# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. PAUL A. GOETZ** **PART** **47**

***Justice***

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KIRSTEN RORKE, as Executor of the Estate of GEORGE EDWARD YARBROUGH, JR.,

Plaintiff,

- v -

CARMEL RICHMOND NURSING HOME, INC., ARCHCARE COMMUNITY SERVICES, INC., JENNY GUO, FREDERICK BECKETT III, M.D.,

Defendants.

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**INDEX NO.** 151285/2020

**MOTION DATE** 04/14/2025

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for JUDGMENT - SUMMARY.

In this medical malpractice and negligence action arising from the death of plaintiff's husband, George Edward Yarbrough Jr. (the decedent), defendant Frederick Beckett III, MD (Dr. Beckett), moves pursuant to CPLR § 3212 to dismiss the complaint as against him.

## BACKGROUND

In 2016, the decedent suffered a stroke which left him generally bedridden (NYSCEF Doc No 122, p. 39). Starting in May of 2017, the decedent became a resident of defendant Carmel Richmond Nursing Home (Carmel) (NYSCEF Doc No 30 ¶ 50).

In July of 2019, the decedent was admitted to Staten Island University Hospital (SIUH) due to lethargy; he was discharged from SIUH and transferred back to Carmel on July 31, 2019 (*see generally*, NYSCEF Doc Nos 130-133). On August 28, 2019, the decedent was again admitted to SIUH due to lethargy; he was discharged and transferred back to Carmel on September 5, 2019 (*id.*).

On September 6, 2019, Gina Esposito, a Carmel nurse, observed that the decedent had a sacral wound measuring 2.5 x 3.5 cm (NYSCEF Doc No 133, p. 906). On September 13, 2019, Esposito assessed the wound and noted that had progressed to stage two, measuring 4 x 6 cm (*id.*). Esposito assessed the wound again on September 20, 2019, at which time it measured 7.5 x 7.5 cm, but she was unable to determine the stage of the wound because it was covered by yellow slough (*id.*). She requested that a wound consultant visit the decedent, and defendant Jenny Guo approved the request on September 22, 2019 (*id.*).

On September 27, 2019, Dr. Beckett, a physician who made weekly rounds at Carmel as an employee of Vohra Wound Care, performed the requested examination (NYSCEF Doc No 126, p. 14). In Dr. Beckett's initial wound evaluation and management summary, he measured the wound at 10.5 x 13 cm, noted that the wound was "unstageable (due to necrosis)," and recommended "reposition[ing]" the decedent "per facility protocol" and debridement of the wound (NYSCEF Doc No 134). Under "reason for no debridement," Dr. Beckett wrote that he was "[u]nable to obtain consent from patient or surrogate and unable to contact primary physician" (*id.*); however, several days later (on October 2, 2019), he added the following note: "unable to obtain consent from resident and family at the time pr of previous note. primary physician not contacted for consent as noted in previous note, this was an error" (*id.*).

Dr. Beckett's September 27, 2019 evaluation summary did not state whether the decedent was "exhibiting any signs of infection associated with the sacral wound, such as a bad odor, [] discharge, [or] erythema (redness) surrounding the edges," or that the decedent had a fever, but Dr. Beckett asserts that "[h]ad such signs been present, or reported to [him], [he] would have documented their presence . . . and taken action to get this wound debrided emergently" (NYSCEF Doc No 136).

The following day, the decedent developed a fever of 105° and was transferred to SIUH (NYSCEF Doc No 122, pp. 103-04). There, he was diagnosed with "septic shock; sacral decubitus ulcer, stage III; [and] necrosis of sacral muscle due to chronic ulcer of sacrum," and underwent a debridement procedure (NYSCEF Doc No 132, p. 33, 199).[1] Though no photos were taken of the wound before the procedure, the decedent's sister captured a photo of it on September 30, 2019, illustrating the severity of his condition and the surgery (NYSCEF Doc No 143, p. 6). The decedent did not recover and was transferred to palliative care before he passed away on October 12, 2019 from "sepsis and other maladies" (NYSCEF Doc No 144 ¶ 18).

Expert Affirmations

In support of his motion, Dr. Beckett submits the affirmation of Igor A. Laskowski, MD, PhD, a physician experienced in vascular surgery (NYSCEF Doc No 137). Dr. Laskowski opines that "[a]lthough it is possible that there was colonized bacteria underneath the eschar when Dr. Beckett evaluated the decedent on 9/27/19," the evaluation "appeared to be complete and thorough" and "the clinical picture did not appear to be urgent," and thus "Dr. Beckett's recommendations [] were [] appropriate" under the circumstances (*id.* [also noting that "wounds can change/deteriorate" quickly]).

In opposition, plaintiff submits the expert affirmation of a physician with "experience evaluating and managing conditions like pressure ulcers, chronic wounds, and associated complications including infection and sepsis" (NYSCEF Doc No 144 [expert's name redacted]). Plaintiff's expert opines that "the wound's progression, presence of yellow slough, necrotic

[1] Plaintiff testified that when the doctors "opened up the wound," a "hideous . . . smell permeated every room in every corner of Critical Care," such that "doctors [] walking by [asked,] where is the dead body" (*id.*, pp. 75-77). Plaintiff had only smelled a similar odor from the decedent once at Carmel, which was the prior afternoon (*id.*, p. 78), i.e., the same day the decedent was examined by Dr. Beckett. At the time, plaintiff "didn't [] know what the smell was" and had been asked to step out of the room so that nurses could "change[] his diaper" but she speculated that "they must have been wrapping up the wound" (*id.*).

tissue, purulent exudate, testimony of malodors, and other signs noted in the records and by Nurse Esposito [] indicate that infection and early sepsis were already developing well before Dr. Beckett's initial consultation on September 27, 2019," and "Dr. Beckett should have noticed these clear signs of infection and performed a debridement or sent the decedent to the hospital" (*id.*). Plaintiff's expert further asserts that "the standard of care requires evaluation of basic vital signs" and there is no indication that Dr. Beckett did so; and Dr. Beckett's failure to pursue consent to perform the debridement was a "deviation from the standard of care," and even if he could not obtain consent for the procedure, he "should have sent decedent to the hospital" (*id.*).

**DISCUSSION**

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be

examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Dr. Beckett asserts that "the sole focus of the plaintiff's claim against [him] can only be a failure to appropriately treat the plaintiff's decubitus ulcer," but that the affirmation of Dr. Laskowski confirms that Dr. Beckett performed the examination within the "applicable standards of medical care" (NYSCEF Doc No 113, pp. 8-10). In opposition, plaintiff argues that she not only alleges that Dr. Beckett failed to appropriately treat the decedent, but that he "fail[ed] to suspect infection, [] account for past medical history, [and] properly document" the details of the examination (NYSCEF Doc No 141, p. 8). Plaintiff notes that Dr. Beckett "offers no details about what steps, if any, he actually took" to obtain consent for the debridement procedure; Dr. Beckett should have considered "the explosive growth (over about 400%) of the wound"; and "[s]everal of the witnesses presented conflicting testimony that puts their credibility in issue" (*id.*, pp. 9-13 [e.g., "Dr. Beckett testified that he relied on nurses to notify him about deteriorating wounds[,] yet professed no knowledge of worsening symptoms or escalation requests"; "The timing and content of Dr. Beckett's October 2 note—attempting to revise prior documentation he later recanted—[]raise serious concerns"]). Finally, plaintiff argues that "Dr. Laskowski's affirmation is of no probative value" because, *inter alia*, he did not review or address all pertinent evidence (*id.*, pp. 14-16).[2]

[2] Plaintiff also asserts that the affirmations submitted in support of the motion fail to include the required affirmation of truth of statement and notarization as required by CPLR § 2106 (*id.*, pp. 16-17). However, each of the affirmations begin with substantially compliant language (NYSCEF Doc Nos 113, 136, 137 ["affirm[ing] the following to be true under the penalties of perjury"]; CPLR § 2106 ["such affirmation shall be in substantially the

At the outset, Dr. Laskowski's affirmation is of limited import because he "relied, in part, on [Dr. Beckett's] sharply disputed version of the facts" (*Sepesi v Watson*, 124 AD3d 1021, 1022 [3rd Dept 2015]; NYSCEF Doc No 137 [Dr. Laskowski stating: "Dr. Beckett was not able to obtain consent for debridement"; the "wound at the time of Dr. Beckett's evaluation was not frankly infected"; "had [] signs [of infection] been present, [Dr. Beckett] would have documented their presence"; "Evidence of systemic infection [] did not become apparent until the following evening"]).

It is undisputed that the wound nearly doubled in size each week from the time it was first discovered on September 6, 2019 to Dr. Beckett's examination on September 27, 2019 (NYSCEF Doc No 133, p. 906); and at the time of the examination, it measured 10.5 x 13 cm (NYSCEF Doc No 134). Notably, this rapid growth was not documented in the examination report (*id.*), and Dr. Laskowski does not address its significance, if any, in his affirmation (NYSCEF Doc No 137). Plaintiff's expert, on the other hand, asserts that "[t]he size and historical progression of the wound alone was sufficient basis to suspect infection" (NYSCEF Doc No 144).[3] Additionally, Dr. Laskowski states that Dr. Beckett's evaluation "appeared to be complete and thorough" (NYSCEF Doc No 137), however, Dr. Beckett failed to document the decedent's vital signs (NYSCEF Doc No 134). While Dr. Beckett attests that "there was no report of any fever" (NYSCEF Doc No 136), he does not clarify whether he took the decedent's temperature and other vital signs, which plaintiff's expert asserts was a deviation of the standard

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[suggested] form"]) and "the amendments to CPLR 2106 . . . now permit a statement to be made 'under the penalties of perjury' without notarization" (*Fifth Partners LLC v Foley*, 227 AD3d 543, 544 [1st Dept 2024]).

[3] Counsel for Dr. Beckett insists that the photo of the wound taken on September 30, 2019 (NYSCEF Doc No 143, p. 6) is "irrelevant" to the issue of how the wound presented at Dr. Beckett's examination and only establishes how it looked after "a surgical debridement [] which completely altered the appearance and size of the wound" (NYSCEF Doc No 148). The photo shows that the surgeons operated on a large part of the decedent's sacral area and cut deeply, suggesting that the wound was of a significant size and severity only one day after the examination. While the photo does not establish as a matter of law that the wound was so conspicuously urgent at the time of examination that Dr. Beckett should have acted on it, it is at least probative of this issue.

of care (NYSCEF Doc No 144 ["[o]n initial consultation, the standard of care requires evaluation of basic vital signs"]). "Conflicting expert [opinions such as these] raise issues of fact and credibility that cannot be resolved on a motion for summary judgment" (*Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004]; *Artemiou v City of New York*, 220 AD3d 437, 439 [1st Dept 2023]).

Plaintiff's testimony as to the odor emanating from the decedent on the day of the examination, and again during his debridement procedure, also conflicts with Dr. Beckett's assertions that the wound presented no odor (*compare*, NYSCEF Doc No 122, pp. 75-78 [plaintiff testifying that when the doctors "opened up the wound," a "hideous . . . smell permeated every room in every corner of Critical Care" which plaintiff had smelled the prior afternoon when the nurses were apparently "wrapping up the wound"] *with* NYSCEF Doc No 136 [Dr. Beckett stating in his affirmation that "the decedent [] was not exhibiting any signs of infection associated with the sacral wound, such as bad odor"]). Contradictory sworn statements such as these raise questions of fact which cannot be resolved on a motion for summary judgment (*Lowman v Consolidated Edison Co. of N.Y., Inc.*, 220 AD3d 510, 511 [1st Dept 2023] [summary judgment "properly denied" where contradictory testimony was submitted]; *Matter of Halpern v White*, 189 AD3d 407, 408 [1st Dept 2020] ["Issues of fact presented by . . . conflicting deposition testimony [] preclude summary judgment"]; *Evans v Acosta*, 169 AD3d 438, 439 [1st Dept 2019] ["The conflicting testimony of the two eyewitnesses . . . , as well as the conflicting expert opinions, present triable issues of fact and credibility precluding summary judgment"]).

Finally, as noted by plaintiff, issues of fact remain as to whether Dr. Beckett took any steps to obtain the consent needed to perform the debridement procedure. In Dr. Beckett's

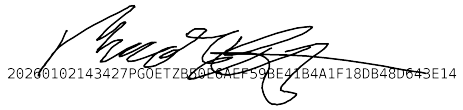
examination report, he wrote on the date of the exam that he was "[u]nable to obtain consent from patient or surrogate and unable to contact primary physician," but several days later, added that this note "was an error," and that the "primary physician [was] not contacted for consent" (NYSCEF Doc No 134). This issue was not adequately clarified in Dr. Beckett's deposition (NYSCEF Doc No 126, pp. 50-52) or the motion (NYSCEF Doc No 113, p. 9 [simply stating that "Dr. Beckett was not able to obtain consent"]), and Dr. Beckett did not address it in his affirmation in support (NYSCEF Doc No 136). Plaintiff's expert asserts that "it is a deviation from the standard of care to merely attempt to contact a primary care physician and take no further action when that attempt fails," and that in any event, "Dr. Beckett should have sent decedent to the hospital" (NYSCEF Doc No 144). In reply, counsel for Dr. Beckett argues that "plaintiff and his expert fail to [] establish that had the decedent been sent to the hospital on 9/27/19 instead of 9/28/19, that it would have made any difference in the damages or the outcome" (NYSCEF Doc No 148). However, it was Dr. Beckett's burden "to demonstrate the absence of any material issues of fact" as to causation (*Pullman*, 28 NY3d at 1062), and he failed to meet that prima facie burden on the instant motion.

Accordingly, Dr. Beckett's motion for summary judgment dismissing the complaint against him will be denied.

## CONCLUSION

Based on the foregoing, it is

ORDERED that the motion is denied in its entirety.




1/2/2026
DATE

PAUL A. GOETZ, J.S.C.

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