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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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KENNETH R. KALSTEIN, as Temporary Guardian and on behalf of **SYLVIA KALSTEIN,** an Incapacitated Person,

Plaintiffs,

-against-

COUNTY OF NASSAU AND NASSAU HEALTH CARE CORPORATION d/b/a NASSAU UNIVERSITY MEDICAL CENTER ,

Defendants.

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TRIAL PART: 10

NASSAU COUNTY

INDEX NO: 006371-10

MOTION SEQ. NO: 1

SUBMIT DATE: 1/18/12

The following papers having been read on this motion:

Notice of Motion.....1
Answering Affidavit.....2
Reply.....3

This motion by the defendant Nassau Health Care Corporation d/b/a Nassau County Medical Center ("NUMC") for an order pursuant to CPLR§ 3212 granting it summary judgment dismissing the complaint against it is denied.

The plaintiff in this action, Sylvia Kalstein's son Kenneth R. Kalstein, seeks to recover damages for medical malpractice based upon the defendant NUMC's allegedly negligent treatment of his mother Sylvia Kalstein. He alleges that during her stay at NUMC, Ms. Kalstein's left side peripheral IV site became infiltrated which caused extravasation of medication on to her upper extremity which lead to severe ischemic necrotic injury to her left arm and hand. The plaintiff has advanced two causes of action; medical malpractice and negligent granting of staff privileges.

NUMC seeks summary judgment dismissing the complaint against it.

The facts pertinent to the determination of this motion are as follows:

Ms. Kalstein was admitted to NUMC on January 31, 2009 having suffered a massive cerebellar hemorrhagic stroke at her home. Ms. Kalstein's admittance record from the Emergency

Room indicates that she was at high risk for skin breakdown. Dr. Mehta performed an emergent suboccipital craniectomy with drainage of the hematoa. While the operative report indicates that "adequate IV was performed," it also indicates that peripheral infusion lines were present on admission and the EMS report indicates that it was "difficult to establish IV." Ms. Kalstein spent a few days in the Surgical Intensive Care Unit and was transferred to the Coronary Care Unit on February 2, 2009 where she remained until she was transferred to Winthrop University Hospital on February 8, 2009. During her stay, Ms. Kalstein had two peripheral IV sites to facilitate the infusion of numerous medications, one on her upper left extremity and one on her right. It is not disputed that on February 1, 2009, Ms. Kalstein's left IV site became infiltrated leading to extravasation of IV medications on her upper left extremity. It is also not disputed that calcium gluconate was infused right before the infiltration was diagnosed and that medication is known to be caustic to the skin and can cause necrosis. Ms. Kalstein's chart reflects that Dr. Zuhrov, a hospital resident, placed a central line at 12:40 PM and was notified of a blister where the IV infiltrated at 4:30 PM. NUMC's records reflect that a skin integrity consult and assessment was done three days later on February 4, 2009 by a skin and integrity nurse. Blackened skin was first noted on February 7th. A consult by a dermatologist or plastic surgeon was not sought. That Ms. Kalstein suffered considerably from ischemic necrosis as a result of the infiltration and extravasation is not disputed, either.

At her examination-before-trial Nurse Fantastico, an employee of NUMC, testified in general terms regarding the procedure she followed when checking IVs as follows:

> "In the morning we always check the IV site. Check the patient. If the lines are okay. Then by ten o'clock we give the medications. We check the IV site again. If it's – you know, you check if the arm is soft, those kind of things. Around probably eleven o'clock, I check again, but everything is being checked like every hour. Restraints we check every half an hour. Most of the time we're really with the patient. You know, I stay with the patient most of my time. I check on their central monitor. By eleven

> o'clock I noticed that [Ms. Kalstein's] arm [was] getting very, you know, cold and it's swollen, so I took out the IV immediately.

Nurse Fantastico testified that when she discovered Ms. Kalstein's infiltrated IV shortly after 11:00 AM on February 1st, she immediately discontinued the IV, elevated the extremity and applied an Xeroflow dressing. She testified that she promptly notified Dr. Zuhrov who placed a central line at 12:40 PM to enable the continued administration of IV medications. She testified that thereafter, NUMC treated Ms. Kalstein's extremities via placing Xeroflow dressing, elevating the extremity, changing dressings, applying Bacitracin, Collagenase and Silvadene and having the extremity evaluated by a wound care specialist.

The plaintiff alleges that the defendants "failed to properly insert IVC/Central line, failed to monitor and prevent the development of ischemia and necrosis of the left hand, failed to properly restrain the patient or apply appropriate pressure, failed to diagnose and treat the ischemic necrotic condition, failed to write MD orders, and failed to monitor the patient."

"On a motion for summary judgment pursuant to CPLR§ 3212, the proponent 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." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept 2004), affd as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept 1990).

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury (citations omitted).' " Wexelbaum v. Jean, 80 AD3d 756 (2nd Dept 2011), quoting DiMitri v. Monsouri, 302 AD2d 420, 421 (2nd Dept 2003). "In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries." Stukas v. Streiter, 83 AD3d 18, 23 (2nd Dept 2011). "Thus, on a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (citations omitted)." Wexelbaum v. Jean, supra, at p. 757; see also, Stukas v. Streiter, supra, at p. 23, 27. If the moving defendant only establishes that he did not commit medial malpractice, in opposing the motion, the plaintiff must establish the existence of a material issue of fact with respect to only that issue. Stukas v. Streiter, supra, at p. 30-31. Similarly, if the moving defendant only establishes a lack of proximate course, in opposing the motion, the plaintiff need establish only the existence of a material issue of fact with respect to that issue. Stukas v. Streiter, supra, at p. 25. However, if the moving defendant establishes both a lack of negligence and proximate cause, in order to defeat summary judgment, the plaintiff must establish an issue of fact as to both of those issues. Stukas v. Streiter, supra, at p. 25.

Habit evidence is admissible in cases "where the proof demonstrates 'a deliberate and repetitive practice' by a person 'in complete control of the circumstances' as opposed to 'conduct however frequent yet likely to vary from time to time depending on the surrounding circumstances.' " Rivera v Anilesh, 8 NY3d 627, 634 (2007), quoting Halloran v Virginia Chemicals, 41 NY2d 386, 391 (1997); see also, Biesiada v Suresh, 309 AD2d 1245 (4th Dept 2003); Nigro v Benjamin, 155 AD2d 872 (4th Dept 1980). "If these conditions are satisfied 'a party should be able, by introducing evidence of such habit or regular usage, to allow the inference of its persistence . . . on a particular occasion.' " Rivera v Anilesh, supra at p. 364, quoting Halloran v Virginia Chemicals, supra at p.

392.

In support of its motion, NUMC has submitted the affidavit of registered nurse M. Elayne De Simone. Having reviewed the plaintiff's Bill of Particulars, Ms. Kalstein's medical records and the deposition testimony of Karen and Kenneth Kalstein, Dr. Zhurov and Nurse Fantastico, she opines to a reasonable degree of medical certainty that NUMC and its employees did not depart from good and accepted medical practice in their care of Ms. Kalstein and that those parties' acts did not proximately cause her injuries. Nurse De Simone notes that Nurse Fantastico testified as to her custom and practice with regard to monitoring IV sites and managing medications being infused via IV. Nurse DeSimone notes that Nurse Fantastico's testimony establishes that she "routinely" monitored the IV site, provided medications via the left IV per doctors' orders, and timely and properly diagnosed the IV infiltration and extravasation. Nurse DeSimone notes that upon discovering the problem with Ms. Kalstein's IV, Nurse Fantastico promptly notified a doctor and began appropriate treatment of the IV site and the extremity including removal of the IV, elevating the extremity and applying Xeroflow dressing. Nurse DeSimone also notes that a central line was placed by Dr. Zhurov at 12:40 PM. She opines that NUMC's staff properly evaluated and treated Ms. Kalstein's upper extremity following the infiltration and extravasation. More specifically, she states that Ms. Kalstein's "left hand was monitored appropriately and treatment rendered based upon the findings of examinations performed." In conclusion, Nurse DeSimone opines "the care in starting the IV, monitoring the IV, and administration of the medication was entirely appropriate." She notes that "IV infiltrations can and do occur under the best circumstances with appropriate care;" that the "infiltration was timely diagnosed and treated appropriately thereafter;" and, that "the subsequent monitoring and treatment of the left hand was entirely appropriate as well." NUMC has not established its entitlement to summary judgment. Its allegations regarding the care it provided once the necrotic condition was discovered is unacceptably conclusory.

Assuming, arguendo, that NUMC has established its entitlement to summary judgment based on Nurse Fantastico's testimony and Nurse DeSimone's expert opinion thereby shifting the burden

to the plaintiff to establish the existence of a material issue of fact, the plaintiff has met his burden.

In opposition, the plaintiff has submitted the affidavit of a Board Certified surgeon who has also reviewed the medical and legal records pertinent to this case. He notes that upon her admission to NUMC, Ms. Kalstein's skin condition was of normal temperature, moisture and color and its integrity was intact. The plaintiff's expert notes that calcium gluconate's product information warns that it should not be given via intramuscular or subcutaneous routes because tissue necrosis or sloughing may occur. The plaintiff's expert then opines that "good practice requires that both calcium gluconate and/or vancomycin (which was also being administered) be administered through a subclavian central venous catheter so as to avoid the causation of any adverse effects, such as skin necrosis due to leakage of an IV line." Thus, he opines that administration of vancomycin and calcium gluconate through a peripheral line was a departure from good medicine practice. He further opines that "calcium gluconate and vancomycin should not be administered through the same line because they are incompatible medications" and he notes that since there is no evidence reflecting which medications were administered through which lines, whether vancomycin and calcium gluconate were administered via the same line is certainly possible. The plaintiff's expert similarly faults NUMC for not having reflected in Ms. Kalstein's chart not only which line was used for which drug but also documenting patency of the IV line prior to infusing medications as well as verifying needle placement in the vein and noting precisely when the infusion was started – date; time; location; by whom; type and amount of solution; medications/additives added; action/reaction to medications; additional solutions and medications, pertinent observations. She also faults NUMC's staff for failing to record patency; care and location of injection site; and, pertinent observations while the infusion was in progress. And, the plaintiff's expert also faults NUMC for not utilizing a "transparent plastic dressing which would have allowed for easy inspection of the insertion site for infiltration." Finally, she faults NUMC for not obtaining appropriate timely consultations by a dermatologist and/or plastic surgeon given the urgency for timely and thorough treatment.

That the plaintiff's Bill of Particulars did not specifically allege fault by NUMC by

administrating calcium gluconate and vancomycin via IV as opposed to a central line and in the same line does not prevent him from doing so in opposition to NUMC's motion. In his Bill of Particulars, the plaintiff alleged a failure to insert a catheter and/or a central line as well as failure to prevent the development of ischemic necrosis which encompasses the present claims.

Nevertheless, the calcium gluconate product information relied on by the plaintiff's expert states that it should not be administered intramuscularly or subcutaneously: It did not preclude administration via IV as was done here. Accordingly, the plaintiff's expert's opinion that calcium gluconate should not be given through an IV fails as it is contradicted by his/her own product information and accordingly lacks support. See, Shapiro v Gurwin Jewish Geriatric Nursing and Rehabilitation Center, 84 AD3d 1348 (2nd Dept 2011). And, the failure to record things in Ms. Kalstein's hospital chart did not mean that those things were not done and standing alone cannot establish malpractice, either. Melendez v Parkchester, 76 AD3d 927 (1st Dept. 2010).

Nevertheless, that NUMC's expert Nurse DeSimone opines that "[t]here is absolutely no contraindication to using the same peripheral IV line to infuse vancomycin and calcium gluconate as was performed in this case" does no more than raise an issue of fact since the plaintiff's expert disagrees. Furthermore, the failure to obtain proper consults following discovery of the infiltration and extravasation also presents an issue of fact.

This constitutes the decision and order of this Court.

ENTER

DATED: February 27, 2012

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J. S.C.

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