

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

ROBERT PACIO and CHRISTINE PACIO,

Plaintiffs,

- against -

FRANKLIN HOSPITAL, BERNARD BIENSTOCK, M.D.,
and FRANKLIN HOSPITAL MEDICAL CENTER HOME
HEALTH CARE, NORTH SHORE UNIVERSITY
HOSPITAL AT GLEN COVE,

Defendants.

TRIAL/IAS PART 20
NASSAU COUNTY

INDEX NO. 9041/06

MOTION SUBMISSION
DATE: 4/15/08

MOTION SEQUENCE
NO. 3

The following papers read on this motion:

| | |
|--------------------------------------|----------|
| Notice of Motion and Affidavits..... | <u>X</u> |
| Affirmation in Opposition..... | <u>X</u> |
| Reply Affirmation..... | <u>X</u> |

Counsel for the defendants, Franklin Hospital, Franklin Hospital Home Care s/h/a Franklin Hospital Medical Center Home Health care, (hereinafter referred to as "Franklin Hospital"), and Glen Cove Hospital s/h/a North Shore University Hospital at Glen Cove, (hereinafter referred to as "Glen Cove Hospital"), move for an order pursuant to CPLR §3212 granting the defendant, Glen Cove Hospital, summary judgment dismissing all claims against the defendant as untimely. The plaintiffs submit opposition. The defendant, Glen Cove Hospital, submits a reply affirmation.

BACKGROUND

The plaintiff had been paralyzed by an automobile accident in 1999. The plaintiff lived at home with his wife using a walker and a wheelchair with the assistance of a home care program from 2000 to December, 2003. The plaintiff was admitted to Franklin Hospital in December of 2003 as he fell twice at his home. On December 16, 2003 he was released from Franklin Hospital and he went to Glengariff, a sub-acute care facility where he had previously been a patient while recovering from his car accident. The plaintiff was transferred from Glengariff to Glen Cove Hospital and admitted to the emergency room with complaints including shortness of breath, diarrhea and decubitus ulcers. The plaintiff claims that he entered Glen Cove Hospital with a "quarter-sized"

stage II pink and non-draining pressure ulcer on the sacrum which was caused to deteriorate and/or cause another one in the same area. The plaintiff claims the pressure sores/decubitus ulcers increased in size and were assessed as a stage III pressure ulcer on January 9, 2004, and that bilateral heel pressure ulcers were also allowed to develop.

An action was commenced on June 25, 2006 alleging negligent delivery of medical care, medical malpractice, and lack of informed consent against the defendant, Franklin Hospital, and the defendant, Bernard Bienstock, M.D. On November 20, 2006, plaintiff filed an Amended Summons and Complaint against the defendant, Glen Cove Hospital.

Requested Relief

The defendant, Glen Cove Hospital, submits that plaintiff's action sounding in medical malpractice, as and against the defendant, Glen Cove Hospital, 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, as and against the defendant, Glen Cove Hospital, is not an action sounding in medical malpractice, but rather an ordinary negligence action.

The plaintiff provides that plaintiff is not challenging the defendant's assessment process, medical orders, or nursing plans, but rather, that the crux of plaintiff's claim is that "the defendant, through the nursing department and its nurses and aids, failed to actually implement, follow and/or carry out the protocol and/or plan that was already in place." Therefore, plaintiff argues, the defendant's wrongdoing constitutes common law negligence, as opposed to medical malpractice. The plaintiff contends that the defendant's failure to follow its own protocol and procedure is negligence, rather than medical malpractice, and therefore, as the instant action was brought within the applicable three year statute of limitations, the action against Glen Cove Hospital is timely.

Notably, the plaintiff does not dispute that an action sounding in medical malpractice as and against the defendant, Glen Cove, is time-barred. Therefore, plaintiff's second cause of action for medical malpractice, and third cause of action for lack of informed consent, as and against the defendant, Glen Cove Hospital, are dismissed.

This Court will now address whether the first cause of action as and against the defendant, Glen Cove Hospital, constitutes negligence or medical malpractice.

Applicable Case 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*, *supra*,

found that the allegations of inadequate instruction, training, education and supervision of the defendant physician's staff essentially 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 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), *McCormack v. Mt. Sinai Hospital, 85 AD2d 596*, (same)).

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, (*Id.*, citing *Bleiler, supra*, and *Weiner v. Lenox Hill Hospital, 88 NY2d 784*), the Court of Appeals in *Scott v. Uljanov, 74 NY2d 673*, 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, "(*Id.*, 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, 74 NY2d 673*, (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)).

As to claims alleging "negligent hiring", such claims have been found to sound in medical malpractice when the claims of negligent training, instruction, education and supervision of medical staff assist in the rendition of medical treatment. (*Id.*, citing *Scott v. Uljanov, supra, Cullinan v. Pignatoro, 266 AD2d 807, Baresi v. State, supra, Bates v. New York City Health and Hospitals Corp. 194 AD2d 422* and *Perkins v. Kearney, 155 AD2d 191*). "The functions of training, instruction, education and supervision of medical staff are deemed to sound in medical malpractice

on the rationale that the claims are in effect a challenge to the adequacy and timeliness of the rendering of medical treatment, since such functions are an integral part of the rendition of medical treatment. (*Id.*, citing *Barresi v. State of New York, supra*).

Discussion

The plaintiff, in the Amended Complaint, asserts in the first cause of action against all defendants, including the moving defendant, Glen Cove Hospital, that, *inter alia*, more particularly, the moving defendant, Glen Cove Hospital, was negligent in failing to hire sufficiently qualified staff to meet plaintiff's needs, in improperly supervising its staff and its residents/patients, in failing to properly train the staff, in failing to timely and properly communicate the necessary care and services required by plaintiff and in failing to follow statutory laws, rules and regulations. The plaintiff's Verified Bill of Particulars, responsive to Glen Cove Hospital's demand, (*albeit*, verified by plaintiff's counsel dispute plaintiff having residency in Nassau County, and lacking a copy of an affidavit of service) alleges, *inter alia*, that the defendant, Glen Cove Hospital, failed to heed the history, complaints, signs, symptoms and condition of the plaintiff, failed to promptly and properly examine, test, diagnose and treat plaintiff's conditions, failed to obtain proper consultations with specialists, conduct proper and timely comprehensive patient assessments, failed to notify the family of significant changes in condition, failed to follow own policy and protocols, failed to provide adequate rehabilitative services, and failed to properly assess the risk of pressure ulcers.

Plaintiff, in opposition to the motion, sets forth that, for the purposes of this motion, "we admit that the process of assessing a patient's risks, needs and/or conditions, the planning of the interventions and treatments to address those risks, needs and/or conditions, including the protocol, and the evaluation of the effectiveness of such plans and interventions implicate the concept of medical malpractice because they necessarily involve professional, medical, and/or nursing judgment, assessment, evaluation, and/or analytical process." However, plaintiff argues that plaintiff is not challenging the defendant's assessment process, but rather, that the crux of plaintiff's claim is that the defendant failed to *implement, follow and/or carry out* the protocol and/or plan already in place, and therefore, plaintiff's wrongdoing constitutes negligence and not medical malpractice.

The protocol plaintiff refers to includes the assessment of skin on a daily basis, monitoring all at risk patients daily, implementing pressure reduction measures, observing and repairing all signs and symptoms of pressure ulcer development, assessing the pressure ulcer for location, inspecting skin, proper positioning, transferring and turning techniques, elevating patient's heels, repositioning bed-bound individuals in shifts, the requirement of a special mattress/specialty bed, and the monitoring of weight gain.

The protocol which plaintiff claims that the defendant, Glen Cove Hospital, failed to implement, follow and/or carry out, is related to the improper assessment of the plaintiff's condition and degree of supervision. Plaintiff's claim is in effect a challenge to the adequacy and timeliness of the rendering of medical treatment since such functions are an integral part of the rendition of medical treatment. (*Barresi v. State of New York, supra*.) Plaintiff's reference to the claim, in terms of "failing to implement protocol", is not determinative. As already provided, the courts must look at the reality of the action and not its mere name. (*Tighe v. Ginsberg*, 146 AD2d 268). Here, the

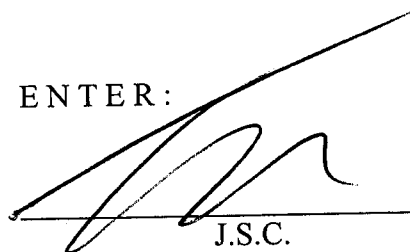
essence of the plaintiff's allegation is that the defendant, Glen Cove Hospital, in failing to implement its protocol, failed to properly assess plaintiff's condition and the degree of supervision required. The conduct complained of, the failure to implement and carry out the protocol, constitutes an integral part of the process of rendering medical treatment to the plaintiff.

The protocol is directly related to the assessment of plaintiff's condition and degree of supervision. Plaintiff's claimed injuries were allegedly caused by the defendant's failure to follow protocol pertaining to the proper care and treatment of the plaintiff. The protocol involves somatic healthcare and defendant's alleged failure to follow such protocol is the failure to provide appropriate medical care to the plaintiff. The alleged failure to follow protocol is not a medically unrelated duty involving an obvious administrative task such as the maintenance of facilities and equipment, including wheelchairs and bedrails.

As the conduct complained of involves the assessment of plaintiff's condition, or the degree of supervision which must be exercised given the plaintiff's condition, the plaintiff's action, as and against the defendant, Glen Cove Hospital, sounds in medical malpractice.

As plaintiff's action as and against the defendant, Glen Cove Hospital, sounds in medical malpractice, the plaintiff's action is time-barred. Therefore, the defendant's motion is granted and plaintiff's entire action, as and against the defendant, Glen Cove Hospital, is dismissed.

ENTER:



J.S.C.

Dated: June 10, 2008

cc: Schwartzapfel, Novick, Truhowsky & Marcus, P.C.
Law Office of Vincent D. McNamara
Kopff, Nardelli & Dopf, LLP

ENTERED

JUN 13 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**