Wood v Brooklyn Gardens Nursing & Rehabilitation Ctr.
2024 NY Slip Op 34719(U)
October 9, 2024
Supreme Court, Kings County
Docket Number: Index No. 502404/20
Judge: Genine D. Edwards

At Medical Malpractice Early Settlement Part 6 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 9th day of October 2024.

P R E S E N T:

HON. GENINE D. EDWARDS,
Justice.

---x

GLENN WOODY WOOD, as Administrator of the Estate of GWENDOLYN SMALL, a/k/a GWENDOLYN JONES SMALL, Deceased,

Plaintiff,

-against-

BROOKLYN GARDENS NURSING AND REHABILITATION CENTER, a/k/a BISHOP HENRY B. HUCLES NURSING HOME, OXFORD NURSING HOME, INC., a/k/a OXFORD NURSING HOME, INTERFAITH MEDICAL CENTER, MAIMONIDES MEDICAL CENTER, RUTLAND NURSING HOME, INC., and KINGSBROOK JEWISH MEDICAL CENTER,

Defendants.

---x

DECISION, ORDER, AND JUDGMENT

Index No. 502404/20

Mot. Seq. No. 1-4

The following e-filed papers read herein: NYSCEF Doc Nos.:

Notice of Motion, Affirmations, and Exhibits.....	93-112; 115-143; 145-170; 172-188
Affirmations in Opposition, and Exhibits.....	193-218; 221-246; 249-274; 277-301
Reply Affirmations and Exhibits.....	305-306; 309-310;[1] 311; 314

In this action to recover damages for negligence, medical malpractice, wrongful death, and violation of Public Health Law § 2801-d, defendants Interfaith Medical Center ("IMC"), Kingsbrook Jewish Medical Center ("KJMC") and Rutland Nursing Home

---

[1] This Court did not consider the supplemental expert affirmation of Jeffrey Levine, M.D., dated June 24, 2024 ("Dr. Levine's supplemental affirmation"), which was included with the exhibits annexed to defendant Oxford's Reply Affirmation of the same date ("Oxford's reply affirmation"). *See Alvarellos v. Tassinari*, 222 A.D.3d 815, 201 N.Y.S.3d 489 (2d Dept. 2023); *Pena v. Geisinger Community Med. Ctr.*, 209 A.D.3d 663, 174 N.Y.S.3d 873 (2d Dept. 2022). Likewise, this Court did not consider any of the references to Dr. Levine's supplemental affirmation in Oxford's reply affirmation.

("Rutland") jointly, Oxford Nursing Home (sued herein as Oxford Nursing Home, Inc., a/k/a Oxford Nursing Home) ("Oxford"), and Maimonides Medical Center ("MMC") each moved for an order, pursuant to CPLR 3212, granting such defendant summary judgment dismissing the complaint as against it. Glenn Woody Wood ("plaintiff"), as the administrator of the Estate of his late mother, Gwendolyn Small, a/k/a Gwendolyn Jones Small, deceased (the "patient"), opposed all four motions via a joint expert affirmation of Ira Mehlman, M.D., a board-certified internist and emergency room physician ("plaintiff's expert affirmation").[2] Remaining defendant Brooklyn Gardens Nursing and Rehabilitation Center, a/k/a Bishop Henry B. Hucles Nursing Home ("BGNR"), did not move for summary judgment.

Summary

From January 10, 2018 to April 15, 2019, the patient was intermittently hospitalized (or resided, as applicable) in a defendant's facility (be it in a hospital or in a nursing home, including non-movant BGNR) (the "treatment period"). The patient died at MMC on April 15, 2019 from "Multiple Complications[,] Including Enterocutaneous Fistulas" due to [Surgical] Treatment of Umbilical Hernia and Urachal Cyst."[3]

---

[2] To be precise, plaintiff did not oppose the dismissal of (and thus abandoned) the portion of his fourth cause of action sounding in negligent hiring, training, and supervision as against IMC, KJMC, and MMC. *See Clarke v. New York City Health & Hosps.*, 210 A.D.3d 631, 177 N.Y.S.3d 681 (2d Dept. 2022); *114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757, 114 N.Y.S.3d 100 (2d Dept. 2019).

[3] An "enterocutaneous fistula" is "a fistulous passage connecting the intestine and skin of the abdomen"; an "umbilical hernia" is "a hernia in which bowel or omentum protrudes through the abdominal wall under the skin at the umbilicus"; a "urachal cyst" is "a [congenital] cystic remnant in the urachus derived from the intraembryonic part of the allantois"; and the "allantois" is "[a] fetal membrane developing from the hindgut (or yolk sac, in humans) [which] [i]n humans . . . becomes a fibrous cord, [known as] the (footnote continued)

Although the patient was only 60 years old at the inception of the treatment period, her comorbidities, at the time, were already unusually extensive; namely: (1) diabetes mellitus; (2) diabetic neuropathy; (3) a diabetic foot/heel ulcer; (4) chronic osteoarthritis with the ensuing wheelchair dependency; (5) deep venous thrombosis with the IVC filter placement; (7) myocardial infarction; (8) congestive heart failure; (9) coronary artery disease with four prior stent placements by way of percutaneous coronary angioplasty; (10) essential hypertension; (11) history of urinary tract infections; (12) hyperlipidemia; (13) obesity; and (14) a bipolar disorder in remission.[4] Although the patient was incontinent of both bladder and bowel, she was also passing urine through her umbilicus (as well as suffering from recurrent urinary tract infections) because of the congenital urachal sinus or cyst.

On March 12, 2018, the surgeons at MMC (after receiving a cardiac clearance for the patient from IMC's physicians) performed on the patient a six-hour-long open surgery for the "urachal sinus excision" and the "umbilical hernia repair." Twelve days later, on March 24, 2018, the patient underwent at MMC another surgery in the form of emergency exploratory laparotomy, lysis of adhesions, drainage of an intraperitoneal

---

urachus." Stedman's Medical Dictionary, Entry Nos. 336600, 406070, 224770, and 22730, respectively (online edition available on Westlaw).

[4] As one of MMC's experts, Nurse Nancy O'Loughlin Keelan ("Nurse Keelan"), pointed out (in ¶ 43 of her affirmation, dated January 12, 2024):

> Although the patient was chronologically in her sixties at the time of these hospitalizations, her metabolic age was much older due to years of chronic illness and immobility. Her skin was thinner, drier, and less elastic than a patient of similar age without the multiple comorbidities present in this case."

abscess, and a "Graham Patch"[5] for repair of the perforated gastric antral ulcer. The two surgeries (individually and collectively) took a profound toll on the patient's body in the form of the development and persistence of the post-operative surgical wounds and abscesses, multiple persisting infections (which over time became resistant to antibiotics), and the development and persistence of pressure ulcers.

For treatment of her post-operative complications, the patient was shuttled multiple times between the nursing homes (either Rutland, Oxford, or non-movant BGNH) or hospitals (either MMC, KJMC, or IMC) in the approximately eight-month period from March 31, 2018 when she was discharged from MMC to Oxford and until her terminal hospitalization at MMC, which started on November 28, 2018 and ended with her death on April 15, 2019.

On January 30, 2020, the patient's son as the administratror of her Estate commenced this action against the moving defendants (among others). The crux of plaintiff's claims – whether denominated as negligence, medical malpractice, wrongful death, or (in the case of moving defendants Rutland and Oxford) a violation of the Public Health Law – lay in the alleged *failures* of the individual defendants to perform the following:

(1) to "prevent [the patient's] bedsores from developing and deteriorating";

(2) to establish "[a] written turning and positioning 'schedule'" and to document the patient's turning and positioning at every two hours;

---

[5] A "Graham Patch" is a well-vascularized piece of omentum (fat which covers the intestines) that is brought over with the silk sutures to cover the perforation.

(3) "to implement a system to monitor the effectiveness of [the patient's] turning and positioning";

(4) "to order and implement [that the patient's heels be] elevated . . . at all times," "to offload [her] lower extremities at all times," and to offload the [patient from her] sacral area";

(5) "to limit [the patient's] sitting time";

(6) "to review and revise the care plan" as the patient's skin continued to deteriorate; and

(7) "to implement a proper wound care plan [for the patient]" and to document the as-ordered "abdominal surgical wound changes."

According to plaintiff's expert, the foregoing alleged failures (individually and collectively) were the *proximate cause* of the patient developing: (1) "sacral [and] heel pressure ulcer[s] and the subsequent infection," and (2) "severe infection and sepsis." Plaintiff's expert concluded that a "very reasonable effort to prevent the development of the ulcer[s] was not made[,] since the interventions required by the standard of care were not performed. Accordingly, the definition of [the] 'unavoidable' [pressure ulcers] cannot be met."

After discovery was completed and a note of issue was filed, defendants timely moved for summary judgment. On July 19, 2024, the motions were fully submitted and the Court reserved decision.

Standard of Review

In the medical-malpractice context, "[a] defendant moving for summary judgment . . . must demonstrate the absence of any material issues of fact with respect to at least one of the elements of a cause of action alleging medical malpractice: (1) whether the physician deviated or departed from accepted community standards of practice, or (2) that such a departure was a proximate cause of the plaintiff's injuries" and, where wrongful death is alleged, of wrongful death as well. *Rosenthal v. Alexander*, 180 A.D.3d 826, 118 N.Y.S.3d 658 (2d Dept. 2020) (internal citation omitted). "When a defendant in a medical malpractice action demonstrates the absence of any material issues of fact with respect to at least one of those elements, summary judgment dismissing the action should eventuate unless the plaintiff raises a triable issue of fact in opposition." *Schwartz v. Partridge*, 179 A.D.3d 963, 117 N.Y.S.3d 300 (2d Dept. 2020) (internal citations omitted). Plaintiff's physician's affirmation in opposition to a motion for summary judgment must attest to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury." *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). "General and conclusory allegations unsupported by competent evidence are insufficient to defeat a motion for summary judgment." *Nelson v. Lighter*, 179 A.D.3d 933, 116 N.Y.S.3d 360 (2d Dept. 2020).

"Liability under the Public Health Law contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent

and limit the deprivation and injury to the patient." *Jenack v. Goshen Operations, LLC*, 222 A.D.3d 36, 199 N.Y.S.3d 542 (2d Dept. 2023). "Thus, the basis for liability under Public Health Law § 2801-d . . . contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule." *Schwartz v. Partridge*, 179 A.D.3d 963, 117 N.Y.S.3d 300 (2d Dept. 2020) (internal quotation marks omitted).

Discussion

Here, the defendants each established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against each of them, through their respective physicians' affirmations and the patient's medical records. The physicians opined that the defendants did not deviate or depart from accepted community standards with respect to the prevention and treatment of the patient's pressure ulcers, and that her pressure ulcers were unavoidable because of her overall medical condition, multiple hospitalizations,[6] and extensive comorbidities. *Russell v. River Manor Corp.*, 216 A.D.3d 827, 188 N.Y.S.3d 191 (2d Dept. 2023); *Carradice v. Jamaica Hosp. Med. Ctr.*, 198 A.D.3d 863, 156 N.Y.S.3d 90 (2d Dept. 2021). Further, with respect to Public Health Law § 2801-d, Oxford and Rutland each established, as a matter of law, that the patient's alleged injuries did not arise due to any action or negligence of its respective employees. *See Russell v. River Manor Corp.*, 216 A.D.3d 827; *Jenack v. Goshen*

[6] By way of illustration, "[t]he patient had [a total of] nine (9) overnight admissions to [MMC] of various lengths." Nurse Keelan's Affirmation, ¶ 47.

Operations, LLC, 222 A.D.3d 36; *Gold v. Park Ave. Extended Care Ctr. Corp.*, 90 A.D.3d 833, 935 N.Y.S.2d 597 (2d Dept. 2011).

In opposition, plaintiff failed to raise a triable issue of fact.[7] Plaintiff's expert's affirmation was conclusory and speculative, failed to address the significance of the cumulatively significant impacts of the two surgeries on the patient's health, in the context of her pre-existing extensive comorbidities, and was superficial on the essential issue of proximate cause. *See Campbell v. Ditmas Park Rehabilitation & Care Ctr., LLC*, 225 A.D.3d 835, 208 N.Y.S.3d 220 (2d Dept. 2024); *Russell v. River Manor Corp.*, 216 A.D.3d 827; *Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept. 2023); *Lowe v. Japal*, 170 A.D.3d 701, 95 N.Y.S.3d 363 (2d Dept. 2019); *Novick v. South Nassau Communities Hosp.*, 136 A.D.3d 999, 26 N.Y.S.3d 182 (2d Dept. 2016).

Where, as is the instance here, the patient's pressure ulcers were not preventable or curable by the repeated medical, surgical, and nursing interventions at a total of five

---

[7] Contrary to defendants' contentions, plaintiff's expert, a double board-certified physician in Internal Medicine and Emergency Medicine, who averred that he was "intimately familiar with the risks of patients developing pressure ulcers and required interventions to reduce the risks of pressure ulcers developing in healthcare facilities," sufficiently laid a foundation for his opinions and demonstrated that he has the "requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable." *Gordon v. Zeitlin*, ___ A.D.3d ___, 216 N.Y.S.3d 726 (2d Dept. 2024) (internal quotation marks omitted). Further, "an expert's affidavit may be deemed sufficiently probative to defeat summary judgment if it makes reference to outside material of a kind accepted in the profession as reliable in forming a professional opinion[,] and such reference is accompanied by evidence establishing the out-of-court material's reliability." *Romano v. Stanley*, 90 N.Y.2d 444, 661 N.Y.S.2d 589 (1997) (internal quotation marks omitted). In that regard, this Court notes plaintiff's expert's reference to the "Pressure Ulcer Stages/Categories" in the report (albeit, outdated) of the National Pressure Ulcer Advisory Panel. The staging guidelines, as revised in 2016, are set forth in Laura E. Edsberg, Joyce M. Black, Margaret Goldberg, Laurie McNichol, Lynn Moore, & Mary Sieggreen, *Revised National Pressure Ulcer Advisory Panel Pressure Injury Staging System*, J WOUND OSTOMY CONTINENCE NURS., 2016;43(6):585-597 (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5098472/pdf/wocn-43-585.pdf [last accessed October 4, 2024]).

separate facilities, their development and overall persistence could not be relied on as the key indicator of the quality of care provided (or the lack thereof). Rather, the development and persistence of a pressure ulcer could have been a quality indicator only where (unlike the case here) a patient was either without risk factors or was at a low risk for developing pressure ulcers.

Ultimately, "[t]he presence of an injury does not mean that there was negligence." *Landau v. Rappaport*, 306 A.D.2d 446, 761 N.Y.S.2d 325 (2d Dept. 2003). The development and/or worsening of a pressure ulcer was not a basis, in and of itself, on which an inference of negligence or medical malpractice could be premised against a health-care provider. Plaintiff's expert's contention that Oxford and Rutland violated various cited state and federal regulations, ran contrary to the explicit language of 10 NYCRR 415.12 (c) (1) and 42 CFR 483.25 (b) (1) (i), respectively, which (in each instance) exempted medical facilities from liability for pressure ulcers where "the individual's clinical condition demonstrate[d] that they were unavoidable," as was the instance here.[8]

Likewise unavailing were plaintiff's expert's additional contentions that (1) "[a] written turning and positioning 'schedule' was not found in the Oxford chart"; (2) "[t]he [IMC] records fail to document turning and positioning every two hours as required by the standard of care"; (3) "incomplete entries [in Rutland's chart] reveal[ed] that

---

[8] 10 NYCRR § 415.12 (c) provides that a nursing home "shall ensure that: (1) a resident who enters the facility without pressure sores does not develop pressure sores *unless the individual's clinical condition demonstrates that they were unavoidable despite every reasonable effort to prevent them*; and (2) a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing" (emphasis added).

physician orders were not carried out"; and (4) Rutland "failed to relate accurate wound assessments" because there were "large gaps in [its] clinical documentation." Indeed, "[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 [pressure] ulcer itself." *Braunstein v. Maimonides Med. Ctr.*, 161 A.D.3d 675, 78 N.Y.S.3d 344 (1st Dept. 2018) (citing *Topel v. Long Is. Jewish Med. Ctr.*, 55 N.Y.2d 682, 446 N.Y.S.2d 932 [1981]). The alleged omissions in the turning and positioning and in wound-care records maintained by defendants were immaterial and (in and of themselves) could not have resulted in injury to the patient. *See Shapiro v. Gurwin Jewish Geriatric Nursing & Rehabilitation Ctr.*, 84 A.D.3d 1348, 923 N.Y.S.2d 894 (2d Dept. 2011).

Further, plaintiff's expert's opinions on proximate cause failed to differentiate between the alleged acts and omissions of various defendants in the course of the approximately 16-month treatment period. *See Lowell v. Flom*, 195 A.D.3d 801, 145 N.Y.S.3d 823 (2d Dept. 2021), *lv. denied* 37 N.Y.3d 917, 157 N.Y.S.3d 847 (2022); *Niedra v. Mt. Sinai Hosp.*, 129 A.D.3d 80, 111 N.Y.S.3d 636 (2d Dept. 2015).

In sum, this Court determined that plaintiff's expert's opinions as to both the departure and proximate cause elements of plaintiff's claims were conclusory and unresponsive to the opinions of defendants' respective experts. *See Van DeVeerdonk v. North Westchester Restorative Therapy & Nursing Ctr.*, 223 A.D.3d 702, 204 N.Y.S.3d 132 (2d Dept. 2024); *Russell v. River Manor Corp.*, 216 A.D.3d 827; *Tsitrin v. New York Community Hosp.*, 154 A.D.3d 994, 62 N.Y.S.3d 506 (2d Dept. 2017). Accordingly, dismissal of the complaint as against each of four moving defendants is warranted. *See*

Jenack v. Goshen Operations, LLC, 222 A.D.3d 36; *Gold v. Park Ave. Extended Care Ctr. Corp.*, 90 A.D.3d 833.

The Court reviewed plaintiff's remaining contentions and found them unavailing or moot in light of its determination.

Conclusion

Based on the foregoing, it is

ORDERED that the respective motions of defendants Interfaith Medical Center, Kingsbrook Jewish Medical Center and Rutland Nursing Home jointly, Oxford Nursing Home (sued herein as Oxford Nursing Home, Inc., a/k/a Oxford Nursing Home), and Maimonides Medical Center are each granted, and the complaint is dismissed in its entirety as against each such moving defendant with prejudice and without costs or disbursements, and it is further

ORDERED that the clerk is directed to enter judgment in favor of each moving defendant, and it is further

ORDERED that the action is severed and continued against remaining defendant Brooklyn Gardens Nursing and Rehabilitation Center, a/k/a Bishop Henry B. Hucles Nursing Home, and the caption is amended as follows:

----------x

GLENN WOODY WOOD, as Administrator of the Estate of GWENDOLYN SMALL, a/k/a GWENDOLYN JONES SMALL, Deceased,

Plaintiff,

-against-

BROOKLYN GARDENS NURSING AND REHABILITATION CENTER, a/k/a BISHOP HENRY B. HUCLES NURSING HOME,

Defendant.

----------x

; and it is further

ORDERED that IMC's counsel shall electronically serve a copy of this Decision, Order, and Judgment with notice of entry on the other parties' respective counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk, and it is further

ORDERED that the parties shall appear at an Alternative Dispute Resolution Conference on October 24, 2024, at 10:30 AM.

This constitutes the Decision, Order, and Judgment of the Court.

ENTER,

J. S. C.

Hon. Genine D. Edwards