

Burke v Commack Auto Transp., Inc.

2010 NY Slip Op 31371(U)

June 1, 2010

Supreme Court, Suffolk County

Docket Number: 03-9089

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**

COPY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 1-4-10
ADJ. DATE 2-25-10
Mot. Seq. # 027 - MD; # 028 - MD

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STEPHEN U. BURKE, as Executor of the Estate of
LENORE GILMARTIN,
Index No. 09089-2003
Plaintiff,

GINSBERG & BROOME, P.C.
Attorneys for Plaintiff
225 Broadway, Suite 3105
New York, New York 10007

- against -

WHITE FLEISCHNER & FINO, LLP
Attys for Commack Auto & McCormack
140 Broadway, 36th Floor
New York, New York 10005

COMMACK AUTO TRANSPORT, INC., ROBERT
McCORMACK, JR., CARILLON NURSING AND
REHABILITATION CENTER, "JOHN" FRITZ, M.D.,
(first name being fictitious as presently unknown),
ROBERT MORIARTY, M.D. and CHARLES
MASCIOLO, M.D.,
Defendants.

FUMUSO, KELLY, DeVERNA, et al.
Attys for Carillon Nursing & Rehab Center
110 Marcus Boulevard
Hauppauge, New York 11788

-----X
COMMACK AUTO TRANSPORT, INC. and ROBERT
McCORMACK, JR.,
Index No. 24-391
Third-Party Plaintiffs,

CLAUSEN MILLER, P.C.
Attorneys for Robert Moriarty
1 Chase Manhattan Plaza, 39th Floor
New York, New York 10005

- against -

SCHAUB, AHMUTY, CITRIN & SPRATT
Attorneys for Charles Mascio
1983 Marcus Avenue, Suite 140
Lake Success, New York 11042

HUGH GILMARTIN, CARILLON NURSING AND
REHABILITATION CENTER, "JOHN" FRITZ, M.D.
(first name being fictitious as presently unknown),
ROBERT MORIARTY, M.D. and CHARLES
MASCIOLO
Third-Party Defendants.

ROBERT P. TUSA, ESQ.
Attorney for Hugh Gilmartin
898 Veterans Memorial Highway, Suite 320
Hauppauge, New York 11788

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COMMACK AUTO TRANSPORT, INC. and ROBERT
McCORMACK, JR.,
Index No. 26-300
Second Third-Party Plaintiffs,

FAGLER & AMSLER, LLP
Attorneys for Melvin Fritz
90 Merrick Avenue, Suite 701
East Meadow, New York 11554

- against -

MELVIN FRITZ, M.D., VISITING NURSE SERVICE
OF SUFFOLK and DEIRDRE GREEN, R.N.
Second Third-Party Defendants.

WILSON, ELSER, MOSKOWITZ, et al.
Attys for Visiting Nurse Service & Green
3 Gannett Drive
White Plains, New York 10604

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Upon the following papers numbered 1 to 62 read on these motions for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 18; 19 - 41; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 42 - 57; Replying Affidavits and supporting papers 58 - 60; 61 - 62; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by second third-party defendants Visiting Nurse Service of Suffolk and Deirdre Green for summary judgment is denied; and it is further

ORDERED that the motion by second third-party defendant Melvin Fritz, M.D. for summary judgment and for an order deleting his name from the caption is also denied.

The main action was commenced in April, 2003, by plaintiff Hugh J. Gilmartin to recover damages for his own personal injuries and his derivative claims and for the wrongful death and conscious pain and suffering of his wife, Lenore Gilmartin, allegedly as the result of an motor vehicle accident which occurred on November 2, 2002 when the Gilmartin vehicle collided with a vehicle owned by defendant/third-party plaintiff Commack Auto Transport, Inc. (Commack) and operated by defendant/third-party plaintiff Robert McCormack, Jr. (McCormack). Defendants/third-party plaintiffs asserted a counterclaim against Hugh J. Gilmartin for contribution and/or indemnity with respect to the claims asserted against defendants on behalf of Lenore Gilmartin.

By order, dated May 4, 2004 (Pitts, J.), the Court granted, as unopposed, a motion by plaintiffs to amend the complaint by substituting Stephen U. Burke as Executor of the Estate of Lenore Gilmartin in the place of Hugh J. Gilmartin and to discontinue the individual claim for personal injury asserted by Hugh J. Gilmartin. It appears that Mr. Gilmartin's derivative claim for his wife's injuries and wrongful death remained although the amended caption reflects otherwise.

In December, 2004, defendants/third-party plaintiffs Commack and McCormack commenced a third-party action against, among others, "John" Fitz, M.D., alleging negligence and malpractice in medical treatment rendered Lenore Gilmartin after the accident.

In February, 2005, plaintiffs served a further amended complaint adding, among others, third-party defendant, "John" Fitz, as a direct defendant. In August, 2006, defendants/third-party plaintiffs commenced a second third-party action, also sounding in malpractice, against additional parties - Melvin Fritz, M.D., Visiting Nurse Service of Suffolk and Deirdre Green, R.N. Following the commencement of discovery, the Plaintiff-Executor discontinued, with prejudice, all of the direct actions against the medical malpractice defendants in three stipulations executed by counsel for all parties and so-ordered by the Court (Pines, J.) on August 9, 2007.

Dr. Fritz now moves for summary judgment dismissing the third-party claims against him on the basis that he did not deviate or depart from accepted community standards in the medical community in treating Mrs. Gilmartin and the treatment rendered by him was not the proximate cause of her injuries and death.

Burke v. Commack Auto Transport, Inc.
Index No. 03-9089
Page No. 3

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage. On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from a good and accepted medical practice or that the plaintiff was not injured thereby. In opposition, the plaintiff must submit a physician’s affidavit attesting to the defendant’s departure from accepted practice, which departure was a competent producing cause of the injury. General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment” (*Yankus v Kelly*, __ AD3d __, __NYS2d __, 2010 WL 1725626 [NYAD 2d Dept]).

Dr. Fritz’s submissions include the pleadings, portions of Mrs. Gilmartin’s medical records related to her hospital admissions in November and December, 2002, her admission to the Carillon Nursing and Rehabilitation Center, and to the care rendered her at home by the Visiting Nurse Service of Suffolk, a copy of the transcript of the deposition testimony given by defendant Mascoli¹ and the personal affidavit of Dr. Fritz.

By his personal affidavit Dr. Fritz avers that at the time he rendered medical care to Mrs. Gilmartin he was board-certified in family medicine and geriatrics and held the position of Medical Director at Carillon. He now bases his expert opinion upon his review of Mrs. Gilmartin’s medical records, with special emphasis on the chart for her admission to Carillon, the deposition testimony given in this action and upon his training and experience as a physician and his personal knowledge of the case. He states that within a reasonable degree of medical certitude that he did not depart from good and acceptable standards of medical practice in the care and treatment rendered to Mrs. Gilmartin during her admission to Carillon from December 11, 2002 through December 21, 2002, nor did the manner in which care was rendered by him in any way cause or contribute to her injury and ultimate demise.

Dr. Fritz states that he had no contact with Mrs. Gilmartin before her admission to Carillon upon her discharge from Huntington Hospital. Because her attending physicians at the Hospital did not maintain privileges at Carillon he became her attending physician at Carillon. Mrs. Gilmartin’s chart at Carillon reflects that following a motor vehicle accident she had undergone an open reduction of a fracture of her left leg which also required the insertion of hardware. She then developed osteomyelitis as post-operative complication which required treatment with antibiotic therapy. At the time of her admission to Carillon she had been successfully managed for approximately one month with the antibiotic Levaquin, without any indication of adverse side effects

¹ Although counsel states that the deposition testimony of Dr. Moriarty has been submitted, it is the transcript of Dr. Mascoli’s deposition testimony which is annexed to the papers attached to the motion papers. Inasmuch as the movant has not attached the transcript of Dr. Moriarty’s testimony, counsel’s references to Dr. Moriarty’s testimony have not been considered in support of this motion.

Burke v Commack Auto Transport, Inc.
Index No. 03-9089
Page No. 4

and with improvement in her condition. The recommendation of her attending physicians, per the transfer note of Dr. Moriarty was to continue her antibiotic regimen through to the end of its course 13 days later. The daily administration was to remain at 500mg, orally. Upon conducting a physical examination of Mrs. Gilmartin, Dr. Fritz observed her to have vital signs within normal limits and to be alert, oriented and febrile. Consistent with the recommendation of her attending physicians at the hospital he endorsed the care plan, which among other things called for Mrs. Gilmartin to complete her antibiotic regime with Levaquin. Dr. Fritz opines that his endorsement of the care plan for Mrs. Gilmartin did not constitute a departure from good and accepted practice.

Dr. Fritz continues that Mrs. Gilmartin's course of treatment at Carillon was uneventful. She underwent physical therapy and continued to show improvement and, as her attending physician at the facility, he periodically reviewed her progress. Prior to her discharge she was seen and evaluated outside the facility by her attending orthopedist. Mrs. Gilmartin showed no signs or symptoms of colitis or sepsis while a patient at Carillon. Such symptoms include severe abdominal pain, tenderness and distension, persistent diarrhea, fever, and an elevated white blood count. Consistent with the standard practice and custom of the facility, Dr. Fritz or a staff member provided Mrs. Gilmartin with discharge instructions which included advising her to complete the Levaquin regime, to follow up with her attending and primary care physicians for further care and treatment, and to advise her primary care physician concerning the onset of any new and/or unusual changes in her condition or complaints.

Dr. Fritz further avers that he no further contact with Mrs. Gilmartin subsequent to her discharge from Carillon on December 21, 2002. She was referred back to her primary care and attending physicians for future care. In addition, Mrs. Gilmartin was to be monitored and receive further care from the Visiting Nurse Service of Suffolk with whom arrangements had been made for daily visits. He asserts that the post-discharge instructions given Mrs. Gilmartin were well within the bounds of accepted medical practice under the circumstances. Because Mrs. Gilmartin had not exhibited any of the symptoms of colitis or infection during her admission at Carillon, that the appearance of any such symptom would have been a new and unusual presentation which she was admonished to report to her primary care physician. Moreover, a review of her subsequent treatment records reveals that when symptoms and complaints ultimately arose, they were transmitted to her care givers. Dr. Fritz concludes that he did not depart from good and accepted medical care in the care and treatment afforded Mrs. Gilmartin, and further, that his care and treatment of her did not in any way cause or contribute to her demise.

Dr. Fritz has made a prima facie showing of his entitlement to judgment as a matter of law through his own affidavit, by averring that his evaluation and treatment of Mrs. Gilmartin was in accord with accepted medical standards and that any alleged deviation was not a proximate cause of her injury (*Swezey v Montague Rehab & Pain Mgt., P.C.*, 59 AD3d 431, 872 NYS2d 199 [2009]; *see also, Videnovic v Goodman*, 54 AD3d 937, 864 NYS2d 496 [2008]). In order to defeat summary judgment, third-party plaintiffs Commack and McCormack are required to submit a physician's

Burke v Commack Auto Transport, Inc.
Index No. 03-9089
Page No. 5

affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that Dr. Fritz's omissions or departures were a competent producing cause of Mrs. Gilmartin's injury (*Swezey v Montague Rehab & Pain Management, P.C., supra*).

In opposition, Commack and McCormack submit the affidavit of their expert, Debra Ann Spicehandler, M.D. who avers she is presently licensed to practice medicine in the State of New York, and was so licensed at time of the alleged malpractice. She avers that she is experienced in the care and treatment of patients with diarrhea, with dehydration, and with *Clostridium difficile* [*C. difficile*] colitis associated with long-term Levaquin or other antibiotic use. She avers that she is fully familiar with the appropriate standards of care both in prescribing Levaquin and in evaluating and treating dehydration, diarrhea, and *C. difficile* colitis. She states that in formulating her opinion she reviewed Mrs. Gilmartin's records from her admissions at Huntington Hospital and Carillon, the Visiting Nurse Service of Suffolk's records regarding Mrs. Gilmartin and the deposition testimony given by Drs. Fritz, Moriarty, Mascoli and Nurses Green, O'Brien, Ersboll, McPartland and Jablonski. She also reviewed the deposition testimony given by Mr. Gilmartin.

Dr. Spicehandler avers that it is well known in the medical community that the colons of patients, such as Mrs. Gilmartin, who spend weeks in hospitals or nursing facilities are frequently colonized with bacterium *C. difficile*; that the treatment of patients with the antibiotics like Levaquin, for several weeks can alter the normal colonic bacteria flora permitting the *C. difficile* organisms to multiply; that such patients are at high risk for developing symptomatic *C. difficile* colitis, manifested by diarrhea; and that a significant number of those patients who develop symptomatic *C. difficile* colitis will, unless treated properly after the development of diarrhea, progress rapidly to a fulminant pseudo membranous colitis with multi-organ failure that cannot be successfully treated such as occurred with Mrs. Gilmartin.

Dr. Spicehandler opines, based upon a reasonable degree of medical certainty, that Dr. Fritz, as Mrs. Gilmartin's attending physician deviated from the standard of care in prescribing Levaquin for her and discharging her to her home without informing her of the potential side effects of the medication, and failed to do what a reasonably prudent doctor would have done under the particular circumstances of Mrs. Gilmartin's case. Dr. Spicehandler also opines that Dr. Fritz's failure to advise Mrs. Gilmartin that if she developed diarrhea while taking the antibiotic medication, or in the days immediately after the antibiotic treatment was finished, that diarrhea could be an early sign of a serious condition associated with the antibiotic, and that she should immediately seek medical attention, was a departure from the standard of proper care. Failing to ascertain that the patient clearly understood the potential seriousness if diarrhea should develop in her circumstances and the importance of seeking immediate medical attention was also a departure from the standard of proper care. Under the circumstances it was insufficient for Dr. Fritz to merely advise Mrs. Gilmartin to notify a doctor if there was a change in her status, or for him to assume that she had been so advised, without making sure that she understood the potential seriousness of diarrhea in her circumstances and need for immediate medical attention should it occur.

Burke v. Commack Auto Transport, Inc.

Index No. 03-9089

Page No. 6

Dr. Spicehandler further opines, with a reasonable degree of medical certainty, if Mrs. Gilmartin had sought medical attention promptly upon developing diarrhea, given her history, a reasonably prudent physician would have immediately recognized the danger of her condition and, upon prompt treatment, there is a substantial likelihood that her condition would not have progressed to the stage of irreversibility that ultimately occurred, and therefore, an appreciable chance that she would have survived.

In reply, defendant Fritz submits the affirmation of counsel who, among other things, challenges the accuracy of the movants' expert's opinion. Inasmuch as counsel has not established himself as a medical expert, his evaluation of movants' expert's opinion is without any probative value.

In any event, summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. Where, as here, medical experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution (*Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2010]; *Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2005]; *Dandrea v Hertz*, 23 AD3d 332, 804 NYS2d 106 [2005]). The request by Dr. Fritz for summary judgment is, therefore, denied.

The motion by the Visiting Nurse Service of Suffolk and Deirdre Green, R.N. for summary judgment on the third-party complaint against them is also denied. In support of their motion, the Visiting Nurse Service of Suffolk and Nurse Green submit, *inter alia*, the pleadings; Mrs. Gilmartin's medical records relating to her treatment at Huntington Hospital, the Carillon Nursing and Rehabilitation Center and by the Visiting Nurse Service of Suffolk; and the transcripts of the deposition testimony given by Drs. Mascoli and Moriarty, and by Nurse Deirdre Green.

A nurse is legally capable of committing malpractice. A negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice (*Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885 [1985]). To make a prima facie showing of entitlement to summary judgment, a defendant must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the plaintiff (*Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2002]). The failure to proffer such evidence warrants denial of the motion regardless of the sufficiency of the evidence proffered in opposition thereto (*Muscatello v City of New York*, 215 AD2d 463, 627 NYS2d 567 [1995]).

Here, the submissions of Nurse Deirdre Green and her employer, the Visiting Nurse Service of Suffolk, are insufficient to make a prima facie showing of entitlement to summary judgment. They have not supported their motion with an expert's affidavit establishing that Nurse Green rendered acceptable medical care to Mrs. Gilmartin. (*see, Abalola v Flower Hosp.*, 44 AD3d 522, 843 NYS2d 615 [2007]). The deposition testimony of Drs. Moriarty and Mascoli, which the

Murke v Commack Auto Transport, Inc.
Index No. 03-9089
Page No. 7

Movants contend establishes that Nurse Green and her employer did not depart or deviate from the standard of care is, at best, vague and equivocal with regard to the nursing care rendered to Mrs. Gilmartin. Nurse Green's own testimony that she did not deviate from the standard of care is wholly conclusory. Consequently, the supporting proof did not resolve the issue of whether Nurse Green was negligent in failing to report Mrs Gilmartin's worsening condition (*see, Currier v St. Peter's Hospital*, 89 AD2d 693, 453 NYS2d 793 [1982]). Since the movants failed to satisfy their burden, as proponents of summary judgment, it is unnecessary to analyze the sufficiency of the opposing papers (*Savage v Franco*, 35 AD3d 581, 827 NYS2d 210 [2006]).

Accordingly, the motions by Dr. Fritz and by the Visiting Nurse Service of Suffolk and Deirdre Green, R.N. for summary judgment are denied.

Dated: June 1, 2010
Riverhead, New York



EMILY PINES
J. S. C.