

**Hutter v. St. Charles Hospital and Rehabilitation Center, 603454/14**

September 12, 2016

- Supreme Court, Nassau County, Trial/IAS Part 6
- 603454/14
- Justice Thomas Feinman
- For Plaintiff: Attorneys for Plaintiff, Frank Hutter: Law Offices of Dennis J. Kelly, P.C.
- For Defendant: Attorneys for Defendant, St. Charles Hospital and Rehabilitation Center: Montfort, Healy, McGuire & Salley, LLP.

Cite as: Hutter v. St. Charles Hospital and Rehabilitation Center, 603454/14, NYLJ 1202767010738, at \*1 (Sup., NA, Decided August 24, 2016)

**CASENAME**

Frank Hutter, Plaintiff v. St. Charles Hospital and Rehabilitation Center, Defendant

603454/14

Justice Thomas Feinman

Decided: August 24, 2016

**ATTORNEYS**

Attorneys for Plaintiff, Frank Hutter: Law Offices of Dennis J. Kelly, P.C.

Attorneys for Defendant, St. Charles Hospital and Rehabilitation Center: Montfort, Healy, McGuire & Salley, LLP.

The following papers read on this motion:

Notice of Motion and Affidavits X

Affirmation in Opposition X

Reply Affirmation X

**RELIEF REQUESTED**

The defendant, St. Charles Hospital and Rehabilitation Center, (hereinafter referred to as the "Rehabilitation Center"), moves for an order pursuant to CPLR §3212 dismissing plaintiff's complaint on the ground that plaintiff's action sounds in medical malpractice and not negligence, and as so, is time-barred. The plaintiff submits opposition. The defendant submits a reply affirmation.

**BACKGROUND**

The plaintiff initiated this action to recover for personal injuries sustained on July 20, 2011 when the plaintiff fell during a physical therapy session at the Rehabilitation Center.

The plaintiff initiated this action asserting one cause of action for negligence. The plaintiff, by way of Verified Bill of Particulars, claims that the defendant "failed and omitted to properly supervise [the] plaintiff to prevent falls, failed and omitted to properly diagnose plaintiff's injuries in a timely manner, and failed and omitted to properly treat plaintiff's injuries in a timely manner." The plaintiff, by way of Supplemental Verified Bill of Particulars, alleges that the defendant "failed to use proper care when staff placed him in a strenuous position likely to cause injury." The plaintiff also claims that the defendant "violated New York State Office of Professional Practice Guidelines by allowing an unlicensed aide to provide direct contact with the plaintiff," citing Guideline 7: Delegation of Tasks 7-4, which provides as follows:

"7.4 Unlicensed individuals may perform tasks such as answering phones, preparing paperwork, cleaning equipment, and assisting patients to prepare for treatment. An unlicensed assistant may observe patients performing self-directed exercise protocols, but the licensed physical therapist must evaluate or treat the patient during each session. An unlicensed person may not apply hot and cold packs or place electrodes on a patient. Family members or caregivers may be trained to assist the patient in the performance of self-directed tasks where appropriate (e.g., care at home). *Unlicensed persons may act as an extra set of hands for the physical therapist or physical therapist assistant, who is actually providing treatment.* However, they may not: Interpret referrals, perform evaluation procedures, initiate, adjust, or perform treatment programs, or assume responsibilities for planning patient care. The professional judgment of the physical therapist determines what constitutes treatment and the activities that, therefore, may and may not be performed by the unlicensed person." (emphasis added)

The defendant, the Rehabilitation Center, submits that plaintiff's action sounding in medical malpractice is time-barred as the applicable two and one half year statute of limitations expired. (CPLR §214-a). The plaintiff, in opposition, claims this action is not an action sounding in medical malpractice but rather an ordinary negligence action, and as the applicable three year statute of limitations did not expire, plaintiff's action is timely. (CPLR §214(5)).

This Court's task is to determine whether plaintiff's action as and against the defendant constitutes negligence or medical malpractice.

### **Applicable Law**

It is well settled that conduct may be deemed medical malpractice, rather than negligence, when it constitutes medical treatment, or bears a substantial relationship to the rendition of medical treatment by a licensed physician. (*Barresi v. State of New York*, 232 AD2d 962, citing *Scott v. Uljanov*, 74 NY2d 673, quoting *Bleiler v. Bodnar*, 65 NY2d 65). "The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of facts." (*Barresi v. State of New York*, supra, citing *Smith v. Pasquarella*, 201 AD2d 782, quoting *Miller v. Albany Medical Center Hospital*, 95 AD2d 977). The Court in *Barresi v. State of New York*, supra, found that the allegations of inadequate instruction, training, education and supervision of the defendant physician's staff essentially constitute malpractice allegations regarding the defendant's failure to properly treat and care for the plaintiff. When the alleged negligent conduct constitutes an integral part of the process of rendering medical treatment to the plaintiff, the conduct must be characterized as malpractice. (*Scott v. Uljanov*, supra, *Bleiler v. Bodnar*, supra, *Smee v. Sisters of Charity Hosp.*, 210 AD2d 966.) The securing

of a drainage tube which came from the surgical site was part of, and related to, the medical treatment rendered by the defendant, and therefore, plaintiff's complaint sounded in medical malpractice. (*Gaska v. Heller*, 29 AD3d 945).

The Court in *Rodriguez ex rel. Estate of Mendez v. Mount Sinai Medical Center*, 798 NYS2d 713, referred to a litany of cases as guidance in determining what claims were identifiable as malpractice, and what claims were actions sounding in ordinary negligence. Generally, where a party asserts a claim against a hospital for its failure to fulfill a clearly identifiable medically unrelated duty, the claim has been deemed to sound in negligence. (*Id.*) "These medically unrelated duties include such obvious administrative tasks as the maintenance of facilities and equipment, and providing a safe facility." (*Id.*, citing *Alaggia v. North Shore University Hospital*, 92 AD2d 532, (hospital bed not properly equipped), *Gould v. New York City Health and Hospital Corp.*, 128 Misc2d 328, (furnishing defective equipment), *Holtforth v. Rochester General Hospital*, 304 NY 32, (failure to provide a functioning wheelchair).

While the Courts have held that a claim of ordinary negligence will encompass a situation where the hospital staff member failed to abide by a mandatory hospital rule or the hospital failed to adopt or prescribe proper procedures, (*Rodriguez ex rel. Estate of Mendez v. Mount Sinai Medical Center*, *supra*, citing *Bleiler v. Bodnar*, *supra*, and *Weiner v. Lenox Hill Hospital*, 88 NY2d 784), the Court of Appeals in *Scott v. Uljanov*, *supra*, held that the essential question to be answered in determining the applicable statute of limitations is whether the conduct at issue constitutes an integral part of the process of rendering medical treatment to the patient. The Courts must look at the reality of the action and not its mere name. (*Id.*, citing *Tighe v. Ginsberg*, 146 AD2d 268).

Claims which have been found to sound in medical malpractice rather than negligence found that the essence of the allegation was that the improper assessment of the patient's condition and the degree of supervision required led to the subject injuries. (*Rodriguez v. Mount Sinai Medical Center*, citing *Harrington v. St. Mary's Hosp.*, 280 AD2d 912, (the patient fell out of bed after the nurse stepped outside to give him privacy); *Scott v. Uljanov*, *supra*, (patient fell out of bed); *Smee v. Sisters of Charity Hosp.*, *supra* (same); *Fox v. White Plains Medical Center*, 125 AD2d 538 (same)). Conversely, claims involving the fall of an unattended hospital patient have been deemed actions sounding in negligence where the cause of the fall was attributed to a hospital's specific duties unrelated to the improper assessment of the patient's condition and degree of supervision. (*Id.*, citing *Schneider v. Kings Highway*, 67 NY2d 743, (an elderly woman fell from her hospital bed with a lowered bedrail), *Papa v. Brunswick Gen. Hosp.*, 132 AD2d 601 (decedent fell from his hospital bed)).

"[I]n the area of somatic health care, professionals other than licensed physicians may be liable for 'medical malpractice' within the meaning of CPLR 214-a." (*Wahler v. Lockport Physical Therapy*, 275 AD2d 906). Physical therapists may be liable for medical malpractice if the alleged negligent act or omission amounts to "medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician." (*Id.*, citing *Bleiler v. Bodnar*, *supra*). Plaintiff's complaint to recover for injuries sustained from a traction device during a physical therapy session was found to be predicated upon the negligent administration of physical therapy and governed by the 2½ year statute of limitation set forth in CPLR §214-a. (*Meiselman v. Fogel*, 858 NYS2d 200). A negligence action to recover for burns to her left forearm from moist heating pads while receiving physical therapy at the defendant's office was dismissed as time-barred as the "alleged conduct derived from [a] duty owed to

plaintiff as a result of [a] physician-patient relationship and was substantially related to her medical treatment," sounding in medical malpractice. (Id.)

"Although plaintiff challenged and assessed the adequacy of the supervision, training and treatment requirements of those who assist or are subordinate personnel, the functions of those personnel constitute an integral part of the process of rendering medical treatment, and allegations of inadequacy do not remove or change their roles from that of medical malpractice to simple negligence." (Perkins v. Kearney, 155 AD2d 191). As the '[p]laintiff's allegations challenge the hospital's assessment of the supervisory and treatment needs of its highly-intoxicated patient during his initial emergency room care, and as such, the conduct at issue constituted an integral part of the process of rendering medical treatment to him." (Scott v. Uljanov, supra).

"The critical question in determining whether an action sounds in medical malpractice or simple negligence is the nature of the duty to the plaintiff which the defendant is alleged to have breached." (Stanley v. Lebetkin, 123 AD2d 854, citing Bleiler v. Bodnar, supra, Lenny v. Loehmann, 78 AD2d 813). "When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence." (Id.) The plaintiff who fell from the examining table and fractured her ankle was on the defendant's examining table as a result of a physician-patient relationship substantially related to the treatment given to the plaintiff, constituting medical malpractice and not negligence. (Id.)

## **DISCUSSION**

The defendant, the Rehabilitation Center, has demonstrated that the plaintiff, who was presented to the Rehabilitation Center for rehabilitation services following a total knee replacement, consulted with his therapist, Lauren Mendolia, a Physical Therapist, who was in the therapy room when the plaintiff fell in the course of his physical therapy treatment. The plaintiff fell while using a cable column machine with Mary Beth Ging, a Physical Therapist Aide.

The plaintiff, in opposition, submits that a question of fact exists as to whether the Physical Therapist was in the therapy room. Assuming, arguendo, that the Physical Therapist was not in the therapy room, plaintiff's allegation that the Physical Therapist Aide was untrained, and alone in assisting plaintiff when he went to the cable machine, is a challenge to the adequacy of supervision and training of an aide, one who assists or is subordinate personnel, whereby the aide's function constitutes an integral part of the process rendering medical treatment, and "allegations of inadequacy do not remove or change their roles from that of medical malpractice to simple negligence." (Perkins v. Kearney, supra). The defendant's duty to properly supervise or train the aide is specifically related to the assessment of plaintiff's condition and degree of supervision. (Id.) The defendant's duty, and the aide's duty, to the plaintiff arises from the physician-patient relationship and is substantially related to the plaintiff's medical treatment, his physical therapy, giving rise to an action sounding in medical malpractice, not simple negligence. (Stanley v. Lebetkin, supra). The complained of conduct, to wit, the untrained unsupervised aide's assistance with the plaintiff in using the cable column machine, bears a substantial relationship to the rendition of medical treatment by a licensed physician, to wit, the physical therapy prescribed by the Physical Therapist. (Barressi v. State of New York, supra). The plaintiff is challenging the defendant's assessment of a patient's supervisory or treatment need, and as so, the plaintiff's claim sounds in medical malpractice. (Scott v. Uljanov, supra).

Plaintiff's allegation that the defendant violated the New York State Office of Professional Practice Guidelines by allowing an "unlicensed aide" to provide direct contact with the plaintiff challenges the defendant's instruction or supervision of the defendant's staff regarding the care and treatment of the plaintiff. (*Baressi v. State of New York*, supra). In looking at the reality of the plaintiff's action, and not its mere name, the essence of plaintiff's allegation herein concerning the inadequate supervision which led to the plaintiff's injuries, the alleged negligent conduct at bar constitutes an integral part of the process of rendering medical treatment to the plaintiff, (*Scott v. Uljanov*, supra).

### **CONCLUSION**

In light of the foregoing, the plaintiff's action as and against the defendant constitutes medical malpractice and not negligence, and therefore, plaintiff's action is hereby dismissed as time-barred.

Dated: August 24, 2016