SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART IA-19A

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DONNA ROTANTE, AS ADMINISTRATRIX OF THE ESTATE OF FRANK ROTANTE AND DONNA ROTANTE, INDIVIDUALLY,

Plaintiff(s),

- against -

INDEX NO: 308437/2010

DECISION/ORDER

CHAIM CHARYTAN, M.D., NEPHROLOGY ASSOCIATES, P.C., THE NEW YORK HOSPITAL MEDICAL CENTER QUEENS, THE TRUDE WEISHAUPT DIALYSIS CENTER, JOSEPH T. COOKE, M.D., DAVID A. BERLIN, M.D., MICHELLE L. LUBETZKY, M.D., NINA SUNDARAM, M.D., CAITLIN J. GUO, M.D., MIRIAM H. CHUNG, M.D., ROGOSIN INSTITUTE, TRC, L.P., RICHARD J. KEATING, M.D., RAJESH V. SWAMINATHAN, M.D., JOY M. GELBMAN, M.D., DAVID H. MILLER, M.D., and NEW YORK PRESBYTERIAN HOSPITAL-NEW YORK WEILL CORNELL MEDICAL CENTER,

Defendant(s).

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HON. LEWIS J. LUBELL

Motion by defendant New York Presbyterian Hospital, sued herein as New York Presbyterian Hospital-New York Weill Cornell Medical Center (NYPH) for summary judgment dismissing plaintiff's complaint and all cross claims against NYPH is decided as follows.

The decedent received dialysis treatment at Trude Westhaupt Dialysis Center at New York Hospital Queens ("Dialysis Center"). In this medical malpractice/wrongful death action, plaintiff alleges, generally, that the defendants failed to diagnose and treat the decedent's staph infection on October 8, 2008,

when he presented for dialysis treatment. Further, it is alleged that the defendants were negligent on October 10, 2008, when they failed to communicate the results of a blood test and cultures to the decedent's caregivers, as well as on October 13, when he again presented for dialysis treatment. This Court previously denied defendant Dr. Charytan's[1] and Nephrology Associates, P.C.'s motion for summary judgment on the ground that plaintiff's expert's affidavit demonstrated material issues of fact as to whether Dr. Charytan departed from good and accepted medical practice in failing to adopt and implement proper protocols for the treatment of dialysis patients who present with infection.

The decedent presented for treatment at the NYPH emergency room (ER) on October 13, 2008. At that time, he had already contracted methicillin-sensitive staphylococcus aureus (MSSA), as indicated on a blood culture taken at the dialyses center on October 8, 2008. The results of the culture were allegedly not reported, however, until after the decedent went into pulseless electric arrest at the NYPH ER on October 13.

According to the expert report of Robert A. Silverman, M.D., board-certified in Emergency medicine and Internal Medicine, NYPH medical personnel acted within accepted standards of medical care in treating the decedent from the time of admission on October 13, until his death on October 16. When the decedent arrived at the ER at 2:53 p.m., he was alert, coherent, and did not have a fever.

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[1] Dr. Charytan, an employee of New York Hospital, was the Medical Director of the Dialysis Center.

He was able to ambulate, and stated he had exertional shortness of breath. While his blood pressure was low, given his coherent condition, the immediate administration of IV fluids was not indicated. His condition (ambulating, coherent, no fever, blood pressure improved in the first hour after arriving at the ER) did not indicate bacteremia (albeit it is now known that he was positive for MSSA). At 4:00 p.m., 67 minutes after arrival, he was taken to an examining room. At 4:15 P.M. he complained of shortness of breath and was given oxygen. Although his blood pressure improved to 95/46, at 4:25 p.m. he went into a sudden PEA. Dr. Silverman concluded that the PEA was the result of hyperkalemia, which was adequately treated by the administration of insulin, Kayexalate, sodium bicarbonate, and Calcium, and not his (then) undiagnosed bacteremia. He states that the administration of these drugs restored the decedent's pulse, which is proof of hyperkalemia.

Plaintiff's expert opines that plaintiff had a 30% chance of survival, which was worsened by the failure of the NYPH medical staff to earlier detect and treat plaintiff's hyperkalemia. Plaintiff's expert ostensibly agrees with NYPH's expert that the decedent's death resulted from hyperkalemia-induced PEA in the setting of pre-existing bacteremia and endocarditis.[2] Plaintiff's expert states that the decedent exhibited signs of sepsis, and thus should have been "worked up" sooner, and that an EKG would have revealed the presence of the hyperkalemia.

[2] Plaintiff's theory of the case was previously that decedent died from untreated MSSA, and that it was a departure not to administer IV-fluids. Plaintiff did not plead that an EKG should have been performed, which would have led to the earlier discovery of decedent's hyperkalemia.

Analysis

A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries. (*Anyie B. v Bronx Lebanon Hosp.*, 128 A.D.3d 1, 2, 5 N.Y.S.3d 92, 93 [1st Dept. 2015].) If a defendant in a medical malpractice action establishes prima facie entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's prima facie showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged." (*Pullman v Silverman*, 125 AD3d 562, 562, 5 NYS3d 38 [1st Dept. 2015], aff'd 28 N.Y.3d 1060, 66 N.E.3d 663, 43 N.Y.S.3d 793 [2016].)

Movants met their burden of demonstrating a *prima facia* entitlement to summary judgment. NYPH demonstrated, prima facie, both that its medical personnel did not depart from the applicable standard of ER care in the decedent's treatment and that, in any event, no alleged departure proximately caused the decedent's injuries or death.

In opposition, plaintiff raises a new theory of malpractice -- i.e., that performing an EKG would have caused the earlier detection of the decedent's hyperkalemia. Plaintiff cannot defeat a summary judgment motion that made out

a prima facie case by asserting, without more, a new theory of liability for the first time in the opposition papers. (*Biondi v Behrman*, 149 A.D.3d 562, 2017 N.Y. App. Div. LEXIS 2977 [1st Dept. 2017] [as plaintiff's opposition papers were insufficient absent this new theory of recovery, defendants' summary judgment motion should have been granted].)

In any event, plaintiff's new theory is based on the claim that performing an EKG was indicated, as the plaintiff had symptoms of low blood pressure and shortness of breath. Plaintiff's expert appears to contend that decedent had symptoms of cardiac arrest which should have been treated by ordering an EKG, which in turn would have led to the discovery of the hyperkalemia. However, the failure to investigate a condition by performing testing that would have led to an incidental discovery of an unindicated condition, does not constitute malpractice. (*See David v Hutchinson*, 114 A.D.3d 412, 413, 980 N.Y.S.2d 38 [1st Dept. 2014]; *Curry v Dr. Elena Vezza Physician, P.C.*, 106 A.D.3d 413, 413, 963 N.Y.S.2d 661 [1st Dept. 2013] ["failing to investigate an otherwise unindicated disease is not malpractice"].)

Moreover, plaintiff's expert failed to address key points raised by defendant's expert, i.e., (1) that as decedent was not confused or disoriented, and was able to walk and play with his daughter, he did not manifest "acute lethargy" required for ESI level 2, and (2) that the decedent had exertional shortness of breath, not shortness of breath while sitting, and (3) that the decedent's pre-existing bacteremia and endocarditis meant that the ER personnel could not have "altered

[the] course" of decedent's disease. The plaintiff's expert's conclusion that the decedent had a 30% chance of survival did not address any of the facts established by the medical record, nor did plaintiff's expert provide any basis for his belief that the decedent had a 30% chance of survival. A plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered." (*Dallas-Stephenson v Waisman*, 39 A.D.3d 303, 307, 833 N.Y.S.2d 89 [1st Dept. 2007]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 A.D.3d 439, 886 N.Y.S.2d 883 [1st Dept. 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup v Long*, 95 A.D.3d 726, 728-729, 945 N.Y.S.2d 246 [1st Dept. 2012]).

Plaintiff's expert did not challenge the movant's prima facie case as to informed consent.

The motion is granted, and the complaint is dismissed as to the moving defendant.

Dated: July 16, 2018

Hon. Lewis J. Lubell, J.S.C.