

**Harper v Kennedy**

2023 NY Slip Op 31670(U)

May 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 513727/2019

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS:

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NORMAN HARPER, JR. as Administrator of the  
Estate of VIRGINIA HARPER, deceased,

Plaintiff,

-against-

**DECISION AND ORDER**

Index No. 513727/2019

Motion Sequences: 7, 8, & 9

THOMAS KENNEDY, M.D., DANIEL R.J.  
O’CONNOR, M.D., J ELENA PRESTIGIACOMO,  
R.N., NEW YORK - PRESBYTERIAN  
BROOKLYN METHODIST HOSPITAL and  
FOUR SEASONS NURSING AND  
REHABILITATION CENTER,

Defendants.

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**HON. CONSUELO MALLAFRE MELENDEZ, J.S.C**

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 104, 105-121;  
153-157; 170; 123, 124-138; 158-160, 168; 139, 140-149; 162-164, 166-167; 169.

Defendants THOMAS KENNEDY, M.D. JOSEPHINE ELENA PRESTIGIACOMO,  
R.N. s/h/a J ELENA PRESTIGIACOMO, R.N. and NEW YORK-  
PRESBYTERIAN/BROOKLYN METHODIST s/h/a NEW YORK-PRESBYTERIAN  
BROOKLYN METHODIST HOSPITAL, DANIEL R. O’CONNOR, M.D., s/h/a DANIEL R.J.  
O’CONNOR, M.D, and FOUR SEASONS NURSING AND REHABILITATION CENTER

each move this court for an order granting summary judgment pursuant to CPLR § 3212  
dismissing Plaintiff’s complaint in its entirety. Plaintiff submitted opposition to these motions.  
Plaintiff does not oppose that portion of defendant’s motion seeking dismissal of claims relating  
to the alleged negligent care rendered by Dr. Thomas Kennedy on May 31, 2017. Accordingly,  
the motion for summary judgment on behalf of Thomas Kennedy, M.D is granted and all claims  
relating to Dr. Thomas Kennedy are dismissed.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist, and the movant is entitled to judgment as a matter of law. *Owens v. City of New York*, 183 AD3d 903, 906 [2d Dept. 2020] citing *Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695, 696 [2d Dept. 2015], quoting *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]. “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.” *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. “Thus, in moving for summary judgment, a physician defendant must establish, prima facie, ‘either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.’” *Hutchinson*, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. “Once this showing has been made, the burden shifts to the plaintiff to rebut the defendant's prima facie showing with evidentiary facts or materials ‘so as to demonstrate the existence of a triable issue of fact.’” *Paglinawan v. Ing-Yann Jeng*, 211 AD3d 743, 744 [2d Dept. 2022] citing *Assunta v. Rubin*, 189 AD3d 1321, 1323 [2d Dept. 2020].

“When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.” *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. As relevant here, “[a]ny conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve.” *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015].

Defendants J. Elena Prestigiacom, R.N., and New York - Presbyterian Brooklyn Methodist Hospital (“NYPBMH”) submitted expert affirmations of two physicians and one registered nurse. Defendants’ expert, ERNEST S. CHIU, M.D., FACS, a physician board-certified in Plastic Surgery, has established that he is qualified to opine as to the wound care provided by Nurse Prestigiacom and NYPBM in this case. Defendants’ expert GREGORY MAZARIN, M.D., a physician board-certified in emergency medicine, has established that he is qualified to opine as to the treatment rendered to the patient by NYPBMH in this case. Defendants’ expert, SARAH LBOVITS, RN, MSN, ANP, CWOCN, IIWCC-NYU, a licensed registered nurse, has established that she is qualified to opine as to the care and treatment provided by Nurse Prestigiacom and NYPBMH. Plaintiff’s expert, a physician board-certified in critical care, has also established that they are qualified to opine as to the treatment rendered to the patient in this case. Plaintiff’s expert, a licensed registered nurse, has also established that they are qualified to opine as to treatment provided by the nursing staff in this case.

Based on their submissions, including expert affidavits and affirmations of defendants J ELENA PRESTIGIACOMO, R.N., and NEW YORK - PRESBYTERIAN BROOKLYN METHODIST HOSPITAL the court finds that the defendants have met their *prima facie* burden for summary judgment. However, in opposition the plaintiff raises issues of material fact through their submissions and expert affirmations.

Defendants’ expert, Nurse Lebovits, opines that Nurse Prestigiacom acted within the standard of care in 2017 when she “performed a complete skin assessment evaluation by performing a head to toe examination, turning the patient over and checking her backside, and heels and that no sacral ulceration was noted.” The expert further opines that Nurse Prestigiacom did not deviate from the standard of care in 2017 when she continued ulcer

prevention protocol in accordance with Ms. Harper being high risk to develop a pressure ulcer; and that the plan of care implemented was consistent with the standard of care. Nurse Lebovits further opines that Nurse Prestigiacomio's skin assessment and preventative treatment were not the proximate cause of Ms. Harper's injuries. Nurse Lebovits states in her affidavit that the patient was seen by multiple nurses who performed skin assessments and none of them noted the presence of a pressure ulcer.

In opposition, plaintiff's expert, a licensed registered nurse, opines that upon admission Ms. Harper should have been assessed an 11 on the Braden Scale, and instead was assessed an 18 by Nurse Prestigiacomio. A score of 11 on the Braden Scale would have qualified Ms. Harper as high risk to develop pressure ulcers whereas an 18 was indicative of a mild risk of developing pressure ulcers. Plaintiff's expert further opines within a reasonable degree of nursing certainty that Ms. Harper should have been assessed a high risk with appropriate preventative measures implemented upon her admission and instead was assessed and considered a mild risk and no preventive measures were implemented which was a deviation from the standard of care, and a proximate cause of Ms. Harper's sacral pressure injury. According to plaintiff's expert, these preventative measures included, "a special air mattress, turning and positioning documented every two hours, skin care plan, booties, pillows, blocks, [and] cushions." Plaintiff's expert states that none of these preventative measures were documented in the chart, which is a deviation from the standard of care. Plaintiff's expert raises issues of fact as to whether the skin assessments upon patient's admission to the hospital were done correctly and whether the plan of care implemented was within standard of care.

As supported by the record, plaintiff and defendants submitted detailed conflicting expert opinions which raises questions of fact. Accordingly, summary judgment is DENIED as to Nurse Prestigiacommo.

Defendant New York-Presbyterian Brooklyn Methodist Hospital (“NYPBMH”) submitted the expert affirmation of physician Dr. Ernest S. Chiu. Dr. Chiu opines that the standard of care in 2017 for evaluating a patient for possible skin ulcerations required a head-to-toe examination, turning the patient over and checking their backside and heels. Dr. Chiu further opines that the standard of care for preventing skin ulcerations in 2017 required “placing the patient on a specialty mattress, repositioning every two hours, offloading pressure, and reducing shear/friction.” It is Dr. Chiu’s opinion within a reasonable degree of medical certainty that the defendant NYPBMH and its physicians, nurses, staff, and employees at all times acted within the standard of care, that a skin assessment and evaluation was performed appropriately, and that no sacral ulcer was noted. Dr. Chiu further opines that defendants’ appropriately put the proper prevention protocols in place for Ms. Harper being considered high risk due to her multiple co-morbidities and hip fracture. Her co-morbidities included hypertension, stage III chronic kidney disease, dementia, and hyperlipidemia. The prevention protocol defendants put in place, according to Dr. Chiu, included “skin inspection every shift, repositioning every two hours, offloading pressure per protocol, reducing shear/friction, and placing Ms. Harper on a IsoGel air mattress.” Dr. Chiu further opines that due to these prevention measures being taken, the patient did not develop any sacral ulcers while admitted to NYPBMH, “despite contrary evidence in the Four Seasons chart that noted a stage IV ulcer on admission.”

In opposition, plaintiff’s expert states that Dr. Chiu fails to reference any documentation in the record reflecting that these preventative measures were actually taken. Plaintiff’s expert

opines within a reasonable degree of medical certainty that none of these preventative measures were taken which was a deviation from the standard of care and proximately caused the sacral ulcer to develop and grow without being noted by anyone at NYPBMH. Plaintiff's expert also highlighted that Dr. Chiu did not address that a Braden Scale score of 18 is considered a "mild risk" for developing pressure ulcers. Plaintiff's expert further opines that those inconsistencies in the record allowed for the inadequate preventative measures to be taken, which was a deviation from the standard of care. Plaintiff's expert states that the 5 cm x 5 cm sacral pressure ulcer found by Four Seasons upon Ms. Harper's admission after being transferred directly from NYPBMH was "preventable and avoidable, and occurred due to the negligent treatment rendered by the staff and nurses of NYPBMH."

The expert affirmations submitted by plaintiff and defendants clearly conflict with one another and therefore raise issues of fact as to whether defendants deviated from the standard of care by failing to appropriately assess Ms. Harper's skin, implement prevention protocol and document the same. Accordingly, the motion for summary judgment is DENIED as to defendant New York-Presbyterian Brooklyn Methodist Hospital.

Based on defendant Dr. O'Connor's submissions and expert affirmation the court finds that the defendant has met his *prima facie* burden for summary judgment. However, in opposition the plaintiff raises issues of material fact through their submissions and expert affirmation. Defendant's expert, Michael J. Bronson, M.D., a physician board-certified in orthopedic surgery, established that he is qualified to opine as to the care and treatment rendered by Dr. O'Connor in this case. Plaintiff's expert, a medical doctor board-certified in orthopedic surgery and sports medicine, also established expertise to opine as to the care and treatment rendered by Dr. O'Connor in this case.

In support of the motion for summary judgment, defendant Dr. O'Connor's expert opines that as the orthopedic attending physician, Dr. O'Connor's responsibility to the patient was as to her orthopedic care. Defendant's expert further opines that the pressure ulcer is the responsibility of the nursing and wound care team and that NYPBMH has a skin care team which Dr. O'Connor is not part of. Defendant's expert further opines that it is the skin care team's responsibility to assess the patient's skin and treat decubitus ulcers and Dr. O'Connor is not responsible to provide or supervise such treatment.

In opposition, plaintiff's expert opines that as the attending physician, the standard of care required Dr. O'Connor to ensure the appropriate measures were implemented to prevent pressure ulcers, including making sure the patient was turned and positioned, and assessed for tissue deterioration. Plaintiff's expert further opines that defendant's failure to do so was a deviation from the standard of care and a proximate cause of Ms. Harper's bedsore at the sacrum. Plaintiff's expert further opines that although co-defendant Nurse Prestigiaco assessed the patient as an 18 on the Braden Scale which is a mild risk for decubitus ulcers, Ms. Harper was high risk for ulcers because she was a total assist and could not move. Plaintiff's expert also disagrees with defendant's expert's opinion that wound care is the responsibility of the skin care team and not Dr. O'Connor, rather it is a team effort. Plaintiff's expert opines that as the attending physician Dr. O'Connor deviated from the standard of care by failing to oversee that preventative measures were implemented. Based on conflicting opinions of the experts, the court finds an issue of fact exists.

Therefore, summary judgment is DENIED as to defendant Dr. O'Connor.

Based on defendant Four Seasons Nursing and Rehabilitation Center's ("Four Seasons") submissions and expert affirmation the court finds that the defendant has met their *prima facie*



burden for summary judgment. However, in opposition, the plaintiff raises issues of material fact through their submissions and expert affirmation.

Defendant Four Seasons' expert, Lawrence Diamond, M.D., is a physician board-certified by the American Board of Family Practice, has an added board certification in Geriatric Medicine, and is board-certified as a Medical Director from the American Medical Directors Association. The expert, Dr. Diamond, has established that he is qualified to opine as to the treatment rendered in this case.

In his affirmation, Dr. Diamond opines that the standard of care, pursuant to NYCRR § 415.12, requires that “the facility must perform a comprehensive assessment; when a resident enters a facility without pressure sores, take reasonable efforts to prevent ulcers from developing; and for a resident having pressure sores, provide necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.” Dr. Diamond further opines that Ms. Harper was assessed using a Braden Scale and her high risk score prompted a care plan which included “skin checks, wound rounds, skin inspection, turning and positioning, incontinence care and specialty surfaces” as well as weekly wound rounds, and appropriate treatments and pain management. Dr. Diamond opines that the standard of care was met by Four Seasons. Dr. Diamond states that the chart indicates that Ms. Harper was severely underweight upon admission and was refusing meals, and that the deterioration of her sacral ulcer was directly related to her nutritional compromise. Dr. Diamond opines that the detailed progress notes by the attending physicians document “Ms. Harper's nutritional status, infections, and overall decline, and how they altered the plan of care/treatment.” According to Dr. Diamond, adult failure to thrive is a diagnosis “manifested by poor nutrition, weight loss, inactivity, depression and decreasing functional ability,” as seen in Ms. Harper's records. Further, Dr. Diamond refers

to Ms. Harper's case as "one of inevitable decline consistent with failure to thrive and geriatric syndrome" stating that this is consistent with the notes in her chart.

Plaintiff's expert opines within a reasonable degree of medical certainty that defendant Four Seasons failed to implement an appropriate plan of care for Ms. Harper upon her admission on June 6, 2017. Plaintiff's expert states that no prevention interventions including, "turning and positioning at least every two hours, and properly using pillows, cushions, blocks, booties" were implemented until June 19, 2017, which was a deviation from the standard of care. Plaintiff's expert further opines that it was a deviation from the standard of care not to call a wound care consult for the sacral decubitus ulcer.

Plaintiff's expert further opines that Four Seasons failed to provide Ms. Harper with adequate nutrition which resulted in her "failure to thrive" and that was a deviation which caused the pressure ulcer to deteriorate further. Plaintiff's expert further opines that the PEG placement should have been performed much earlier than June 23, 2017, and that defendant Four Seasons should have transferred Ms. Harper to New York Community Hospital during her first week at their facility. At that time her sacral ulcer had grown to 6 cm x 6 cm, had a foul smell and pus, and she was febrile. Plaintiff's expert further opines that if the surgical debridement was performed at that time and the wound cultured, then the appropriate antibiotic medication would have been prescribed and would have allowed timely healing of the wound. This deviation from the standard of care allowed the wound to grow and become infected. Dr. Cimafranca, attending physician at Four Seasons, notes that on June 13, 2017, Ms. Harper had a fever, "etiology to be determined." According to plaintiff's expert it was a deviation from the standard of care not to determine the etiology of the fever. The decubitus ulcer was never addressed by any of the staff at Four Seasons as a possible source of Ms. Harper's infection or her fever. Plaintiff's expert

raises an issue of fact as to whether Four Seasons deviated from the standard of care in addressing her nutritional needs and treating the sacral ulcer she arrived with.

Additionally, plaintiff's expert and defendant's expert offer conflicting testimony regarding whether a deep tissue injury such as Ms. Harper's sacral ulcer can develop in two hours, raising an issue of fact for the jury to decide.

Accordingly, the motion for summary judgment is DENIED as to defendant Four Seasons Nursing and Rehabilitation Center.

Defendants Dr. O'Connor and Four Seasons Nursing and Rehabilitation Center move for dismissal of the lack of informed consent claims which were not addressed by plaintiff in opposition. Therefore, summary judgment is granted as to Daniel R. O'Connor, M.D. and Four Seasons Nursing and Rehabilitation Center as to claims for lack of informed consent claims and are dismissed as to these defendants.

This constitutes the decision and order of the court.

Dated: May 17, 2023

**ENTER.**



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Hon. Consuelo Mallafre Melendez,  
J.S.C.