

**Jones v Schnurmacher Ctr. for Rehabilitation & Nursing**

2014 NY Slip Op 32814(U)

August 13, 2014

Supreme Court, Westchester County

Docket Number: 58283/2011

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

# DECISION AND ORDER

**FILED & ENTERED**

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To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART, WESTCHESTER COUNTY**

**Present: HON. MARY H. SMITH  
Supreme Court Justice**

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**WILLIE STEVEN JONES, Executor of the Estate of  
PAULINE JONES,**

Plaintiff,

**MOTION DATE: 8/1/14  
INDEX NO.: 58283/11**

-against-

**SCHNURMACHER CENTER FOR REHABILITATION  
AND NURSING; ANURAG ANAND, M.D.; LAWRENCE  
HOSPITAL CENTER, THOMAS CAMISA, M.D. and  
ERIC GORDON, M.D.,**

Defendants.

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The following papers numbered 1 to 9 were read on this motion by defendant Schnurmacher Center for Rehabilitation and Nursing for summary judgment dismissing the complaint, etc.

**Papers Numbered**

Notice of Motion - Affirmation (Bienstock) - Exhs. (A-S) - Memorandum Of Law.....	1-4
Answering Affirmation (Scanlan) - Affirmation (Capobianco) - Exhs. (1-9) - Memorandum of Law .....	5-8
Replying Affirmation (Bienstock) .....	9

Upon the foregoing papers, it is Ordered and adjudged that this motion by defendant Schnurmacher Center for Rehabilitation and Nursing for summary judgment dismissing the complaint and amending the caption to delete its name from the caption is disposed of as follows:

This is an action for negligence and wrongful death. On September, 13, 2009, Pauline Jones, then 88 years of age, had fallen as a result of her knee having buckled, resulting in a hairline fracture of her femur. Although Ms. Jones had suffered from a long-term seizure disorder, it is not disputed that her fall had been unrelated to any seizure. Non-party Dr. Anthony Salvate, Ms. Jones' long term private primary care physician, had testified that Ms. Jones had been treated for her seizure disorder with both Dilantin and Phenobarbital.<sup>1</sup> Dr. Salvate further had testified that, during the course of his treatment, Ms. Jones's antiepileptic values purposefully had been kept in the lower end of the range for a number of years because her seizures had remained well controlled and she once had experienced levels of toxicity when she had been administered higher doses of Dilantin and Phenobarbital.

Immediately following her fall, Ms. Jones had been admitted to non-party Lawrence Hospital where she had been treated by Dr. Salvate. At the time of her Hospital admission, Ms. Jones' blood lab report showed a Dilantin reading of 9.7 (normal range 10.0-25.0) and a Phenobarbital reading of 13.5 (normal range 15.0-40.0). No changes to her medication had been prescribed. It had been determined that Ms. Jones did not need surgery and that she instead would benefit from short-term physical therapy at defendant

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<sup>1</sup>Ms. Jones had been taking 30 mg of Phenobarbital two times per day and 100 mg of Dilantin three times per day to control her seizure disorder

Schnurmacher Center for Rehabilitation and Nursing ("Schnurmacher"). Her transfer instructions read that she was to continue taking 30 mg of Phenobarbital two times per day and 100 mg of Dilantin three times per day to control her seizure disorder.

Ms. Jones had been transferred to Schnurmacher, during the evening of September 16, 2009. Upon her arrival, Ms. Jones had been evaluated by defendant Dr. Anurag Anand, who had testified that she was not an employee of Schnurmacher but a private attending physician. Dr. Anand also had testified that her responsibilities had included admitting patients to the rehabilitation floor, which required her to examine the patients, formulate plans of care and monitor the patients prior to their discharge.

Dr. Anand had read Ms. Jones' 38-page medical records and had acknowledged her pre-existing seizure disorder. She had prescribed antiepileptic medication in the same continued doses of 30 mg of Phenobarbital two times per day and 100 mg of Dilantin three times per day, as well as physical and occupational therapy. Additionally, Dr. Anand had prescribed Macrochantin, an antibiotic, and Detrol, for incontinence. Although Dr. Anand had testified that it would have been her usual practice to administer a loading dose of the antiseizure medications, she did not order that for Ms. Jones.

On September 18, 2009, Dr. Anand had ordered a complete blood count on Ms. Jones, which included assessing her levels for Phenobarbital and Dilantin. The test results the following day had indicated that Ms. Jones' Phenobarbital and Dilantin values were further below the normal ranges; Dilantin was 3.0 (normal 10.0-20.0) and Phenobarbital 6.9 (normal 15.0-40.0). Two different nurses had made Dr. Anand aware of Ms. Jones' low antiepileptic values, and Dr. Anand had acknowledged awareness of this fact in her typed medical record note, dated September 19, 2009. Ms. Jones' medication dosages,

however, had not been altered throughout her stay at Schnurmacher.

On September 21, 2009, at approximately 8:45 a.m., Certified Nurse Assistance Josephine Miller had been assisting Ms. Jones in the bathroom; it had been the first time that she had met Ms. Jones. According to Ms. Miller, she had not been aware that Ms. Jones was on medication for epileptic seizures, nor had she been aware that Ms. Jones was prone to epileptic seizures. Ms. Miller had testified that she had "pivoted" Ms. Jones 3 to 4 feet from her bed to the toilet. This distance description, however, is belied by the submitted room photographs and floor plan included in plaintiff's opposition papers. According to Ms. Miller, she briefly had left the bathroom, while Ms. Jones had remained seated on the toilet, to get a wash basin and then had returned and stood in the bathroom, collecting soap and wash rags, when she suddenly had observed Ms. Jones' body stiffen, her head tilt and her body begin to slide. Ms. Miller had testified that she had grabbed Ms. Jones, yelling for help, and had lowered Ms. Jones' body to the floor. When asked at her deposition whether Ms. Jones had hit her head, Ms. Francis had replied, "Not that I know of." When asked whether Ms. Jones had been experiencing seizure-like movements after she was on the floor, Ms. Francis had testified, "That I don't remember either. I just put her on the floor and rushed out to get help."

Registered Nurse Kiono Francis then had arrived to assist. According to Nurse Francis, she had observed Ms. Jones on the floor unresponsive and "having seizure-like movements." Nurse Francis had testified that it is not her practice, when she arrives on a floor for work, to review a patient's chart to review the patient's condition.

Dr. Anand had testified that it was her recollection that she had walked into Ms. Jones' room, that Ms. Jones still had been lying on the floor, and that she had been

informed that she had fallen.

A 911 call then had been placed, and Ms. Jones had been transported to White Plains Hospital. Defendant Dr. Anand's transfer note, dated September, 21, 2009, stated that the incident possibly had been related to a seizure although she personally had not observed any seizure activity at the time that she had evaluated Ms. Jones.

At White Plains Hospital, plaintiff had been diagnosed with trauma to her body upon impact to the floor and pain on movement of the neck, left arm and left shoulder, scalp hematoma and acute left parietal subdural hematoma with mild sulcal compression due to mass effect including sulcal effacement, both old and new cervical fractures and quadriplegia secondary to cord contusion and requiring a tracheostomy placement for permanent ventilator support. Ms. Jones' health had continued to deteriorate and she had passed away five months later.

This action ensued, plaintiff alleging that defendants had been negligent in their care and treatment of Ms. Jones<sup>2</sup> and that they had departed from the required standard of care, specifically by failing to have formulated a section of the comprehensive Care Plan addressed specifically to a patient's seizure disorder, its treatment, prevention, risk for falls and the monitoring of antiseizure medications, the failure on defendants' part to provide proper nursing skill, supervision, assistance and a safe environment for Ms. Jones at the time that she was placed on the toilet given her seizure disorder, risk for falls, prolonged duration of subtherapeutic levels of the antiseizure medication and fractured femur, and

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<sup>2</sup>By Decision and Order, dated May 19, 2014, this Court had granted plaintiff's motion for an Order pursuant to CPLR 3217 discontinuing this action as against defendants Lawrence Hospital Center, Camisa and Gordon.

the failure of the attending physician Dr. Anand to have addressed Ms. Jones' extremely low and subtherapeutic levels of Ms. Jones' antiseizure medications, Dilantin and Phenobarbital.

Defendant Schnurmacher presently is moving for summary judgment dismissing the complaint, arguing that it has no liability for the treatment plan devised by defendant Dr. Anand, a private attending physician who had not been an employee of Schnurmacher, and that its role had been only to assist in Dr. Anand's formulated plan of care and supervision, and that there is no evidence that it had exercised any independent medical judgment or that the attending physician's plan of care for Ms. Jones had been clearly contraindicated. Further, Schnurmacher argues, as supported by the submitted affirmation of its geriatric expert Dr. Giselle Wolf-Klein, that its care and treatment of Ms. Jones had been at all times in accordance with good and accepted medical practice and had not been a substantial factor in causing Ms. Jones' alleged injuries. Accordingly, Schnurmacher argues that it has no liability herein and is entitled to judgment dismissing the complaint.

Plaintiff opposes the motion, arguing with the support of her geriatric expert Dr. Luigi M. Capobianco, that defendant Schnurmacher had failed, along with Dr. Anand, in violation of good, common and accepted medical and nursing home practice, as well as Title 42 C.F.R. §482.20 et seq. and 10 N.Y.C.R.R. 415.1 et seq., to formulate a section of the Comprehensive Care Plan addressed specifically to Ms. Jones' seizure disorder and its treatment and seizure prevention, as well as the monitoring of the prescribed anti-seizure medication, to her risk for falls and fall prevention measures, that Schnurmacher further had failed to provide Ms. Jones proper nursing skill, supervision, assistance and a safe environment at the time that she had been placed on the toilet by the certified nursing

assistant, who admittedly had not been aware of Ms. Jones' risk for seizures and falls, who then had left the bathroom without having an ability to continue to observe Ms. Jones, notwithstanding that Ms. Jones' Admission Assessment states that she requires "hands on" assistance and is at risk for falls, and that Dr. Anand had placed the efficacy of Ms. Jones' antiseizure medication at risk by her ordering Macrochantin and Detrol which can reduce the blood levels of Dilantin, by failing to have administered a loading dose of Dilantin and Phenobarbital to Ms. Jones, which had been required by good, common and accepted medical practice, and then she further had failed to address the significantly lower and extremely subtherapeutic levels of Ms. Jones' antiseizure medications. Plaintiff argues that Ms. Jones' injuries documented by White Plains Hospital necessarily make it highly unlikely that the certified nurse assistant had lowered Ms. Jones to the floor, as she had testified, since only blunt trauma could have caused the scalp hematoma, a subdural hematoma, cervical spine contusions and cervical spinal fractures.

Defendant Schnurmacher's motion for summary judgment is granted to the extent that plaintiff's claims alleging defendant Schnurmacher's liability for defendant Dr. Anand's negligence and medical malpractice, if any, are hereby dismissed. Defendant Schnurmacher has demonstrated that it had not been Dr. Anand's employer and that Dr. Anand instead had been a private attending physician, and plaintiff has failed to offer any proof establishing that, contrary to Schnurmacher's expert's stated opinion, Dr. Anand's treatment plan for Ms. Jones had been so clearly contraindicated as imposing upon Schnurmacher's staff an obligation to depart from Dr. Anand's formulated treatment plan; accordingly, the Court finds that Schnurmacher has no liability for Dr. Anand's malpractice and negligent plan of medical care and supervision, if any. See Caretta v. Fischer, 101

A.D.3d 929 (2nd Dept. 2012); Vaccaria v. St. Vincent's Medical Center, 71 A.D.3d 1000 898 (2nd Dept. 2010).

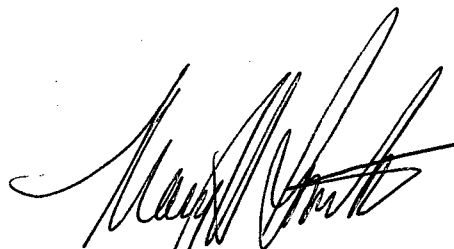
However, the remainder of defendant Schnurmacher's motion is denied, as the Court finds that there exist triable issues of fact as to whether defendants Schnurmacher's nursing staff had committed independent acts of negligence which substantially had caused Ms. Jones' injuries. See Rosenstack v. Wong, 106 A.D.3d 804 (2nd Dept. 2013); Corletta v. Fischer, supra, 101 A.D.3d 929. Although the parties' respective expert opinions conflict as to whether Schnurmacher's staff had committed independent acts of negligence, which ordinarily requires denial of summary judgment, see Rosenstack v. Wong, supra, 106 A.D.3d 804; Shields v. Baktidy, 11 A.D.3d 671 (2nd Dept. 2004), here the Court must find that Schnurmacher's expert's opinion is wholly conclusory on this issue, and thus necessarily insufficient to demonstrate defendant's prima facie entitlement to judgment. See Lormel v. Macura, 113 A.D.3d 734 (2nd Dept. 2014); Rosenstack v. Wong, 106 A.D.3d 804.

In any event, plaintiff's expert has opined that Schnurmacher had departed from the required standard of care, and specifically that Nurse Francis and certified Nurse Assistant Miller, who had admitted to not having read Ms. Jones' chart and to their not having been aware of her medical seizure condition and her assessed risk for falls, had departed from the required standard of good and appropriate care, and that Ms. Miller, who had admitted that she had left Ms. Jones unattended while she had collected bathing supplies, further had not acted properly in accordance with the required standard of assisting nursing care by her failing to properly have monitored Ms. Jones while she had been seated on the toilet, necessarily raising issues of fact with respect thereto. Further, this Court finds that

plaintiff has presented additional issues of fact as to whether Ms. Miller had been present in the bathroom and monitoring Ms. Jones at the time of Ms. Jones' fall, and whether Ms. Jones had been placed on the floor by Ms. Miller, as Miller had testified, as opposed to Ms. Jones having fallen on the floor, striking her head, which latter finding is consistent both with the testimony of Dr. Anand that she had been advised that Ms. Jones had fallen and the blunt trauma diagnoses made by White Plains Hospital, which facts notably have been completely unaddressed by Schnurmacher. Lastly, there are issues of fact as to whether any Schnurmacher staff departures and negligence had been a substantial factor in causing Ms. Jones' injuries.

The parties shall appear in the Settlement Conference Part, room 1600, at 9:30 a.m., on September 30, 2014.

Dated: August 13, 2014  
White Plains, New York



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MARY H. SMITH  
J.S.C.