

Gibbs v River Manor Corp.

2024 NY Slip Op 33215(U)

September 12, 2024

Supreme Court, Kings County

Docket Number: Index No. 514224/2020

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 12th day of September 2024.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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LYNNORA GIBBS, as Administratrix of the Estate of
THOMAS LETT, and LYNNORA GIBBS, Individually,

Plaintiffs,

-against-

RIVER MANOR CORP. d/b/a ATRIUM CENTER FOR
REHABILITATION AND NURSING,

Defendant.

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

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:
NYSCEF #s: 67 – 68, 69 – 82, 83, 84 – 88, 89

Defendant River Manor Corp. d/b/a Atrium Center for Rehabilitation and Nursing (“Atrium Center”) moves (Seq. No. 4) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor on all claims against them. Plaintiff opposes the motion.

Plaintiff Lynnora Gibbs commenced this action, as administratrix of the estate of Thomas Lett (“Decedent”), on August 5, 2020, alleging violations of Public Health Law §§ 2801-d and 2803-c, medical malpractice, negligence, and wrongful death. Plaintiff also asserted individual claims for loss of services.

Decedent resided at Atrium Center, a long-term care facility, from October 17, 2017 to July 26, 2018. He was 79 years old and was initially transferred to Atrium Center from Brookdale Hospital following treatment for ataxia and acute kidney injury. He had a medical history including hypertension, seizure disorder, Parkinson’s disease, and dementia. His skin was noted to be intact at the time of his admission, and he was initially assessed with a Braden score of 17 (mild risk of pressure ulcers).

On March 29, 2018, five months into his care at Atrium Center, nurses first noted redness on Decedent’s left lateral heel, and recorded that the attending physician was “made aware and verbal order received for skin

prep [every day] and to off load heels with booties.” On June 4, his chart reflected that his left lateral heel formed a “hard callus.” On June 14, he was seen by a wound care specialist who assessed the site as a deep tissue injury measuring 3 x 4 cm.

On July 1, 2018, a stage II sacral ulcer was observed measuring 2 x 0.6 x 0.2 cm. He was evaluated by a wound care specialist on July 3, who noted the left heel wound showed improvement. On July 24, the sacral wound was measured at 2.1 x 1 x 0.3 cm.

Decedent was ultimately transferred back to Brookdale Hospital on July 26 amidst an overall decline in health, “decreased oral intake and failure to thrive.” Upon his Brookdale arrival, he was recorded to have a stage III sacral pressure ulcer measuring 3 x 1.5 x 0.5 cm, an unstageable left lateral heel tissue injury, a stage III left ankle pressure ulcer, stage II right ankle pressure ulcer, and unstageable “black and dry” right heel ulcer (*see* Exhibit G1, at 33-34). These injuries were also noted on subsequent physical examinations (*id.*, at 113, 122). He was admitted to the ICU, intubated, and diagnosed with epileptic seizure, multifactorial septic shock, and hypernatremia. He was ultimately placed on a medical floor (with DNR/DNI order) on August 3, and he passed away on August 6.

Plaintiff alleges that Atrium Center, through its agents and employees, departed from the standard of care by improperly assessing Plaintiff’s risk for pressure ulcers, failing to implement pressure ulcer prevention measures, and failing to timely and properly treat his pressure ulcers. Plaintiff further alleges that those departures from the standard of care proximately caused the development and deterioration of Decedent’s pressure ulcers, and that those pressure ulcers were a proximate cause of pain and suffering and 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]). 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 this motion, Defendant submits an expert affirmation from Lee Ruotsi, M.D. ("Dr. Ruotsi"), a licensed physician certified in wound care.

Based on the record and his expertise, Dr. Ruotsi opines that Atrium Center did not depart from good and accepted medical standards in preventing and treating Decedent's pressure ulcers and skin breakdown. The expert opines that when his left heel redness was first observed on March 29, appropriate measures were implemented including saline cleansing, protective dressing, and heel booties. The expert notes that Decedent was not fully bed-bound at that time, and he was noted to be non-compliant with keeping the heel booties on at times. On May 21, his wound treatment was updated to xeroform dressing, which the expert opines was also appropriate and within the standard of care.

Dr. Ruotsi further opines that the recommendations of the wound care specialist on June 14 were in accordance with the standard of care and implemented appropriately, including turning and positioning protocols which were "already in place" every two hours according to the chart.

Additionally, Dr. Ruotsi opines that Decedent's skin breakdown was not caused by any departures from the standard of care on the part of the Atrium Center staff, and further opines that his left-sided and sacrum wounds were "unavoidable" despite reasonable prevention efforts. He notes that the wounds developed "as his Parkinson's progressed and his overall condition declined" and opines that such pressure injuries were an

unavoidable result of his “accumulating comorbidities.” He also opines that the patient’s left heel tissue injury could have been due to friction and pressure caused by seizures, and that Decedent’s occluded tibial artery in the left leg also impaired his blood circulation and prevented the wound from healing. The expert also opines that a skin tear such as observed on Decedent’s sacrum can “occur for a variety of reasons” such as movement or friction from a patient with fragile skin. The expert states that Decedent’s wounds were ultimately limited to his left leg, which had constricted blood flow, and the sacrum, a “common area of skin breakdown as it contains the largest surface area,” and opines that Decedent would have had more injuries and “much larger than the wounds described by Atrium and Brookdale” if there had been departures from the standard of care in turning and positioning. The expert’s only mention of the additional pressure ulcers recorded at Brookdale – to his right heel and bilateral ankles – are that the “hospital records are somewhat subjective” and the notes made by Brookdale nursing staff are inconsistent in places about the stage and size of his pressure ulcers.

Finally, the expert opines that Decedent’s decline in health and subsequent death at Brookdale Hospital was entirely due to his comorbidities, including progressively worsening Parkinson’s disease, a progressive decline in neurological function, and a weakened immune system. The expert opines there is no causal link between the alleged pressure injuries and his hospitalization or death, as “neither area [left heel or sacrum] was ever infected or had complications.”

Although Dr. Ruotsi has established a proper foundation to opine on the standard of care in preventing and treating pressure ulcers, his opinions herein are conclusory and unsupported by the record. The expert’s statements that Decedent’s pressure ulcers were limited to his left heel and sacrum are contradicted by the Brookdale Hospital records. Those records indicate he also had *bilateral* heel and ankle pressure ulcers upon his transfer from Atrium Center. These additional pressure ulcers are not addressed by the defendant’s expert. His statements that all pressure sores developed at Atrium Center were “unavoidable” based on his clinical condition, pursuant to Public Health Law § 2801-d and federal and local regulations, are therefore also conclusory and unsupported by the record.

Additionally, Dr. Ruotsi's statement that no pressure ulcers ever became infected or had any complications is not supported by the evidence, as Decedent's stage II, stage III, and unstageable pressure ulcers were documented upon his admission to Brookdale Hospital as a potential cause of septic shock. The records from his ICU admission indicate that sepsis was attributed to multiple sources of infection including UTI, pneumonia, and pressure ulcers (*see* Exhibit G1, at 160). A later progress note from July 31 also reads "multifactorial septic shock (UTI vs HCAP vs multiple pressure ulcers)" (*id.*, at 164).

As the expert's assessments are controverted by the evidence, including discrepancies in the Atrium Center and Brookdale Hospital records on the size and stage of Decedent's multiple pressure ulcers, his opinions have no probative value to support a motion for summary judgment (*see Dmytryszyn v Herschman*, 98 AD3d 715 [2d Dept 2012]). Defendant has therefore not met the required *prima facie* burden.

Notwithstanding the movant's inability to meet their burden, Plaintiff submits in opposition an expert affirmation from a licensed physician [name of expert redacted], certified in emergency medicine, toxicology, and undersea and hyperbaric medicine. The Court was presented with a signed, unredacted copy of the affirmation for *in camera* inspection. The expert affirms that he has relevant experience in wound care and standards for prevention and treatment of pressure ulcers in nursing homes and hospitals.

Based on the record and relevant expertise, Plaintiff's physician expert opines that Atrium Center deviated from the standard of care by not adequately turning and positioning Decedent. Notably, as cited by Defendant's expert, the Atrium Center records from June 14 stated that "turning and positioning protocols [were] already in place" following a wound care consultation, but this was the first mention of such protocols in the record, and it does not specify when those protocols were first implemented. Plaintiff's expert notes that the developing left heel ulcer was first observed on March 29, and that Decedent was "noted to have a change in his functional status" in April 2018 with "generalized weakness, debility, altered mental status," and inability to perform activities of daily living without assistance. The expert therefore opines that he was likely unable to adequately turn and reposition himself. The expert opines that in accordance with the standard of care, a turning and positioning schedule at least every two hours should have been implemented and documented after the first pressure ulcer

was discovered, given Decedent's limited mobility. The expert opines that the lack of any record that such a schedule was implemented until June 2018 constitutes a departure from the standard of care.

Plaintiff's physician expert also opines that the standard of care requires "accurate and consistent staging and sizing" of all pressure ulcers. The expert notes that upon admission to Brookdale Hospital, the left heel and sacral ulcers were measured as larger than they had been in the Atrium Center records. The expert also notes that additional stage III and unstageable pressure ulcers were documented on the right heel and bilateral ankles upon Decedent's admission to Brookdale Hospital, but those pressure ulcers had never been recorded by Atrium Center. The expert opines that Atrium Center's nurses and specialists did not adequately keep track of the stage, size, and location of Decedent's pressure ulcers so that his personalized prevention and treatment plan could be updated accordingly, and the expert opines this constituted a departure from the standard of care.

On the issue of causation, Plaintiff's physician expert counters the movant's expert opinion that Decedent's pressure ulcers were an unavoidable result of Parkinson's disease and other comorbidities. The expert opines that his limited mobility and worsening Parkinson's made Decedent a higher *risk* for pressure ulcers, but they did not make this condition inevitable. The expert opines that Atrium Center's alleged deviation from the standard of care, i.e., failure to respond to his increased risk and implement a proper care plan, was the proximate cause of his pressure injuries.

The physician expert also opines that the development and deterioration of Decedent's pressure ulcers was a contributing factor in his overall decline and death. Even if they were not the cause of his infection or septic shock, the expert opines that such ulcers would contribute to his inability to recover generally, because "his body was pre-occupied trying to heal the multiple pressure ulcers." Thus, the expert opines that Decedent had difficulty warding off his other infections and multiple medical issues in conjunction with the pressure ulcers, and this was a proximate cause of his subsequent hospitalization and death.

Additionally, Plaintiff submits an expert affidavit from Charlotte Sheppard ("RN Sheppard"), a registered nurse which education and experience in gerontological nursing and wound care.

Defendant argues in reply that RN Sheppard is not qualified to offer opinions "regarding standard of care,

treatment, or causation.” An expert opinion need not be provided by a specialist, but the expert must demonstrate that they are “possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable” (*DiLorenzo v Zaso*, 148 AD3d 1111, 1112-1113 [2d Dept 2017]; *see also Cerrone v North Shore-Long Is. Jewish Health Sys, Inc.*, 197 AD3d 449 [2d Dept 2021]). It is well established that a registered nurse may offer an expert opinion *only* on the standard of care and treatment as it pertains to nursing; they may not opine on a physician’s standard of care or render a medical opinion on proximate causation (*see Boltzansky v New York Community Hosp.*, 175 AD3d 1478, 1479 [2d Dept 2019]; *Zak v Brookhaven Mem. Hosp. Med. Ctr.*, 54 AD3d 852, 853 [2d Dept 2008]).

The Court finds that RN Sheppard is qualified to offer opinions as to the standard of care and treatment as it relates to acts and omissions of the *nursing personnel* at Atrium Center only, i.e., the standard of care as to assessing and documenting the size of pressure ulcers. Treatment decisions under the supervision of the attending physician and/or wound care physician – such as creating an individualized care plan with a turning/positioning schedule and pressure relieving devices – are not within the scope of nursing treatment and therefore not part of the Court’s consideration of RN Sheppard’s affidavit. Opinions from RN Sheppard with respect to proximate causation of Decedent’s injuries and death also have no probative value. Notwithstanding, Plaintiff’s expert affirmation from a medical doctor, as discussed above, established a proper foundation to opine on both the standard of care and proximate causation.

In relevant part, Plaintiff’s nursing expert RN Sheppard opines that “frequent and precise documentation of the stage, size, and appearance of developing pressure ulcers” is the standard of care for nurses in a care facility such as Atrium Center. She specifically opines that the standard of care “required a complete assessment including measurement at least every seven days,” yet there were gaps in these measurements and some wounds which were never measured, staged, or acknowledged at all until his Brookdale admission.

Even if the Defendant met their prima facie burden on the claims of deviation from the standard of care or proximate causation, Plaintiff’s experts offer conflicting opinions, raising issues of fact and credibility “requiring a jury’s resolution” and precluding summary judgment (*Stewart v. North Shore University Hospital at*

Syosset, 204 AD3d 858, 860 [2d Dept. 2022]).

Notwithstanding the above, the movants also seek dismissal of Plaintiff's claim for punitive damages, on the basis that such damages are not applicable in this case. Based on the record and the submissions of the parties, no alleged conduct from Atrium Center rises to the level of a "high degree of moral culpability or willful or wanton negligence or recklessness" (*Gomez v Cabatic*, 159 AD3d 62, 73 [2d Dept 2018]). Plaintiff briefly addresses this claim in opposition, but only in a conclusory manner. Plaintiff does not reference any part of Decedent's treatment which supports a finding of willfulness or recklessness, beyond ordinary negligence or malpractice. Accordingly, summary judgment is granted to Defendants as to the punitive damages claim only.

It is hereby:

ORDERED that Defendants' motion (Seq. No. 4) for an Order, pursuant to CPLR 3212, granting summary judgment and dismissing Plaintiff's complaint against them, is **GRANTED TO THE EXTENT** of dismissing Plaintiff's claim for punitive damages only, and the motion is otherwise **DENIED**.

This constitutes the decision and order of this Court.

ENTER.



Hon. Consuelo Mallafré Meléndez

J.S.C.