

Burry v Wayne County Bd. of Supervisors
2019 NY Slip Op 34043(U)
December 13, 2019
Supreme Court, Wayne County
Docket Number: 80326
Judge: Daniel G. Barrett
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At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 16th day of October, 2019.

PRESENT: Honorable Daniel G. Barrett
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

RENEE BURRY, INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF
BEULAH BETTS,

Plaintiffs,

DECISION
Index No. 80326

-vs-

WAYNE COUNTY BOARD OF SUPERVISORS,
COUNTY OF WAYNE, WAYNE COUNTY
NURSING HOME, NICOLE WISE,
NURSEFINDERS, LLC AND
ARUN K. NAGPAUL, M.D.,

Defendants

The Plaintiff, Renee Burry, individually and as Executrix of the Estate of Beulah Betts, and the Wayne County Board of Supervisors, County of Wayne, Wayne County Nursing Home, [hereafter Defendant], have filed applications for various forms of relief.

I. ORDER TO SHOW CAUSE FILED BY THE PLAINTIFF

The Plaintiff seeks an Order compelling the Defendant to disclose the following documents:

- 1. The closet sheet or card care relative to Beulah Betts;

2. Any documentation, including but not limited to cell phone records, identifying (1) when a bed alarm, if any, was ordered, (2) when an assessment was completed identifying that Beulah required a bed alarm, (3) when a bed alarm was in use with respect to Beulah, and (4) when the bed alarm sounded;
3. Accident/incident log for Beulah Betts;
4. SBAR (blank and any completed form with respect to Beulah Betts);
5. Care path card (blank and any completed form relative to Beulah Betts);
6. Change in condition package (blank and completed with respect to Beulah Betts).

The first item to be disclosed in this application is the closet sheet or card care relating to Beulah Betts. Plaintiff acknowledges receipt of a "closet care plan" but it is undated. Beulah Betts had three different stays in the nursing home in 2019 and the Plaintiff cannot link it to the October 26, 2015 stay. Defendant should attempt to provide a closet care plan for the October 26th stay.

The second item requested deals with bed alarms. The Defendant has previously disclosed they are not in possession for any order for a bed alarm, bed alarm assessment, and cell phone records regarding a bed alarm. Plaintiff is requesting any documentation showing when a bed alarm was in use and when the bed alarm sounded.

The next item requested is the accident/incident log for Beulah Betts. The Defendant submitted accident/incident reports for four falls: October 30; November 1; November 2; and November 12. A fifth fall is referenced in the MDS records occurring sometime between November 4 and November 8. There is no record for this fall. Defendant should try to find the log relative to the fifth fall.

SBAR form - The Defendants were unable to locate this form. Plaintiff is requesting a blank form.

Care path card - This record was provided.

Change in condition package - Defendant should provide a blank form and a completed form.

These requests should be complied by February 4, 2020. If the Defendant does not possess any item, it should simply state it does not possess it.

II

MOTION BY PLAINTIFF

The Plaintiff seeks summary judgment on the issue whether the Defendants violated NYCRR 415.22 by failing to maintain a complete and accurate medical record and for an Order to remedy spoliation by striking Defendant's pleadings and defenses, imposing judgment and scheduling an inquest for damages including attorney's fees. Alternatively, Plaintiff asked the Court to remedy the spoliation by (1) an adverse inference in the jury charge; (2) an Order of Preclusion prohibiting the defendants from offering at trial any documents not disclosed prior to February 4, 2020 and (3) an Order of Preclusion prohibiting the defendants from benefitting from its regulatory violation by using at trial the absence of documentation to support any defense.

The motion for partial summary judgment on the issue whether the Defendant violated NYCRR 415.22 is denied. Liability under Public Health Law §2801-d is not based on a deprivation from accepted standards of medical practice or a breach of duty of care (see Novich v South Nassau Community Hosp., 136 A.D. 3d 999, 1001 [2nd Dept 2016]). Rather liability under the statute "contemplates injury to the patient caused by the deprivation of right conferred by contract, statute, regulation, code or rule, subject to the

defense that the facility exercise all care reasonably necessary to prevent and limit the deprivation and injury to the patient” (Moore v St. James Health Care CTR., LLC, 141 A.D. 3d 701, 703 [2d Dept 2016]).

There is an issue of fact as to whether the Defendants exercised all care reasonably necessary to prevent and limit the deprivation and injury to the Plaintiff which requires the denial of the motion.

MISSING DOCUMENTS

There is no Fall Risk Assessment for the admission on October 15 or October 26. The nursing home’s policy ARC-109A dictates that all residents will be assessed for fall risk on admission using the Fall Risk Assessment. Mr. Vinnik, the Administrator for Wayne County Nursing Home, testified that the Fall Risk Assessment was not complete for the October 26 admission and this was not a violation of New York State regulations. He testified that the regulations require upon admission the individual’s fall history needs to be addressed, but it does not require a specific document to be completed. He further testified that a proper referral was made to PYOT to address her fall history.

CCP Committee - must review each fall with approaches to prevent further falls pursuant to policy A-08 titled Resident Comprehensive Care Plan/Committee. Policy A-08 directs the CCP Committee to document its activities by completing and signing a Care Plan Conference Summary form. This was not done. Dr. Nagpaul testified if the Care Committee did not meet in person they could discuss approaches to prevent falls. The progress notes indicate that she had fallen between October 26, 2015 and November 12, 2015. Incident reports were completed for each of the falls documented in the notes (except for the fifth fall). Dr. Nagpaul’s progress note of November 3, 2015, indicates that Ms. Betts had fallen three times. As a result of these falls plans were implemented to address future falls. Ms. Betts’ room assignment was changed to a room nearer to the nurses’ station. A sign was placed over the bed instructing Ms. Betts to use the “call bell” before getting out of bed. Dr. Nagpaul recommended using the call bell and the sign above her bed.

Bed Alarms - Policy number N-65 indicates that nursing will complete a Resident Safety and Fall Assessment for the need of alarms with appropriate documentation and follow up. This will be discussed with the CCP Committee team as needed. No care plan conference summary is found within Beulah Bett's records to indicate an assessment for the use of a bed alarm was discussed with the CCP Committee.

Resident nursing instructions - According to policy A-08, all residents will have an interim care plan developed on admission (withing 24-72 hours). The nursing instructions will act as an interim care plan. The Defendant Wayne County produced two different versions of the same document purporting to be a resident care instruction. The staff who cared for Beulah Betts testified they did not recognize these "resident nursing instructions". The two resident nursing instructions generated reflect that Beulah Betts was 83 years old on one sheet and 85 years old on the other sheet. She was actually 81 years old at the time of her confinement.

SBAR form - These are used to communicate information to the attending physicians. Nursing was responsible for completing the SBAR form. The Defendant could not locate the SBAR form for Beulah Betts.

Stop and Watch Documentation - It is an early warning communication to alert certified nursing assistants or other personnel can use to alert a nurse if they notice something different in a resident's daily care. The Defendant could not locate the stop and watch documentation.

Urinary Analysis - Dr. Nagpaul ordered urinary analysis on November 13, 2015. The November 6 sample was found to be contaminated so another test was ordered. There is no documentation relative to the second sample.

Laboratory Work Flow Sheet - Missing

Wandering/Elopement Risk Assessment Tool - Missing

Safety Device/Restrain Nursing Assessment Tool - Missing

Worksheet for Risk Assessment of Skin - Missing

Hydration Check List - Missing

Pain Assessment Tool - Absent

Incident/Accident Log - Four falls are accounted for but the fifth fall is not recorded.

The Plaintiff has requested that partial summary judgment be granted and the Defendant's Answer be stricken for failure to provide the missing items. The Court is denying this application. The Court is granting the Defendant until February 4, 2020 to provide any of these missing documents. Their failure to do so will result in preclusion of these items coming in as evidence at the time of trial. At this point and time the Court is not making a ruling on the inference charge. This will be addressed after the completion of proof.

The Plaintiff seeks an Order of Preclusion prohibiting the Defendant from benefitting from its regulatory violation by using at trial the absence of documentation to support any defense. The Court is not ruling on this application. Plaintiff has the right to object at the time of trial. The Court will not issue an Order at this time but will entertain Plaintiff's objection to this type of evidence at time of trial.

III CROSS MOTION OF THE DEFENDANT

The Defendant seeks multiple forms of relief:

1. An Order striking Plaintiff's Complaint and Bill of Particulars of all theories of liability and measure of damages that were not raised in the Notice of Claim;

2. Precluding Plaintiff from adducing any proof at trial relative to the theories not raised in the Notice of Claim;
3. Striking Plaintiff's claim for punitive damages;
4. Seeking an Order denying Plaintiff's Motion striking Defendant's Answer as a remedy for spoliation.

The facts of this case are unique in that the Plaintiff made an application to the Court for permission to serve a late Notice of Claim. The Court application contained the Notice of Claim as well as the supporting documentation provided by Plaintiff's counsel. Therefore the Defendant was aware of the contents of the Notice of Claim as well as the materials mentioned in the application to serve a late Notice of Claim. The Notice of Claim sets forth that the Plaintiff was a resident of the nursing home on three separate occasions in 2015. The nature of the claim is for personal injuries, including conscious pain and suffering and death as a result of the negligence and violations of Article 28 of the Public Health Law and statutory claims arising from Article 28 of the Public Health Law. Plaintiff is seeking compensatory damages, punitive damages and an award of attorney's fees, for wrongful death and claims for loss of guidance, companionship and support. The manner in which the claim arose is described as a failure to perform an adequate Fall Risk Assessment, failure to identify and appreciate the fall risk presented by Ms. Betts' physical and cognitive limitations and behaviors; failure to generate a care plan adequate to address her limitations, needs and fall risk, and failure to prevent her fall on November 12, 2015.

The Defendant request an Order striking all portions of the Plaintiff's Complaint and Bill of Particulars that exceed the scope of the Notice of Claim. Another unique aspect of this case is that the Plaintiff requested all medical records in a timely fashion. Noticing some records were missing, counsel for Plaintiff made a good faith followup request for medical records. At this stage we are aware that the Defendant did not provide all records and in some cases did not prepare records one would anticipate

pursuant to the policies of the nursing home. As part of the remedy to address the failure to produce documents, the Court is permitting the Plaintiff latitude in the presentation of proof. However, based on what has been submitted the following items will not be permitted in the Bill of Particulars and proof will not be admitted at trial relative the following items::

1. Negligently and carelessly failing to exercise due care in hiring of agents, servants and employees;
2. Negligently and carelessly failing to supervise and monitor defendant's agents, servants and employees;
3. Negligently and carelessly failing to secure adequate funding to operate;
4. Negligently and carelessly failing to provide adequate staffing;
5. Negligently and carelessly failing to train agents, servants and employees.

The Defendant contends that only one fall is mentioned in the Notice of Claim and therefore any mention of any other fall should be precluded. In the application for the late Notice of Claim there are references to multiple falls . The Plaintiff will be allowed to discuss these multiple falls at the time of trial.


Defendant requests that 10 NYCRR 415.22 be stricken as it is not mentioned in the Notice of Claim. This particular statute was mentioned in the supporting papers for the application of the Lake Notice of Claim and will be permitted at trial.

The Defendant requests that the Plaintiff be precluded from seeking damages for deprivation of society and loss of enjoyment of life's pleasures. This request is denied. The loss of society is intertwined with the pleaded loss of companionship and support.

Relative to claim for punitive damages, Plaintiff and Defendant agree that punitive damages are not allowed against a municipal entity.

This constitutes the Decision of the Court. Counsel for Plaintiff to prepare an Order consistent with this Decision.

Dated: December 13, 2019
Lyons, New York

A handwritten signature in black ink, appearing to read "Daniel G. Barrett", written over a horizontal line.

Daniel G. Barrett
Acting Supreme Court Justice