

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 25, 2021

531101

DEBRA COLON, Individually and
as Executor of the Estate of
ELTOR COLON, Deceased,
Respondent,

v

MEMORANDUM AND ORDER

SUSAN CHOI et al.,
Appellants.

Calendar Date: February 8, 2021

Before: Egan Jr., J.P., Clark, Aarons, Pritzker and
Colangelo, JJ.

Smith, Sovik, Kendrick & Sugnet, PC, Syracuse (Anthony R. Brighton of counsel), for Susan Choi and another, appellants.

Levene Gouldin & Thompson, LLP, Vestal (Elizabeth A. Sopinski of counsel), for Joseph Newmark and another, appellants.

DeFrancisco & Falgiatano LLP, East Syracuse (Charles L. Falgiatano of counsel), for respondent.

Aarons, J.

Appeal from an order of the Supreme Court (Faughnan, J.), entered February 19, 2020 in Broome County, which denied defendants' motions for summary judgment dismissing the amended complaint.

Plaintiff, individually and in her capacity as executor of the estate of Eltor Colon (hereinafter decedent), her spouse, commenced this action against defendants alleging causes of action for medical malpractice, wrongful death and loss of consortium. Plaintiff alleged that defendant Susan Choi, decedent's primary care physician, and defendant Joseph Newmark, a dermatologist to whom decedent was referred, failed to diagnose and treat decedent with adenocarcinoma of the anus. Following joinder of issue and discovery, Choi and defendant Guthrie Medical Group, P.C., Choi's employer (hereinafter collectively referred to as the Guthrie defendants), moved for summary judgment dismissing the amended complaint. Newmark and defendant Joseph Newmark, M.D., P.C. (hereinafter collectively referred to as the Newmark defendants) separately moved for similar relief. In a February 2020 order, Supreme Court denied both motions. This appeal ensued. We affirm.

Turning first to the Guthrie defendants' motion, they satisfied their burden of establishing that Choi did not depart from the applicable standard of care (see Launt v Lopasic, 189 AD3d 1740, 1743 [2020]; Humphrey v Riley, 163 AD3d 1313, 1314 [2018]; Martino v Miller, 97 AD3d 1009, 1010 [2012]). Choi averred that, upon a digital rectal examination and a prostate examination of decedent in December 2013, there were small warts and there was no evidence that they were growing internally or impinging on decedent's anus. She further averred that, based on her examination, she acted within the standard of care by referring decedent to a dermatologist for treatment because such treatment was not part of her practice. Choi additionally concluded that she acted appropriately when, after decedent complained to her in February 2014 about the topical treatment that he had been receiving, she advised him that she was unaware of alternative treatments and suggested that he seek a different dermatologist.

In opposition thereto, plaintiff tendered, among other things, an expert affidavit from an internist. The internist averred that, upon Choi's December 2013 examination of decedent, the warts were indurated enough to appreciate and the standard of care required a biopsy or a referral to a colorectal surgeon,

as opposed to a dermatologist, to determine if the mass infiltrated into the anal canal. The internist also opined that Choi departed from the applicable standard of care when she advised decedent to seek a different dermatologist after receiving his complaints in February 2014, and that the standard of care required that Choi reexamine him and perform a biopsy or refer him to a surgeon to have a biopsy done. Contrary to the Guthrie defendants' assertion, the internist's opinion was sufficiently detailed and had an adequate foundation. Accordingly, Supreme Court correctly found that a material issue of fact existed as to whether Choi's treatment of decedent was a departure from the applicable standard of care (see Furman v DeSimone, 180 AD3d 1310, 1312-1313 [2020]; Yerich v Bassett Healthcare Network, 176 AD3d 1359, 1361 [2019]).

Regarding the motion by the Newmark defendants, the record discloses that they satisfied their moving burden (see Launt v Lopasic, 189 AD3d at 1743; Doucett v Strominger, 112 AD3d 1030, 1032 [2013]). The Newmark defendants relied, in part, on an expert affidavit by a dermatologist. This dermatologist averred that Newmark performed a physical examination of decedent which entailed visualizing and palpating the affected area. According to the dermatologist, Newmark, in January 2014, correctly diagnosed decedent with persistent perirectal condyloma caused by the human papillomavirus and acted within the standard of care by ordering treatment with a topical ointment. The dermatologist also stated that decedent's condition had not changed at subsequent visits and that Newmark acted appropriately in not referring decedent to another practitioner or changing the ordered treatment. The dermatologist opined that, based on these subsequent visits, there was no reason for Newmark to suspect that decedent had cancer or that a biopsy was necessary.

Plaintiff, however, raised an issue of fact regarding Newmark's treatment of decedent. Plaintiff's expert opined that Newmark failed to conduct thorough examinations of decedent and departed from the applicable standard of care by not performing a biopsy or referring decedent to a specialist for a biopsy when decedent's condition did not improve over the course of

decident's presentations to Newmark. The expert further opined that Newmark failed to appreciate the significance of the masses with induration and that perirectal condyloma can be malignant. Based on the competing expert opinions, Supreme Court correctly denied the Newmark defendants' motion (see Furman v DeSimone, 180 AD3d at 1312-1313; Fuller v Aberdale, 130 AD3d 1277, 1285 [2015]).

Egan Jr., J.P., Clark, Pritzker and Colangelo, JJ.,
concur.

ORDERED that the order is affirmed, with costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court