Beswick v. CareStat

185 F.Supp.2d 418
United States District Court for the Eastern District of Pennsylvania
December 6, 2001

No. 00-1304. Originally styled as "Beswick v. City of Philadelphia." Ralph Raymond BESWICK, et al. v. CITY OF PHILADELPHIA, et al.

GILES, Chief Judge.

I. INTRODUCTION

Ralph Raymond Beswick, Jr. and Rose Wiegand, Co-Administrators of the Estate of Ralph Richard Beswick, Sr., bring a constitutional claim pursuant to 42 U.S.C. § 1983 against the City of Philadelphia ("City") and its former 911 call-taker, Julie Rodriguez, and, asserting pendent jurisdiction, bring state law negligence claims against Julie Rodriguez, and Father and Son Transport Leasing Inc., d/b/a CareStat Ambulance and Invalid Coach Transportation, Inc. ("CareStat"), a private ambulance service, its record owner, Slawomir Cieloszcyk, a purported owner and manager, Gregory Sverdlev, and two CareStat employees, Ruslan Ilehuk and Ivan Tkach (collectively "CareStat defendants").

Before the court are four Motions for Summary Judgment filed by:~ the CareStat defendants, for alleged failure to establish proximate cause;~ and~ Tkach~ and Ilehuk, on the grounds that~ there is no competent evidence supporting the claim of Tkach and Ilehuk's employee negligence~ .

For the reasons that follow, the City's motion is granted, the CareStat defendants' motions are denied, and the motions of Sverdlev, Tkach, and Ilehuk are denied.

II. FACTUAL BACKGROUND

Plaintiffs' claims all arise from the death of Ralph Richard Beswick, Sr. on February 11, 2000.~

Consistent with the review standards applicable to motions for summary judgment, Fed.R.Civ.P. 56(c), the alleged facts, viewed in the light most favorable to the plaintiffs, follow.

A. The Events of February 11, 2000

On the evening of February 11, 2000, Ralph Richard Beswick, Sr. collapsed on the dining room floor of the South Kensington home that he and Wiegand had shared for 23 years.^ From the living room where she had been watching television, Wiegand heard the "thump" of Beswick falling and went to him.[1] Upon entering the kitchen and finding Beswick lying prone on the floor, Wiegand immediately dialed the City's medical emergency response number, 911, and told the answering call-taker, Julie Rodriguez, that Beswick had fallen and needed urgent assistance, and requested an ambulance.

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[1] There is some discrepancy in the record as to whether Wiegand went to Beswick immediately after he had fallen, or if some minutes had passed before she realized he had fallen. For the purposes of summary judgment, this court must assume that Wiegand went to him straightaway, as she indicated in her police statement taken eleven days after Beswick's death.^

Rodriguez asked if Beswick was breathing. Wiegand responded that he was. Without obtaining any further information, Rodriguez told Wiegand that "somebody" was "on the way."

Fire Department regulations require 911 operators to refer all emergency medical calls to the Fire Department, which then dispatches Fire Rescue Units appropriately equipped and staffed to respond to medical emergencies. The mechanical protocol of the job of 911 call-taker requires that the call be transferred immediately to the dispatcher upon termination of the emergency call. The last step of the mechanical protocol of the call-taker job is to punch a sequential button on a console to connect the dispatcher and transmit the acquired information from the caller. The dispatcher forwards the call to the Rescue Unit closest to the response site.

Instead of following established procedure, which would have continued the process to trigger the Rescue Unit's response, Rodriguez abandoned protocol and used a telephone located next to her console to call a private ambulance company, CareStat, to see if it could respond to the Wiegand call. Rodriguez, without the knowledge of the City, had recently begun working for CareStat as a dispatcher in her off hours, and had a secret deal with CareStat to refer to it all calls received in her City 911 capacity that she believed CareStat could handle. Under the City's protocol, Rodriguez was required to treat all 911 calls as emergencies requiring the City's Rescue Unit response. She had no discretion to act otherwise.

Immediately after speaking with Wiegand, Rodriguez telephoned Slawomir Cieloszcyk (also known as "Slavik"), the owner and dispatcher of CareStat. Upon telling Cieloszcyk that Ralph Beswick, Sr. was age 65 and unconscious from a fall, Rodriguez asked how long it would take CareStat to get to the Beswick home.^ Neither Rodriguez nor Cieloszcyk knew that the 911 call was, in fact, a situation other than an emergency, such as a heart attack or other serious medical event.^ Cieloszcyk estimated a response time of fifteen minutes. He ended the conversation by saying, "We're on the way."

Arguably, corruptly, in violation of Pennsylvania's statutory requirements applicable to private ambulances, Cieloszcyk undertook a response to a medical situation to which CareStat was not authorized to respond. All 911 calls are assumed to be medical emergencies unless and until actual response and evaluation by the City Fire Department might determine otherwise. CareStat had no permission from the City to use 911 call-taker Rodriguez to refer calls to it and knew that the 911 call was being diverted from the City's established response system. Under these circumstances, Cieloszcyk nevertheless gave the Beswick response assignment to employees Ilehuk and Tkach, neither of whom had completed the requisite training to become a licensed EMT or paramedic.^ Ilehuk and Tkach, having the same knowledge as Cieloszcyk, including the deal with Rodriguez to compromise her City 911 job responsibilities, accepted the call and set out for the Beswick residence.

Ten minutes after the first 911 call had been made, because there was yet no emergency vehicle at the Beswick home, Wiegand's sister placed another 911 call at 8:02 p.m. to make sure that the City's rescue services had already been dispatched. This call also happened to have been received and handled by Rodriguez. Despite this second urgent call, Rodriguez did not punch it over to the City's emergency dispatch system. She called CareStat again, seeking assurance that its ambulance dispatched would arrive soon. Cieloszcyk assured Rodriguez that the CareStat ambulance was on the way as he had promised her.

Because an emergency equipped unit still had not arrived, Wiegand called 911 a third time. The third call came to a call-taker other than Rodriguez. He followed all Fire Department procedures and within a very short time period a City Fire Department Rescue Unit arrived at the Beswick home. Rodriguez became aware of the third Wiegand call. She promptly called Cieloszcyk at CareStat and told him that a City paramedic unit was responding to the Beswick home, and requested that he hide her involvement in the misdirecting of the 911 calls. By the time that the CareStat ambulance arrived, the Fire Rescue Unit had already removed Beswick from the home. It was then that the Beswick family realized that the 911 call-taker had caused a private ambulance to attempt to respond to their emergency call, and that it was ill-equipped to have dealt with the Beswick medical emergency had it arrived earlier.

B. The Delay in Response to Beswick because of Defendants' Actions

The first emergency telephone call concerning Beswick was received by Rodriguez at the Fire Command Center ("FCC") at 19:53:41. The second call, placed by Wiegand's sister, was received by Rodriguez at 20:02:54. The third Wiegand call was received at the FCC by dispatcher Jose Zayes at 20:04:57, and the City Fire Department response was immediately dispatched.

Fire Battalion Chief William C. Schweizer confirmed that at the time Rodriguez received the first call at 19:53:41, Medic Unit No. 2 would have been available to respond from its base at Kensington and Castor, which was within several minutes of the Beswick home. Medic Unit No. 2, like other City Medic Units, was staffed with paramedics, who have more training than EMTs. However, at 20:04:57, when Zayes received the third call, Medic Unit No. 2 was no longer available. Nor was the next closest Medic Unit, No. 8, based at Boudinot and Hart Streets. In response to the 20:04:47 call, Medic Unit 31, the third closest of the City's Medic Units, was dispatched from Second Street, and Fire Department Engine No. 7 was dispatched from Kensington and Castor. However, Engine No. 7 is staffed only with EMTs, and EMTs are not permitted to administer epinephrine or atropine to patients. Medic unit 31 took 8 minutes and 34 seconds to arrive at 959 East Schiller Street. Engine No. 7 took 3 minutes and 34 seconds to arrive. Engine No. 7 and Medic Unit No. 2-which was available for the first call but was never contacted by Rodriguez-were both based at Kensington and Castor, and would have had to travel the same distance to get to the Beswick residence. Based upon this information, the total delay in getting a Medic Unit to respond to Beswick has been estimated by Battalion Chief Schweizer to be 16 minutes and 16 seconds.^ [2]

Plaintiffs have introduced evidence that this 16 minute, 16 second delay caused or contributed to the cause of Beswick's death, through the deposition testimony of Kale Etchberger and Joanne Przeworski, the two Fire Department paramedics who arrived on the scene as part of Medic Unit 31. Both testified that when they arrived, Engine No. 7's EMTs were already tending to Beswick. However, those EMTs, unlike paramedics, cannot administer medications. As indicated in these paramedics' depositions, Engine No. 7's Lifepack 500 defibrillator machine received a "shock advised" message at 20:07:48, which suggests that at the time, Beswick was either in a state of v-fib or v-tack;

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[2] It is undisputed that Beswick died of a heart attack upon his arrival at the hospital. He was cremated two days later without an autopsy, so the exact magnitude of his heart attack can never be known.

in other words, his heartbeat was not totally flat. Additionally, upon the administration of medications by Etchberger and Przeworski, Beswick's heart rate was temporarily restored. Both paramedics testified that they believed he had a chance to be saved when they first came to the scene.^ Plaintiffs' expert, Dr. Norman Makous, a cardiologist, would opine to a reasonable degree of medical certainty that based on established medical literature regarding observed cardiac arrests due to ventricular fibrillation, and assuming that Beswick was still breathing at the time of the first 911 call, that had Medic Unit No. 2 arrived after the first call, Beswick's chance of survival would have equaled, if not exceeded, thirty-four (34) percent.^

C. The Fire Department's Custom of Permitting Employees to Refer 911 Calls to Private Ambulance Companies

At the time of Beswick's death, the Fire Department's official policy permitted Medic Unit personnel to refer to private ambulance services persons to whom there had been a City Rescue Unit response if assessment at the scene was that the medical condition was not an emergency. Emergency Medical Services Bulletin 91-42 stated,

> All personnel assigned to Medic Units are reminded that it is not the Philadelphia Fire Department's policy to recommend private ambulance companies *by name* for non-emergency basic life support transportation. In instances where private ambulances are the appropriate mode of patient transportation, the decision as to which ambulance company will be contacted is to be left to the patient or the patient's family.

^ (emphasis added) All private ambulance transports first had to be approved by a medical doctor at the basic command position, whom the medic units would phone with a detailed description of the patient's condition, as well as an estimated response time for a private ambulance.^ This required medics-EMTs and paramedics-first to contact a private ambulance company in order to obtain an estimated response time before calling the basic command position.^ Chen, a City paramedic, testified at his deposition that it was a widespread custom for paramedics following this procedure to refer non-emergency patients to specific private ambulance companies, and that he was not aware of the prohibition on recommending private ambulance companies by name, because he had not read it. It was posted on a bulletin board and not distributed to paramedics individually. He believed that paramedics were too busy responding to emergencies to read the bulletin board.^

With knowledge of the City, some Fire Department EMTs and paramedics hold second jobs with private ambulance companies. According to the City's answers to interrogatories, as of February 11, 2000, there were: (1) 276 paramedics employed by the City Fire Department, 57 of whom had Fire Department permission to engage in employment outside of the City Fire Department with a private ambulance company; and (2) approximately 1,269 EMTs employed by the City Fire Department, of whom approximately 141 had Fire Department permission to engage in employment outside of the City Fire Department with a private ambulance company. In the results of a reverse telephone lookup of numbers that had been obtained from telephone records of two City Fire-Rescue personnel under suspicion of violating the City prohibition, six private ambulance companies, including CareStat, were identified as referred companies.^

However, it is undisputed that none of the 51 call-taker/dispatchers employed by the City Fire Department had Fire Department permission to engage in outside employment. Plaintiffs assert Rodriguez could have been influenced by what she might

have heard or known that paramedics, like Chen, were able to do in referring medical conditions to private ambulance services for response and must have reasonably believed that her referral of the Beswick 911 medical event to CareStat would have been condoned by the City. There is no evidence that Rodriguez was motivated by any policy or lack of policy by the City. Nevertheless, plaintiffs would offer expert opinion that it would have been easy for Rodriguez, a City Fire Department employee, to become confused as to the boundaries or limitations of her call-taker job.

City policymakers were aware, through patient complaint forms submitted by 911 callers or their relatives, that the City's custom of permitting employee referrals to private ambulance companies had resulted in some instances where EMTs or paramedics had erroneously adjudged a patient's condition as non-emergency and refused to transport them.^

Six weeks after Beswick's death, on March 31, 2000, the City Fire Commissioner issued Memorandum No. 00-25, which stated,

> At no time are Philadelphia Fire Department employees permitted to initiate contact with a private ambulance service and/or refer or recommend a specific private ambulance service to a patient. The private ambulance service to be used must be chosen by the patient or the patient's representative.^ ~

III. Discussion

Summary judgment under Federal Rule of Civil Procedure 56(c) is appropriate only if, drawing all inferences in favor of the non-moving party, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law."^ ~

Loss of a Chance Theory of Proximate Cause

CareStat defendants argue that on its face, a statistical survival rate of 34 percent, which plaintiffs' medical expert concludes is the chance for survival Beswick would have had if a City ambulance had been appropriately dispatched, is insufficient as a matter of law to establish proximate cause. In the alternative, CareStat defendants argue that additional factors unique to Beswick, such as preexisting heart and stroke conditions, as well as chronic obstructive pulmonary disease, necessarily served to reduce his chances of survival well below 34 percent; further, they contend that Wiegand's deposition testimony indicates that she waited "five or ten minutes" before responding to Beswick's collapse, therefore Dr. Makous' conclusions, which are based on observedcardiac arrests, are inadmissible. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (holding that when expert testimony's factual basis, data, principles, methods or their application are called sufficiently into question, the trial court must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline).

1. For Purposes of Summary Judgment, Beswick's Chance of Survival, Absent Defendants' Negligence, was 34 Percent.

Addressing defendants' alternative argument first, for summary judgment purposes, this court must accept plaintiffs' allegation that Wiegand heard Beswick collapse and responded immediately, as she stated in the police report taken eleven days after Beswick's death. Further, Dr. Makous' conclusions are predicated upon an article from

the New England Journal of Medicine, which states that "the rate of survival to hospital discharge for patients with a witnessed collapse who are found to be in ventricular fibrillation is 34 percent." Mickey S. Eisenberg, M.D., Ph.D., & Terry J. Mengert, M.D., "Cardiac Resuscitation," N. Eng. J. Med., vol. 344, no. 17, at 1304 (April 26, 2001). The article further states that "[w]hen cardiopulmonary resuscitation is started within four minutes after collapse, the likelihood of survival to hospital discharge doubles." Id. at 1305. Viewing all facts of record in the light most favorable to plaintiffs, this court must assume that Wiegand called 911 immediately after Beswick's collapse, and that at that time, Medic Unit No. 2, with licensed paramedics, was available for dispatch and 3 minutes and 34 seconds from the Beswick residence.[3] Thus, a jury could conclude that Beswick's chances for survival were at least 34 percent, if not more, had the 911 call not been diverted to CareStat. Moreover, the 34 percent survival rate noted in the article and in Dr. Makous' conclusions does not assume only patients who are experiencing their first cardiac arrest, or patients without other pre-existing conditions. Thus, for the purposes of summary judgment, the court must assume that the factors surrounding the cardiac arrest of an individual with Beswick's medical history were taken into account by both the article and Dr. Makous.

Federal Rule of Evidence 702 states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The Court in *Daubert* listed four factors courts should consider in determining reliability under Rule 702: (1) whether the theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether the technique has a high known or potential rate of error; and (4) whether the theory has attained general acceptance within the scientific community. 509 U.S. at 593-94, 113 S.Ct. 2786. The proponent of the testimony does not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable. In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir.1994).

The court finds Dr. Makous, a licensed physician who has spent more than fifty years practicing cardiology, is basing his opinions upon established modern medicine, stated, inter loci, in the New England Journal of Medicine, and thus is scientifically reliable for the purposes of *Daubert*. The 34 percent probability that Dr. Makous cites should not be confused with the degree of his medical certainty as to the accuracy of that opinion.

2. Loss of a Chance

Pennsylvania tort law follows the Restatement Second of Torts, § 323, which provides:

> § 323. Negligent Performance of Undertaking to Render Services One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or

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[3] The article does not specify whether the start of CPR within four minutes after cardiac arrest doubles the 34 percent chance of survival, or if it refers to some other statistic. Id.

> things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

(emphasis added). See *Hamil v. Bashline*, 481 Pa. 256, 392 A.2d 1280, 1286 (1978). In *Hamil*, plaintiff's husband, who was suffering from severe chest pains, was brought to the defendant hospital. Due to a faulty electrical outlet, the EKG machine failed to function. A second EKG machine could not be found and, upon receiving no further aid or treatment, *Hamil* transported her husband to a private doctor's office, where he died of cardiac arrest while an EKG was being taken. Plaintiff's expert witness estimated that the decedent would have had a 75 percent chance of surviving the attack had he been appropriately treated upon his arrival at the hospital. Following the introduction of all evidence, the trial court determined that plaintiff's medical expert had failed to establish, with the required degree of medical certainty, that the alleged negligence of the defendant was the proximate cause of plaintiff's harm, and directed a verdict for the defendant. The Supreme Court reversed, finding that cases such as this "by their very nature elude the degree of certainty one would prefer and upon which the law normally insists before a person may be held liable." Id. at 1287. The court interpreted the effect of § 323(a) of the Restatement as to address these situations, and relaxed the degree of evidentiary proof normally required for plaintiff to make a case for the jury as to whether a defendant may be held liable for the plaintiff's injuries. Accordingly, the court adopted the following standard:

Once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and that the harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm. Such a conclusion follows from an analysis of the function of Section 323(a).

Id. See also *Jones v. Montefiore Hospita*l, 494 Pa. 410, 431 A.2d 920 (1981); *Mitzelfelt v. Kamrin*, 526 Pa. 54, 584 A.2d 888 (1990).

In determining the burden of proof required ultimately to warrant a jury verdict for the plaintiff, the *Hamil* court again relied on the Restatement Second of Torts, which reflected the state of the law at the time of its adoption in 1965; namely that the quantum of proof, or "substantial factor," necessary is a preponderance of the evidence. 392 A.2d at 1288 n. 9 (citing Restatement (Second) of Torts § 433B, comment (a)).[4] Accordingly, this court will permit Dr. Makous' testimony regarding the increased risk of harm to

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[4] Comment (a) of Section 433B states:

> a. Subsection (1) states the general rule as to the burden of proof on the issue of causation. As on other issues in civil cases, the plaintiff is required to produce evidence that the conduct of the defendant has been a substantial factor in bringing about the harm he has suffered, and to sustain his burden of proof by a preponderance of the evidence. This means that he must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Beswick of 34 percent, and will allow the jury to determine, by a preponderance of the evidence, whether this increased risk brought about Beswick's death.

Since *Hamil* was decided, several states have altered their standards for establishing liability in medical malpractice cases. Part (f) of § 4 Restatement (Third) of Torts (1999 Main Vol.) (Proof of Plaintiff's Negligence and Legal Causation) addresses these theories of lost chance as they have been adopted by those states:

> f. Lost chance. In some jurisdictions a plaintiff can recover for a lost chance of recovery from a disease or medical condition (or for other increased risk of harm). Where the harm for which the plaintiff seeks to recover is the lost chance itself, the plaintiff's negligence in causing the loss of chance reduces the plaintiff's recovery under §§ 7. Such a rule is not a burdenshifting rule on the issue of causation, but a rule about what constitutes the plaintiff's compensable injury. In some jurisdictions, the lost chance doctrine allows a plaintiff to recover damages for the entire injury on a showing that the defendant substantially increased the risk of that injury. In those jurisdictions, if the plaintiff uses the doctrine of lost chance to prove that the injury was caused by the defendant's negligence, the defendant may use the doctrine of lost chance to prove that the injury was caused by the plaintiff's negligence. Otherwise, the defendant may not use the doctrine of lost chance to prove that the plaintiff's injury was caused by the plaintiff's negligence. The rule stated in this Comment does not affect the ability of a plaintiff or defendant to prove causation by a preponderance of the evidence – i.e., more likely than not-by use of statistical evidence.

The doctrine of loss of chance has two versions. Under one, the plaintiff can recover only for the value of the lost chance. See, e.g., *Thompson v. Sun City Community Hosp.*, 141 Ariz. 597, 688 P.2d 605, 616 (1984)^ . Under this theory, the burden of proof for causation is not changed; rather, the injury is defined as the loss of a chance in itself, as opposed to the resultant harm to the plaintiff. With the injury thus defined, a plaintiff is able to prove causation for that injury under the traditional preponderance test. Recovery is generally the percentage of the damages defendant was found to have caused.

Under the other version of the lost chance doctrine, the nature of plaintiff's injury remains unchanged; rather, the court permits a lower burden of proof, allowing plaintiff to prove that the defendant caused the injury, even though plaintiff cannot prove more likely than not, but for the defendant's negligence, the injury would not have occurred. See, e.g., *Falcon v. Memorial Hosp.*, 436 Mich. 443, 462 N.W.2d 44 (1990), superceded by statute,Mich. Comp. Laws Ann. § 600.2912a(2) (1994)^ .

Pennsylvania law has not adopted either of these approaches.~

D. Negligence of Ilehuk and Tkach

The CareStat defendants seek dismissal of Tkach and Ilehuk on the grounds that any negligence on their part could not have been a proximate cause of the death of Beswick because they arrived after the Fire Department, and thus never participated in the care of Beswick. Plaintiffs argue that it is not the lack of qualifications of these defendants that caused the delay in Beswick's treatment. Rather, they claim that these defendants should have turned down the assignment because of their lack of qualifications, which contributed to the delay in medical attention. Plaintiffs assert, and defendants do not dispute, that Ilehuk and Tkach had not yet completed their training as paramedics. Thus, plaintiffs contend, those defendants' acceptance of the 911 call was improper as a

matter of Pennsylvania statutory law.^ Because of the breach of their duty to refuse a call for a residential transport, defendants caused a delay which allegedly was the proximate cause of Beswick losing all chance of survival.

IV. CONCLUSION

For the foregoing reasons,~ the CareStat defendants' Motions are denied, and~ Tkach, and Ilehuk's Motion is denied.

An appropriate order follows.~

Legend: ~ *matter omitted* ^ *citation matter omitted*
Footnotes have been renumbered