

McDaid v Semegran

2007 NY Slip Op 33333(U)

October 9, 2007

Supreme Court, Nassau County

Docket Number: 0213-05/

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

DONNA PURR McDAID, as Administratrix of the
Estate of DENNIS BOSCO McDAID, and
DONNA PURR McDAID, Individually,

Plaintiff(s),

ORIGINAL RETURN DATE: 07/23/07
SUBMISSION DATE: 08/31/07
INDEX No.: 000213/05

-against-

ADAM BERNARD SEMEGHAN, M.D.,
MICHAEL A. SAMA, M.D., PUTNAM HOSPITAL
CENTER, PEGASUS EMERGENCY MEDICINE
GROUP NEW YORK, P.C., JAY ANDREW
YELON, M.D., and NORTH SHORE UNIVERSITY
HOSPITAL,

MOTION SEQUENCE #8,9

Defendant(s).

The following papers read on this motion:

- Notice of Motion..... A
- Cross-Motion..... B
- Answering Papers..... C
- Reply..... D,E

Motion by defendants Michael A. Sama, M.D. and Pegasus Emergency Medical Group [Pegasus] for summary judgment dismissing the complaint is denied. Cross-motion by defendant Putnam Hospital Center [Putnam] for summary judgment dismissing the complaint is denied.

This is an action for wrongful death based upon medical malpractice. Plaintiff Donna Purr McDaid is the administratrix of her deceased husband, Dennis Bosco McDaid. Plaintiff also asserts claims for her husband's conscious pain and suffering and her own loss of consortium.

At around 11:30 p.m. on September 29, 2003, Dennis struck a deer while riding a motorcycle not far from his home in Putnam County. Although Dennis was thrown off the motorcycle and landed beneath it, he was able to walk home with the bike after the accident. At home, Dennis took

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several vicodins, but the medication was ineffective to relieve the pain in his ribs and abdomen. Around 3:00 a.m. the following morning, he sought treatment at the emergency room of defendant Putnam.

In the emergency room, Dennis was seen by Dr. Norma Kurtz, an employee of defendant Pegasus. Upon her initial examination, Dr. Kurtz was concerned that Dennis had suffered internal injury. The doctor's concerns were no doubt increased by the fact that Dennis weighed over 300 pounds and was a smoker. In order to form a diagnosis, Dr. Kurtz wanted to perform certain tests, including an EKG, a chest x-ray, and a CAT scan of the abdominal/pelvic area. Dr. Kurtz, and her colleague Dr. Sama, maintain that a radiology technician was available to begin the x-ray and the CAT scan shortly.¹ However, according to plaintiff, Dennis was told that a technician would not be available until 7:00 a.m.² In any event, Dennis left the hospital at around 3:40 a.m., stating that he had to go to work later that morning.³

Nevertheless, the pain persisted, and after nausea and vomiting began, Dennis saw Dr. Thomas Burnette, his primary care physician, around 2:30 in the afternoon on September 30. Concerned that Dennis had suffered "significant intra-abdominal trauma," Dr. Burnette summoned an ambulance to take him back to Putnam Hospital.

Returning to the emergency room around 3:30 p.m., Dennis was seen by defendant Dr. Michael Sama, who is an officer of Pegasus and the director of emergency medicine at Putnam. Concerned that the patient had sustained injury to the spleen, Dr. Sama ordered a chest x-ray, a brain scan, and a CAT scan of the abdominal/pelvic areas. Dr. Sama also reached out for the surgeon who was on call for the emergency room, defendant Dr. Adam Semeghan. Dr. Semeghan, who was already at the hospital, joined Dennis in the radiology area, where he had been taken for the CAT scan. After the scan revealed a laceration to the spleen, Dr. Semeghan took over Dennis' care.

On October 1, 2003, Dennis was airlifted from Putnam to defendant North Shore University Hospital [North Shore]. At North Shore, defendant Dr. Jay Yelon performed an exploratory operation on Dennis' spleen and abdomen. Unfortunately, due to internal bleeding, Dennis developed an abdominal abscess. This condition led to acute respiratory distress and Dennis' death on October 29, 2003.

This action for medical malpractice was commenced on January 6, 2005. Plaintiff alleges that Pegasus and Dr. Sama departed from good and accepted medical practice by failing to stop

¹Dr. Sama's Ex. J (deposition of Dr. Kurtz) at 17; Dr. Sama's Ex. K (deposition of Dr. Sama) at 16.

²Dr. Sama's Ex.N, record of Dr. Thomas Burnette.

³Dr. Sama's Ex. I (emergency room record).

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Dennis' hemorrhaging in a timely manner, failing to diagnose Dennis' ruptured spleen, and failing to take the necessary steps to stabilize his condition. Plaintiff alleges almost identical departures from good and accepted medical practice on the part of Putnam.

Dr. Sama and Putnam move for summary judgment dismissing plaintiff's complaint. Although plaintiff alleges that malpractice on the part of Dr. Semegran, Dr. Yelin and North Shore also contributed to Dennis' injury and death, the quality of their care is not in issue on the present motions.

A doctor must exercise that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where the doctor practices (*Nestorowich v. Ricotta*, 97 NY2d 393, 398 [2002]). Thus, a doctor has a duty to exercise due care, as measured against the conduct of the doctor's own peers (Id). This duty is described as the reasonably prudent doctor standard.

Implicit within the concept of due care is the principle that doctors must employ their best judgment in exercising their skill and applying their medical knowledge (Id). The notion of "best judgment" assures conformance with the prevailing standard of care and accepted medical practice. Thus, if a doctor as a matter of professional judgment elects to pursue a particular treatment, the doctor is not liable in negligence merely because the treatment proved ineffective or a diagnosis proved inaccurate (Id). Upon a showing that the physician considered and chose among several medically acceptable treatment alternatives, defendant is entitled to a charge that an error in judgment is not malpractice.⁴

In a medical malpractice action, culpable conduct attributable to the patient is not a bar to recovery (CPLR 1411). However, the amount of damages recoverable is reduced by the proportion which the patient's culpable conduct bears to the culpable conduct which caused the patient's injury (CPLR 1411). An example of comparative fault which will serve to reduce recovery is the patient's failure to inform the doctor of past medical conditions (*Russo v. Rifkin*, 113 AD2d 570 [2d Dep't 1985]). Another example is the patient's leaving the hospital against medical advice after undergoing surgery or a medical procedure (*Suria Shiffman*, 107 AD2d 309, modified on other grounds 67 NY2d 87 [1986]). Indeed, the rule that the patient's failure to follow post-operative instructions is considered only in mitigation was applied even before the enactment of CPLR § 1411, when contributory fault was generally a complete defense to a negligence action (see *Morse v. Rapkin*, 24 AD2d 24 [1st Dep't 1965]).

In support of their motion for summary judgment, Pegasus and Dr. Sama submit the affidavit of Dr. Robert Leviton, an expert in the field of emergency medicine. Dr. Leviton asserts that both Dr. Kurtz and Dr. Sama followed good and accepted medical practice in the treatment of the

⁴The pattern jury instructions provide: "A doctor is not liable for an error in judgment if [the doctor] does what [he or she] decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances" (PJI 2:150).

patient. More specifically, Dr. Leviton notes that Dr. Kurtz ordered a "trauma profile" battery of tests and advised Dennis of the serious risks which he faced by leaving the hospital. Upon the patient's return to the emergency room, Dr. Sama ordered tests similar to those which had been ordered by Dr. Kurtz twelve hours earlier. The court concludes that Pegasus and Dr. Sama have established prima facie that they did not depart from the standard of a reasonably prudent doctor. Thus, the burden shifts to plaintiff to establish a triable issue as to whether any malpractice was committed by defendants (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In opposition, plaintiff submits the affidavit of Dr. Richard Birrer, another expert in the field of emergency medicine. Dr. Birrer asserts that Dr. Sama departed from good and accepted emergency medical practice by failing to take "orthostatic blood pressure," that is a reading while the patient is in an upright position.⁵ Dr. Birrer also contends that Dr. Sama failed to order "serial examinations" of the patient to detect changes in his vital signs during the five hours while he was waiting to be admitted to the hospital. Dr. Birrer further contends that the saline solution which was administered to Dennis was insufficient to promote urine output and ensure proper cellular waste elimination. Finally, among other departures, Dr. Birrer asserts that Dr. Sama failed to consider transferring the patient to Westchester County Medical Center, a designated trauma center.

Defendants argue that these alleged departures constitute "new theories of liability." However, it is clear that they are simply specific instances of the general theory of liability set forth in plaintiff's bill of particulars, namely failing to stop the patient's hemorrhaging and failing to stabilize his condition in a timely manner. While the jury may ultimately conclude that Dr. Sama exercised his best judgment under the circumstances, plaintiff has carried her burden of establishing a triable issue on the question of malpractice by Dr. Sama. Accordingly, defendants Pegasus and Dr. Sama's motion for summary judgment is denied.⁶

The liability of a hospital may arise in several different ways. As a general proposition, a hospital may be vicariously liable for the malpractice, or ordinary negligence, of its employees under the principal of respondeat superior (*N.X. v. Cabrini Medical Center*, 97 NY2d 247 [2002]). Thus, a hospital will be vicariously liable for malpractice committed by a doctor who is an employee

⁵See Merriam Webster's Medical Desk Dictionary.

⁶Dr. Birrer does not specifically address the treatment provided by Dr. Kurtz, other than in relation to the information which Dennis received as to when an x-ray technician would be available. As will be explained below, the availability of a radiology technician is relevant not to Dr. Kurtz' duty of due care but rather to that of Putnam hospital. However, Dr. Sama's allegedly inadequate treatment appears to have been based, at least in part, upon the prior examination conducted by Dr. Kurtz. Although Dr. Kurtz has not been named as a defendant, the quality of the care which she provided is relevant to whether Pegasus complied with the reasonably prudent doctor standard.

of the hospital, if the doctor acted in furtherance of the hospital's business and within the scope of the doctor's employment. On the other hand, a hospital is not vicariously liable for the malpractice of an independent physician retained by the patient, merely because the physician has attending privileges at the hospital (*Welch v. Medical Center*, 21 AD3d 802, 807 [1st Dep't 2005]). However, a hospital may be vicariously liable for the negligence of an emergency room doctor, even if the doctor is an independent contractor (*Sandra M. v. St. Luke's Roosevelt Hospital Center*, 33 AD3d 875, 877 [2d Dep't 2006]). A patient enters the emergency room for medical treatment, and the hospital holds itself out as a provider of medical services. Furthermore, patients may reasonably assume that doctors who treat them in the emergency room do so on behalf of the hospital (*Id.*). Because Dennis was treated by Dr. Kurtz and Dr. Sama in the emergency room, Putnam will be vicariously liable for any malpractice committed by those doctors. Whether Putnam is vicariously liable for any malpractice on the part of Dr. Semegran, will depend upon whether Putnam had "control" over Dr. Semegran and upon principles of ostensible, or apparent, agency (*Welch v. Medical Center*, supra, 21 AD3d at 809).

Aside from vicarious liability, a hospital may also be directly liable for breach of a duty that it, as an institution, owes to its patients. The hospital's duty may sound in malpractice or in negligence (*Bleiler v. Bodner*, 65 NY2d 65, 73 [1985]). For example, a hospital may be liable for breach of its duty to use due care in adopting and prescribing proper procedures and regulations and also for failing to furnish competent medical personnel (*Id.*). In *Bleiler*, the court noted that these causes of action sound in negligence rather than medical malpractice.

A general hospital which maintains outpatient emergency medical facilities has a direct duty to provide outpatient emergency care to any person who, in the opinion of a physician, requires it (Public Health Law § 2805-b[1]). Pursuant to 42 U.S.C. § 1395dd(a), a hospital that has an emergency department must provide for an appropriate medical screening examination, within the capability of the hospital's emergency department, of any person who requests an examination or treatment, to determine whether or not an emergency medical condition exists. The federal statute provides that any person who suffers personal harm as a direct result of a participating hospital's violation of its provisions may bring a civil action against the hospital to obtain damages available for personal injury under the law of the state where the hospital is located (42 U.S.C. § 1395dd(d)(2)[A]).⁷ This statute gives rise to a state law cause of action in negligence for failure to conduct an appropriate emergency room examination (*Almond v. Massena*, 237 AD2d 94 [3d Dep't 1998]).

The deposition testimony of Dr. Kurtz and Dr. Sama is to the effect that a radiology technician was available to begin the necessary diagnostic procedures. Based on these depositions, Putnam has established prima facie that it complied with its duty to provide competent medical personnel and to provide for an appropriate medical screening examination. Thus, the burden shifts to

⁷Section 1395dd provides that it does not preempt any state or local law requirement, except to the extent that the requirement directly conflicts with its provisions (42 U.S.C. § 1395dd[f]).

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plaintiff to show a triable issue as to whether Putnam complied with its obligations as a provider of emergency medical services.

The record of Dennis' primary care physician, Doctor Thomas Burnette, states that Dennis was "apparently" told that a radiology technician would not be available until 7:00 a.m. Similarly, both plaintiff and Dennis' brother, William, testified that this is what Dennis told them to explain why he left Putnam's emergency room at 3:30 a.m. on September 30, 2003.

The Dead Man's Statute will not preclude consideration of this alleged statement to Dennis for purposes of defeating summary judgment (*Phillips v. Kantor & Co.*, 31 NY2d 307) and the truth of whether a radiology technician was available is irrelevant if Putnam was nevertheless informing its patients that no such technician was available and that "they could either wait or go home" (deposition testimony of William McDaid at p.40).

Thus, a question of fact exists as to whether Putnam furnished competent medical personnel and provided for an appropriate screening examination. The alleged representation by an employee of Putnam to Dennis regarding the unavailability of the technician is also relevant on the issue of comparative fault on the part of Dennis in leaving Putnam's emergency room. Defendant Putnam's motion for summary judgment dismissing the complaint is denied.

This decision constitutes the order of the court.

Dated: 10-09-07

Walter G. Alton, Jr. & Associates, P.C.
Attorneys for Plaintiffs
548 West 28th Street, Suite 670
New York, NY 10001

Keller, O'Reilly & Watson, P.C.
Attorneys for Defendant Adam Bernard Semegran, M.D.
242 Crossways Park West
Woodbury, NY 11797

Patrick F. Adams, P.C.
Attorneys for Defendants Michael A. Sama, M.D. and
Pegasus Emergency Medicine Group
49 Fifth Avenue
Bay Shore, NY 11706-7306

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Kaufman Borgeest & Ryan, LLP
Attorneys for Defendant Putnam Hospital
200 Summit Lake Drive
Valhalla, NY 10595

Heidell, Pittoni, Murphy & Bach, LLP
Attn: Laura S. Murphy, Esq.
Attorneys for Defendants Jay Andrew Yelon, M.D. and
North Shore University Hospital
99 Park Avenue
New York, NY 10016