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SHORT FORM ORDER

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INDEX
NO. 02558/00

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XV - SUFFOLK COUNTY

PRESENT:
HON. PATRICK HENRY

JILL SCHAEDTLER, as Administratrix of the Estate of RICHARD SCHAEDTLER, Deceased,

Plaintiff,

v

ANTHONY N. DONATELLI, JR., M.D., STEPHEN M. BURKE, M.D., RAYMOND L. EBARB, M.D., KENNETH B. LEVITES, M.D., GREAT SOUTH BAY FAMILY MEDICAL, PRACTICE, P.C. and JOHN NICHOLAS NOVECK, P.A.

Defendants.

Motion Date: 12/14/01, 1/25/02, 3/8
Motion: 001-MOT D
____Final Disposition
__X__Non-Final Disposition

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ORDERED that this motion by the individual physician defendants Donatelli, Burke, Ebarb and Levites for *summary* judgment dismissing the complaint as against them, pursuant to CPLR 3212, is granted unopposed as to defendant Levites, on the ground that he was not even affiliated with the defendant medical group at the time of the alleged malpractice, and denied with respect to the other moving defendants, as indicated herein.

The facts of this case are not complicated, and the legal issue -- notwithstanding the excellent fullsome submissions of counsel -- is readily framed.

Doctors Donatelli, Burke and Ebarb were, at the time of the alleged malpractice, the sole shareholders and officers of the co-defendant professional corporation Great South Bay Family Medical Practice, P.C. ("the Group"). Co-defendant Noveck was employed by the Group as a licensed Physicians Assistant.

Also Group employees at the time were osteopathic Doctors Loiodice and Freeman, who were, however, not shareholders or officers of the Group, and who are not named defendants herein.

Plaintiffs decedent Richard Schaedtler had been a patient of the Group since February 1994. On May 26, 1999, he presented at the Group's office about 7:30 p.m., pursuant to an expedient appointment, complaining mainly of chest pain and shortness of breath. There was only one physician in the office when Schaedtler came in, Dr. Loiodice. Dr. Freeman was on call, but not in the office. The three medical doctors had either left for the day or had not been in that day at all. Pursuant to office protocol, the nurse receptionist had the patient seen by P.A. Noveck. Noveck, without consulting either of the two doctors available to him, diagnosed Schaedtler's symptoms as a panic attack, prescribed medication and sent him home. On June 3, 1999; eight days later, without having sought any further medical assistance, Schaedtler died of a heart attack.

In support of their instant motion, the Doctors rely, for a start, on the professional corporation statute -- BCL 1505(a) -- which says that professional corporate shareholders -- unlike partners -- are not vicariously liable for acts of malpractice committed by co-shareholders or by employees. They are, of course, liable for their own acts of malpractice, and for those committed by persons under their direct supervision.

The Doctors rely also on the Physicians Assistant statute found in Secs. 6541 and 6542 of the Education Law and in the Rules and Regulations of the New York Department of Public Health (10 NYCRR Art. 94), which define, in general, the scope of a P.A.'s authority, under the eye of a "supervising physician". In the instant case, say the moving defendants, that could have been Dr. Loiodice, and/or Dr. Freeman, but not they, because they were not even at the premises when the alleged malpractice occurred, nor were they ever consulted.

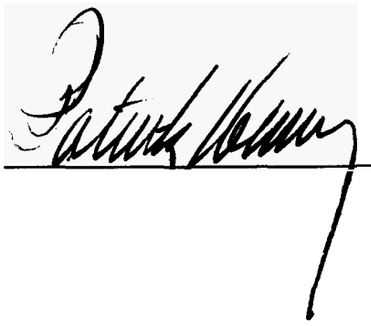
In opposition to the instant motion, the plaintiff points out that the BCL shields doctors and other professionals only from vicarious liability, but not from their own professional negligence. There is no evidence in this record, the plaintiff must recognize, that any of the three moving physicians supervised P.A. Noveck, directly or indirectly, on May 26, 1999 in his care of Mr. Schaedtler. However, the plaintiff adduces evidence, in affidavit form, from a cardiologist, analyzing the Group protocol for patients presenting like Schaedtler, with cardiac symptomatology, and concluding that Doctors Donatelli, Burke and Ebarb have committed medical malpractice in adopting and following that protocol. In other words, each of those doctors was continuously the P.A.'s "supervising physician", for all patients, every time Noveck used that protocol.

Plaintiff's arguments are persuasive, at least for the purpose of *summary* disposition.

Although a shareholder in a professional corporation faces no vicarious personal liability in instances not involving the direct rendition or the direct supervision of professional services, the shareholder may -- depending on the particular facts -- be responsible for staff supervision and for the implementation of office policy and procedure (*Yaniv v. Taub*, 256 AD2d 273, 683 NYS2d 35 [1st Dep't 19981). BCL §1505(a), with its vicarious shield, does not otherwise supplant ordinary principles of corporate responsibility and liability for, say, negligent hiring and retention (*Wise v. Greenwald*, 208 AD2d 1141, 617 NYS2d 591 [3rd Dep't 19941). A hospital department chairman, for example, can be liable for a surgical error with which the chairman had no direct connection, if the chairman violated his duty to provide his department with medically acceptable rules and regulations which it was his responsibility to develope and implement (*Maxwell v. Cole*, 126 Misc2d 597, 482 NYS2d 1000 [Sup Ct. New York Co. 1984] [criticized for "some unnecessarily broad language" in Ellis v. Brookdale Hosp. Med. Center, 122 AD2d 19, 504 NYS2d 189 (2nd Dep't 1986)] [cf. *Latiff v, Wyckoff Heights Hosp.*, 144 AD2d 650, 535 NYS2d 2 [2nd Dep't 1988]).

We find and hold that the affidavit of plaintiffs expert cardiologist creates issues of fact as to the medical acceptability of the Group's protocol for Physician Assistants and as to the respective responsibilities of each shareholder physician defendant for that protocol.

Dated: 28 May 2002



J.S.C.