McIntyre v Palm Gardens Ctr. for Nursing & Rehabilitation
2024 NY Slip Op 32312(U)
July 5, 2024
Supreme Court, Kings County
Docket Number: Index No. 522106/2016
Judge: Consuelo Mallafre Melendez
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At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of July 2024.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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GORDON MCINTYRE, as administrator d.b.n. of the goods, chattels and credits which were of THOMAS P. MCINTYRE, deceased, and MONICA MCINTYRE, individually,

Plaintiffs,

-against-

PALM GARDENS CENTER FOR NURSING AND REHABILITATION, PALM GARDENS CARE CENTER, LLC and MOHAMMED RAHMAN, M.D.,

Defendants.

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DECISION & ORDER

Index No. 522106/2016
Mo. Seq. 2 & 3

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

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 43-67, 76-137, 147-162

Defendant Palm Gardens Center for Nursing & Rehabilitation and Palm Gardens Care Center LLC ("Palm Gardens") move (Seq. No. 3) for an Order, pursuant to CPLR 3212, granting summary judgment to said defendants, dismissing all claims against them.

Defendant Mohammed Rahman, M.D. ("Dr. Rahman") separately moves (Seq. No. 2) for an Order, pursuant to CPLR 3212, granting summary judgment in his favor, dismissing the case against him. Alternatively, Dr. Rahman requests that the court issue an Order granting partial summary judgment, dismissing the plaintiff's claim for gross negligence; and holding that *res ipsa loquitur* is inapplicable to the claim in this case, be issued.

Plaintiff commenced this action on December 12, 2016, asserting claims of medical malpractice and wrongful death against the moving defendants, alleging that the defendants failed to properly diagnose and treat the decedent's decubitus ulcers and caused the decedent's death.

This case involves the plaintiff's decedent, a 77-year-old male, who suffered a major stroke and was treated at Kings County Hospital in August 2014. The decedent was then admitted to New York Presbyterian Brooklyn Memorial Hospital where he suffered a respiratory event that required intubation and a PEG tube for feeding. On September 26, 2014, the decedent was admitted to Palm Gardens where he was ventilator dependent as a result of the stroke and anoxic encephalopathy. Dr. Rahman, a pulmonologist, was an attending for Palm Gardens in 2014, who oversaw patients who were ventilator dependent. When the decedent was first admitted on September 26, 2014, Dr. Rahman noted that the patient had anoxia, respiratory failure, immobility, pneumonia, cerebrovascular disease, multiple prior cerebral vascular accidents (strokes), hypertension, hyperlipidemia, congestive heart failure, diabetes, epilepsy, was incontinent of his bowels and bladder, coronary artery disease, a PEG feeding tube, and hyponatremia.

The medical record indicates that the same day the decedent was admitted to Palm Gardens, a palliative care plan was created to care for the decedent in his end stage of life and monitor the decedent's skin. This involved the Wound Care Team, a group of nurses and doctors who are tasked with taking care of any skin wounds a patient may encounter. Dr. Rahman testified that he would defer to the expertise of the Wound Care Team exclusively when addressing the decedent's skin care issues. However, no ulcers were noted at the time of the decedent's first admission to Palm Gardens.

On October 9, 2014, the decedent was transferred to Mount Sinai Hospital due to a hematuria (blood in the urine). The decedent was discharged from Mount Sinai Hospital on October 16, 2014, with a diagnosis of UTI, dehydration, gastrostomy malfunction, and epilepsy. Upon readmission to Palm Gardens on October 16, 2014, the decedent was assigned a Braden Score of 13 (high risk for pressure ulcers), significant dryness was noted on both feet, and A&D ointment was applied, but no ulcers were noted.

On November 3, 2014, redness on the left and right feet was documented by Dr. Rahman and the nurses of the Wound Care Team began zinc oxide ointment treatment to be applied to the area four times a day for fourteen days. On November 7, 2014, the decedent had a Stage II ulcer measuring 2 x 3 x 0.2 cm on his left heel and 3 x 2 cm on his right heel. From November 7, 2014 through November 11, 2014, the decedent remained on antibiotics, continued PEG feedings, and stayed ventilator dependent. On November 11, 2014, a nurse's note

stated that "bunny boots" were on and released every two hours, the heels were floated by a pillow placed under the decedent's ankles, and skin changes were noted to both feet.

On November 12, 2014, the Wound Care Team noted the vascular/arterial wound of the left anterior foot was necrotic and measured 4.0 x 5.8 cm. In addition, the decedent's white blood cells were elevated. On November 13, 2014, the decedent was seen by a wound physician, and the decision was made by Dr. Rahman to transfer the decedent to Mount Sinai Hospital due to sepsis, anemia, multiple deep tissue injuries to both feet and a fever of 102 degrees Fahrenheit.

On December 2, 2014, the decedent returned to Palm Gardens. A nurse's skin assessment, completed by Charlene Vallecillo, noted an excoriation on the decedent's back and neck, stage III pressure ulcer to the sacrum, stage IV ulcers on the left and right heels, and stage III ulcer on the lateral aspect of both ankles. The decedent's blood test revealed high white blood cells and low red blood cells and hemoglobin. The decedent's nutritional needs were reassessed to promote wound healing by a nutritionist to include Glucerna, Vitamin C, and a multivitamin via the PEG feeding tube.

On December 4, 2014, it was noted that all wounds were unstageable and had black necrotic tissue. From this point on, Daily Nursing Progress Notes stated how the decedent was repositioned, heels floated, and bunny boots secured.

On December 23, 2014, the decedent was once again transferred back to Mount Sinai Hospital. His systolic blood pressure was above 200 and he had anemia, congestive heart failure, and acute renal failure. The decedent's sacral ulcer was described as a stage II, and he had several wounds on his right foot with a foul odor and gangrenous wounds on his left foot with foul purulent discharge. The decedent died on December 30, 2014. The parties note in their respective Statement of Facts that the death was a result of cardiopulmonary arrest, secondary to congestive heart failure and coronary artery disease.

Plaintiff alleges that Palm Gardens and Dr. Rahman departed from good and accepted medical standards by failing to properly diagnose and treat the decedent's pressure ulcers, and that these departures were a proximate cause of the decedent's alleged injuries.

Generally, "[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party" (*Stukas v. Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). "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 [internal citations omitted]" (*Hutchinson v. New York City Health & Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019], quoting *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'" (*id.*, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.,* 132 AD3d 959, 960 [2d Dept. 2015]). If a defendant makes 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" (*Stukas v. Streiter*, 83 AD3d 18 at 30). "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted]" (*Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept 2022] [internal citations omitted]). "Any conflicts in the testimony merely raise an issue of fact for the factfinder 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]). However, "expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted]" (*Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019]).

In support of its motion for summary judgment, Palm Gardens submits an expert affirmation from Gisele Wolf-Klein, M.D. ("Dr. Wolf"), a physician licensed to practice Internal and Geriatric Medicine. The movant also submits medical records and deposition transcripts.

Based on her review of the records, pleadings, and testimony, Dr. Wolf opines that Palm Gardens did not depart from good and accepted standards in rendering treatment to the decedent. Dr. Wolf opines that the alleged deviations failed to consider the decedent's litany of significant co-morbidities upon arriving to Palm Gardens including respiratory failure, acute CVA, seizure disorder, Type 2 diabetes, and other medical conditions.

Dr. Wolf opines that the treatment ordered by Palm Gardens during the decedent's second admission was appropriate and within the standard of care for the decedent's newly acquired ulcers. The ointment used to treat the decedent keeps the ulcerated skin hydrated and promotes healing. Dr. Wolf also opines that the orders for the application of Bacitracin to the neck and back excoriations were proper because Bacitracin is a topical antibiotic ointment used to treat skin injuries including cuts, scrapes, and burns.

Dr. Wolf further opines that the decedent received timely and appropriate consultations with the wound care specialists while at Palm Gardens. Looking at the record, she found the fact that the decedent was seen by the Wound Care Team "twice during the course of just two weeks was well within the standard of care." In addition to the appropriate consultations, she opines that Palm Gardens also ordered appropriate treatment measures by ordering turning, bunny boots, and an off-loading mattress. Furthermore, Dr. Wolf found that the ulcers were vascular, which is a common development for patients with decedent's co-morbidities.

After reviewing the interventions to ensure that the decedent maintained adequate nutrition and hydration, Dr. Wolf opined that the treatment was appropriate to promote wound healing. The decedent's malnourishment and complications began prior to his arrival at Palm Gardens and Palm Gardens exercised the accepted standard of practice by making timely consultations to optimize his nutrition. The decedent was given Vitamin C, multivitamins, protein, and carbohydrate supplements to promote his nutrition intake. In addition, the decedent was frequently monitored by dietary staff to assist with wound healing.

Moreover, Dr. Wolf opines that the decedent's skin conditions, including the wounds and ulcers, were unable to heal because he was at the end stage of life. During this time, vital body systems and organs can decrease in function or totally cease to function completely. She opines that the skin is the largest organ of the body and will become compromised in the setting of decreased perfusion, reduced oxygen, and the body's inability to utilize vital nutrients when an individual is at the end stages of life. Further, she opines that the decedent's low blood count (anemia) contributed to causing the skin to become non-healing. Dr. Wolf opines that if there is an insufficient amount of blood to carry oxygen through the body, certain organs will not receive the oxygen that they need, here, the decedent's skin. To further support her opinion, Dr. Wolf references how the Wound Care Team noted the ulcer was on the left anterior foot, which is important because pressure ulcers

cannot form on the anterior foot unless the patient is resting on their stomach. The record supports that the decedent was not.

Lastly, Dr. Wolf opines that the decedent's sacral ulcer developed and was unable to heel because he was required to be positioned with an elevated head of bed between 30 and 45 degrees during the entirety of the Palm Gardens admission. Dr. Wolf opines that the high bed elevation enhances oxygenation and ventilation and was needed as the decedent was ventilator dependent. She opines that a patient in this manner cannot be fully turned and positioned in the same manner as a patient with a head of bed less than 30 degrees. Further, she opines that the higher backrest elevation is likely to result in increased loading of the pelvic region, producing pressure on the gluteal, sacral, and coccygeal areas. Thus, the decedent's necessary position for proper ventilation increased the risk of pressure ulcers developing. Further, Dr. Wolf opines that upon admission to Palm Gardens, the decedent was properly assessed as being at high risk for skin breakdown. In accordance with the accepted standard of care, she opines that the "Comprehensive Care Plan reflects instructions for the decedent to be turned and positioned every two hours, keep the head of the bed elevated to 45 degrees to prevent aspiration, place bunny boots on both heels, float both heels on a pillow, and use specialized pressure reducing air mattress." Dr. Wolf opines that the medical record indicated that the plan was followed through by the Wound Care Team by regular skin checking, cleaning, and "bunny boots being placed on the decedent when needed.

Based on these submissions, Palm Gardens has established a prima facie case that its treatment of the decedent's pressure ulcers was within good and accepted medical standards and that no act or omission of the Palm Garden staff, wound nurses, or doctors, caused or contributed to the development of the decedent's skin conditions. Further, these submissions support Dr. Wolf's opinion that none of the Plaintiff's claims were the proximate cause of the decedent's injuries.

In opposition to Palm Gardens' motion, Plaintiff submits an expert affirmation from Edward H. Lowe, M.D. ("Dr. Lowe"), a licensed General Medical Practice and Primary Ambulatory Care physician.

Plaintiff's expert opines that Palm Gardens departed from the standard of care by failing to recognize and address the decedent's early onset development of the pressure ulcers. Dr. Lowe opines that when the

decedent was re-admitted to Palm Gardens on October 16, 2014, there was no wound staging, however, it was noted in his chart that he had "dry heels," and on November 7, 2014, there was a stage II lesion on the left heel and a stage I lesion on the right heel. Based on this, Dr. Lowe opines that Palm Gardens failed to take the appropriate medical measures to prevent the decedent from developing these later lesions. Moreover, he opines that Palm Gardens deviated from accepted medical standards by failing to note the application of lotion, which was the recommended treatment for the decedent's "dry heels."

Dr. Lowe also opines that the deterioration of the decedent's ulcers could have been avoided with adequate surveillance and the provision of proper nursing care. The decedent was noted as being at risk for skin breakdown due to his lack of mobility when he was first admitted. Dr. Lowe opines that Palm Gardens was on notice of the decedent's condition and should have implemented proactive and preventative care to avoid the deterioration of his skin. He points to the medical record to show how the turning and repositing of the decedent remained the same throughout the decedent's entire time at Palm Gardens consistent with a Palliative care plan, when Palm Gardens should have taken a proactive care approach.

Dr. Lowe further opines that earlier consultation with a vascular surgeon was the appropriate standard of care. He opines that Palm Gardens deviated from good and acceptable medical standards by failing to recognize that the ulceration of the heels and ankles was the decedent's body responding to some infectious source and that a vascular surgeon should have been consulted at this time before the decedent was not a candidate for surgery. Dr. Lowe opines the fact that Palm Gardens waited over a month from the first appearance of ulcers in November to consult a vascular surgeon is a deviation from the standard of care. Dr. Lowe also opines that Palm Gardens failed to recognize that the decedent was suffering from poor blood circulation in his lower extremities, which prevented the consideration of other care alternatives like surgery.

Further, Dr. Lowe opines that the decedent should have been repositioned more often than every two hours and that this should have been documented in a detailed repositioning schedule. He opines that Palm Gardens' "failure to properly and adequately turn and position decedent resulted in the development of pressure ulcers, and accordingly, a proximate cause of Plaintiff's decedent's injuries." Moreover, Dr. Lowe opines that Palm Gardens failed to modify the decedent's care plan as it related to his pressure ulcers.

Lastly, Dr. Lowe opines that Palm Gardens failed to record a turning and positioning chart which could have provided insight as to when the decedent was allegedly turned. He opines that the lack of record keeping is a violation of the decedent's rights under New York Public Health Law §2801-d.

On the issue of proximate cause, Dr. Lowe opines that the failure to treat the vascular infections and the unrelieved pressure were the cause of the decedent's pain and ultimate death, not his declining medical condition. Dr. Lowe opines that the delay and failure to conduct a total examination of the patient's symptoms led to "further deterioration in the patient's medical condition, and ultimate death." Further, he opines that the failure to diagnose the cause of the patient's infection was a deviation from good and acceptable medical standards and was the proximate cause of the worsening of decedent's ulcers. He also opines that Palm Gardens' "failure to properly and adequately turn and position the decedent resulted in the development of pressure ulcers, and accordingly, a proximate cause of Plaintiff's decedent's injuries."

Based upon the submissions before the court, Plaintiff's expert has failed to raise an issue of fact as his opinions are conclusory and speculative. "General and conclusory allegations of medical malpractice, …unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician's summary judgment motion" (*Coffey v. Mansouri*, 209 AD3d 714, 716 [2d Dept 2022], quoting *Myers v. Ferrara*, 56 AD3d 78, 84 [2d Dept. 2008]). While Palm Gardens' submissions and expert opinions establish their prima facie burden on summary judgment, Plaintiff's expert is conclusory in opinions that Palm Gardens deviated from standard medical practice in diagnosing and treating the decedent's pressure ulcers. Palm Gardens' expert sets forth a detailed explanation as to their course of treatment for the decedent's ulcers. Dr. Wolf explains when the ulcers were first discovered and the course of treatment they followed as the ulcers progressed. Moreover, Palm Garden's expert explained how these types of pressure ulcers are a risk when the patient is at their end stage of life (multi-organ failure). In contrast, Plaintiff's expert's opinions are not based on the patient's entire clinical picture and fail to account for the patient's severely compromised condition and the inability to re-position this ventilator and PEG dependent patient.

Upon admission the decedent was nonverbal, ventilated, only responded to tactile stimuli, and required a PEG tube for feeding. Dr. Lowe fails to address how the myriad of the decedent's comorbidities impacted the overall health of the decedent's skin. Dr. Lowe concludes that the ulcers were not diagnosed or treated properly without any concrete facts to oppose the opinion of Dr. Wolf or the notations in the medical record that support Palm Gardens' position. His opinion about consulting a vascular surgeon is also conclusory because there are no facts indicating that the decedent would be a candidate for surgery as he was receiving palliative care. In addition, Dr. Lowe concedes that Palm Gardens demonstrated a diligent effort to turn and position the decedent. (Plaintiff's expert affirmation, at 9).

As to causation, Plaintiff's expert's opinions are conclusory and not fully discussed. Dr. Lowe's opinion as to the decedent's "loss of chance" theory is unsupported by the record as the decedent was ventilator dependent with a poor life expectancy upon admission. The decedent was at the end stage of his life and Dr. Lowe failed to support his opinion that the ulcers caused the decedent's injuries by ignoring the decedent's stroke, heart failure, renal failure, and other medical conditions that have a high risk of causing skin degradation. The record supports that the decedent had a poor prognosis and that a palliative care plan was implemented to keep the decedent comfortable in his last few months of life.

Further, Dr. Lowe fails to rebut the record indicating that Mt. Sinai Hospital found that the decedent's death was attributed to his cardiopulmonary arrest, secondary to congestive heart failure, and coronary artery disease, not ulcers. Instead, Plaintiff's expert conclusorily opines that the ulcers were evidence of alleged negligence, and that this negligence caused the decedent's death, without reference to the medical records.

Dr. Lowe's opinion that Palm Gardens violated New York Public Health Law § 2801-d by not reporting a record of "the time and position" of all turning and positioning is also conclusory. Dr. Lowe does not cite to any authority that a chart of specific turning times and positions is required under the statute or regulations. In fact, courts have held that a "failure to document each element of the skin care protocol does not equate to a failure to perform each element" (*Braunstein v. Maimonides Medical Center*, 161 AD3d 675 [1st Dept 2018]). For these reasons, Palm Gardens' motion for summary judgment is granted as to medical malpractice and wrongful death.

Turning to the summary judgment motion of Dr. Rahman (Seq. No. 2), the movant submits an expert affirmation from Lawrence N. Diamond M.D. ("Dr. Diamond"), a physician certified in Family Medicine and Geriatric Medicine. The movant also submits medical records and deposition transcripts.

Dr. Diamond opines that Dr. Rahman appropriately developed an initial plan for the decedent on September 26, 2014. He opines that the treatment plan was for a patient who was at the very end stage of his life and had no possibility of regaining neurological functioning. The plan considered the family's wishes, the decedent's physical condition, and the decedent's poor prognosis. Dr. Diamond opines that this palliative care plan was not a deviation from the standard of care given the medical record of the decedent.

Dr. Diamond further opines that it is a good and accepted medical practice to work with specialists and defer to their respective expertise. He opines that Dr. Rahman appropriately deferred to specialists for the decedent's wound care issues as well as his nutritional needs. Dr. Diamond said that Dr. Rahman's primary function was to monitor the decedent's pulmonary condition and make sure he was comfortable, as he was the pulmonologist in charge of managing ventilator dependent patients. Thus, Dr. Diamond opines that it was standard for Dr. Rahman to appropriately create a palliative care plan and defer to the Wound Care Team for treatment of the ulcers.

Moreover, Dr. Diamond opines that it was the role of the Wound Care Team to manage, examine, and treat the decedent's decubitus ulcers. He opines that the Wound Care Team would measure and record the presence and status of the ulcers and if necessary, involve Dr. Rahman. Dr. Diamond opines that it is not a departure for Dr. Rahman to not have become directly involved in the wound and skin care issues of the decedent. In addition, he opines that when Dr. Rahman became aware of the "redness" of the decedent's skin in November 2014, Dr. Rahman appropriately noted this skin change and referred treatment to the Wound Care Team.

Dr. Diamond opines that the treatment of the first skin ulcer that was identified on November 7, 2014 was in accordance with the standard of medical practice. The wounds were treated with zinc oxide, Dermacin, and Betadine. This treatment was rendered by the Wound Care Team, and he opines that it was appropriate for

Dr. Rahman to defer and follow the medical treatment recommended by specialists who handle wound care issues.

Dr. Diamond further opines that Dr. Rahman did not depart from accepted medical standards as it pertains to the decedent's infections. Dr. Rahman ordered and reviewed laboratory studies between September 26, 2014, and December 30, 2014. The laboratory studies reflect close monitoring of the decedent's body temperatures, white blood count levels, and glucose levels. The medical charts showed that the decedent was on several intravenous antibiotics including Ampicillin, Meropenem, and Vancomycin. Dr. Diamond opines that the reviewing of laboratory studies and the course of antibiotic treatment by Dr. Rahman was not a deviation from accepted medical practice. Moreover, Dr. Rahman made appropriate recommendations to transfer the decedent to hospitals when the decedent had serious health complications indicated by the laboratory studies for further specialized treatment.

Dr. Diamond further opines that Dr. Rahman did not depart from accepted standards of care by not ordering a vascular surgeon consultation. Dr. Diamond opines that given the decedent's poor prognosis; he was not a candidate for surgical intervention. He opines that he was not a candidate for surgery because the decedent was unresponsive, in chronic respiratory failure, ventilator dependent, required a PEG feeding tube, was incontinent of his bowels and bladder, suffered multi-organ failure, and other comorbidities.

On the issue of proximate cause, Dr. Diamond opines that the decedent was at his end stage of life, and nothing that Dr. Rahman or Palm Gardens did or didn't do resulted in the decedent's development of his pressure ulcers and death. Dr. Diamond opines that his ulcers and death were caused by the decedent's chronic renal failure, multiorgan failure, and congestive heart failure. Moreover, Dr. Diamond opines that the treatment rendered by Dr. Rahman caused no injury to the decedent.

Based on these submissions, Dr. Rahman has established a prima facie case that his treatment of the decedent's pressure ulcers was within good and accepted medical standards and that no act or omission contributed to the development of the decedent's skin conditions or his death.

In opposition to Dr. Rahman's motion, Plaintiff submits the same affirmation from Dr. Lowe, who addresses both defendants' motions.

Based on Dr. Rahman's testimony, Dr. Lowe opines that Dr. Rahman was acting as the primary care physician of the decedent. Dr. Lowe opines that he was the "gatekeeper" of the decedent's care and treatment. Dr. Lowe opines that Dr. Rahman "divorced" himself from the critical decision-making of the decedent's day-to-day care, by solely managing the pulmonary and respiratory care of the decedent, leading to inadequate care and treatment of the decedent's skin. It is Dr. Lowe's opinion that if Dr. Rahman had taken on his role as primary care physician of the decedent, he would have recognized the decedent was at risk for developing "wet gangrene."

Dr. Lowe further opines that Dr. Rahman deviated from acceptable medical standards by failing to timely consider and refer the decedent for consultation with a vascular surgeon. Dr. Lowe opines that the decedent suffered a loss of chance of survival from the delay in consultation. Upon the decedent's admission to Mt. Sinai Hospital from Palm Gardens, the decedent was reported as dehydrated, growing Enterococcus Fecalis and Acinetobacter Hemolyticus, and anemic. By early November he was developing ulcerations and in December 2014, the decedent's ankle/brachial index indicated bilateral atherosclerosis of a mild to moderate degree. Dr. Lowe opines that the failure to recognize that the decedent was suffering insufficient arterial circulation and consult a vascular surgeon led to him being placed beyond the possibility of surgery.

Dr. Lowe also opines, as discussed with respect to Palm Gardens, that the deterioration of the decedent's ulcers could have been avoided with adequate surveillance and the provision of proper medical care. The decedent was noted as being at risk for skin breakdown due to his mobility level when he was first admitted. With this fact, Dr. Lowe opines that Dr. Rahman was on notice of the decedent's medical condition and should have been fully aware of what was needed and necessary for his proper care and treatment, including proactive care to avoid ulcers. Dr. Lowe opines that although Dr. Rahman was on notice of the decedent's high risk for skin breakdown, the medical records show that the frequency of the alleged turning and repositioning remained the same throughout the decedent's entire admission at Palm Gardens. Therefore, Dr. Lowe opines this was a deviation in the standard of care.

Lastly, Dr. Lowe opines that there are no records indicating that the "Comprehensive Care Plan" that Dr. Rahman initiated was fulfilled and implemented by the staff of Palm Gardens.

As to proximate cause, Dr. Lowe opines without detail that Dr. Rahman's failure to timely consult a vascular surgeon and render proper care was the proximate cause of the decedent's injury and ultimate death. Dr. Lowe opines that inadequate care led the ulcers to progress and death of the decedent and deprived the decedent of his chance of survival.

Plaintiff's expert has failed to raise an issue of fact in reference to the care and treatment rendered by Dr Rahman as his opinions are conclusory and speculative (*see Coffey*, 209 AD3d 714). Dr. Lowe's opinions are conclusory as he does not point to any facts to support his findings. Dr. Lowe opines that Dr. Rahman deviated from the standard of care without explaining any alleged deviations or what the standard of care required. In contrast, Dr. Diamond explains the diligent effort that Dr. Rahman made in assessing and integrating a Comprehensive Care Plan for the decedent to keep him comfortable in his "last stage of life." Moreover, Dr. Lowe concedes that the defendants demonstrated "a diligent effort to turn and position the decedent." (Plaintiff's expert affirmation, at 9).

In addition, Dr. Lowe fails to illustrate with detail how Dr. Rahman's treatment plan and care were deviations from accepted medical standards. Dr. Lowe's opinion is conclusory as he does not reference Dr. Rahman's treatment plan in reviewing the medical records and ignores that the record indicates that Dr. Rahman ordered and reviewed laboratory reports to monitor the decedent's condition, updated treatment plans to include "bunny boots" and ointments, and transferred the decedent to the hospital when it was necessary the decedent's health. As to Dr. Lowe's opinion that Dr. Rahman failed to or delayed in consulting a vascular surgeon, Dr. Diamond points to the record as support for his opinion that the decedent would not have been a candidate for surgery at any point during his treatment and care, as he was at his end stage of life.

Further, Dr. Lowe's opinion that Dr. Rahman was acting as the decedent's primary care physician is not supported by the record. Dr. Rahman testified that he obtained a specialty in pulmonary medicine through a "fellowship in pulmonary medicine from Albert Einstein College of Medicine" (Dr. Rahman deposition tr, at 10). Dr. Rahman also testified that he was "a consultant [and] attending physician" at Palm Gardens in charge of pulmonary and internal medicine (*id.*, at 12, 14). Dr. Rahman further states that his functions at Palm Gardens

were to take care of any issues in his specialty (*id.*, at 14-15). When asked what duties were specific to his specialty, Dr Rahman testified, "ventilator management and long-term care" (*id.*).

A doctor must exercise "that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where [the doctor] practices" (*Nestorowich v. Ricotta*, 97 NY2d 393, 398 [2002]). The Second Department has held that it is not a departure from accepted medical standards for a physician to defer to a specialist since the physician would not be involved in that aspect of the patient's care (*Aaron v. Raber*, 188 AD3d 967, 969 [2d Dept. 2020]). Here, Dr. Rahman's duty is limited to ventilator and long-term pulmonary care. The record does not support any conclusion that ulcer care or primary care was in Dr. Rahman's specialty. Therefore, Dr. Diamond's opinion that Dr. Rahman did not deviate from his standard of care by deferring to the Wound Care Team to treat and care for the decedent's ulcers since wound care was not within his duties as a pulmonary physician is well supported.

Dr. Lowe's opinion that the failure to document turning records for the decedent is also not supported by the facts at hand. Dr. Lowe failed to explain how Dr. Rahman deviated from the standard of care in this respect. Rather consistent with Dr Diamond's opinion, the record indicates that Dr. Rahman ordered active and appropriate treatment for a patient who was at the end stage of life and ventilator dependent.

Dr. Lowe's opinion on proximate cause is also conclusory. Dr. Lowe fails to address how the decedent's extensive comorbidities affected the decedent's degrading skin. In contrast, Dr. Diamond explains how a patient in the decedent's condition is at a high risk of developing ulcers due to the body's organ failure. In addition, Dr. Lowe's opinion that the decedent had a lost chance of survival is speculative as the decedent was receiving palliative care having suffered a major stroke with no chance of recovery.

In sum, Dr. Rahman's motion for summary judgment is granted as to medical malpractice and wrongful death as Plaintiff fails to raise an issue of fact to withstand summary judgment.

Referring specifically to the movant's request to dismiss the claim of gross negligence and any claims based on *res ipsa loquitur*, these claims are dismissed as they are not opposed by Plaintiff. The Court notes that *res ipsa loquitur* is not a separate cause of action but an evidentiary rule permitting an inference of negligence when its elements are met, and Plaintiff has not made any showing it is applicable here (*see Bucsko v Gordon,*

118 AD3d 653 [2d Dept 2014]; *Frew v Hospital of Albert Einstein Coll. of Medicine Div. of Montefiore Hosp. & Med. Ctr.,* 76 AD2d 826 [2d Dept 1980]). Therefore, Dr. Rahman's motion for summary judgment is granted in its entirety.

Accordingly, it is hereby:

ORDERED that Palm Gardens' motion (Seq. No. 3) for an Order, pursuant to CPLR 3212, granting summary judgment to said defendant, dismissing all claims against them, is **GRANTED**; and it is further

ORDERED that Dr. Rahman's motion (Seq. No. 2) for an Order, pursuant to CPLR 3212, granting summary judgment to said defendant, dismissing all claims against them, is **GRANTED.**

This constitutes the decision and order of this Court.[1]

ENTER.

Hon. Consuelo Mallafre Melendez

J.S.C.

[1] This decision was drafted with the assistance of legal intern Justin Murphy, Brooklyn Law School.