

Hunt v Zeitlan
2018 NY Slip Op 34122(U)
April 30, 2018
Supreme Court, Westchester County
Docket Number: Index No. 70264/2014
Judge: William J. Giacomo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X
JEREMIAH HUNT, as ADMINISTRATOR of the ESTATE OF MONICA HUNT, Deceased, and JEREMIAH HUNT, Individually,

Plaintiffs,

Index No. 70264/2014

– against –

DECISION & ORDER

GARY A. ZEITLAN, WHITE PLAINS MEDICAL ASSOCIATES, P.C., WHITE PLAINS HOSPITAL MEDICAL CENTER, MICHAEL MALOTZ SKILLED NURSING PAVILION, ST. JOHN'S RIVERSIDE HOSPITAL and VISITING NURSE SERVICES OF WESTCHESTER, INC.,

Defendants.

----- X

In this action to recover damages for wrongful death as a result of medical malpractice, the defendants Gary A. Zeitlan, White Plains Medical Associates P.C., and White Plains Hospital Medical Center, move for summary judgment, pursuant to CPLR 3212, dismissing the complaint insofar as asserted against them:

Papers Considered

1. Notice of Motion/Affirmation of Leland N. Garbus, Esq./Affirmation of Alan A. Pollock, M.D./Affidavit of Anne Walsh, N.P./Exhibits A-M;
2. Affirmation of Keith J. Clarke, Esq./Exhibit 1/Affirmation of Perry Starer, M.D./Exhibits 1-5;
3. Reply Affirmation of Leland N. Garbus, Esq.

Factual and Procedural Background

Plaintiffs commenced this action seeking damages for negligence, medical malpractice, and wrongful death, against Dr. Zeitlan, White Plains Medical Associates, P.C., White Plains Hospital Medical Center, Michael Malotz Skilled Nursing Pavilion, St. John's Riverside Hospital, and Visiting Nurse Services of Westchester, Inc.

Hunt v. Zeitlan, Index No. 70264/2014

In an order dated August 17, 2015, this Court (Giacomo, J.) granted the unopposed motion of the defendant Visiting Nurse Services of Westchester to dismiss the complaint insofar as asserted against it.

The decedent, Monica Hunt, was a patient at White Plains Hospital between May 4, 2012, and May 31, 2012. Dr. Zeitlan was the attending physician at White Plains Hospital. She was discharged from White Plains Hospital to Michael Malotz Skilled Nursing Pavilion and thereafter, admitted to St. John's Riverside Hospital. She suffered cardiac arrest on August 1, 2012. Plaintiffs allege that due to the negligence and departure of accepted medical and nursing standards, the decedent suffered severe and permanent personal injuries, including the development, progression, and deterioration of pressure ulcers to the sacrum and buttocks, disfigurement, loss of mobility, pain and suffering, and death.

Dr. Zeitlan, White Plains Medical Associates, and White Plains Hospital move for summary judgment, pursuant to CPLR 3212, dismissing the complaint insofar as asserted against them. Defendants argue that the 72-year-old decedent had a history of comorbidities including multiple sclerosis and paraplegia and a history of decubitus ulcers.

Defendants submit the affirmation of Alan A. Pollock, M.D., board certified in Internal Medicine and Infectious Diseases. Dr. Pollock opines, with a reasonable degree of medical certainty, that the moving defendants did not depart from standards of good and accepted medical practice nor did any care and treatment provided by the Hospital or Dr. Zeitlan cause or contribute to any alleged injury, including death.

Dr. Pollock noted that the decubitus ulcers pre-existed and were noted on the decedent's admission to White Plains Hospital. All the decubitus ulcers developed while plaintiff was at home and were appropriately managed with various interventions throughout her hospital stay. The decedent also suffered multiple comorbidities, including lower extremity paralysis, that made her predisposed to the development of decubitus ulcers prior to hospitalization. At the time of her admission, she was in declining health, which was tacitly acknowledged by the DNR consent. The decedent did not suffer any critical crisis while a patient at the Hospital and was not discharged with any condition posing an imminent threat to life. Dr. Pollock opines that the decedent did not suffer from any systemic infection while at the Hospital. She was discharged on May 31, 2012, with lower extremity wounds that had prompted her admission, was treated, and clearly improved due to the good and appropriate medical and surgical care.

Dr. Pollock opined that the ulcerations involving the buttocks and sacral region were addressed and did not change to any medically significant degree. After discharge, the decedent's care was assumed by a skilled nursing facility and their physicians. She was admitted and discharged from the hospital on two further occasions, which were both prior to her cardiac arrest two months later. Dr. Pollock states that because no autopsy was performed, there is no objective, scientific basis to assert that the decedent's death on August 1, 2012, was contributed to or caused by any infection or by care or treatment

Hunt v. Zeitlan, Index No. 70264/2014

rendered while she was a patient at White Plains Hospital. Dr. Pollock opines that the defendants did not depart from good and accepted standards of medical practice and that their care of treatment of the decedent did not cause any alleged injury.

Defendants also submit the expert affidavit of Anne Walsh, N.P. Ms. Walsh attests that the nursing care at White Plains Hospital did not cause decedent to sustain decubitus ulcers and did not cause any of her alleged injuries, including death. At the time the decedent was admitted to the Hospital on May 4, 2012, she had been restricted to a wheelchair for over twenty years and had a long history of documented decubitus ulcers. At least seven decubitus ulcers were documented upon her admission to the Hospital. Proper nursing interventions were immediately initiated including turning and re-positioning. The ulcers on her legs presented with necrotic tissue which required surgical care for debridement. Ms. Walsh states that at all times, the nursing care at the Hospital met the standard of care. The decedent's skin was assessed daily, she was turned and re-positioned regularly as consistent with the standard of care, and received a specialty mattress. At the time she was approved for discharge, the condition had improved. She was discharged to a skilled nursing facility with instructions to continue antibiotics and to follow up with Dr. Zeitlin and the White Plains Hospital wound care center. The decedent's wounds and ulcers did not worsen during her hospital admission.

Ms. Walsh opines that there were no departures from good and accepted nursing practice that caused any of the wounds in the sacral region or caused any exacerbation of the wounds. There was no medically significant worsening of the pressure ulcers during her admission. The sacral wounds were all recurrent making precise staging difficult for the nursing staff. Ms. Walsh states that as the decedent's health was deteriorating after her discharge, despite proper medical care, she was beginning to develop Kennedy Terminal Ulcers which are part of the process of the body dying and are not preventable by nursing or medical interventions. Ms. Walsh opines that White Plains Hospital met the standard of care at all times and there were no acts or omissions by the Hospital that caused the alleged injuries.

In opposition, plaintiffs argue that the defendants failed to demonstrate entitlement to summary judgment and that issues of fact exist as to whether defendants deviated from the standard of care in negligently and carelessly allowing the decedent to sustain pressure ulcers and failing to properly treat the ulcers. Plaintiffs argue that although the decedent was admitted to the Hospital with a number of pressure ulcers, the negligent care and treatment she received resulted in the development of a new buttock/sacral ulcer and the worsening of an existing buttock/sacral ulcer.

Plaintiff submits the affirmation of Perry Starer, M.D., board certified in Internal Medicine and Geriatric Medicine. Dr. Starer opined, with a reasonable degree of medical certainty, that defendants departed from accepted standards of medical and nursing care, failed to provide adequate and appropriate medical and nursing care, and that such departures were a substantial factor in causing the development, progression, and deterioration of pressure ulcers to the sacrum and buttocks. Moreover, he opined that

Hunt v. Zeitlan, Index No. 70264/2014

violations of the Hospital's own policies and procedures demonstrate that the defendant hospital failed to perform acts that it had a duty to perform and that a reasonably prudent person, including nurses and aides, would have performed under the circumstances. He also opines that the decedent's ulcers were not unavoidable due to any underlying medical condition.

According to Dr. Starer, hospital protocol required repositioning at least every two hours. Despite this protocol, Dr. Starer states that the decedent was not turned and positioned at least every two hours, rather, it was closer to every four hours. Dr. Starer opines that the Hospital departed from accepted medical practice from May 4, 2012, through May 31, 2012, when it failed to turn and position the decedent at appropriate intervals, and that such failure resulted in the development of a new right sided buttock stage III ulcer which was documented on May 31, 2012. Moreover, the stage II ulcer on the left sided buttock on admission worsened to a deep tissue injury. Dr. Starer further opines that the decedent's medical conditions, including multiple sclerosis, paraplegia, and diabetes mellitus, did not make the development and worsening of the pressure ulcers unavoidable.

Discussion

"In order to establish liability for medical malpractice, a plaintiff must prove that the defendant deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries" (*Leavy v Merriam*, 133 AD3d 636, 637 [2d Dept 2015]). A physician moving for summary judgment in a medical malpractice action must establish, prima facie, either that there was no departure from accepted community standards of medical practice, or that any alleged departure was not a proximate cause of the plaintiff's injuries (see *Aronov v Soukkary*, 104 AD3d 623, 624 [2d Dept 2013]; *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012]). Once a defendant has made such a showing, the burden shifts to the plaintiff to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"A plaintiff cannot rebut a defendant physician's showing that he or she was not negligent and defeat a motion for summary judgment by offering an expert's affidavit containing general allegations of medical malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical malpractice" (*Shectman v Wilson*, 68 AD3d 848, 849 [2nd Dept 2009]; see also *Alvarez v Prospect Hosp.*, 68 NY2d at 324-325; *Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 801 [2nd Dept 2008]).

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them by submitting the affirmation of their expert who opined that the moving defendants did not deviate or depart from accepted medical practice and that even if they had, there is no proximate cause between the alleged departure and the injuries.

Hunt v. Zeitlan, Index No. 70264/2014

In opposition, however, the plaintiffs raised a triable issue of fact, through the submission of an expert affidavit of Dr. Starer, who opined that defendants departed from accepted medical standards in failing to reposition the decedent every two hours which was the proximate cause of the development of a new Stage III right-sided sacral pressure ulcer and the deterioration of the left sacral pressure ulcer from Stage II to a deep tissue injury.

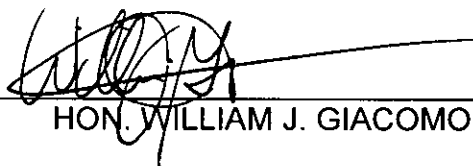
Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts (*see McKenzie v Clarke*, 77 AD3d 637, 638 [2d Dept 2010]; *Shields v Baktidy*, 11 AD3d 671, 672 [2d Dept 2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2d Dept 2003]).

However, to the extent that the complaint asserts a wrongful death cause of action against Dr. Zeitlan, White Plains Medical Associates P.C., and White Plains Hospital Medical Center, that cause of action is dismissed. The affidavit of Dr. Starer fails to raise an issue of fact that the alleged departures in failing to reposition the decedent every two hours was the proximate cause of her cardiac arrest.

Accordingly, the motion of the defendants Gary A. Zeitlan, White Plains Medical Associates P.C., and White Plains Hospital Medical Center for summary judgment dismissing the complaint is GRANTED solely to the extent that the wrongful death cause of action is dismissed insofar as asserted against them; and the motion is otherwise DENIED (motion sequence #2).

The parties are directed to appear in the Settlement Conference Part on **May 29, 2018, room 1600, at 9:15 a.m.** for further proceedings.

Dated: White Plains, New York
April 30, 2018



HON. WILLIAM J. GIACOMO, J.S.C.