

Dumas v Adirondack Med. Ctr.
2010 NY Slip Op 34042(U)
March 11, 2010
Supreme Court, Saratoga County
Docket Number: 2007-0337
Judge: Frank B. Williams
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT - COUNTY OF SARATOGA

DAVID DUMAS as Administrator of the Estate of
KIRSTEN LORRAINE DUMAS, and DAVID
DUMAS, Individually and as Parent and Natural
Guardian on behalf of ELIZABETH DUMAS, and
JOSEPH DUMAS, Infants,

ORIGINAL

Plaintiffs,

-against-

DECISION AND ORDER

ADIRONDACK MEDICAL CENTER, BRIM
HEALTHCARE, INC., ELIZABETH BUCK, M.D.,
EDWARD FROST, M.D., CATHERINE R. HILL,
FNP/NPP, MICHAEL ELIO, M.D., RICHARD G.
LAND, R.N., ANGELA L. GATKER, R.N.,
SHARON ST. LOUIS, R.N., SUSAN M.
McKILLIP, R.N., KASSIDY N. TODD, P.A.,
JANE DOE 1, being a factitious name to designate
certain unknown female nursing staff at the
ADIRONDACK MEDICAL CENTER, JOHN DOE, I,
being a fictitious name to designate certain unknown
male nursing staff at the ADIRONDACK MEDICAL
CENTER, VARINS AMBULANCE SERVICES, INC.,
BRIAN P. CASTINE and TREVOR A. YATES,

Index No. 2007-0337
RJI No. 45-1-2007-1165

2010 MAR 12 PM 2:04
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

Defendant.

APPEARANCES:

POWERS & SANTOLA, LLP
(Laura Jordan, Esq., of Counsel)
Attorneys for Plaintiffs

THUILLEZ, FORD, GOLD, BUTLER & YOUNG, LLP
(Kelly M. Monroe, Esq., of Counsel)
Attorneys for Defendants Adirondack Medical Center, Brim
Healthcare, Inc., Elizabeth Buck, M.D., Edward Frost, M.D., Michael
Elio, P.A., Richard G. Land, R.N., Angela L. Gatker, R.N., Sharon M.
St. Louis, R.N., Susan M. McKillip, R.N., Kassidy N. Todd, PA., Jane
Doe I, and John Doe I

D'AGOSTINO, KRACKELER, MAGUIRE & CARDONA, P.C.
(Rebekah Nellis Kennedy Esq., of Counsel)
Attorneys for Defendants Elizabeth Buck, M.D. and Edward Frost, M.D.

HISCOCK & BARCLAY, LLP
(Alexandra Maloney, Esq., of Counsel)
Attorneys for Defendant Catherine R. Hill, FNP/NPP

PETRONE & PETRONE, P.C.
(Janet F. Neumann, Esq., of Counsel)
Attorneys for Defendants Varin's Ambulance Service, Inc., Brian
P. Castine and Trevor A. Yates

FRANK B. WILLIAMS, J.

The events relevant to this action began on February 4, 2005 when the Lake Placid Police Department responded to an incident involving Kirsten Dumas, who was attempting to commit suicide by jumping off a bridge in Lake Placid, New York. Plaintiff's attempt was thwarted by bystanders and she was eventually transported to Adirondack Medical Center's Lake Placid Emergency Department for medical treatment.

After plaintiff was assessed at Adirondack Medical Center's Lake Placid facility, she was transferred for admission to the Intensive Care Unit of Adirondack Medical Center's Saranac Lake facility (hereinafter referred to AMC). Plaintiff was admitted to AMC under the care and treatment of Dr. Elizabeth Buck.

At approximately 10:50 P.M. on February 4, 2005, Dr. Buck performed an evaluation, examination and assessment of plaintiff. Plaintiff was intubated and sedated at the time. Dr. Buck diagnosed plaintiff with alcohol ingestion and suicidality. Dr. Buck issued a "Restraint and Seclusion Order" for wrist restraints. This was a twelve hour order due to expire at 10:50 A.M. on February 5, 2005. As indicated on the restraint order by Dr. Buck, the purpose of the wrist restraints due to plaintiff's "high potential for removing lines, tubes,

equipment or dressings” and “high risk of injury to herself.” Thereafter, Dr. Buck requested a psychiatric consultation for the morning of February 5, 2005 and expected plaintiff to be transferred to a psychiatric facility the next day.

At approximately 11:40 P.M., plaintiff was extubated because she was gagging with the ET tube and struggling.

At 12:30 A.M. Dr. Buck was notified that plaintiff’s blood pressure had decreased but that she was sleeping soundly. At some point after the extubation, plaintiff’s wrist restraints were removed. Dr. Buck believes that the wrist restraints were removed by the nurses based upon their assessment that the restraints were no longer necessary to maintain plaintiff’s safety.

At 2:40 A.M. on February 5, 2005, plaintiff was found by Nurse Chartier to have tied a wrist restraint around her neck and was in the process of tightening it when discovered by the nurse. Nurse Chartier had to cut the wrist restraint used by plaintiff while struggling with plaintiff. The wrist restraint used by plaintiff in her suicide attempt had been left at her bedside after being removed at 11:50 P.M.. During this incident, Nurse Chartier testified that plaintiff was saying “I want to die, just let me die.” The wrist restraints were re-applied at that time.

Although not ordered by Dr. Buck, a one-to-one observation with a sitter at plaintiff’s bedside began at 3:15 A.M. and the wrist restraints were removed. Plaintiff remained calm the remainder of the evening with the sitter at her bedside.

Dr. Buck turned over the care of the patient to Dr. Frost at approximately 8:00 A.M. and Dr. Buck did not provide any further treatment to plaintiff after that time.

On the morning of February 5, 2005, at approximately 9:00 A.M., a psychiatric evaluation was performed on plaintiff by Catherine Hill, a psychiatric nurse practitioner. Nurse Hill's notes indicated that plaintiff was uncooperative, guarded, depressed, irritable, hopeless, helpless and anhedonic.

Nurse Hill diagnosed plaintiff as suffering from severe depression with suicidal gesture. As part of her final assessment of plaintiff that morning, Nurse Hill indicated that plaintiff made a suicidal gesture and continued to be suicidal with ideation, plan and intent. Nurse Hill stated that plaintiff was a danger to herself and recommended she be transferred to a mental health unit for her safety and stabilization.

Around the same time as Nurse Hill's psychiatric evaluation of plaintiff, Dr. Edward Frost was taking over as the attending physician in charge of the medical care and treatment of plaintiff. Dr. Frost remained plaintiff's attending physician for the remainder of her admission at AMC on February 5, 2005.

At approximately 10:10 A.M. on February 5, 2005, Dr. Frost reviewed plaintiff's medical chart, spoke with Dr. Buck and Nurse Hill regarding plaintiff, and subsequently performed an examination and evaluation of plaintiff. At the time of his examination, Dr. Frost indicated that plaintiff was status post-suicide attempt and that she continued to voice suicidal ideation and make suicidal gestures. He indicated his intent to attempt a transfer of plaintiff to a mental health facility as recommended by Nurse Hill.

Following the examination of plaintiff, Dr. Frost completed the paper work and orders required to transfer her out of AMC to a mental health facility. In particular, Dr. Frost issued a "Certificate of Examining Physician to Support an Application for Involuntary Psychiatric

Admission” as she posed a substantial threat of harming herself. Dr. Frost indicated that plaintiff stated she wanted to die and had attempted suicide already.

In order to have a patient involuntarily admitted for psychiatric treatment, two physicians must certify the need. Dr. Christopher Hyson also examined plaintiff around 11:00 A.M. on February 5, 2005 and issued a “Certificate of Examining Physician to Support an Application for Involuntary Psychiatric Admission.” Within his certificate, Dr. Hyson indicated that plaintiff admitted she wanted to die during her prior suicide attempt and further admitted she still wanted to die and would try to injure herself again if the opportunity was available.

Glens Falls Hospital agreed to accept plaintiff for inpatient psychiatric treatment and plans were set into motion to effectuate the transfer.

At approximately 11:30 A.M. on February 5, 2005, Dr. Frost issued a “Patient Transfer Order by Physician (Mandatory).”

While awaiting transfer and while still a patient in the ICU at AMC, plaintiff was left unattended in her room, without restraints applied or sedating medications administered. At approximately 11:45 A.M., plaintiff went into her bathroom and tried to kill herself again by tying a wrist restraint around her neck and tightening it. When she was found by Richard Land, RN, it is alleged that she was blue in the face and cyanotic from the restriction of oxygen she caused. Nurse Land had to physically cut the restraint off her neck because he could not untie it.

Dr. Frost examined plaintiff after this second in-hospital suicide attempt around 12:00 P.M. on February 5, 2005. His physical exam revealed ecchymosis of the neck.

As a result of this second suicide attempt, Dr. Frost determined that plaintiff was still a suicidal risk and at 12:20 P.M., he ordered the medication Geodon as needed for agitation and Ativan as needed for breakthrough agitation. He also ordered four point leather restraints as a suicide precaution.

The four-point leather restraints ordered by Dr. Frost after the second suicide attempt were removed by Nurse Land at 2:00 P.M. because a sitter was available to provide one-to-one direct observation of plaintiff.

As her attending physician, Dr. Frost was responsible for issuing the medical orders that would be in place during plaintiff's transfer from AMC to Glens Falls Hospital. The only medical order written by Dr. Frost for use during plaintiff's planned transfer via ambulance was for oxygen to be administered to maintain her oxygen saturations at or above 92%. No other orders were issued for her transport.

At approximately 4:00 P.M., defendant Varins Ambulance Service, Inc. (hereinafter referred to as Varins) arrived at AMC to transfer plaintiff from the AMC ICU to Glens Falls Hospital. The two Varins employees responsible for transport to Glens Falls Hospital were defendants Trevor Yates and Brian Castine. At the time, Mr. Yates was a certified Advanced Emergency Medical Technician and Mr. Castine was an ambulance driver.

Dr. Frost did not revise or make any additions to his transfer orders following the second suicide attempt at AMC. It was his opinion that plaintiff had been calm and had not made any suicidal gestures for over two and a half hours. Additionally, Dr. Frost states that plaintiff had a history of tachycardia which could have been exacerbated by physical restraints. Dr. Frost did not speak with the ambulance crew that would be transporting

plaintiff to Glens Falls Hospital.

Nurse Land told Yates and Castine that plaintiff had attempted suicide several times in the evening and overnight. During that conversation with Nurse Land, Yates asked if plaintiff was going to be medicated for transport and was told she was not.

Then Nurse Land brought Yates and Castine into a conference room at the ICE and told them that "This girl means it. She is the one who is going to jump out of your ambulance." Yates and Castine confirmed that this conversation with Nurse Land took place.

Following their conversation with Nurse Land, Yates and Castine went into plaintiff's room and had her sit on the ambulance stretcher and strapped two seat belts over her body, one across her ankles and the other across her waist. They then placed a blanket over her body and over the push-button release seat belts, covering her body from her feet to her chest, including her arms and hands. The stretcher was elevated at the head so she was in a seated position on the stretcher.

Castine testified that Yates told him he locked the back ambulance doors because AMC thought it would be a good idea.

Plaintiff was then loaded into the ambulance so that her head was toward the driver and her feet were closest to the rear ambulance doors. Yates sat on the bench seat located on the passenger side of the patient compartment of the ambulance and buckled his seatbelt. He was able to observe plaintiff from that position.

At approximately 4:20 P.M., Castine drove the ambulance away from AMC and began the trip towards Glens Falls Hospital. About two minutes into the trip, Yates moved off the bench seat and into the jump seat which was located behind the driver's seat of the of the

ambulance so that the stretcher was between him and the rear ambulance doors. After he was seated, Yates buckled his seatbelt and began doing paperwork.

Approximately five minutes later, Yates heard plaintiff moving and he saw her fling off the blanket and head toward the rear doors of the ambulance. He observed her open the rear passenger side door and jump from the back of the moving ambulance which was traveling about 55 miles per hour. She landed on the highway and sustained injuries requiring her transport back to AMC. A doctor by the name of George Cook, M.D. and a nurse were the first two people on the scene to provide medical care to plaintiff.

Counsel for plaintiff alleges she had reactive pupils and a pulse and was breathing on her own when they examined her on more than one occasion during the time period prior to her being transported away from the accident scene. Counsel for Varins Ambulance Service claims that Yates performed CPR on plaintiff until they got to AMC. Following plaintiff's arrival back at AMC, she was transferred to Fletcher Allen Health Care in Burlington, Vermont where she later died from her injuries.

All the parties have filed motions in this action. Plaintiff does not oppose the motions for summary judgment by defendants Brim Healthcare Inc., Elizabeth Buck, M.D., Michael Elio, P.A., Angela L. Gatker, R.N., Sharon M. St. Louis, Susan M. McKillip, R.N., P.A., Kassidy N. Todd, P.A., Jane Doe 1 and John Doe 1 and accordingly, those motions are granted. The remaining motions will be addressed hereinbelow.

Plaintiff's complaint alleges six causes of action, one based on medical and/or professional malpractice; one for wrongful death; loss of consortium and two causes of action grounded in negligence, one of which is based upon negligent care, use and operation

of the ambulance and one based upon the failure to take proper precautions to medicate and/or restrain her to prevent her from harming herself.

Defendants Varins Ambulance Services, Brian P. Castine and Trevor A. Yates bring a motion for summary judgment on the grounds that it was not negligent and it is entitled to summary judgment as a matter of law. Varins argues that with respect to the alleged failure to properly restrain the patient, EMT's engaged in Basic Life Support are specifically prohibited from physically restraining a patient during inter-facility transports. Restraints, if any, need to be ordered and applied by the sending physician and/or facility. Since Dr. Frost, the sending physician, did not order restraints, they were not permitted to use them.

Defendant Varins also relies on Mental Health Act § 9.59 which states that an ambulance service and any member thereof who is an EMT or an advanced EMT, who is taking custody of and transporting a person to a hospital or facility shall not be liable for damages, injuries or death alleged to have been sustained by an act or omission unless it is established that such injuries or death was caused by gross negligence on the part of such EMT.

The motion is opposed by plaintiff and the remaining defendants Adirondack Medical Center, Richard G. Land, R.N. and Edward Frost, M.D. and Catherine R. Hill.

The motion for summary judgment is denied. Yates and Castine were specifically told of plaintiff's prior suicide attempts. They were also told that plaintiff "would be the one to jump out of the ambulance." Although Yates and Castine were not permitted to use restraints, Yates' decision to move from the seat next to plaintiff, where he could observe and presumably restrain her himself when she unbuckled the stretcher's belts, to the jump seat

where he could not observe her and, in fact did not observe her due to completing paperwork, and being prevented from restraining her by the very placement of the stretcher, raises questions of fact as to whether defendants Varin's, Castine and Yates were grossly negligent.

Defendants Elizabeth Buck, M.D. (now dismissed from the action) and Edward Frost, M.D. bring a motion for summary judgment on the grounds that they were not negligent and are entitled to summary judgment as a matter of law.

In opposition to the motion by Dr. Frost, plaintiff submits the affidavit of Ralph J. Carotenuto, M.D. who opines that Dr. Frost failed to request a follow-up psychiatric evaluation of plaintiff following her second in-hospital suicide attempt. Given the course of events and plaintiff's mental health condition as outlined in AMC's records, a fact finder could determine that such an evaluation was warranted prior to plaintiff's transfer out of AMC and also the failure to do so was a deviation from good and accepted medical practice. Additionally, Dr. Carotenuto states that Dr. Frost failed to order four point restraints or chemical sedation and one-to-one direct observation of the patient during the ambulance transport and failure to do so was a deviation from good and accepted medical practices. Plaintiff has raised sufficient questions of fact as to whether or not Dr. Frost was negligent, thereby defeating Dr. Frost's motion for summary judgment.

Defendants Brim Healthcare, Inc. (now dismissed from the action), Adirondack Medical Center and Richard G. Land, R.N., bring a motion for summary judgment on the grounds that they were not negligent and are entitled to summary judgment as a matter of law. Additionally, AMC and Land seek to dismiss the loss of consortium claim of David Dumas and the conscious pain and suffering claim of Kirsten Dumas and allege that plaintiffs

have not suffered any pecuniary loss.

These defendants claim that based upon the affidavit of Edward Bonk, Registered Nurse, Certified Nurse Anesthetist, the Adirondack Medical Center nursing staff adhered to good and accepted nursing practice and complied with all standards of nursing care in their rendering of nursing care to the decedent. They allege that the nursing staff appropriately and timely advised the physicians of any significant changes in plaintiff's condition; they appropriately assessed plaintiff and made acceptable and reasonable determinations as to when restraints, per physician order, should be removed; and finally, the nursing staff appropriately and more than adequately advised the Varins ambulance crew that the decedent had made several attempts at suicide during her admission to the hospital, that the decedent was being transferred for mental health care and that the decedent had a real intent to commit suicide, going so far as to advise the Varins crew that plaintiff "would be the patient to jump out of the ambulance."

In opposition to the motion, plaintiff argues that while Edward Bonk, R.N., C.N.A. may be qualified to provide an opinion as to accepted standards of nursing care and a breach thereof, a nurse is not qualified to provide an opinion that said departure was or was not a substantial factor in causing any injury to the plaintiff (*Zak v Brookhaven Memorial Hosp. Med. Cntr*, 54 Ad3d 852).

In further opposition to the motion, plaintiff refers to the affidavit of Ralph J. Carotenuto, M.D. who opines that Richard Land, R.N.'s care and treatment of plaintiff deviated from accepted standards of nursing care and that such deviations were a proximate cause of her death. He states that while Nurse Land verbally informed the Varin's

ambulance personnel that plaintiff wanted to kill herself and was the patient who “would jump out of the ambulance,” there is no indication in the medical records that Nurse Land ever conveyed this same information, warning or opinion to Dr. Frost, the attending physician and person responsible for issuing the transfer orders for plaintiff. It is alleged that Nurse Land had a duty to advocate for plaintiff as her nurse because nurses have more patient contact than physician’s do and that Nurse Land failed to do so.

The motion for summary judgment as to Adirondack Medical Center and Richard G. Land, R.N. is denied. Plaintiff has submitted sufficient evidence to raise questions of fact as to whether or not Adirondack Medical Center and Richard G. Land, R.N. were negligent, thereby defeating their motion for summary judgment in its entirety.

Plaintiff brings a motion seeking an order granting him leave to serve an amended complaint of gross negligence against defendant Varins Ambulance Service, In., Brian P. Castine and Trevor A. Yates. Defendants Adirondack Medical Center, Brim Healthcare, Inc., Michael Elio, P.A., Richard G. Land, R.N., Angela L. Gatker, R.N., Sharon M. St. Louis, Susan M. McKillip, R.N., P.A., Cassidy N. Todd, P.A., Jane Doe 1 and John Doe 1 bring a motion seeking an order granting them leave to serve an amended cross claim and granting them leave to serve an amended verified bill of particulars against defendants Varins Ambulance Services, Inc., Brian P. Castine and Trevor A. Yates specifically alleging a claim of gross negligence against them. Defendants Elizabeth Buck, M.D., Edward Frost, M.D., bring a motion seeking an order granting them leave to serve an amended cross claim and granting them leave to serve an amended verified bill of particulars against defendants Varins Ambulance Services, Inc., Brian P. Castine and Trevor A. Yates specifically alleging a claim

of gross negligence against them. The motions are opposed by counsel for Varins Ambulance Services, Inc., Castine and Yates.

The motion is granted on the grounds that CPLR 3025 specifically states that "Leave shall be freely given upon such terms as may be just * * * ." The facts upon which the claim of gross negligence have already been pled and there is no prejudice to defendant Varins Ambulance Services, Inc., Castine and Yates in allowing the amendment.

This decision shall constitute the order of the court.

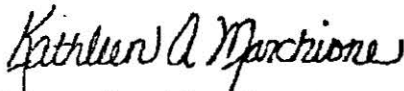
DATED: March 11, 2010

Saratoga Springs, New York

2010 MAR 12 PM 2:04
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED

ENTERED
Kathleen A. Marchione



Papers Considered Clerk



HON. FRANK B. WILLIAMS
JUSTICE OF THE SUPREME COURT

1. Notice of Motion dated October 30, 2009 and Affidavit of Janet Neumann, Esq., dated October 29, 2009, with annexed exhibits.
2. Affidavit of Mark A. Varin, Esq., dated October 29, 2009, with annexed exhibits.
3. Affidavit of James R. Storey, M.D., dated October 30, 2009, with annexed exhibits.
4. Notice of Motion and Affidavit of Kelly M. Monroe, Esq., dated November 2, 2009, with annexed exhibits.
5. Affidavit of Edward C. Bonk, R.N., C.R.N.A., dated November 2, 2009, with annexed exhibits.
6. Memorandum of Law by Kelly M. Monroe, Esq., dated November 2, 2009, with annexed exhibits.
7. Notice of Motion by Rebekah Nellis Kennedy, Esq., dated November 4, 2009.
8. Affirmation of Rebekah Nellis Kennedy, Esq., dated November 4, 2009, with annexed exhibits.
9. Affirmation of Elizabeth Buck, M.D., undated.
10. Affirmation of Edward F. Frost, M.D., undated.
11. Memorandum of Law by Rebekah Nellis Kennedy, Esq., dated November 4, 2009.
12. Affidavit of Kelly M. Monroe, Esq., dated November 12, 2009.
13. Affirmation of Rebekah Nellis Kennedy, Esq., dated November 16, 2009.
14. Affirmation of Janet F. Neumann, dated November 19, 2009.
15. Affirmation of Janet F. Neumann, dated November 25, 2009.

16. Affirmation of Janet F. Neumann, dated November 25, 2009.
17. Affidavit of Ralph J. Carotenuto, M.D., dated December 10, 2009, with annexed exhibits.
18. Affidavit of Kelly M. Monroe, Esq., dated December 11, 2009.
19. Affidavit of Alexandra Maloney, Esq., dated December 15, 2009.
20. Affidavit of David Dumas, dated December 31, 2009.
21. Affirmation in Opposition by Laura M. Jordan, Esq., dated January 1, 2010, with annexed exhibits.
22. Memorandum of Law by Laura M. Jordan, Esq., dated January 1, 2009 (*sic*).
23. Reply Affirmation of Rebekah Nellis Kennedy, Esq., dated January 6, 2010.
24. Affirmation of Janet F. Neumann, dated January 6, 2010.
25. Affirmation of Janet F. Neumann, dated January 6, 2010.
26. Reply Affidavit of Kelly M. Monroe, Esq., dated January 7, 2010.
27. Notice of Motion by Laura M. Jordan, Esq., dated January 8, 2010.
28. Affirmation of Laura M. Jordan, Esq., dated January 8, 2010, with annexed exhibits.
29. Affirmation of Lori E. Petrone, Esq., dated January 14, 2010.
30. Reply Affirmation of Laura M. Jordan, Esq., dated January 20, 2010.
31. Notice of Motion and Affidavit of Kelly M. Monroe, Esq., dated January 25, 2010, with annexed exhibits.
32. Notice of Cross Motion by Rebekah Nellis Kennedy, Esq., dated January 28, 2010.
33. Affirmation of Rebekah Nellis Kennedy, Esq., dated January 26, 2010, with annexed exhibits.
34. Affirmation of Janet F. Neumann, Esq., dated February 2, 2010, with annexed exhibits.
35. Affirmation of Janet F. Neumann, Esq., dated February 4, 2010, with annexed exhibits.
36. Affirmation of Kelly M. Monroe, Esq., dated February 11, 2010.
37. Reply Affirmation of Rebekah Nellis Kennedy, Esq., dated February 11, 2010.

The court is filing the original decision and order together with original papers in the Saratoga County Clerk's Office. Attorneys for plaintiffs to comply with CPLR 2220.