

Bowman v St. Luke's-Roosevelt Hosp. Ctr.
2013 NY Slip Op 31135(U)
May 21, 2013
Sup Ct, New York County
Docket Number: 150213/09
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

~~PART~~ PART 16

Index Number : 150213/2009
BOWMAN, JOAN
VS.
SAINT LUKE'S-ROOSEVELT
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ and cross-motion are decided in accordance with the accompanying memorandum decision.

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

FILED

MAY 23 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: MAY 21 2013

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
JOAN BOWMAN, AS THE ADMINISTRATOR DE
BONIS NON OF THE ESTATE OF MICHAEL E.
BOWMAN,

Plaintiff,

Index No. 150213/09
Mot. Seq. Nos. 003 & 004

-against-

ST. LUKE'S-ROOSEVELT HOSPITAL CENTER,
et al.,

Defendants.

FILED

JUL 23 2013

-----X
SCHLESINGER, J.:

COUNTY CLERK'S OFFICE
NEW YORK

There are clear differences of opinion among the various parties to this wrongful death action. However, all must agree that what occurred on July 9, 2008, when Michael Bowman died at age 39, was a tragedy. Mr. Bowman died of a somewhat unusual condition known as Necrotizing Fasciitis. Several days before his death, Mr. Bowman began having severe pains in his legs. This pain was so severe that he went by ambulance to St. Luke's-Roosevelt Hospital Center on July 7, 2008. What occurred at St. Luke's is not truly relevant, for our purposes here, to what occurred on the next day, July 8, when Mr. Bowman went by a second ambulance to St. Vincent's Hospital. There he was primarily treated by an emergency medical doctor Tara Director. Regarding St. Luke's, the first named defendant in this action, it is sufficient to say that the plaintiff was treated there and released. In other words, he was not admitted as a patient.

Before this Court now are dispositive motions by Dr. Director and St. Vincent's Hospital. There is also a motion by defendants St. Luke's and its doctors Dr. Kwon and Dr. Wiener for partial summary judgment seeking the dismissal of certain elements of

damages. As to the latter motion, plaintiff's counsel has withdrawn all wrongful death claims with the exception of what she considers to be funeral expenses. Since the moving defendants disagree with the claim in the amount of \$52,000.00, that issue remains extant.

But as stated above, the main motions are by Dr. Director and the hospital where she worked, St. Vincent's. No one disputes what actions of relevance occurred before Mr. Bowman arrived at St. Vincent's at approximately 11:26 a.m. on July 8. In fact, no one really disputes what happened during the next 12 or so hours before he was pronounced dead at St. Vincent's at approximately 1:05 a.m. on July 9. What is disputed is whether or not there are any viable theories of liability as to the actions or inactions of the moving defendants.

When Mr. Bowman arrived at the hospital on Tuesday, July 8, he was complaining of shortness of breath and extreme pain and swelling to his left lower leg. The complaints regarding his leg had existed since the preceding Saturday. Dr. Director first saw Mr. Bowman at approximately 11:53 a.m. Beside the swelling to his leg, a small open area on Mr. Bowman's left heel was also noted. It seems clear that Dr. Director's working diagnosis was a blood clot or deep vein thrombosis (DVT) in the leg, which she theorized had broken off and traveled to plaintiff's lungs, causing a pulmonary embolism. Mr. Bowman was given heavy pain medication soon after he arrived at the hospital, and it does appear that since the pain in his leg was under control, all concentration turned to this suspected embolism.

Dr. Director ordered a CT scan of Mr. Bowman's chest with contrast. However, since the time sheet indicating the time the order was placed was lost, we only know that the CT scan was performed at 3:14 p.m. and read at 4:00 p.m. It appears that because of the time lapse between when the contrast was given and when the study was made that

the scan became somewhat non-diagnostic. But in any event, no gross pulmonary embolism was seen. Additionally chest x-rays were taken at 5:53 p.m. and 6:44 p.m. It was clear that up until this time (and continuing), Dr. Director was still considering DVT as her primary diagnosis.

Meanwhile, Mr. Bowman's blood pressure was falling and his heart rate was escalating. More tests were ordered, including an ultrasound of his leg, which was negative. At approximately 4:30 p.m. Dr. Director went to the patient and noted that he had clearly deteriorated. He was pale and confused, and his oxygen saturation was worsening. She believed that his condition was critical and had him admitted to the hospital's MICU Unit (Medical Intensive Care Unit) at 4:33 p.m. Dr. Director also called in consultants, which included cardiology, thoracic and vascular surgery. It was decided to take Mr. Bowman to the operating room at 6:45 p.m. Earlier, at approximately 5:00 pm., a nurse had noted that Mr. Bowman's left leg was extremely swollen and that there was a blood-filled blister in his left groin. Three lines giving him fluids and medication were set up. Also, at 6:15 p.m. a central line was placed so that medicine could be put in that line to raise Mr. Bowman's blood pressure, which had dropped precipitously.

During the surgery, an emergency TEE (Trans-Esophageal Echocardiogram) was performed, but this test continued to show nothing abnormal in Mr. Bowman's chest. Meanwhile, it was noted that his left leg was now massively swollen with a large hematoma and blistering in its entire length. Surgical exploration of the leg was then done and revealed a large quantity of dead muscle. Fasciotomies were done of the calf and thigh. From this procedure there appeared to be necrotic tissue. Cultures were taken. After the operation, Mr. Bowman was taken to the recovery room at approximately 10:35 p.m.

During the surgery and after, various antibiotics were given as well as units of blood and platelets. After surgery, his condition continued to deteriorate. A Code was called at 12:42 a.m. and, despite efforts to revive him, he died, at 1:05 a.m on July 9. An autopsy was performed and the cause of death was a Beta-Hemolytic Group A Streptococcal infection of the left lower extremity. There was extensive necrosis of the skin and soft tissues with resulting sepsis and pulmonary edema.

It is on these essentially undisputed facts that Dr. Director produces an expert to opine on her responsibility, if any, for Mr. Bowman's death. That expert is Dr. Gregory Mazarin, a board certified physician in Emergency Medicine since 2001. He is now an Attending in the Emergency Department of Montefiore Medical Center and an Assistant Professor of Emergency Medicine. He also had other titles. But there is no question that he has credentials to opine on this case. Finally, with regard to his capability here, he states that he has diagnosed and treated patients with Group A strep infections, as well as necrotizing fasciitis.

In Dr. Mazarin's affirmation he uses the first 25 paragraphs to give a detailed history of Mr. Bowman's hours at St. Vincent's. He then recites what he perceives to be plaintiff's claim as against Dr. Director. In ¶27 he says that he sees no merit to any of the plaintiff's allegations of negligence as to Dr. Director. Rather, it is his opinion to a reasonable degree of medical certainty, that the care and treatment rendered by Dr. Director was entirely in accord with accepted standards of medical and emergency practice.

He then discusses Mr. Bowman's presentation at the hospital, with a clear emphasis on his complaint of shortness of breath. The leg pain is almost incidental to Dr. Mazarin's analysis. Instead, he says that a DVT was an appropriate consideration that had to be

ruled out. He points out that Mr. Bowman had no fever or elevated white blood count, nor signs or symptoms of infection. He says that Heparin was appropriately started because of the concern about a clot and that supportive care was provided.

Dr. Mazarin also says that the labs did not indicate infection but were consistent with a pulmonary embolism. He goes on to opine that Dr. Director continued to be legitimately concerned about a clot. He recites that she followed up the scan with a Doppler of Mr. Bowman's leg, which was negative. However, neither the Doppler nor the scan failed to exclude the possibility of a clot in the lungs. Later on, after Mr. Bowman had been placed in the MICU, cardiology did an Echocardiogram that showed evidence of right-sided heart failure, which would have been expected with a large pulmonary embolus.

Dr. Mazarin then says that after Mr. Bowman was taken to the operating room, Dr. Director had no further involvement in his case. However, he asserts that while the patient was under her care, an extensive investigation was performed in a short period of time. He adds that the patient was managed in a reasonable, appropriate and sequential manner and in coordination with the appropriate consultants that she called. He tells us that Dr. Director signed off at 8:38 p.m.

After sharing these opinions with the Court, Dr. Mazarin then tackles the issue of proximate cause in the concluding paragraphs 30-35 of his affirmation. He tells us that by the time Mr. Bowman arrived at St. Vincent's, he was already in critical condition. With renal, pulmonary and cardiological impairment, he goes on to say, it was appropriate for Dr. Director to focus in on a pulmonary embolism. He continues that it was not until Mr. Bowman was in the operating room that it was finally established that he did not have a pulmonary embolism. Further, in the operating room his leg was cut into in several places

and he was given broad spectrum antibiotics because of the possibility (the doctor's word), though not yet a clearly established diagnosis, of necrotizing fasciitis. Dr. Mazarin says that in hindsight and in looking at the cultures, necrotizing fasciitis as a diagnosis would account for Mr. Bowman's left leg problems and other associated symptoms, including systemic multi-organ involvement, when he arrived at St. Vincent's.

However, Dr. Mazarin tells us that necrotizing fasciitis is a "rare and aggressive form of the disease which involves subcutaneous and deep tissue infection." It often does not manifest itself as a skin condition until late in the disease process. He says that it can be extremely difficult to diagnose. Therefore, it was not unreasonable or outside the standard of care for Dr. Director not to have suspected its existence. However, this doctor says (at ¶ 33) that even if this diagnosis had been made and antibiotics administered early on in the emergency room, "in my opinion that would not have halted progression of this virulent organism to affect the outcome for the patient." He adds that definitive treatment requires surgical debridement, and even then there is no certainty of saving the patient. He adds that the rate of mortality is even higher the longer the patient has the condition.

In this regard, Dr. Mazarin elaborates further and says that even if the correct diagnosis had been made right away, it still would have taken several hours to obtain appropriate lab tests, x-rays and consultations. This all had to be done before the patient was ready for surgery, and the patient still would have needed a work-up for a pulmonary embolism before the surgery; this possibility still had to be investigated because Mr. Bowman's primary complaint and symptoms were respiratory in nature.

Finally, Dr. Mazarin states (at ¶ 35) that by the time Mr. Bowman arrived at St. Vincent's "his condition was sufficiently advanced such that, in my opinion, he had little

chance of survival and probably would have died even if the diagnosis of necrotizing fasciitis had been established immediately...”

I find that with the submission of this affirmation from a well-credentialed and qualified Emergency Medicine physician, the moving defendant has made out a prima facie case.

There is also a cross-motion for summary judgment by St. Vincent's, Dr. Kwon and Dr. Wiener. Counsel essentially makes two arguments. First, he says that the employees of the hospital did nothing wrong. Second, it is urged that the hospital is not vicariously liable for the care and treatment provided by Dr. Director. What is the basis for this claim? They argue that Dr. Director was acting here as an agent of Mr. Bowman's private primary care physician, Dr. Krisczar Bungay who essentially controlled the treatment she provided. Counsel cites *Suits v. Wyckoff Heights Medical Center*, 84 AD3d 487 (1st Dep't 2011), which holds that a hospital cannot be held liable when a patient is under the care of a private attending physician chosen by the patient where the hospital employees merely are carrying out the orders of the private doctor.

But that is certainly not the case here. In this regard, counsel also (finally) recognizes the leading case of *Mduba v. Benedictine Hospital*, 52 AD2d 450 (3rd Dep't 1976) but attempts to distinguish it because Mr. Bowman was referred to the hospital by his private doctor, Dr. Bungay, who was even listed as his admitting doctor. Counsel argues that Dr. Bunday sent Mr. Bowman to the hospital to rule out a DVT and pulmonary embolism. Also, he directed on a prescription note that the emergency department perform a CT scan and give Mr. Bowman Lovenox. Finally on this point, counsel points out that Dr. Director, pursuant to the patients chart which substitutes for her memory, says

that she spoke to Dr. Bungay multiple times. She had worked with him before and therefore there was a professional relationship between the two.

The hospital does not submit any expert affirmation. Instead, counsel relies on Dr. Mazarin's affirmation, particularly on the issue of proximate cause. The cross-motion ends by arguing that there was a complete lack of evidence that any employee of the hospital committed any negligent act or was responsible in any way for Mr. Bowman's death.

There is vigorous opposition by the plaintiff to both motions. First of all, counsel for the plaintiff points out that the decedent saw his private doctor, Dr. Bungay, for only a short period of time before the doctor sent him by ambulance to the emergency room and that Dr. Bungay did not specify any particular doctor who should treat Mr. Bowman once he reached the emergency room. More significant to the opposition is the sworn affidavit submitted by Dr. Sigal Yawetz, who is board certified in infectious disease since 1997 and licensed to practice medicine in Massachusetts. She graduated from the Sackler School of Medicine of Tel Aviv University in 1993. She then did a post-doc research fellowship in Microbiology, Immunology and OB/GYN at UCLA School of Medicine. She then continued her studies at Mass General, Brigham and Women's Hospital and Harvard Medical Center from 1997-1999. She is now an Assistant Professor of Medicine at Harvard Medical School and an Associate Physician at Brigham and Women's Hospital. She indicates that she is frequently asked to consult on cases by the emergency department at the hospitals where she works in the field of infectious diseases. She has also practiced as a consultant in infectious disease at Harvard Vanguard Medical Associates and at the Dana Farber Cancer Institute.

Dr. Yawetz says that in her many years of training, she has diagnosed and treated many patients with Group A streptococcal infections and necrotizing fasciitis. Finally, Dr. Yawetz says that she has participated in many clinical conferences where cases of necrotizing fasciitis and Group A streptococcal cases were presented and discussed. Before giving her opinion, she states that she has reviewed all relevant legal and medical records including the examinations before trial of the various parties. Finally, she has read the expert affirmation of Dr. Gregory Mazarin.

She begins with a general opinion, stating with a reasonable degree of medical certainty that both moving defendants Dr. Director and St. Vincent's Hospital were negligent and departed from accepted standards of care in the treatment of Michael Bowman and that this negligence was a cause of Mr. Bowman's death. In the substantive part of her affidavit she reviews the relevant hospital records. She immediately finds fault with Dr. Director's record keeping. For example, she points out that Dr. Director notes that at 20:38 (8:38 p.m.) the patient was reevaluated and observed at bedside for his response to treatment on multiple occasions and that lab tests and x-rays were reviewed, but she does not describe when these actions were taken or the specific findings of these evaluations or the specific treatments that were provided.

Dr. Yawetz also points out with disapproval that Dr. Director's impression of what was making Mr. Bowman so ill never changed. Nor is there any evidence that Dr. Director ever reconsidered her diagnosis or ever included infection to the leg or a systemic infection in her differential diagnosis. Also, there is no record of any antibiotics given to Mr. Bowman while he was in the emergency department. Antibiotics were first given in the operating room. The operative record indicates that anesthesia was first begun at 19:01 p.m or 7:01

p.m. and concluded at 22:59 or 9:59 p.m. Antibiotics were first given with the administration of Vancomycin at approximately 20:55 p.m. or 8:55 p.m. Two other antibiotics were also administered. Finally, the attending surgeon wrote after his review that a massive pulmonary embolus was highly unlikely.

Dr. Yawetz then proceeds to give six reasons for her opinion that both moving defendants were negligent. These are the following: First, that nobody at the hospital, including Dr. Director, paid enough attention to the condition of Mr. Bowman's left leg and its deteriorating condition. Second, that the defendants failed to generate a differential diagnosis following their initial examination of Mr. Bowman; in other words, they were fixated on a single diagnosis which was not supported by later findings. Third, the defendants failed to address critical clinical findings which were documented in the chart by the nursing staff. Fourth, the defendants failed to obtain any information from St. Luke's Hospital with regard to the patient's presentation only the day before. Fifth, the defendants failed to consider timely empiric antibiotic therapy for Mr. Bowman, who was a patient suffering from shock. Finally, by focusing and fixating on a single diagnosis, the defendants delayed a life-saving surgical procedure to deal with Mr. Bowman's actual diagnosis of fasciitis.

In the paragraph after these six departures are listed, Dr. Yawetz elaborates on her opinion. With regard to the failure to pay attention to Mr. Bowman's left leg, the expert points out that at the moment the patient presented to St. Vincent's his complaints of pain were out of proportion to any of the findings. Also, it was noted that his leg was red and swollen, and he had a history of fever. At the initial 12:00 examination by the nurse, pain in the areas of the left knee and pre-tibia was located. Further, there was a small open

area on his left heel. He was immediately given painkillers limited to his leg. There was no indication that Mr. Bowman had any chest pain.

Dr. Yawetz then points out that the hallmark sign of necrotizing fasciitis is severe and profound pain, particularly here where there was no history of trauma. She also reports that necrotizing fasciitis is often accompanied by fever, redness and swelling, all signs and symptoms that Mr. Bowman displayed. Dr. Yawetz says that while any of these findings by themselves may not prove a diagnosis, when they are accompanied with profound pain, they do become specific for necrotizing fasciitis.

With regard to care by the hospital, it was reported that when Mr. Bowman arrived in the emergency department his temperature was 95.4 F, but his temperature was never taken again. This was particularly significant in light of his complaints of fever and chills and the fact that the day before when he was at St. Luke's his temperature was above 100 (though this was never checked) and it appears that Mr. Bowman also had a temperature of 102 F on Sunday, July 6. The failure to contact St. Luke's Hospital, where he had presented the day before, and the failure to take his temperature after the initial reading was, according to Dr. Yawetz, substandard care.

As stated above, Dr. Yawetz opines that the defendants were negligent by not dealing with the obvious problem in Mr. Bowman's left leg. They failed to deal with it by considering that there may be an infection, in failing to give antibiotics before he got to surgery, and in failing to consider surgical management specifically for the leg. But the doctor explains because the defendants only considered a clot in their diagnosis, they ignored the patient's left leg and the progression of the disease there. This expert further opines that it was critical to include a differential diagnosis that involved Mr. Bowman's leg.

Because of this failure, they never evaluated the leg properly or provided therapeutic consideration for the infection.

Mr. Bowman, before the onset of this deadly disease, was a healthy, non-diabetic man. He should have been given antibiotics in the emergency department because those would have begun to treat the systemic infection that was causing him to deteriorate. In the emergency department he was showing signs of shock, which went undiagnosed. No proper treatment was provided, according to Dr. Yawetz.

With regard to the single differential diagnosis here of a DVT or pulmonary embolism, this doctor points out that many of the tests done in the emergency department indicated that Mr. Bowman was not in fact suffering from either of these conditions. This included negative ultrasounds done at St. Luke's (if that hospital had been contacted) as well as the negative Doppler at St. Vincent's. Further, the CT scan did not show an embolism large enough to be causing these terrible signs and symptoms. This doctor also documents other clinical signs pointing to the fact that a massive embolism was unlikely.

However on the other hand, there were many test and findings that indicated that Mr. Bowman was developing shock and that he had an infection, a deadly serious one, necrotizing fasciitis. Those findings included fever, followed by hypothermia, an elevated WBC, leukopenia, pain in the left leg out of proportion to the findings, redness of that leg and mottled leg skin. Later on, there was ascending bullae and oozing blisters on the leg. A diagnosis of a leg DVT and/or a pulmonary embolism simply did not account for these findings.

Dr. Yawetz then deals with the issue of proximate cause. She points out that when Mr. Bowman presented to St. Vincent's he was triaged as ESI 3, which is not considered

critical and life threatening. Nor was he in shock when he first presented. This doctor opines that if antibiotics had been given early on, they would have controlled his sepsis and provided additional time to diagnosis and treat the underlying necrotizing fasciitis which required surgical debridement. Surgical debridement was critical to saving Mr. Bowman's life, and he was effectively denied this in the many hours he spent at St. Vincent's before succumbing to the disease.

Mr. Bowman in fact survived the surgery he had. Therefore, it is likely, according to this expert, that he would have been a viable candidate for the necessary surgical debridement. Dr. Yawetz ends her affidavit by acknowledging that mortality with necrotizing fasciitis is high but survival can be achieved if it is timely diagnosed and treated. Mr. Bowman here had no other underlying co-morbid conditions. He had no underlying conditions that increased his risk. It was standard of care to provide him with immediate antibiotic therapy and surgical debridement. Dr. Yawetz believes that if this course had been taken, the likelihood is that Mr. Bowman would have survived.

It is clear to this Court that the affidavit of Dr. Yawetz creates clear issues of fact with regard to both issues here extant, the negligence of Dr. Director and the hospital and whether that negligence was a substantial factor in causing the death of the decedent. As for the hospital's vicarious liability for the actions of Dr. Director, it is clear that she was acting as an agent for no one other than the hospital, at least that was the impression given to Mr. Bowman. While she may have had some communication with Dr. Bungay, it is evident that once Mr. Bowman presented to her emergency department, Dr. Director was the doctor in charge of his care, and she was the doctor to decide what tests to be administered. She was also the doctor who decided on one exclusive differential diagnosis, a diagnosis that proved to be wrong.

I believe that pursuant to the reasoning of *Mduba, supra*, the hospital here is vicariously liable for Dr. Director's actions. Finally, with regard to independent acts of negligence by the hospital, one could point to the failure to make complaint notations, the failure to take and record Mr. Bowman's temperature as the hours progressed, the failure to contact St. Luke's Hospital to obtain relevant information, along with other failures discussed in the opposition papers. Therefore, St. Vincent's Hospital will remain as a defendant under principles of vicarious liability for Dr. Director as well as negligent acts via its employees other than this defendant.

Finally, as stated in the beginning of this decision, the St. Luke's defendants are asking the Court to dismiss the claims made with regard to a party or celebration of Mr. Bowman's life that took place on August 23, 2008, at Tavern on the Green with costs of approximately \$52,000.00. According to plaintiff's counsel, approximately 350 friends and family members attended this celebration.

The bill from the funeral parlor was for \$9,845.00, which covered cremation and a casket. The defendants do not object to their responsibility for this amount if liability against them is found. But they do say that pursuant to EPTL §§ 5-4.3(a) and 11-3.3(a), there is no basis for including this expensive party in the definition of funeral expenses for which a responsible party would be liable.

This Court reserves decision on this controversy. I believe that before a decision is made as to whether to give this aspect of the plaintiff's claim to the jury as a reasonable funeral expense or to decide the issue as a matter of law, which moving defendants want, I must hear the full facts and circumstances surrounding this event. Therefore, I will reserve judgment on this claim.

Accordingly, it is hereby

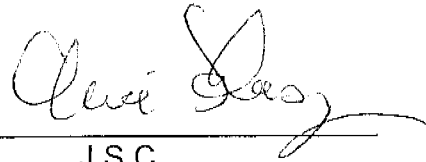
ORDERED that the motion for summary judgment by Dr. Tara Director and the cross-motion by St. Vincent's Hospital are both denied; and it is further

ORDERED that the motion for partial summary judgment by defendants St. Luke'-Roosevelt Hospital Center and Dr. Andreana Kwon and Dr. Dan Wiener is granted to the extent of severing and dismissing on consent all pecuniary aspects of the wrongful death claim except for the claim for funeral expenses; and it is further

ORDERED that counsel shall appear for a pre-trial conference in Room 222 at 60 Centre Street on Wednesday, June 26, 2013 at 11:00, prepared to discuss settlement and select a trial date.

Dated: May 21, 2013

MAY 21 2013



J.S.C.

ALICE SCHLESINGER

FILED

MAY 23 2013

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