

FILED

SEP 15 2017

Hon. W. Hunt Dumont
J.S.C. ret., *1/a* on recall
Morris County

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Attorneys for Defendants, AHS Hospital Corp./Morristown Medical Center (improperly pled as Morristown Memorial Hospital), and Andrew Youssef, M.D.

SUZANNE KOERNER, Individually and as
Executrix of the Estate of Suzanna Stica,
Deceased

Plaintiffs,

v.

RAUNAQ BHATT, M.D., DR. PETER
ROYTMAN, M.D., KATHLEEN
GRABIANOWSKI, R.N., MARIA TINAZA,
R.N., ANDREA WINNER, R.N., MARIA
GARCIA, R.N., ERIN HERITAGE, M.D.,
ANDREW YOUSSEUF, M.D.

MORRISTOWN MEMORIAL HOSPITAL
and JOHN DOES 1-5 (fictitious names, true
names being unknown),

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO. MRS-L-2983-13

Civil Action

ORDER

THIS MATTER having come before the Court by Schenck, Price, Smith & King, LLP, Attorneys for Defendants, AHS Hospital Corp./Morristown Medical Center (improperly pled as Morristown Memorial Hospital), Kathleen Grabianowski, R.N., Maria Tinaza, R.N., Andrea Winner, R.N., Maria Garcia, R.N. and Andrew Youssef, M.D. for an Order for reconsideration of the October 28, 2016 Order, and the Court having considered the submissions of the parties and having heard oral argument of counsel, and for good cause shown;


IT IS, on this 15th day of ~~December~~, September, 2017

ORDERED that the Order of October 28, 2016 is hereby vacated; and it is

FURTHER ORDERED that Defendants, AHS Hospital Corp./Morristown Medical Center (improperly pled as Morristown Memorial Hospital), Kathleen Grabianowski, R.N., Maria Tinaza, R.N., Andrea Winner, R.N., Maria Garcia, R.N. and Andrew Youssouf, M.D.'s, motion for reconsideration is hereby granted; and it is

FURTHER ORDERED that Summary Judgment be entered with prejudice in favor of Defendants, AHS Hospital Corp./Morristown Medical Center (improperly pled as Morristown Memorial Hospital), Kathleen Grabianowski, R.N., Maria Tinaza, R.N., Andrea Winner, R.N., Maria Garcia, R.N. and Andrew Youssouf, M.D.; and it is

FURTHER ORDERED that a copy of this Order be served upon all parties within 7 days of the date hereof.



W. HUNT DUMONT, J.S.C. J.S.C.
RETIRED T/A ON RECALL

*Denied for the reasons set forth in
the attached Statement of Reasons*

Papers received from movant:

- Notice of Motion
- Affidavit in Support of Motion
- Certification in Support of Motion
- Proposed Order
- Brief in Support of Motion
- Proof of Service
-

Papers received from respondent:

- Notice of Cross-Motion
- Affidavit in Support of Cross-Motion
- Certification in Support of Cross-Motion
- Affidavit in Opposition to Motion
- Certification in Opposition to Motion
- Proposed [counter-] Order
- Brief in Support of Cross-Motion
- Brief in Opposition to Motion
- Proof of Service
-

Responsive papers received:

- Reply Affidavit
- Reply Certification
- Reply Brief
- Affidavit in Opposition to Cross-Motion
- Certification in Opposition to Cross-Motion
- Brief in Opposition to Cross-Motion
- Proof of Service
-

Other:

-
-

FILED

SEP 15 2017

**Hon. W. Hunt Dumont
J.S.C. ret., 1/a on recall
Morris County**

STATEMENT OF REASONS

Suzanne Koerner, Individually and as Executrix of the Estate of Suzanna Stica, Deceased

v.

AHS Hospital Corp., et al.

MRS-L-2983-13

I. BACKGROUND

This is a medical malpractice case that arises out of the resuscitation of patient who had executed “Do not resuscitate” (DNR) and “Do not intubate (DNI) orders prior to her resuscitation from cardiac arrest at Defendant Morristown Medical Center.

Plaintiff Suzanne Koerner (daughter of decedent) individually and as Executrix of the Estate of her mother, Suzanna Stica, alleges that Defendants AHS Hospital Corp., Morristown Medical Center, Andrew Youssouf, M.D., Erin Heritage-Peek, M.D., Peter Roytman, M.D., Raunaq Bhatt, M.D. and four named nurses failed to honor the decedent’s DNR/DNI orders and improperly resuscitated decedent which caused decedent to endure unwanted pain and suffering. Plaintiff claims that, as a result of the prolonging of her mother’s life, she had very poor quality of life in her final six months and endured unwanted pain and suffering.

This is a case of first impression in New Jersey.

Defendants AHS/MMC filed a motion for summary judgment last year which the other Defendants joined in. At that time, the Defendants argued that the Plaintiff is not entitled to relief for “wrongful life” or “wrongful prolongation of life.” Plaintiff opposed the Defendants’ respective motions for summary judgment. After a lengthy argument before the Court last October, the motions were denied. The Defendants now seek reconsideration of that ruling.

For the purposes of the underlying motion the following facts are uncontested. On November 29, 2011, Ms. Stica was brought from her assisted living community to Morristown Medical Center emergency department with complaints of breathing problems. At the time, Ms. Stica was eighty nine years old and her medical records indicated that she had previously executed “Do Not Resuscitate” (DNR) and “Do Not Intubate” (DNI) orders, otherwise known as advance medical directives. Ms. Stica’s DNR ordered her physicians and medical providers not to resuscitate her in the event that she suffered a cardiac arrest. The next day while undergoing a Doppler procedure, Ms. Stica went into cardiac arrest. Despite having a DNR, the staff resuscitated Ms. Stica and she lived another six months before dying.

Plaintiff claims that following the resuscitation, Ms. Stica suffered from a poor or diminished quality of life, which included: being intubated against her wishes, daily pain due to her arthritic condition, difficulty breathing from end stage lung disease, confinement to a wheelchair, difficulty eating due to a breathing problem, chest pain, bowel and bladder problems, increased depression and dementia, increased incidents of falling down, suffered a stroke making it difficult for her to communicate, speak, and eat. (Plaintiff’s Answers to Uniform A (1) interrogatories).

In their motion for reconsideration, Defendants argue that their motion for summary judgment should have been granted because the New Jersey Advance Directive for Health Care Act, N.J.S.A. 26:2H-73, immunizes health care providers and institutions when lifesaving care is administered in violation of a DNR directive. Secondly, they argue that the Court erred in extending the concepts developed in the “wrongful birth” cases¹ in order to recognize a new cause of action for “wrongful prolongation of life.” Lastly, they argue that the Court’s decision

¹ Berman v. Allan, 80 N.J. 421 (1979) and Procanik by Procanik v. Cillo, 97 N.J. 339 (1984) and 226 N.J. Super. 132 (App. Div. 1988); Schroeder v. Perkel, 87 N.J. 53 (1981)

to deny summary judgment based upon a trend in other jurisdictions recognizing a cause of action for “wrongful prolongation of life” was palpably unreasonable.

II. Reconsideration Standard

“[R]econsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice.” Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Furthermore, a motion for reconsideration is only appropriate “for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence.” Id. (citing D’Atria v. D’Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990).

A motion for reconsideration is not an opportunity for a second bite at the apple. It is not a mechanism for unhappy litigants to attempt once more to air their positions and re-litigate issues already decided. See Michel v. Michel, 210 N.J. Super. 218, 224 (Ch. Div. 1985). Moreover, a party cannot rely on facts that were not raised in the initial motion to justify reconsideration when those facts were either known or could have been known at the time of the initial hearing. Del Vecchio v. Hemberger, 388 N.J. Super. 179, 189 (App. Div. 2006).

III. Analysis

The issue before the Court in the Defendants’ respective motions for reconsideration is whether a valid cause of action exists for the decedent against her health-care providers for prolonging her life by resuscitating her contrary to her clear advance medical directives and causing her ongoing pain and suffering. In its October 28, 2016 decision, this Court held that such a cause of action is valid and permitted the Plaintiff to proceed with her case.

a. Whether the New Jersey Advance Directive for Healthcare Act Immunizes Medical Personnel from Civil Liability a result of their Failure to Follow a DNR.

First, Defendants argue in their motion for reconsideration that the Court overlooked the immunity provisions of the the New Jersey Advance Directive for Healthcare Act (the “Act”), N.J.S.A. 26:2H-73.

In the Defendants’ respective motions for reconsideration, they argue that summary judgment should have been granted because the Act immunizes health care providers and institutions when lifesaving care is administered in violation of an advance medical directive.

The Act “recognizes the inherent dignity and value of human life and within this context recognizes the fundamental right of individuals to make health care decisions to have life-prolonging medical or surgical means or procedures provided, withheld or withdrawn.” N.J.S.A. 26:2H-54(b). The Act immunizes medical personnel and institutions from associated civil or criminal liability when a patient’s wishes are actually carried out. Neither a healthcare representative nor a healthcare institution shall be “subject to criminal or civil liability for any actions performed in good faith and in accordance with the provisions of this act to carry out the terms of an advance directive.” See N.J.S.A. 26:2H-73(a) and (c).

Thus, the Act provides health care providers with immunity when they are following the Act by carrying out a DNR and/or DNI; it does not provide immunity when they do not follow advance medical directives. In this case, Defendants did not carry out Ms. Stica’s DNR; they simply ignored it. Ms. Stica had a right to reject lifesaving treatment and to reject unwanted medical care. Ms. Stica exercised this right by completing a DNR and a DNI. Defendants violated Ms. Stica’s rights when they resuscitated her against the clear directives. As a result, Ms. Stica lived an additional six months in a diminished condition that included unwanted pain and suffering.

The Act immunizes health care professionals who are **carrying out** advance medical directives. See N.J.S.A. 26:2H-73. The immunity is intended to protect health care providers from wrongful death lawsuits and criminal prosecution for not taking action to save a dying patient. Here, the Defendants acted to save a dying patient. In so doing, they did not carry out the DNR. Rather, they disregarded it and in the process violated Ms. Stica's fundamental right to refuse unwanted medical care. Thus, the immunization provisions do not apply.

b. Whether Court's Decision to Deny Summary Judgment Was Well-Reasoned and Not Palpably Incorrect or Irrational.

Next, Defendants argue that the Court erred in extending the concepts developed in the "wrongful birth" cases (Berman and Procanik) in order to recognize a new cause of action for "wrongful prolongation of life." Defendants also argue that the Court's decision to deny summary judgment based upon a trend in other jurisdictions recognizing a cause of action for "wrongful prolongation of life", was palpably unreasonable.

The United States Supreme Court and New Jersey have both recognized a right to reject medical treatment. In the absence of a New Jersey case either allowing or barring a wrongful prolongation of life cause of action, this Court correctly relied on the Berman v. Allan, 80 N.J. 421 (1979) and Procanik by Procanik v. Cillo, 97 N.J. 339 (1984) wrongful birth cases.

The primary purpose of tort law is to compensate plaintiffs for the injuries they have suffered wrongfully at the hands of others. Berman, Supra at 427. One of the main purposes of tort law is to deter conduct which causes personal injuries. Lewis v. Am. Cyanamid Co., 155 N.J. 544, 576 (1998). The calculation of any damages in a tort claim is generally assessed by comparing "the condition plaintiff would have been in, had the defendants' not been negligent with plaintiff's impaired condition as a result of the negligence." Berman, supra at 427.

In wrongful life cases the damages “computation would require the trier of fact to measure the difference in value between life in an impaired condition and the “utter void of nonexistence.” Id. Such an endeavor, however, is literally impossible. As Chief Justice Weintraub noted, man, who knows nothing of death or nothingness, simply cannot affix a price tag to non-life.” Id. (citations omitted). In Berman, the New Jersey Supreme Court stated that “where a wrong itself is of such a nature as to preclude the computation of damages with precise exactitude, it would be a perversion of fundamental principles of justice to deny all relief to the injured [party], and thereby relieve the wrongdoer from making any amend for his acts.” Supra at 428.

In Berman, the plaintiffs, parents of an infant child and the infant child, sued the defendant doctors after the child was born with Down’s Syndrome. The parents’ cause of action was based on the defendant doctors’ failure to advise the parents of the high risk that the child may develop Down’s Syndrome due to the mother’s age (38) as well as advise of tests to determine whether the child would be born with Down’s Syndrome. Supra at 425. The Supreme Court held that a parent could recover damages for mental anguish that resulted from a child’s diminished condition. Supra at 432-433. The Berman child was also able to recover “extraordinary medical hospital and other health care expenses” associated with the child’s impairment after the parents were deprived of their right to choose regarding the termination of the pregnancy. Id. However, the Supreme Court rejected imposing the damage of the expense of the child’s rearing because it was disproportionate to the culpability involved. Supra at 432. Nonetheless, the court did not say that the medical expenses could never be recovered.

Here, Ms. Stica lived for less than a year (6 months) after the Defendants failed to follow her DNR. Thus, the damages are more easily discernable (i.e. they are for a finite period because she passed away), not disproportionate to the Defendants culpability and should be compensable.

Since Berman, the New Jersey Supreme Court and Appellate Division have “extended the scope of damages recoverable in parents' wrongful birth claims to include expenses for the care of the child directly attributable to his disabled condition.” Procanik by Procanik v. Cillo, 226 N.J. Super. 132, 143 (App. Div. 1988) referencing earlier decisions by the Supreme Court in the case at 97 N.J. 339 (1984) and Schroeder v. Perkel, 87 N.J. 53 (1981) (reversing Appellate Division's grant of partial summary judgment to defendant doctors in plaintiff parents' wrongful life action for the birth of a child with cystic fibrosis and holding that medical expenses were part of the loss proximately caused by defendants' deprivation of plaintiffs' right to choose whether or not to conceive a child with the illness).

As such, this Court, in rendering its decision on the summary judgment motions recognized a growing trend to compensate victims who have increased expenses resulting from a medical professional's negligent failure to identify remedial diseases before they become permanent. Similarly, in this case, the medical professionals' failure to follow the Ms. Stica's DNR caused her to suffer enhanced permanent illnesses with increased pain and suffering, which could have been avoided had the medical professional followed her DNR. As such, this Court recognized that a Plaintiff is entitled to relief for her damages that resulted from a medical professional's negligent failure to follow a validly executed DNR.

In addition to New Jersey law, the Plaintiff cited cases from other jurisdictions which the Court read and referred to at oral argument indicating a growing trend across the country to recognize some form of relief in this situation.

Defendants have failed to show how the Court's decision was either based upon a palpably incorrect or irrational basis or how the Court obviously did not consider, or failed to appreciate the significance of probative, competent evidence. Cummings v. Bahr, *supra* at 384. The Court's decision to permit the Plaintiff to proceed on her wrongful prolongation life claim

based was based on tort principles, growing trends in New Jersey case law and recognition of New Jersey's leadership in recognizing a patient's right to refuse unwanted medical treatment as support for validating this cause of action. See N.J.S.A. 26:2H-53, the New Jersey Advance Directives for Health Care Act.

Ms. Stica had a well-established right to reject lifesaving treatment. As such, Plaintiff is entitled to recover damages for the diminished condition of Ms. Stica that was created due to the Defendants' failure to follow her DNR. "[W]here a wrong itself is of such a nature as to preclude the computation of damages with precise exactitude, it would be a perversion of fundamental principles of justice to deny all relief to the injured [party], and thereby relieve the wrongdoer from making any amend for his acts." Berman, supra at 428.

IV. Conclusion

Accordingly, the Defendants' motions seeking reconsideration of the Court's October 28, 2016 Order denying their respective summary judgment motions, are **DENIED**.