Gross v Dauer
2020 NY Slip Op 34841(U)
January 28, 2020
Supreme Court, Nassau County
Docket Number: Index No. 610883/17
Judge: Jeffrey S. Brown

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 9**

MICHAEL GROSS, individually and as the executor of the Estate of Beverly Gross, deceased,

Plaintiff,

INDEX # 610883/17
Mot. Seq. 3
Submit Date 12.20.19

-against-

JAN H. DAUER, M.D., ROBERT KEVIN LUNTZ, M.D., INTEGRATED MEDICAL PROFESSIONALS PLLC, and PLAINVIEW HOSPITAL,

Defendants.

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The following papers were read on this motion: Documents Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	73
Answering Affidavit	96,101, 102
Reply Affidavit.....	

Defendants Jan H. Dauer, M.D. and Plainview Hospital move by notice of motion pursuant to CPLR 3212 for an order granting summary judgment in their favor and dismissing the action as against them.

This medical malpractice action arises out of an emergency room visit to Plainview Hospital on October 12, 2016 where decedent Beverly Gross presented with chills and abdominal/flank pain. By his bill of particulars, plaintiff alleges, among other things, that the moving defendants failed to diagnose and treat the decedent for kidney stone obstruction of a ureter, and evolving urosepsis. Among the alleged departures, plaintiff indicates that the moving defendants failed to have the patient evaluated by a urologist, merely speaking to a urologist over the phone, and prescribed inappropriate medications for the treatment of decedent's condition. Beverly Gross returned to the

hospital the same day, was admitted and referred for surgery, and died approximately two weeks later on October 28, 2016.

> A party seeking summary judgment has the burden of tendering evidentiary proof in a form admissible at trial to show the absence of material issues of fact entitling that party to judgment as a matter of law (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324). Where the moving party establishes a prima facie entitlement to such relief, the burden then shifts to the opposing party to demonstrate by evidentiary facts that genuine issues of fact exist to preclude summary judgment (*see id.* at 324; *Zuckerman v. City of New York*, 49 NY2d 557, 562-563). '[S]ince summary judgment is the procedural equivalent of a trial, it must be denied if any doubt exists as to a triable issue or where a material issue of fact is arguable' (*see Dykeman v. Heht*, 52 AD3d 767, 769). Even the color of a triable issue forecloses the remedy (*Dorival v. DePass*, 74 AD3d 729, 730, *quoting Rudnitsky v. Robbins*, 191 AD2d 488, 489) [internal quotations omitted]."

(*Fairlane Financial Corp. v. Longspaugh*, 144 AD3d 858 [2d Dept 2016]; *see also Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

"In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries [internal quotations omitted]." (*Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1088 [2d Dept 2014], quoting *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012]). "Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury." (*Semel v. Guzman*, 84 AD3d 1054, 1056 [2d Dept 2011], citing *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 [2d Dept 2005]; *Goldberg v Horowitz*, 73 AD3d 691 [2d Dept 2010]; see also, *Skelly–Hand v. Lizardi*, 111 AD3d 1187, 1189 [2d Dept 2013]). A plaintiff is not required to eliminate all other possible causes. (*Skelly–Hand* at 1189).

"A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries." (*Michel v Long Is. Jewish Med. Ctr.*, 125 AD3d 945, 945 [2d Dept 2015], lv denied, 26 NY3d 905 [2015]; *see also Barrocales v New York Methodist Hosp.*, 122 AD3d 648, 649 [2d Dept 2014]; *Berthen v Bania*, 121 AD3d 732, 732 [2d Dept 2014]; *Trauring v Gendal*, 121 AD3d 1097, 1097 [2d Dept 2014]). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the *prima facie* burden." (*Gillespie v New York Hosp. Queens,* 96 AD3d 901, 902 [2d Dept 2012]).

"'General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment [citations omitted].'" (*Bendel v Rajpal*, 101 AD3d 662, 663 [2d Dept 2012], quoting *Bezerman v Bailine*, 95 AD3d 1153, 1154 [2d Dept 2012]; see also, *Savage v Quinn*, 91 AD3d 748, 749 [2d Dept 2012]; *Myers v Ferrara*, 56 AD3d 78, 84 [2d Dept 2008], citing *Alvarez*, 68 NY2d at 325; *Thompson v Orner*, 36 AD3d 791, 792 [2d Dept 2007]; *DiMitri v Monsouri*, 302 AD2d 420, 421 [2d Dept 2003]). An expert's statement which "fail[s] to respond to relevant issues raised by the defendants' experts" does not suffice to establish the existence of a material issue of fact. (*Ahmed v Pannone*, 116 AD3d 802 [2d Dept 2014], lv dismissed 25 NY3d 964 [2015], rearg denied 26 NY3d 944 [2015]; see also, *Brinkley v Nassau Health Care Corp.*, 120 AD3d 1287 [2d Dept 2014]). Furthermore, an expert's opinion which fails to set forth his or her rationale, methodology and reasons therefor also fails to establish an issue of fact. (*Rivers v Birnbaum*, 102 AD3d 26, 44 [2d Dept 2012]; *Dunn v Khan*, 62 AD3d 828, 829-830 [2d Dept 2009]).

In support of their motion, movants submit the affirmation of Gregory Mazarin, M.D., a physician board certified and specializing in emergency medicine. Upon his review of the relevant litigation documents, the hospital records, and the deposition transcripts of the plaintiff, defendants, and a non-party witness physician, Dr. Mazarin opines that the care rendered by the moving defendants fully conformed to good and accepted practice, without departure or deviation.

In particular, Dr. Mazarin opines that the moving defendants took the proper medical history and consulted with the appropriate specialty, urologist Dr. Luntz by telephone, communicating the results of the urinalysis, BUN and creatinine levels, CT scan, and the selection of antibiotic. At her initial presentation, decedent's white blood cell count was not elevated and her vital signs were normal. Together with Dr. Luntz, it was decided to discharge the decedent from the hospital and have her follow up with Dr. Luntz at his office the following morning, with instructions to return if her symptoms worsened. According to Dr. Mazarin, the CT scan revealed a 3 mm calculus within the mid-right ureter, among other abnormal findings including left kidney atrophy, and urinalysis was positive for infection. He notes that the decedent reported being allergic to a number of antibiotics but it was later determined that she was not allergic to Macrobid®, and she was discharged with orders for that medication. Plaintiff returned to the emergency department that same evening with altered mental status and was placed on intravenous antibiotics and taken to the operating room for a cystoscopy and right ureteral stent placement.

Dr. Mazarin opines that the hospital and Dr. Dauer appropriately diagnosed the decedent and carried out their duties and responsibilities in light of the circumstances and information presented at the time. In particular, he states that a telephone consult was appropriate as urinary infections and kidney stones are common complaints in the emergency department and are within Dr. Dauer's purview to treat and a blood culture was not indicated at that time because the patient was afebrile

with normal white blood cell count and vital signs. In addition, Dr. Mazarin finds that the movants fully complied with the emergency department and additional hospital policies in effect at the time. Finally, Dr. Mazarin opines that plaintiff's lack of informed consent claim is without basis as no invasive procedures were performed on the admission in question.

Dr. Luntz opposes, arguing that the motion must be denied because movant's falsely claim reliance on the consultation with him in deciding to discharge the plaintiff's decedent. Dr. Luntz argues that contrary to the movant's assertions, plaintiff's deposition testimony does not indicate that the decedent's test results were fully communicated as he only perceived the information regarding a kidney stone and chills and did not "remember what else [Dr. Dauer] said."

By affirmation,[1] Dr. Luntz further states that he was not called for a urology consult nor requested to do one over the phone. Rather, the purpose of the courtesy call from Dr. Dauer was to advise him of the status of the patient and the discharge with instructions to see Dr. Luntz the following day, an occurrence that he states is common. Dr. Luntz indicates that he was not informed of the decedent's complete medical picture and was not involved in the decision concerning her discharge from the Plainview Hospital emergency department. In particular, he states that he was not advised that the patient complained of chills, the complete results of the CT scan (including an atrophic kidney), and the finding of leukocyte esterase on the urinalysis. Had he been made aware of all of these symptoms, he would have recommended intravenous antibiotics be given. Dr. Luntz indicates that the decision to discharge the decedent was made prior to his being called.

Standing alone, the issues of foundational fact raised by Dr. Luntz are sufficient to defeat the motion. Indeed, while movants argue that Dr. Luntz's affirmation is inadmissable, they do not dispute that the only mention of his involvement in the October 12, 2016 emergency room record is as follows "case d/w Dr. Luntz who states to start AbXs and will see in office tomorrow. Patient and family agree." Nor do they dispute the relevant portions of deposition testimony pointed to by Dr. Luntz in opposition to the motion. Nevertheless, a review of plaintiff's opposition papers mandates the same result.

Plaintiff submits the affidavit of an unnamed physician specializing in emergency medicine in the greater metropolitan area.[2] Upon his review of the medical records and deposition transcripts,

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[1] By their reply, moving defendants object to Dr. Luntz's use of an affirmation rather than an affidavit as he is a party to this action. (*See Slavenburg Corp. v. Opus Apparel, Inc.*, 53 NY2d 799 [1981]; *LaRusso v. Katz*, 30 AD3d 240 [1st Dept 2006]). For the reasons explained, even if Dr. Luntz's affirmation is disregarded, the motion must be denied.

[2] An unredacted copy of plaintiff's expert affirmation has been provided to the court for in camera review.

plaintiff's expert opines that there were significant departures from the standard of care by Dr. Dauer, which departures deprived the decedent of timely and necessary treatment and resulted in severe sepsis and, ultimately, death. He indicates that the decedent had a complicated medical history, which included prior kidney stones and treatment with urologist Dr. Jeffrey Lane, with whom Dr. Luntz shared a large practice. She presented to the emergency department with chills, right flank pain, and right lower quadrant abdominal pain but without pain or difficulty urinating. The decedent reported three episodes of vomiting and pain of 8 on a scale of 1-10. Lab results indicated an elevated BUN and creatinine, low GFR (glomerular filtration rate), and leukocyte esterase, proteins, and nitrates present in the urine. Upon receiving results of the abdominal/pelvic CT scan, Dr. Dauer ordered urine cultures, which showed white and red blood cells and bacteria "too numerous to count." Dr. Dauer ordered a white blood cell count, without a differential to detail the counts of white blood cell types.

Plaintiff's expert notes that although Dr. Dauer testified that he shared the results of the decedent's testing with Dr. Luntz, he admittedly did not inform Dr. Luntz of the low GFR, the atrophic kidney, and could not recall whether he disclosed the complaint of chills. Dr. Luntz, by contrast, testified that he did not recall the conversation but had be been told about the results of the urinalysis, he would have advised Dr. Dauer to obtain a clean sample and re-run the test to rule out any contaminant. Additionally, Dr. Dauer testified that he discussed administering intravenous antibiotics with the decedent and her husband but they wanted to leave the hospital, so he ordered oral Macrobid® instead. Plaintiff's expert indicates that upon assessment at 11:13pm, after plaintiff's decedent returned to hospital, it was determined that she had possible urosepsis secondary to the renal calculus and she was taken in for emergency surgery. A note from the consulting infectious disease specialist on the following day indicated that the most likely cause of the patient's sepsis was obstructive uropathy.

Plaintiff's expert opines that the decedent's case was a complicated one as she had an atrophic left kidney so a condition threatening the right kidney should have raised a high level of concern. In addition, a calculus in the ureter can cause partial or complete obstruction, which can lead to infection, urosepsis, septic shock, and ultimately death. He/she opines that the decedent was a perfect set up for development of urosepsis and that she was improperly discharged from the emergency room with a blocked ureter, abnormal kidney function, flank pain masked by morphine, and a urinary tract infection. In addition, plaintiff's expert opines that the oral antibiotic with which plaintiff was discharged was inadequate and unlikely to reach her obstructed kidney. Nor was she personally evaluated by a urologist or infectious disease specialist.

Plaintiff's expert opines that the decedent was on the verge of becoming septic and was sent home prematurely. He/she indicates that intravenous antibiotic therapy was required and had it been started earlier, urosepsis and its sequella would have been avoided. He/she further indicates that the standard of care require the physician to explain that it would be in the patient's best interest to remain and receive appropriate treatment and to thoroughly document if the patient should leave

against medical advice. Failure to provide intravenous antibiotics after having recognized the need for it and failure to take steps to persuade the patient to stay, according to plaintiff's expert, represents a sharp deviation from good and accepted medical practice. Similarly, plaintiff's expert opines that Dr. Dauer failed to adequately justify discharge of the decedent, where her obstructed ureter and infection remained, no ultrasound had been performed, and white blood cell count was missing a differential. The fact that the decedent felt better was not indicative of improvement as she had received morphine, intravenous fluid, and Zofran®. Rather, additional reassement was required to appreciate the severity of plaintiff's condition and to timely and adequately treat her, including by pursuing necessary consults. Additionally, there are questions of fact concerning whether such departures substantially contributed to the damages that plaintiff claims in this action. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." (*Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]). "Such conflicting expert opinions will raise credibility issues which can only be resolved by a jury [or trier of fact]. In addition, plaintiff's expert opines that a prescription for oral Macrobid®, especially in a patient who had been vomiting and was given a dose of Zofran® to quell nausea was a deviation from the standard of care as was the failure to obtain an adequate urology consult or an infectious disease consult. In sum, plaintiff's expert finds that this decedent presented a complicated case, with an atrophic left kidney and a threatened right kidney, along with an infection and the movants failed to appreciate the severity of the symptoms and act accordingly. Plaintiff's expert concludes that the moving defendants' departures deprived the decedent of a substantial opportunity to avoid urosepsis, septic shock, and, ultimately her death.

In light of the record evidence and conflicting medical affidavits presented, the court finds that there are issues of fact concerning whether the moving defendants departed from the standards of good and accepted medical practice by failing" (*DiGeronimo v Fuchs,* 101 AD3d 933, 936 [2d Dept 2012]).

For the foregoing reasons, it is hereby

ORDERED, that the motion by Jan. H. Dauer, MD and Plainview Hospital is **denied**.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 28, 2020

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED
JAN 29 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE