Steer v Hill Haven Nursing Home
2019 NY Slip Op 33991(U)
September 19, 2019
Supreme Court, Monroe County
Docket Number: E2017002411
Judge: Debra A. Martin

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

JEFFREY STEER as Administrator of the Estate of AMUTEL STEER,

DECISION

Plaintiff,

Index No. E2017002411

vs.

HILL HAVEN NURSING HOME,
ROCHESTER GENERAL LONG TERM CARE, INC.

Defendants.

This case involves the care provided to decedent Amutel Steer while a resident at Hill Haven Nursing Home. Mrs. Steer had resided at this nursing home beginning in 2009 until shortly before her death in October 2016 at age 80, with the lawsuit focusing on her treatment beginning in 2015.

For many years before 2015, Mrs. Steer had been non-verbal and suffered from advanced dementia and quadriplegia due to Alzheimer's. She was bladder and bowel incontinent and required 100% assistance for all movement. Plaintiff-son alleged that Mrs. Steer suffered from a pressure sore on her head in December 2015 that appeared to be related to his braiding of her hair and which healed uneventfully in about 3 weeks. She then developed several pressure sores on her sacrum and coccyx beginning in February 2016, one of which did not heal and allegedly led to her death on October 2, 2016. The complaint alleged negligence, wrongful death, "reckless disregard" for rights

conferred by Public Health Law §§ 2801-d and 2803-c, and for "deprivation of dignity" arising from Mrs. Steer's treatment during this time period.

Defendants' (collectively referred to as "Hill Haven") motion for summary judgment was supported by affidavits from Dr. Daniel Shand and Nurse Practitioner Heidi Cross. Dr. Shand, a physician specializing in Emergency Medicine, described Alzheimer's disease as irreversible and progressive, causing destruction of a person's ability to speak, swallow, chew and, ultimately, breathe. This disease eventuality lead to the complete shutdown of all functions in Mrs. Steer, as evidenced by the cause of death on her death certificate: "aspiration secondary to dementia", meaning "her brain was so compromised by that point in time it stopped regulating her breathing." Dr. Shand opined that the Hill Haven records showed her progressive disinterest in eating and swallowing in the months leading up to her death, which was an unavoidable consequence of this disease.

Dr. Shand further opined that Alzheimer's patients are at a greater risk for developing pressure sores because of their immobility and malnutrition, which causes all organs, including the skin, to fail. This means that sores are inevitable despite proper care and avoidance procedures. Incontinency exacerbates the problem and, in the case of Mrs. Steer, prevented healing. He concluded that defendants' care neither caused nor failed to correct the pressure sore condition, and that her death was totally unrelated to the sores; Alzheimer's disease, with likely contribution of the cancerous neck lesion discovered upon her admission to the hospital that impeded her breathing, caused her death.

Nurse Heidi Cross, a Wound and Ostomy Nurse Practitioner provided a detailed affidavit of her review of the Hill Haven records and the applicable state and federal regulations. Her recitation of Mrs. Steer's medical history provided relevant information: (1) upon her admission to Hill Haven in March 2009, her Alzheimer's dementia was already "advanced" and she suffered from hypertension; and (2) during the period relevant to this lawsuit (December 2015 through September 2016), Mrs. Steer's general state of health declined significantly, consistent with her advanced Alzheimer's dementia, age and "concomitant frailties."

A review of the Hill Haven records confirmed the progression of the Alzheimer's. Upon her admission in 2009, she was moving all 4 extremities and walked with a steady gait (HHNH 61). By 2013[1] it was noted that her ability to walk was "severely limited to non-existent" (HHNH 241), and by 2014, she was not ambulatory and on full mechanical transfers, with no coherent verbal communication (HHNH 677).

NP Cross referenced three prior instances of pressure sores: two on the coccyx area, discovered in May 2015, and one on the back of her head in December 2015. All were treated and resolved within a matter of weeks.

On February 8, 2016, a 1 x 2 cm sore was discovered on her coccyx, and the nursing staff followed the same procedures that previously had been successful. The Care Plan was changed to include these treatments and by February 25, the wound was divided into two areas, with healing in between. By March 15, the left side wound was healed but the right side persisted. By April 15, NP Cross noted "consistent with

[1] The certified medical records submitted with the motion are for a limited timeframe, so the year in which her mobility limitations had progressed to this level is not discernable.

the Decedent's overall pattern of general health decline", the wound was "slightly worse" and a wound care specialist, NP Dushuk, was called in. Her record of April 26 documented a four-pound weight loss since December and a 1.5 x 2 cm sore on the coccyx and a 1 x1 cm sore on the right buttock, which was epithelialized (healed). (HHNH105-6). NP Dushuk ordered medication to continue and repositioning every two hours. Hill Haven maintained the care and utilized special bedding, with resultant noticeable improvement in the coccyx sore by May 2, "much" improvement by May 10, and further reduction in size to 0.8 x .03 cm by May 25.

During May 2016, the staff began to note changes in Mrs. Steer's eating habits, with teeth clenching and holding food without swallowing. (HHNH 108). NP Duchuk noted no significant weight loss but that she was "definitely at risk", a concern echoed by the attending physician, resulting in continuation of fortified food and weight monitoring. Declining overall health due to Alzheimer's was documented. (HHNH 417-8).

Despite the initial improvement, the coccyx sore again worsened so that by June 27, it had enlarged to 2.5 x 2.5 cm. Additional treatments and examinations by the NP and physician were documented, including antibiotics when infection was noted, and additional nutritional supplements. There was modest improvement of the sore over the next several months, but healing had essentially stalled. By September, there was notation of growing concerns about a significant decrease in her appetite and weight loss, and another conversation with plaintiff on September 19 that his mother had

> "end stage dementia and would no longer be able to take adequate po (by mouth) intake nutritionally. Weight has been declining due to inadequate calories despite best efforts by Nursing staff to feed the patient. Patients wound

> would also be difficult to heal if not impossible due to her nutrition status (Stage IV)."

(HHNH 151). The insertion of a feeding tube was discussed with plaintiff and over the next several days, as he considered the feeding tube option, the wound worsened, and Mrs. Steer's eating/drinking was "minimal." (HHNH 154). Because of concern that Mrs. Steer had progressed to develop osteomyelitis at the wound site, she was transported to Rochester General Hospital on September 21.

At the hospital, a scan ruled out osteomyelitis and the treatment focus became a new discovery, that of a "partially necrotic" neck mass that was determined by biopsy to be thyroid cancer with metastasis to the pancreas. Although there was consideration given by the family to do further testing of the mass, the risks of a biopsy outweighed the benefits. There was documented concern that the mass was compressing her airway, which, along with her inability to swallow due to the dementia, required frequent suctioning. She ultimately passed on October 2, 2016 due to "Aspiration pneumonia secondary to dementia."

NP Cross outlined the care given to Mrs. Steer based on the record as it related to wound care, specifically, and general nursing care, and then addressed each of the plaintiff's claims and alleged regulatory violations. She concluded that Hill Haven appropriately monitored Mrs. Steer's risk for developing pressure sores, responded when they developed, provided a variety of treatments, communicated with the family, and documented the situation, all in compliance with the appropriate standards of care, Public Health Law, and applicable regulations.

The plaintiff opposed the motion with an affidavit of Dr. Mark Shoag, internist. He

recited portions of the medical record to support his opinion that the defendants were negligent in failing to implement and follow an appropriate care plan which resulted in the breakdown of her skin and in the treatment of the sore once it developed. He faulted their failure to be careful in moving the patient as causing the sore and the delay in noticing the sore until it was open as impacting the healing. He also opined there was no problem with weight loss until August when the worsening ulcer was "siphoning off" her nutritional intake as her body attempted to heal the sore. He faulted defendants' failure to address her weight loss and the possible insertion of a feeding tube earlier. He refused to speculate on the impact of the thyroid cancer on her condition either before or after her admission to the hospital but opined that the pressure sore contributed to her death.

Decision

Defendants met their burden of proof through the affidavits of the two experts. The burden then shifted to the plaintiff to raise a triable issue of fact, which he failed to do. The defendants' experts focused on the progressive nature of Azheimer's disease, that was already severe in 2016, and with a cascade of unavoidable problems that would, unfortunately, lead to Mrs. Steer's death. This disease caused extreme immobility, in the form of quadriplegia and limb constriction, and eating issues, including bruxism that prevented her from opening her mouth, difficulty swallowing, decreased appetite, and the resultant weight loss. She was incontinent to bladder and bowel, with associated hygiene issues. Given this terrible disease, pressure sores were inevitable and untreatable, although the defendants had some initial successes using a variety of

mattresses, medication, positioning techniques, and food supplements. Ultimately, she died of the disease, possibly exacerbated by the thyroid tumor.

Plaintiff's expert, Dr. Shoag, submitted a 31-page affidavit that did not mention "Alzheimer's" and, consequently, did not refute the defendants' experts' opinion that this co-morbidity was the proximate cause of the pressure sores and her death. The case law is clear, notably in pressure sore cases, that failing to address the specific contentions of the defendant's expert is insufficient to defeat a motion for summary judgment:

> "In opposition, plaintiff failed to raise an issue of fact. Plaintiff submitted a conclusory and speculative affirmation of an unnamed expert who failed to mention the decedent's existing health conditions contributing to the ulcers, her comatose state, or that she had end-stage failure of her critical organs, including the skin."

(*Craig v St. Barnabas Nursing Home*, 129 AD3d 643, 644 [1st Dept 2015]; see also *Vargas v St. Barnabas Hosp.*, 168 AD3d 596 [1st Dept 2019]; *Negron v St. Barnabas Nursing Home*, 105 AD3d 501 [1st Dept 2013]; *Chance v Felder*, 33 AD3d 645, 646 [2d Dept 2006]; *Slone v Salzer*, 7 AD3d 609, 610 [2d Dept 2004].) The tenuous stretch of Dr. Shoag's opinion with respect to the wrongful death claim is particularly problematic because he does not even attempt to explain how the pressure sore caused her death, other than to speculate that it weakened her. His opinion cannot be reconciled with the hospital record that noted "she is not swallowing likely due to her mental status and tumor, with lots of secretions" (Ex. G, pg. 131) and the stated primary cause of death as "aspiration pneumonia secondary to dementia. (Ex. G, pg. 143.)

Plaintiff's expert also failed to create a causal connection between any alleged deprivation of rights pursuant to Public Health Law § 2801-d and Mrs. Steer's injuries,

(see *Ciccotto v Fulton Commons Care Ctr., Inc.*, 149 AD3d 1030, 1031-32 [2d Dept 2017]; *Moore v St. James Health Care Ctr., LLC*, 141 AD3d 701, 703 [2d Dept 2016]; *Novick v South Nassau Communities Hosp.*, 136 AD3d 999 [2d Dept 2016]; *Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833 [2d Dept 2011]; *Shapiro v Gurwin Jewish Geriatric Nursing & Rehabilitation Ctr.*, 84 AD3d 1348, 1349 [2d Dept 2011]. The public health regulation that pertains specifically to pressure sores recognizes the unavoidability of this injury in patients with co-morbidities:

> "Each resident shall receive and the facility shall provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, in accordance with the comprehensive assessment and plan of care subject to the resident's right of self-determination.
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> ***
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> (c) *Pressure sores*. Based on the comprehensive assessment of a resident, the facility shall ensure that:
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> (1) a resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable despite every reasonable effort to prevent them; and
>
> (2) a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing."

(10 NYCRR 415.12; see also 42 CFR 483.25 [1]). Although plaintiff alleged and Dr. Shoag attempted to find regulatory violations, the connection between the alleged violations were either based on speculation or totally ignored the overwhelming co-morbidity of the Alzheimer's disease. He also failed to mention that the various treatments provided to Mrs. Steer actually resulted in documented improvement in the sore for several months in the summer of 2016.

Plaintiff also alleged as his fourth cause of action a claim for "deprivation of dignity." Since plaintiff failed to present any argument in opposition to the defendants' motion on this claim, this issue is deemed abandoned. (*Ciesinski v Town of Aurora*, 202 AD2d 984 [4th Dept 1994].)

Defendants are directed to submit a proposed order incorporating this Decision.

Dated: September 19, 2019

Hon. Debra A. Martin, ASCJ