

Perro v Schappert

2006 NY Slip Op 30423(U)

July 20, 2006

Supreme Court, Suffolk County

Docket Number: 04-8509

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-23-06
ADJ. DATE 3-23-06
Mot. Seq. # 001 - MG; CASEDISP

-----X	
GARY PERRO, JR.,	:
	:
Plaintiff,	:
	:
- against -	:
	:
BONNIE SCHAPPERT, R.N., and	:
CARING HANDS HOME CARE, INC.,	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 7 - 17; Replying Affidavits and supporting papers 18 - 20; Other 21; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Bonnie Schappert, R.N. for an order pursuant to CPLR 3212 granting her summary judgment dismissing the complaint is granted and the complaint is dismissed.

Plaintiff Gary Perro, Jr., who is a quadriplegic, commenced this medical malpractice and negligence action against defendants Bonnie Schappert, R.N. ("Schappert") and Caring Hands Home Care, Inc. ("Caring Hands") for his home nursing care that allegedly departed from the proper practice, customs and standards by the filing of a summons and complaint on or about April 13, 2004. Issue was joined by service of a verified answer on or about June 16, 2004 by defendant Schappert. Defendant Caring Hands, however, has not answered or otherwise appeared in this action and is in default (*see*, CPLR 3215).

The record shows that nurse Schappert was hired by defendant Caring Hands as a W-2 employee to care for plaintiff on Thursdays from 8 a.m. to 4 p.m. On February 14, 2002 plaintiff's Foley catheter was not draining properly and he asked Schappert replace it, although this was normally done by another shift nurse, Irene Manolias. Schappert attempted to remove plaintiff's catheter, first by draining

it with a syringe, and then by cutting the side port of the catheter. When the catheter failed to come out, Schappert called her employer Bridget Durkin and then plaintiff's urologist, Dr. Musto, who told her to bring plaintiff to a hospital emergency room. Schappert then called plaintiff's father to let him know that plaintiff had to be brought to a hospital emergency room. When Schappert's shift ended, she informed Lisa Lucasi, the next shift nurse, about the problem with plaintiff's catheter. Plaintiff's father was also home at that time. Schappert went home, and Lucasi accompanied plaintiff to the hospital. The next time Schappert cared for plaintiff was February 21. On that date, plaintiff was taken to Mather Memorial hospital for removal of the catheter, however, hospital staff were unable to remove it. Instead, hospital staff placed a Texas catheter over his retained Foley catheter for drainage. Schappert next cared for plaintiff on February 28, and she noted that he was shaking and had spasms. Sometime during that day, Schappert brought him to his neurology appointment at Stony Brook Hospital. Schappert cared for plaintiff again on March 4, 2002, and after he began to complain of dizziness, slurred speech, and numbness in both feet, he was admitted at Mather Memorial Hospital. Lastly, on March 6, 2002, plaintiff had his retained Foley catheter removed during a second surgical procedure at Central Suffolk Hospital.

The gravamen of the complaint is that defendant Bonnie Schappert, R.N. ("Schappert") as an employee of defendant Caring Hands Home Care, Inc. ("Caring Hands") failed to use reasonable nursing care in connection with her attempted draining and removal of a Foley catheter from the plaintiff's bladder and urethra on February 14, 2002. Plaintiff also seeks to recover damages against defendant Caring Hands on the basis that it was negligent in the supervision and control of their home health care services rendered to him by Schappert, and in that they also failed to properly train Schappert. Plaintiff alleges in his bill of particulars that as a result of the defendant's negligence and improper care, he required a visit to a hospital emergency room as well as two subsequent surgical procedures to remove the subject Foley catheter. He further claims that as a result of his physical injuries he has suffered recurrent urinary tract infections with associated bladder, kidney and abdominal pain. In his supplemental bill of particulars, plaintiff also claims that he suffers an increased frequency of kidney stones, hypertension, neurological symptoms, and chronic back pain.

Defendant Schappert now moves for summary judgment dismissing the complaint on the grounds that she was in compliance with the standard of care for the removal of the plaintiff's Foley catheter by attempting to first drain it with a syringe, and secondly, by attempting to drain it by cutting its side port. In support of the motion Schappert submits, inter alia, the summons and complaint; Schappert's verified answer; pleadings; the plaintiff's verified bill of particulars; plaintiff's supplemental bill of particulars; and the affirmation of Richard S. Blum, M.D.

In opposition, plaintiff contends that Schappert departed from good and accepted nursing practice by failing to properly remove the plaintiff's catheter, and by failing to promptly seek emergency medical assistance. Plaintiff further argues that Schappert's alleged departures were the proximate cause of the retention of plaintiff's catheter, his resulting recurrent urinary tract infections, and his various neurological symptoms. In support of her opposition plaintiff submits, inter alia, the transcript of Schappert's deposition, and the affidavit of Ketty Dorga, R.N. In reply, Schappert asserts that she secured immediate medical attention for the plaintiff once she realized that the balloon port of plaintiff's catheter was not draining. Schappert also contends that there is nothing that she did or failed to do which proximately caused the plaintiff's alleged injuries.

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]; *DeStafano v Immerman*, 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]). Further, New York Courts have recognized that a nurse who renders treatment is capable of committing malpractice (*see, Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885 [1985]; *Bamert v Central General Hosp.*, 53 NY2d 656, 438 NYS2d 999 [1981]; *Martinez v Tsung*, 14 AD3d 399, 789 NYS2d 474 [1st Dept 2005]).

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the plaintiff (*see, Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To rebut a prima facie showing by the defendant physician, a plaintiff must submit evidentiary facts or materials in opposition to the motion, demonstrating the existence of a triable issue of fact as to whether defendant hospital or physician deviated or departed from accepted practice and whether such departure was a proximate cause of injury or damage (*see, Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

Defendant Schappert's motion for summary judgment is supported by expert medical evidence establishing her prima facie entitlement to judgment as a matter of law (*see, Heshin v Levitt*, 273 AD2d 442, 711 NYS2d 749 [2d Dept 2000]). Defendant Schappert's expert, Dr. Blum, opines, within a reasonable degree of medical certainty, that Schappert's technique in removing plaintiff's catheter was in compliance with good and accepted nursing practice and was not a competent producing cause of plaintiff's alleged injuries. Dr. Blum states that the standard of care for removal of a Foley catheter consists of withdrawing the fluid inside with a syringe or cutting the side port with scissors. Dr. Blum opines that since Schappert cut off the side port she was in complete compliance with the standard of care. Dr. Blum also opines that Schappert otherwise complied with the standards relating to nursing care relating to the plaintiff on February 14, 2002.

The burden then shifted to plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent-producing cause of plaintiff's injuries (*see, Lifshitz v Beth Israel Med. Ctr.-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Bonnie Schappert testified at her deposition that she is a registered nurse and has special training in ventilator care. She started working for Caring Hands as a W-2 employee in 1995. In February, 2002 she was assigned by Caring Hands one Thursday per week to care for plaintiff from 8 a.m. to 4 p.m. Her duties with respect to the plaintiff consisted of a "bed bath," "trach care," and getting plaintiff dressed and in his wheelchair if that is what he wanted done. She was also responsible for cleaning plaintiff's Foley catheter, and emptying and replacing his catheter drainage bag, however, since plaintiff directed his own care, he had to first verbally consent. Irene Manolias, his regular nurse, was responsible for changing and replacing plaintiff's catheter itself. According to Ms. Schappert, plaintiff had frequent urinary tract infections, which were indicated by cloudy urine, but not always clinically

diagnosed. Schappert also testified that her notes indicated that she irrigated plaintiff's Foley catheter on February 10. She was on duty again on February 14, 2002 and at 12:30 p.m. she irrigated plaintiff's Foley at the port near the leg bag and noted that her injection did not easily go through. The second time she injected saline injection, she also met "resistance" at first, but then it went in easily. By 2:30 p.m. she noticed that plaintiff's urine was not draining and plaintiff requested that she change his Foley catheter. After she attached a syringe to the port on the catheter some water came out. She also turned the Foley a little bit, and pushed it inside a little bit after waiting a while. However, when she pulled back on the syringe plunger, to deflate the balloon portion of the Foley, no water came out. Schappert then cut the port but nothing happened. Next, she pulled to see if the Foley would come out but she noted some resistance and it caused plaintiff some discomfort. Upon advice of her employer, Bridget Durkin she called plaintiff's urologist, Dr. Musto, who told her that plaintiff should go to the emergency room. She then called plaintiff's father to let him know that plaintiff had to go to a hospital emergency room. Shortly after plaintiff's father arrived, her shift ended and the next shift nurse Lisa Lucasi was on duty. After she told Lisa about the problem with plaintiff's catheter, he was taken to Mather Memorial Hospital, but Schappert did not accompany them there. At this point, the record is unclear as to the medical services, if any, rendered to plaintiff by medical staff at Mather on February 14. Schappert next took care of plaintiff on February 21, and on that date, plaintiff was again taken to Mather Memorial. Irene Manolias was also present and provided information about plaintiff to hospital staff. At Mather, attempts to remove plaintiff's retained Foley catheter proved unsuccessful. Schappert again cared for plaintiff on February 28, and on that date, she noted that plaintiff had a Texas catheter over his retained Foley catheter for drainage. She also noticed that he was shaking and complaining of pain in his back. Later that day, she went with plaintiff to his neurology appointment at Stony Brook Hospital. She next cared for plaintiff on March 4, 2002 when his retained catheter was surgically removed. Lastly, Schappert and plaintiff later discussed the operation, but not in great detail.

Ketty Dorga, R.N. states in her affidavit that she is a registered nurse and has performed "numerous catheter changes" during the "course of her career." Nurse Dorga states that she reviewed plaintiff's medical and nursing records and transcripts of the parties' depositions. Dorga states that it is her opinion, with a reasonable degree of certainty, that Schappert departed from good and accepted nursing practice by "negligently" using a syringe to drain the Foley and by cutting the drainage port of same. Nurse Dorga also opines that Schappert's manipulation of the catheter resulted in the obstruction of the balloon port and the need for the catheter to be removed surgically. Nurse Dorga further opines that Schappert's departures were the proximate cause of the retention of the Foley catheter in plaintiff's bladder and the cause of his recurrent urinary tract infections, and chronic abdominal pain. Finally, Nurse Dorga states that had Schappert sought emergency medical assistance when she first discovered that plaintiff's catheter was not draining properly, the appropriate care could have been rendered to plaintiff, and he would not have sustained any injuries.

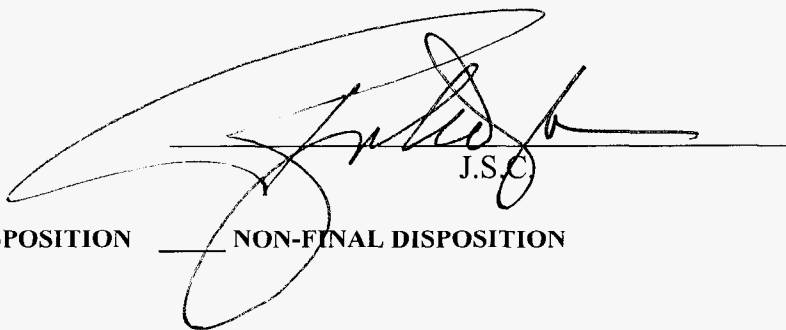
Initially, the Court notes that the opinion of plaintiff's expert that Schappert forcefully twisted or tugged the catheter or that her actions in attempting to remove it caused it to become twisted and/or resulted in the obstruction of the balloon port are not supported by the record and constitute pure speculation (*see, Furey v Kraft*, 27 AD2d 416, 812 NYS2d 590 [2d Dept 2006]). Secondly, the statements by Nurse Dorga that Schappert did not seek prompt medical attention, and that plaintiff's injuries could have been avoided had she done so, are also not supported by the record and are sheer speculation (*see, Wager v Hainline*, __AD3d__, 815 NYS2d 121 [2d Dept 2006]). Moreover, plaintiff's

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expert fails to address plaintiff's own culpability in deciding when Schappert and other nurses were permitted to change and/or irrigate his Foley catheter, the actions and conduct of other medical personnel who cared for plaintiff before and after Schappert's shifts on February 14, and 28, 2002, the plaintiff's preexisting bladder, kidney and neurological disorders, and the effects of all subsequent emergency room medical procedures (*see, Dellacona v Dorf*, 5 AD3d 625, 774 NYS2d 776 [2d Dept 2004]). In any event, even if Schappert failed to immediately bring plaintiff to a hospital emergency room on February 14, 2002, and even if she had mishandled the subject Foley catheter, there is no evidence that these alleged departures were a proximate cause of the plaintiff's injuries (*see, Wicksman v Nassau County Health Care Corp.*, 27 AD3d 644, 811 NYS2d 778 [2d Dept 2006]). General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment (*see, DiMitre v Monsour*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]). Thus, the affirmation of plaintiff's expert, which failed to differentiate between the acts and omissions of the defendant and others rendering nursing and medical services to plaintiff, and failed to demonstrate that any alleged departure of Schappert was a proximate cause of his injuries, was insufficient to defeat summary judgment (*see, Dellacona v Dorf, supra*).

Since there are no allegations or evidence in the record that any other employee or nurse hired by Caring Hands deviated from the proper standard of care with respect to the plaintiff or that any employee, director, officer, or owner of this defendant caused plaintiff's injuries, there is no basis for imposing direct or vicarious liability against Caring Hands (*cf., Williams v Howe*, 297 AD2d 671, 747 NYS2d 251 [2d Dept 2002]). Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: JUL 20 2006


 J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION