Payne v Jewish Home & Hosp. Bronx Div.
2015 NY Slip Op 32180(U)
October 7, 2015
Supreme Court, Bronx County
Docket Number: 311134/2011
Judge: Stanley B. Green
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 FILED Oct 22 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

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SAMMIE PAYNE, JR., as Administrator of the Estate of JESSIE PAYNE,

Plaintiff(s),

- against-

JEWISH HOME & HOSPITAL BRONX DIVISION HARRY & JEANNETTE WEINBERG CAMPUS,

Defendant(s)

INDEX No. 311134/2011

DECISION

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HON. STANLEY GREEN:

The motion by Jewish Home Lifecare, Harry and Jeannette Weinberg Campus, Bronx s/h/a Jewish Home & Hospital Bronx Division Harry & Jeanette Weinberg Campus (JHH), for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is granted.

Plaintiff claims that as a result of JHH's negligent care and treatment and deprivation of rights pursuant to PHL §2801-d and §2803-c, decedent suffered a fall on 2/23/09, which resulted in a right hip fracture.

Decedent was admitted to JHL on November 19, 2003, from Bronx Lebanon Hospital where she had been admitted for delusions. At the time she was admitted, a nursing assessment was completed which noted that decedent was alert and independent with locomotion, dressing and eating, but required supervision for toilet use, grooming, hygiene and bathing due to her cognitive impairment. Although decedent was initially assessed as not being at risk for falls, a Comprehensive Care Plan (CCP) was initiated for a potential for falls possibly related to psychotropic medications with interventions to address that risk.

By April 2004, decedent was assessed as being at high risk for falls related to the progression of her dementia, cognitive impairment, impaired safety awareness and impaired balance. Interventions were added to her care plan, including: a bed alarm device, bed rest after meals, hipsters (devices that are placed on the hips to provide cushioning to the hips if there is a fall) and soft helmet, as needed, and refer to rehab nursing.

On 2/23/09, at 10:50 p.m., a CNA responding to the bed alarm found decedent sitting on the floor on the right side of her bed. LPN Walrond and Ms. Henriques, an RN, examined decedent and noted that she was able to move all her limbs on command and she made no complaints of pain. They also noted that there was no swelling or apparent injury to her head and back. The physician on duty, Dr. Kumarasan, also examined decedent with the same results.

On 2/24/09, at 7:15 a.m., decedent first complained of pain when a CNA attempted to get her out of bed. She was evaluated by LPN Walrond and a STAT hip x-ray was ordered. The x-ray revealed a right femoral neck fracture. Decedent was transferred to Montefiore Medical Center where she underwent an open reduction with internal fixation. Decedent was discharged back to JHL on 2/29/09, where she remained, non-ambulatory, until her death on June 15, 2009.

JHL seeks dismissal of the complaint on the ground that the care and treatment it provided was at all times in accordance with good and accepted standards of practice and did not cause or contribute to any injury sustained by decedent. JHL also contends that it provided all care reasonably necessary to prevent the deprivation of decedent's rights pursuant to PHL§2801-d and §2803-c and there was no conduct by it that was reckless, grossly negligent or violative of a right afforded under the PHL so as to entitle plaintiff to punitive damages.

In support of the motion, JHL submits the affirmation of Dr. Wolf-Klein, who is Board

Certified in Geriatric Medicine and is the Director of Geriatric Education at LI Jewish Medical Center and North Shore University Hospital, as well as a Professor of Clinical Medicine at Albert Einstein College of Medicine and a Professor of Clinical Medicine at The Hofstra North Shore/Long Island Jewish School of Medicine.

Dr. Wolf-Klein opines, based on her review of the pleadings, medical records and transcripts of the deposition testimony, that the treatment rendered by JHL was at all times rendered in accordance with good and accepted standards of practice and did not cause or contribute to any injury sustained by decedent. She also opines that the treatment provided by JHL never constituted negligence or gross negligence, did not violate the PHL or NYCRR in general, or as specified in the bills of particulars and that JHL provided all care reasonably necessary to prevent the deprivation of decedent's rights under PHL§§2801-d and 2803-c.

Dr. Wolf-Klein notes that on admission to JHL, a Nursing Assessment, Fall Risk Assessment and Comprehensive Care Plan were completed and throughout decedent's admission, Resident/Patient Reviews were completed quarterly, annually and when there was a significant change. She also notes that interventions were added to the CCP throughout decedent's residence and that at the time of decedent's fall, the interventions included: anticipate ADL needs; secure eyeglasses and hearing aids and encourage proper usage; keep environment clutter free; place call bell in reach; obtain proper fitting and stable footwear; bed rest after meals; hipster and soft helmet as needed; educate specific safety issues; bed alarm device; staff will ambulate resident with one-assist at all times; refer to rehab for unsteady gait; offer rest period after lunch; and PT screen.

Dr. Wolf-Klein opines that the CCP's, including the goals and interventions that were

implemented, were appropriate, reasonable and indicated for decedent and that the resident assessments, including the CCP's, were timely and created, reviewed, updated and maintained in conformity with 42 CFR §§ 483.20 (b), ©, (k)(2) (k)(3) and 10 NYCRR 415.11. She also opines that JHL staff and employees provided adequate supervision and assistive devices to prevent accidents in conformity with the mandates set forth in 42 CFR § 483.25(h) and 10 NYCRR 415.12(h), ("Quality of Care -Accidents," which require the facility to ensure that the resident environment remains free of accident hazards and that each resident receive adequate supervision and assistive devices to prevent accidents) and NYCRR§ 415.11 (which relates to comprehensive assessments, the frequency of such assessments, review of assessments and comprehensive care plans) 42 CFR 483.25 (h) and 10 NYCRR §415.12(h).

Dr. Wolf-Klein notes that the records and testimony show that decedent had a bed alarm prior to 2/23/09, that according to the toileting schedule, decedent was toileted on 2/23/09 at 10:00 p.m., and that when decedent was found sitting on the floor at 10:50 p.m., she was examined by the LPN, RN Henriques and Dr. Kumarasan, the on duty physician and no injuries or complaints were noted.

Dr. Wolf-Klein also notes that in 2007, decedent was assessed for a floor mat and a low bed by rehab nursing and it was determined that she was not a candidate for either because she was ambulatory and might trip and fall. Dr. Wolf-Klein opines that this assessment and determination was appropriate and that this assessment did not change up through and including 2/23/09, as decedent remained ambulatory throughout that time. Dr. Klein also notes that although decedent suffered falls prior to the 2/23/09 fall, she never sustained injuries in those falls.

Dr. Wolf-Klein opines that there was no delay by JHL in determining that decedent had incurred a fall and that appropriate and timely care and treatment was provided to decedent in response to the fall. She notes that decedent was examined by LPN Walrond, Ms. Henriques, RN and Dr. Kumarasan on 2/23/09 and that decedent did not begin to exhibit complaints regarding the right hip until 2/24/09. She opines that when decedent first made a complaint, it was promptly addressed by the JHL staff, as evidenced by the STAT performance of an x-ray which revealed the fracture and that she was promptly transferred to Montefiore Medical Center for evaluation and treatment.

Dr. Wolf-Klein opines that the fall on 2/23/09 was not the result of any negligence, gross negligence or violation of the mandates set forth in 42 CFR 483.25 (h) and 10 NYCRR 415.12(h) and that the fall at issue could not be prevented. She explains that dementia is a systemic disease that affects every organ and that as the disease reaches terminal stages, patients lose the ability to walk and become bed bound. She opines that decedent's dementia resulted in her frequently ambulating around the facility up until the time of the fall and that rather than restrain decedent, JHL carefully, appropriately, reasonably and thoughtfully implemented a care plan specifically tailored for decedent. She opines that by providing close supervision of decedent, whose routine was to wander throughout the unit, JHL staff prioritized decedent's quality of life and respected her wishes and that "had physical restraints been provided, such as tying decedent into a gerichair recliner to restrict her ambulation," it would have been a departure from the accepted standards of care. Thus, she opines that JHL did not depart from 42 CFR 483.13(a) and 10 NYCRR 415.4(a)., both related to restraints, as they were not used throughout decedent's admission.

Dr. Wolf-Klein explains that decedent eventually developed failure to thrive, which is

typically seen in the last stages of dementia, and passed away due to a progressive deterioration due to her dementia.

Plaintiff contends that JHL has failed to make a prima facie showing of entitlement to summary judgment dismissing his cause of action pursuant to the PHL because its expert fails to show that JHL did not violate any law, rule, regulation or contract or its own policies and procedures and questions of fact exist as to whether JHL exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted. Plaintiff also contends that, even if JHL has made a prima facie showing, summary judgment must be denied because material issues of fact exist which preclude a grant of summary judgment.

Initially, it is noted that plaintiff has not opposed JHL's motion insofar as it seeks dismissal of the cause of action for gross negligence and punitive damages. Accordingly, those claims are dismissed.

As to the cause of action pursuant to the PHL and the cause of action for negligence, despite plaintiff's contention to the contrary, the evidence presented is sufficient to establish, prima facie, JHL's entitlement to summary judgment dismissing these causes of action. While plaintiff contends that Dr. Wolf-Klein's opinion is insufficient to establish JHL's prima facie entitlement to dismissal of the cause of action under the PHL because it is based upon the standard of proof for medical malpractice actions, in fact, Dr. Wolf-Klein opines not only that JHL did not depart from the standard of care or breach any duty owed to decedent, but also that JHL provided care and treatment "according to the medical standards and regulations, including but not limited to its policies and procedures," that JHL "did not violate any statutes of Public Health Laws," and that JHL "undertook all care reasonably necessary to prevent and limit the

deprivation and/or injury for which liability is asserted" under the PHL. She describes, in detail, the manner in which JHL complied with the statutory provisions, particularly 42 CFR Part 483 and 10 NYCRR Part 415 and supports her opinion with references to the records. Thus, the burden shifted to plaintiff to present competent evidence to show that the defendant departed from accepted standards of practice and that such departure was a proximate cause of the plaintiff's injuries (Kafka v. New York Hospital, 228 AD2d 332).

In order to sustain this burden, plaintiff must present expert testimony that the defendant's conduct constituted a deviation from the requisite standard of care (Berger v. Becker, 272 AD2d 565) and deprived decedent of her nursing home right under the PHL. The expert's opinion must be based on facts in the record or personal knowledge (Cassano v. Hagstrom (5 NY2d 643). He has failed to meet this burden.

While a medical expert need not be a specialist in a particular field in order render an opinion regarding accepted practices in that field, the witness should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable (Behar v. Coren, 21 AD3d 1045). Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered (Romano v. Stanley, 90 NY2d 444).

Here, plaintiff's counsel and Dr. Weingarten (in his affirmation) indicate that his qualifications as an expert witness are detailed in his CV annexed to the motion. However, the CV was not annexed to the motion papers or Dr. Weingarten's affirmation. In Reply to plaintiff's opposition, JHL has provided a copy of Dr. Weingarten's webpage (submitted in Reply by defense counsel) which shows that Dr. Weingarten is a Board Certified

Anesthesiologist who has been practicing Pain Management since 1984. There is no evidence that Dr. Weingarten has any knowledge, training or experience with geriatric patients in a long term care setting or that he is familiar with the standard of care for nursing homes and Public Health Law as it related to nursing home. Therefore, he is not qualified to render an opinion in this case and his affirmation is insufficient to raise a material issue of fact to defeat JHL's motion.

Even assuming, arguendo, that Dr. Weingarten were somehow qualified to render an opinion in this case, his opinion would be insufficient to defeat JHL's motion because he did not review pertinent deposition testimony and his opinion is not supported by the records. For example, Dr. Weingarten states that "a bed alarm was never considered," when plaintiff's deposition testimony and the testimony of Nurse Waldron show that decedent did have a bed alarm on the night of her fall. He also opines that JHL's failure to implement a toileting schedule violated the regulations, when the records show that there was a toileting schedule and decedent had been taken to the toilet 50 minutes before her fall. He suggests that decedent fell while being transferred when the records show that decedent was by herself at the time that she fell and he states that decedent was not seen by a doctor until the next day, when the record shows that Dr. Kumarasan examined decedent on the night of the fall. Dr. Weingarten also ignores the records which show that decedent was reassessed and the care plans updated and he fails to offer any alternative intervention that would have or could have prevented decedent from getting up or prevented the fracture. These inaccuracies and assumptions render Dr. Weingarten's opinion conclusory and insufficient to raise a material issue of fact to defeat JHL's motion (Abalola v. Flower Hospital, 44 AD3d 522). Accordingly, the motion by JHL for summary judgment

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dismissing the complaint is granted.

Movant shall serve a copy of this order with Notice of Entry on the Clerk of the Court who shall enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: October 7, 2015

STANLEY GREEN, J.S.C.