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| <b>Muller v Newburgh Operations, LLC</b>                                                                                                                                                                                       |
| 2023 NY Slip Op 35277(U)                                                                                                                                                                                                       |
| July 12, 2023                                                                                                                                                                                                                  |
| Supreme Court, Orange County                                                                                                                                                                                                   |
| Docket Number: Index No. EF007233-2020                                                                                                                                                                                         |
| Judge: Craig Stephen Brown                                                                                                                                                                                                     |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
MANFRED B. MULLER, JR. AND MICHAEL MULLER  
AS EXECUTORS OF THE ESTATE OF MANFRED B.  
MULLER,

Plaintiffs,

**DECISION & ORDER**

- against -

Index No. EF007233-2020

NEWBURGH OPERATIONS, LLC, ELANT AT  
NEWBURGH, INC., AND ELANT, INC.,

Defendants.

-----X  
**CRAIG STEPHEN BROWN, A.J.S.C.**

Defendant Newburgh Operations, LLC moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing all claims asserted against it, with prejudice, upon the grounds that the within causes of action for negligence, negligence per se, deprivation of rights pursuant to NY Public Health Law §§ 2801-d and 2803-c, and wrongful death have no merit.

The following papers were read:

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|------------------------------------------------------------------------------------|--------|
| Notice of Motion - Affirmation of Angela Thompson-Tinsley, Esq. - Annexed Exhibits | 1 - 3  |
| Statement of Material Facts                                                        | 4      |
| Defendant's Memorandum of Law                                                      | 5      |
| Jonathan Roman, Esq.'s Affirmation in Opposition -                                 | 6 - 8  |
| Counter statement of Material Facts - Annexed Exhibits                             |        |
| Reply Affirmation of Angela Thompson-Tinsley, Esq. - Annexed Exhibits              | 9 - 10 |

Upon the foregoing papers it is hereby ORDERED that the defendant Newburgh Operation, LLC's motion for summary judgment is denied. All other requested relief is denied.

The instant action alleges nursing home negligence, violation of Public Health Law §§ 2801-d and 2803-c, and wrongful death. The moving defendant has submitted an affirmation of Yoav Borsuk, M.D. in support of its motion for summary judgment. Dr. Borsuk states in his affirmation, *inter alia*, that, "[I]t is my opinion that the Facility did not depart from the accepted standard of care with respect to care provided to Mr. Muller during his admission, so that the Facility did not deprive Mr. Muller of any of his resident's rights or benefits... In my opinion, the Facility staff exercised all care reasonably necessary to prevent and limit the injuries claimed on behalf of Mr. Muller in this case... In my opinion, there is no evidence in the records that negligent care caused Mr. Muller's decline in his ability to transfer or ambulate. There is also no evidence that any negligence was a factor in Mr. Muller's falls" (Affirmation of Yoav Borsuk, M.D., paragraphs 7-19).

Dr. Borsuk further states that, "It is my opinion... that Mr. Muller did not experience any pressure injuries while he was at the Facility. For that reason, plaintiffs' allegations of negligence related to the lack of appropriate interventions are not applicable. The sacral area skin impairment experienced by Mr. Muller was related to multi-organ failure in the final 2 months of his life... It is my opinion that Mr. Muller's death was not the result of any negligence in care provided by the Facility. The cause of death was documented as asystole (minutes); acute respiratory failure (5 days); and CAD (years). Other contributing factors were COPD, HTN, status post cardiac stent, and Parkinson's. Mr. Muller's decline was very rapid in the final months of his life, but there is nothing that the Facility staff did, or failed to do that contributed to his decompensation or death... It is my opinion, as a physician with

extensive experience in skilled nursing facility (long-term and short-term) care, that the staff at the Facility complied with accepted standards of nursing care, and that the Facility did not violate any of Mr. Muller's resident's rights as set forth in state and federal regulations" (Affirmation of Yoav Borsuk, M.D., paragraphs 25-37).

However, plaintiffs have submitted an affirmation from Perry Starer, M.D., who is board certified in internal medicine and geriatrics. Dr. Starer points out that there were multiple instances of false medical charting for the decedent Manfred B. Muller - including when Mr. Muller was not even at defendant's facility (*see* Affirmation of Perry Starer, M.D., paragraphs 26-30). Dr. Starer states in his affirmation, *inter alia*, that, "It is my opinion to a reasonable degree of medical certainty that these instances of false and fraudulent charting are a departure from the standard of care. Additionally, the nursing home is legally required to have an accurate record of care for Mr. Muller, and thus he had a right to have an accurate record of care made on his behalf. 10 NYCRR §415.22. The false and fraudulent charting is a reckless and willful violation of Mr. Muller's rights. 10 NYCRR §415.22. Additionally, the fraudulent charting has implications beyond the specific instances described above. Specifically, the false charting includes that the nursing home was charting that skin observations were occurring, when they were not. Stacey Muller testified that Mr. Muller was complaining of pain in his backside area towards the end of the summer in 2017. The pressure ulcer was not noted until 10/3/17, and was quite severe at that time. Specifically, it was large and already had developed necrotic tissue. Given the severe nature of the injury when it was first assessed on 10/3/17, the pain in that area that Mr. Muller was expressing during the time before 10/3/17, and that the nursing home was charting that they were performing skin observations that they were not actually doing, it is more likely the case that the pressure ulcer had started before 10/3/17, but that the nursing home failed to assess it. Moreover, given the number of false

and fraudulent entries, it is fair to say that it was a chronic issue at the nursing home. Given the number of times that Newburgh Operations falsely and fraudulently charted that they provided care to Mr. Muller, when in fact, he was in the hospital, and given that numerous members of the nursing staff appear to have engaged in it, it is my opinion to a reasonable degree of medical certainty that the Newburgh Operations medical record is not reliable, and cannot be trusted" (Affirmation of Perry Starer, M.D., paragraphs 31-33).

Plaintiffs' medical expert Dr. Starer further states that, "Mr. Muller developed a pressure ulcer as of 10/3/17, while he was in the care of Newburgh Operations. It was first assessed as an unstageable pressure injury to the sacrum, butterfly shaped, 7 cm x 5 cm x unknown depth. The pressure injury was 50% slough and 50% granulation. The nursing home claims that the pressure ulcer began on that day, and defendant's expert relies on that assumption, in part, to opine that the pressure ulcer was not a pressure ulcer, but a Kennedy Terminal Ulcer, a concept used in an attempts [sic] to explain the development of pressure injuries in patients with actual or presumed terminal conditions. However, the size of the wound, and the presence of slough and granulation tissue indicate that this was not a new wound. Slough is necrotic tissue, and would likely take more than one day to form. Granulation tissue is healing tissue, and it would be similarly unlikely to have formed in one day. Based on these factors alone, it is my opinion to a reasonable degree of medical certainty that it is more likely than not that the pressure ulcer noted on 10/3/17 had been present for some period of time prior to that date, but simply not noted or treated by the nursing home. Additionally, Stacey Muller testified that Mr. Muller had expressed pain in his backside area in the late summer of 2017. Pain in that area at that time would also be consistent with a sacral pressure ulcer that had developed prior to 10/3/17. It is my opinion to a reasonable degree of medical certainty that Newburgh

Operations failed to turn and reposition Mr. Muller at least every two hours while in bed, and at least every hour while in a chair, prior to the development of the unstageable sacral pressure ulcer, which were departures from the standard of care, and violations of the regulations. 10 NYCRR 415.11 and 10 NYCRR 415.12. It is also my opinion that such departures and violations were a substantial and/or contributing cause for the development of Mr. Muller's sacral pressure ulcer" (Affirmation of Perry Starer, M.D., paragraphs 40-42).

In addition, Dr. Starer opined that, "Mr. Muller suffered from several UTIs during the period of time prior to October, 2017. Mr. Muller was taken to the SLCH ER [St. Luke's Cornwall Hospital Emergency Room] on 5/12/17 due to AMS and lethargy. He was diagnosed with a UTI, and discharged with a prescription for antibiotics. Mr. Muller was admitted to SLCH on 6/16/17, with symptoms including worsening confusion, and AMS. Mr. Muller was diagnosed with UTI and related sepsis. Although antibiotics were ordered with each infection, there was no change in the care plan to prevent the infection in the first instance. In fact, the "UTI-Prevention and Management" care plans (from 6/28/17 and 9/16/17) do not contain any actual prevention methods. The items selected in the care plans simply acted as a monitoring tool for when Mr. Muller got a UTI, there were no interventions identified that would be considered preventive in nature. It is my opinion to a reasonable degree of medical certainty that Newburgh Operations' failure to provide appropriate hygiene and incontinence care was a departure from the standard of care and a violation of Mr. Muller's rights. Further, it is my opinion that such departures were a substantial and/or contributing cause of the UTIs and the related sepsis that were diagnosed during these admissions... Given the number of urinary tract infections, it would have been standard of care to reassess the plan of care to determine what could be done to prevent the UTI... It is clear from the incontinence care plans that this was not done, as no changes were made to the frequency of the

incontinence care. Additionally, the CNA documentation also shows that no changes were made to the incontinence care that was provided in the months leading up to October, 2017. This can be seen in the "Toilet" and "Bladder" portion of the CNA documentation from June, 2017 through October, 2017. It is my opinion to a reasonable degree of medical certainty that the failure to reassess the plans of care, and make the appropriate changes, despite the repeated UTIs, was a departure from the standard of care and a violation of Mr. Muller's rights... It is my opinion to a reasonable degree of medical certainty that Newburgh Operations' failure to provide appropriate catheter and incontinence care was a departure from the standard of care and a violation of Mr. Muller's rights. Further, it is my opinion that such departures were a substantial and/or contributing cause of the UTI, and the related sepsis... It is my opinion to a reasonable degree of medical certainty that the unstageable pressure ulcer, repeated UTIs and resulting sepsis were a significant and/or contributing factor in Mr. Muller's death. Mr. Muller was already compromised by the COPD, Parkinson's disease, Alzheimer's disease, DM and HTN, and the pressure ulcer, UTIs and sepsis placed an extra clinical burden on his heart, and contributed to its failure, resulting in Mr. Muller's death" (Affirmation of Perry Starer, M.D., paragraphs 57-67).

Finally, Dr. Starer affirmed that, "Based on my review of the medical record, it is my opinion to a reasonable degree of medical certainty that Mr. Muller's sacral ulcer was a pressure ulcer, and not a Kennedy Terminal Ulcer... Based on the photo of Mr. Muller's penis, the description in the SLCH medical record, and Stacey Muller's testimony of what she observed as an RN, it is my opinion to a reasonable degree of medical certainty that the nursing home failed to secure the foley catheter, which allowed it to be pulled or otherwise mishandled, which was a departure from the standard of care and a violation of Mr. Muller's rights. Further, it is my opinion that this departure and violation was a substantial and/or contributing factor in the injury

to the meatus. Moreover, the injury would have been extremely painful. The nursing home medical record contains no assessment or treatment of the injury. It is my opinion to a reasonable degree of medical certainty that the failure to assess or treat the injury was a departure from the standard of care and a violation of Mr. Muller's rights. Further, the failure to inform the family of the injury, is a departure from the standard of care and a violation of Mr. Muller's rights... It is my opinion to a reasonable degree of medical certainty that Newburgh Operations failed to properly rehab Mr. Muller, provide him with an alarm, and was chronically understaffed, which were departures from the standard of care, and violations of Mr. Muller's rights. 10 NYCRR 415.11 and 10 NYCRR 415.12. It is also my opinion that such departures and violations were a substantial and/or contributing cause for the falls that occurred, and the injuries Mr. Muller suffered as a result of the falls... Mr. Muller went from 189 lbs. on 4/5/17, to 169 lbs. on 7/25/17, to 152 lbs. on 10/31/17. Despite this significant weight loss, no change is made as to the level of assistance he is provided with to eat until November, 2017... It is my opinion to a reasonable degree of medical certainty that the failure of the nursing home to provide the necessary assistance to eat was a departure from the standard of care, and also a violation of Mr. Muller's rights. Further, it is my opinion that the departure and violation was a substantial and/or contributing cause of Mr. Muller's weight loss and malnutrition" (Affirmation of Perry Starer, M.D., paragraphs 74-92).

The defendant's medical expert's opinions are "contradicted by the plaintiffs' medical expert, leaving a conflict of medical opinion that should be resolved by a finder of fact" (*Viti v. Franklin General Hospital*, 190 AD2d 790 [2nd Dept., 1993] citing *Taype v. City of New York*, 82 AD2d 648; *Kallenberg v. Beth Israel Hospital*, 45 AD2d 177, affd 37 NY2d 719). Further, pursuant to Public Health Law §2801-d, "where the deprivation of any... right or benefit [of a patient in a residential health care facility] is found to have been willful or in reckless disregard of the lawful rights

of the patient; punitive damages may be assessed." In the instant matter, the plaintiffs, through their medical expert, have raised a triable issue of fact as to whether Mr. Muller's rights, including his right to accurate medical charting, were willfully or recklessly deprived. Accordingly, the defendant's motion for summary judgment with respect to all claims, including those for punitive damages, against Newburgh Operations, LLC must be denied.

The foregoing constitutes the Decision and Order of this Court.

So Ordered.

Dated: July 12, 2023  
Goshen, New York



HON. CRAIG STEPHEN BROWN  
Acting Supreme Court Justice

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