IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ROBERT C. MURPHY, and CATHERINE P. MURPHY,	:	**C.A. NO: 03C-07-028 (RBY)**
Plaintiffs,	:	
v.	:	
BAYHEALTH MEDICAL CENTER, DELMARVA EMERGENCY PHYSICIANS, LLP, ROBERT CHRZANOWSKI, NIDIA DE YANEZ, M.D., P.A. and J. RAFAEL YANEZ, M.D.,	:	
Defendants.	:	

Submitted: October 4, 2005
Decided: January 9, 2006

Gary W. Aber, Esq., Aber, Goldlust, Baker & Over, Wilmington, Delaware, Attorney for Plaintiffs.

John D. Balguer, Esq., White & Williams, Wilmington, Delaware, Attorney for Defendant Yanez.

Mason E. Turner, Jr., Esq., Pricket, Jones & Elliott, Wilmington, Delaware, Attorney for Defendants Bayhealth, Delmarva Emergency Physicians, LLP and Chrzanowski.

OPINION

Upon Consideration of Defendants Bayhealth Motion to Dismiss

GRANTED IN PART, DENIED IN PART

Murphy v. Bayhealth, et al.
C.A. No: 03C-07-028
January 9, 2006

OPINION

On September 16, 2005, this Court heard the Motion of Defendants, Bayhealth, Inc. and Bayhealth Medical Center, Inc. (collectively referred to as "Bayhealth"), to dismiss the claims of Plaintiffs, Robert C. Murphy and Catherine P. Murphy, pursuant to Del. Super. Ct. Civ. R. 37(b). Bayhealth argues that Plaintiffs' claims against Bayhealth should be dismissed, because Plaintiffs failed to comply with this Court's April 21, 2005 Order, requiring Plaintiffs to produce their expert reports by August 15, 2005, and because Plaintiff's now asserted claims are an entirely new theory of liability. For the following reasons, Bayhealth's Motion to Dismiss should be GRANTED in part and DENIED in part.

STATEMENT OF FACTS

Plaintiff, Robert C. Murphy, was injured in a motor vehicle accident on July 17, 2001. Plaintiff was transported from the scene to Kent General Hospital Emergency Room, where he was admitted overnight in the ICU for observation of an injury to his cervical spine, Central Cord Syndrome. During this admission, Plaintiff was treated by neurosurgeon, J. Raphael Yanez, M.D. On July 28, 2001, Plaintiff returned to Kent General Emergency Room with complaints of severe back pain, numbness, tingling, and sensory changes. Plaintiff was examined by Robert T. Chrzanowski, M.D., who consulted with Dr. Yanez. Dr. Chrzanowski diagnosed Plaintiff with Central Cord Syndrome, and released him with prescriptions for pain medication. Plaintiff returned to Kent General on July 31, 2001 with complaints of

paralysis in both legs, thigh numbness, and left calf pain. Plaintiff was admitted to Kent General until August 3, 2001, when he was transferred to Milford Memorial Hospital. While at Milford Memorial, Plaintiff underwent a duplex scan on August 6, 2001, which revealed extensive deep venous thrombosis ("DVT").

PROCEDURAL HISTORY

Plaintiffs initiated this medical malpractice lawsuit on July 16, 2003 against Defendants Bayhealth, Delmarva Emergency Physicians, LLP, Robert T. Chrzanowski, M.D., Kent Diagnostic Radiology, P.A., Raphael Caccese, Jr., M.D., J. Raphael Yanez and Nidia De Yanez, M.D., P.A., and J. Raphael Yanez, M.D., individually. Plaintiffs claim that Defendants' failure to diagnose Plaintiff, Robert C. Murphy, with DVT caused him permanent injury. The only defendants remaining in this action are Bayhealth and J. Raphael Yanez and Nidia De Yanez, M.D., P.A., and J. Raphael Yanez, M.D., individually (collectively referred to as "Dr. Yanez"). The other defendants have been dismissed. Therefore, the only viable claims remaining against Bayhealth are Counts I and IV of the Complaint. Count I makes direct allegations of negligence against Bayhealth, and Count IV alleges that Bayhealth was liable for the negligence of Dr. Yanez.

On February 4, 2005, this Court denied Bayhealth's Motion for Summary Judgment on the issue of agency. Bayhealth argued that it was not liable for the negligence of any of the defendant doctors, who were independent contractors, and not agents of Bayhealth. The Court held that the issue of whether an agency

relationship existed between Bayhealth and Dr. Yanez was a question of fact for the jury to decide.

Bayhealth originally moved to dismiss Plaintiffs' claims pursuant to Rule 37(b) on March 24, 2005. At that time, Plaintiffs had identified an expert for the claims against Dr. Yanez, but not the other defendants.[1] As a result, Defendants Kent Diagnostic Radiology, Caccesse, and Bayhealth moved for dismissal under 18 Del.C. §§ 6853 and 6854 for Plaintiffs' failure to identify an expert witness in a medical malpractice action. On April 15, 2005, this Court gave Plaintiffs a deadline of August 15, 2005 to produce expert reports to Defendants. Failure of Plaintiffs to comply would result in dismissal of the action. Around the same time, Plaintiffs' original attorney withdrew his appearance in this matter. The Court's Order also gave Plaintiffs a deadline of June 15, 2005 to find new counsel. Gary W. Aber, Esquire subsequently entered his appearance on behalf of Plaintiffs on June 6, 2005.

On August 26, 2005, Defendants, Kent Diagnostic and Caccesse, renewed their Motion to Dismiss Pursuant to Rule 37(b), because Plaintiffs had failed to produce expert witness reports by the August 15, 2005 deadline.[2] Bayhealth filed a similar Motion to Dismiss on August 29, 2005. Plaintiffs filed a response to Defendants' Motions on September 13, 2005, and attached a copy of the report of nursing expert,

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[1] Plaintiffs produced an expert witness report for the claims against Dr. Caccesse, but the expert subsequently withdrew from the case.

[2] Plaintiffs did produce the report of neurologist, Frank H. Boehm, Jr., M.D., to opine as to the negligence of Dr. Yanez within the time provided by the Court. As such, Dr. Yanez is not a party to the present Motion.

Barbara Freimuth, BSN, RN, BC, LNC. Ms. Freimuth opined that the Bayhealth nurses were negligent in failing to accurately assess Plaintiff Robert Murphy for DVT.

This Court heard arguments on Bayhealth's Motion to Dismiss on September 16, 2005. In addition to arguing that Plaintiffs failed to produce their expert witness reports within the time provided by this Court, Bayhealth also argued that Plaintiffs should be precluded from raising allegations of nursing negligence, which were not claimed in the pleadings, and which – at this point – would be new theories long barred by time.

DISCUSSION

This Court has the discretion to dismiss an action, or grant a default judgment, if a party to the litigation fails to abide by an order of the Court.[3] Dismissal or default judgment is an extreme remedy that typically looks to a demonstration of " 'some element of wilfulness or conscious disregard of the order.' "[4] In *Sundor*, the Delaware Supreme Court reversed the Trial Court's Order of default judgment against defendant for its failure to answer all of plaintiff's interrogatories by the deadline. The Trial Court had reasoned that default judgment was appropriate, because defendant's answers to some, but not all, of the interrogatories were "evasive and

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[3] Del. Super. Ct. R. 37(b)(2)(C); *Shockley v. Wilmington Medical Center*, 1988 WL 147321, at *2 (Del. Super.).

[4] *Sundor Electric, Inc. v. E.J.T. Construction Co., Inc.*, 337 A.2d 651, 652 (Del. 1975) (quoting 4A Moore's Federal Practice (2 ed) § 37.03[2. -5]).

incomplete."[5] Although the Supreme Court agreed that defendant's actions were evasive and incomplete, the Court found that default judgment was a penalty too severe for defendant's actions.[6]

In the present matter, Plaintiffs' obligation to produce expert witness reports was long overdue but was complicated by the withdrawal of their original counsel in April 2005. Nevertheless, Plaintiffs were given until June 15, 2005 to hire new counsel, and were given a final deadline of August 15, 2005 to produce expert reports still in place. Plaintiffs did retain new counsel before the June 15, 2005 deadline. Gary W. Aber, Esquire entered his appearance on behalf of Plaintiffs on June 6, 2005. Within the ten weeks between Mr. Aber's appearance in this matter and the August 15, 2005 deadline, Plaintiffs produced a report for an expert witness who opined about the claims against Dr. Yanez. Mr. Aber's analysis of the case also resulted in the dismissal of Defendants Caccese and Kent Diagnostic Radiology in October 2005.

However, Plaintiffs did not produce an expert witness report for the claims against Bayhealth until September 13, 2005. Plaintiffs filed the report of Barbara Freimuth, BSN, RN, BC, LNC, with their response to Bayhealth's Motion to Dismiss. Plaintiffs' failure to submit an expert report for the claims against Bayhealth by the deadline is not indicative of a willful or conscious disregard of the Order. This is, however, a case where deadlines had been breached previously, and were extended

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[5] *Id.* at 652.

[6] *Id.*

for a limited time due to Plaintiffs' recent complications. Thus, the circumstances do not fit into the *Sundor* consideration.

_____Moreover, in civil actions, allegations of negligence must be averred with particularity.[7] The purpose of the particularity requirement is to put the defendant on notice of the claims in order to give the defendant a fair opportunity to plan a defense.[8] Generally, Rule 9(b) is satisfied, when the pleading advises the defendant "(1) what duty, if any, was breached; (2) who breached it; (3) what act or failure to act breached the duty; and (4) the party upon whom the act was performed."[9] Pleadings that comply with Rule 9(b) cannot merely " 'state the result or conclusion of fact arising from circumstances not set forth in the declaration, nor... make a general statement of the facts which admits of almost any proof to sustain it.' "[10] In the context of a medical malpractice action, the particularity requirement of Rule 9(b) must be "applied in light of the particular situation presented by the case."[11] "Even

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[7] Del. Super. Ct. Civ. R. 9(b).

[8] *Riggs National Bank v. Boyd*, 2000 WL 3303308, at *3 (Del. Super.) (citing *Fox v. Fox*, 729 A.2d 825, 827 n.2 (Del. 1999)(citations omitted)).

[9] *Slade v. Carroll*, 2004 WL 440381, at *2 (Del. Super.)(citing *Myer v. Dyer*, 542 A.2d 802, 805 (Del. Super. 1987)(dismissing claims of medical negligence for failure to specify dates on which the alleged malpractice occurred)).

[10] *Riggs National Bank*, 2000 WL 3303308, at *4 (quoting *Lee v. Johnson*, Del. Super., C.A. No. 96C-03-291, Quillen, J. (June 4, 1996)).

[11] *Id.*

exceptionally injured plaintiffs must plead with particularity the deviation from the standards of care and causation."[12]

In *Riggs*, the Court held that the Amended Complaint failed to make allegations of nursing negligence with sufficient particularity.[13] Therefore, the Court found that the Amended Complaint did not comply with Rule 9(b).[14] The Court rejected the plaintiffs' argument that the admitted deficiencies of the Amended Complaint were remedied by the opinion of an expert, who would testify as to the negligence of the hospital's nursing staff.[15] The Court dismissed the claims of nursing negligence, because the Amended Complaint was not "specific enough to create a claim against Beebe for a breach of the standard of care by the nursing staff of Beebe."[16]

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[12] *Id.* (citing *Marro v. Gopez*, Del. Super., C.A. No. 92C-01-102, Silverman, J. (Jan. 18, 1994)).

[13] The only references to nursing negligence made in the Amended Complaint were the following claims made in paragraphs 7 and 8:

> WILLIS S. BOYD, M.D. was an agent, servant, and employee of the BEEBE MEDICAL CENTER, INC. and operated within the scope of his employment and his negligence *along with the negligence of any other employee of the hospital, unknown at the time*, is imputed...[8.] BEEBE MEDICAL CENTER, INC. ...is liable for the negligent acts and omissions of *members of its staff.*"
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> *Id*. (emphasis added).

[14] *Id*.

[15] *Id*.

[16] *Id*.

Plaintiffs' claims of nursing negligence in the present case are even less discernable in the Complaint than those made in *Riggs*. Count I of the Complaint makes direct allegations against Bayhealth for its failure to train its employees, implement standards and protocols, and monitor employees in the diagnosis of DVT. Nowhere does Count I make any direct allegations of nursing negligence. A claim of nursing negligence could only be extrapolated from the allegations in Count I, which is not sufficient for purposes of Rule 9(b). Like the plaintiffs in *Riggs*, the fact that Plaintiffs have a nursing expert who will opine that the Bayhealth nurses were negligent in recognizing Plaintiff Robert Murphy's symptoms of DVT does not create a timely pleading of such a theory in compliance with Rule 9 (b).

Indeed, Plaintiffs acknowledge that the claims of nursing negligence were not plead with specificity. However, they claim that the requirement for particularity is excusable, because Bayhealth is in a better position to know the facts surrounding the alleged negligence. To that effect, Plaintiffs refer to *Myer v. Dyer*.[17] There, the Court held that "[i]n a medical malpractice action, it is highly likely that the defendant is in a superior position to adduce the relevant evidence and formulate a defenses thereupon."[18] As such, the Court held that the particularity requirement is relaxed in a medical malpractice action, when the "facts lie more in the knowledge of the

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[17] 542 A.2d 802 (Del. Super. 1987).

[18] *Id.* at 805 (Del. Super. 1987)(citing *Gunzl v. Osteopathic HospitalAssoc. of Delaware*, Del. Super., C.A. No. 81C-FE-6, Martin, J. (January 19, 1983)).

opposite party, than of the party pleading."[19] In *Myer*, however, the plaintiffs made thirty-seven allegations in the complaint as to how the defendant doctor negligently treated their minor daughter. The defendant alleged that the complaint was insufficient for purposes of Rule 9(b), because of the manner in which the claims were made. Defendant argued that Rule 9(b) required the claims to be set forth in a particular format. The Court disagreed, however, holding that Rule 9(b) "does not set a standard for what constitutes a cause of action."[20] Rather, Rule 9(b) instructs how a cause of action should be stated.[21] As such, the plaintiffs' failure to state their claims in a particular form in that particular situation was not fatal to sustaining their cause of action for medical negligence.[22]

Plaintiffs' reliance on *Myer,* though, is misplaced. The *Myer* Court's emphasis of substance over form conformed with the purpose of Rule 9(b) to put the defendant on fair notice.[23] The Court held that the nature of the medical malpractice claims were such that the doctor, more than the plaintiffs, would be in a better position to understand the facts surrounding the alleged negligence. In *Myer*, the Court recognized the defendant's notice of the claims, as evidenced by his answer to the

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19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

complaint.[24] In the present case, Plaintiffs' claims are insufficient in both form and substance. Although Defendant may be in a better situation to understand the facts underlying a nursing negligence claim, that fact does not alleviate Plaintiffs' burden to make the claim. The Complaint did not put Bayhealth on notice that Plaintiffs intended to pursue a claim of nursing negligence. In addition, the fact that Plaintiffs made individual, particularized claims against the doctors lends more support to the Bayhealth's lack of notice.

Plaintiffs also rely on *Phillips v. Delaware Power and Light Company*[25] for their argument that the particularity requirement is eased when a negligence allegation is based on an omission or failure to act. Plaintiffs' reliance on *Phillips* is not persuasive. In *Phillips*, plaintiffs claimed that defendant negligently maintained its gas mains, which caused a gas explosion. The Court denied defendant's motion to strike a portion of the complaint for particularity. The Court held that, when claiming that a defendant's omission or failure to perform was negligent, "there is no need of 'particularity' in the complaint to show in what manner the defendant failed to act and thereby breached his duty to plaintiff."[26] The Court did not hold that the plaintiff's duty to put the defendant on notice was waived. To the contrary, the Court held that "an adversary should be always advised of the basis of the claim."[27] The

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[24] *Id*.

[25] 194 A.2d 690 (Del. Super. 1963).

[26] *Id*. at 698.

[27] *Id*. at 696.

Court found that plaintiffs did not have to plead exactly how defendant should have maintained the gas mains. It was sufficient to alleged that defendant breached its duty to maintain the gas main in a reasonably safe condition.[28] The Court found that "defendant was put on adequate notice of the negligence on which plaintiffs premise their claim, and that there has been sensible compliance with the requirements of Rule 9(b)."[29] In this case, Plaintiffs' duty to put Bayhealth on notice of a claim of nursing negligence was not relieved by merely pleading negligence. Here, an entirely new claim of negligence on the part of nurses, a group of hospital employees never previously mentioned, allegedly rendering a type of care never within any time limitation prescribed previously alleged does not conform to the requirements of Rule 9(b).

CONCLUSION

For the reasons stated above, Bayhealth's Motion to Dismiss the direct claim of negligence against Defendant Bayhealth is **GRANTED** thereby dismissing Count I of the Complaint against Defendant Bayhealth. As earlier Ordered, Plaintiffs' claims against Bayhealth for its vicarious liability for the negligence of Dr. Yanez still remain a jury issue. Accordingly, Bayhealth's Motion to Dismiss Claim IV is **DENIED.**

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[28] *Id.* at 697.

[29] *Id.* at 698.

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/s/ Robert B. Young
Judge

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