

ANTOINETTE EUBAIRE
VERSUS
DR. VICTOR BROWN AND
TOURO INFIRMARY

*** NO. 2000-CA-1086**
*** COURT OF APPEAL**
*** FOURTH CIRCUIT**
*** STATE OF LOUISIANA**

CONSOLIDATED WITH:
ANTOINETTE EUBAIRE
VERSUS
VICTOR BROWN, M.D.

CONSOLIDATED WITH:
NO. 2000-CA-1087

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 90-10548 C/W 92-16383, DIVISION "K-14"
HONORABLE RICHARD J. GANUCHEAU, JUDGE

JAMES F. MC KAY, III
JUDGE

(Court composed of Judge James F. McKay III, Judge Terri F. Love, Judge Max N. Tobias, Jr.)

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AFFIRMED

Plaintiff appeals the trial court's striking of a jury as well as its dismissal of her case. We affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of April 16, 1989, the plaintiff, Antoinette Eubaire, appeared at the Touro Infirmary emergency room, complaining of lower abdominal pain radiating to her lower back, nausea, dizziness and vaginal bleeding for the previous three days. The emergency room physician diagnosed a pelvic mass and felt that Ms. Eubaire needed to be admitted. Because Ms. Eubaire had no physician, the gynecologist on call, Dr. Victor Brown, saw and admitted her.

Following Ms. Eubaire's admission, her evaluation and workup indicated a uterine leiomyoma. On April 18, 1989, Ms. Eubaire underwent emergency surgery, where Dr. Brown performed a laparotomy. A large myoma was found; so, a myomectomy was done. Dr. Brown also performed

an excision of an ovarian cyst, a lysis of pelvic adhesions, and a fibromyectomy. Further exploration of the abdomen revealed a mass on the right side of Ms. Eubaire's abdominal aorta at the level of the kidney. Dr. Brown palpated the mass, which caused the patient's blood pressure and pulse to elevate a significant amount. This led Dr. Brown to suspect that the mass was a pheochromocytoma, a rare life-threatening tumor, and to cease surgical procedures after stabilizing Ms. Eubaire.

After surgery, Dr. Brown consulted with Dr. Stephen Harkness, a board certified general surgeon, and other specialists regarding the evaluation and treatment of the suspected pheochromocytoma. Dr. Harkness recommended that Ms. Eubaire be allowed to recover from surgery before attempting any further surgery, at a later date, to remove the pheochromocytoma.

On August 7, 1989, Ms. Eubaire returned to the Touro emergency room complaining of chest pains, cold sweats, and a sensation where she could feel her heart beating in her head. Due to her history of pheochromocytoma, Ms. Eubaire was admitted to be seen by Dr. Harkness. She was taken to surgery on August 11, 1989 and a right adrenal

pheochromocytoma resection was performed. Dr. Harkness discharged Ms. Eubaire on August 16, 1989.

On November 17, 1989, Ms. Eubaire once again returned to the Touro emergency room. This time she complained of vaginal bleeding or spotting accompanied by abdominal discomfort. After being evaluated by a physician at the emergency room, she was released with instructions to call her physician the following morning and to return to the emergency room only if her symptoms worsened or if new symptoms appeared. On the next day, Ms. Eubaire saw Dr. Brown at his office. Because of Ms. Eubaire's three month history of amenorrhea, a negative pregnancy test, and enlargement of her uterus, Dr. Brown recommended a laparoscopy.

Ms. Eubaire was admitted to the one-day surgery unit at Touro Infirmary on November 30, 1989 for a laparoscopy to be performed by Dr. Brown. However, the procedure was abandoned because it was impossible to visualize the pelvis, due to adhesions, and it was impossible to dissect away the pelvic organs. In the recovery room, Ms. Eubaire had some complaints of nausea. She was discharged later that same day pursuant to the orders of Dr. Brown. The one-day surgery staff, however, failed to call

Ms. Eubaire within 24-hours of the discharge to follow-up.

Over the weekend, Ms. Eubaire communicated with the emergency room at Touro and advised them that she was vomiting and experiencing severe swelling and pain. She was allegedly advised that she had “gas” and was instructed to obtain “Gas-X” at a nearby drug store. On December 5, 1989, Ms. Eubaire’s condition had deteriorated to such an extent that she returned to the emergency room at Touro, at which time she was immediately admitted. On December 7, 1989, Dr. Hoffman performed (a) a lysis of Ms. Eubaire’s abdominal adhesions, (b) an evacuation of a peritoneal hematoma, (c) an evacuation of an infected inner-loop abscess or hematoma, (d) a stripping of the small bowel exudate, (e) an appendectomy, (f) a tube gastrostomy, and (g) a left side oophorectomy. Post-operatively, Ms. Eubaire suffered from the drainage of fecal material and undigested food until her discharge from the hospital on January 5, 1990.

On May 30, 1990, Ms. Eubaire filed a petition for discovery. After some discovery was conducted, she filed a petition for damages against Dr. Brown on September 23, 1992. Dr. Brown answered the suit and requested a trial by jury. On November 20, 1992, the cases were consolidated and the

suit for damages was transferred to the division handling the discovery matter. Ms. Eubaire amended her petition for damages on March 18, 1993, naming Touro Infirmary as an additional defendant, alleging that Touro was solidarily liable with Dr. Brown in various respects. On July 13, 1994, Dr. Brown filed a motion to dismiss on the grounds that he had been discharged in bankruptcy. The trial court granted Dr. Brown's motion and dismissed him.

On October 4, 1995, Touro filed a motion to set the case for trial by jury. A jury trial order was signed by the trial court the same day. On December 19, 1996, Ms. Eubaire posted a cash bond for the jury. However, on the morning of trial, January 8, 1997, the trial court, *ex proprio motu*, struck the jury on the grounds that the request by Dr. Brown for a jury trial did not apply because Dr. Brown had been dismissed from the case. At this time, Ms. Eubaire's oral motion to impanel a jury was rejected. In response, Ms. Eubaire moved to continue the case and the trial court agreed to the continuance. The trial court denied Ms. Eubaire's request to reconsider its striking of the jury on March 20, 1997. On April 7, 1997, Ms. Eubaire moved for leave to file a superseding petition, which articulated in a single

pleading all of her claims and requested a trial by jury. On May 12, 1997, the trial court denied the motion for leave to file the superseding petition on the grounds that it was “an attempt to secure a jury trial where a trial by jury was not timely requested.” Both this Court and the Louisiana Supreme Court denied Ms. Eubaire’s applications for supervisory writs on the subject. Whereupon, Ms. Eubaire filed a motion for leave to file a supplemental and amending petition, which was also denied by the trial court.

After a bench trial held on February 2, 2000, the trial court dismissed Ms. Eubaire’s claim. The trial court found that she had “failed to prove any deviation from the standard of care by the defendant, Touro Infirmary, or by any person for whom Touro Infirmary is responsible.” Ms. Eubaire now appeals.

DISCUSSION

On appeal, Ms. Eubaire raises essentially two issues. The first is whether the trial court erred by denying her a trial by jury. The second is whether the trial court erred by not finding any negligence on the part of Touro Infirmary.

Trial By Jury

Louisiana Code of Civil Procedure Article 1733 (C) provides that “the pleading demanding a trial by jury shall be filed not later than ten days after either the service of the last pleading directed to any issue triable by a jury, or the granting of a motion to withdraw a demand for a trial by jury.” A trial judge is vested with much discretion to disallow the filing of amended pleadings if the judge finds that they are being filed solely for the purpose of circumventing time limitations for requesting a jury trial. Sharkey v. Sterling Drug, Inc., 600 So.2d 701 (La. App. 1 Cir. 1992).

In the instant case, Ms. Eubaire filed a petition for damages in 1992. In response to this petition, Dr. Brown filed an answer in which a jury trial was requested. When the plaintiff filed a supplemental and amending petition to add Touro as a defendant in 1992, she did not ask for a trial by jury. On July 13, 1994, the trial court dismissed Dr. Brown from the case. On the scheduled trial date, January 8, 1997, the trial court noting that no other party had requested a jury trial, struck the jury. On March 19, 1997, the plaintiff filed a motion for reconsideration of the denial of a jury trial, which the trial court denied on March 20, 1997. On April 7, 1997, the plaintiff filed a motion for leave to file a superseding petition, which the trial

court denied on May 12, 1997. Thereupon, the plaintiff filed an application for a supervisory writ with this Court. This Court denied the writ application, finding that there was no basis to overturn the trial court's judgment denying leave to file the "superseding petition," because the plaintiff did not timely seek review of the trial court's January 8, 1997 order striking the jury or the March 20, 1997 order denying her motion to reconsider the denial of a jury trial. Plaintiff's writ application to the Supreme Court was also denied. Accordingly, the issue regarding the jury trial is now moot.

Negligence On the Part of Touro

The trial court found that the plaintiff failed to prove any deviation from the standard of care by defendant, Touro Infirmary, or by any person for whom Touro Infirmary was responsible. Likewise, the medical review panel, which earlier considered Ms. Eubaire's complaint, found that the evidence did not support the conclusion that Touro failed to meet the applicable standard of care because: 1) it is not the hospital's responsibility to decide if an individual is a candidate for surgery; 2) there is nothing in the record, furnished to the panel for review, that would indicate Touro

Infirmary was responsible for the doctor/patient relationship; and 3) there was nothing observed by the nursing staff that would have precluded the patient's discharge per her treating physician's order. We find nothing clearly wrong or manifestly erroneous with either the trial court's or the medical review panel's findings.

Under Louisiana law, hospitals are not vicariously liable for the negligence of physicians who hold staff privileges, and it is well settled that hospitals are not insurers against physician malpractice. Sibley v. Board of Supervisors, 490 So.2d 307 (La. App. 1 Cir. 1986).

La. R.S. 9:2794 sets forth three requirements which a plaintiff must satisfy to meet its burden of proving the negligence of a nurse: (1) she must exercise the degree of skill ordinarily employed, under similar circumstances, by the members of the nursing or health care profession in good standing in the same community or locality; (2) she either lacked this degree of knowledge or skill or failed to use reasonable care and diligence along with her best judgment in the application of that skill; and (3) as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care, the plaintiff suffered injuries that would not, otherwise, have occurred.

Odom v. State, Dept. of Health & Hosp., 98-1590 (La. App. 3 Cir. 3/24/99), 733 So.2d 91, 96.

In the instant case, our review of the record indicates that Ms. Eubaire failed to meet her burden of proving negligence on the part of Touro

Infirmary or by any person for whom Touro was responsible. Although it is true that the Touro one-day surgery staff failed to adhere to its internal rule and follow up with Ms. Eubaire within 24 hours of her discharge, the testimony of the medical experts established that there was no obligation to do so and in any event the staff's failure to do so was not the cause of any injury to Ms. Eubaire. Accordingly, we find no error in the trial court's judgment.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED