

**Hoefler v Yukelis**

2009 NY Slip Op 33383(U)

January 22, 2009

Supreme Court, New York County

Docket Number: 118140/06

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM

PART 13

Justice

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INDEX NO

Leonard Hoefler, et al.

118140/06

MOTION DATE 8/7/08\*

MOTION SEQ. NO. 001

- v -

Igor Yukelis, M.D., Jean-Francois Eid, M.D.,  
Mikhail Zalmanov, M.D., Art Donnersbach, M.D.,  
Mobile Anesthesia Associates, P.C. and  
Center for Specialty Care Inc.

MOTION CAL. NO. \_\_\_\_\_

\*Held in abeyance until 10/16/08

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by plaintiffs for leave to amend the complaint and to serve a further amended bill of particulars; the motion by defendants Igor Yukelis, M.D., Jean-Francois Eid, M.D. and Art Donnersbach, M.D. for summary judgment (seq. 003) and the motion by defendant Center for Specialty Care, Inc., ("Center") for partial summary judgment (seq.004) are consolidated here for disposition.

This medical malpractice action involves the untimely death of plaintiffs' twenty-one year old decedent Brian Hoefler on May 8, 2006 after undergoing elective surgery to correct a congenital penile curvature. The autopsy performed on Mr. Hoefler lists the cause of death as complications of anesthesia with isoflurane propofol and fentanyl. The record shows that the ambulatory surgery was performed at the Center by defendant Jean-Francois, Eid, M.D. , who was

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

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**Mr. Hoefler's private attending physician. Defendant Mobile Anesthesia Associates, P.C. ("Mobile") maintained a contract with the Center providing that Mobile would supply exclusive anesthesia coverage to the center. The anesthesiologist assigned to Mr. Hoefler's surgery was defendant Igor Yukelis, M.D.**

**Defendant Mikhail Zalmanov was the President of Mobile and he was called to the operating room at around 2 P.M. to assist Dr. Yukelis when the patient showed signs of complications. Dr. Zalmanov found the patient in severe distress and, assuming the responsibility of the code leader, called a cardiac code. Defendant Art Donnersbach, M.D., another anesthesiologist who was administering anesthesia to a different patient in a different room, arrived in the operating room just before Dr. Zalmanov arrived. He did a quick assessment and advised that CPR was needed. Dr. Zalmanov then arrived and Dr. Donnersbach returned to care for his own patient. Paramedics were called to the Center and they treated Mr. Hoefler and transported him to New York Presbyterian Hospital where he died at 4:15 P.M. The cause of death is listed as malignant hypothermia due to, or as a consequence of, general anesthesia.**

**Plaintiffs allege in their bills of particulars that defendants were negligent in, among other things, failing to properly monitor the patient during surgery; administering excessive anesthetic agents; failing to timely recognize that the patient was suffering from hypoxia; prematurely extubating the patient; and failing to timely recognize and treat the symptoms of malignant hypothermia. Plaintiffs move to amend their complaint to add a demand for punitive damages. In that connection, they seek to amend their bills of particulars to allege that defendant Dr. Yukelis created a fraudulent and dishonest anesthesia chart when he indicated that all vital signs were normal throughout the surgery and up to the time of the cardiac arrest. According to plaintiffs' counsel, this was done by Dr. Yukelis "[i]n an attempt to confuse and mislead those investigating the death of plaintiffs' intestate in an attempt to avoid responsibility for the death of plaintiffs' intestate, as well as to mislead those attempting to save the life of**

plaintiffs' intestate at the emergency room to which he was taken, at the New York Presbyterian Hospital." (Spadaro affirmation in support of the motion to amend, ¶ 9).

Additionally, as a basis for seeking punitive damages, plaintiffs seek to add the following allegations:

- a) defendants prevented the paramedics from entering the operating room for several minutes after they arrived, and told paramedics that the patient would be brought to the paramedics, thereby delaying timely treatment for the patient;
- b) defendants failed to warn the paramedics that the patient had clenched his endotracheal tube and was not receiving adequate oxygen and that the auditory alarms on the monitors were turned off; and
- c) defendants had ceased CPR as of the time that the paramedics had arrived at the operating room.

Plaintiffs allege that this was conduct constituting gross indifference and disregard for the patient's care.

In support of the motion to amend the complaint and the bills of particulars, plaintiffs have submitted a letter dated May 6, 2008 from Marc J. Bloom, M.D. to plaintiffs' counsel in which he states that upon review of the records of the surgery, the deposition testimony of the paramedics, the information provided by the emergency room physician, and the records of the Medical Examiner, he has concluded that the anesthesia chart cannot be accurate. In essence, Dr. Bloom explains that given the patient's high temperature of 107 degrees and other symptoms, "it is not possible for the case to have proceeded in his anesthesia chart, with absolutely normal vital signs and then sudden and inexplicable arrest." (Bloom affirmation dated May 6, 2008). He concludes that the anesthesia chart "cannot be an accurate or even reasonable representation of Brian's physiology preceding his arrest." Dr. Bloom does not address any of the other allegations raised by plaintiffs in their motion to amend the complaint and bills of particulars.

In response to this submission by Dr. Bloom, counsel for defendants

Yukelis, Eid and Donnersbach argues that this letter, which plaintiffs' counsel has referred to as an affidavit in his supporting affirmation, is in fact, at best, an unsworn letter. Plaintiffs' counsel takes the position in reply that the document is an affidavit because ". . . the paragraph immediately preceding Dr. Bloom's signature reads: 'I, Mark J. Bloom, M.D., being a doctor duly licensed to practice medicine in the State of New York pursuant to the applicable provisions of the Civil Practice Laws and Rules, hereby affirm under the penalties of perjury that the statements contained herein are true and accurate.'" Counsel argues that pursuant to CPLR 2106, this is an affidavit. If the letter were properly affirmed, it would be an affirmation, not an affidavit. However, the court notes that the letter is dated May 6, 2008. The second page of the letter, which contains only the language quoted above, and no specific reference to the patient in this case, is dated April 26, 2008. The "affirming" language pre-dates the substance of the statement. Accordingly, the statement is not properly affirmed and has no probative value in its current form.

Assuming for the sake of argument that the submission of Dr. Bloom were to be accepted as an affirmation, he addresses only one of the proposed amendments to the pleading, and that is the inaccuracy of the anesthesia chart. Even with respect to that one aspect discussed by Dr. Bloom, there is no demonstration of a causal connection between the inaccuracies of the chart and plaintiffs' decedent's injuries and ultimate death (see *Katechis v. Our Lady of Mercy Medical Center*, 36 AD3d 514 [2007]). Accordingly, to the extent that the motion seeks to add allegations that defendants caused injury to plaintiffs' decedent by preventing the paramedics from entering the operating room for several minutes; failing to warn the paramedics that the patient had clenched his endotracheal tube; prematurely ceasing CPR and rendering a false anesthesia record, the motion must be denied on the basis that the proposed amendment lacks merit (*id.*).

However, plaintiffs also argue that defendant Dr. Yukelis intentionally created a fraudulent anesthesia chart in order to avoid being held responsible for

the patient's death and that this conduct is properly the basis of an award for punitive damages. While the United States District Court, Southern District held in Whittlesey v. Espy (1996 WL 689402 [S.D.N.Y. 1996]) that a claim for punitive damages might be supported where there is an allegation that a doctor intentionally falsified records in an attempt to frustrate the patient's recovery, but cannot be sustained where plaintiff alleges that a physician falsified his records after the alleged malpractice had transpired, the Fourth Department held in Abraham v. Kosinski, D. P. M. (251 AD2d 967 [1998]) that allegations that defendant intentionally withheld medical records in order to avoid a malpractice claim are sufficient to support a claim for punitive damages.

Although defendants have argued that they would be prejudiced by an amendment at this stage in the litigation, the court is not persuaded that granting leave to amend will significantly prejudice defendants (compare Schiffer v. Speaker, 36 AD3d 520 [2007]). Accordingly, upon the condition that plaintiffs submit an affirmation by Dr. Bloom in proper form within 30 days after entry of this order, plaintiff's motion is granted to the extent that plaintiff may amend the complaint and bill of particulars to allege that defendant Dr. Yukelis created a fraudulent anesthesia chart in an attempt to avoid responsibility for the patient's death, and to demand punitive damages. Plaintiffs are to clarify in the amendment whether this new claim and demand for punitive damages is asserted against defendants Mobile Anesthesia and/or the Center. There is no basis in the record for this amendment to apply to defendant Dr. Eid or Dr. Zalmanov. The complaint has been dismissed against defendant Dr. Donnersbach (see below). The amended complaint and bill(s) of particulars are to be served within 30 days. Defendants will have 60 days after the amendment to move for summary judgment with respect to this new claim.

Regarding the motion by the Center for partial summary judgment, the notice of motion seeks partial summary judgment in favor of defendant as to all affirmative acts by its employees; partial summary judgment dismissing plaintiffs' cause of action for lack of informed consent; and partial summary

judgment dismissing the cause of action for conscious pain and suffering. In support of the motion, the Center has submitted an affirmation by Mark J. Rosen, M.D. a physician who is board certified in internal medicine, pulmonary medicine and critical care medicine. Plaintiffs' counsel has asserted that Dr. Rosen's affirmation does not comply with CPLR 2106 because Dr. Rosen states that he "affirms the following under penalties of perjury" but does not include language that "the following" is true. The court disagrees and finds that the language of the affirmation, which refers to the penalties of perjury, sufficiently conveys that Dr. Rosen is stating that "the following" is true. In fact, the court notes that although plaintiffs' counsel objects that Dr. Rosen's language doesn't comply with CPLR 2106 because Dr. Rosen does not include the word "true", counsel's own affirmation submitted in partial opposition to the Center's motion states that he "does hereby affirm the following under the penalties of perjury", but does not include the word "true", while other affirmations submitted by counsel in reply do include the word "truth". If this court were to accept the premise that Dr. Rosen's affirmation does not comply with CPLR 2106, then the affirmation in partial opposition submitted by plaintiffs' counsel to the Center's motion would also be rejected.

Defendant Center has made a prima facie showing of entitlement to partial summary judgment with respect to the alleged negligence of its employees and the lack of informed consent claim as it pertains to the acts of its employees. Plaintiffs have not submitted an expert's affirmation in opposition. Plaintiffs have indicated that they do not oppose dismissal of the third cause of action for conscious pain and suffering<sup>1</sup>. Counsel also states in opposition that defendant has not sought dismissal of the cause of action for wrongful death. Defense counsel did not dispute this in reply. It is not clear from the motion papers

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<sup>1</sup>The court notes that there is a typographical error in the complaint. There are two "third" causes of action listed, one for pain and suffering and the other, which should be the fourth cause of action, for loss of services.

whether the Center is seeking dismissal of the wrongful death claim because although the motion is styled as seeking partial summary judgment, Dr. Rosen's submission states that "there were no departures from good and accepted medical practice on the part of the Center's employees regarding their care and treatment of plaintiffs' decedent which were a proximate cause of plaintiffs' decedent's injuries *and death*." (Rosen affirmation, ¶ 22, emphasis supplied.) At the conference held today, the court asked for clarification from counsel for the Center and was told that the Center does seek summary judgment dismissing the wrongful death cause of action as to all affirmative acts of negligence by its employees. Plaintiffs' counsel indicated that plaintiffs will not oppose that relief.

Because plaintiffs have not submitted any expert opinion in opposition to the motion, plaintiffs have failed to rebut the Center's prima facie showing of entitlement to summary judgment as it pertains to the Center's employees (see generally Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). There is proof in the record to indicate that defendant Dr. Yukelis, Dr. Zalmanov and Mobile were acting under the apparent or ostensible agency of the Center (see generally Brown v. Speaker, 33 AD3d 446 [2006]; Welch v. Scheinfeld, 21 AD3d 802 [2005]). Thus, this order only grants summary judgment to the Center as it pertains to the acts of the Center's employees.

Regarding the motion by defendants Igor Yukelis, M.D., Jean-Francois Eid, M.D. and Art Donnersbach, M.D., Dr. Donnersbach has made a prima facie showing of entitlement to summary judgment through submission of the expert affirmation of Paul Poppers, M.D. and plaintiffs have not opposed the motion. Nor have plaintiffs opposed dismissal of the third cause of action for conscious pain and suffering. Accordingly, summary judgment is granted to defendant Dr. Donnersbach dismissing the complaint against him in the entirety, and the cause of action for conscious pain and suffering against defendants Dr. Yukelis and Dr. Eid is dismissed.

ORDERED that the Clerk enter judgment dismissing the complaint against defendant Art Donnersbach, M.D. and severing the action against the remaining

defendants; and it is further

ORDERED that the caption be amended to delete the name of defendant Art Donnersbach, M.D.

Dated: 1/22/09

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J.S.C.

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Check if appropriate:  DO NOT POST  REFERENCE

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