

Mancuso v Kaleida Health

2011 NY Slip Op 34241(U)

June 24, 2011

Supreme Court, Erie County

Docket Number: I2009-5955

Judge: Donna M. Siwek

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

FILED

2011 JUN 27 AM 9:13

ERIE COUNTY
CLERK'S OFFICE

DANIEL MANCUSO, As Executor of the
Estate of ROSE M. KIJ,

Plaintiff,

v.

Index No. I2009-5955

KALEIDA HEALTH d/b/a MILLARD FILLMORE,
TWIN CITY AMBULANCE CORP.,
ELDERWOOD HEALTH CARE AT CRESTWOOD,
CRESTWOOD HEALTH CARE CENTER, INC.,
ELDERWOOD HEALTH CARE AT RIVERWOOD,

Defendants,

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SIWEK, J.,

MEMORANDUM DECISION

This Memorandum Decision addresses Twin City Ambulance Corp.’s (“Twin City’s”) motion for summary judgment dismissing the complaint and amended complaint against it and pursuant to CPLR §3211 and §3212 . The issue the court must decide on this motion is whether plaintiff’s claim against the defendant Twin City sounds in negligence or medical malpractice. If the action sounds in medical malpractice, Twin City argues that it is subject to dismissal due to the failure to attach a Certificate of Merit to the amended complaint and because it is barred by the statute of limitations. On the other hand, if it sounds in simple negligence, the statute of limitations does not serve as a basis for dismissal.¹

In the seventh cause of action at paragraphs 51-53 of the Complaint, the plaintiff alleges that Twin City “provided medical transportation services to decedent Rose M. Kij on or about August 16, 2007”, was negligent in the medical transportation services it provided to Rose M. Kij and, that as a result of the negligence of Twin City, plaintiff’s decedent suffered injuries.

¹Although the defendant’s motion initially sought dismissal of plaintiff’s wrongful death claim as time barred, the plaintiff has conceded that the wrongful death cause of action against this defendant is time barred.

Both sides agree that there is no case directly on point to determine whether the claim against the ambulance company sounds in simple negligence or professional malpractice. Plaintiff asserts that it is not alleging a medical malpractice claim against Twin City, rather that Twin City negligently delivered or transmitted an incorrect medication list and/or failed to deliver or transmit a medication list that was provided to Twin City to Millard Fillmore Hospital resulting in rhabdomyolysis and the death of Rose M. Kij. Plaintiff claims that he is not asserting a medical malpractice claim against Twin City because Twin City is not licensed to practice medicine; and that, therefore, his claim is not time barred, nor is there a need for a Certificate of Merit. On the other hand, Twin City claims that identifying the decedent's medications is part of obtaining a medical history and part of providing medical services, and therefore constitutes medical malpractice.

Twin City relies principally on the Court of Appeals decision in *Bleiler v. Bodnar*, 65 N.Y.2d 65 (1985) where the court considered whether allegations that a triage nurse and emergency room physician failed to take a proper medical history constituted negligence or malpractice. The *Bleiler* Court discussed the standard by which to determine whether a claim sounds in simple negligence or medical malpractice and noted that the central inquiry is whether the negligent act or omission constituted medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. See also, *Smee v. Sisters of Charity Hosp.*, 245 A.D.2d 1103 (4th Dept. 1997); *Edbauer v. Harris Hill Nursing Facility*, 245 A.D.2d 1103 (4th Dept. 1997). In *Bleiler*, the Court of Appeals determined that plaintiff's claim sounded in medical malpractice because the taking of a proper medical history is a crucial element of diagnosis and treatment. The defendant also relies on several cases which hold persons other

than physicians liable for medical malpractice.

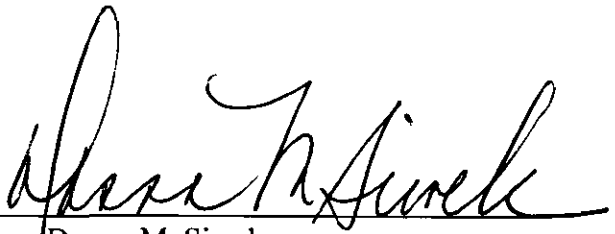
We note at the outset that “medical malpractice is a form of negligence, and, therefore, no rigid analytical line separates the two”. *Scott v Uljanov*, 74 N.Y.2d 673 (1989). We are not presented with the question of whether under certain circumstances, an ambulance company may be held liable for medical malpractice. Rather, the inquiry turns on the facts of the claim and whether the negligent act alleged in the complaint constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. See, *Karasek v. LaJoie*, 92 N.Y.2d 171 (1998). In *Karasek*, the Court of Appeals noted that its prior holding in *Bleiler* settled the question of who may be covered by the provisions of CPLR § 214-a, it did not address the separate question of what categories of health-related activity constitute “medical treatment or bear a substantial relationship to the rendition of such treatment.” *Id.* at 175 (services provided by psychologists are not medical services within the meaning of CPLR § 214-a). A claim sounds in negligence “when the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the [defendant’s] failure in fulfilling a different duty.” *Bleiler, supra; Edbauer, supra, Pacio v. Franklin Hospital*, 63 A.D.3d 1130 (2d Dept. 2009). Where “neither special medical knowledge nor professional expert testimony is necessary to determine the nature of the duty to the plaintiff which has allegedly been breached, and whether or not due care was exercised, an action sounds in simple negligence.” *DeLeon v. Hospital of Albert Einstein College of Medicine*, 164 A.D.2d 743 (1st Dept. 1991); *Coursen v. New York Hospital-Medical Center*, 114 A.D.2d 254 (1st Dept. 1986).

While Twin City relies upon *Bleiler* to argue by extension that the provision of the medication list to the ambulance personnel is analogous to an emergency room nurse’s failure to take a proper history, we agree with the plaintiff that a fair reading of the complaint and

allegations as against Twin City, namely the failure to deliver the medication list to the hospital, sound in negligence. They do not constitute medical treatment nor do they bear a substantial relationship to the rendition of medical treatment by a licensed physician. Furthermore, a jury could consider the claim against Twin City without the aid of an expert opinion.

In reaching our decision, we rely on the Fourth Department's decision in *Fields v. Sisters of Charity Hospital*, 275 A.D.2d 1004 (4th Dept. 2000). In *Fields*, plaintiff's decedent was admitted to the hospital with a history of a seizure. The attending physician ordered medications and directed that the decedent be placed on seizure precautions. During a CT scan of his head, he suffered a grand mal seizure, fell from the table and sustained injuries, including a fractured nose. The Fourth Department determined that the defendant "failed to establish as a matter of law that the alleged failure to follow the doctor's order that seizure precautions be implemented constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician and amounts to malpractice." We find the same is true of the defendant's motion in this case.

We conclude that the complaint sets forth a claim for simple negligence and is not barred by the statute of limitations nor does it require a Certificate of Merit. Therefore, the defendant Twin City's motion for summary judgment and to dismiss is denied. This is the Decision of the Court. Submit Order on notice.


Hon. Donna M. Siwek
Justice of the Supreme Court

Dated: June 24, 2011