IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Estate of Janet A. Slanger, by and through Robert R. Slanger, the independent administrator of the estate of Janet A. Slanger, Plaintiff, v. Advanced Urgent Care, Ltd., an Illinois corporation, Alan L. Sisson, M.D., Silver Cross Hospital and Medical Centers, an Illinois not-for-profit corporation, David Collins, M.D., Terri Kennedy, N.P., EM Strategies Ltd., an Illinois corporation, Jessica Gasiorowski, R.N., and Tryniti Metz, R.N., Defendants.	)	No. 18 L 13153

MEMORANDUM OPINION AND ORDER

Summary judgment is appropriate only if no question of material fact exists and the moving party deserves dismissal as a matter of law. In this case, conflicting testimony exists as to whether a physician, his employer, and a nurse practitioner proximately caused the decedent's death. Summary judgment is, therefore, inappropriate for those defendants as to that issue. There is, however, no question of material fact that a special relationship did not exist between the physician and the decedent. Since the physician and his employer owed the decedent no duty, summary judgment for those two defendants is appropriate, and the physician and his employer must be dismissed with prejudice.

Facts

Late on December 10, 2016, Janet Slanger presented to an Advanced Urgent Care, Ltd. facility. There, Dr. Alan Sisson examined Janet for a viral syndrome and then sent her home. Approximately three hours later, at 1:25 a.m. on December 11, 2016, Janet presented to Silver Cross Hospital's emergency department. While in the ER, Janet was examined and treated by various providers including Terri Kennedy, a nurse practitioner, and Jessica Gasiorowski and Tryniti Metz, both registered nurses.

Silver Cross's records reveal that Janet experienced symptoms including difficulty breathing and swallowing, throat and neck pain, swollen lymph nodes, fever, and chills. The ER records also noted that Janet had laryngitis and a recent dental procedure. The medical staff treated Janet with Lidocaine and Toradol. At approximately 2:45 a.m., Dr. David Collins, a physician employed by EM Strategies Ltd., signed Janet's discharge.

At approximately 4:17 a.m., Janet called 9-1-1, unable to speak. Paramedics arrived at Janet's home nine minutes later and found her unresponsive. The paramedics were unsuccessful in intubating Janet because of a large mass located in or around her trachea. The paramedics then transported Janet to Palos Community Hospital, where she died on December 13, 2016. On December 19, 2017, Dr. James Bryant conducted Janet's autopsy. His report concluded that Janet's immediate cause of death was "acute respiratory distress due to tracheobronchial mucus obstruction due to asthma."

On April 15, 2019, Robert R. Slanger, the independent administrator of Janet's estate, filed an 18-count wrongful death and survival action complaint against the defendants. Counts five and six are directed against Kennedy under the Wrongful Death and Survival Acts, respectively. Counts seven and eight are directed against Collins under the same statutes, respectively. Counts nine and 10 are directed against EM Strategies under the *respondeat superior* doctrine as Collins' and Kennedy's employer, again, under the Wrongful Death and Survival Acts, respectively.

The complaint alleges that Collins knew or should have known that Janet's symptoms, physical examination, and lab results were consistent with an upper airway obstruction. The complaint claims that Collins and Kennedy breached their duties of professional care to Janet by, among other things, failing to: (1) ensure that treaters obtained Janet's comprehensive medical history and conducted an adequate physical examination, including imaging Janet's neck and throat; (2) detect or diagnose a peritonsillar, pharyngeal, or retropharyngeal abscess in Janet's throat or upper airway; (3) properly treat that condition; and (4) supervise Kennedy's evaluation and treatment of Janet.

Collins, Kennedy, and EM Strategies filed a summary judgment motion as to counts five through 10. The defendants argue that the autopsy makes plain that their conduct did not proximately cause Janet's death. Collins separately filed another summary judgment motion, arguing that there existed no special relationship between Collins and Janet and, therefore, he owed her no duty of professional care. The parties subsequently filed their response and reply briefs.

Analysis

The defendants bring their summary judgment motions pursuant to the Code of Civil Procedure. 735 ILCS 5/2-1005. Summary judgment is appropriate if the record reveals there exists no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c). To determine whether a genuine issue of material fact exists, a court must "construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). "Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 22 (quoting *Espinoza v. Elgin, Joliet & E. Ry.*, 165 Ill. 2d 107, 114 (1995)).

A defendant may move for summary judgment by pointing out the absence of necessary evidence supporting the plaintiff's position. *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 368-69 (2006). This is a so-called *Celotex* motion after the United States Supreme Court's decision of the same name. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the defendant carries its initial burden of production on a *Celotex* motion, the burden shifts to the plaintiff to show a factual basis to support the elements of their claim. *Willett,* 366 Ill. App. 3d at 369. "While parties opposing a summary judgment motion are not required to prove their case, they are under a duty to present a factual basis which would arguably entitle them to judgment in their favor, based on the applicable law." *Id.*

On summary judgment, a court does not decide a question of fact, but determines whether one exists. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (4th Dist. 2008). Further, a court does not choose between competing inferences or weigh evidence to decide which of two interpretations is more likely. *Bank Computer Network Corp. v. Continental Ill. Nat'l Bank & Tr. Co.*, 110 Ill. App. 3d 492, 497 (1st Dist. 1982). Speculation, conjecture, and guess are insufficient to withstand summary judgment. *McGath v. Price*, 342 Ill. App. 3d 19, 27 (1st Dist. 2003).

I. Summary Judgment Motion as to Proximate Cause

The foundation for the defendants' summary judgment motion as to proximate cause is based on Bryant's private autopsy report and his deposition. Bryant concluded that Janet died from acute respiratory distress secondary to a tracheobronchial mucus obstruction resulting from an asthma attack. Bryant further opined that Janet did not die from an airway obstruction in her pharyngeal, retropharyngeal, or peritonsillar area secondary to an abscess.

The defendants filed their motion before Janet's estate disclosed its Illinois Supreme Court Rule 213(f)(3) expert witnesses. The estate's subsequent disclosure identified Dr. Shaku Teas as an expert witness. Teas' written disclosure includes various opinions, including that: (1) Bryant performed an incompetent autopsy; (2) Bryant's opinion

regarding the cause of Janet's death is incorrect; and Janet died of an upper airway obstruction caused by an infected abscess leading to brain hypoxia.

Teas' disclosed opinions unquestionably conflict with those of Bryant. That conflict presents a classic battle of the experts that requires a jury "to listen to the conflicting evidence and use its best judgment to determine where the truth could be found." *Snelson v. Kamm*, 204 Ill. 2d 1, 36 (2003) (quoting 319 Ill. App. 3d 116, 145 (4th Dist. 2001)). In short, the conflict of expert opinions raises various questions of material fact that this court cannot resolve. The defendants' summary judgment motion as to proximate cause must, therefore, be denied.

II. Summary Judgment Motion as to Duty

In a medical malpractice action, a plaintiff must prove a duty owed by the defendant physician. *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 466 (5th Dist. 2009) (citing *Lenahan v. University of Chicago*, 348 Ill. App. 3d 155, 163 (1st Dist. 2004)). In Illinois, a physician's duty is limited to those situations in which a direct physician-patient relationship exists or a special relationship exists. *Id.* A physician-patient relationship is a consensual one in which "the patient knowingly seeks the physician's assistance and the physician knowingly accepts the person as a patient." *Reynolds v. Decatur Mem'l Hosp.*, 277 Ill. App. 3d 80, 85 (4th Dist. 1996). In contrast, a special relationship is created when a physician takes affirmative acts to participate in the care, evaluation, diagnosis, or treatment of a specific patient. *Lenahan*, 348 Ill. App. 3d at 164 (emphasis added). In determining whether a special relationship exists, the central inquiry "is whether the physician has been asked to provide a specific service for the benefit of a specific patient." *Mackey v. Sarroca*, 2015 IL App (3d) 130219, ¶ 20.

Robert argues that a special relationship between Janet and Collins existed for two reasons. First, Collins wrote in the decedent's medical chart that he was the "supervising physician" and agreed with Kennedy's treatment and discharge plan. Second, Collins reviewed and evaluated the care and treatment provided to Janet, formed medical

opinions informing his decision to authorize Kennedy's discharge plan, and then billed Janet for his services. Robert also points to Collins' deposition, in which he testified that he had authority to order further medical testing or modify Kennedy's discharge plan if he thought it necessary.

Neither of Robert's arguments is compelling. First, Collins approved Kennedy's treatment and discharge plan in Collins' role as a supervising physician, not as a treating physician undertaking an affirmative act on Janet's behalf. To the contrary, Collins and Kennedy testified that collaborating physicians, such as Collins, are required, pursuant to Silver Cross's practices, to review and sign 10 to 20 percent of an intermediate or mid-level provider's medical charts and are otherwise not required to see each patient assigned to the mid-level provider. This testimony speaks to an overarching administrative duty rather than a duty of care owed to a specific patient. Absent some indication that Collins took exception to reviewing and approving Janet's medical chart, his approval of Kennedy's treatment and discharge plan is of no consequence. That Collins was the only person on December 11, 2016 authorized to sign off on patients' medical charts only bolsters the conclusion that his approval of Kennedy's discharge plan did not create a special relationship as he had no choice in the matter.

It is true that Collins could have hypothetically disagreed with Kennedy's discharge plan and exercised his authority differently, but such a possibility does not alter this result for two reasons. First, there is no support for concluding a physician-patient relationship exists based on the mere possibility that it could eventually exist. Second, Collins may have had the opportunity and authority to care and treat Janet, but did not do so. This only reinforces the conclusion that he did not actively participate in Janet's evaluation, diagnosis, care, or treatment.

Second, it is undisputed that Collins merely reviewed Janet's medical chart after Kennedy had provided care and treatment. Collins' review, evaluation, and billing for services provided to Janet by Kennedy says nothing about Collins taking affirmative steps to

participate in Janet's care or treatment. *See Gillespie v. University of Chicago Hosp.*, 387 Ill. App. 3d 540, 545-56 (1st Dist. 2008) (affirming physician-patient relationship did not exist because physician's review and interpretation of patient's test results and billing for such services occurred only after patient's discharge and played no role in patient's diagnosis, care, or treatment). Moreover, Robert has not set forth any evidence to rebut Collins' testimony that he did not see, diagnose, care, or treat Janet. This lack of evidence corroborates Kennedy's testimony that she did not consult Collins and used her independent judgment to care and treat Janet.

Robert's argument that Collins formed medical opinions that influenced his decision to approve Janet's discharge from Silver Cross is also without support. The record is devoid of any evidence supporting the conclusion that Collins formed any medical opinions as to Janet's care or treatment. At Collins' deposition, counsel asked whether Collins currently held any medical opinions as to Janet's care and treatment by Kennedy. At no point did counsel inquire whether, as of December 11, 2016, Collins had medical opinions about or that affected Janet's care and treatment. It is particularly significant that Kennedy never discussed her evaluation or diagnosis with Collins or any other physician on duty during Janet's ER visit.

Robert's reliance on *Mackey* is not insightful. In *Mackey*, the court reversed and remanded the dismissal of a medical malpractice complaint because the facts pointed to the existence of a special relationship between an on-call urologist and the patient. 2015 IL App (3d) 130219, ¶ 27. The complaint established that the urologist:

> (1) was the on-call urologist assigned to consult with treating physicians at Silver Cross Hospital pursuant to a contract between the hospital and his employer; (2) was compensated for his consulting services; (3) was consulted by the emergency room physician for [the plaintiff's] benefit for the specific purpose of rendering diagnostic and medical advice regarding her treatment; (4) received specific information regarding her history, symptoms, and diagnostic test results; (5) evaluated those tests results and formed a medical opinion that she was

> not in danger of sepsis; (6) was actually responsible for making decision regarding her care and whether she was to be admitted or released; and (7) decided that [the plaintiff] did not need to be admitted but could be discharged with an instruction to seek an out-patient follow-up appointment. . . .

Id. In this case, the first, second, fourth, and sixth factors are comparable. Even so, these factors were not central to the *Mackey* court's finding of a special relationship. Rather, the treating physician in *Mackey* testified that, in light of the patient's condition, established procedures dictated a consultation with an on-call urologist. The treating physician further testified the on-call urologist became ultimately responsible for decisions regarding the patient's care because, once an on-call specialist has been contacted, that doctor takes control of the patient's treatment. *Id.* ¶ 6. The on-call urologist was, in fact, consulted, reviewed all the test results, recommended certain pain medication, decided to discharge the patient, and told the treating physician to instruct the patient to follow-up with an appointment at the on-call urologist's office. *Id.* ¶¶ 6-7.

In contrast here, Kennedy testified she did not consult Collins or the on-call collaborating physician and that mid-level providers, such as she, could practice independently from the on-call collaborating physician. It is further significant that Kennedy, unlike the treating physician in *Mackey*, explicitly testified that she used her independent judgment as a nurse practitioner in providing treatment and care to Janet at all relevant times. Kennedy's testimony therefore corroborates Collins' testimony that: (1) he did not directly supervise Janet's care and treatment; (2) mid-level providers functioned independently under their own medical licenses; and (3) mid-level providers need not necessarily follow a consulting physician's advice in the event of a disagreement.

The lack of a consult between Kennedy and Collins is, alone, enough to distinguish this case from *Mackey*. Absent a consultation, there is no factual support to raise a reasonable inference that Collins became sufficiently involved in Janet's care and treatment to raise a

duty based on a special relationship. This is especially true because, as stated above, Collins is not alleged to have taken any actions with respect to Janet until after others had treated her. In sum, Robert has failed to raise questions of material fact sufficient to defeat the summary judgment motion.

Conclusion

For the reasons presented above, it is ordered that:

1. The summary judgment motion based on proximate cause brought by Collins, Kennedy, and EM Strategies is denied;
2. The summary judgment motion based on duty brought by Collins is granted;
3. Counts seven and eight against Collins and counts nine and 10 against EM Strategies as Collins' employer are dismissed with prejudice;
4. Counts nine and 10 against EM Strategies as the employer of other defendants remain;
5. This case continues as to all remaining defendants; and
6. Pursuant to Illinois Supreme Court Rule 304(a), there is no just reason to delay enforcement or appeal, or both, of this order.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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