

<b>Schiller v Empress Ambulance Serv., Inc.</b>
2018 NY Slip Op 34236(U)
July 23, 2018
Supreme Court, Westchester County
Docket Number: Index No. 58806/2017
Judge: Linda S. Jamieson
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NYSCEF DOC. NO. 36

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**PRESENT: HON. LINDA S. JAMIESON**

-----X

NAAMI ADLER SCHILLER as the Executor  
of the Estate of ALAN SCHILLER and  
NAAMI ADLER SCHILLER, Individually,

Index No. 58806/2017

Plaintiffs,

DECISION AND ORDER

-against-

EMPRESS AMBULANCE SERVICE, INC.,

Defendant.

-----X

The following papers numbered 1 to 3 were read on this motion:

<u>Paper</u>	<u>Number</u>
Order to Show Cause, Affirmation and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

Defendant's motion seeks (1) to dismiss the action for failure to serve a Notice of Medical Malpractice Action; (2) in the alternative, to dismiss all medical malpractice claims, and preclude plaintiffs from offering evidence at trial or questioning defendant about such claims; (3) in the alternative, a conditional order of dismissal compelling plaintiffs to serve a

Notice of Medical Malpractice Action within 30 days; and (4) to

stay depositions pending receipt of a Notice of Medical

[\* 1]

Malpractice Action. This last request for relief is moot, because the depositions have already occurred.

This case arises out of treatment that the decedent received from personnel employed by defendant after decedent had had a heart attack, and was being transported to White Plains Hospital. Plaintiffs state, in no uncertain terms, that they do not seek damages for medical malpractice, but only for negligence.

CPLR § 3406 requires a Notice of Medical Malpractice Action in actions "to recover damages for dental, medical or podiatric malpractice." The section does not include other healthcare personnel, such as chiropractors, psychologists or social workers, among others. See *Karasek v. LaJoie*, 92 N.Y.2d 171, 177 (1998). Defendant cites no cases, and research has revealed none, that discuss whether claims against paramedics for their treatment of patients is medical malpractice, or simply professional negligence. Instead, all that defendant does is cite to cases involving hospitals and nurses, and argue that by analogy, the requirement for medical malpractice claims should also apply to paramedics. See, e.g., *Bleiler v. Bodnar*, 65 N.Y.2d 65, 72 (1985) ("a negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice."). The Court disagrees. A paramedic or Emergency Medical Technician, while a highly trained

first responder, is no more a doctor than a chiropractor or psychologist is.

The First Department case of *Perez v. Fitzgerald*, 115 A.D.3d 177, 182, 981 N.Y.S.2d 5 (1<sup>st</sup> Dept. 2014) is instructional. In that case, the Court held that cases against chiropractors were for professional negligence, and not medical malpractice. It explained that claims for medical malpractice against hospitals and medical corporations, based on allegations against "physical therapists, technicians, nurses, etc." are because their actions were "performed at the direction of a physician or pursuant to a hospital protocol which was part and parcel of patient care. In addition, the alleged injury was found to have occurred during the course of medical treatment where it bore a substantial relationship to treatment that was provided pursuant to a referral or prescription from a physician." *Id.*

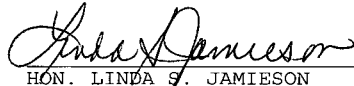
That is not the case here. If the Legislature had wanted to include emergency responders like defendant's employees in the requirements of CPLR § 3406, it certainly could have done so. This Court is not going to expand the statute that way. See *Nestor v. New York State Div. of Hous. & Cmty. Renewal*, 257 A.D.2d 395, 396, 683 N.Y.S.2d 74, 75 (1<sup>st</sup> Dept. 1999) ("the terms of the law are unambiguous. It is the function of the court to enforce a statute in a manner that is consistent with legislative intent and, where that intent is clear upon its face, the court

will not expand the scope of the legislation by judicial construction.”).

Accordingly, the motion is denied in its entirety, except that to clarify that to the extent that any of plaintiff’s claims appear to allege medical malpractice, they really only allege professional negligence.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
July 23, 2018

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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