

LAW CURRENTS An informational newsletter from Richard A. Klass, Esq.



“Who’s to say who’s an expert?”

– Paul Newman

The nursing home resident needed to be transported by ambulette to her medical appointment. Being that the resident was wheelchair-bound, she was to be accompanied to the appointment by her nurse’s aide. The ambulette driver met them inside the nursing facility, wheeled the resident to the ambulette, raised the wheelchair onto the lift and wheeled the resident into the ambulette. The driver then strapped the seatbelt on the resident; however, it was alleged the driver failed to secure the wheelchair to the ambulette.

As the driver started driving to the medical appointment, the ambulette stopped short. Since the wheelchair had not been secured to the ambulette, this caused the resident to slide out

from her wheelchair. Unfortunately, the resident’s foot bent underneath her and she fractured her tibia.

Safety measures that should have been taken

The resident died six months after the ambulette incident. Her daughter retained **Richard A. Klass, Esq., *Your Court Street Lawyer***, to sue the nursing home and ambulette service for personal injuries sustained by her mother which had caused her severe pain.

The president of the ambulette transportation service testified that the driver should have secured the wheelchair by

strapping the wheels to the floor of the vehicle so that the wheelchair would not move. He also testified that a shoulder belt was needed, as a seatbelt couldn't hold the person well enough as a wheelchair tends to roll. The ambulette transportation service president stated it was the responsibility of the driver to make sure that the person being transported was properly secured in the ambulette.

Summary judgment motion by the nursing home

Based on the above testimony, the nursing home moved for summary judgment, seeking the dismissal of the lawsuit against the nursing home. The nursing home claimed that it was not the responsibility of the nurse's aide accompanying the resident to make sure that the resident was properly secured in the ambulette when being transported to medical appointments. In support of its motion, the nursing home put forth an affidavit from an engineer designated as an expert witness who stated that it was "clearly the responsibility of the driver to ensure that the patient is securely fastened as it is the driver's responsibility to ensure the safety of the patient during transportation." He further opined that, "it is not the responsibility of the attendant to ensure that the patient is securely fashioned [sic]."

Expert witness cannot usurp the role of the judge

In opposition to the motion, it was urged that the nursing home didn't really offer any evidence to support its fundamental obligation to its residents – to ensure that its residents are safe. The daughter cited to the decision in *D'Elia v. Menorah Home and Hospital for Aged and Infirm*, 51 AD3d 848 [2 Dept. 2008], where the court held that "a medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety." It was argued that there were issues of fact as to whether the nursing home failed to implement available precautions to protect the resident from the foreseeable risk of not being properly secured in the ambulette.

As to the expert witness' affidavit, it was alleged to only contain opinions from the engineer as to what was "clear" to him as to the duties of the parties, without relying on anything more. Substantial New York case holds for the proposition that an expert cannot offer mere opinions as to legal obligations. See, *Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63, 69 [1 Dept. 2002].¹

In denying the motion for summary judgment, the judge held that:

The affidavit of defendants' expert is rejected, as it sought to opine on the duties of the parties, the sole province of the court. Absent this affidavit, defendants have failed to eliminate issues of fact as to a nursing home's broader duty to safeguard and supervise the decedent, a wheelchair-bound resident of the nursing home, while being transported to an appointment by ambulette.

— *Richard A. Klass, Esq.*

Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court St., 28th Fl., Brooklyn, NY. He may be reached at (718) COURT•ST or RichKlass@courtstreetlaw.com with questions. Prior results do not guarantee a similar outcome.

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¹ "expert witnesses should not * * * offer opinion as to the legal obligations of parties * * *; that is an issue to be determined by the trial court. Expert opinion as to a legal conclusion is impermissible" (*Colon v Rent-A-Center, Inc.*, 276 AD2d 58, 61). An expert may not be utilized to offer opinion as to the legal standards which he believes should have governed a party's conduct."



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