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MARGARET MARY NOBLE v. DOMENICO AMBROSIO (02/28/90)

SUPREME COURT OF NEW YORK, SUFFOLK COUNTY Index No. 84-15360 1990.NY.42256

<<http://www.versuslaw.com>>; 574 N.Y.S.2d 234; 151 Misc. 2d 276 decided: February 28, 1990. **MARGARET MARY NOBLE, AN INFANT, BY HER FATHER AND NATURAL GUARDIAN, WILLIAM NOBLE AND WILLIAM NOBLE, INDIVIDUALLY, PLAINTIFFS, v. DOMENICO AMBROSIO, ET AL., DEFENDANTS. BURT ABEL, ET ANO, THIRD-PARTY PLAINTIFFS, V. ALFRED C. LIEFRIG, ET AL., THIRD-PARTY DEFENDANTS. COMMUNITY HOSPITAL OF WESTERN SUFFOLK, FORMERLY SMITHTOWN GENERAL HOSPITAL, SECOND THIRD-PARTY PLAINTIFF, V. ATTILIO SPADAFORA, M.D., ET AL., SECOND THIRD-PARTY DEFENDANTS** Page 277 TOBEROFF & TESSLER, ESQS., Attorneys for Plaintiffs, New York, New York. DAVIS & HOFFMAN, Attorneys for Defendant/Third & Second Third Party Plaintiff, SMITHTOWN GENERAL HOSPITAL, New York, New York. VARDARD, JOHS, DeTOLLA & HELWIG, ESQS., Attorneys for Defendants/Second Third Party Defendants, ATTILIO SPADAFORA, REINALDO R. GUTIERREZ, FRANCISCO PINI, SMITHTOWN ANESTHESIA ASSOCIATES, Smithtown, New York. WORTMAN, FUMUSO, KELLY, DeVERNA & SNYDER, ESQS., Attorneys for Defendant DOMENICO AMBROSIO, Huntington, New York. RIVKIN, RADLER, DUNNE & BAYH, ESQS., Attorneys for Defendant/Third Party Defendants, ALFRED C. LIEFRIG, STANLEY W. WESOTSKI, ALFRED MARTINEZ, WESOTSKI, MARTINEZ & LIEFRIG, P.C., Uniondale, New York. John Copertino, J.s.c. Author: Copertino
MEMORANDUM This medical malpractice action was brought in 1977 by the plaintiffs against anesthesiologist Domenico Ambrosio and surgeon Alfred C. Liefbrig, who attended to the infant plaintiff at the Smithtown General Hospital ("Hospital"). The Hospital, the anesthesiologist's partners and the members of the surgeon's professional corporation were also named as defendants in this action. As the action wended upon its course, a settlement agreement was made on April 18, 1980 and on May 23, 1980, an order was signed approving this agreement and empowering the guardian plaintiff to compromise the main action against all the named defendants save the Hospital; the action against it was severed and continued. On November 15, 1980, an order was entered granting leave to amend plaintiffs' bill of particulars "so as to withdraw all claims against . . . [the] Hospital, other than the derivative claim based upon the acts of negligence and malpractice allegedly committed by Dr. . . . Ambrosio" In 1981 a third-party action was commenced by the Hospital against the surgeons and their professional corporation demanding indemnification from the surgeons. The surgeons'

John Copertino, J.s.c.

Author: Copertino

MEMORANDUM

This medical malpractice action was brought in 1977 by the plaintiffs against anesthesiologist Domenico Ambrosio and surgeon Alfred C. Liefbrig, who attended to the infant plaintiff at the Smithtown General Hospital ("Hospital"). The Hospital, the anesthesiologist's partners and the members of the surgeon's professional corporation were also named as defendants in this action.

As the action wended upon its course, a settlement agreement was made on April 18, 1980 and on May 23, 1980, an order was signed approving this agreement and empowering the guardian plaintiff to compromise the main action against all the named defendants save the Hospital; the action against it was severed and continued.

On November 15, 1980, an order was entered granting leave to amend plaintiffs' bill of particulars "so as to withdraw all claims against . . . [the] Hospital, other than the derivative claim based upon the acts of negligence and malpractice allegedly committed by Dr. . . . Ambrosio"

In 1981 a third-party action was commenced by the Hospital against the surgeons and their professional corporation demanding indemnification from the surgeons. The surgeons' answer consisted of a general denial and an affirmative defense to the effect that the third-party complaint failed to state a cause of action, as well as an affirmative defense maintaining that the third-party complaint was barred by General Obligations Law § 15-108.

In July 1987, the Hospital instituted a second third-party action against Dr. Ambrosio's partners, alleging in its

complaint that the injuries suffered by the infant plaintiff were caused "wholly and entirely . . . [by] the active and primary negligence of defendant Ambrosio . . ." and that the Hospital was entitled to indemnification from the partners "by virtue of their vicarious liability for the actions of their partner . . . Ambrosio." The second third-party defendants' answer denied any wrongdoing on the part of any of the physicians named in the action and set forth twelve affirmative defenses as follows:

"AS AND FOR A FIRST AFFIRMATIVE DEFENSE

8. That the answering defendants are entitled to a set off for the entire settlement heretofore received by the plaintiffs in satisfaction of the plaintiff's claims herein. AS AND FOR A SECOND AFFIRMATIVE DEFENSE

9. That any and all legal responsibilities of the answering defendants have been fully satisfied by virtue of a prior settlement of this action with the plaintiffs.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

10. The cause of action may not be maintained because of prior discharge, release and/or settlement of this action by the answering defendants.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

11. This action cannot be maintained in as much as it would result in double recovery by the plaintiffs for the same injuries.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

12. The Second Third-Party Plaintiffs Complaint fails to state a cause of action as against these answering defendants, upon which relief can be granted.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

13. These answering defendants allege, upon information and belief, that whatever injuries and/or damages were sustained by the plaintiff at the time and place alleged in the Complaint were in whole or in part the result of the culpable conduct ...



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