

Schiller v Empress Ambulance Serv., Inc.
2019 NY Slip Op 34604(U)
October 7, 2019
Supreme Court, Westchester County
Docket Number: Index No. 58806/2017
Judge: Linda S. Jamieson
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Disp _____ Dec x Seq. No. 3 Type SJ

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.

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The following papers numbered 1 to 3 were read on this

motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Affirmation and Exhibits in Opposition	2
Reply Affirmation	3

Defendant's motion seeks summary judgment dismissing this negligence action in its entirety.

This case arises out of treatment that the decedent received from personnel employed by defendant. Shortly before three a.m. on June 5, 2016, decedent's family called 911, reporting that decedent was having trouble breathing. Approximately ten minutes later, defendant ambulance arrived at decedent's home. The timing of the events is in dispute, but there is no dispute that defendant's personnel took a medical history from decedent, did

an evaluation and assessment, hooked him up to certain monitoring devices, gave him a CPAP mask to help him breathe, tried to and eventually did insert an IV line, only for decedent to dislodge it. Defendant's employees noticed that decedent was deteriorating, and transferred him to a stretcher so that he could be moved to the ambulance and then to the hospital. Before he could be moved into the ambulance, decedent went into cardiac arrest.¹ Defendant's personnel initiated CPR, loaded him into the ambulance, placed EKG pads on him for better cardiac monitoring, and realized that he was in pulseless electrical activity - which meant that his implanted defibrillator was unable to shock his heart back into beating. The paramedic then intubated decedent, gained intraosseous access, or access through the bone marrow in his tibia, in order to replace the IV line, and began administering Ephinephrine. Decedent never regained consciousness and subsequently passed away.

As this Court previously held, this action sounds in professional negligence, not medical malpractice. "A claim of professional negligence requires proof that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury." *Gonzalez v. Clay*, 83 A.D.3d 999, 999, 921 N.Y.S.2d 334, 335 (2d Dept. 2011). A review of

¹The Court appreciates how both sides were careful to explain all medical terms and procedures throughout their papers.

defendant's papers shows that the "defendant made out a prima facie case for summary judgment." *Polichetti v. Cohen*, 268 A.D.2d 417, 417, 702 N.Y.S.2d 85, 86 (2d Dept. 2000). Defendant's experts, a board-certified internist and cardiologist and a board-certified emergency medicine specialist, opined that decedent was already very ill by the time defendant arrived at the home; that attempting to stabilize decedent before moving him to the ambulance was appropriate; that the use of the CPAP device was required "to allow oxygen to be pushed into" his lungs; that it made sense to first attempt an IV, and then when that did not work, the intraosseous line; that the cardiac arrest was a natural result of decedent's declining condition, rather than a result of anything that defendant's employees did or failed to do; and that once decedent went into pulseless electrical activity, there was very little that defendant could do. Defendant's experts state that although there is a question about how many doses of Ephinephrine defendant's employees gave decedent,² "additional Ephinephrine administration would not have changed decedent's ultimate outcome."

"Summary judgment is a drastic remedy and should not be granted when there is doubt as to the existence of a material triable issue of fact. On a motion for summary judgment, the

²The records reflect that only two doses were administered, but the paramedic testified at his deposition that he would have given a dose every six minutes.

court should accept as true the evidence submitted by the opposing party and any evidence of the movant which favors the opposing party." *O'Sullivan v. Presbyterian Hosp. in City of New York at Columbia Presbyterian Med. Ctr.*, 217 A.D.2d 98, 100-01, 634 N.Y.S.2d 101, 103 (1st Dept. 1995). In response to defendant's prima facie showing, plaintiffs submit the reports of the same sort of expert doctors. These doctors argue that defendant was negligent by not moving decedent to the hospital quickly enough; by not administering Lasix, a diuretic used to treat fluid retention and swelling caused by congestive heart failure;³ by using the CPAP device, which was contraindicated for this patient; by only administering two doses, or doses every six minutes of Epinephrine instead of every three to five minutes.

In its reply papers, defendant attempts to rebut all of these contrary assertions. It does not succeed. These disputed questions of fact must be left to a jury to determine. *Kung v. Zheng*, 73 A.D.3d 862, 863, 901 N.Y.S.2d 334, 336 (2d Dept. 2010). "Where an individual is alleged to have committed professional negligence, a jury must compare the defendant's conduct to the degree of skill and care used by others in the community who practice in the same field. The degree of skill and care that must be exercised in each particular case may be established

³Decedent took an additional dose of Lasix prior to the ambulance's arrival. However, plaintiffs' experts state that IV or intraosseous Lasix would have been much faster acting.

through evidence of the general customs and practices of others who are in the same business or trade as that of the alleged tortfeasor. This may be accomplished by presenting the testimony of an expert who has demonstrated his or her knowledge of the relevant standards of care in the trade or profession at issue. Such expert testimony has been held to be admissible not only to explain highly technical medical or surgical questions, but has also been found appropriate to clarify a wide range of issues calling for the application of accepted professional standards." *Abrams v. Bute*, 138 A.D.3d 179, 184-85, 27 N.Y.S.3d 58, 63 (2d Dept. 2016).

The parties are directed to appear for a Settlement Conference in the Settlement Conference Part, Courtroom 1600, on November 26, 2019 at 9:15 a.m.

The foregoing constitutes the decision and order of the

Court.

Dated: White Plains, New York
 October 7, 2019

Linda S. Jamieson
 HON. LINDA S. JAMIESON
 Justice of the Supreme Court

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