

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

ELAINE GREENBERG, as Executor of the Estate of
GERALD GREENBERG, Deceased

Plaintiff,

-against-

MONTEFIORE NEW ROCHELLE HOSPITAL,
DIEGO ESCOBAR, M.D., and MONTEFIORE
HEALTH SYSTEM, INC.,

Defendants.

Index No.: 20340/2019E

AFFIRMATION IN OPPOSITION

Gerry Grunsfeld, an attorney duly admitted to practice law by and before the courts of the State of New York affirms the following to be true under penalty of perjury:

1. I am a Member of Lazar Grunsfeld Elnadav, LLP, attorneys for Plaintiff, and I am familiar with the facts of this case.
2. I make this Affirmation in Opposition to Defendants' motion to dismiss Plaintiff's Complaint.

RELEVANT FACTUAL BACKGROUND

3. Plaintiff Decedent, Dr. Gerald Greenberg, ("Dr. Greenberg") signed a Living Will and Health Care Proxy on December 21, 2011. *A true and accurate copy are annexed hereto as Exhibits A and B.* In the Living Will, Dr. Greenberg wrote that in the event he had irreversible brain damage such that he could not regain the ability to make decisions and/or express his wishes, he did not want to receive any form of medical treatment beyond what was needed to keep him comfortable. In particular, Dr. Greenberg wrote that he did not want to be given antibiotics or tube feeding. In the Health Care Proxy, Dr. Greenberg designated his wife, Dr.

Elaine Greenberg, as his healthcare agent, and his son, Michael Greenberg, as his healthcare agent, if Dr. Elaine Greenberg was unavailable.

4. Dr. Greenberg, (a 63-year-old male), was brought to Montefiore Hospital Emergency Department on November 3, 2016, at approximately 6:18 p.m., with advanced Alzheimer's disease, after having been found on the floor of his room at Willow Towers¹, disheveled, lying in urine, and minimally responsive. *See page 1 of Dr. Greenberg's medical chart excerpt, annexed hereto as **Exhibit C***. Shortly before Dr. Greenberg's arrival to Montefiore Hospital, Dr. Elaine Greenberg faxed a copy of Dr. Greenberg's health care proxy and living will to the Hospital. **Exhibit C**, at Pages 43-45. Upon arrival at Montefiore Hospital, labs were drawn revealing Dr. Greenberg had severe sepsis. *Exhibit C, at Page 6*. Sepsis occurs when lactate and other chemicals are released in the bloodstream as part of the body's response to a severe infection. Left untreated in a sixty-three-year-old man with several underlying medical conditions, severe sepsis would be expected to cause organ failure followed by death within three to five days.

5. Dr. Greenberg's son Michael Greenberg, arrived at Montefiore Hospital at approximately 9 p.m. After talking to his mother (Dr. Elaine Greenberg) about his father's serious physical and mental decline, they discussed how, based on Dr. Greenberg's explicit end of life directives, it would be his firm wish for his sepsis to be left untreated, with the understanding this would likely cause his death within days. As such, they determined that they would instruct the Hospital not to provide Dr. Greenberg with any interventional treatment of any kind. Accordingly, Michael Greenberg gave the hospital staff another copy of Dr. Greenberg's health care proxy and living will, and advised them that he had spoken to his mother who was Dr.

¹ Willow Towers is a facility that offers specialized residential care for persons suffering from Alzheimer's.

Greenberg's health proxy and that the family had decided that Dr. Greenberg should not receive any interventional treatment. At approximately 10.00 p.m., that evening, Michael Greenberg filled out a Medical Orders for Life Sustaining Treatment ("MOLST") form. **Exhibit D.** The MOLST form provided that:

- a. Dr. Greenberg was to receive comfort measures only;
- b. Dr. Greenberg was not to receive any intravenous fluids; and
- c. Dr. Greenberg was not to receive any antibiotics

6. Notwithstanding these clear instructions, at approximately 10pm, Dr. Riera-Gonzalez placed an order for Dr. Greenberg to be given one liter of fluid via IV, 50 ml of dextrose, and 10 units of insulin. *Exhibit C, at Page 421.* Furthermore, at 11 p.m., Dr. Escobar placed an order for blood to be drawn from Dr. Greenberg. *Exhibit C, at Page 426.*

7. At 11:05 p.m., Dr. Riera-Gonzalez called Dr. Elaine Greenberg on the phone and informed her that Dr. Greenberg had sepsis and that it could be life-threatening. Dr. Elaine Greenberg confirmed to Dr. Riera-Gonzalez that in light of Dr. Greenberg's clear end of life directives, the hospital was not to provide Dr. Greenberg with any form of interventional treatment, but was to provide him with comfort measures. Dr. Elaine Greenberg specifically advised Dr. Gonzalez that Dr. Greenberg should not be given antibiotics, nutrition/fluids via tube, pressors, or invasive tests. The chart records that at this point, Dr. Greenberg was admitted to the medical floor, and his chart was updated to specify that Dr. Greenberg should only receive comfort measures, and that a hospice evaluation should be considered. *Exhibit C, at Page 103.*

8. Despite the chart explicitly documenting Dr. Greenberg's end of life wishes, when Dr. Escobar saw Dr. Greenberg the following morning, he ordered the patient to be placed on antibiotics, to undergo further lab tests and a brain CT. *Exhibit C, at Page 7.* Dr. Greenberg received at least one IV infusion of ceftriaxone antibiotics pursuant to Dr. Escobar's Order.

Exhibit C, at Page 433. Dr. Greenberg also underwent the brain CT Dr. Escobar ordered. In addition, Dr. Greenberg was given magnesium sulphate on November 6th. *Exhibit C, at Page 440.* In addition, the hospital staff drew blood from Dr. Greenberg on a daily basis. All of these interventional medications and treatments were administered to Dr. Greenberg when his wife and son were not present. All of these medications and tests directly violated Dr. Greenberg's written end of life instructions which had been relayed to the Hospital on several occasions, and which instructions were contained within Dr. Greenberg's chart.

9. According to a medical expert retained by Plaintiff, given Dr. Greenberg's poor health on admission, left untreated, the severe sepsis would likely have ended Dr. Greenberg's life within three to five days of his admission, and therefore ended his suffering within three to five days. According to Plaintiff's medical expert, because Defendants treated Dr. Greenberg with hydration, antibiotics and other medications, his sepsis resolved within two days of his admission, and Dr. Greenberg was therefore forced to suffer for an additional thirty days before he died on December 5, 2016. Because Dr. Greenberg did not have sufficient mental or swallowing capacity to eat, he essentially starved to death during these additional 30 days.

10. Thus, Defendants are directly responsible for Dr. Greenberg's immense pain and suffering, which was caused by egregious medical malpractice on their part- namely, imposing and substituting their own views as to whether Dr. Greenberg should be allowed to let his life end in the quickest and most painless way possible. They determined and they decided that they did not think this was acceptable.

ARGUMENT

11. Defendants argue that they are entitled to dismissal of this action because New York does not recognize wrongful-life claims, however, this action is not premised on a wrongful life claim. Rather, as alleged at Paragraphs 41-43 of Plaintiff's complaint, this action is premised

on medical malpractice and in particular on Defendants' violation of NY CLS Pub. Health §§ 2994-f (1), which provides:

An attending physician or attending nurse practitioner informed of a decision to withdraw or withhold life-sustaining treatment made pursuant to the standards of this article shall record the decision in the patient's medical record, review the medical basis for the decision, and shall either: (a) implement the decision, or (b) promptly make his or her objection to the decision and the reasons for the objection known to the decision-maker, and either make all reasonable efforts to arrange for the transfer of the patient to another physician or nurse practitioner, if necessary, or promptly refer the matter to the ethics review committee.

In the instant case, Dr. Escobar and the other Defendants deliberately or negligently ignored Dr. Greenberg's end of life instructions which are documented on virtually every page of Dr. Greenberg's chart.

12. If Defendants disagreed with Dr. Greenberg's end of life directives, pursuant to NY CLS Pub. Health §§ 2994-f (1), they were nonetheless required to implement his directives. If Defendants felt their consciences did not allow them to implement such directives, they were required to either transfer the patient to another facility or refer the matter to an ethics review committee. What they unequivocally were not allowed to do, is ignore Dr. Greenberg's end of life directives and replace the patient's will and autonomy with their own will and autonomy.

1. Defendant cite *Sheppard-Mobley v King*, 4 N.Y.3d 627, 830 (2005) and *Cronin v. Jamaica Hosp. Med. Ctr.*, 60 A.D.3d 803 2d Dept. 2009), as authority for their proposition that New York does not allow a claim of medical malpractice against a health care provider that prolongs a patient's life against his wishes, causing pain and suffering during the additional period of life. However, Defendants' reliance on *Sheppard-Mobley* and *Cronin* is misplaced. *Sheppard-Mobley* and *Cronin* were decided in 2005 and 2009- before the 2010 enactment of NY CLS Pub. Health §§ 2994-f (1). Upon information and belief, there has not been a single reported case since the 2010 passage of Pub. Health §§ 2994-f (1), involving a health-care provider that

disregarded a patient's end of life directives. However, in *Doctors Hosp. of Augusta, LLC v Alicea*, 332 Ga App 529, (2015), Georgia's highest Appellate Court upheld both of the lower Courts' rulings which had found that the hospital's intubation of a patient without first obtaining the consent of the health care proxy, may have violated Georgia's Advance Directive for Health Care Act (which "sets forth general principles governing the expression of decisions regarding health care and the appointment of a health care agent").

13. Thus, Defendants' reliance on *Sheppard-Mobley* and *Cronin*, is inapposite, given that at the time of those Decisions, a doctor/hospital that violated a patient's end of life directives was not violating New York law. Conversely, today, a doctor/hospital that violates a patient's end of life directives (as Defendants did) is in direct violation of NY CLS Pub. Health §§ 2994-f (1). It is virtually certain that if *Sheppard-Mobley* and *Cronin* were being decided today, the Courts would have found that in violating NY CLS Pub. Health §§ 2994-f (1), Defendants had committed malpractice, and that a Plaintiff has a viable medical malpractice claim under New York law for the pain and suffering caused by a Defendant's violation of the statute.

CONCLUSION

14. Because the subsequent enactment of NY CLS Pub. Health §§ 2994-f (1) has superseded the binding precedent of *Sheppard-Mobley* and *Cronin*, Defendants' motion to dismiss should be denied.

WHEREFORE, Plaintiff respectfully requests an Order denying Defendants' motion to dismiss.

Dated: Brooklyn, NY
December 7, 2020

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