

Corteselli v Wolfe

2009 NY Slip Op 32298(U)

June 3, 2009

Supreme Court, Nassau County

Docket Number: 21165/08

Judge: Ute W. Lally

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present: HON. UTE WOLFF LALLY,

Justice

CHRISTOPHER CORTESELLI, TRIAL/IAS, PART 5
NASSAU COUNTY

Plaintiff(s),

MOTION DATE: 4/10/09
INDEX No. 21165/08
MOTION SEQ. NO. 1,2,3,4

-against-

TIMOTHY WOLFE, DIANE WOLFE, JOHN
SQUIRES, DORA ISRAEL, VIVIAN BARKAI,
TALIA BARKAI, LESLIE WATNIK, NEIL
WATNIK and SIDNEY STEIN,

Defendant(s).

ERIC M. PARCHMENT, an infant, et al. Index No. 21643/08

Plaintiff(s),

-against-

TIMOTHY WOLFE, DIANE WOLFE, JOHN
SQUIRES, DORA ISRAEL, VIVIAN BARKAI,
TALIA BARKAI, LESLIE WATNIK, NEIL
WATNIC and SIDNEY STEIN,

Defendant(s).

STEFAN TESSLER, et al.,

Plaintiff(s),

INDEX NO. 21863/08

-against-

DIANE WOLFE and TIMOTHY WOLFE,

Defendant(s).

- The following papers read on this motion:
- Notice of Motion/ Order to Show Cause.....1-3
 - Notice of Cross Motion.....4-8
 - Second Notice of Cross Motion.....9-11
 - Third Notice of Cross Motion.....12-14
 - Answering Affidavits.....15-17
 - Replying Affidavits.....18-22

Upon the foregoing papers, it is ordered that this motion by defendants Timothy R. Wolfe, Diane J. Wolfe and John Squires for an order pursuant to CPLR 602(a) consolidating this action with two other actions pending in this court relating to the same motor vehicle accident is denied. In the alternative the three actions are joined for trial.

So much of this motion for an order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing the punitive damages claims asserted in the Corteselli and Parchment actions is denied as hereinafter provided.

Cross-motion by plaintiff in action #2 for an order pursuant to CPLR compelling defendants Timothy R. Wolfe and Diane Wolfe to provide HIPAA compliant authorizations to obtain the full and complete hospital records of North Shore University Hospital at Manhasset, etc., regarding defendant Timothy R. Wolfe is granted to the limited extent provided hereinafter.

Cross-motion by Dora Israel, defendant in actions #1 and #2 for an order pursuant to CPLR 602(a) joining said actions for trial and joint discovery is granted.

Cross-motion by defendants Timothy R. Wolfe, Diane Wolfe and John Squires for a protective order pursuant to CPLR 3103, CPLR 3122 and CPLR 4505 is denied.

The aforementioned actions were instituted arising from an automobile accident which occurred on September 28, 2008 at 2:00 a.m. on South Road in Sands Point, N.Y. where plaintiffs were passengers in a vehicle driven by Timothy R. Wolfe and owned by his mother, Diane Wolfe. Timothy and his mother are defendants in all three actions. The remaining defendants allegedly owned and/or hosted parties at their homes/residences at which Timothy R. Wolfe was present and allegedly consumed alcohol and/or drugs. Defendant John Squires is the husband of Diane Wolfe. Plaintiffs allege that defendant Timothy R. Wolfe, who had a junior (restricted) license on the date of the accident, operated his vehicle, in violation of said license, while under the influence of alcohol and drugs, in a negligent and careless manner, at an excessive rate of speed causing the vehicle to leave the roadway and strike a tree as a result of which plaintiffs sustained serious injury.

There are presently a motion and three cross motions before the court which shall be treated seriatim.

Each of the three actions sought to be joined has its genesis in a single motor vehicle accident.

It is well established that the question of whether to direct a joint trial pursuant to CPLR 602(a) rests within the sound discretion of the trial court (*Skelly v Sachem Cent. School Dist.*, 309 AD2d 917 [2nd Dept. 2003]). Where there are common questions of law or fact, a joint trial is warranted unless the opposing party demonstrates prejudice to a substantial right (*Perini Corp. v WDF, Inc.*, 33 AD3d 605, 606 [2nd Dept. 2006]).

Review of the record indicates that the interests of justice and judicial economy would be best served by consolidation of the Corteselli action, for the purpose of joint of trial (CPLR 602[a]; *Nigro v Pickett*, 39 AD3d 720, 722 [2nd Dept. 2007]), with the two actions pending under index numbers 021643/08 and 021863/08 respectively. All three actions involve common questions of law and fact and a joint trial, while leaving the individual actions intact, will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent the injustice which would result from divergent decisions based on the same facts (*Mas-Edwards v Ultimate Services, Inc.*, 45 AD3d 540 [2nd Dept. 2007]; *Gutman v Klein*, 26 AD3d 464, 465 [2nd Dept. 2006]). When the common question standard has been met, it lies in the court's discretion to choose between an order of consolidation or one for joint trial.

While plaintiff Eric M. Parchment opposes the request for consolidation, he has failed to establish that a joint trial would prejudice a substantial right (*Mattia v Food Emporium, Inc.*, 259 AD2d 527 [2nd Dept. 1999]). Plaintiffs in actions #1 and #2 assert identical causes of action against the same defendants. Plaintiffs in action #3 assert the same negligence claims *vis a vis* ownership and operation of the vehicle driven by defendant Timothy R. Wolfe but assert no claims against defendants Dora Israel, Vivian Barkai, Talia Barkai, Leslie Watnik, Neil Watnik and Sidney Stein regarding the provision and/or use of alcohol/drugs. It is beyond cavil that all three actions involve the same essential facts and will require determination of common issues. The trial court, with appropriate management and control of the trial, the speculative fears of jury confusion and the possibility of inadequate consideration of the causes of action against Dora Israel and the other defendants in actions #1 and #2, who are not present in action #3, will be obviated.

Compensatory damages are intended to insure that the victim of wrongdoing receives fair and just compensation commensurate with

the injury sustained. Punitive damages, on the other hand, are not designed to compensate the injured party but to punish the tortfeasor and deter the wrongdoer and others similarly situated (*Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 489 [2007]). Generally, demands for punitive damages arise in the context of intentional torts such as fraud, libel or malicious prosecution. Conduct warranting an award of punitive damages, however, need not be intentionally harmful but may consist of acts which constitute willful or wanton negligence or recklessness (*Randi A.J. v Long Island Surgi-Center*, 46 AD3d 74, 80-81 [2nd Dept. 2007]). Punitive damages are permitted when the defendant's wrongdoing "evinces a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Walker v Sheldon*, 10 NY2d 401, 405 [1961]).

Although cognizant that well settled precedent instructs that intoxication alone does not open the door for punitive damages, and that each situation must be considered on a case by case basis (*Trudeau v Cooke*, 2 AD3d 1133, 1134 [3rd Dept. 2003]), whether defendant driver engaged in the requisite wanton and reckless conduct, in addition to drug or alcohol induced impairment, so as to warrant the imposition of punitive damages, is a decision which is best reserved for the trier of fact based upon evidence at trial and the inferences reasonably drawn therefrom.

Notwithstanding the Wolfe defendants' assertion that the evidence establishes that Timothy did not consume alcohol or drugs prior to the accident, the evidence on which they rely, i.e., a single page of an eleven page report does not conclusively resolve this issue which remains for determination by the trier of fact.

To the extent that the claims asserted against defendant Diane J. Wolfe are based upon her status as owner of the vehicle driven by her son Timothy she is only vicariously liable for the damages allegedly suffered by the plaintiffs. As such, she cannot be liable for punitive damages (*Hale III v Saltamacchia*, 28 AD3d 715 [2nd Dept. 2006]; *O'Connor v Kuzmicki*, 14 AD3d 498, 499 [2nd Dept. 2005]). To the extent that the complaints in the Corteselli and Parchment actions, however, may be read to assert independent acts of negligence on the part of Timothy's mother and her husband in permitting him to operate the vehicle in violation of the restrictions on his license, the issue of punitive damages is reserved for the trier of fact.

Generally the test for disclosure pursuant to CPLR 3101 is whether the information sought is material and necessary. The test

is one of relevance, usefulness and reason (*Allen v Cromwell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). CPLR 3101(a) requires full disclosure of all evidence material and necessary to the prosecution or defense of an action, regardless of the burden of proof (*Weber v Ryder TRS, Inc.*, 49 AD3d 865, 866 [2nd Dept. 2008]).

It is the opinion of this court that defendant Timothy R. Wolfe's physical condition at the time of the accident is in controversy within the meaning of CPLR 3121(a) and thus subject to potential discovery. A party seeking to inspect a defendant's medical records must first demonstrate that the defendant's medical or physical condition is in controversy within the meaning of CPLR 3121(a). Even where this preliminary burden has been satisfied, discovery may be precluded where the information sought is privileged and thus exempt from disclosure pursuant to CPLR 3101(b) (*Lombardi v Hall*, 5 AD3d 739, 740 [2nd Dept. 2004]).

Here, the information sought, medical records from North Shore University Hospital and from other emergency medical professionals who treated defendant Timothy at the scene of the accident, falls within the scope of the physician-patient privilege (CPLR 4504; *Dillenbeck v Hess*, 73 NY2d 278 [1989]). A litigant, however, will be deemed to have waived the privilege when, in bringing or defending a personal injury action, he affirmatively places his medical or physical condition in issue either by way of counterclaim or to excuse the conduct complained of by the plaintiff (*Koump v Smith*, 25 NY2d 287, 294 [1969]). The waiver does not occur automatically in every instance where a party is forced to defend an action in which his physical or mental condition is put in controversy. Rather, a defendant must do more than simply deny the allegations in the complaint. He must affirmatively assert the condition either by way of counterclaim or to excuse the conduct complained of (*Bongiorno v Livingston*, 20 AD3d 379, 381 [2nd Dept. 2005]).

Defendant Timothy R. Wolfe has, in the court's view, waived the physician-patient privilege solely with respect to North Shore University Hospital medical records regarding the results of drug and alcohol tests administered on the night of the accident, and records of emergency medical professionals who treated him at the scene of the accident, by submitting and relying upon a single page of an eleven page report from the hospital's laboratory to support his defense that he had not consumed drugs or alcohol prior to the accident. As set forth in *Dillenbeck v Hess* (*supra* at p. 287) "a party should not be permitted to affirmatively assert a medical condition in seeking damages or ... in defending against liability

while simultaneously relying on the confidential physician-plaintiff relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim." As such the Wolfe defendants shall execute HIPAA compliant authorizations and provide same to plaintiffs within twenty (20) days after service of a copy of this order with notice o entry upon their attorney.

Dated: JUN 03 2009

Wolfe
J.S.C.

ENTERED

JUN 05 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**