

**Burke v Commack Auto Transp., Inc.**

2008 NY Slip Op 30185(U)

January 18, 2008

Supreme Court, Suffolk County

Docket Number: 0009089/2003

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 23 - SUFFOLK COUNTY**

**PRESENT:**

Hon. EMILY PINES  
Justice of the Supreme Court

MOTION DATE 10-3-07  
ADJ. DATE 11-15-07  
Mot. Seq. # 017 - MD; # 018 - XMD; # 019 -XMD;  
# 020 - XMD; # 021 - XMD;

-----X  
STEPHEN U. BURKE, as Executor of the Estate of :  
LENORE GILMARTIN, :  
Index No. 09089-2003 :  
Plaintiff, :

GINSBERG & BROOME, P.C.  
Attorneys for Plaintiff  
225 Broadway, Suite 3105  
New York, New York 10007

- against -

COMMACK AUTO TRANSPORT, INC., ROBERT :  
McCORMACK, JR., CARILLON NURSING AND :  
REHABILITATION CENTER, "JOHN" FRITZ, M.D., :  
(first name being fictitious as presently unknown), :  
ROBERT MORIARTY, M.D. and CHARLES :  
MASCIOLI, M.D., :  
Defendants. :

WHITE FLEISCHNER & FINO, LLP  
Attys for Commack Auto & McCormack  
140 Broadway, 36<sup>th</sup> Floor  
New York, New York 10005

FUMUSO, KELLY, DeVERNA, et al.  
Attys for Carillon Nursing & Rehab Center  
110 Marcus Boulevard  
Hauppauge, New York 11788

-----X  
COMMACK AUTO TRANSPORT, INC. and ROBERT :  
McCORMACK, JR., :  
Index No. 24-391 :  
Third-Party Plaintiffs, :

CLAUSEN MILLER, P.C.  
Attorneys for Robert Moriarty  
1 Chase Manhattan Plaza, 39<sup>th</sup> Floor  
New York, New York 10005

- against -

HUGH GILMARTIN, CARILLON NURSING AND :  
REHABILITATION CENTER, "JOHN" FRITZ, M.D. :  
(first name being fictitious as presently unknown), :  
ROBERT MORIARTY, M.D. and CHARLES :  
MASCIOLI. :  
Third-Party Defendants. :

SCHAUB, AHMUTY, CITRIN & SPRATT  
Attorneys for Charles Mascioli  
1983 Marcus Avenue, Suite 140  
Lake Success, New York 11042

ROBERT P. TUSA, ESQ.  
Attorney for Hugh Gilmartin  
898 Veterans Memorial Highway, Suite 320  
Hauppauge, New York 11788

-----X  
COMMACK AUTO TRANSPORT, INC. and ROBERT :  
McCORMACK, JR., :  
Index No. 26-300 :  
Second Third-Party Plaintiffs, :

FAGLER & AMSLER, LLP  
Attorneys for Melvin Fritz  
90 Merrick Avenue, Suite 701  
East Meadow, New York 11554

- against -

MELVIN FRITZ, M.D., VISITING NURSE SERVICE :  
OF SUFFOLK and DEIDRE GREEN, R.N. :  
Second Third-Party Defendants. :  
-----X

WILSON, ELSER, MOSKOWITZ, et al.  
Attys for Visiting Nurse Service & Greene  
3 Gannett Drive  
White Plains, New York 10604

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**ORDERED** that this motion by second third-party defendants Visiting Nurse Service of Suffolk and Deirdre Green, R.N. for an order pursuant to CPLR 603 and/or CPLR 1003 severing the third-party actions from the main action and these four cross motions by defendant/third-party defendant Robert Moriarty, M.D., defendant/third-party defendant Charles Mascioli, M.D., defendant/third-party defendant Carillon Nursing and Rehabilitation Center, and by second third-party defendant Melvin Fritz, M.D. all seeking the same relief are denied.

The main action was commenced in April, 2003, by plaintiff Hugh J. Gilmartin to recover damages for his own personal injuries and his derivative claims and for the wrongful death and conscious pain and suffering of his wife, Lenore Gilmartin, allegedly as the result of an motor vehicle accident which occurred on November 2, 2002 when the Gilmartin vehicle collided with a vehicle owned by defendant/third-party plaintiff Commack Auto Transport, Inc. (Commack) and operated by defendant/third-party plaintiff Robert McCormack, Jr. (McCormack). Defendants/third-party plaintiffs asserted a counterclaim against Hugh J. Gilmartin for contribution and/or indemnity with respect to the claims asserted against defendants on behalf of Lenore Gilmartin.

By order, dated May 4, 2004 (Pitts, J.), the Court granted, as unopposed, a motion by plaintiffs to amend the complaint by substituting Stephen U. Burke as Executor of the Estate of Lenore Gilmartin in the place of Hugh J. Gilmartin and to discontinue the individual claim for personal injury asserted by Hugh J. Gilmartin. It appears that Mr. Gilmartin's derivative claim for his wife's injuries and wrongful death remained although the amended caption reflects otherwise.

In December, 2004, defendants/third-party plaintiffs Commack and McCormack commenced a third-party action against Hugh J. Gilmartin, Carillon Nursing Home and Rehabilitation Center, "John" Fitz, M.D., Robert Moriarty, M.D. and Charles Mascioli, M.D. The third-party complaint as against third-party defendants Carillon, Fitz, Moriarty and Mascioli alleges negligence and malpractice in medical treatment rendered Lenore Gilmartin after the accident.

In February, 2005, plaintiffs served a further amended complaint adding third-party defendants Carillon, "John" Fitz, Dr. Moriarty and Dr. Mascioli as direct defendants. By order, dated September 21, 2005 (Pitts, J.), the Court dismissed the wrongful death claims asserted in the complaint as against Carillon and Dr. Moriarty. In August, 2006, defendants/third-party plaintiffs commenced a second third-party action, also sounding in malpractice, against additional parties - Melvin Fritz, M.D., Visiting Nurse Service of Suffolk and Deirdre Green, R.N. Following the commencement of discovery, the Plaintiff-Executor discontinued, with prejudice, all of the direct actions against the medical malpractice defendants in three stipulations executed by counsel for all parties and so-ordered by the Court (Pines, J.) on August 9, 2007.

Now, third-party defendants Carillon, Moriarty and Mascioli and all the second third-party defendants move, by Notice of Motion and Notice of Cross Motion (motion sequence nos. 17, 18, 19, 20 and 21) for severance of the third-party actions from the main action, on the grounds that a combined negligence/malpractice trial will confuse a jury and that there was an inordinate delay between service of the original and third-party complaints. Third-party plaintiffs counter that third-party defendants, as well as plaintiff, are equally responsible for the many delays in conducting and completing disclosure and argue, further, that severance will inure to the detriment of those parties due

to the intertwined issues of law and fact in the two sets of actions. Thus, while third-party and second third-party defendants all assert that the differing types of proof will prejudice the medical malpractice clients, third-party plaintiffs argue that the potential for inconsistent verdicts, especially in the area of proximate cause and damages in the wrongful death arena all inure to the detriment of those parties.

Although it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly. Where complex issues are intertwined, albeit in technically different actions, it would be better not to fragment trials but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one (*Shanley v Callanan Industries, Inc.*, 54 NY2d 52, 444 N.Y.S.2d 585 [1981]). Severance of a third-party action is thus within the discretion of the trial court. It is inappropriate, however, absent a showing that a party's substantial rights would otherwise be prejudiced (*Andresakis v Lynn*, 236 AD2d 252, 653 NYS2d 559 [1<sup>st</sup> Dept. 1997]), or that the relief would be in the furtherance of convenience (CPLR 603). Where allegations of negligence leading to personal injury and wrongful death raise common issues, despite differing legal standards, the factual and legal questions involved are sufficiently intertwined that the interests of justice and judicial economy require a single trial (*Guilford v Netter*, 179 AD 2d 801, 578 NYS 2d 664 [2d Dept. 1992]; *Rogers v U-Haul Company*, 161 AD2d 214, 554 NYS2d 600 [1<sup>st</sup> Dept. 1990]; *Coppola v Robb*, 55 AD2d 634, 390 NYS2d 167 [2d Dept. 1976]). In both the *Rogers* and the *Coppola* cases, actions for personal injury arising from the negligent operation of an automobile were followed by third-party actions for medical malpractice.

While the moving parties argue that severance is appropriate in their case because it involves multiple malpractice defendants, their argument is unpersuasive. First, many of the differing standards they cite exist among the various third-party and second third-party defendants themselves, since they include nursing facilities, physicians and registered nurses. Second, all parties in this action are responsible for the delays, whether in commencing suit or in bringing this very motion at this late date. In addition, as third-party plaintiff set forth during oral argument, there are significant common issues relating to proximate cause and indeed damages in this case, which should not be subject to inconsistent verdicts (see, *Rothstein v Milleridge Inn, Inc.*, 251 AD2d 154, 674 NYS2d 346 [1<sup>st</sup> Dept. 1998]; *Jones-Ledbetter v Biltmore Auto Sales, Inc.*, 239 AD2d 390, 658 NYS2d 833 [2<sup>nd</sup> Dept. 1997]).

The moving parties state that their rights will be prejudiced by a denial of severance, arguing that the main case is ready for trial while they have yet to produce their clients for depositions. In fact, this is not the case. This case is only now starting with true discovery, following this Court's recent orders. Plaintiff (Executor) and the beneficiaries of the Estate are all being produced via this Court's October 25, 2007 Order, before February 29, 2008. At the conference scheduled for March 2008, the Court will schedule the depositions of the third-party and second third-party defendants, so that this very old case can, at last, proceed to trial. It is clearly time to finish depositions and get this case on the trial calendar. Plaintiff waited three years to sue the medical malpractice defendants and discontinued against them one year later. Third-party plaintiff waited three years to sue the second third-party defendants. Third-party defendants have waited between one and two years to move to sever. Inasmuch as there have already been unjustified delays engendered by all sides in this action, any prejudice resulting from an additional brief delay to permit the completion of discovery proceedings, is far outweighed by the interests of judicial economy in having the parties involved resolve all their

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outstanding issues at one time (see, *Klein v City of Long Beach*, 154 AD2d 346, 545 NYS2d 825 [1989]; *Schein v Sea Shore Marina Properties Corp.*, 118 AD2d 767, 500 NYS2d 157 [1986]).

Counsel for movants mentioned several cases during oral argument which bear discussion. In *Schackelford v Mills*, 110 AD2d 630, 487 NYS 2d 371 [2d Dept. 1988], the Court affirmed the denial of a motion to consolidate, where the underlying actions involved separate accidents. *Stephens v Allstate Insurance Company*, 185 AD2d 338, 586 NYS 2d 305 [2d Dept. 1992]) concerned claims by various plaintiffs against their insurers for failure to compensate them, for completely different services rendered to different patients. Finally, in *Brown v Brooklyn Union Gas Co.*, 137 AD2d 479, 524 NYS2d 228 [2d Dept. 1988] the appellate court reversed the granting of consolidation of a personal injury and legal malpractice action, where all wrongful death causes of action had been dismissed. In none of these cases was the motion one to sever a case that had been pending for some time as a consolidated action, where discovery as a consolidated action was already underway and the case was not yet on the trial calendar. The only one of these cases in which the appellate court reversed the trial court's discretionary determination was *Brown, supra*. There exists, in this Court's view, far more connection among cases involving physical injury and death than such claims and one arising out of alleged legal malpractice.

For all the foregoing reasons, the Court, in its discretion, denies the motion and the cross motions to sever the third-party action and the second third-party action from the complaint. The parties are reminded of the scheduled Court Conference, of March 27, 2008, at which time the remaining depositions will all be scheduled. Counsel for all parties are directed to send an attorney with knowledge of the case and authority to schedule depositions to the Conference. No adjournments will be granted.

This constitutes the Decision and Order of the Court.

Dated: 1/18/08

  
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HON. EMILY PINES J.S.C.