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

PRESENT: Joan B. Lobis PART 6
Justice

Index Number : 108864/2007
MEDINA, LOUIS A.
VS.
HASSEN, M.D. WALEED A.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/7/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-21
Answering Affidavits — Exhibits	X-mot. 22-26
Replying Affidavits	27-29

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

FILED
MAR 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/11/10

J.S.C.

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

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 6

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LOUIS A. MEDINA, as Administrator
of the Estate of LOUIS MEDINA,

Plaintiff,

-against-

WALEED A. HASSEN, M.D., VICTOR WIJESINGHE, N.P., and THE MOUNT SINAI HOSPITAL,

Defendants.

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Index No. 108864/2007

Decision and Order

JOAN B. LOBIS, J.S.C.:

In this medical malpractice action, defendants Mount Sinai Hospital (the "hospital"), Waleed A. Hassen, M.D. (Dr. Hassen), and Victor Wijesinghe, N.P. (Wijesinghe) move for an order granting them summary judgment dismissing this action, commenced by Louis A. Medina (Medina), the son and administrator of the estate of Louis Medina. Medina cross-moves for an order granting him partial summary judgment on liability only.

The decedent, who was a hospital service patient, was diagnosed there with a mass on his kidney. According to the hospital chart, after testing, he and Medina were advised that there was only a one-third chance that the mass was benign, and the risks and benefits of and alternatives to surgical excision and of anesthesia were explained the patient. He decided to have the surgery. He was instructed not to eat anything past midnight before the day of the surgery, and, according to the hospital chart, on the day of the procedure, his stomach contents were emptied. The mass was removed by a Dr. Simon Hall on February 17, 2006. A clear diet was ordered for the patient that

day, and until a subsequent order was placed regarding the food permitted the patient, the clear liquid diet was to remain in place. That order was not changed. On the day of the surgery, the decedent was doing well, except for some complaints of paraincisional pain, for which he was prescribed morphine in a form that was to be self-administered.

The next day, in Dr. Hall's absence, Dr. Hassen was the patient's covering attending physician. Dr. Hassen saw the patient on the morning of February 18, at which time the patient was still doing well. Dr. Hassen, as the on-call attending, was to be contacted if necessary. Sometime that evening, Medina was visiting his father. Evidently, at that time, the patient's sister, Irene Premdas (Premdas), telephoned him. During most of that call, he was allegedly feeling well and joked with his sister about the food he had just received (Jello, coffee or tea, and soup). Evidently, the patient had not yet eaten the food. Toward the end of that conversation, the patient indicated that he was not feeling well, and gave the phone to his son, who told Premdas that he would call the nurse.

Medina could not remember anything about what his father had eaten. Medina testified that his father shared his room with another patient, who was ambulatory. He further testified that his father's breathing had become very labored, that he was panting, and that his heavy breathing was not normal. He was also in pain. Medina called for a nurse, who stated that the pain was due to the fact that the patient had been sleeping, and thus, had not self-administered the morphine. The nurse told the patient to try to use a breathing device, but Medina said that his father was having difficulty with it, and was unable to do so, and that the nurse simply said he should keep

trying. The patient, according to Medina, told that nurse that his chest felt as though it was burning in the area of his lungs. Medina's impression, from his dealings with the nurse, was that she did not feel his father was experiencing anything which was of any concern, but stated that she would keep an eye on the patient.

A progress note of 8:00 that evening written by nurse Cleotilde Hernandez (Hernandez) recited that the patient was very anxious; that there were audible rhonchi; that his stomach had become distended; that the patient was encouraged to do deep breathing with the incentive spirometer, but that he had refused to do so; that his blood pressure was 154/68; that his heart rate was 100; and that he had been given a saline nebulizer, followed by chest PT, which enabled the patient to cough up a large amount of greenish secretions and fall asleep. Nurse Hernandez wrote another note at 10:00 P.M., stating that the patient's heart rate was 102, his blood pressure was 142/60, and that his chest continued to be very congested. The note indicated that the patient was refusing to cough and use the spirometer.

Nurse Hernandez's 11:30 P.M. chart entry recited that the patient had started to have labored breathing, and that she had called Wijesinghe, the nurse practitioner, at 11:25 P.M., to examine the patient. Wijesinghe testified that there was a chain of command hospital policy, which required a nurse practitioner to be called before a physician was called. Wijesinghe arrived at 11:30 P.M., noted the patient to be in respiratory distress, and was told by the patient that he had no pain, but that he was having a hard time breathing. According to Wijesinghe, there were no signs that the patient had vomited. At 12:35 P.M., the patient, who still had a palpable pulse, became

unresponsive, and Wijesinghe called for the code team, which arrived quickly. In the meantime, he began ambu-bagging the patient.

The code team intubated the patient, who had gone into cardiac arrest, and thus he was shocked and given medication. His pulse and blood pressure recovered. The hospital's discharge summary indicates that before the resuscitation efforts, large amounts of fluid were suctioned from the patient's lungs, and, according to the note of Oleg Epelbaum, M.D. (Dr. Epelbaum), the head of the code team, a massive amount of liquified food particles was suctioned. There were indications in the hospital chart that the patient had aspirated food or vomitus into his lungs, and a chest x-ray evidently confirmed massive aspiration pneumonia.

Dr. Hassen was called during the code and arrived while it was in progress. He testified that, at that time, the evidence suggested that the patient's respiratory arrest may have been due to aspiration of what may have been food particles into the lungs, and that it was assumed that the aspiration led to the patient's cardiac arrest. A February 19, 2:00 A.M. critical care note indicated that the patient had aspirated biliary material. Dr. Epelbaum's impression as to a cause of the code was massive aspiration, which he testified meant that the aspiration was extreme, and not what one would normally expect to suction. The patient became comatose and brain dead; life support was ultimately terminated, and he died on February 23, 2006.

Medina commenced this action against the moving defendants. Hernandez, who left the hospital's employ in 2006, was named but apparently never served with process, and was

eventually deleted from the caption by stipulation of the parties. The amended complaint purports to allege four causes of action. The first cause of action is asserted against all the defendants, and alleges that defendants, their agents, and employees rendered negligent care and treatment to the decedent, thereby causing him conscious pain and suffering and death. The second cause of action alleges that Hernandez and Wijesinghe "rendered improper treatment and omitted proper treatment in absence of a physician constituting negligence *per se*," and that as a result, the patient sustained personal injury and died. The third cause of action, alleged against all defendants, sounds in wrongful death, and the fourth cause of action asserts that all of the defendants failed to obtain the decedent's informed consent.

The bills of particulars, as are relevant, allege that defendants were negligent in improperly feeding the patient after surgery; and in failing to properly remove the decedent's gastric contents; elevate his head and chest; have a doctor timely and properly examine the decedent; timely and properly diagnose and treat the decedent's symptoms and aspiration; request a pulmonary consultation; and discontinue morphine.

Defendants now move for an order granting them summary judgment, dismissing this action. They allege, relying on the hospital chart, the deposition transcripts, and the affirmation of their expert internist/anesthesiologist, Dr. Louis Brusco (Dr. Brusco), that a proper informed consent was obtained for the removal of the kidney mass, and that, in any event, a reasonable person in the decedent's position would have consented to the procedure if a proper informed consent had been obtained. In addition, summary judgment is sought in favor of Dr. Hassen and Wijesinghe on the

grounds that their involvement in the decedent's care was quite limited, and that they rendered their care in conformance with accepted standards of practice. Finally, the defendants claim that summary judgment must be granted as to the hospital because the patient was told not to eat for eight hours before his surgery, his stomach was emptied before surgery, he was put on a clear liquid diet postoperatively, and he was prescribed an appropriate amount of morphine. It is further claimed that the decedent did not demonstrate any signs or symptoms warranting anything other than the care which was rendered by the nursing staff on the evening of September 18, before the code was called. Therefore, the care was appropriate.

Dr. Brusco effectively urges that the decedent probably had an occult[1] aspiration which was not seen by anyone and occurred before Wijesinghe's arrival, that the patient rapidly deteriorated, and that the notations about massive amounts of liquid food particles having been suctioned during the code represented an event which first occurred when the patient was laid flat for CPR. Dr. Brusco claims that the defendants took all proper steps to prevent emesis and aspiration. Dr. Brusco also asserts that the care rendered by the code team was timely and appropriate, as was the care which the hospital rendered following the code. Since there was allegedly no malpractice by the defendants, Dr. Brusco opines that they caused no injury to the decedent.

[1] According to Dr. Brusco, occult aspiration occurs as a result of contents coming from the stomach or mouth and then going into the lungs, as contrasted with frank aspiration, which occurs during the act of swallowing.

Medina, relying on the affirmation of Dr. Zvi Herschman (Dr. Herschman), whose expertise is in anesthesiology, critical medicine, and pain medicine, does not offer any opposition to the branch of the motion which seeks dismissal of the lack of informed consent cause of action. Further, the expert does not offer any opinion as to any departures on the part of Dr. Hassen or Wijesinghe. Additionally, Dr. Herschman does not claim that the code team departed from accepted standards of care or that any other subsequent treatment rendered at the hospital was negligent. Medina's counsel claims, however, that the movants' failure to specifically address his client's negligence per se cause of action requires that such cause of action be sustained as to Wijesinghe and the hospital, which would be vicariously liable for Wijesinghe and Hernandez. Medina also claims that Dr. Herschman has established that Medina is entitled to summary judgment on liability, or that he has at least raised issues of fact warranting the denial of summary judgment in defendants' favor, because the evidence allegedly demonstrates that the hospital gave the decedent solid food postoperatively, a circumstance which, if established, even defense counsel conceded would be a departure from accepted standards of care, and because such departure caused the aspiration and resulting injuries. Dr. Herschman further claims that Hernandez was negligent on February 18, from 7:00-11:25 P.M., in failing to call either a physician or a nurse practitioner to see the patient in light of his deteriorating condition, including his agitation, increasing heart rate and blood pressure, heavy chest congestion, difficulty breathing, audible rhonchi, a distended abdomen, refusal to use the spirometer, and his having coughed up a large amount of greenish secretions. According to Dr. Herschman, who disagreed with movants' expert that such signs and symptoms were normal postoperative findings, these were clearly signs of aspiration, which required Hernandez to promptly seek the services of a physician or nurse practitioner, so that appropriate evaluation, testing and

treatment could be rendered, instead of waiting for about four and a half hours until the patient was suffering from respiratory distress. As a result, it is claimed that the patient did not receive treatment to prevent his deterioration.

Medina notes that Wijesinghe testified that the hospital had a protocol mandating that when the nurse had a problem with a patient, the first person that was required to be contacted was a nurse practitioner, who then, if necessary, would contact a physician. Dr. Herschman claims that if such a policy existed, the hospital was negligent in creating and implementing such a policy, because when a patient is in respiratory distress, the first person who should be called is a physician, not a nurse practitioner. Alternatively, if there was no such hospital policy, then, Dr. Herschman claims that Hernandez was negligent in not calling a physician, once the patient was in respiratory distress. Dr. Herschman claims that, since physicians have more training than a nurse practitioner, a physician would "likely know how to treat ... [the patient] without added delay." Dr. Herschman opines, without elaboration, that the delay in having a physician present caused injury to the patient.

In response, movants, relying on Dr. Brusco's reply affirmation, assert that Medina's claim that the hospital gave the decedent solid foods, is a distortion of the record. They further claim that there is nothing that a physician could have done for the patient that Wijesinghe did not do, that it is standard and common practice for a hospital to use a nurse practitioner for a first call, and that the decedent's signs and symptoms on the evening of September 18, before he was found in respiratory distress, were common postoperative findings, which did not require additional intervention.

The law is well settled that the movants on a summary judgment application bear the initial burden of prima facie establishing their entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985); Kuri v. Bhattacharya, 44 A.D.3d 718 (2d Dep't 2007). In a malpractice case, a defendant seeking summary judgment would have to establish that he did not depart from accepted standards of practice, or that, even if he did, he did not proximately cause injury to the patient. Lowhar v. Eva Stern 500, LLC, ___ A.D.3d ___, 2010 NY Slip Op 00821 (2d Dep't 2010). A plaintiff seeking to establish a claim of medical malpractice against a defendant would have to show that the defendant departed from accepted standards of care, and that such departure caused injury to the patient. Frye v. Montefiore Medical Center, 70 A.D.3d 15, 24 (1st Dep't 2009).

The failure to meet one's burden mandates the denial of the application, "regardless of the sufficiency of the opposing papers." Winegrad, 64 N.Y.2d at 853. However, where the movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the other side to raise a material triable issue of fact warranting the motion's denial. Alvarez, 68 N.Y.2d at 324.

The hospital has prima facie established that the decedent's informed consent to the surgery was obtained, a fact which plaintiff does not dispute. Also, neither Dr. Hassen nor Wijesinghe would be responsible for obtaining the patient's consent to the surgery, since they were not involved in performing it. Additionally, the treatment rendered during the code did not require

consent, since it constituted an emergency. Public Health Law § 2805-d (4)(c); Connelly v. Warner 248 A.D.2d 941 (4th Dep't 1998). Accordingly, the fourth cause of action sounding in lack of informed consent is dismissed as to all defendants.

The branch of the motion which seeks dismissal of the action as to Dr. Hassen and Wijesinghe, who have prima facie established their entitlement to such relief, is granted, and the action is dismissed as to them. Both had limited contact with the patient, and there was no attempt by Medina's expert to rebut these movants' prima facie showing that their care and treatment of the decedent were appropriate. While Dr. Herschman may have had a problem with the hospital's alleged policy in having a nurse practitioner be the first called, Dr. Herschman did not indicate that Wijesinghe did anything wrong. Also, while Medina's counsel claims that Wijesinghe did not prima facie meet his burden, because he did not specifically address the cause of action for "negligence *per se*," a review of the allegations under that cause of action reveals that it is nothing more than a claim that Wijesinghe rendered improper treatment or failed to render proper treatment, which is duplicative of the first cause of action asserted against Wijesinghe, the dismissal of which Medina did not oppose. Thus the action is dismissed as to Dr. Hassen and Wijesinghe, and as to the hospital to the extent that it is claimed to be liable to Medina for the alleged acts and omissions of Dr. Hassen and Wijesinghe.

To the extent that Medina seeks summary judgment based on the hospital having given the decedent soup, allegedly solid food, postoperatively, the application must be denied, since Premdas's testimony that the decedent had been given soup was inadmissible hearsay, based on what

the decedent allegedly told her over the phone. In addition, even if her testimony was not hearsay, the soup, as testified to by Premdas, could well have been clear broth. Moreover, even if the decedent had eaten solid food postoperatively, it could have been provided to him by his or his roommate's visitor or by his roommate. Thus, summary judgment cannot be granted to Medina based on a claim that the decedent was given soup.

The branch of the cross motion which is premised on the hospital's allegedly negligent policy in requiring a nurse practitioner to be called first, is also denied, since there is a dispute as to whether such a policy constitutes hospital negligence, and as to what, if anything, would have been done differently or more quickly had a physician been called first. Also, Dr. Herschman's opinion as to how any delay caused by Wijesinghe responding first resulted in injury to the decedent was bald and conclusory. The balance of the motion and the cross motion are denied. The papers raise an issue of fact at least as to whether the patient's signs and symptoms on the evening of February 18 required the nursing staff to earlier call for a physician or nurse practitioner to evaluate, test and treat the patient.

Accordingly, it is

ORDERED that Medina's cross motion for an order granting him partial summary judgment on the issue of liability is denied; and it is further

ORDERED that the branch of the motion seeking summary judgment in favor of

Waleed A. Hassen, M.D., and Victor Wijesinghe, N.P. is granted, and the action is severed and dismissed as to Dr. Hassen and Wijesinghe with costs and disbursements to Dr. Hassen and Wijesinghe as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the branch of the motion which seeks summary judgment in favor of Mount Sinai Hospital is granted to the extent that the cause of action sounding in the lack of informed consent (fourth cause of action) is dismissed, as are any claims asserted against Mount Sinai Hospital predicated on its vicarious liability for Dr. Hassen and Wijesinghe, but is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Counsel for all remaining parties shall appear for a pre-trial conference on March 30, 2010, at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: March 11, 2010

JOAN B. LOBIS, J.S.C.