

Rodriguez v Fretwell
2018 NY Slip Op 32816(U)
November 2, 2018
Supreme Court, New York County
Docket Number: 805077/2017
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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STEVE RODRIGUEZ AND LUISA RODRIGUEZ

DECISION AND ORDER
Index No. 805077/2017

Plaintiff,

-against-

KENNETH R. FRETWELL, M.D., MICHAEL M. GOLDMAN, M.D., DESSISLAVA I. STEVANOVA, M.D., WESLEY L. DAVISON, M.D., THJ MEDICAL SERVICES, P.C., "NEPHROLOGY MEDICAL GROUP," this name being fictitious Pending identification of this party, and JAMAICA HOSPITAL MEDICAL CENTER

Defendants.

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HON. GEORGE J. SILVER:

In this medical malpractice action, defendants MICHAEL M. GOLDMAN, M.D. ("Dr. Goldman") and ISLAND NEPHROLOGY SERVICES, P.C. ("Island") separately move for summary judgment and an order dismissing plaintiffs STEVE RODRIGUEZ ("Rodriguez") and LUISA RODRIGUEZ's (collectively, "plaintiffs") complaint as against them. Plaintiffs do not oppose either motion. If Dr. Goldman and Island's applications are granted, defendants JAMAICA HOSPITAL CENTER and TJH MEDICAL SERVICES, P.C. ("JMHC" and "TJH", respectively) ask that plaintiffs' claims as against them be dismissed since those claims are based solely on vicarious liability for the alleged acts and omissions of Dr. Goldman. Plaintiffs oppose JMHC and TJH's application only to the extent that plaintiffs argue that claims of vicarious liability for the acts and omissions of a separate physician, KENNETH R. FRETWELL, M.D. ("Dr. Fretwell") still exist in this case to keep both

JMHC and TJH in this case. As such, plaintiffs argue that there is no need for this court to render a partial determination on vicarious liability for the alleged acts and omissions of Dr. Goldman when claims of vicarious liability for the alleged acts and omissions of Dr. Fretwell still exist.

BACKGROUND AND ARGUMENTS

This is a medical malpractice action premised on plaintiffs' allegations of defendants' collective failure to appreciate the proper care and intervention needed to treat Rodriguez's appendicitis. Indeed, plaintiffs allege that even though Dr. Fretwell was aware of the severity of Rodriguez's appendicitis, he chose to advise against surgery during a consultation on July 5, 2016. Thereafter, Rodriguez was referred for a nephrology consult with Dr. Goldman on July 6, 2016 due to an increased blood urea nitrogen (BUN)/creatinine ratio of 58/3 on admission, dark urine, and less frequent urination. At his consultation with Rodriguez, Dr. Goldman noted that Rodriguez had a history of uncontrolled diabetes, hypertension, elevated creatinine, and proteinuria (excessive protein in the urine). Dr. Goldman further diagnosed Rodriguez with Acute Kidney Injury (AKI) and Chronic Kidney Disease (CKD) and ordered Heparin, Zosyn, and IV fluids.

On July 7, 2016, Rodriguez's creatinine levels increased to a peak of 4.2, but his urine output was improving. Dr. Goldman instructed his staff to increase IV

fluids and adjust antibiotics. By the following day, Rodriguez's creatinine decreased to 2.9 and his urine output continued to improve. By July 12, 2016, Rodriguez's creatinine had further decreased to 2.5. On July 12, 2016, Dr. Fretwell reported that Rodriguez had deteriorated and was showing signs of sepsis including an elevated white blood cell count. Dr. Fretwell recommended surgery, ultimately performing an exploratory laparotomy and appendectomy.

Dr. Goldman treated Rodriguez on July 13, 2016, one day post-appendectomy. At that time, Rodriguez's levels fluctuated between 2.0 and 2.5 and Dr. Goldman instructed clinical staff to decrease IV fluids and place a towel below his scrotum due to edema. On July 15, 2016, Dr. Goldman noted that Rodriguez's blood pressure was well-controlled and IV fluids were discontinued. Between July 18 and 21, 2016, Rodriguez's creatinine levels fluctuated between 1.8 and 2.5. Dr. Goldman instructed staff to increase IV antibiotics if creatinine remained at the same level or decreased.

On July 28, 2016, Rodriguez's creatinine decreased to 1.5 and on July 29, 2016, it had further decreased to 1.3, both well-below Rodriguez's pre-admission baseline. Dr. Goldman instructed Rodriguez to follow up as an outpatient.

On August 3, 2016, Rodriguez underwent surgery at JHMC to treat an infection of the drain from the surgery on July 12, 2016. Dr. Goldman treated Rodriguez on August 4, 2016, one day post-surgery and noted that Rodriguez's

creatinine was elevated to 1.7. Dr. Goldman instructed clinical staff to hold fluids due to penile and scrotal edema and Rodriguez's creatinine levels decreased to 1.2 by August 10, 2016.

Rodriguez was discharged home on August 10, 2016 in stable condition and was instructed to follow with a nephrologist. Thereafter, Rodriguez developed complications that he attributes to his surgery. Indeed, plaintiffs contend that during Rodriguez's hospitalization, his surgery was indicated but improperly performed, resulting in a ruptured appendix and the need for future surgeries.

Dr. Goldman's unopposed motion is based on his contention, through the affirmation of nephrologist Vaughn Folkert, M.D. ("Dr. Folkert"), medical records, and deposition testimony, that he did not depart from applicable standards of care while treating Rodriguez, and did not proximately cause Rodriguez's alleged injuries. To be sure, Dr. Goldman contends that plaintiffs' allegations against him must be dismissed since they are predicated upon the belief that he improperly managed Rodriguez's appendicitis and failed to recommend surgery during the July 5, 2016 consultation before Dr. Fretwell. As Dr. Goldman was not responsible for managing Rodriguez's appendicitis and as a nephrologist, was not able to decide whether his care should be managed operatively or non-operatively, Dr. Goldman contends that plaintiffs cannot sustain a viable cause of action as against him. As Dr. Folkert opines, "Dr. Goldman was not managing [Rodriguez's]

appendicitis and any decision related thereto and that his role was strictly as a consulting nephrologist for [Rodriguez's] AKI." Correspondingly, Dr. Goldman testified at his deposition that he was not involved in the decision of whether to perform surgery. Moreover, Dr. Goldman contends that any allegations that he failed to provide appropriate nephrology treatment must also be dismissed, as Dr. Folkert has stated that Dr. Goldman appropriately monitored and treated Rodriguez's elevated creatinine levels. Further, Dr. Goldman argues that plaintiffs' allegation that his treatment somehow exacerbated Rodriguez's kidney disease, kidney dysfunction, and diabetes is contraindicated by the evidence before the court, and therefore should similarly be dismissed. Indeed, Dr. Goldman highlights that the evidence adduced during discovery suggests that despite Rodriguez's appendicitis and two surgeries, his kidney function improved during his admission. Accordingly, Dr. Goldman submits that all claims against him regarding Rodriguez's appendicitis and surgery should be dismissed.

Island similarly submits that judgment in its favor is warranted because Island did not have a physician/patient relationship with Rodriguez and therefore owed no duty to him. Island contends that plaintiffs concede that Rodriguez was never treated at Island. As such, Island argues that plaintiffs' direct theories of liability as against it must be dismissed since Island did not have an immediate relationship with Rodriguez. Island further contends that since Dr. Goldman, who

had privileges at its facility, did not deviate from applicable standards of care and proximately cause plaintiffs' injuries, plaintiffs cannot maintain an action as against it on a theory of vicarious liability.

JMHC and TJH separately argue that as plaintiffs cannot sustain a viable cause of action against Dr. Goldman, all claims of vicarious liability against them premised on Dr. Goldman's treatment must similarly be dismissed. Plaintiffs' sole opposition to that application is based on plaintiffs' contention that JMHC and TJH's application is premature since plaintiffs have a viable case against them premised on vicarious liability with respect to Dr. Fretwell's alleged malpractice.

DISCUSSION

To prevail on summary judgment in a medical malpractice case, a hospital and the physicians therein must demonstrate that they did not depart from accepted standards of practice or that, even if they did, they did not proximately cause the patient's injury (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (see e.g., *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207). The expert cannot make conclusions by assuming material facts

which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept. 2003]).

Once a *prima facie* showing is made, the burden shifts to the plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, a plaintiff must submit an expert affidavit attesting that a defendant departed from accepted medical practice and that the departure proximately caused the injuries alleged (*see Roques*, 73 AD3d at 207, *supra*). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2nd Dept. 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by a jury (*id.*).

Finally, in the medical malpractice realm, the general rule is that a medical facility will be held vicariously liable for the malpractice of its employees (*Bing v. Thunig*, 2 NY2d 656 [1957]) A medical facility may also be held vicariously liable for non-employees on the theory of agency and control-in-fact, or in the alternative theory of apparent or ostensible agency (*Hill v. St. Clare's Hosp.*, 67 NY2d 72

[1986].) However, if summary judgment is granted in favor of physician, any claims a plaintiff has asserted against a facility based on vicarious liability for that physician's malpractice must also be dismissed (*see, e.g. Edin v. Halff*, 261 AD2d 569 [2d Dept. 1999][affirming lower court's order setting aside a jury's verdict exonerating physicians but finding a hospital vicariously liable for their alleged negligence as inconsistent]; *Escobar v. New York Hospital*, 111 AD2d 128, 129 [1st Dept. 1985][holding that hospital cannot be held liable on vicarious liability theory for physician defendants as to whom action has been discontinued]).

Here, Dr. Goldman has set forth a *prima facie* showing in favor of dismissal. In particular, Dr. Folkert, who is experienced within the field of nephrology, has submitted a detailed expert affirmation based upon ample evidence in the record highlighting the fact that Dr. Goldman did not depart from applicable standards of care while treating Rodriguez, and did not proximately cause Rodriguez's alleged injuries. Critically, Dr. Folkert opines that "Dr. Goldman was not managing [Rodriguez's] appendicitis and any decision related thereto and that his role was strictly as a consulting nephrologist for [Rodriguez's] AKI." Consequently, Dr. Folkert's affirmation supports the position that Dr. Goldman was not involved in the underlying care that serves as a basis for plaintiffs' allegations. That conclusion is further supported by Dr. Goldman's own testimony that he was not involved in the decision of whether to perform surgery on Rodriguez. Dr. Folkert further submits

that Dr. Goldman appropriately monitored and treated Rodriguez's elevated creatinine levels, thus debunking any malpractice claims premised on his role as a nephrologist. Support for dismissal based on Dr. Goldman's role as a nephrologist is buttressed by medical evidence indicating that Rodriguez's creatinine levels dropped following Dr. Goldman's intervention. Further, there is evidence within the record that Dr. Goldman's treatment did not indirectly exacerbate Rodriguez's kidney disease, kidney dysfunction, and diabetes. As Dr. Goldman's contentions are unchallenged by plaintiffs and predicated upon ample evidence within the record, Dr. Goldman has made an unopposed *prima facie* showing that entitles him to dismissal.

Similarly, Island is entitled to dismissal, as plaintiffs have provided no opposition to its claims that it had no direct role in the treatment of Rodriguez. As a consequence of dismissal of this action as against Dr. Goldman, claims of vicarious liability premised on Dr. Goldman's alleged malpractice are similarly without merit as against Island, JMHC and TJH. Plaintiffs' contention that dismissal of vicarious liability claims premised on Dr. Goldman's alleged malpractice as against JMHC and TJH is premature is unavailing. Accordingly, based on the foregoing, it is hereby

ORDRED that Dr. Goldman and Island's unopposed motions for summary judgment are granted in their entirety; and it is further

ORDERED that because of the dismissal of plaintiffs' claims as against Dr. Goldman, plaintiffs' claims of vicarious liability premised on Dr. Goldman's alleged malpractice as against Island, JMH, and TJH are hereby dismissed in their entirety; and it further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly, and to amend the caption in this action to read as follows:

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STEVE RODRIGUEZ AND LUISA RODRIGUEZ

Index No. 805077/2017

Plaintiff,

-against-

KENNETH R. FRETWELL, M.D., THJ
MEDICAL SERVICES, P.C., and JAMAICA
HOSPITAL MEDICAL CENTER


Defendants.

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; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference in this action on Tuesday December 4, 2018 at 111 Centre Street, New York, NY at 9:30 AM in Part 10, Room 1227.

This constitutes the decision and order of the court.

Dated: 11-2-2018


GEORGE J. SILVER, J.S.C.