

Almonte v Jewish Home & Hosp. for the Aged

2009 NY Slip Op 32577(U)

October 22, 2009

Supreme Court, New York County

Docket Number: 103411/06

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C. Justice

PART 11

Index Number : 103411/2006
ALMONTE, LOUIS
vs.
JEWISH HOME & HOSPITAL
SEQUENCE NUMBER : 006
OTHER RELIEFS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED
NOV 05 2009
NEW YORK
COUNTY CLERK

Dated: October 22, 2009

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

LOUISE ALMONTE, as Administrator of the Estate of
OLGA ALMONTE,

Plaintiff,

-against-

THE JEWISH HOME AND HOSPITAL FOR THE AGED,

Defendant.

-----X

INDEX NO. 103411/06

FILED
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NEW YORK
COUNTY CLERK'S OFFICE!

JOAN A. MADDEN, J.:

In this post trial motion, plaintiff Luis Almonte as Administrator of the Estate of Olga Almonte, ("Plaintiff") moves pursuant to CPLR 4404(b) for an order setting aside the jury verdict on the grounds that the verdict is against the weight of the evidence and for judgment notwithstanding the verdict. Defendant The Jewish Home and Hospital for The Aged ("JHH") opposes the motion arguing that there was ample evidence upon which the jury rendered a verdict in favor of defendant, that plaintiff failed to move for a directed verdict and therefore waived the right to make a motion for judgment notwithstanding the verdict, and that even if the issue is preserved, no grounds exist for granting the motion.

In order to set aside a jury verdict and direct judgment in favor of a party, there must be "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial." Cohen v. Hallmark Cards, 45 NY2d 493, 499 (1978). In order to set aside the verdict as against

the weight of the evidence and order a new trial it must be established that “the jury could not have reached the verdict on any fair interpretation of the evidence.” Yakut v. City of New York, 162 AD2d 185, 188 (1st Dept 1990) (citing Nicastro v. Park, 113 AD2d 129, 134 [2nd Dept 1985]). For the reasons below, the court concludes that there is no basis to set aside the verdict on either ground and plaintiff’s motion must be denied.

Plaintiff sued JHH alleging, inter alia, violations of Public Health Law § 2801-d (PHL), negligence and wrongful death, in connection with the care and treatment of his mother Olga Almonte at the JHH. Olga Almonte was a resident at JHH from July 7, 2003 until her death on February 27, 2005. Plaintiff alleged that JHH failed to provide proper care for Olga Almonte so that she developed pressure sores or ulcers, suffered from malnutrition and dehydration, and ultimately developed pneumonia which caused her death. Plaintiff also alleged that Olga Almonte’s treating physician, Dr. Kassabian, departed from good and accepted practice as to the rate of flow of nutrition Olga Almonte received through a feeding tube. The jury concluded that JHH did not violate PHL § 2801-d, specifically finding JHH did not violate certain implementing regulations, and that Dr. Kassabian did not depart from good and accepted practice.

Section 2801-d of the Public Health Law provides in relevant part as follows:

Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation, except as hereinafter provided. For purposes of this section, a “right or benefit” of a patient of a residential health care facility shall mean any right or benefit created or established for the well being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code rule or regulation.

In this motion, plaintiff focuses on issues relating to a pressure ulcer which developed on

Olga Almonte's right buttock and relies on the following New York State Department of Health regulations¹:

(c) *Pressure sores*. Based on the comprehensive assessment of a resident, the facility shall ensure that:

- 1) a resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable despite every reasonable effort to prevent them; and
- 2) a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing. [10 NYCRR §415.12 (c)(1), (2)]

Each resident shall receive and the facility shall provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, in accordance with the comprehensive assessment plan of care subject to the resident's right of self-determination. [10 NYCRR §415.12]

The facility shall have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care. The facility shall assure that each resident receives treatments, medications, diets and other health services in accordance with individual care plans. [10 NYCRR §415.13].²

Based on the right buttock pressure sore, plaintiff argued that JHH violated PHL § 2801-d and the above regulations, as the ulcer was avoidable and JHH did not take every reasonable step

¹Plaintiff's other allegations rely on the following New York State Department of Health regulations: 10 NYCRR §415.12 (e), range of motion; 10 NYCRR §415.12 (i), nutrition; 10 NYCRR § 415.12(j), hydration; 10 NYCRR § 415.12 (d), urinary incontinence; and 10 NYCRR § 415.12 (g), enteral feeding tubes.

²Plaintiff also cites 10 NYCRR §415.26 which requires "a nursing home facility [to be] administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental and psycho social well-being of each resident."

to prevent it. Plaintiff further argued that Olga Almonte did not receive the necessary treatment and services to prevent infection so that the ulcer worsened.

The trial testimony indicated that pressure sores are classified as Stage I through Stage IV, with Stage I the least and Stage IV the most serious. A Stage I ulcer is characterized by an area of redness or change in skin color; Stage II by superficial loss of tissue; Stage III as penetrating through the subcutaneous tissue; and Stage IV as penetrating into the muscle and bone. The evidence showed that Olga Almonte had three pressure sores between the time of her admission on July 7, 2003 and her death on February 27, 2005. When admitted, Olga Almonte had a small sacral pressure sore which healed within the month.³ On January 8, 2004, when she returned to JHH after treatment at Mt. Sinai, she had a stage IV ulcer on her right hallux, i.e. toe, which healed by April 12, 2004.⁴ The right buttock ulcer, the one at issue, developed in December, 2003. It was documented as a Stage II ulcer on December 19, 2003 and progressed to Stage IV by December 24, 2004. At its largest, it measured approximately 6.5 cm by 4.5 cm by 1 cm. At the time of her death in February, 2005, it was reduced in size to 1 cm by .7 cm by .8 cm. Plaintiff alleges that had Olga Almonte received proper care, this pressure sore would not have developed nor would it have progressed to Stage IV.

The witnesses who testified as to the medical issues agreed that Olga Almonte's overall medical condition determined the nature of the care she required, and that as her condition deteriorated, she was at a greater risk of developing pressure sores. When admitted to JHH, Olga

³ This was classified as Stage I or possibly Stage II ulcer, and although it recurred in February, 2004, it healed by March 10, 2004.

⁴ While it recurred in October 2004, it healed by January, 2005.

Almonte was 82 years old and diagnosed with dementia, syphilis and right sided weakness from a stroke or cerebral vascular accident. She weighed approximately 111 pounds, was incontinent and walked with assistance until her admission to the long term care facility on August 9, 2003. On or about October 23, 2003, Olga Almonte suffered a stroke which left her paralyzed on the right side of her body and confined to a wheel chair. Dr. Kassabian, who is Board Certified in geriatric and palliative care medicine, testified that Olga Almonte developed a condition known as the "failure to thrive," characterized by a loss of weight and appetite, inactivity and diminishment of her nutritional status. According to Dr. Kassabian, this led to dehydration, impairment of her immune system and multiple infections. While plaintiff's geriatric expert, Dr. Dupree, testified that the syndrome began in January, 2004, defendant's geriatric expert, Dr. Capobianco, testified that it began earlier, and attributed it to dementia, or Alzheimer's disease, the stroke and syphilis.⁵

Based on Olga Almonte's condition, specifically the failure to thrive syndrome, Dr. Kassabian testified that he discussed placement of a feeding tube with Louis Almonte, Olga Almonte's son and the Administrator of her Estate, in the beginning of 2004, but was unable to obtain his consent until November, 2004. Olga Almonte died in February, 2005 from pneumonia. Plaintiff alleges it was aspiration pneumonia caused by an excessive rate of feed through the tube.⁶ JHH points to the death certificate which attributes bronchopneumonia with complications

⁵According to Dr. Capobianco, Alzheimer's is a chronic inflammation of the brain and a progressive inflammatory process, and in Olga Almonte, her dementia and syphilis impacted on her cognitive functioning.

⁶As previously stated, the jury found that Dr. Kassabian did not depart from good and accepted practice regarding the rate of flow through the feeding tube.

from hypertension and arteriosclerotic cardiovascular disease, as the cause of death.

As indicated above, plaintiff argues in this motion, that the verdict must be set aside as against the weight of the evidence as the evidence shows that the ulcer on Olga Almonte's right buttock was avoidable, JHH did not make every reasonable effort to prevent her from developing the ulcer, and JHH failed to provide the necessary care and services, in particular nursing and related services. Specifically, plaintiff argues that the evidence demonstrated that JHH failed to provide sufficient staff and specific treatment plans to meet Olga Almonte's needs to prevent the development of the buttock ulcer, and to take appropriate steps to ensure the ulcer did not worsen. Plaintiff argues that a proper plan and care would have encompassed weight shifting or repositioning Olga Almonte hourly while she was in a wheel chair, removing her from the wheel chair every two hours and appropriate hygiene care for her incontinence, including bi-weekly baths.

Plaintiff points to the testimony of Olga Almonte's treating nurse, Bella Aguillar (Nurse Aguillar), who performed the skin integrity assessments. Plaintiff argues her testimony established that Olga Almonte's care treatment plan originally put in place on July 7, 2003, was not updated on August 26, 2003 nor in October, 2003. Plaintiff argues that as Olga Almonte's condition deteriorated after she suffered the stroke, she was at a higher risk of developing pressure sores and the plan should have been updated to provide interventions for her right sided paralysis and confinement to a wheel chair. Plaintiff further points out that the plan was not updated on December 19, 2003 when the pressure sore on her buttock was first documented as a Stage II ulcer, and that it was updated only after the ulcer progressed to Stage IV on December 24, 2003. Additionally, plaintiff argues that when the skin care plan was updated, it provided for

weight shifting every two hours, and given Olga Almonte's paralysis, hourly weight shifting should have been ordered.

In support of this argument, plaintiff relies on the Nursing Orders Accountability Records (NOARS) which detailed instructions to the nurse's aides, and provided for positioning Olga Almonte every two hours while in bed, taking her out of bed and placing her in a wheel chair at 10 a.m., and returning her to bed after dinner. Specifically, plaintiff argues that the plan and the NOARS, by not providing for weight shifting every hour of a wheelchair-confined patient, violated JHH's Department of Nursing Policy and Procedure for Skin Care Protocols.⁷ Plaintiff also argues that once Olga Almonte developed the pressure sore on her buttock, the plan violated the Nursing Policy and Procedure by failing to require that Olga Almonte be removed from the wheel chair every two hours and placed in bed for pressure relief, and that this was only ordered after the buttock ulcer worsened to Stage IV.

As to the arguments that JHH failed to provide proper hygiene care, plaintiff asserts that proper hygiene is critical for ensuring that an incontinent patient does not develop pressure sores. Plaintiff contends that the care plan provided for Olga Almonte to have bi-weekly baths, but the evidence showed that she did not have bi-weekly baths, and in December 2003, she did not have a bath until December 24, 2003.

Plaintiff points to Dr. Dupree's testimony that the prolonged pressure from sitting in a wheel chair caused the pressure sore on her buttock to develop and prevented it from healing, and

⁷In a footnote, plaintiff argues that although the policy and procedure called for the staff to encourage weight shifting every hour, for a resident such as Olga Almonte who was suffering from dementia and was dependent on staff for all activities of daily living, weight shifting every hour would have to be provided.

Dr. Capobianco's testimony that it was a circulatory pressure that caused the ulcer. Plaintiff further points to the lack of an opinion by Dr. Capobianco as to the specific cause of the buttock ulcer or the clinical condition that rendered the ulcer's development unavoidable. As to Dr. Kassabian, plaintiff argues his opinion that the development of the ulcer was unavoidable was impeached by his deposition testimony that he had no strong opinion one way or the other as to whether it was unavoidable. Based on the foregoing, plaintiff argues that JHH failed to meet its burden that it used all care reasonably necessary to prevent the development and worsening of the pressure sore.

JHH asserts that it took all reasonable steps to prevent the development of the pressure sore on Olga Almonte's right buttock and that it was unavoidable. JHH points to the testimony of Drs. Kassabian and Capobianco that due to her terminal illness, dementia, strokes, right-sided paralysis, immobility and the fact that she was nutritionally compromised, Olga Almonte was prone to skin ulceration. JHH also relies on the evidence that the ulcer which at its largest measured approximately 6.5 cm by 4.5 cm by 1 cm, was reduced in size at the time of death to 1 cm by .7 cm by .8 cm. JHH further argues that although it was classified as a Stage IV ulcer, it did not reach the bone, was not infected, nor was there tunneling under the skin. JHH points to Dr. Capobianco's testimony that the reduction in the size of the ulcer and the fact that it never reached the bone, indicates that Olga Almonte was repositioned, weight shifted and given proper hygiene care, since the ulcer would not have healed in the absence of such care.

As to plaintiff's arguments that the plans fail to provide for proper care and that the records fail to document that Olga Almonte was given proper care, JHH argues this claim is unsupported by the evidence. Specifically, JHH argues that based on Olga Almonte's overall

medical condition, that she was prone to ulcers, and based on the reduction of the size of the ulcer and that it did not become infected nor reach the bone, and the opinions of Drs. Kassabian and Capobianco, the evidence shows that Olga Almonte received proper care. JHH further argues that the relevant plans at the time of Olga Almonte's admission included not only the skin care plan, but also a stroke care plan which noted possible complications of stroke, including immobility and pressure sores. As to the buttock ulcer, JHH argues that the care plan for December, 2003 provided that Olga Almonte was to be weight shifted when she was in the wheel chair, and the August, 2004 safety care plan stated that she was to be positioned in the wheel chair so as to prevent leaning too much to one side. JHH also points to Nurse Aguilar's testimony that in addition to the care plans, at the beginning of a shift, she would discuss with the nursing staff what had to be done during the shift, and for patients with pressure sores the instructions were to weight-shift those patients every two hours. Nurse Aguillar also testified that weight shifting and positioning would be done while removing Olga Almonte from her bed to the wheel chair, while preparing her for bed in the evening, and while checking her as to the need for care and providing care for incontinence. Addressing plaintiff's assertion that JHH's policy and procedures require weight shifting of a resident such as Olga Almonte every hour, JHH argues that under the policy and procedure, hourly weight shifting is not mandated, but rather "encouraged."

As for hygiene care, JHH argues that Olga Almonte received a bed-bath as part of her routine morning care, and that her perineal area was cleaned and lubricated as part of her care for incontinence. JHH points to the evidence that Olga Almonte was given proper care for the buttock ulcer as she was provided with an air mattress, was turned and positioned, and was given

nutritional supplements. JHH also points to Dr. Copabianco's testimony that if Olga Almonte had been left sitting in the same position for long periods of time, she would have developed ulcers on both buttocks, and a resident such as Olga Almonte who was in her 80's, suffered from a failure to thrive syndrome and was incontinent, could develop a Stage IV ulcer in as little as two to three days. As to plaintiff's argument that Dr. Kassabian's credibility was impeached by his deposition testimony, JHH argues that this was an issue for the jury.

JHH further argues that the opinion and testimony of Brenda Young, its expert nurse, established that the nursing assignment records for JHH showed that Olga Almonte was appropriately turned and positioned, that the times reflected the proper protocol, and that she was given proper hygiene care. Furthermore, as to plaintiff's claims that the care plan was not followed as Olga Almonte was not given bi-weekly baths, JHH points to the evidence that Olga Almonte was combative, resisted baths and showers, and Nurse Young's opinion that bed-baths were preferable under such circumstances. Finally, JHH points to Nurse Young's opinion that staffing levels at JHH of one nurse and three to five certified nurse's aides depending on the shift was adequate to provide proper care.

Turning to plaintiff's motion to set aside the verdict, the question of whether a jury verdict is against the weight of the evidence "is essentially a discretionary and factual determination involving a balancing of many factors," and "[t]he operative consideration in invoking the court's discretion . . . is a finding that the jury could not have reached its verdict on any fair interpretations of the evidence." Yalkut v. City of New York, *supra* at 188. In this case, while the medical experts gave conflicting opinions, it cannot be said that the jury could not have reached the verdict on any fair interpretation of the evidence. *Id.*; Nicastro v. Park, *supra*.

The testimony of Drs. Kassabian and Capobianco that due to her terminal illness, dementia, strokes, paralysis, immobility and failure to thrive, Olga Almonte was susceptible to skin ulcerations, was credible and not seriously challenged. Nurse Aguilar's testimony regarding the methods and frequency of procedures for weight shifting, the additional oral instructions given to the staff at the beginning of each shift, together with the treatment plans and NOARS, provided sufficient evidence from which the jury could have inferred that Olga Almonte was given appropriate care to prevent the development of pressure sores. Moreover, Nurse Young's testimony was not undermined, and the jury could have accepted her opinion that JHH had sufficient nursing staff including nurse's aides to properly care for Olga Almonte. When this evidence is considered in light of Olga Almonte's overall medical condition and the fact that the care JHH provided resulted in significantly reducing the size and seriousness of the buttock ulcer, a fair interpretation of the evidence supports the jury's conclusion that the ulcer on Olga Almonte's right buttock was unavoidable, that JHH took all practical steps to prevent it, and Ms. Almonte received the necessary treatment and services to prevent infections and new sores. Based on the foregoing, plaintiff's motion to set aside the verdict is denied.

Plaintiff's motion for judgment notwithstanding the verdict involves an inquiry as to whether there is sufficient evidence as a matter of law to support the verdict. See Cohen v. Hallmark Cards, *supra* at 498; Nicastro v. Park, *supra* at 132. This court's determination above, that a fair interpretation of the evidence supports the jury's verdict, necessarily encompasses the determination that a valid line of reasoning and permissible inferences exist to lead rational persons to the conclusion reached by the jury, which is the standard applicable in considering

whether sufficient evidence exists as a matter of law. Thus, plaintiff's motion for judgment notwithstanding the verdict is denied.

Accordingly, it is

ORDERED that the motion of Louis Almonte as Administrator of the Estate of Olga Almonte to set aside the jur verdict and for judgment notwithstanding the jury verdict is denied.

DATED: October 27, 2009

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J.S.C.

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