

2014 WL 8094573 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Ulster County

Joycie O'CONNOR, as Executrix of the Estate of Robert
J. O'Connor, and Joycie O'Connor, Individually, Plaintiff,

v.

THE KINGSTON HOSPITAL, Ellenville Regional Hospital,
Willcare, Inc., and Somsak Bhitiyakul, M.D., Defendants.

No. 134011.
June 6, 2014.

Motion Return Date: March 24, 2014
RJI No. 55-11-01121

Decision & Order

The Berkman Law Office, LLC, (David Steigbigel, Esq., of Counsel), Attorneys for Plaintiff, 111 Livingston Street, Suite 1928, Brooklyn, New York 11201.

Sholes & Miller, LLP, (Robert Irving Miller, Esq., of Counsel), Attorneys for Defendant the Kingston Hospital, 327 Mill Street, Poughkeepsie, New York 12601.

O'Connor, O'Connor, Bresee & First, P.C., (Anne M. Hurley, Esq., of Counsel), Attorneys for Defendant Ellenville Regional Hospital, 20 Corporate Woods Boulevard, Albany, New York 12211.

Lynch Schwab, PLLC, (Jay S. Campbell, Esq., of Counsel), Attorneys for Defendant Willcare, Inc., 1441 Route 22, Suite 206, Brewster, New York 10509.

Catania, Mahon, Milligram & Rider, PLLC, (Rebecca Baldwin Mantello, Esq., of Counsel), Attorneys for Defendant Somsak Bhitiyakul, M.D., One Corwin Court, P.O. Box 1479, Newburgh, New York 12550.

Christopher E. Cahill, Judge.

Cahill, J.:

*1 Plaintiff commenced the instant action against Dr. Bhitiyakul, Kingston Hospital, Willcare and ERH (hereinafter collectively referred to as defendants) alleging medical malpractice, violations of Federal and State laws, rules and regulations, and lack of informed consent. Defendants each now move for summary judgment dismissing the complaint against them.

I. Dr. Bhitiyakul

On December 26, 2008, Dr. Somsak Bhitiyakul¹ admitted Robert O'Connor (hereinafter decedent) to Kingston Hospital. Shortly thereafter, decedent was diagnosed with terminal cancer. Plaintiff's malpractice claim as against Dr. Bhitiyakul focuses on his alleged failure to take preventative measures given decedent's risk for pressure ulcers. More

particularly, plaintiff maintain that Dr. Bhitiyakul should have ordered an air mattress or egg crate mattress during the brief time frame decedent was under his care at Kingston Hospital.

As the proponent of a motion for summary judgment in a medical malpractice action, Dr. Bhitiyakul, decedent's primary care physician, bears the initial burden of establishing that the medical treatment he rendered was within acceptable standards of care and that his actions were not a substantial factor in causing the claimed injuries (*see Doucett v Strominger*, 112 AD3d 1030, 1031 F20131; *Longtemps v Oliva*, 110 AD3d 1316, 1317 [2013]). Here, Dr. Bhitiyakul met his initial burden of establishing entitlement to summary judgment by submitting decedent's medical records, deposition testimony, and the affidavit of Dr. Brent Spears, a board certified hospice and palliative medicine physician. Based on his review of the relevant medical records, Dr. Spears opined that decedent did not have a pressure ulcer when Dr. Bhitiyakul initially admitted him to Kingston Hospital. Indeed, decedent's medical records reveal that the only skin abnormality present upon admission was a dried, scabbed blister on his right buttock.

On January 1, 2009, the only other date Dr. Bhitiyakul examined decedent at Kingston Hospital, a nurse documented a Stage II pressure ulcer in the same region. However, it is Dr. Spears' opinion that the nurse misinterpreted the nature of decedent's pre-existing blister. A subsequent nursing note supports Dr. Spears' findings in this regard. Given the foregoing, Dr. Spears concluded that there was no evidence Dr. Bhitiyakul departed from accepted standards of medical care or that he caused decedent's claimed injury.

In opposition to Dr. Bhitiyakul's motion, plaintiff submitted an affidavit from Lorrinda Tanious, a registered nurse. In her affidavit Nurse Tanious notes that her opinion is based on a "reasonable degree of nursing certainty" (Steigbigel Aff., Ex. A, ¶4). As such, Nurse Tanious lacks the qualifications to render a medical opinion regarding the relevant standard of care, and whether Dr. Bhitiyakul deviated from such standard (*see Hoffman v Pelletier*, 6 AD3d 889,890- 891 [2004]; *Jordan v Glens Falls Hosp.*, 261 AD2d 666, 667 [1999]). Accordingly, the Court finds that plaintiff failed to demonstrate the existence of a triable issue of fact (*See Elliot v Long Is. Home Ltd.*, 12 AD3d 481,482 [2004]; *Mills v Moriarty*, 302 AD2d 436,436-437 [2003], *lv denied* 100 NY2d 502 [2003]).

*2 Finally, inasmuch as plaintiff does not oppose the dismissal of the second and third causes of action, which allege statutory and regulatory violations, and lack of informed consent, "respectively, those prongs of Dr. Bhitiyakul's summary judgment motion are also granted,"²

II. Kingston Hospital

Even if Kingston Hospital met its initial burden of proof, a view of the evidence in the light most favorable to plaintiff leads the Court to conclude that she raised triable issues effect sufficient to defeat Kingston Hospital's motion. Nurse Tanious, who is competent to testify regarding the acceptable standards of nursing care, explained that a lack of proper nutrition, dehydration and immobility, all conditions which contributed to decedent's first hospitalization, are well-recognized risks for developing pressure ulcers (*see Zak v Brookhaven Mem. Hosp. Med. Ctr.*, 54 ADM 852,853 [2008]). Decedent's medical records reveal that he did indeed develop pressure ulcers at Kingston Hospital. For instance, on January 4, 2009, a nurse documented three small, Stage II ulcers on decedent's right buttock and, on January 7, 2009, three small Stage HI ulcers were again noted in the same area. In response, Kingston Hospital staff applied a moisturizing skin barrier cream, which Nurse Tanious avers was inappropriate in decedent's case because it caused the already "wet" wound to worsen.

With regard to the issue of wound prevention, plaintiff, who maintains she was present at decedent's bedside each day, testified that she never observed Kingston Hospital staff turn or rotate him. Nor does the record indicate that decedent was provided an air mattress or egg crate mattress during toe first hospitalization. Additionally, despite Kingston Hospital's assertions to the contrary, plaintiff testified that she observed three quarter-sized wounds on decedent's

buttocks on January 9, 2009, the date he was discharged, Willcare's records from January 9, 2009 further suggest that decedent had a Stage IV pressure ulcer at that time.

After decedent was discharged, he was cared for at home by plaintiff and Willcare, a home health care agency, until January 18, 2009, when he was readmitted to Kingston Hospital. After decedent was readmitted, he was examined by a wound care nurse, Erin O'Leary, who observed an "unstageable pressure ulcer on the sacrum measuring 10.0 x 11.0 cm" with eschar in the wound bed, as well as additional smaller wounds (Capobianco Aff., Ex. B). Nurse O'Leary recommended a treatment plan, which included application of hydrogel to the wound bed, a "First Step" bed (akin to an air mattress), repositioning at two hour intervals, and a surgical consult

*3 Nevertheless, at her deposition, Nurse O'Leary testified that Kingston Hospital never provided decedent with an air mattress. The medical records are also devoid of evidence that decedent was consistently repositioned at two hour intervals. Had these measures been taken, it is Nurse Tanious' opinion that further skin breakdown could have been avoided, thereby reducing decedent's pain and suffering. Based on the aforementioned unresolved issues of fact, Kingston Hospital's motion for summary judgment is denied.

III. Willcare

In support of its motion for summary judgment, Willcare submitted decedent's medical records, plaintiff's deposition testimony and that of an employee, and the affidavit of Dr. Roy Goldberg, a board certified geriatrician. Based upon his review of decedent's medical records and plaintiff's deposition testimony, Dr. Goldberg opined that decedent developed pressure ulcers during his first hospitalization at Kingston Hospital and had three ulcers present on his sacrum upon discharge. Notably, the record reflects that Willcare only provided home care to decedent for two hours every other day. Plaintiff was otherwise solely responsible for decedent's care. To that end, plaintiff confirmed that the Willcare nurse would turn decedent and apply cream to his buttocks. Plaintiff also testified that she was instructed on the proper technique for regularly turning decedent, and administering medication. As Dr. Goldberg points out, during the course of the week that decedent was home prior to being readmitted to Kingston Hospital, plaintiff observed that the marks on his buttocks had improved. For these reasons, Dr. Goldberg opined that the treatment rendered by Willcare was in accordance with good and accepted standards of medical practice, and was not the proximate cause of any injuries he allegedly sustained. As such, the Court concludes that Willcare met its initial burden of establishing entitlement to summary judgment.

In opposition, plaintiff points out numerous inconsistencies in Willcare's records concerning decedent's skin condition. For example, on January 13, 2009, January 15, 2009, and January 17, 2009, the Willcare nurse noted no redness or skin breakdown, yet when decedent arrived at Kingston Hospital on January 18, 2009, he reportedly had a large pressure ulcer on his left buttock in addition to ulcerated areas on his right buttock with radiating redness and wounds on both heels. According to Nurse Tanious, wounds of this size and severity could not have formed overnight, or even over the course of a few days. Thus, there is a question of fact as to whether Willcare's staff conducted thorough skin assessments and formulated a proper treatment plan given decedent's condition.

*4 In this regard, Lunette Krom, a registered nurse and Willcare employee, specifically testified that she did not treat decedent's buttocks on January 11, 2009, or January 13, 2009. Nurse Krom also acknowledged that she never requested an air mattress for decedent although plaintiff testified that he was complaining about his buttocks during Nurse Krom's first home visit. In Nurse Tanious' opinion, the formation of additional wounds and the spread of the existing pressure ulcer could have been avoided had Willcare's staff rendered decedent proper nursing care. Given the foregoing, the Court concludes that plaintiff has raised questions of fact sufficient to defeat Willcare's motion for summary judgment with respect to the medical malpractice claim.

In contrast, since plaintiff does not oppose the dismissal of the second and third causes of action, those prongs of Willcare's summary judgment motion are granted.

IV. ERH

On January 23, 2009, decedent was transferred from Kingston Hospital to Ellenville Regional Hospital (hereinafter ERH). In support of its motion for summary judgment, ERH submitted, among other things, decedent's medical records, deposition testimony of one of its employees, and the affidavit of Dr. Luigi M. Capobianco, a board certified geriatric physician. Upon arrival, a wound care nurse conducted a pressure ulcer assessment and documented an unstageable pressure ulcer on the decedent's sacrum, which measured 10 by 11 centimeters with purulent serosanguineous discharge and odor. The wound care nurse also observed that the wound bed was necrotic and had the appearance of "rotting flesh" (Capobianco Aff., Ex. C).

Later that day, decedent was examined by Dr. Vidyadhsra Kagali and a treatment plan was formulated, including administration of topical medications and repositioning at two hour intervals to relieve the pressure on the sacrum. Care plan meetings were regularly held by hospital staff, and decedent's hospital progress notes confirm that the treatment plan was executed as ordered. Decedent was also evaluated by a surgeon and, on February 6, 2009, the sacral wound was surgically debrided.

Consequently, it is Dr. Capobianco's opinion that decedent was "closely and appropriately treated and monitored by the medical and nursing staff throughout his course at [ERH] (Capobianco Aff., ¶ 12). Given decedent's terminal cancer and other comorbidities. Dr. Capobianco further opined that decedent was "never a candidate for wound healing" (Capobianco Aff., ¶10). The foregoing evidence is sufficient to shift the burden to plaintiff to demonstrate that triable issues of fact exist as to whether ERH departed from accepted standards of medical practice.

*5 While plaintiff does not dispute that decedent had "massive pressure ulcers" upon admission to ERH, she argues that ERH's failure to provide an air mattress or egg crate mattress caused him additional pain and suffering (Steigtgel Aff, ¶ 83). Plaintiff's claims, however, are belied by the medical records which establish that ERH issued decedent a pressure relieving mattress for both his bed and wheelchair upon admission. Following decedent's debridement surgery, the pressure relieving mattress was exchanged for an alternating air mattress to be used during the postoperative phase. Finally, when decedent was discharged, ERH ordered a hospital air mattress for use in his home. Accordingly, the Court concludes that plaintiff failed to raise a question of fact sufficient to defeat ERH's motion for summary judgment

Therefore, it is

ORDERED that defendant Somsak Bhitiyakul, MD.'s motion for summary judgment is hereby granted; and it is further

ORDERED that defendant Kingston Hospital's cross-motion for summary judgment is denied; and it is further

ORDERED that defendant Willcare's motion for summary judgment is denied, in part, and granted, in part; and it is former

ORDERED that defendant Ellenville Regional Hospital's motion for summary judgment is hereby granted.

This shall constitute the decision and order of the Court. The original decision and order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED

Dated: Kingston, New York

June 4, 2014

ENTER,

<<signature>>

CHRISTOPHERE E. CAHILL, JSC

Footnotes

- 1 Unless otherwise stated, all references to Dr. Bhitiyakul refer to Dr. Somsak Bhitiyakul. This clarification is necessary as decedent was also treated at Kingston Hospital by Bhitiyakul's son, Dr. Saharat Bhitiyakul.
- 2 In March 2013, the Court granted plaintiffs motion to name Somsak Bhitiyakul, M.D., P.C. as a defendant to the action. However, it now appears that plaintiff abandoned her vicarious liability claim as she never served tie practice with a summons and complaint In any event, given the absence of liability on the part of Dr. Bhitiyakui, no vicarious liability lies against his practice (*See Helfer v Chaptin*, 96 AD3d 1270, 1270 [2012]).

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