

IN THE COURT OF COMMON PLEAS of PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT of PENNSYLVANIA

CIVIL TRIAL DIVISION

| | | |
|---------------------------------|---|----------------------|
| BERNARD and DAWN FELDMAN | : | |
| Plaintiffs | : | SEPTEMBER TERM, 1997 |
| v. | : | |
| | : | |
| NAZARETH HOSPITAL | : | |
| Defendant | : | No. 213 |

OPINION OF THE COURT

September 28, 1999

GOODHEART, J.

INTRODUCTION

The Plaintiffs have appealed from my Order of July 22, 1999, granting the Defendant's Motion for Summary Judgment, and dismissing the action with prejudice.

In September of 1995, Plaintiff Bernard Feldman was admitted to Nazareth Hospital after arriving in the Emergency Room complaining of a collapsed right foot. Mr. Feldman's foot was severely ulcerated, and was draining pus and blood, so the hospital admitted him for evaluation and treatment. During the transfusion, Mr. Feldman developed respiratory distress, and was then intubated and transferred to the Intensive Care Unit.

The hospital's records indicate that the episode of respiratory distress was caused by congestive heart failure, which the hospital treated with diuretics and with ventilator equipment to ease the patient's breathing.

The Plaintiffs commenced this action on September 3, 1997, by Writ of Summons. In their Complaint, which was filed on November 26, 1997, the Plaintiffs alleged that the true cause

of Mr. Feldman's respiratory distress was the transfusion itself, during which – according to the Complaint – improperly typed, matched or filtered blood or blood products were introduced into Mr. Feldman's system.

The Complaint originally contained three counts -- one in negligence, one for battery, and the third for breach of warranty – but the breach of warranty count was dismissed on Preliminary Objections, by Order dated February 18, 1998¹.

The Defendant filed its Motion for Summary Judgment on June 7, 1999, contending that because the Plaintiffs had neither identified their proposed expert witnesses nor submitted the experts' by the Court-established deadline of May 4, 1999 they would be unable as a matter of law to prove the essential elements of their case². I granted that Motion; this timely appeal followed.

DISCUSSION

The Negligence Claim

The Plaintiffs claim that expert testimony is unnecessary to establish the Defendant's negligence, because that negligence is so obvious that even a layperson could recognize it, as in Brannan v. Lankenau Hospital, 490 Pa. 588; 417 A.2d 196 (1980). The record belies this contention.

Further, even if one assumes that the Plaintiffs are correct, the record also fails to support an inference that the Mr. Feldman's respiratory distress was caused by the Defendant's negligence;

¹ This decision, rendered by the Honorable Pamela Pryor Dembe (*nee* Cohen), was unquestionably the correct one; Pennsylvania does not recognize a cause of action for breach of warranty in medical care. Collins v. Hand, 431 Pa. 378; 246 A.2d 398 (1968).

² In their response to the Defendants' Motion for Summary Judgment, the Plaintiffs avoided directly conceding that they lacked an expert, but nevertheless identified no such witness.

without causation, there can be no liability, even if negligence is presumed.

Without an expert witness, the Plaintiffs can -- at most -- prove only that Mr. Feldman suffered an episode of respiratory distress during a blood transfusion. They cannot prove that the blood transfusion was administered improperly, because they have no witness to establish the applicable standard of care and its breach, nor can they prove that the transfusion itself caused the respiratory distress; indeed, the only arguably competent evidence on causation available -- the hospital's records -- flatly contradicts the Plaintiffs' theory of the case.

The Informed Consent Claim

The performance of surgery without "informed consent" constitutes the intentional tort of battery. Since the commission of an intentional tort is never within the scope of an agent or employee's duties, there can be no *respondeat superior* liability imposed against the defendant hospital in this case, even if its employees, actual agents or apparent agents committed a battery on Mr. Feldman. Furthermore, in Pennsylvania, the duty to obtain informed consent runs only from the physician to the patient, and not from the facility itself, Kelly v. Methodist Hospital, et al, 444 Pa. Super. 427; 664 A.2d 148 (1995); Watkins v. Hospital of the University of Pennsylvania, et al, 1999 PA Super 181; -- A.2d -- (1999), except in certain special circumstances not present here³.

Moreover, at the time of the Plaintiff's hospitalization, the doctrine of "informed consent"

³ In Friter v. Iolab Corporation, 414 Pa. Super. 622; 607 A.2d 1111 (1992), the hospital in question was involved in an FDA clinical investigation, and the FDA's regulations -- binding on the hospital -- required any institution participating in the study to obtain an informed consent from any patient undergoing experimental treatment. The regulations thus created an independent duty on the part of the hospital not found in Pennsylvania law.

did not apply to the administration of blood transfusions outside of surgery. Hoffman v. Brandywine Hospital, 443 Pa. Super. 245; 661 A.2d 397 (1995)⁴.

In the absence of expert testimony, the Plaintiffs would be unable to sustain their burden of proof at trial, and for that reason, my decision to grant the Defendant's Motion for Summary Judgment should be affirmed.

BY THE COURT:

Goodheart, J.

⁴ The Healthcare Services Malpractice Act, 40 P.S. §1301.811-A, was amended effective January 25, 1997. Subsection (a)(3) of the amended statute specifically makes the doctrine of informed consent applicable to blood transfusions not incident to surgery.