SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. **BERNARD F. McCAFFREY**

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

LOUIS TULLO, as Administrator of the Estate of MICHAEL TULLO, deceased, and LOUIS TULLO, individually,

INDEX NO. 22906/97

MOTION SUBMISSION DATE: 12/21/00

Plaintiffs,

-against-

MOTION NO. 2 & 3

BRIAN E. PINARD, M.D. and WINTHROP UNIVERSITY HOSPITAL,

Defendants.

Defendants' respective applications, pursuant to CPLR 3212, for awards of summary judgment dismissing plaintiffs' complaint against them are determined as hereinafter provided.

On 8/8/95 at approximately 1:00 p.m. Michael Tullo, age 66, was taken by ambulance to defendant Winthrop University Hospital following a motor vehicle accident. At the emergency room he was met by Winthrop's trauma team headed by defendant Brian E. Pinard, M.D., the Acting Chairman of its Department of Surgery, (Dr. Pinard's 6/22/99 deposition, p. 6, l. 25). In addition, to Dr. Pinard, a trauma surgeon, who admitted Mr. Tullo, a variety of other specialists (i.e., a cardiologist, "intensivist," pulmonary medicine specialist, orthopedist, neurosurgeon and anesthesiologists) were consulted and coordinated by him (p. 47, ls. 3-25; p. 53, ls. 6-21).

The initial diagnosis was "blunt vehicular trauma, possible right knee or hip dislocation, frontal flap laceration [and] respiratory distress" (p. 38, l. 19). The chart (defendant Pinard's Exhibit 5) specifically notes, inter alia, that Mr. Tullo was a steriod dependent asthma sufferer (p. 12) with "chronic, obstructive pulmonary disease" (p. 98). He was intubated in the emergency room due to an acute onset of asthma (p. 12). He was thereafter transferred to the Surgical Intensive Care Unit.

A battery of diagnostic tests were performed. For example, a cardiac "consultation/evaluation sheet" (exhibit 5, p. 13) states, inter alia, that an EKG revealed "poor baseline, sinus tach, left axis, LAE [left atrial enlargement], non-specific ST-T wave changes" (see also, 6/22/99 deposition, p. 22, l. 3). The evaluation concludes "rule out effusion-contusion" and therefore, a number of additional tests (e.g. an ultrasound, technetium scan, serial cardiac enzyme studies and several EKGs [p. 40, l. 11-p. 42, l. 11]) were conducted to assist in the diagnosis. The chart includes a "principal diagnosis" of "contusion of heart without open wound into thorax" and a "secondary diagnosis" of "respiratory failure, paroxsmal ventricular tachycardia; motor vehicle traffic accident..., asthma...; open wound of face without complication, forehead; specified form of chronic ischemic heart disease; open wound of knee, leg and ankle, uncomplicated [and] essential hypertension...." (Exhibit 5, p. 1a).

Mr. Tullo was monitored throughout the following days. An 8/9/95 cardiologist's consultation note states, in pertinent part, "[i]t is unclear at this time whether patient has suffered cardiac contusion, epicardial coronary thrombosis or whether these abnormalities are chronic. We will call his P.M.D. [private medical doctor] for results of recent cardiac w/u [workup]" (exhibit 5, p. 47a; exhibit 7, p. 48, ls. 10-18).

On 8/10/95 a cardiologist's note (exhibit 5, p. 48a) indicates an echocardiogram revealed a moderate decrease in the left verticular function. The echocardiagram (p. 33) also states, inter alia, "abnormal changes possibly due to myocardial ischemia". Mr. Tullo's private physician was contacted later that day and a corresponding notation reads "have spoken to [private medical doctor] who stated that [patient] did not have a cath or stress test recently." The note concludes "would continue to monitor for a few more days (p. 48a; p. 50, ls. 8-10).

During the evening of 8/10/95 Mr. Tullo was transferred to a telemetry unit where he received less monitoring than in an intensive care unit but more than on a standard hospital floor (p. 32, l. 20-p. 33, l. 3).

A 8/11/95 note states, inter alia, "skeletal muscle trauma...wall motion [abnormalities] may represent old infaret or contusion - continue to monitor for anything. Repeat [second] echo for improvement. Pt. wishes to have further cardiac [work-up] as outpatient or [with private medical doctor]" (exhibit 5, p. 52; exhibit 7, p. 59, l. 2). A final 8/11/95 cardiologist's note indicates that a heart scan that day was consistent with "cardiomyopathy, old [myocardial infarction]...Imp. cardiomyopathy likely [secondary] to [hypertension and coronary artery disease]....Pt. has had no atypical [chest pains] or arrythmia and can be discharged..., however, his myopathy requires evaluation (would suggest cath) this can be done by his [private medical doctor] as an outpatient or in hospital" (exhibit 5, p. 53). On 8/12/95 Mr. Tullo went to the bathroom, felt a worsening shortness of breath, was walked to bed by his nurse where he went into ventricular tachycardia, lost consciousness and expired (exhibit 5, p. 56). An autopsy (exhibit 6) concluded that the cause of death was "[a]cute and chronic bronchial asthma exacerbated by blunt force and trauma with fractures of ribs and spine." "Hypertensive and atherosclerotic cardiovascular disease" are listed as "[o]ther significant conditions."

Plaintiffs filed this medical malpractice action on 8/8/97. Following joinder of issue and the completion of disclosure, on 10/8/99 the case was certified for trial. Although plaintiffs' note of issue was filed on 1/6/00 (or greater than 120 days prior to defendants' applications), on 7/17/00 their request for leave to serve and file these motions was granted (CPLR 3212[a]).

Plaintiffs' 5/11/98 bills of particulars allege a failure to properly monitor and treat Mr. Tullo's cardiac condition despite, inter alia, "abnormal EKG results", "to appreciate the cardiac contusion," "to perform immediate and indicate[d] invasive cardiac procedures including, but not limited to, angioplasty, cardiac catherization and artery bypass surgery" and admit the decedent to the "fast track" or "emergent" cardiac care unit.

Dr. Pinard's application is primarily premised upon his limited duty as trauma surgeon who coordinated the various specialities i.e., he did not assume a general duty of medical care to the decedent merely because he was the admitting physician (Yasin vs. Manhattan Eye, Ear & Throat Hospital, 254 AD2d 281, 678 NYS2d 112 [2d Dept., 1998]; Markley vs. Albany Medical Center, 163 AD2d 639, 558 NYS2d 688, 690 [3rd Dept., 1990]). Indeed, the 12/7/00 affirmation in opposition of plaintiffs' expert, a board certified cardiologist, is silent as to Dr. Pinard and is restricted to the purported deficiencies of the codefendant's cardiologists. The uncontroverted 5/25/00 affirmation of Dr. Pinard's expert, Anthony C. Mustalish, M.D. avers, with a reasonable degree of medical certainty, that he "acted appropriately and professionally

at all times in his capacity as a trauma surgeon and on-call attending physician" (para. 9) whose " role was limited to coordinating the involvement of [the] medical specialists" rather than "dictate to such specialists the particular steps or diagnostic studies they were to undertake in assessing Mr. Tullo's condition as it related to their areas of specialty" (para. 12). He therefore "acted according to good and accepted medical practice when he arranged for the consultation of a pulmonary and critical care specialist" (p. 13), cardiology consultation (para. 14), neurosurgeon (p. 16) and orthopedist (para. 17) upon whom he appropriately relied and "did not, by act or omission, hinder the physicians following Mr. Tullo" (para. 21). Plaintiffs' conclusory assertion that Dr. Pinard, a trauma surgeon, was obligated to "supercede the judgment" of the cardiologists and other specialties treating the decedent (12/7/00 affirmation in opposition of Joseph G. Dell, Esq., para. 13) is unsupported by caselaw or other authority and inadequate to create a genuine issue of fact warranting a trial as to his alleged malpractice. Accordingly, defendant Brian Pinard's application, pursuant to CPLR 3212, for an award of summary judgment dismissing plaintiffs' complaint against him is granted.

With respect to the hospital, plaintiffs' expert opines, inter alia, that the 8/9/95-8/11/95 series of EKG's revealed "a dramatic sequence of increasing ischemic changes" including ST-T changes "which strongly suggest myocardial ischemia." The heart scan and an echocardiogram also reportedly showed "new abnormalities not seen in the patient's previous echocardiogram." In addition, Mr. Tullo's hemoglobin and hematocrit diminished thereby allegedly reducing his oxygen supply 33% (para. 3).

The cardiologists' failure to follow-up on these "dramatic changes" e.g., order a transfusion; perform a catherization or transfer the patient back to the intensive care unit reportedly constituted a deviation from appropriate standard of care and proximately caused him to develop a "worsening myocardial ischemia" and lethal arrhythmia (paras. 5 and 6).

Conversely, the 8/16/00 and 12/20/00 affirmations of the hospital's expert, David Farr, M.D., aver that Mr. Tullo's "chronic underlying cardiac condition" was appropriately treated. Neither the EKGs, the scan or any other diagnostic test allegedly revealed the "dramatic sequence of increasing ischemic cardiac changes" cited by plaintiffs' expert. Thus, as reflected within the final 8/11/95 note, although Mr. Tullo's myopathy required evaluation (either, as he desired, by his own physician as an outpatient or within the hospital) in the absence of any atypical chest pains, arrythmia or other acute condition, he, could reportedly, be discharged. Dr. Farr further opines that an angiogram, angioplasty, cardiac catheterization or bypass surgery would therefore allegedly have been inappropriate.

In view of the conflicting, specific conclusions of the respective experts, it can not however, presently be declared as a matter of law that the hospital's physicians' were not negligent or that their negligence did not proximately cause Mr. Tullo's death (Cahill vs. County of Westchester, 226 AD2d 571, 641 NYS2d 346 [2d Dept., 1996]; Alvarez vs. Prospect Hospital, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572). "Although generally a hospital may not be held liable for the malpractice of a physician who is not an employee of the hospital (see e.g., Sledziewski vs. Cioffi, 137 AD2d 186, 188-189, 528 NYS2d 913), a hospital may be held vicariously liable for the acts of independent physicians if the patient, as occurred in the case at bar, enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician" (Ryan vs. New York City Health and Hospitals Corporation, 220 AD2d 734, 633 NYS2d 500, 501 [2d Dept., 1995]; Austin vs. Interfaith Medical Center, 264 AD2d 702, 694 NYS2d 730 [2d Dept., 1999]; Felter vs. Mercy Community Hospital Corporation, 244 AD2d 385, 664 NYS2d 321 [2d Dept., 1997]; Cittron vs. Northern Dutchess Hospital, 198 AD2d 618, 603 NYS2d 639 [3rd Dept., 1993]).

Accordingly, defendant Winthrop University Hospital's application, pursuant to CPLR 3212, for an award of summary judgment dismissing plaintiffs' complaint against it is denied.

Dated: MAR 09 2001

J.S.C.

ENTERED

MAR 15 2001

NASSAU COUNTY
COUNTY CLERK'S OFFICE