

**Wilson v Southampton Urgent Med. Care, P.C.**

2011 NY Slip Op 30052(U)

January 7, 2011

Supreme Court, New York County

Docket Number: 116085/07

Judge: Alice Schlesinger

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER  
*Justice*

PART **IA** PART 16

Index Number : 116085/2007

WILSON, JANE

vs.

SOUTHAMPTON URGENT MEDICAL

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*by defendants  
Bradley Gluck, M.D. and Southampton  
Radiology for summary judgment  
is granted in accordance with the  
accompanying memorandum decision.*

**FILED**

JAN 11 2011

Dated: JAN 07 2011 NEW YORK COUNTY CLERK'S OFFICE

*Alice Schlesinger*

**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
JANE WILSON, as Administratrix of the Goods  
Chattels and Credits which were of TRACY A. ALLEN,  
Deceased,

Plaintiff,

Index No. 116085/07  
Motion Seq. No. 001

-against-

SOUTHAMPTON URGENT MEDICAL CARE, P.C.,  
MARK R. KOT, 24/7 EMERGENCY CARE, P.C.,  
ALAN GANDOLFI, MICHAEL AMERES,  
SOUTHAMPTON RADIOLOGY, P.C.,  
BRADLEY GLUCK, ANDREA LIBUTTI, and  
SOUTHAMPTON HOSPITAL,

Defendants.

-----X  
SCHLESINGER, J.:

**FILED**  
JAN 11 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

This is an action that sounds in wrongful death and medical malpractice. An original complaint against certain named defendants was filed on December 4, 2007. Several months later, specifically on March 31, 2008, an amended summons and complaint was filed, which for the first time included Dr. Bradley Gluck and his employer Southampton Radiology, P.C. It is these two defendants that are now moving for summary judgment pursuant to an affirmative defense which they included in their original answer.

The affirmative defense asserted is that the statute of limitations barred any action against these moving defendants. Moving counsel points out that Dr. Gluck had only one contact with the decedent Jane Wilson, which was on March 30, 2005. Therefore, it is urged that this amended complaint, which included these defendants, filed on March 31, 2008, was simply brought too late. Counsel notes that the statute of limitations in medical malpractice cases is two and one-half years from the alleged malpractice and

for wrongful death cases it is two years from the date of death. The decedent died on December 20, 2005. Therefore, the argument goes, while the original wrongful death action filed just barely within the two-year time frame, may have been timely against the defendants named therein, by March 31, 2008, it was too late to sue Dr. Gluck and his Radiology P.C. As far as the medical malpractice cause of action, it is counsel's contention that the two and one-half years had to start from March 30, 2005, the only interaction that Dr. Gluck had with Ms. Wilson. Therefore, under those circumstances, the medical malpractice action against him and his P.C. had to have been commenced by September 30, 2007.

I find in the first instance that moving defendants have made out a prima facie case for the granting of their motion. Under such circumstances, the burden then shifts to the plaintiff to attempt to show that the relation back doctrine applies here. In other words, the burden is shifted to the plaintiff to prove or at least suggest that there are issues as to the three factors that are relevant in the determination as to whether or not there is such a relation back.

A three-prong test has been utilized for applying the relation back doctrine to toll the statute of limitations. *Mondello v. New York Blood Center-Greater N.Y. Blood Program*, 80 NY2d 219 (1992). These all concern themselves with proper notice and fairness to the additional defendants. Therefore, the factors that must be proved are as follows. First, plaintiff must show that the claims against the additional defendants, in this case Dr. Gluck and his Radiology, P.C. arise out of the same conduct, occurrence or transaction that was claimed in the original complaint against the originally named defendants. The second factor, and usually the most problematic one for a plaintiff to prove, is that the new party

must be "united in interest" with an original defendant. In this case, the original defendant would be Southampton Hospital.

Here the claims made in the original complaint, as well as in the amended complaint, all concern a failure to diagnose a metastatic cancer of the brain during the period of January 2005 through September 2005, when Ms. Wilson was diagnosed with this condition. In this regard, plaintiff's counsel contends that such failure to diagnose included Dr. Gluck's reading of the CT scan without contrast, which he interpreted on March 30, 2005.

The third factor in the relation back doctrine is that the new party knew or should have known, but for a mistake by the plaintiff as to the identity of the proper parties, that the action would have been brought against him. In this case, as part of the moving defendants' papers, there is an affidavit from Dr. Gluck, who says that he was never an employee of Southampton Hospital and until he received a copy of the March 31, 2008 complaint, he never knew anything about any situation involving the decedent. Further, he emphasizes that his only involvement in the care and treatment of Ms. Wilson occurred on March 30, 2005, when he gave his impression of the CT scan and specifically found no evidence of an acute injury or insult. It appears that the CT scan was ordered by another defendant in this case because of complaints of severe headaches by Ms. Wilson.

Plaintiff's counsel in her opposition attempts to show how she has met the three factors discussed above. In the first instance, as to whether or not the claims now asserted against the new defendants were related to the earlier claims, she points out that while the complaint is general, it does allege malpractice, a failure to diagnose cancer, starting with events of January 2005, and continuing through August 2005 and that Dr. Gluck's reading

of the CT scan occurred during that period of time.

As to the second factor, counsel argues that the new defendants are in fact united in interest with Southampton Hospital because they had an association with the Hospital and there was every reason for the decedent to believe that Dr. Gluck was in fact an employee of the hospital. In this regard, a Second Department case is cited, *Austin v. Interfaith Medical Center*, 264 AD2d 702 (1999). The facts in *Austin* are very similar to the facts in this case and counsel is correct when she says that that court did find that the newly named defendant, an emergency room physician, was united in interest with the hospital because the hospital was vicariously liable for that physician's alleged malpractice.

Unfortunately for the plaintiff, a much more recent case from the First Department, *Anderson v. Montefiore Medical Center*, 41 AD3d 105 (2007), comes to a strikingly different result. In *Anderson*, the court makes it clear that while the hospital may well be vicariously liable for the acts of independent physicians, such as Dr. Gluck here, the converse does not operate. This is so because the defendant physician cannot be held vicariously liable for the negligence of the hospital.

At oral argument, *Anderson* was discussed in some depth. But opposing counsel was unable to distinguish the facts in *Anderson* and its holding from the facts in the instant case. Therefore, even though this Court could arguably make a finding that the general claims asserted against the new defendants are related to the originally asserted claims and thereby satisfy the first factor, I cannot find, pursuant to *Anderson*, that Southampton Hospital and Dr. Gluck are united in interest as required by the second prong of the test for tolling.

That being the case, Dr. Gluck and Southampton Radiology, P.C. are entitled to have their motion granted. However, since Dr. Gluck's interpretation of the CT scan could be an element in showing malpractice by the Hospital, which arguably is vicariously liable for Dr. Gluck's actions, I am directing that his counsel make him available for a deposition.

Accordingly, it is hereby

ORDERED that the motion by defendants Dr. Bradley Gluck and Southampton Radiology, P.C. to dismiss the action against them as untimely and in violation of the statute of limitations is granted and the complaint is hereby severed and dismissed as against those defendants, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

Dated: January 7, 2011

JAN 07 2011

*Alice Schlesinger*  
\_\_\_\_\_  
J.S.C.

**ALICE SCHLESINGER**

**FILED**

JAN 11 2011

NEW YORK  
COUNTY CLERK'S OFFICE