

**Knipel v North Shore Univ. Hosp., Inc.**

2008 NY Slip Op 33433(U)

December 12, 2008

Supreme Court, Nassau County

Docket Number: 15559/04

Judge: Arthur M. Diamond

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**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ARTHUR M. DIAMOND**  
**Justice Supreme Court**

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**RUTH KNIPEL, as Executrix of the goods and chattels  
of the ESTATE OF ALEXANDER KNIPEL**

**Plaintiff,**

**-against-**

**NORTH SHORE UNIVERSITY HOSPITAL, INC.,  
NORTH SHORE UNIVERSITY HOSPITAL AT  
PLAINVIEW, INC., WHITE OAKS NURSING HOME,  
JEFFREY SCAVRON, M.D., THEODORE  
FELDERMAN, M.D., IRWIN INGWER, M.D.,  
EZRA BENDIT, M.D., GARY MOSKOWITZ, M.D.,  
ROBERT SCHOENFELD, M.D., "JOHN DOES 1  
THROUGH 10", JEFFREY WHITE and ELEANOR  
WHITE, d/b/a WHITE OAKS NURSING HOME**

**Defendant.**

**TRIAL PART: 21**

**NASSAU COUNTY**

**INDEX NO: 15559/04**

**MOTION SEQ. NO: 3**

**SUBMIT DATE: 11/24/08**

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**The following papers having been read on this motion:**

- Order to Show Cause .....1**
- Opposition .....2**
- Memorandum of Law.....3**
- Reply.....4**

This motion by defendants Gary Moskowitz, M.D. and Robert Schoenfeld, M.D., for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them is denied.

The plaintiff in this action seeks to recover damages for medical malpractice and the wrongful death of her decedent, Alexander Knipel. The decedent was hospitalized at North Shore University Hospital at Plainview from September 5, 2002 until October 10, 2002 for treatment of a urinary tract infection. On October 10, 2002, he was discharged to White Oaks Nursing Home where he remained until he died on November 16, 2002. The death certificate identifies respiratory arrest as the cause of death.

The moving defendants Drs. Moskowitz and Schoenfeld were attending doctors at defendant White Oaks Nursing Home. They treated the plaintiff's decedent on October 11, 2002 and October 13 and 14, 2002 respectively. They seek summary judgment dismissing the complaint against them on the grounds that their treatment of the decedent was at all times and all respects in accordance with the prevailing medical standards and that in any event, assuming, *arguendo*, they were negligent in their care of the decedent, they did not cause his injuries or death.

The facts pertinent to the instant application are as follows:

Dr. Schoenfeld, an attending physician at White Oak Nursing Home, examined Mr. Knipel after his admission there on October 11, 2002. Dr. Schoenfeld indicated Mr. Knipel's history and physical condition, and later ordered a chest x-ray and urinalysis with culture and sensitivity. On October 12, 2002 Dr. Schoenfeld ordered a swallow evaluation via telephone because the decedent was having difficulty swallowing. At her examination-before-trial, the decedent's wife testified that she arrived at the Nursing Home on October 13, 2002, at about 10:30 AM. She testified that her husband was gasping for air and she immediately notified the staff that she feared that he had swallowed his bottom denture since she scoured the room and it could not be found. She testified that his whole body was arching, writhing, and moving and that his eyes were wild and he couldn't eat. She testified that she was later advised by a nurse that her husband's chest x-ray was negative and that he was suffering from a respiratory infection which was being treated with antibiotics. The decedent's wife testified that when she arrived at the Nursing Home the next day at about 10:30 AM, her husband's breathing was worse and his gasping and body movements were worse.

Dr. Moskowitz saw Mr. Knipel on October 14, 2002. His note in the chart is not timed but the next nurse's note is at 10:00 AM. At his examination-before-trial, Dr. Moskowitz testified that his note read as follows:

10/14/02: Patient seen as requested. Spiked temperature last night. Rocephin. Had negative chest x-ray. Urine, CSF culture and sensitivity pending. Has Stage IV decubitus. Will continue antibiotic pending culture and sensitivity results.

Dr. Moskowitz's only other involvement with Mr. Knipel was as a result of a telephone call made from White Oak Nursing Home at 12:40 PM that same day. The decedent's chart note indicates that

Dr. Moskowitz ordered the decedent's transfer to North Shore University Hospital at Plainview after a discussion with Mrs. Knipel. That was Dr. Moskowitz's sole involvement with Alexander Knipel.

Upon the decedent's readmission to North Shore University Hospital at Plainview, it was discovered by an emergency room physician Dr. Fiorenti that his dentures had been lodged in his throat, in particular, in the posterior pharynx. At his examination-before-trial, Dr. Fiorenti testified that the decedent was in severe unresponsive condition on his admission: He registered a 10 out of 10 for distress. He testified that the dentures were not visible on his physical examination and that only when he performed a laryngoscope with a light did he see the dentures lodged in the decedent's throat.

In her Bill of Particulars, the plaintiff alleges that the defendant Drs. Moskowitz and Schoenfeld committed medical malpractice by, *inter alia*, by improperly performing indicated procedures; by failing to perform indicated procedures; by failing to take a proper history and physical examination of the decedent; by failing to perform indicated treatments and improperly performing indicated treatments; by failing to properly diagnose the condition(s) of the decedent; by improperly prescribing and administering medication; by failing to timely refer plaintiff's decedent to a specialist; by failing to properly treat decedent's condition; and by failing to heed or appreciate the significance of the signs or symptoms exhibited by plaintiff's decedent; failing to properly monitor the decedent's dental devices and/or dentures and by failing to properly and adequately assure said dental devices and/or dentures were properly fitting in his mouth; by failing to properly supervise and care for the plaintiff's decedent in allowing him to swallow the dental devices and/or dentures; and, by failing to detect that the plaintiff's decedent swallowed the said dental devices and/or dentures.

The moving defendant doctors maintain that it was not their duty "to keep track of the

[decedent's] dentures.” In fact, they note that Tracey Diamondopol, the Assistant Director of Nursing at White Oaks Nursing Home at the time of the decedent's admission, testified at her examination-before-trial that it was the Certified Nursing Assistant and the Nurse's Aide's responsibility to do so.

“[I]n order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated from good and accepted medical practice, and that the departure was a proximate cause of the plaintiff's injuries (Myers v Ferrara, \_\_ AD2d \_\_, 864 NYS2d 517, 521 (2<sup>nd</sup> Dept. 2008), citing Lovett v Interfaith Medical Center, 52 AD3d 578 (2<sup>nd</sup> Dept. 2008); Sheenan-Conrades v Winifred Masterson Burke Rehabilitation Hosp., 51 AD3d 769, 770 (2<sup>nd</sup> Dept. 2008); Roca v Perel, 51 AD3d 757, 758 (2<sup>nd</sup> Dept. 2008); Rebozo v Wilen, 41 AD3d 457, 458 (2<sup>nd</sup> Dept. 2007); Thompson v Orner, 36 AD3d 791, 791-792 (2<sup>nd</sup> Dept. 2007); Anderson v Lamoute, 306 AD2d 232, 233 (2<sup>nd</sup> Dept. 2003). “Consequently, on a motion for summary judgment in a medical malpractice case, the defendant physician must come forward with evidence in admissible form establishing, *prima facie*, either that he or she did not deviate from good and accepted medical practice, or that, if there was such a departure, it was not a proximate cause of the plaintiff's injuries. Myers v Ferrara, *supra*, at p. 952, citing Germaine v Yu, 49 AD3d 685, 686 (2<sup>nd</sup> Dept. 2008); Rebozo v Wilen, *supra*; Williams v Sahay, 12 AD3d 366, 368 (2004).

In support of their motion, the defendant doctors have submitted the Affidavit of Board Certified Internist Preston L. Winters. Having reviewed the Summons and Complaint, the Bill of Particulars, the transcripts of the examinations-before-trial and the decedent's medical records, he opines to a reasonable degree of medical certainty that neither Dr. Moskowitz nor Dr. Schoenfeld departed from good and accepted standards of medical malpractice in their care and treatment of the decedent and that their care and treatment of him did not proximately cause his injuries and/or death.

He explains that it was appropriate for Dr. Schoenfeld to perform a physical examination upon the decedent's admission to White Oaks Nursing Home; that that examination was appropriately performed; and, that it was medically appropriate for him to order the tests he ordered. He further opines that it was medically appropriate for Dr. Moskowitz to examine Mr. Knipel as he did; that the examination was appropriately performed; and, that it was appropriate for him to await the results of culture and sensitivity tests before changing the antibiotics previously ordered. He further opines that it was medically appropriate for Dr. Moskowitz to order the decedent's transfer to North Shore University Hospital Plainview based upon the wishes of Mrs. Knipel.

Addressing the plaintiff's allegations against Drs. Moskowitz and Schoenfeld, Dr. Winters opines that neither Dr. Schoenfeld nor Dr. Moskowitz would have been able to see the denture upon a routine examination of the decedent without the use of a laryngoscope. Further, in his opinion, with a reasonable degree of medical certainty, it was not within the standard of care for internists such as Drs. Schoenfeld and Dr. Moskowitz to have utilized a laryngoscope in their examination of the decedent. He further opines to a reasonable degree of medical certainty that there is no evidence that any treatment rendered by Drs. Schoenfeld or Moskowitz proximately caused any of the alleged injuries and/or death of Alexander Knipel.

Dr. Winters and concomitantly the moving defendant doctors fail to address all of the plaintiff's allegations of negligence. More specifically, Dr. Winter does not address the plaintiff's allegations that they failed to heed or appreciate the significance of the signs and/or symptoms that the decedent exhibited. Nor does Dr. Winter or the moving defendant doctors address whether the outcome would have been different had they done so.

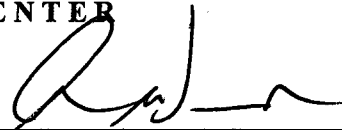
In view of their failure to address all of the plaintiff's allegations of negligence in toto, the defendants have not established their entitlement to summary judgment and their motion is denied.

See, Larsen v Loyshusuk, 55 AD3d 560 (2<sup>nd</sup> Dept. 2008), citing Kuri v Bhattacharya, 44AD3d 718 (2<sup>nd</sup> Dept. 2007).

This constitutes the decision and order of this Court.

DATED: December 12, 2008

ENTER



HON. ARTHUR M. DIAMOND  
J. S.C.

To:

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**ENTERED**  
**DEC 16 2008**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**