

France v Packy

2012 NY Slip Op 31448(U)

May 24, 2012

Sup Ct, Suffolk County

Docket Number: 07-33165

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 12-21-11
ADJ. DATE 3-7-12
Mot. Seq. # 002 - MG

-----X		JACOB D. FUCHSBERG, ESQ.
SHAN FRANCE as Administrator of the Estate of :		Attorney for Plaintiff
INEZ MARTINEZ a/k/a INEZ MARTINEZ- :		500 Fifth Avenue
FRANCE, :		New York, New York 10110-4599
Plaintiff, :		
- against - :		KELLY, RODE & KELLY, LLP
		Attorney for Defendants Packy & Dickinson
		330 Old Country Road
		Mineola, New York 11501
THEODORE PACKY, M.D., KYLE KWOK, :		
M.D., RICHARD DICKINSON, M.D., :		ERIC T. SCHNEIDERMAN, ESQ.
JENNIFER EHLERS, M.D., and JEANMARIE :		Attorney General of the State of New York
DELISI, R.N., :		By: Bridget E. Farrell, Esq.
Defendants. :		Attorney for Defendants Kwok, Ehlers & Delisi
-----X		120 Broadway
		New York, New York 10271

Upon the following papers numbered 1 to 38 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 29; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 30 - 35; Replying Affidavits and supporting papers 36 - 38; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Kyle Kwok, M.D., Jennifer Ehlers, M.D., and Jeanmarie Delisi, R.N., for an order granting summary judgment dismissing the complaint against them is granted.

On April 28, 2005, at approximately 4:30 p.m., Inez Martinez presented at the Stony Brook University Medical Center Emergency Department with symptoms compatible with meningitis, namely, fever, headache, photophobia, stiff neck and nausea. She initially was seen by defendant Kyle Kwok, M.D., who at the time was completing a one-year rotational internship at the hospital. Dr. Kwok obtained a medical history and performed a general physical examination of Ms. Martinez. It is noted

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that Ms. Martinez' medical history included a splenectomy and lupus. A diagnostic assessment of Ms. Martinez by Dr. Kwok for a possible meningitis infection using Kernig's sign, Brudzinski's sign and neck rigidity allegedly showed no indication of meningeal inflammation. Dr. Kwok then referred Ms. Martinez to the attending physician, defendant Theodore Packy, M.D. Based on his own examination of her and the information set forth on her chart, Dr. Packy gave Ms. Martinez a differential diagnosis of viral infection. He ordered that Ms. Martinez be given medication and one liter of neurosaline intravenously to treat her nausea symptom, as well as pain medication for her headache. A complete blood count (CBC) test also was ordered.

Later that same day, when Dr. Kwok's and Dr. Packy's work shifts in the emergency department ended, responsibility for Ms. Martinez' medical care was transferred to defendant Jennifer Ehlers, D.O., who, like Dr. Kwok, was a medical intern temporarily assigned to the emergency department, and to defendant Richard Dickenson, M.D., the attending physician. At approximately 10:00 p.m., Ms. Martinez was discharged from the emergency department by Dr. Dickinson with a diagnosis of resolved headache and fever. Prior to her discharge, Ms. Martinez allegedly told both Dr. Ehlers and Dr. Dickinson that the headache was gone and that she felt well enough to go home. She was instructed at the time of discharge to take Tylenol or Motrin for the fever, to return to the hospital if the headache returned or if her symptoms changed or worsened, and to seek follow-up treatment from her physician. Dr. Dickinson's discharge instructions allegedly were given to Ms. Martinez, and to Ms. Martinez' mother, by defendant Jeanmarie Delisi, R.N., who was working that night in the emergency department as the discharge nurse.

The next day, Ms. Martinez again was suffering with symptoms of headache, neck stiffness, and nausea, as well as abdominal pain and vomiting. She presented at Good Samaritan Hospital the evening of April 29, 2006, and was admitted through the emergency department with a diagnosis of bacterial meningitis. Thereafter, in October 2007, Ms. Martinez commenced the instant action seeking damages for medical malpractice and lack of informed consent. Sadly, Ms. Martinez passed away on February 8, 2009. By order dated November 29, 2010, this Court granted a motion for leave to substitute Shan France, Administrator of the Estate of Inez Martinez, as the plaintiff in this action. Supplemental bills of particulars served in April 2011 allege that Dr. Kwok, Dr. Ehlers and Nurse Delisi were negligent, among other things, in failing to perform a lumbar spinal puncture as part of their diagnostic evaluation of Ms. Martinez' symptoms, in failing to make a proper diagnosis of meningitis, and in discharging Ms. Martinez "despite her complaints of headache, fever, chills, CBC showing left shift, generalized body aches, photophobia, nausea and vomiting, as well as a history of splenectomy."

Dr. Kwok and Dr. Ehlers now move for an order granting summary judgment dismissing the complaint against them, arguing that they cannot be held liable for medical malpractice, as they were acting only as medical interns under the direct supervision of the attending physicians, and the attending physicians' directions for Ms. Martinez' treatment did not deviate from normal medical practice. Nurse Delisi also seeks summary judgment in her favor on the complaint on the ground that she cannot be held liable for following the instructions of the attending physician responsible for Ms. Martinez' medical treatment. In support of the motion, moving defendants submit copies of the pleadings and the bills of particulars, transcripts of the parties' deposition testimony, and certified hospital records relating to Ms. Martinez' emergency department treatment at Stony Brook University Medical Center on April 28,

France v Packy
 Index No. 07-33165
 Page No. 3

2005. They also submit an expert affidavit of Dr. Thomas Kwiarkowski, the former Vice Chairman of the Department of Emergency Medicine at the Albert Einstein College of Medicine and current Assistant Dean and Professor of Emergency Medicine at the Hofstra North Shore-LIJ School of Medicine.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted standards of medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff's injury or damage (*see Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Gerrner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]; *DiMitre v Monsour*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]). On a motion for summary judgment dismissing a medical malpractice action, a defendant has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Savage v Quinn*, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Myers v Ferrara*, 56 AD3d 78, 864 NYS2d 517 [2d Dept 2008]; *Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]). If the defendant makes such a showing, the burden shifts to the plaintiff to submit evidentiary proof rebutting the defendant's prima facie showing (*Stukas v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176; *see Garrett v University Assoc. in Obstetrics & Gynecology, P.C.*, __ AD3d __, 2012 NY Slip Op. 03405 [2d Dept 2012]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Guzzi v Gewirtz*, 82 AD3d 838, 918 NYS2d 552 [2d Dept 2011]; *DiMitre v Monsour*, 302 AD2d 420, 754 NYS2d 674).

As to the applications by Dr. Kwok and Dr. Ehlers for summary judgment dismissing the complaint against them, a physician owes a patient three basic duties of care: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the physician practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Pike v Honsinger*, 155 NY 201, 49 NE 760 [1898]). However, a resident or medical intern who assists a physician perform a medical procedure or implement a treatment plan, and who does not exercise any independent medical judgment, cannot be held liable for malpractice if the supervising physician's directions do not so greatly deviate from normal practice that the intern or resident should be held liable for failing to intervene (*Soto v Andaz*, 8 AD3d 470, 471, 779 NYS2d 104 [2d Dept 2004]; *see Bellafiore v Ricotta*, 83 AD3d 632, 920 NYS2d 373 [2d Dept 2011]; *Cham v St. Mary's Hosp. of Brooklyn*, 72 AD3d 1003, 901 NYS2d 65 [2d Dept 2010]; *Costello v Kirmani*, 54 AD3d 656, 863 NYS2d 262 [2d Dept 2008]; *Muniz v Katlowitz*, 49 AD3d 511, 856 NYS2d 120 [2d Dept 2008]).

Here, the submissions in support of the motion are sufficient to establish a prima facie case that Dr. Kwok and Dr. Ehlers are entitled to judgment in their favor as a matter of law (*see Bellafiore v Ricotta*, 83 AD3d 632, 920 NYS2d 373; *Costello v Kirmani*, 54 AD3d 656, 863 NYS2d 262; *Muniz v Katlowitz*, 49 AD3d 511, 856 NYS2d 120). In particular, the affidavit of Dr. Kwiarkowski shows that while Dr. Kwok and Dr. Ehlers made assessment evaluations of Ms. Martinez' condition, Dr. Packy and Dr. Dickinson, as the attending physicians, were responsible for conducting independent examinations of Ms. Martinez, determining a diagnosis, and devising a plan of treatment. According to Dr.

Kwiarkowski, as first-year medical interns, Dr. Kwok and Dr. Ehlers did not have the authority to make diagnoses, to order medication or tests, or to order the discharge of a patient. He asserts that Dr. Kwok's presentation to Dr. Packy following his initial medical history interview and examination of Ms. Martinez was appropriate, that the results of the blood studies ordered by Dr. Packy were within normal limits for a patient such as Ms. Martinez, and that there is no evidence that Ms. Martinez had active meningitis at the time of her discharge. Moreover, Dr. Kwiarkowski avers that "[t]he risk of a patient such as Ms. Martinez developing meningitis is a highly sophisticated item of medical knowledge and not one that a junior resident would be expected to know."

Further, the deposition testimony submitted with the moving papers shows that while Dr. Kwok performed the initial evaluation and Dr. Ehlers performed follow-up assessments of Ms. Martinez' condition, neither one ordered medical tests or medication for her, or directed that she be discharged from the emergency room. Rather, the attending physicians conducted their own examinations of Ms. Martinez, arrived at a diagnosis and treatment plan, and supervised the treatment given during the April 28 admission at the emergency department of Stony Brook University Hospital. The deposition testimony of Dr. Dickinson also shows that he made the determination to discharge Ms. Martinez after she reported that her headache was gone, and that, while her history of splenectomy increased her risk of bacteremia and sepsis, there are no special requirements or guidelines for evaluating emergency patients who have had a splenectomy.

As to the summary judgment application by Delisi, the primary duty of a hospital's nursing staff is to follow the physicians' orders (*see Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 292 NYS2d 440 [1968]). A hospital generally is shielded from liability when its employees follow the orders of a private attending physician unless such physician's orders "are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into their correctness" (*Filippone v St. Vincent's Hosp. & Med. Ctr. of New York*, 253 AD2d 616, 618, 677 NYS2d 340 [1st Dept 1998]; *see Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 292 NYS2d 440; *Cook v Reisner*, 295 AD2d 466, 744 NYS2d 426 [2d Dept 2002]; *Poblocki v Todoro*, 49 AD3d 1239, 856 NYS2d 327 [4th Dept 2008]; *Warney v Haddad*, 237 AD2d 123, 654 NYS2d 138 [1st Dept 1997]). A nurse also may be held liable for his or her independent acts of medical malpractice (*Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885 [1985]; *see Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d 567 [2d Dept 2011]; *Applewhite v Accuhealth, Inc.*, 81 AD3d 94, 915 NYS2d 223 [1st Dept 2010]). It is noted that an act constitutes medical malpractice "when it can be characterized as a 'crucial element of diagnosis and treatment' and 'an integral part of the process of rendering medical treatment'" (*Spiegel v Goldfard*, 66 AD3d 873, 874, 889 NYS2d 45 [2d Dept 2009], *lv denied* 15 NY3d 711, 910 NYS2d 36 [2010], *quoting Bleiler v Bodnar*, 65 NY2d 65, 72, 489 NYS2d 885; *see Pacio v Franklin Hosp.*, 63 AD3d 1130, 882 NYS2d 247 [2d Dept 2009]).

As with Dr. Kwok and Dr. Ehlers, the evidence submitted in support of the motion establishes a prima facie case that Nurse Delisi appropriately followed the orders of the attending physician, Dr. Dickinson, and that she did not deviate from accepted medical practice (*see Sela v Katz*, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; *Martinez v La Porta*, 50 AD3d 976, 857 NYS2d 194 [2d Dept 2008]). Moving defendants, therefore, shifted the burden to plaintiff to present evidentiary proof in admissible form sufficient to raise triable issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d

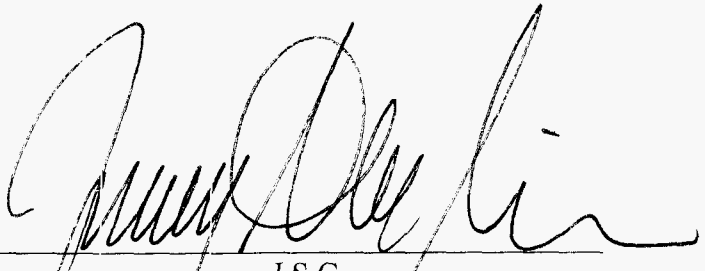
France v Packy
Index No. 07-33165
Page No. 5

923 [1986]; *Stukas v Streiter*. 83 AD3d 18, 918 NYS2d 176).

In opposition to the motion, plaintiff failed to submit evidence raising a triable issue as to whether movants breached a duty of care owed to Ms. Martinez. Significantly, the redacted affidavit of plaintiff's expert included with the opposition papers is insufficient to defeat summary judgment, as plaintiff failed to submit an unredacted original affidavit of its expert to the Court for in camera inspection or to explain the failure to identify such expert by name (*see Rose v Horton Med. Ctr.*, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]; *Cook v Reisner*, 295 AD2d 466, 744 NYS2d 426; *Marano v Mercy Hosp.*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; *Kruck v St. John's Episcopal Hosp.*, 228 AD2d 565, 644 NYS2d 325 [2d Dept 1996]).

Accordingly, the motion for summary judgment dismissing the complaint as against defendants Dr. Kwok, Dr. Ehlers and Nurse Delisi is granted. The action is severed and continued as against the remaining defendants.

Dated: MAY 24 2012



J.S.C.
HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION