

2/15/2002 NYLJ 1, (col. 5)
2/15/2002 N.Y.L.J. 1, (col. 5)

New York Law Journal
Volume 227, Number 31
Copr. 2002 NLP IP Company

Friday, February 15, 2002

RULING NARROWLY, PANEL REVIVES HOSPITAL SUIT

ACTIONS OF OTHER STAFFERS KEY IN ATTACK BY DOCTOR

By John Caher

ALBANY In a cautious and narrow decision, the Court of Appeals yesterday reinstated a direct negligence claim against Cabrini Medical Center, where a woman recovering from vaginal surgery was sexually molested by a resident employed by the hospital.

The Court revived the lawsuit primarily because factual questions remain regarding the conduct of nurses and the extent of their obligation to protect the patient. It categorically declined to impose a heightened duty based on the patient's sedated condition, and stressed that the ruling should not be read as burdening hospitals with a broader responsibility than historically required.

"Our holding does not impose a 'gatekeeping' function upon nurses to stop and question physicians, ascertain reasons for their presence, or to stand guard and monitor their interactions with patients," Judge Richard C. Wesley wrote for the unanimous court. "We simply hold that observations and information known to or readily perceivable by hospital staff that there is a risk of harm to a patient under the circumstances can be sufficient to trigger the duty to protect."

Also yesterday, the Court held in a medical malpractice action that a trial judge wrongly gave an "error in judgment" charge without requiring a showing that the defendant doctor made a choice between two or more medically acceptable alternatives. However, in *Nestorowich v. Ricotta*, 12, the Court split 6-1 on whether delivering the error in judgment charge in this case constituted harmless error.

N.X. v. Cabrini Medical Center, 4, arises from what Judge Wesley described in the first sentence of the opinion as a "troubling case" involving "an egregious abuse of the physician-patient relationship." It involves a young woman, N.X., who had undergone surgery for genital warts at the Manhattan hospital on July 27, 1995.

While in the recovery room and still drowsy from the anesthetic, the woman was assaulted by a surgical resident, Dr. Andrea Favara. The record indicates that the patient awoke to find Dr. Favara pulling up her gown, pushing her thighs apart and commanding her to spread her legs. Dr. Favara then inserted his fingers in her vagina and anus, over the repeated protestations of the patient who was apparently in considerable pain. Dr. Favara was in no way involved in the care of the patient and was a stranger to the three nurses in close proximity.

After the patient complained, the supervising nurse confronted Dr. Favara, who claimed he was performing an unauthorized cervical and rectal examination. Dr. Favara was fired following an investigation, and the patient commenced a lawsuit.

The Appellate Division, First Department dismissed the case in a 3-2 decision. The First Department majority found that there was no claim under either a direct negligence or vicarious liability standard, and the dissent argued that the claim was viable under either theory. Yesterday, the Court of Appeals said both sides got it wrong.

The Court reiterated that under the doctrine of respondeat superior, an employer can be held vicariously liable only when the tortious acts of an employee were within the scope of employment.

"A sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives," Judge Wesley wrote. "We refuse to transmogrify Favara's egregious conduct into a medical procedure within the physician's scope of employment. This was a sexual assault that in no way advanced the business of the hospital."

What the Nurses Knew

However, the Court came to a different conclusion with regard to direct negligence, primarily because of lingering questions over what the nurses knew, when they knew it, and what they did and when they did it. Judge Wesley said

the plaintiff has raised several issues surrounding Dr. Favara's appearance in the recovery room that should have alerted the nurses that the patient was in "obvious jeopardy of imminent harm."

For example, the three nurses were unfamiliar with Dr. Favara, they knew that hospital policy required the presence of a female staff member when a male physician conducts a pelvic exam on a female patient, and were aware that residents are not normally assigned to a recovery room.

In addition, Judge Wesley said, there is a factual and credibility question as to whether the nurses, who were in the 18-foot-by-14 foot recovery room where the incident occurred, heard the patient as she repeatedly asked Dr. Favara to cease the examination.

The Court remitted to Manhattan Supreme Court for further proceedings.

"This common-sense approach safeguards patients when there is reason to take action for their protection and does not burden the practice of medicine or intrude upon the traditional relationship between doctors and nurses," Judge Wesley stressed.

Charles Palella of Kurzman Karelsen & Frank LLP in Manhattan argued for the plaintiff. Representing the hospital was Daniel S. Ratner of Heidell Pittoni Murphy & Bach PC in Manhattan.

Nestorowich came to the Court from Buffalo, where Dr. John Ricotta performed an adrenalectomy on Walter Nestorowich.

Mr. Nestorowich had been battling cancer for a decade, and by 1993 the disease had spread to his left adrenal gland. During surgery, Dr. Ricotta tied off blood vessels supplying the gland and also ligated the renal artery supplying the left kidney. The kidney the only one Mr. Nestorowich had left failed and the patient ultimately died. A malpractice action resulted.

At trial, the judge gave the jury an "error in judgment" charge, instructing the panel that a physician is not liable for a judgmental error if his judgment is based on careful consideration and is consistent with the decision a prudent doctor would make under similar circumstances. The jury held for the defendant, leading to an appeal by Mr. Nestorowich's widow. In a 3-2 decision, the Appellate Division, Fourth Department, held that the charge was not improper, but even if it was, the panel said, the error was harmless. The Court of Appeals affirmed on harmless error grounds.

Judge Carmen Beauchamp Ciparick, writing for the majority, said the charge was improper. Since ligation of the renal artery was unintentional, this was not a case where the physician exercised professional judgment and chose one procedure or technique over another, Judge Ciparick said.

Error Was Harmless

However, the majority said the error was harmless since the tumor was huge and the procedure complicated by the patient's obesity. It also said that Mr. Nestorowich was made fully aware of the risk of losing his one remaining kidney, and he knew that the only alternative to the surgery was the "unchecked advancement of the tumor on his adrenal gland."

Judge George Bundy Smith agreed that the charge was improper, but said the majority's conclusion that the error was harmless "is mere speculation."

"In giving the error in judgment charge, the court clouded the issue which was before the jury," Judge Smith said in dissent. "No one can determine what the effect of that charge was on the jury and its decision."

Michael G. Cooper of Hamburg, Erie County, argued for the plaintiff. Dr. Ricotta was represented by Ann M. Campbell of Brown & Tarantino in Buffalo.

2/15/2002 NYLJ 1, (col. 5)

END OF DOCUMENT