

**Burns v Rockville Skilled Nursing & Rehabilitation
Ctr., LLC**

2012 NY Slip Op 31176(U)

April 17, 2012

Supreme Court, Nassau County

Docket Number: 601828/09

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 17

KATHRYN BURNS, as Executrix of the Estate
of WILLIAM BURNS, Deceased,
Plaintiff,

- against -

Index No. 601828/09
Mot. Seq. #3
Mot. Date 12.8.12
Submit Date 2.27.12

ROCKVILLE SKILLED NURSING & REHABILITATION
CENTER, LLC and SOUTH NASSAU COMMUNITIES
HOSPITAL,
Defendants.

-----X
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The following papers were read on this motion:	Papers Numbered
Amended Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit	3

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This motion by the plaintiff Kathryn Burns as Executrix of the Estate of William Burns (Burns) for an order pursuant to CPLR 3212(e) granting her partial summary judgment: (1) holding defendant Rockville Skilled Nursing & Rehabilitation Center (Rockville) liable on its third cause of action pursuant to Public Health Law § 2801-d; dismissing Rockville’s 16th affirmative defense in response to said cause of action; and holding Rockville liable for punitive damages based upon a finding of “reckless disregard” with respect to that cause of action is determined as provided herein.

This is an action to recover damages for medical malpractice, violations of the Public Health Law and wrongful death. The plaintiff seeks summary judgment against Rockville predicated upon its claim pursuant to the Public Health Law § 2801-d as well as its claim for punitive damages.

The facts pertinent to the determination of this motion are as follows:

Burns was a patient at Rockville from August 7, 2007 through February 4, 2008. From February 4, 2008 through February 8, 2008, Burns was treated at defendant South Nassau Communities Hospital for a broken hip. He was readmitted to Rockville on February 8, 2008, during which time ulcers on his buttocks and heel deteriorated until February 27, 2008, on which date he was readmitted to South Nassau Communities Hospital where he remained until March 6, 2008. From March 6, 2008 until his demise on March 14, 2008, Burns was cared for at Beach Terrace Care Center. At her examination before trial, Charmaine Lewis, R.N., Rockville's Director of Nursing, admitted that there were numerous entries on Burns' chart purporting to reflect observations of and care rendered to him at times when he was in fact absent from the facility, as well as times where no chart entries were made, despite the fact he was present at Rockville.

In support of her motion, the plaintiff has submitted the affidavit of Jeanette Sodor, R.N. Having reviewed Burns' records kept by Rockville (August 7, 2007 - February 17, 2008) as well as North Shore University Hospital (August 3, 2007 - August 7, 2007), South Nassau Community Hospital (February 4, 2008 - February 8, 2008) and Beach Terrace Care Center

(March 6, 2008 - March 14, 2008), as well as the deposition testimony of Charmaine Lewis, R.N., Director of Nursing, she opines that “numerous entries made purporting to record care rendered to and observations of [Burns] by CNA’S at times when [he] was physically absent from the facility, and additional areas where no charting at all occurred despite the fact that [he] was in the facility constitutes a clinical Record Violation and is a departure from accepted standards for medical and nursing records.” She opines that:

[t]he right to a complete and accurate set of clinical records is . . . a ‘right or benefit’ that was guaranteed to Mr. Burns under PHL § 2801-d”; that “[w]ithout an accurate and complete clinical record, defendant Rockville cannot demonstrate that it undertook ‘every reasonable effort’ to prevent injury to Mr. Burns”; and, that [a]bsent a clinical record that is complete and accurate, in [her] experience a facility cannot demonstrate that it undertook ‘every reasonable effort’ to prevent pressure sores.

She further opines that:

[t]he inclusion of inaccurate and, indeed, false information in Mr. Burns’ medical record, of procedures that did not and could not have occurred, is in and of itself an ‘injury’ to Mr. Burns, for it could be detrimental to his health when such records are relied upon by other health care professionals involved in his treatment.

Indeed, Ms. Sodor opines that the errors in Burns’ medical records justify rejection of his record in its entirety as “unworthy of belief.” Furthermore, she characterizes Rockville’s record keeping errors as “reckless conduct.”

In support of her motion, the plaintiff maintains that based upon the uncontroverted fact that chart entries were made for Burns following his discharge from Rockville at a time when he was not even a patient there, Rockville failed to maintain “complete, accurately documented, readily accessible and systematically organized” records as required by 10 NYCRR 415.22 and

concomitantly failed to provide him with “adequate and appropriate medical care” as required by Public Health Law § 2803-c(1)(e). The plaintiff additionally maintains that in view of the state of its records, it will not be possible for Rockville to demonstrate that “it used every reasonable effort to prevent injury” to Burns. Plaintiff seeks summary judgment declaring as such, thereby granting her summary judgment with respect to liability on her Public Health Law claim.

The plaintiff also seeks summary judgment holding Rockville liable for punitive damages pursuant to Public Health Law § 2803-d(2) based upon Burns’ uncontroverted, blatantly erroneous medical records.

“On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Sheppard-Mobley v King*, 10 AD3d 70, 74 [2nd Dept 2004], *affd as mod.*, 4 NY3d 627 [2005], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez v Prospect Hosp.*, *supra*, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (See, *Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 [2nd Dept 2006], citing *Secof v Greens Condominium*, 158 AD2d 591 [2nd Dept 1990]).

Public Health Law § 2801-d imposes statutory liability on “any residential health care facility that deprives any patient of said facility of any right or benefit . . . created or established for the well being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation.” (See, *Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178 [1st Dept 2002]). Liability, however, is limited to “injuries suffered as a result of said deprivation.” (Public Health Law § 2801-d[1]). Similarly, Public Health Law § 2801-d(2) provides that “[u]pon a finding that a patient has been deprived of a right or benefit and that said patient has been injured **as a result of** said deprivation, compensatory damages shall be assessed . . . **unless** there is a finding that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient (emphasis added).” Therefore, to recover for the deprivation of a right, there must be “injuries suffered” by the patient “as a result of said deprivation.” (*Sullivan v Our Lady of Consolation Geriatric Care Center*, 60 AD3d 663, 665 [2nd Dept 2009]; see also, *Shapiro v Gurwin Joseph Geriatric Nursing & Rehabilitation Center*, 84 AD3d 1348 [2nd Dept 2011]; *Zeides v Hebrew Home for the Aged at Riverdale*, supra, at p. 179; *Maltese-Kojallo v Fairview Nursing Center, Inc.*, 2010 WL 337306 [Supreme Court Queens County 2010]).

A nursing home patient has “the right to receive adequate and appropriate medical care.” (Public Health Law § 2803-c (3)(e); *Zeides v Hebrew Home for the Aged at Riverdale*, supra, at p. 179). 10 NYCRR 415.12(d) requires a facility to ensure that a resident who enters the facility without pressure sores does not develop pressure sores unless the individual’s clinical condition

demonstrates that they were unavoidable despite every reasonable effort to prevent them and that a resident who has pressure sores receives “necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.” Finally, 10 NYCRR 415.22 requires facilities like Rockville to maintain clinical records for each resident which are “complete, accurately documented, readily accessible and systematically organized.”

The Public Health Law provides, however, that it shall be an affirmative defense “that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted.” (See, *Zeides v Hebrew Home for Aged at Riverdale*, supra, at p. 179). Injury is defined as including **but not limited to** physical harm and/or emotional harm to a patient, death of a patient and financial loss to a patient.

Pursuant to Public Health Law § 2801-d(6), the court has discretion to award a prevailing party attorney fees. And, pursuant to Public Health Law § 2801-d(2), punitive damages lie when “the deprivation of a right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient.”

The plaintiff has failed to establish her entitlement to summary judgment, and so the burden does not shift to the defendant to establish the existence of a material issue of fact. Contrary to the plaintiff’s characterization of Public Health Law § 2801-d, the burden does not shift to Rockville once she has made a *prima facie* showing of a deprivation of an enumerated right or benefit: Evidence that the plaintiff suffered an injury as a result thereof is also required.

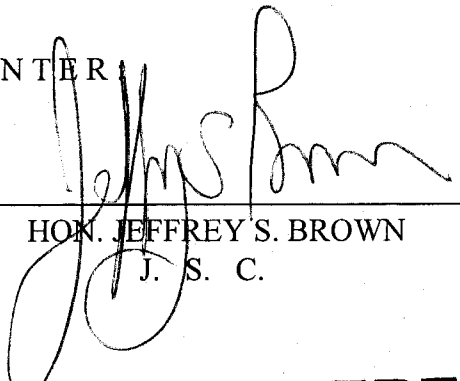
(Public Health § 2801-d[1], [2]; *Gold v Park Ave. Extended Care Center Corp*, 90 AD3d 833 [2nd Dept 2011]; *Shapiro v Gurwin Joseph Geriatric Nursing & Rehabilitation Center*, supra; *Sullivan v Our Lady of Consolation Geriatric Care Center*, supra). Therefore, the plaintiff's demonstration that Rockville violated 10 NYCRR 415.22 by "failing to maintain complete accurately documented" medical records for Burns, standing alone, does not entitle her to summary judgment. (See, *Shapiro v Gurwin Joseph Geriatric Nursing & Rehabilitation Center*, supra; *Butler v Shorefront Jewish Geriatric Center, Inc.*, 33 Misc 3d 686 [Supreme Court Kings County 2011]).

As for Rockville's alleged violation of 10 NYCRR 415.12(c) which requires a facility to undertake efforts to avoid bed sores, the plaintiff relies solely on Burns' faulty medical records to establish Rockville's violation of 10 NYCRR 415.22. The plaintiff has made no attempt to establish that Rockville actually violated that regulation. Again, standing alone, the errors in Burns' medical records do not establish a violation of 10 NYCRR 415.22. While records reflecting that a patient was repositioned when he was not at the facility are troubling, that does not establish as a matter of law that Rockville violated 10 NYCRR 415.22. That is particularly so since the chart errors occurred after Burns' discharge and, accordingly, did not affect his subsequent care. (Compare, *In re Rice*, 289 AD2d 898, 899 [3rd Dept. 2001]). Furthermore, it cannot be determined at this juncture as a matter of law that the cited errors render Rockville's medical records of Burns' care entirely "unworthy of belief."

The plaintiff's motion for summary judgment declaring Rockville liable for having violated the Public Health Law and dismissing its 16th affirmative defense is **DENIED**.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
April 17, 2012

ENTER


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ENTERED
APR 23 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE