

**Stack v Huntington Hosp. Assn.**

2019 NY Slip Op 30610(U)

January 8, 2019

Supreme Court, Suffolk County

Docket Number: 63728/2014

Judge: Joseph A. Santorelli

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**ORIGINAL**

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CAL No. \_\_\_\_\_

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

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GEORGE STACK, as Attorney-in-Fact for LUCILLE  
STACK, and GEORGE STACK, Individually,

Plaintiffs,

-against-

HUNTINGTON HOSPITAL ASSOCIATION, d/b/a  
HUNTINGTON HOSPITAL, HUNTINGTON HOSPITAL,  
NORTH SHORE-LONG ISLAND JEWISH HEALTH  
SYSTEM, INC., COHEN, BERGMAN & KLEPPER,  
M.D.'S, P.C., PAVAL ROMANO, M.D. and PAUL  
MACCARO, M.D.,

Defendants.  
-----X

**SCHAEFER LAW GROUP, P.C.**  
*Attorneys for Plaintiff*  
199 East Main Street, Suite 4  
Smithtown, New York 11787

**VARDARO & ASSOCIATES, LLP.**  
*Attorneys for Defendants Huntington  
Hospital Association, d/b/a Huntington  
Hospital, Huntington Hospital, North  
Shore-Long Island Jewish Health System,  
Inc., and Paul Maccaro, M.D.*  
732 Smithtown Bypass, Suite 203  
Smithtown, New York 11787

**LEWIS JOHS AVALLONE AVILES,  
LLP**  
*Attorneys for Defendants, Cohen,  
Bergman & Klepper, M.D.'s, P.C. and  
Paval Romano, M.D.*  
One CA Plaza, Suite 225  
Islandia, New York 11749

In this action to recover damages for medical malpractice there are, in effect, two motions *in limine* before the Court for determination.

- (I) The defendants separately move for an order precluding testimony by the plaintiffs' economist:
  - (A) as to alleged health care services rendered to plaintiff Lucille Stack by her adult daughter, Peggy Louise Rowe; and (B) as to alleged lost earnings and expenses incurred by her adult son, plaintiff George Stack.<sup>1</sup>
- (II) Defendants Huntington Hospital, (and related entities), North Shore-Long Island Jewish Health System, Inc. and Paul Maccaro, M.D. move for an order precluding testimony regarding a statement allegedly made by Dr.

<sup>1</sup> By order dated October 11, 2018, (Baisley, J.), these motions were denied with leave to renew before the judge assigned to preside over the trial of this matter.

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Fitterman, a hospitalist employed by Huntington Hospital, to Lucille Stack in the presence of her daughter-in-law, Constance Stack, that Lucille Stack had "kind of slipped through the cracks".

The plaintiffs oppose these applications.

The Court has reviewed the motion papers and the plaintiffs' opposition thereto and renders the following decision on the motions.

**I. THE MOTION TO PRECLUDE TESTIMONY REGARDING THE SERVICES PROVIDED TO LUCILLE STACK BY HER DAUGHTER PEGGY LOUISE ROWE AND THE LOST EARNINGS AND EXPENSES INCURRED BY PLAINTIFF GEORGE STACK**

The defendants contend that the plaintiffs' expert economist will be expected to testify, *inter alia*, with respect to the valuation of home care services rendered to Lucille Stack in past years by her daughter Peggy Louise Rowe. The expert values these services at \$559,992.00. Rowe is not a party to this action.

Rowe was deposed on November 10, 2015. In October of 2012, Rowe was separating from her husband and moving into an apartment because her home was going into foreclosure. She had also lost her job.

In August of 2013, Rowe relocated to New York and moved in with Lucille Stack to care for her. Rowe noted that her mother had a "live in" home care attendant that "was being paid out-of-pocket and was a huge, huge expense." The home care attendant remained with Rowe and Lucille Stack until January of 2014 when Medicaid provided an aide to assist with her care. Rowe obtained full time employment. She cared for and spent time with her mother when she was not working.

Rowe testified that Lucille Stack pays the rent and the utility costs and they "... kind of split ..." the cost of groceries.

The Court has reviewed the deposition of Peggy Louise Rowe and concludes that it evinces a loving, caring daughter taking care of her ill mother without any expectation of compensation for her kindness. Contrary to plaintiffs' contentions, the actions of Peggy Louise Rowe were gratuitous. Thus, the defendants' motion to preclude evidence of their value is granted.

Plaintiff George Stack, the adult son of Lucille Stack, seeks damages estimated by plaintiffs' economic expert in the sum of \$5,055.00 reflecting the value of days he missed from work and the cost of gasoline expenses. The defendants argue that George Stack is not entitled

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to damages for gratuitous services he provided to his mother.

In opposition, the plaintiffs contend that the defendants have failed to meet their burden of showing that evidence of economic loss sustained by George Stack should be excluded.

Preliminarily the Court concludes that the plaintiffs' reliance upon Auer v State, 289 A.D.2d 626 [3d Dept. 2001], is misplaced. There, the parents [emphasis added], were held to be entitled to damages for the value of medical services which they provided gratuitously to their daughter. Here, plaintiff George Stack, an adult, seeks compensation for "services" he gratuitously provided to his mother. George Stack is not entitled to such compensation (see, Schultz v Harrison Radiator Div. Gen. Motors Corp., 90 N.Y.2d 311).

Therefore, the defendants' motion to preclude such evidence is granted.

## II. THE ALLEGED STATEMENT BY DR. FITTERMAN

The moving defendants argue that Dr. Fitterman's alleged statement that Lucille Stack "kind of slipped through the cracks" is inadmissible hearsay. Further, the moving defendants contend that Dr. Fitterman's alleged statement does not fall within the party admission exception to the hearsay rule because Dr. Fitterman was not a speaking agent.

In opposition, the plaintiffs claim that Dr. Fitterman was a speaking agent and his statement was made within the scope of his authority to consult with his patient concerning her treatment history. Thus, his statement falls within the speaking agent exception to the hearsay rule.

The hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay rule where "the making of the statement is an activity within the scope of his authority" (Loschiavo v Port Auth. of New York & New Jersey, 58 N.Y.2d 1040, 1041).

The exception requires that: (a) the making of the statement is an activity within the scope of the agent's authority; and (2) the statements were made in the course of business or transaction for which the agent was employed (see Loschiavo, supra; Candela v City of New York, 8 A.D.3d 45, 47 [1<sup>st</sup> Dept. 2004]; Navedo v 250 Willis Ave. Supermarket, 290 A.D.2d 246 [1<sup>st</sup> Dept. 2002]). The burden is on the proponent of such testimony to establish its admissibility (see, Tyrell v Wal Mart Stores, 97 N.Y.2d 650, 652).

Here, the plaintiffs have failed to establish the admissibility of the alleged statement. While Dr. Fitterman, a hospitalist, possessed the authority to speak to Lucille Stack about her care and treatment, he did not have the authority to comment or opine on the quality of the care


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provided to Lucille Stack by the defendants.

Accordingly, the motion to preclude evidence regarding Dr. Fitterman's alleged statement that Lucille Stack had "kind of slipped through the cracks" is granted.

The foregoing shall constitute the decision and order of this Court.

Dated: Suffolk County, New York  
January 8, 2019



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HON. JOSEPH A. SANTORELLI  
J.S.C.