Wilkie v Sarkissian
2025 NY Slip Op 35586(U)
February 7, 2025
Supreme Court, Queens County
Docket Number: Index No. 707622/2021
Judge: Tracy Catapano-Fox
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Short Form Order
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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MARGO WILKIE, as Administrator of the Estate of VINCENT WILKIE and MARGO WILKIE, Individually,

Plaintiffs,

-against-

EDMOND SARKISSIAN, M.D., and ADVANTAGECARE PHYSICIANS, P.C.,

Defendants.

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Index No. 707622/2021

Part MDP
Motion Date: January 8, 2025

Sequence No. 1

Calendar No. 44

The following papers numbered EF-25 through EF-42 read on this motion by defendants for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits	EF25-EF37
Affirmation in Opposition, Exhibits	EF38-EF40
Reply Affirmation	EF42

Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendants' motion for summary judgment and dismissal of plaintiff's Complaint is granted as to plaintiff's claims for lack of informed consent, negligent hiring and under a theory of *res ipsa loquitor*, but denied as to plaintiff's claims for medical malpractice and wrongful death. Plaintiff commenced this action for medical malpractice, wrongful death, lack of informed consent, loss of consortium and negligent hiring against defendants who allegedly failed to diagnose and treat plaintiff decedent Vincent Wilkie's pulmonary fibrosis and interstitial lung disease, resulting in injuries and death. Plaintiff filed the Summons and Complaint on April 1, 2021, and issue was joined on April 16, 2021.

Defendants argue summary judgment is warranted, as they did not depart from good and accepted medical care, and their acts or omissions did not proximately cause decedent's injuries

and death. They present the pleadings, decedent's medical records, parties' deposition testimony, and the expert affirmation of Steve H. Salzman, M.D. in support of their motion. Dr. Salzman affirmed he is a licensed physician in New York, who is board certified in Internal Medicine, Pulmonary Disease, Critical Care Medicine and Sleep Medicine. He reviewed the pleadings, parties' deposition testimony, decedent's medical records, and based upon the records and his training, knowledge and experience, rendered the following opinions within a reasonable degree of medical certainty.

Dr. Salzman opined within a reasonable degree of medical certainty that defendants did not depart from accepted standard of medical care and did not proximately cause decedent's injuries or death. He noted decedent presented to defendant Dr. Sarkissian on April 17, 2013 with fever, chills, and cold and congestion symptoms after returning from Nigeria. Dr. Salzman opined Dr. Sarkissian obtained a proper history from decedent, performed a thorough examination, and appropriately ordered a chest x-ray. He noted the radiologist report indicated no active pneumonic consolidation, but noted there were increased interstitial markings in both lungs, which the radiologist noted may or may not be a chronic finding. Dr. Salzman opined Dr. Sarkissian properly reviewed the results of decedent's chest x-ray, assessed clinically that decedent had pneumonia and treated him appropriately and within the standard of care. He opined there is no merit to plaintiff's claim that Dr. Sarkissian failed to act on a pulmonary abnormality of bilateral interstitial infiltrates, as "interstitial markings" is not equivalent to interstitial lung disease.

Dr. Salzman opined the radiology report did not require Dr. Sarkissian to refer decedent to a pulmonologist based upon the interpretation "interstitial markings" as this was not a significant finding based upon decedent's presentation and history. He opined the interstitial lung markings could be caused by infection and did not necessarily indicate lung disease, and accepted standards of medical care did not require Dr. Sarkissian to act on findings or order a further workup or referral. He noted decedent returned to Dr. Sarkissian on April 25, 2013 and May 31, 2013 with no chest pain, no shortness of breath, and no complaints of fever, chills or chest pain. Dr. Salzman noted decedent returned to Dr. Sarkissian on July 2, 2013, with complaints of back pain when he breathed but no shortness of breath, and while Dr. Sarkissian properly ordered a chest x-ray for July 3, 2013, decedent did not pursue it. Dr. Salzman opined there was no indication for Dr. Sarkissian to re-visit the interstitial markings from the April 2013 x-ray, based upon decedent's documented symptoms, complaints and tests.

Dr. Salzman opined Dr. Sarkissian appropriately assessed decedent during the May 19, 2015 visit and advised him to take his diabetes medication, monitor glucose and stop smoking.

He further opined there was no reason to order further testing or refer decedent to a pulmonologist, as he lacked symptoms and the slight drop in oxygen saturation could properly be attributed to decedent's return to smoking. Dr. Salzman opined Dr. Sarkissian obtained a proper history and performed a thorough physical examination on September 8, 2015, when decedent returned with complaints of body aches and headaches. Dr. Salzman opined based upon Dr. Sarkissian noting dry crackles on left base that Dr. Sarkissian appropriately ordered a chest x-ray, CT of the chest without contrast and laboratory studies, and his plan to follow-up one week later was appropriate and within the standard of care. He opined the September 8, 2015 chest x-ray was radiologic evidence that decedent's condition was stable, with no indication of a progressive lung condition. Dr. Salzman also opined the September 11, 2015 CT report suggested a stable, nonspecific condition and did not mention interstitial lung disease in the findings or impression portion of the report.

Dr. Salzman opined Dr. Sarkissian acted within accepted standards of medical care when relying on radiology interpretations and reports that did not identify interstitial lung disease and did not indicate a need for further testing or a pulmonology referral. He opined if decedent had been evaluated by a pulmonologist, he would not have been started on medication, as the available dedications had limited efficacy and no evidence of improved survival. Dr. Salzman opined Dr. Sarkissian's care and treatment of decedent on September 16, 2015 was within accepted standards of medical care, as he appropriately obtained a proper history, performed a thorough physical examination and review of symptoms, and documented right lower abdomen tenderness. He further opined Dr. Sarkissian appropriately reviewed the September 11, 2015 CT scan, appreciated and documented the CT scan findings, and there was no indication to order additional testing or referrals. Dr. Salzman opined Dr. Sarkissian appropriately referred decedent to general surgery on September 21, 2015, when decedent informed him the hospital said he had inflammation around the appendix. Dr. Salzman further opined Dr. Sarkissian appropriately cared and treated decedent during subsequent visits in 2016, and there was no reason to refer decedent to pulmonology or for further testing and treatment.

Dr. Salzman opined Dr. Sarkissian appropriately treated decedent within the standard of care on April 5, 2017, when he noted for the first time decedent complained of shortness of breath on exertion. He noted Dr. Sarkissian appropriately referred decedent for a chest x-ray, ECG and cardiology, and Dr. Sarkissian appropriately appreciated the chest x-ray findings and ordered a CT scan and referral to pulmonology on May 17, 2017. Dr. Salzman opined there was no indication for an earlier referral to pulmonology because decedent was asymptomatic and without complaints of shortness of breath or a radiologist's impression of interstitial lung disease until April 5, 2017.

Dr. Salzman further opined an early referral to pulmonology prior to May 17th would not have changed decedent's treatment or outcome, as it is more than likely he would not have been prescribed medication. Dr. Salzman opined Dr. Sarkissian's plan to continue medications, diet and exercise and repeat labs in December 2017 was within accepted standards of medical care. He noted on March 2, 2019, decedent presented to Dr. Sarkissian with increased shortness of breath, and Dr. Sarkissian referred him to pulmonology and for a CT chest scan, as well as repeat evaluations with cardiology and echocardiogram. It is noted on March 10, 2019, decedent presented to LIJ Northwell Health for coughing and shortness of breath, was transferred to NYU Langone on March 26, 2019 for interstitial lung disease, and passed away on April 3, 2019. Dr. Salzman opined defendants timely evaluated decedent, and did not fail to diagnose and treat pulmonary fibrosis or decreased lung function. He opined the standard of care did not require a lung biopsy, as T scans are better way to look at the entire lung, and Dr. Sarkissian as an internist would not perform a biopsy or obtain lung tissue samples. He further opined further testing was not indicated based upon decedent's complaints, symptoms, and results of testing. Dr. Salzman opined there was no basis for defendants to establish a treatment plan for pulmonary fibrosis because decedent had a chronic and stable oxygen saturation within normal range. He opined decedent would not have been a candidate for lung transplant based upon age, history of smoking, and documented non-compliance with diabetes medication. He also opined there was no indication to stage pulmonary fibrosis because it was not the standard of care. Dr. Sarkissian also opined defendants did not perform any medical or surgical procedure for which informed consent was required and did not cause harm to decedent. Based upon the above, defendants argue they did not depart from accepted standard of medical care and did not proximately cause decedent's injuries and death.

Plaintiff opposes defendants' motion, arguing there are issues of fact in dispute. Plaintiff submitted a memorandum of law and an affirmation from Fariborz Rezai, M.D. in support of the opposition. She argues defendants departed from good and accepted medical practice in Dr. Sarkissian's care of decedent from 2013 through 2019, by failing to timely diagnose and treat decedent's interstitial lung disease (ILD) and idiopathic pulmonary fibrosis (IPF), including failing to refer decedent to a pulmonologist or order additional diagnostic testing. Plaintiff further argues defendants' departures were the proximate cause of a substantial delay in treatment that deprived decedent of life-extending treatment, better quality of life and an opportunity for a better outcome. Plaintiff presents the affirmation of Dr. Fariborz Rezai, a licensed physician in New Jersey who is board certified in pulmonary diseases, critical care medicine, and neurocritical care. Dr. Rezai affirmed he is familiar with the standard of care related to the management, diagnosis and treatment of ILD and IPF in the state of New York in the relevant time period, and reviewed defendants'

motion papers and decedent's medical records in rendering opinions.

Dr. Rezai opined based upon his twenty-years of medical experience that defendants departed from accepted medical practice by failing to promptly diagnose and manage decedent's ILD and IPF from April 17, 2013 through April 3, 2019. He argued decedent's radiological evidence from 2013, 2015 and 2017 consistently indicated findings suggestive of ILD, yet Dr. Sarkissian failed to refer decedent to a pulmonologist or order additional essential testing, such as pulmonary function tests or high-resolution CT scans. Dr. Rezai opined Dr. Sarkissian departed from the standard of care in failing to refer decedent to the pulmonologist or order additional testing even after Dr. Malhotra, a cardiologist, explicitly advised Dr. Sarkissian that decedent's shortness of breath in 2017 and 2018 was likely pulmonary in nature.

Dr. Rezai opined defendants missed critical opportunities to timely diagnose and treat decedent by failing to refer decedent to a pulmonologist or order additional testing, and had Dr. Sarkissian done so, it could have slowed the disease progression, improved decedent's quality of life, and prolong his life expectancy. He opined the standard of care required Dr. Sarkissian to further investigate the presence of elevated eosinophils in combination with the interstitial markings on imaging, as well as decedent's overseas travel to areas known for parasitic infections. Dr. Rezai opined ignoring elevated eosinophils was a significant departure from the standard of care because it delayed the opportunity to identify and address a potentially treatable cause of decedent's symptoms. He opined decedent's 2015 imaging revealed findings that are diagnostic of ILD and strongly suggestive of IPF, and Dr. Sarkissian departed from the standard of care in referring decedent to a pulmonologist and ordering further testing at that time. Dr. Rezai opined this continued failure created a missed opportunity to identify a potentially reversible cause of ILD or initiate antifibrotic therapy to slow disease progression. Dr. Rezai opined defendants' departure proximately caused decedent's pain and suffering, as well as his premature death.

Dr. Rezai noted the 2017 medical records showed decedent was experiencing shortness of breath on exertion, a key symptom of pulmonary fibrosis, and imaging showed fibrotic changes and bronchiectasis that warranted an autoimmune workup or other diagnostic evaluation to identify the underlying cause of the inflammation. He disagreed with defendants' expert, and opined decedent exhibited persistent symptoms and abnormal findings, including crackles, over several years that warranted a referral and further testing. Dr. Rezai opined Dr. Sarkissian departed from the standard of care in ignoring Dr. Malhotra's advice to refer decedent to a pulmonologist after Dr. Malhotra diagnosed decedent with pulmonary hypertension. He opined Dr. Sarkissian's failure to refer decedent to a pulmonologist was a departure from the standard of care and

proximately caused decedent's injuries and death. Dr. Rezai opined defendants' failure prevented decedent from obtaining other treatments, and the standard of care required early intervention with antifibrotic agents that could have slowed the progression of IPF. He also disagreed with defendants' expert that decedent was not a candidate for a lung transplant. Dr. Rezai also noted Dr. Sarkissian failed to communicate decedent's condition with his family with regard to his pulmonary fibrosis, which represented a signature departure from the standard of care that significantly reduced decedent's opportunity for a better outcome. Dr. Rezai opined decedent's serious complications could have been avoided if Dr. Sarkissian had timely diagnosed, followed up and ordered medical interventions for ILD and IPF, and defendants' failure to do so was a substantial factor in causing decedent's severe respiratory compromise, conscious pain and suffering, and death. Based upon the above, plaintiff argues summary judgment is not warranted.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id*.). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp*., 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) However, expert opinions that are conclusory, speculative,

or unsupported by the record are insufficient to raise triable issues of fact. (*Longhi v. Lewit*, 187 A.D.3d 873, 878 [2d Dept. 2020].)

In an action to recover damages for wrongful death, the decedent's personal representative must establish that the defendant's wrong fact, neglect or default caused the decedent's death. (*Eberts v. Makarczuk*, 52 A.D.3d 772, 772-773 [2d Dept. 2008].)

To establish a cause of action to recover damages based upon lack of informed consent, a plaintiff must prove "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury." (*Gilmore v. Mihail*, 174 A.D.3d 686, 688 [2d Dept. 2019].)

In general, a hospital or medical facility may be vicariously liable for the negligence or malpractice of its employees acting within the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

Defendants presented a prima facie case of entitlement to summary judgment, based upon the deposition testimony, decedent's medical records and expert affirmation of Dr. Salzman. (*See Donnelly v. Parikh*, 150 A.D.3d 820 [2d Dept. 2017].) They demonstrated Dr. Sarkissian provided appropriate medical care to decedent within the standard of care from 2013 through 2019 and none of his actions or inactions were the proximate cause of decedent's injuries and death. Defendants demonstrated through Dr. Salzman's affirmation that Dr. Sarkissian acted within accepted standards of medical care when relying on radiology interpretations and reports that did not identify interstitial lung disease and did not indicate a need for further testing or a pulmonology referral. Defendants established Dr. Sarkissian obtained a proper history from decedent, performed a thorough examination, and appropriately ordered a chest x-ray at the initial visit. They further demonstrated Dr. Sarkissian continued to treat decedent within the standard of care through 2019, and there was no indication of shortness of breath or ILD during decedent's 2013, 2015, and 2017 visits. They further demonstrated through Dr. Salzman's affirmation that an early referral to pulmonology prior to May 17, 2019 would not have changed decedent's treatment or outcome, as it is more than likely decedent would not have been prescribed medication. Dr. Salzman opined Dr. Sarkissian's plan to continue medications, diet and exercise and repeat labs in

December 2017 was within accepted standards of medical care, and opined Dr. Sarkissian's actions or inactions did not proximately cause decedent's injuries and death.

Plaintiff failed to raise a triable issue of fact as to the causes of action for lack of informed consent, negligent hiring, or based upon a theory of *res ipsa loquitor*. However, plaintiff raised a triable issue of fact with regard to whether defendants departed from the standard of care by failing to timely refer decedent to a pulmonologist and whether this departure was a proximate cause of decedent's conscious pain and suffering and death. Plaintiff's expert Dr. Rezai established decedent's complaints of shortness of breath upon exertion and radiological imaging from 2013 and periodically afterward suggested ILD that warranted referral to a pulmonologist. He further established Dr. Sarkissian's failure to timely refer decedent was a departure from the standard of care and specifically relied upon the medical records and deposition testimony to demonstrate a triable issue of fact. Defendants further demonstrated through Dr. Rezai's affirmation that the delay in referral proximately caused decedent's opportunity for a better outcome, resulted in progression of the disease, conscious pain and suffering and death. However, plaintiff failed to demonstrate through Dr. Rezai's affirmation that the failure to seek additional testing proximately caused decedent's injuries and death, as he failed to sufficiently refute defendants' expert and his opinions as to this departure were conclusory and vague.

Accordingly, defendants' motion for summary judgment pursuant to CPLR §3212 is granted solely as to plaintiff's causes of action for lack of informed consent, *res ipsa loquitor*, and negligent hiring, but denied as to plaintiff's claims for medical malpractice and wrongful death. The remaining parties shall appear for a pretrial conference on Wednesday, March 26, 2025 at 9:30am in Courtroom 48.

Dated: February 7, 2025

Tracy Catapano-Fox

Hon. Tracy Catapano-Fox, J.S.C.