

NO: UWY-CV10-6003260S : SUPERIOR COURT
CARMEN ARROYO : JUDICIAL DISTRICT
OF WATERBURY
V. : AT WATERBURY, CONNECTICUT
JOSEPH MILLERICK : MAY 3, 2010

MOTION

BEFORE THE HONORABLE BARBARA J. SHEEDY, JUDGE

A P P E A R A N C E S :

Representing the Plaintiff:

ATTORNEY MICHAEL TANSLEY-- Ordering Party
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Representing the Defendant:

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THE COURT: And let's go to Arroyo. Arroyo.
Okay. Okay. Would the parties introduce themselves,
please?

ATTY. HAMILTON: Good morning. My name is
Brenda Hamilton, Danaher, Lagnese & Sacco, for the
defendants.

THE COURT: Okay. And it's your motion to
dismiss?

ATTY. HAMILTON: Yes, Your Honor.

THE COURT: Hamilton. Correct?

ATTY. HAMILTON: That's correct.

THE COURT: Thank you.

ATTY. TANSLEY: Michael Tansley, representing
the plaintiffs, Your Honor.

THE COURT: Good morning, sir. How are you?

ATTY. TANSLEY: Good morning, Your Honor.

THE COURT: Okay. Counsel, I've read the briefs
in each of these matters. I don't want to prevent
you, and please, thank you, but unless you're
addressing the Court, you don't have to stand.

I've - because I've read the briefs, you don't
have to tell me what they're about. I don't want to
prevent you from saying whatever it is you want to
say, but in the interest of time, it ought not be
necessary to say everything all over again.

This is a motion to dismiss filed by the
defendant medical providers, and the basis of the

1 motion to dismiss is that the certificate of good -
2 the opinion letter, excuse me, doesn't provide a
3 sufficiently detailed basis for the - to support
4 the bringing of a negligence medical malpractice
5 action. And that certificate, I keep wanting to
6 refer to it as a certificate, the good faith opinion
7 letter reads - this is a case of a total abdominal
8 hysterectomy.

9 In pertinent part, it reads, from someone from
10 the Tufts University School of Medicine, whose
11 qualifications we also aren't told, although that is
12 not the basis of this motion to dismiss.

13 ATTY. HAMILTON: Your Honor, we actually do
14 allude to it.

15 THE COURT: Well, alluding to it doesn't cut it.
16 We really need to have you explicate your reasons for
17 wanting to dismiss, and you don't with regard to the
18 fact that - you're right, you allude to it, but
19 having alluded to it, you then abandoned it, so I
20 abandon it, as well.

21 So this is a total abdominal hysterectomy. It
22 reads: however - well, let me give you the preceding
23 sentence, Attorney Tansley, an obturator nerve
24 injury, secondary to the use of a self-retaining,
25 it's often called a retraining, in a misspelling
26 here, retractor is a recognized complication of the
27 use of a self-retaining retractor, quote, however,

1 the injury speaks for itself in that this is a
2 complication that can be avoided with proper use of
3 the self-retaining retractor, and therefore was a
4 deviation from the acceptable standards of care by,
5 and the doctors are named.

6 Attorney Tansley, what does that sentence tell
7 me about what these doctors inappropriately or
8 wrongly did?

9 ATTY. TANSLEY: First of all, Your Honor, I
10 think it sets forth what the standard of care is.

11 THE COURT: Proper use of something?

12 ATTY. TANSLEY: Well, the proper use of a
13 medical instrument, utilized in a surgical procedure
14 to avoid injury.

15 THE COURT: You don't mean to say that, do you?
16 I have too much respect for you to think that you
17 want to say that. I mean, to say that the standard
18 of care in any medical malpractice situation is to
19 properly use your implements tells us nothing about
20 the specificity of the doctor's so-called deviation
21 from the standard of care.

22 Did he use it in the wrong place? Did he apply
23 too much pressure? Did he apply too little pressure?
24 What did he do?

25 ATTY. TANSLEY: Well, I think, Your Honor, with
26 respect to what the purpose of this opinion letter
27 is to establish is evidence of medical negligence.

1 It is not necessarily -

2 THE COURT: And where is the evidence here?

3 ATTY. TANSLEY: The evidence here, Your Honor,
4 is that when you use the specific medical instrument,
5 you are to avoid utilizing in a manner that is going
6 to provide her or - or damage the obturator nerve,
7 and in this manner -

8 THE COURT: Isn't that true in every medical
9 malpractice case that - that centers on or has as its
10 centerpiece a total abdominal hysterectomy? I mean,
11 don't we know that about every surgery of that kind
12 that's done, that the practitioner ought to do
13 whatever is necessary to avoid injury to the patient?

14 ATTY. TANSLEY: Well, in this instance, Your
15 Honor, the specificity, it's - it's not just that the
16 letter read that they say oh, to avoid injury to this
17 particular nerve structure, it's that in utilizing
18 the particular instrument that they did use, that it
19 led to the injury. I mean, the doctor -

20 THE COURT: How did it lead?

21 ATTY. TANSLEY: -- specifically says -

22 THE COURT: How did it lead to the injury?

23 ATTY. TANSLEY: By violating the standard of
24 care with respect to utilizing the instrument, Your
25 Honor. That is broad, but, Your Honor, it does set
26 forth a basis such as the statute requires, setting
27 forth evidence of medical negligence. The fact that

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the individual, the plaintiff, was injured in the obturator nerve area, the doctor confirms that that was by a misuse of the - of the retractor, and that the misuse of retractor led to this specific injury, and he specifically identifies both doctors who are involved as the object of the negligence -

THE COURT: Well, he could have done that by looking at the medical records.

ATTY. TANSLEY: Well, that he -

THE COURT: Which you probably provided him, I would hope, before he rendered any opinion.

ATTY. TANSLEY: That is true, Your Honor, in the - in the front page of his letter he does itemize those medical records which he did review.

THE COURT: Yes.

ATTY. TANSLEY: What we are required to do, Your Honor, with respect to the letter is to provide an opinion that sets forth evidence of medical evidence. It doesn't have to be so specific, Your Honor, as to be victorious such as, you know, preponderance of the evidence. This is not a testifying expert that would be required to set forth additional information in order for a jury to make a determination as to the existence or nonexistence of medical negligence.

I think, Your Honor, a good standard to take a look at is the *Wilcox* case that we set forth. The Appellate Court took a look at an opinion, and it was

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recently issued, I think, on March 16th of 2010. The Appellate Court took a look at an opinion letter that's - basically said the following, that the doctors breached their standard of care in the treatment of the plaintiff because they failed to prevent injury to the bile ducts in the particular procedure.

THE COURT: Well, they said more than that in *Wilcox*, sir. In *Wilcox* they also said that there was a failure to accurately document the surgical procedure.

ATTY. TANSLEY: That's - that's true, Your Honor with -

THE COURT: Thank you.

ATTY. TANSLEY: -- respect to the after-the-operation aspect, but with respect to the negligence that occurred during the operation, the - the doctor specifically who wrote the letter said that it was a failure to follow the applicable standard of care, in that basically, the doctors failed to prevent injury to the biliary structure during the particular procedure.

THE COURT: And *Wilcox* is a Superior Court case, sir?

ATTY. TANSLEY: It's an Appellate Court case, Your Honor. It came out on May 16th - March 16th, 2010 of this year. The -

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THE COURT: Affirming the Superior Court decision?

ATTY. TANSLEY: Reversing the Superior Court decision, Your Honor.

THE COURT: Reversing it.

ATTY. TANSLEY: Yes. I believe counsel's office may have been involved in that case, as well. But in our case, Your Honor, again, when we look at the detail, the detail has to set forth the basis for the formation of the opinion, and the basis for the formation of the opinion is clearly set forth. I've reviewed all the medical records, and he sets forth the medical records that he reviewed. He identifies the procedure, he identifies the plaintiff, he identifies the specific tool that is being utilized in the procedure. He identifies the fact that it is known that if you improperly use the self-retaining retractors that you can and will damage the obturator nerve.

In this instance, the doctor says - the doctor who wrote the opinion letter, Your Honor, specifically says that the use of the self-retraining retractors injured the obturator nerve, and in doing so, the doctors deviated from the standard of care. I think with respect to the gatekeeper function that this letter is supposed to, you know, provide, Your Honor, that is clearly sufficient for counsel, myself

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in this instance, to make a good faith determination that a case should be brought in this instance.

I do want to just mention one thing, Your Honor, with respect to the qualifications of the doctor. In the certificate of good faith, I specifically set forth that the doctor who authored the letter was trained, experienced, and was board-certified in obstetrics and gynecology.

In our allegations of the complaint, we set forth that Dr. Miller - Dr. Millerick and Dr. Foster hold themselves out as specialists in gynecology. So we were required to get a specialist who is board certified in gynecology. I specifically set forth and it is a matter of record that this individual who authored the letter was indeed board certified. That is a fact. There's nothing contrary, there's nothing - it's undisputed.

THE COURT: Well, I'm not - I'm not even considering that -

ATTY. TANSLEY: Okay.

THE COURT: -- Attorney Tansley, because it wasn't developed as part of the motion to dismiss.

Attorney Hamilton, do you want to respond to Attorney Tansley's argument?

ATTY. HAMILTON: Only very briefly, Your Honor, because I think Your Honor has laid out our concerns with the letter. I would only note that even in

1 light of the recent Appellate decision in *Wilcox*, we
 2 don't believe that the opinion letter satisfies the
 3 statute, and if I may, I'd like to hand up to Your
 4 Honor a recent decision by Judge Domnarski. In fact,
 5 it came down last week.

6 THE COURT: Domnarski? Who's Domnarski?

7, 8 ATTY. HAMILTON: Judge Domnarski? Am I saying
 it wrong?

9 THE COURT: Domnarski?

10 ATTY. HAMILTON: Domnarski. Thank you. And the
 11 opinion letter that he ruled on, very similar to the
 12 one in the present case, basically said, the writer
 13 said there was negligence without saying what the
 14 standard was and what the violation was, and that's
 15 what we think is the problem here. Indeed, as Your
 16 Honor pointed out, the two sentences in that last
 17 paragraph are entirely inconsistent.

18 THE COURT: Inconsistent?

19 ATTY. HAMILTON: We believe so.

20 THE COURT: How so?

21 ATTY. HAMILTON: Because at first, we believe
 22 that the first sentence says that it's a recognized
 23 complication, in other words, it's a risk.

24 THE COURT: Okay.

25 ATTY. HAMILTON: A risk can happen with
 26 everything going right, so that doesn't mean that
 27 there was negligence just because it's a recognized

1 complication, and the doctor doesn't say that this
2 injury only happens when there's negligence. What
3 he's saying is that this is a known complication of
4 the surgery. So a reader of this paragraph is left,
5 all right, is this a known risk that you get warned
6 about or is this something that happens - and we also
7 have a problem that we think this is basically a res
8 adjudicate argument, but we're not given any notice
9 what exactly was the standard of care which under
10 Wilson they still say you need to give - I beg your
11 pardon. Under *Wilcox*.

12 THE COURT: *Wilcox*.

13 ATTY. HAMILTON: Thank you. And doesn't say how
14 we violated it. And if I may, Your Honor, I've shown
15 this to counsel, may I hand this up to Your Honor?

16 THE COURT: Do you have an objection?

17 ATTY. TANSLEY: I don't have an objection, Your
18 Honor.

19 THE COURT: Okay.

20 ATTY. TANSLEY: Counsel indicated that she would
21 provide me with a copy of those after the hearing.

22 THE COURT: All right. I'll take it.

23 ATTY. HAMILTON: Thank you. And unless you have
24 any more questions, Your Honor?

25 THE COURT: Okay. This is - this opinion letter
26 rendered by Dr. John O'Brien says, among other
27 things, not only did the nurses quote, unquote,

1 deviate from the accepted standard of medical care,
2 but that the anesthesiologist, quote, unquote,
3 deviated from the accepted standard of medical care,
4 and it concludes with saying that the negligence
5 committed by the nurses included not recording this
6 in the medical record and not reporting this to an
7 attending physician.

8 ATTY. HAMILTON: Just to clarify, Your Honor,
9 this motion was not made on behalf of the nurses,
10 it was just made on behalf of the doctors - or the
11 Court -

12 THE COURT: I understand. I understand.

13 ATTY. TANSLEY: If -

14 THE COURT: Sir?

15 ATTY. TANSLEY: If I may respond, Your Honor?
16 With respect to that particular letter, nowhere in
17 that letter does the - the -

18 THE COURT: Which letter are we talking about
19 now?

20 ATTY. TANSLEY: The letter that is directly
21 before Your Honor that you just cited from.

22 THE COURT: This one?

23 ATTY. TANSLEY: Yes, Your Honor.

24 THE COURT: Okay.

25 ATTY. TANSLEY: That counsel just handed up.
26 With respect to the negligence as reported by the
27 author of that opinion, that doctor only states that

1 the anesthesiologist and the - the anesthesiologist
2 who apparently was the target of the motion to
3 dismiss engaged in negligence and did not comply with
4 the standard of care, it doesn't say how, and our -

5 THE COURT: Neither does yours, sir.

6 ATTY. TANSLEY: Well, yes, it does, Your Honor.
7 It specifically says in the use of the self-retaining
8 retractors. Your Honor, if you - if you take a look
9 at those cases that were cited -

10 THE COURT: I actually have, sir -

11 ATTY. TANSLEY: Okay.

12 THE COURT: -- before coming here today.

13 ATTY. TANSLEY: Many of those cases, in fact, I
14 think all of those cases, Your Honor, either the
15 author of the document does not set forth who
16 actually committed the negligence or the statement of
17 negligence is merely a conclusory statement that
18 there was negligence and that the operating doctor or
19 the attending physician did not engage in the
20 appropriate standard of care. It does not
21 specifically identify the injury, how the injury
22 occurred, and what was the cause of the injury
23 through the use of a particular instrument.

24 With respect to the letter setting forth in the
25 paragraph that Your Honor read, that a complication
26 is a known risk, and therefore, it is something that
27 can be accepted during surgery, Your Honor, I don't

1 read the letter such as that. It's a complication
2 that the doctor says can be avoided through the
3 proper use of this medical instrument. This medical
4 instrument was improperly used, thus, the injury.

5 THE COURT: But we are not told how, Attorney
6 Tansley.

7 ATTY. TANSLEY: Your Honor?

8 THE COURT: I don't take lightly, sir, the
9 granting of a motion to dismiss, but I am granting
10 the motion to dismiss here. I think that the purpose
11 is to tell the opposing party what it is that in this
12 case the surgeons did improperly or did not do but
13 should have done.

14 Should the surgeons have used it in a different
15 area? Should they have somehow cut differently?
16 Should they have given the lady medication at the
17 same time that they were doing it? There must be
18 some particulars in this instance as to how that was,
19 that tool, was used. What is it they did or did not
20 do properly?

21 This is a medical malpractice case, Attorney
22 Tansley, so without seeing anything in the case at
23 all, what we know about it as soon as we've
24 identified it as a medical malpractice case is that
25 somebody is going to claim that a medical provider
26 deviated from the acceptable standard of care. All
27 that this tells us is that this or these providers

1 deviated from the standard of care in not properly
2 using the self-retaining retractor. That's not
3 enough. What is it they did wrong? What is it they
4 should have done? How do they defend this action not
5 knowing that?

6 ATTY. TANSLEY: If I may, Your Honor, this -

7 THE COURT: You can make a record, sir, but I've
8 given my ruling.

9 ATTY. TANSLEY: -- but this is - this is the
10 state of pre-discovery. Many of the details with
11 respect to the actual specifics of the deviations
12 would certainly be discovered through the appropriate
13 methods allowed. Being that it is at the pre-
14 discovery process, Your Honor, a reviewing doctor
15 only has those medical records that are before him.
16 This doctor specifically identified the use of a
17 particular tool -

18 THE COURT: The records would have told him
19 where the retractor was being used, the records would
20 have told him how the retractor was being used, and
21 it doesn't.

22 ATTY. TANSLEY: Okay. Well, Your Honor, I'm not
23 sure Your Honor is assuming something in the medical
24 records that is not before the Court with respect to
25 the medical record.

26 THE COURT: I appreciate your argument, sir. I
27 think it was as valiant as could be made in this

1 case, but I think the opinion letter is
2 insufficiently detailed.

3 ATTY. TANSLEY: Okay.

4 THE COURT: So -

5 ATTY. TANSLEY: Will Your Honor be writing an
6 opinion or is -

7 THE COURT: I will because I'm ordering a
8 transcript that you can order, and I will sign the
9 same.

10 ATTY. TANSLEY: Okay.

11 THE COURT: Good luck to you. I mean that.
12 Thank you.

13 ATTY. TANSLEY: Thank you, Your Honor.

14 ATTY. HAMILTON: Thank you, Your Honor.

15 ATTY. TANSLEY: Your Honor, if I may just - just
16 briefly, the basis of the decision is with respect to
17 the specificity of the letter, not the qualifications
18 of the doctor?

19 THE COURT: That's correct, it is.

20 ATTY. TANSLEY: Thank you, Your Honor.

21 THE COURT: You're welcome, sir.


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25 B. J. Sheedy 5/25/10
26 Honorable Barbara J. Sheedy, Judge
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C E R T I F I C A T I O N

I hereby certify the electronic version is/the foregoing pages are a true and correct transcription of the audio recording of the above-referenced case, heard in Superior Court, Judicial District of Waterbury, Waterbury, Connecticut, before the Honorable Barbara J. Sheedy, Judge, on the 3rd day of May, 2010.

Dated this 25th day of May, 2010 in Waterbury, Connecticut.



Angela LeRoy
Court Recording Monitor