

Parson v Weinstein

2010 NY Slip Op 33187(U)

November 5, 2010

Supreme Court, Nassau County

Docket Number: 016041/07

Judge: John M. Galasso

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
DERRICK PARSON, Individually, and as the
Administrator of the Estate of RHEA
PARSON, Deceased,

Plaintiff,

Index No. 016041/07
Sequence #s 001,002,003
Part 37

- against -

10/14/10

MICHAEL DAVID WEINSTEIN, M.D., SHALINEE
CHAWLA, M.D., "JOHN/JANE" CASTILLO, M.D.
(First Name Being Fictitious), WINTHROP
PULMONARY ASSOCIATES, P.C., GENEVIEVE
BERNADETTE SICURANZA, M.D., WOMEN'S
CONTEMPORARY CARE ASSOCIATES, P.C.,
PEYMAN ZANDIEH, M.D., PEYMAN ZANDIEH,
M.D., P.C., "JOHN/JANE DOE, M.D."(First
and Last Name Being Fictitious) and
WINTHROP UNIVERSITY HOSPITAL ASSOCIATION,

Defendants,

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Upon the forgoing papers, the summary judgment motions by defendants Genevieve Bernadette Sicuranza, M.D., Women's Contemporary Care Associates P.C., Peyman Zandieh, M.D., and Peyman Zandieh, M.D., and Peyman Zandieh, M.D., P.C. (Seq.#001) and defendant Shalinee Chawla, M.D. (Seq. #002), plus the cross-motion by plaintiff pursuant to CPLR 3025 (b) for leave to serve a supplemental summons and amended complaint (Seq. #003) are determined as follows:

In this medical malpractice action, the Court will refer to the several defendants/movants as Dr. Sicuranza, Dr. Zandieh and "Women's Care." Plaintiff alleges that these defendants failed to timely recognize, diagnose and treat plaintiffs' deceased, Rhea Parson's post-Cesarean pulmonary and/or venous thromboembolism and/or deep vein thrombosis which ultimately lead to her death.

Mrs. Parson received her prenatal care, of which there are no acts of negligence alleged, from Women's Care . According to the medical record, non-party Dr. Frederick Moon was her primary obstetrician. In addition, Dr. Sicuranza performed two sonograms which indicated there were no fetal complications. She provided no other prenatal care.

On March 10, 2006, Mrs. Parson was admitted to defendant Winthrop-University Hospital and the next day she delivered a baby by C-section. The physician present was non-party Dr. Valerie Cucco.

According to Dr. Sicuranza and the hospital medical records, she was not the doctor at the delivery. Dr. Sicuranza maintains she did not manage Mrs. Parson's postnatal care nor was she a consultant.

Dr. Sicuranza did not see Mrs. Parson's until March 17, 2006, one week after her admission, when an emergency code involving Mrs. Parson was in progress.

Dr. Sicuranza was not aware until March 17<sup>th</sup> that Mrs. Parson was experiencing breathing difficulties. Later that day during obstetrical rounds, she observed plaintiff to be intubated and unresponsive. The last time she saw plaintiff was during rounds on March 19<sup>th</sup>.

Mrs. Parson passed away on March 28, 2006.

According to defendants, there is no indication in the hospital record that Dr. Zandieh rendered treatment to this patient. There are no progress notes. In his affidavit, Dr. Zandieh states he has no recollection of providing any care to plaintiff at any time.

As for Women's Care, it is asserted there were no complaints regarding pre natal care, labor or delivery.

Movants present an affirmation in support of the instant application by Victor Klein, M.D., a Board Certified Obstetrician with a subspeciality in maternal fetal medicine. He opines within a reasonable degree of medical certainty that the care and treatment by the physicians at Women's Care were at all times within good and accepted standards of medical practice and furthermore, that the physicians at Women's Care did not proximately cause or contribute to any of the claimed injuries to plaintiff that resulted in her death.

Dr. Klein expresses the same opinion about Dr. Sicuranza's care and treatment of plaintiff. There were no complications due to the ultrasounds performed, she did not deliver the baby, nor was Dr. Sicuranza managing or consulting on plaintiff's postnatal care. By the time Dr. Sicuranza saw Mrs. Parson on March 17<sup>th</sup>, she was already experiencing difficulty breathing and respiratory distress.

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As to Dr. Zandieh, Dr. Klein notes that there is no medical evidence whatsoever that Dr. Zandieh, who is the only physician within his professional corporation, ever provided any care and treatment at any time to the deceased.

In opposition to this motion, plaintiffs assert first that movants failed to make out their *prima facie* entitlement to judgment. Based upon the evidence noted above, the Court concludes first that defendants have met their initial burden of proof.

As for raising a genuine material question of fact against these defendants, plaintiffs' expert, a specialist in obstetrics and gynecology, paints all physicians affiliated with Women's Care with the same brush stroke. He opined that the doctors at Women's Care were plaintiff's private physicians and they directed her post partum hospital care, which was deficient in both recognizing through a post delivery DVT analysis plaintiff's very high risk factor for embolism and in treating it accordingly.

In limiting his opinion to the present motion, plaintiffs' expert successfully raises material issues regarding Women's Care in its P.C. form but not, however, regarding Dr. Sicuranza, one of its physicians. The expert mentions Dr. Sicuranza only by recognizing her accurate deposition testimony with respect to medical treatments which, in general, coincide with his own conclusions. He makes no specific challenges to the care Dr. Sicuranza actually provided to Mrs. Parson. In addition, plaintiff's expert does not mention or find that any care allegedly provided by Dr. Zandieh was a proximate cause of her injury and death. \*

Accordingly, the complaints and any cross-claims against Genevieve Bernadette Sicuranza, M.D., Peyman Zandieh, M.D., and Peyman Zandieh, M.D., P.C. only are dismissed (Seq. #001).

With respect to Dr. Shalinee Chawla's motion, plaintiffs have presented no opposition. Accordingly, her motion is granted and the complaint and all cross-claims against this defendant are dismissed (Seq. #002).

Addressing plaintiffs' cross-motion for an order pursuant to CPLR 3025 (b) and 203 (b), (c) and (f) granting leave to serve a supplemental Summons and Amended Complaint on Frederick R. Moon, M.D., Valerie Cucco, M.D., Elana Kaster, M.D. and Mary R. Kriner, M.D. to add them as defendants in this action which was originally commenced in 2007, that application is determined as follows:

From the outset, the Court must make clear that any malpractice claims brought against these suggested defendants would be well beyond the statute of limitations (CPLR 214-a).

\* The limited proof plaintiffs offer against Dr. Zandieh shows that Dr. Sicuranza testified that, in her senior capacity as the maternal-fetal doctor on call, she was called by Dr. Zandieh, the voluntary house attending, to let her know there was a patient in the CT scan room. It was the first time she was made aware of plaintiff's respiratory problems. This is hardly a demonstration of a triable issue of fact against Dr. Zandieh. Even if he does not remember Mrs. Parson or the CT scan, there is no allegation of malpractice against him by plaintiffs' expert or mention of any act that was a proximate cause of Mrs. Parson's death.

Consequently, the focus of plaintiffs' application should be on CPLR 203's relation back provisions when a potential defendant is united in interest with the defendants that were timely served. The "freely given" intensions behind CPLR 3025 (b) must give way to the stricter case law applicable when a plaintiff is unable to commence a new action because the statute of limitations has expired.

Plaintiffs claim to have recently discovered that other physicians affiliated with Women's Care were negligent when plaintiff was treated at Winthrop Hospital. Plaintiffs assert that the allegations against these defendants arise out of the same conduct or occurrence in the original complaint and that the obstetricians played an integral role in plaintiff's post-partum care and misdiagnosis of her condition (see *Buran v. Coupal*, 87 NY2d 173; *Mondello v. New York Blood Center*; 80 NY2d 219, 226).

Certainly these new parties are united in interest with defendant Women's Contemporary Care Associates, P.C. because they are the associates in the corporation. By reason of that relationship they are charged with notice of the institution of the action in 2007 (*Id.*).

Nevertheless, the third prong of the test adopted in *Mondello, supra*, requires that each proposed defendant knew or should have known that but for plaintiff's mistake in identifying the proper physicians individually liable in the original complaint, the action would have been brought against him or herself as well. That is the "linchpin" of the relation back doctrine (*Schiavone v. Fortune*, 477 U.S. 21, 31).

The only physician that would possibly have that awareness is Dr. Valerie Cucco, who performed the DVT post-partum risk analysis and it is alleged that plaintiff eventually succumbed to that very risk (see plaintiff's Exhibit A Expert's Affidavit). According to plaintiff's expert, defendant Women's Care not only failed to properly determine Mrs. Parson's risk factor, there was a failure to institute immediately proper prophylactic treatment. He does not specifically name any other physician with reference to departures from accepted standards of care. \* Moreover, plaintiff's counsel admits that at the present time it is unclear what treatment Drs. Kastner and Kriner provided to the deceased.

Defendants argue that plaintiffs' failure to name these individual doctors originally or soon after the complaint was filed was not accidental, but a deliberate tactical decision.

The Court partially agrees with this conclusion because even now, when the case is on the trial calendar, plaintiffs continue to have no idea of the nature of the specific negligent acts of three of the doctors. \*\*

\* Granted, the doctor explains he limits himself to addressing the summary judgment motions of the original defendants; nevertheless he steps out of that restriction when naming Dr. Cucco.

\*\* It is uncontested Dr. Moon was Mrs. Parson's prenatal doctor.

Moreover plaintiffs, who were in possession of the medical records, should have requested their expert to examine the records for any other specific departures from accepted standards of medical care other than those of the named defendants.

Accordingly, the Court denies plaintiff's application with respect to Drs. Kastner, Kriner and Moon (see *Buran v. Coupal, supra*). However, since the undersigned also determines that plaintiffs failure to include Dr. Cucco, who after attending the delivery completed the DVT analysis, was a mistake and not deliberate, plaintiffs' cross-motion is granted as to this obstetrician only (Seq. #003).

November 5, 2010

Hon. John M. Galasso, J.S.C.

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