

Burke v Beyer

2011 NY Slip Op 33963(U)

March 15, 2011

Supreme Court, Bronx County

Docket Number: 6232/06

Judge: Robert E. Torres

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 29

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KYLE BURKE, as Administrator of the Estate of
MYRNAH BURKE, and KYLE BURKE, Individually,

Plaintiffs,

MEMORANDUM DECISION

-against-

Index No. 6232/06

PAUL BEYER, D.O., JAMES E. CROLL, M.D.,
JAMES E. CROLL, M.D., P.C., MARIGEM
LORENZO, M.D., "JOHN/JANE" GONZALES,
M.D., (first name being fictitious and presently
unknown); "JOHN/JANE" DOE, (name being
fictitious and presently unknown), ST. BARNABAS
HOSPITAL,

Defendants.

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Motion by Defendant, James E. Croll, M.D. and James E. Croll, M.D. P.C., for
summary judgment, motion by St. Barnabas Hospital for summary judgment, and cross-
motion by Defendant Paul Beyer, D.O., for summary judgment are consolidated for
disposition and decided as follows:

Initially, the motion by Defendants James E. Croll, M.D. and James E. Croll,
M.D. P.C. for summary judgment and an order dismissing Plaintiff's complaint and all cross-
claims against them is granted. Based on the deposition testimony, the medical records, and
the expert affirmation of Dr. Sheldon Alter, movants have set forth prima facie proof of
entitlement to summary judgment, proof that they did not depart from the standard of care
in their treatment of Plaintiff's decedent and that they neither caused nor contributed to
decedent's injuries. No other Defendant has opposed this motion and Plaintiff has indicated

that he does not oppose the motion for summary judgment by Dr. Croll.

This is a medical malpractice action wherein it is alleged that Defendants were negligent in their care and treatment of decedent on January 20, 2004 at Defendant St. Barnabas Hospital after she presented to the Emergency Room via ambulance. Decedent arrived at approximately 2:15 p.m. and, unfortunately expired at approximately 6:18 p.m. Upon arriving at the hospital, decedent complained that she was feeling dizzy for approximately one week along with vomiting and excessive thirst. The fifty-two year old female's medical history was significant for asthma, hypertension and diabetes. She was taking various medications including Theophylline, Albuterol, HCTZ, Metformin, Accupril, Actose and Glucozide. The triage sheet is stamped at 2:37 and 2:53. Dr. Paul Beyer estimated that she left triage shortly after 3:00 p.m. since that was the timing of the physician's first order for Albuterol. Blood work and lab results revealed renal failure and acidosis. At 5:45 p.m., the patient became lethargic and her blood pressure dropped. The patient was intubated at 5:47 and at 6:05 ventricular fibrillation developed. She was defibrilated three times and pronounced dead by Dr. Beyer at 6:18 p.m.

St. Barnabas Hospital argues that it is entitled to summary judgment because its treatment of Plaintiff, under the direction of the attending physician, Dr. Beyer, was consistent with appropriate standards of care and the actions of the staff were not the proximate cause of Plaintiff's decedent's death. In support of its motion, St. Barnabas has provided the court with the expert affirmation of Richard Blum, M.D. Dr. Blum opines that when decedent presented to the Emergency Room she had a highly atypical constellation of

symptoms. She was not in extremis and there was no medically indicated reason for her to receive anything other than the care she did, in fact, receive. Dr. Blum further opines, within a reasonable degree of medical certainty, that by the time she presented to St. Barnabas, there was no time to initiate and complete dialysis even if blood tests had been performed upon entrance and a diagnosis of renal failure, massive acidosis and pancreatitis had been made almost immediately. Dr. Blum believes that Ms. Burke would have succumbed to the overwhelming interaction of her problems and that there was inadequate time to treat her before she expired. St. Barnabas argues that no evidence in the records creates a question that an employee committed medical malpractice and that, therefore, it cannot be vicariously liable for any physician who treated decedent there.

Dr. Beyer argues that he is entitled to summary judgment herein as none of the care and treatment rendered by him to Plaintiff's decedent either caused or contributed to her demise. In support of his motion, Dr. Beyer has attached the affidavit of Gregory Mazarin, a board certified emergency room physician. Dr. Mazarin opines that, within a reasonable degree of medical certainty, none of the care or treatment rendered to decedent by Dr. Beyer was a proximate cause of decedent's injuries or death and furthermore, Dr. Beyer's treatment of decedent was well within the parameters of good and accepted medical care. Dr. Mazarin describes decedent's presentation to the emergency room as fairly benign initially. Her complaints of light headedness, thirst and vomiting for several days but no elevated temperature, shortness of breath or chest pain did not warrant more immediate care than that which she received. She remained stable without new complaints, was given IV infusing

liquids for her hypertension and blood work was ordered. It was not until the results of that blood work was received that the extreme nature of her condition became known and, according to Dr. Mazarin's affirmation, was treated appropriately.

In order to defeat Defendants' motions for summary judgment, Plaintiff must establish both a deviation from accepted standards of medical care and that such treatment rendered by the moving Defendants was a proximate cause of Plaintiff's injuries. See Cantor v. Mulnik, 93 A.D.2d 751 (1st Dept. 1983). Dr. Beyer argues, and his argument is supported by Dr. Mazarin's expert affidavit, that the treatment he rendered was within the parameters of good and accepted medical practice and not proximately related to the injuries and death of decedent. Furthermore, St. Barnabas argues that should Dr. Beyer be found to have no cause of action existing against him, then the basis for vicarious liability as to Defendant St. Barnabas Hospital is extinguished as a cause of action against a hospital based on respondeat superior can only survive if the Plaintiff has a viable cause of action against the treating physician. See Yolanda Magriz v. St. Barnabas Hospital, 43 A.D.3d 331 (1st Dept. 2007).

In opposition, Plaintiff has provided the court with the affirmation of a physician board certified in emergency room medicine. Plaintiff argues that St. Barnabas should be held vicariously liable for medical malpractice committed by Dr. Beyer and by the resident, Dr. Johns. Plaintiff's expert opines upon reviewing the records in this matter, that Dr. Beyer and Dr. Johns departed from accepted standards of care in caring for Ms. Burke. He opines that, based on Ms. Burke's presentation, the first consideration by the physicians should have been diabetic ketoacidosis but that no glucose stick was used to assess glucose

levels. Furthermore, blood tests were not performed timely. He also claims that the order for fluids should have been "stat" and that by 3:15 she should have been receiving fluids. However, fluids were not ordered until 4:00 and not given until 4:45. He also claims that her vital signs including blood pressure were not appropriately monitored. The doctor states that she was critically ill when she presented to St. Barnabas and that prompt and aggressive medical care and treatment was required was not rendered as discussed, supra. He claims that more timely medical and treatment would have afforded Ms. Burke "a substantial chance for survival and that an opportunity for meaningful medical intervention, including emergency dialysis, if needed, would have given a chance for saving her life."

In order to succeed in a medical malpractice action, a plaintiff must show a departure from the accepted standards of medical care and that such departure was a proximate cause of the patient's injuries. Tungsupong v. Bronx Lebanon Hospital Center, 213 A.D.2d 236 (1st Dept. 1995). Dr. Beyer, through his expert, Dr. Mazarin, has demonstrated that the care rendered to Plaintiff's decedent and was well within the parameters of good and accepted medical and emergency room care based upon the presentation of decedent at the time of her arrival. In reply to Plaintiff's expert's affirmation, Dr. Mazarin counters the expert's suggestions that the lab work should have been sent "stat" as "it is well known that all blood tests from the emergency room are run on a "stat" basis and therefore there is no reason to make this distinction." Furthermore, although Plaintiff's expert contends that the decedent was hypotense in triage, the systolic measurement is far more heavily relied upon and was well above the cut off value of ninety at 107. For this

reason, decedent was not considered hypotensive upon arrival. Furthermore, although decedent initially had an elevated heart rate of 103, just above the normal range of 60 to 100, this was not surprising as she had just finished receiving a nebulizer treatment which is known to speed up the heart. Therefore, based upon the initial vital signs, there was no indication that she was unstable or significantly dehydrated. As decedent presented with a history of occasional vomiting and her blood glucose was not significantly elevated at home there was no reason for intravenous fluids to be started immediately and the intravenous line was placed within a reasonable time frame. Given her presentation, the expert opines that there was no way to predict that she was as sick as she was, and that only when the lab results became available was the gravity of her condition recognized and appropriately addressed. This expert states that although dialysis would have been the optimal treatment, it was not logistically possible to carry this out in someone who had no established dialysis access within the limited time frame available and that given the severity of her condition, the intravenous fluid alone would not have been enough to reverse the course of her pre-morbid condition despite Plaintiff's expert's contention. Furthermore, the affirmation of Plaintiff's expert overlooks the fact that the taking of the vital signs and blood pressure was addressed in the motion by St. Barnabas Hospital where it is noted that the blood pressure was automatically and regularly measured in fifteen minute intervals via the cardiac monitor. Also, the expert for St. Barnabas Hospital states with certainty that decedent's death within three hours was inevitable. In fact, even Plaintiff's expert, in paragraph 26 of his affirmation, refers to Ms. Burke's "critical pathologic condition."

As to Dr. Johns, resident physicians who follow the supervision and instruction of the attending and do not exercise independent medical judgments cannot be held liable for malpractice. See Soto v. Andaz, 8 A.D.3d 470 (2nd Dept. 2004). Plaintiff has raised no question of fact as to whether Dr. Johns exercised independent medical judgment.

The court finds Plaintiff's expert's opinion to be vague, conclusory and insufficient to defeat the summary judgment motions. Plaintiff's expert's opposing arguments do not respond meaningfully to the expert affirmations provided by St. Barnabas Hospital or Dr. Beyer. Mere surmise, suspicion and accusation are insufficient to defeat summary judgment. Holy Spirit Assoc. v. Harper & Row, 101 Misc.2d 30 (1979). The plausibility of Plaintiff's expert's suppositions that decedent had a "chance" for survival or a "chance" to avoid dialysis, etc... is unavailing. Suppositions, even if believable, do not overcome a summary judgment motion absent evidence tending to prove them. See, S.J. Capelin Assoc. Inc., v. Globe Manufacturing, 34 N.Y.2d 338 (1974). Moving Defendants have demonstrated their entitlement to summary judgment and their motions are granted.

This constitutes the Decision and Order of this Court.

DATED: BRONX, NEW YORK
March 15, 2011



Hon. Robert E. Torres

ROBERT E. TORRES
JUDGE