

**Shelton v Atrium Ctr. for Rehabilitation & Nursing**

2024 NY Slip Op 33726(U)

October 11, 2024

Supreme Court, Kings County

Docket Number: Index No. 520020/2021

Judge: Genine D. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York on the 11<sup>th</sup> day of October 2024.

P R E S E N T :

Hon. Genine D. Edwards, Justice

-----X

TIFFANI SHELTON, as administratrix of the Estate  
Of LACHONNE SHELTON, Deceased,

Plaintiff,

Index No: 520020/2021

- against -

Decision & Order

ATRIUM CENTER FOR REHABILITATION  
AND NURSING,

Defendants.

-----X

<u>The following e-filed paper(s) read herein:</u>	<u>NYSCEF Doc. No.</u>
Notice of Motion, Affirmations, and Exhibits.....	20, 21-38, 39-40
Notice of Cross-Motion, Affirmation in Support and Exhibits.....	42, 43-44, 46-47
Affirmation in Opposition.....	52
Reply Affirmation.....	53

In this action to recover damages for medical malpractice, violations of several statutes rules, and regulations including the Public Health Law, and wrongful death, Atrium Center for Rehabilitation and Nursing (“Atrium” or “defendant”) moved for an order granting summary judgment, pursuant to CPLR §3212, dismissing the complaint. Tiffani Shelton (“plaintiff”)

opposed the motion, and cross-moved for permission to serve a supplemental bill of particulars and having same deemed served *nunc pro tunc*. Defendant opposed.

### FACTS

Lachonne Shelton (“decedent”) was admitted to Maimonides Medical Center (“MMC”) on January 16, 2020, for cardiothoracic surgery. Decedent had a prior medical history of aortic aneurysm, blood disease, atypical depression, hypertension, and multiple sclerosis. Attending physician Dr. Robert Rhee noted in the Operative Report that the device used to close the left common femoral artery failed to deploy, so a “transverse [sic] incision in the groin [was made] above the location of the arteriotomy.” Decedent was transferred to Atrium on January 22, 2020 for rehabilitative care. Atrium performed several initial assessments and deemed decedent’s risk factors to be skin breakdown, falls, and further declination in function and immobility. Preventative measures were implemented for skin integrity and falls. Atrium highlighted the use of protective creams and/or ointments, foot elevation, keeping decedent’s personal belongings close to minimize overreach, and using side rails to assist decedent’s bed mobility. Decedent also began physical therapy. On January 24, 2020, Atrium noted decedent’s refusal to eat, shower, use the lavatory and be weighed.

On February 1, 2020, Atrium documented that decedent was found lying on the floor. It was indicated that her legs became numb, she was unable to bear weight on her feet and she slid off the bed. Decedent denied hitting her head but complained of pain in her neck. Visible injuries were absent, and a “neurocheck” showed no deficits. Approximately two days later, decedent was noted to have a skin opening in her sacral area. The wound measured at 3 x 3 cm and was cleaned by Atrium’s personnel. Decedent refused to leave her bed or shower. A wound care specialist evaluated her and reminded decedent of the importance of staying off her buttocks.

Decedent was transferred back to MMC on February 4, 2020, due to complaints of numbness in her lower extremities. She was admitted for one month, and eventually diagnosed with paraparesis of the lower extremities due to spinal cord ischemia. On March 5, 2020, MMC discharged decedent to New Franklin Rehabilitation. On April 11, 2020, decedent reported shortness of breath which prompted an emergency transfer to Flushing Hospital Medical Center (“Flushing Hospital”). Despite resuscitative efforts, decedent ultimately died at Flushing Hospital due to cardiac arrest.

### LAW

#### Medical Malpractice

In an action for medical malpractice, the required elements are a deviation or departure from accepted medical standards of practice, and that such departure proximately caused plaintiff’s injuries. *Blank v. Adiyody*, 220 A.D.3d 832, 198 N.Y.S.3d 172 (2d Dept. 2023); *Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept. 2023). When moving for summary judgment, the defendant bears the initial burden of establishing that there was no departure from accepted medical practice, or if there was such a departure, it was not the proximate cause of plaintiff’s injuries. *See Kelapire v. Kale*, 189 A.D.3d 1197, 134 N.Y.S.3d 255 (2d Dept. 2020).

If this burden is so met, “the burden shifts to the plaintiff to rebut the defendant’s showing by raising a triable issue of fact as to both the departure element and the causation element.” *See Sunshine v. Berger*, 214 A.D.3d 1020, 186 N.Y.S.3d 326 (2d Dept. 2023); *Kielb v. Bascara*, 217 A.D.3d 756, 191 N.Y.S.3d 158 (2d Dept. 2023). In determining a summary judgment motion, “the court must view the evidence in the light most favorable to the

nonmoving party.” *Many v. Lossef*, 190 A.D.3d 721, 137 N.Y.S.3d 128 (2d Dept. 2021). If the plaintiff demonstrates issues of facts sufficient to require a trial, then defendant’s request for summary judgment must be denied. *Stewart v. North Shore Uni. Hosp. At Syosset*, 204 A.D.3d 858, 166 N.Y.S.3d 676 (2d Dept. 2022). Additionally, “summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Id.* at 860.

### DISCUSSION

Here, defendant’s experts, Gisele Wolf-Klein, M.D. (“Dr. Wolf-Klein”) and William Suggs, M.D. (“Dr. Suggs”) opined that decedent’s fall did not contribute to her diagnosis of thoracic spinal cord ischemia, and her sacral pressure ulcer was not caused by any lack of care or attention. According to Dr. Wolf-Klein, defendant’s plan, which included, *inter alia*, placing decedent’s bed in its lowest position and her personal items within reach as well as a call bell met the proper standard of care. Dr. Wolf-Klein continued that defendant had no reason to provide a heightened fall prevention plan, as plaintiff alleged, since decedent was noted to be consistently alert, oriented, and was never assessed to be “at risk of disrupting life-saving treatment, line or tube pulling, or injuring herself or others.” Dr. Wolf-Klein indicated that after decedent’s fall, Atrium appropriately updated decedent’s fall plan, including neurological checks, occupational or physical therapy evaluations, and keeping her personal belongings in close proximity to avoid overreaching. Further, Dr. Wolf-Klein highlighted that decedent exhibited bodily stability after the fall, as she engaged in physical therapy, was able to walk twenty feet with assistance, and did not make further complaints of numbness in her legs until February 4, 2020.

Dr. Wolf-Klein opined that spinal cord ischemia was the catalyst of decedent's new and acute neurological deficits. Her opinion was based on the MMC note entered on February 4, 2020, by David Lobel, M.D., to wit, "[r]epair of the thoracic aneurysm complicated by spinal ischemia secondary to thrombosis." Therefore, Dr. Wolf-Klein concluded that decedent's eventual diagnosis of thoracic spinal cord ischemia, subsequent paralysis, and her death could not be causally related to her fall while under Atrium's care and control. Finally, Dr. Wolf-Klein indicated that Atrium's nursing documentation evidenced that the appropriate care plans were initiated and followed, and thus, did not support any allegations of abuse, neglect, violations, or recklessness in abiding by any state and federal nursing home statutes or regulations, including the Public Health Law.

Dr. Suggs declared that decedent was not diagnosed with nerve damage to her cervical spine as a result of the fall. Dr. Suggs noted different causes for spinal cord ischemia, which were not indicated in the decedent's records. Dr. Suggs posited that decedent's fall did not trigger spinal cord ischemia; the thoracic aortic repair surgery caused decedent's spinal cord ischemia and the acute neurological deficits documented on February 4, 2020.

In opposition, plaintiff's expert raised a triable issue of fact as to whether Atrium responded appropriately to decedent's fall, inter alia. Plaintiff's expert posited that defendants deviated from the standard of care by failing to immediately transfer decedent to the emergency room for diagnostic studies after her fall. Plaintiff's expert explained that thoracic cord ischemia creates swelling and compression in the spinal cord. Additionally, two of the more common symptoms of spinal compression are numbness and cramping in the extremities. Spinal compression must be treated quickly, and where the compression is left untreated for days, a patient may have little to no ability to recover from surgery. Patients who are treated

immediately are more likely to recover to normal or near-normal function, according to plaintiff's expert.

Here, decedent informed defendant of numbness in her legs twice: shortly after she was found lying on the ground, and nearly 72-hours later, which prompted decedent's transfer back to MMC. Plaintiff's expert opined that defendant deviated from the standard of care by failing to identify injuries from decedent's fall. According to plaintiff's expert, by the time decedent's thoracic cord ischemia was identified, her chances of recovery were meager. If decedent was evaluated, diagnosed, and treated immediately, her recovery would have been significantly better.

Furthermore, plaintiff's expert opined that Atrium was aware of decedent's admission assessment results indicating that she was a high risk for falls hence, full-sized guard rails should have been utilized. Plaintiff's expert asserted that despite defendant's care plan, which noted the intended use of half-sized guard rails, same were not present or in use on decedent's bed because she was able to fall.

Lastly, plaintiff's expert stated that defendant's lack of hygienic care was the proximate cause of the development of decedent's stage IV sacral pressure ulcer. Specifically, on January 26, 2020, from 7 AM to 3 PM, Atrium failed to comply with its care plan, which likely led to the development of the Stage IV pressure ulcer diagnosed at MMC. Plaintiff's expert posited that it is contrary to the standard of care to fail to provide a patient with proper hygiene treatment due to the patient's lack of compliance. Since the experts adduced conflicting opinions, credibility questions exist that must be resolved by a factfinder. *Gardiola v. Sung Chui Park*, 229 A.D.3d 602, 215 N.Y.S.3d 144 (2d Dept. 2024).

Plaintiff's Cross-Motion

“Motions to amend or supplement bill of particulars are governed by the same standards as those applying to motions to amend pleadings.” *Cedano v. New York Racing Assn., Inc.*, 171 A.D.3d 1126, 96 N.Y.S.3d 890 (2d Dept. 2019). According to CPLR 3043(c), this Court has discretion to allow the plaintiff to serve a supplemental bill of particulars.

Plaintiff's counsel e-filed the Note of Issue to NYSCEF on November 29, 2023, and this cross-motion to supplement the bill of particulars was e-filed nearly six months later, on May 2, 2024. Plaintiff contended that the purpose of the supplemental bill of particulars is to further elaborate and spotlight defendant's delay in treating decedent after her fall. Plaintiff asserted that defendant will not be prejudiced by the proposed supplement since it was clear that plaintiff's claims involved allegations of allowing decedent to fall on February 1, 2020, and since defendant's experts opined that decedent's injuries were caused by decedent's prior surgery.

In opposition, defendant contended that the proposed supplemental bill of particulars is an amendment rather than a supplement, as it seeks to aver new claims of negligence rather than “elaborate and emphasize” the continuing consequences of plaintiff's previously alleged claims. Defendant further asserted that it would be deprived of a full and fair opportunity to assess the added claim and obtain the necessary material to defend same.

Plaintiff's proposed supplemental claims involve the alleged lack of care immediately after the fall. These supplemental claims flow from the original allegations. Furthermore, during their depositions, Atrium's witnesses responded to questions pertaining to the post-fall protocols. Sharon Seaton, RN testified as follows:

*Q – And then in the last sentence, the last one that I highlighted, “Fall protocol was implemented.”*

*A – Okay.*

*Q – Does this indicate the fall protocol was not implemented before this incident?*

*A – No, that’s not what that means.*

*Q – Can you explain what this means?*

*A – Once a resident has fallen, we have to do a reassessment, a fall reassessment. The protocol is to complete an investigation and complete an incident report, and all on witness fall [sic] and neurocheck is done, and the doctor is notified. The protocol is step by step what is done; investigation, completing the invest — investigation, notification of all parties involved including the next of kin, doctor, and all assessment and whether the other assessment, the care plan in — you know, update care plan.*

Tianna Gayle, CNA testified as follows:

*Q – What would be the full protocol at Atrium?*

*A – Well, once we find a resident fallen on the floor, the CNA reports to the nurse, the nurse will contact the supervisor, the supervisor will come and assist the resident.*

Thus, the supplemental bill of particulars “only served to amplify the allegations in the complaint” and are not new claims or theories. *Quinones v. Long Island Jewish Medical Center*, 216 N.Y.S.3d 750, 752, 2024 N.Y. Slip Op. 04471 (2d Dept. 2024).

The Court considered the parties’ remaining contentions and found them without merit. All relief not expressly granted is denied.

Based upon the foregoing, it is

**ORDERED** that defendant's motion for summary judgment is denied, and it is further

**ORDERED** that plaintiff's cross-motion is granted, and it is further

**ORDERED** that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on counsel for defendant and to electronically file an affidavit of service thereof with the Kings County Clerk, and it is further

**ORDERED** that the parties are directed to appear for an Alternative Dispute Resolution Conference on December 17, 2024, at 11:30 AM.

This constitutes the Decision and Order of this Court.

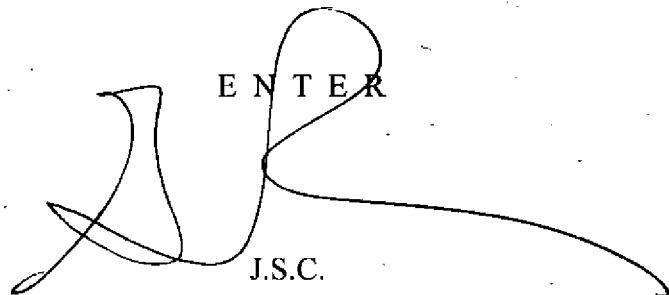
For Clerks use only

MG\_\_

MD\_\_

Motion Seq.#: 1, 2

ENTER



J.S.C.  
Hon. Genine D. Edwards