

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOANNE FEDERICI : CIVIL ACTION  
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 v. :  
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 IRA EPSTEIN, M.D. and :  
 MICHAEL POLNEROW, D.O. : NO. 96-304

MEMORANDUM AND ORDER

VanARTSDALEN, S.J.

July 10, 1997

Plaintiff filed this medical malpractice action against various physicians and medical providers. Plaintiff settled the action against co-defendants Dr. Robert Hally and Thomas Jefferson University Hospital on a joint tort feasor release. Another defendant, Dr. Gavin, was dismissed for lack of personal jurisdiction. Trial has been scheduled to commence on July 21, 1997 on the claims against the two remaining defendants, Dr. Epstein and Dr. Polnerow. They have filed cross-claims against Dr. Hally and Thomas Jefferson University Hospital.

Plaintiff claims profound bilateral hearing loss resulting from improper and excessive use of the drug neomycin that had initially been prescribed by Dr. Hally to whom plaintiff had been referred by her treating nephrologists, Dr. Epstein and Dr. Polnerow of the Wilmington Kidney Center. In or around December, 1993 or early January, 1994, plaintiff complained to her treating nephrologists of ear problems and trouble hearing. She was referred by them to Dr. Imber with whom she consulted on January 19, 1994. She was apparently then advised for the first

time that her hearing problems were probably caused by the use of neomycin. She filed this action on January 16, 1996.

Dr. Epstein and Dr. Polnerow have moved for summary judgment contending: (1) plaintiff's action is barred by the statute of limitations; (2) the Delaware Healthcare Malpractice Act, 18 Del. Laws, §6801-6865 bars the action; (3) there is insufficient evidence of a breach of duty to allow a jury to render a verdict in plaintiff's favor.

The parties agree that Pennsylvania's two-year statute of limitations applies, 42 Pa. C.S.A. §5524(2), and that Pennsylvania has adopted the "discovery rule" to toll the period of limitations. In Bohus v. Beloff, 950 F.2d 919-924 (3rd Cir. 1991), the Court of Appeals stated: "under the most recent restatement of the discovery rule, the statute of limitations begins to run as soon as 'the plaintiff knows, or reasonably should know, 1) that he has been injured and 2) that his injury has been caused by another party's conduct'", citing Cathcart v. Keene Indus. Insulation, 471 A.2d 493 (Pa. Super. 1984). Although plaintiff may have been aware of a hearing loss more than two years prior to the filing of this action, there is no evidence that she knew, or by exercise of reasonable diligence could or should have known, prior to January 19, 1994, that her hearing loss was caused by continuing use of prescribed medicines.

The exact medical cause of the injury need not be known, Bohus, id., i.e. that her hearing loss was caused by

excessive and/or prolonged use of the prescribed drug neomycin. Certainly however, before the limitation period would commence to run against plaintiff's claims she had to know or have reason to know that her hearing problem was more than the temporary result of some minor infection or cold or similar common malady that frequently occurs to many people. When she complained of her hearing problem to the defendant doctors, they simply referred her to Dr. Imber, a hearing specialist, and apparently expressed to her no opinion as to possible causes. Certainly, she had no reason to know the cause of her hearing loss, or that it was caused "by another party's conduct", irrespective of whether it was the result of negligent treatment, until after she consulted with Dr. Imber on January 19, 1994. Although she may have waited several weeks before she met with Dr. Imber, this clearly cannot be held to be to be a lack of due diligence<sup>1</sup>, especially since there is no evidence that she was advised to make the appointment as quickly as possible.

In any event, even if it could be disputed as to when plaintiff knew, or in the exercise of reasonable diligence should have known, that her hearing loss was caused by use of the prescribed drug (as opposed to a cold, flue, respiratory or other illness), this would involve factual issues that would require a

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<sup>1</sup>Although I don't consider it important, certainly it is well known that, absent some emergency situation, a patient frequently has to wait several weeks, or more, before being able to consult with a medical specialist to whom such patient is referred by another doctor

jury determination. Colonna v. Rice, 664 A.2d 979, 980 (Pa. Super. 1995).

Dr. Epstein and Dr. Polnerow practiced medicine in Delaware and they treated and provided services to plaintiff exclusively within the state of Delaware. The Delaware Healthcare Malpractice Act, 18 Del. Laws §§6801-6865 provides that the State Superior Court of Delaware "shall have exclusive jurisdiction of civil actions alleging healthcare malpractice" and that "any party shall have the right to convene a malpractice review panel as herein provided by filing a demand therefore with the Prothonotary". 18 Del. Laws, §6802. Section 6814 of the statute provides for the convening of a malpractice review panel "upon request of a Federal District Court Judge sitting in a civil action in the District of Delaware alleging malpractice in the manner instructed by the said federal court" that shall be as consistent as possible with the state procedure detailed in the statute. There is no provision for convening or utilizing a malpractice review panel in any civil action filed in states other than Delaware or in federal district courts other than the District of Delaware. Thus, it is very doubtful that there is any available procedure for utilizing a malpractice review panel, as provided in the statute, in cases filed in this district.

In addition, although the defendants noted the statute as an affirmative defense in their answer to the complaint, they have never filed any motion or request before me, or sought by any procedure, to convene a malpractice review panel or to avail

themselves of the provisions of the statute in any way, nor have they ever filed a demand or a claim of right to have such a panel convened. They simply contend that this action is barred. The statute does not mandate the convening of a panel in every case, only that "any party shall have the right to convene" a panel upon filing a demand with the prothonotary, which was never done or attempted to be done in this case. I further note that there has been no motion to transfer the action to the District of Delaware pursuant to 28 U.S.C. §1404(a) that might conceivably have been available. Finally, even where a review panel is convened and files a report, it is subject to state court judicial review. Apparently, the case would still be subject to trial by jury. The opinion reached by the review panel would be prima facia, but not conclusive evidence, pursuant to §6812 of the statute. I conclude that the Delaware Malpractice Act does not bar this action or preclude proceeding to trial as scheduled.

The final basis for claiming entitlement for summary judgment is that there is insufficient evidence of a breach of duty. This is clearly a disputed issue of material fact. Expert witnesses for both plaintiff and defendants have submitted reports opining as to the degree of care that should have been provided by the defendant doctors to the plaintiff and whether or not they breached that duty. Merely because Dr. Hally initially prescribed the medicine does not preclude, as a matter of law, holding other treating and consulting physicians liable in negligence for the continuing use of the drug, especially since

Dr. Epstein and Dr. Polnerow were plaintiff's continuing treating nephrologists.

Although not raised in the summary judgment motion, in the pretrial memorandum filed, defendants contend that New Jersey law, the state of plaintiff's residence, rather than Pennsylvania or Delaware law should control as to the measure of damages. Under New Jersey law apparently any damages must be reduced by the amount of insurance payments and receipts from all other "collateral sources". There should be no dispute of fact as to what, if any, collateral source payments were received by plaintiff. The jury could determine what the total damages are and, if it is later determined that collateral sources receipts should be deducted from the recovery, the judgment could be molded to account for such receipts. Since this issue has not been fully briefed, I will not rule on it at this time, although it is my offhand view that the law of the place where the defendants performed their services should be the law applicable as to the measure of damages. The motion for summary judgment will be denied.