SHORT FORM ORDER INDEX NO.: 2009-14305

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present: **HON. JOHN J.J. JONES, JR.**
Justice

INQUEST DATE: 12-19-2012

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JOANN CORSIATTO, As Administratrix of the Goods, Chattells and Credits of VERONICA PECORARO, and JOANN CORSIATTO, Individually,

Plaintiff,

-against-

JOSEPH R. MADDALONE, JR.,

Defendant.

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DECISION AFTER INQUEST

The following is the decision and order rendered upon an inquest in an action alleging legal malpractice against the defendant, Joseph R. Maddalone, Jr. ["the defendant"]. [1] By order dated December 13, 2009, this matter was set down for an inquest upon the filing of a Note of issue and the payment of the appropriate fee. On January 15, 2013, the plaintiff, Joann Corsiatto, as Administratrix of the Goods, Chattels and Credits of Veronica Pecoraro, and Joann Corsiatto, Individually, ["the plaintiff" or "Corsiatto"], submitted papers in lieu of conducting an inquest. In support of the relief sought, the plaintiff has submitted, *inter alia*, the affirmation of Vincent M. Amicizia, Esq., plaintiff's affidavit dated January 15, 2013, the affidavit of Paul Knieste, R.N., dated October 16, 2012, photographs of the decedent's decubitus ulcer, pressure ulcer or bedsore, and various medical records of Veronica Pecoraro in CD Rom form.

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[1] The defendant was disbarred upon his guilty plea to a felony in an unrelated matter on April 15, 2008.

The legal malpractice action was commenced on April 14, 2009. The underlying claim was for medical malpractice, neglect and mistreatment of Veronica Pecoraro, the plaintiff's mother, ["the decedent"], while the decedent was a patient at United Presbyterian Residence ["UPR"]. The decedent was admitted to UPR in August of 1994. She presented with a history of having suffered a stroke and congestive heart failure, was oxygen dependent and diabetic. Upon admission to UPR she had a Stage I-II pressure ulcer in the sacral area in the beginning stages, also referred to as a bedsore or decubitus ulcer.

The plaintiff notified various individuals and entities including the attending physician at UPR, Dr. Chaudry, as well as the Department of Health in Hauppauge, and the New York State Ombudsman for the decedent's floor at UPR, about what the plaintiff considered to be deplorable conditions at UPR. Those conditions included the lack of linens and large diapers, inappropriate meals given to the decedent, a diabetic, and deficient care of the decedent's hygiene needs, purportedly to little or no avail. As time went on the plaintiff contends the decedent suffered physical discomfort, weight loss, frustration and loss of dignity until her death on February 9, 1996.

On January 9, 1996, the plaintiff was notified by UPR that the decedent had a Stage II pressure ulcer the size of a quarter and that a special wound care nurse was going to debride the wound the following day. The plaintiff attests that despite her complaints to Dr. Chaudry and a UPR administrator, the wound was not debrided and the decedent was forced to endure severe pain.

Two-and-a-half weeks later on January 27, 1996, the decedent was taken to the hospital with a high fever. According to the plaintiff, the emergency room doctor commented that the plaintiff's now Stage IV pressure ulcer was the worst he had ever seen. Notably, the plaintiff's submissions do not include an affidavit from the emergency room physician who attended to the decedent. In any event, the decedent underwent two surgeries and her condition was critical. The decedent continued to cry out in pain until her demise on February 9, 1996 from sepsis.

The plaintiff contacted the defendant attorney in July of 1996 to pursue legal action against UPR. Despite numerous meetings with the defendant and his staff, the defendant ultimately admitted to the plaintiff that he failed to commence a timely action against UPR.

This action for legal malpractice was commenced on April 14, 2009. On this inquest the plaintiff seeks $1,000,000 in compensatory damages, $1,000,000 in punitive damages, and interest on the award from the date of the legal malpractice. In support of the application the plaintiff submitted, *inter alia*, the affidavit of Paul Knieste, R.N., dated October 16, 2012 ["the Knieste affidavit"] to express an expert opinion based on the decedent's medical records regarding her care and management while at UPR. The Knieste affidavit does not include Knieste's educational background or a description of credentials qualifying Knieste as an expert on wound care.

In any event, according to the Knieste affidavit, on admission in 1994 the decedent presented with a history of congestive heart failure, chronic obstructive pulmonary disease, non-insulin dependent diabetes mellitus, senile dementia-Alzheimer type, and cerebro-vascular accident, a/k/a stroke. The intake record also notes the presence of a Stage I-II sacral decubitus. The "Stage" refers to the level of progression of the bedsore/pressure ulcer. According to the Knieste affidavit, the decedent's early management at UPR was unremarkable.

With time, the decedent's mental status deteriorated; the decedent refused food, medications and fluids. The decubitus management was frequently changed as the decedent's condition worsened. By January of 1996, it was clear that an infection was present. The decedent's skin care flow sheets indicated a worsening decubitus of which UPR staff was aware as evidenced by changes in the Doctor's Order Sheet for decubitus management as well as the skin assessment sheets.

The medical record indicates that although a wound care specialist was ordered, the decedent was never seen. No order was written for culture of the wound at the decubitus site; no orders were made to obtain blood cultures, both departures from good and accepted medical standards. According to Knieste, the poor management of the decedent's Stage IV pressure sore was contrary to good and accepted medical practice and a contributing cause of the formation of a Stage IV pressure ulcer, the decedent's continued suffering, and death. The decedent's discharge note contained a diagnosis of sepsis.

To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages (***Siwiec v. Rawlins,*** 2013 WL 518690 [2d Dept.], *citing* ***Held v. Seidenberg***, 87 A.D.3d 616, 617, 928 N.Y.S.2d 477, *quoting* ***Dempster v. Liotti***, 86 A.D.3d 169, 176, 924 N.Y.S.2d 484).

To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence (*see* ***Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer***, 8 N.Y.3d 438, 441, 835 N.Y.S.2d 534, 867 N.E.2d 385; ***Rosenbaum v. Sheresky Aronson Mayefsky & Sloan, LLP***, 100 A.D.3d 731, 954 N.Y.S.2d 123). Conclusory allegations of damages or injuries which are predicated on speculation are insufficient (*see* ***Wald v. Berwitz***, 62 A.D.3d 786, 787, 880 N.Y.S.2d 293).

The issue of causation has been resolved in the plaintiff's favor due to the defendant's default, that is, it is established that the plaintiff would have prevailed in the underlying action against UPR. However, it is not established that the plaintiff would have prevailed on all three claims: medical malpractice, negligence and the statutory claim under Public Health Law § 2801-d(1). At least one court has addressed the distinction between medical malpractice and negligence claims on the one hand, and a statutory cause of action under the Public Health Law on the other. *See* ***Butler v. Shorefront Jewish Geriatric Center***, 33 Misc.3d 686, 693, 932 N.Y.S.2d 672 (Kings Sup. Ct. 2011).

Public Health Law § 2801-d (1) states, in relevant part, that "[a]ny residential health care facility that deprives any patient of said facility of any right or benefit . . . shall be liable to said patient for injuries suffered as a result of said deprivation." Predicates for a Public Health Law cause of action include violations of 10 NYCRR 415.12, 415.12 (a) (1); (c) (2); (e) and (m). Section 415.12 requires that each resident shall receive, and the facility shall provide, the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, in accordance with the comprehensive assessment and plan of care, subject to the resident's right of self-determination. The facility shall ensure that a resident's abilities in activities of daily living do not diminish, unless circumstances of the individual's clinical condition demonstrate that diminution was unavoidable. (*see* § 415.12 [a] [1].) A resident having pressure sores shall receive necessary treatment and services to promote healing, prevent infection and prevent new sores from developing (*see* § 415.12 [c] [2].)

Both state and federal regulations provide that residential facilities must ensure that a patient who enters without bed sores does not develop them unless, because of the patient's clinical condition the bed sores were unavoidable and the facility made every reasonable effort to prevent them, and if bed sores do develop, the patient must receive the proper treatment to promote healing, prevent infection and prevent further sores from developing (*see*, 10 NYCRR 415.12[c]; CFR §483.25[a] [1]).

42 CFR 483.25 (c), is equivalent to 10 NYCRR 415.12 (c), requiring that the facility must ensure that a resident who enters the facility without pressure sores does not develop same and that a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

There is no issue of fact in light of the defendant's default and the affidavits submitted on the inquest, that there was a violation of the Public Health Law to the extent that UPR was aware of the decedent's worsening condition, ordered a consult with a wound care specialist, yet never provided such a consult. It has also been established that diagnostic testing was not conducted with a view toward initiating the appropriate antibiotic therapy to combat the infection. It is also beyond dispute that the decedent ultimately died with a final diagnosis of sepsis.

The court is obliged to award an amount in compensatory damages that does not materially deviate from what would be considered "reasonable compensation" under the circumstances given the plaintiff's injuries (***CPLR*** 5501 (c); ***Shurgan by Shurgan v. Tedesco,***179 A.D.2d 805, 578 N.Y.S.2d 658 [2d Dept.1992]). Although the plaintiff assented to conduct the inquest "on papers", the court has not been provided with any comparable awards or verdicts for similar injuries of comparable duration to assist the court's determination of what can be considered reasonable compensation for the decedent's pain and suffering.

The court has found several cases where patients have endured pressure sores similar to that endured by the decedent. For example, in ***Parson v. Interfaith Medical Center***, a jury verdict of $1,000,000 was reduced to $400,000 to compensate the plaintiff's decedent for the

mismanagement of her numerous bedsores that were a cause of her death (***Parson v. Interfaith Medical Center***, 267 A.D.2d 367, 700 N.Y.S.2d 224 [2d Dept. 1999]).

In ***Messina v. DiBlasi***, Richmond Supreme, Index No. 104742-07, after a four week trial in 2011 a jury awarded the plaintiff patient $1,000,000 for past pain and suffering for the mismanagement of bedsores that eventually resulted in an infection, requiring five debridement procedures and a hospitalization that extended for twelve months. Ultimately, one bedsore resulted in the dislocation of the plaintiff's hip.

In ***Manas v. Peninsula Hospital Center Peninsula Center of Extended Care & Rehabilitation***, Queens Supreme, Index No. 9949-07, the decedent developed bedsores and osteomyelitis, eventually requiring the amputation of her legs after a six month hospitalization. The plaintiff claimed that the bedsores and osteomyelitis were not timely detected or treated and that prompt treatment would have preserved her legs. Eventually the decedent there developed sepsis. The infection could not be reversed and it led to cardiac arrest and death. The matter was settled before the trial for $500,000.00.

In ***Questellas v. Highland Care Center, Inc. and Franklin Hospital Medical Center***, Queens Supreme, Index No. 23233-07, the decedent was hospitalized for congestive pulmonary failure, pulmonary edema, and diabetes. Those conditions increased the decedent's risk of developing decubitus ulcers, or bedsores, particularly in the sacral area. The sore worsened during the decedent's stay at the nursing home. The decedent died a year later for causes unrelated to the bedsore. The matter was settled for $305,000.

Finally, in ***Alvarez v. Beth Abraham Health Svcs.***, Bronx Supreme, Index No. 7124-2005, during the plaintiff-quadriplegic's 28 months of residency he developed Stage II bedsores on his feet and heels and a stage IV bedsore on his buttocks requiring surgical debridement and sixteen weeks of treatment that included the application of topical ointments. The jury awarded the plaintiff $500,000 in past pain and suffering.

Here, both the plaintiff's and Knieste's affidavits focus on the mismanagement of the decedent's pressure ulcer between January 9, 1996, and February 9, 1996, a considerably shorter period of time than the previously cited cases. For approximately one month the decedent's condition worsened to the point that the need for a wound care consult was recognized by UPR personnel, but not provided.

Informed by the foregoing, and in light of the evidence adduced by the plaintiff demonstrating a violation of the Public Health Law in the management of the decedent's Stage IV bedsore for a period of one month, the court believes that $200,000 does not materially deviate from what could be considered reasonable compensation given that the decedent's medial condition made her a high risk for decubitus ulcers, that on admission to UPR she presented with a Stage I-II pressure sore, and that the proof pointed out UPR's failures to properly manage the bedsore that occurred in the approximately four weeks that preceded her death.

As part of her claims, plaintiff also seeks an award of punitive damages pursuant to Public Health Law § 2801-d (2). In relevant part the statute provides that "where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient, punitive damages may be assessed."

In particular, plaintiff alleges that UPR violated decedent's rights by failing to provide wound care to a decubitus ulcer in the sacral area and by failing to follow through with a wound care consult and appropriate treatment. She claims that as a result of these failures, the decedent's wound did not improve and became infected, causing sepsis, respiratory failure and death.

There is little direction as to the burden under Public Health Law § 2801-d (2). Trial courts have held that the standard to recover punitive damages under § 2801-d (2) "appear[s] to be a less stringent standard than that under the law governing malpractice" (***Osborne v Rivington House-Nicholas A. Rango Health Care Facility***, 19 Misc. 3d 1132[A], 2008 NY Slip Op 50975[U], *6 [NY Sup. Ct. 2008].) In contrast, a claim for punitive damages pursuant to the Public Health Law was dismissed where plaintiff presented no evidence of "reckless or wanton conduct that might support an award of punitive damages." (***Passet v Menorah Nursing Home, Inc.***, 16 Misc 3d 1117[A], 2007 NY Slip Op 51452[U], *3 [N.Y. Sup. 2007], *citing* ***Morton v Brookhaven Mem. Hosp.***, 32 A.D.3d 381, 8320 N.Y.S. 2d 294 [2d Dept 2006] [a medical malpractice case].)

"The most direct way to effectuate the will of the Legislature is to give meaning and force to the words of its statutes." (***Desiderio v Ochs***, 100 NY2d 159, 169 [2003].) Thus, "where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning." (***Kash v Jewish Home & Infirmary of Rochester, N.Y., Inc.***, 61 A.D.3d 146, 149 [4th Dept .2009], *quoting* ***Pultz v Economakis***, 10 N.Y.3d 542, 547 [2008].)

In order to prove a claim seeking punitive damages pursuant to Public Health Law § 2801-d (2), the conduct of the staff of a nursing home must have been voluntary and intentional or must have created a substantial and unjustifiable risk of harm with a conscious disregard of, or indifference to, that risk. Simple negligence will not do. ***Public Health Law*** § 2801-3(2); ***Butler v Shorefront Jewish Geriatric Center, Inc***. 33 Misc.3d 686, 932 N.Y.S.2d 672 (Kings Sup. Ct. 2011). See *also*, ***Morton v. Brookhaven Memorial Hospital***, *supra* (reversing order that permitted medical malpractice plaintiff to amend complaint to allege a claim for punitive damages where no evidence of willful or wanton negligence on part of physician).

In the absence of any allegations that rise to the level of willfulness or recklessness on the part of particular UPR personnel in the plaintiff's affidavit or the affidavit of Paul Knieste, R.N., and considering the high risk factors which indisputably contributed to the decedent's risk of developing decubitus ulcers, this court declines the invitation to award punitive damages. Therefore, plaintiff's claim for punitive damages is dismissed.

CPLR § 5001 "operates to permit an award of prejudgment interest from the date of the accrual of the malpractice action in actions seeking damages for attorney malpractice" (***Barnett***

v. Schwartz, 47 A.D.3d 197, 208, 848 N.Y.S.2d 663 [2d Dept. 2007] (quotations omitted); accord ***Baker v. Dorfman***, 239 F.3d 415, 426 [2d Cir.2000]). The plaintiff seeks interest at the rate of 9% from the date of the defendant's legal malpractice which the plaintiff suggests would be the date when the underlying period of limitation for medical malpractice actions expired, July 27, 1998.

Using that accrual date the plaintiff's award is increased by an additional $263,411.10 ***(Lovino, Inc. v. Lavallee Law Offices***, 96 A.D.3d 910, 948 N.Y.S.2d 303 [2d Dept. 2012]) (holding prejudgment interest awarded on jury verdict did not constitute double recovery, since the "award of interest is founded on the theory that there has been a deprivation of use of money or its equivalent").

The plaintiff is directed to submit a judgment to the Clerk of Suffolk County awarding $200,000 in damages, plus $263,411.10 in prejudgment interest for a total judgment of $463,411.10 and that the plaintiff shall have judgment therefor.

DATED: 13 March 2013

HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION