OUTSIDE COUNSEL

Addressing Standard for Summary Judgment in Medical Malpractice Cases

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The Court of Appeals recently addressed the standard for negligence on summary judgment motions in medical malpractice matters in a memorandum decision issued on Nov. 1 which includes an interesting concurrence. In *Pullman v. Silverman*,[1] the Court of Appeals reversed an order of the Appellate Division First Department, which had granted a motion for summary judgment by the defendant doctor in the case. Notably, the concurrence identified a Departmental split regarding what negligence standard should apply in deciding such matters and highlighting that plaintiffs have a more difficult burden to overcome in the First, Third and Fourth Departments.

In *Pullman*, plaintiff alleged that defendant David Silverman had committed malpractice by his negligent administration of the medication Lipitor, by his negligent administration of the medication azithromycin, and by his negligent administration of the combination of those two drugs without considering the adverse effects of this combination.

Plaintiff alleged he was caused to have a cardiac arrhythmia as a result of the doctor's negligence, which progressed to a third-degree atrioventricular (AV) heart blockage requiring the placement of a permanent pacemaker. Plaintiff further alleged that his AV heart blockage was caused by the adverse effects of the combination of Lipitor and azithromycin and that this combination was the proximate cause of his injuries.

The defendant moved for summary judgment on the issue of proximate cause and submitted an affidavit from a medical expert to support his motion. As the court's majority in *Pullman* noted, this expert affidavit characterized plaintiff's allegations of malpractice as "centered around an alleged contraindicated prescription by Dr. Silverman to plaintiff of Lipitor separately and/or in conjunction with Azithromycin."

In opposition, the plaintiff asserted that the defendant's expert affidavit did not sufficiently address the allegation of defendant's negligence by the defendant having prescribed azithromycin

together with Lipitor; the plaintiff further asserted that defendant's expert had failed to cite any medical research in support of his conclusions about the combined effect of the two drugs. The plaintiff thus argued that the defendant had failed to eliminate all the triable issues of fact about whether the combined effect of two drugs could have been the proximate cause of plaintiff's injuries.

Citing well-established Court of Appeals precedent on the general issue of summary judgment,[2] the court found that the defendant had failed to meet his burden of proof by presenting evidence sufficient to eliminate any material issues of fact on the question of proximate cause. The court found that defendant's expert had offered "only conclusory assertions unsupported by any medical research that defendant's actions in prescribing both drugs concurrently did not proximately cause plaintiff's AV heart block."

Also noteworthy, and giving an encouraging nod to those who advocate for plain clear language in the law, the court further found that poor writing and the defendant's use of the construction "and/or" was "somewhat confusing", and that this confusing use of "and/or" was part of the reason why the defendant had failed to make a sufficient showing, and that the plaintiff had indeed clearly alleged that the combination of both Lipitor and azithromycin provided one basis for defendant's negligence.[3]

Moreover, the court's majority further found that the defendant's expert had failed to address the effect of azithromycin administration alone as plaintiff had also alleged and that the defendant's expert affidavit had addressed azithromycin only in conclusory statements also unsupported by any reference to medical research.

The Concurrence

In the concurrence, Judge Eugene M. Fahey himself identified a split among the Appellate Division Departments on the issue of which negligence standard should apply in the adjudication of summary judgment motions in medical malpractice cases. Judge Fahey stated that: "I write separately to note that the Court takes no position on whether the Appellate Division correctly stated the standard governing the shifting of burden in a medical malpractice summary judgment motion. This issue was raised by the parties in their briefs, but not thoroughly discussed."

Judge Fahey noted that the First Department's decision in *Pullman*[4] had held that a more burdensome negligence standard should apply in medical malpractice cases. The standard applied by the First Department in its decision in *Pullman* was that if, on a motion for summary

judgment, a defendant in a medical malpractice action established either, 1) that the defendant did not depart from good and accepted practice, or, 2) that any such departure was not the proximate cause of plaintiff's injuries, the plaintiff was then required to rebut defendant's showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged" *Pullman v. Silverman*.[5]

This standard established by the First Department, while followed by the Third and Fourth Departments, reveals a split among the Departments, Judge Fahey found, because that more difficult standard is not the standard applied by the Second Department.

The Second Department, in contrast, follows a rule established by *Stukas v. Streiter*[6] that if a defendant on a motion for summary judgment demonstrates only that she did not depart from the relevant standard of care, then the plaintiff need not address the issue of proximate cause in opposition to the defense motion. Judge Fahey quotes with apparent approval the Second Department's reasoning:

> In the context of any motion for summary judgment, a party's prima facie showing of entitlement to judgment as a matter of law shifts the burden to the nonmoving party, not to prove his or her entire case, as he or she will have the burden of doing at trial, but merely to raise a triable issue of fact with respect to the elements or theories established by the moving party. There is no valid reason for adopting a different rule in medical malpractice cases.[7]

Judge Fahey further quoted the *Stukas* decision on the issue of the more stringent First Department standard requiring a plaintiff to rebut an element of negligence that a defendant moving party did not assert; such a rule the *Stukas* court held is:

> incompatible with the maxim that the moving party's evidence must be viewed in the light most favorable to the nonmoving party, as well as the general principle that summary judgment is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues of fact. It is neither logical nor fair to require the nonmoving plaintiff, who has previously alleged in the pleadings that the defendant's departure was a proximate cause of the claimed injuries, to come forward with evidence addressing an element that was never raised

> by the moving defendant. To require a plaintiff to address both departure and causation in opposing a defendant physician's prima facie showing as to departure only, conflates these two distinct elements, which have always been treated separately in our jurisprudence involving medical malpractice and negligence in general.[8]

Judge Fahey noted that the Stukas ruling is more in line with established Court of Appeals precedent and cited the court's holding on the law of summary judgment in *Alvarez v. Prospect Hospital*,[9]while finding that other Appellate Division opinions citing the First Department's more difficult standard do so without citation to any Court of Appeals precedent.

Judge Fahey concluded his concurrence by discussing the fact that because of its unique facts the Pullman appeal did not give the court the opportunity to address whether the Stukas decision applies the correct standard for summary judgment motions in medical malpractice cases and stated that his joining of the majority in *Pullman* "does not indicate my opinion on the resolution of the split among the Appellate Division Departments."

Until this split is resolved by the court, defendants in medical malpractice cases appear to have a better chance of prevailing on their summary judgment motions in the First Department (as well as the Third and the Fourth Departments). Plaintiffs in contrast will have a better chance of opposing such motions in the Second Department.

Endnotes:

1. 2016 Slip Op 07107, 2016 N.Y. Lexis 3455.
2. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985).
3. See *Garner's Modern American Usage* by Bryan A. Garner (2000) Oxford University Press, page 45: "and/or. A legal and business expression dating from the mid-19th century, and/or has been vilified for most of its life—and rightly so. To avoid ambiguity, don't use it."
4. 125 A.D.3d 562 (1st Dept. 2015).
5. 125 A.D.3d 562 (1st Dept. 2015).
6. 83 A.D.3d 18 (2d Dept. 2011).
7. *Stukas*, 83 A.D.3d at 25.
8. *Stukas*, 83 A.D.3d at 30.
9. 68 N.Y.2d 320 (1986).