Dr. Bhatt's motion for summary judgment (Seq. No. 2) is **GRANTED** and the Plaintiff's complaint against Dr. Bhatt is dismissed in its entirety.

In a separate motion (Seq. No. 1), co-defendant Wyckoff Heights moves for summary judgment on the grounds that Dr. Bhatt did not depart from good and accepted medical practice, nor did his actions proximately cause the injuries or death of Ms. Graham, and therefore Wyckoff Heights is relieved from any employer liability. Their attorney affirmation incorporates the arguments, statement of material facts, and expert affirmation of Dr.

Silberman which were submitted in support of Dr. Bhatt's motion.

Plaintiff does not oppose the motion as to any direct acts or omissions on the part of Wyckoff Heights. In fact, Plaintiff's expert concedes that any claims against the hospital are wholly based on vicarious liability, and Wyckoff Heights and its employees otherwise "complied with the standard of care" (Plaintiff expert aff, at 20). Accordingly, Wyckoff Height's motion is granted without opposition as to any direct claims against them.

It is uncontested that Dr. Bhatt was an employee of Wyckoff Heights at the time of the alleged malpractice, not a private attending physician of Ms. Graham (*see* Dr. Bhatt deposition tr at 18). In a medical malpractice action, "a claim of vicarious liability cannot stand when there is no primary liability upon which such a claim of vicarious liability might rest" (*Longhi v Lewit*, 187 AD3d 873 [2d Dept 2020] [internal quotation marks and citations omitted]). All Plaintiff's claims against Wyckoff Heights derive from Dr. Bhatt's status as an employee of the hospital, acting within the scope of his employment, and the care and treatment he provided to Ms. Graham as an agent of the hospital (*see Goffredo v St. Luke's Cornwall Hosp.*, 194 AD3d 699, 700 [2d Dept 2021]). Therefore, on all issues and claims herein that the Court awards summary judgment to Dr. Bhatt, the vicarious liability claims against Wyckoff Heights on Dr. Bhatt's behalf are also dismissed.

For the same reasons above, the estate's cause of action for wrongful death is dismissed as to Wyckoff Heights, as the vicarious liability claims are not viable in the absence of Dr. Bhatt's primary liability.

Finally, Plaintiff's complaint also asserts a claim against Wyckoff Heights for negligent hiring, premised on the alleged wrongdoing of Dr. Bhatt. As there is no triable question of fact as to Dr. Bhatt's tortious conduct, an essential element of negligent hiring, that cause of action is dismissed.

It is hereby:

ORDERED that Wyckoff Heights's motion (Seq. No. 1) for summary judgment is **GRANTED**; and it is further

ORDERED that Dr. Bhatt's motion (Seq. No. 2) for summary judgment is **GRANTED**; and it is further

ORDERED that the action is dismissed in its entirety with prejudice.

The Clerk is directed to enter judgment in favor of Uptal K. Bhatt, M.D. and Wyckoff Heights Medical Center.

This constitutes the decision and order of this Court.

ENTER.



Hon. Consuelo Mallafré Melendez

J.S.C.