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HERMAN ALSWANGER ET AL. v.
DOUGLAS R. SMEGO ET AL.
(SC 16309)

Sullivan, C. J., and Borden, Norcott, Zarella and Axelrod, Js.

Argued February 15—officially released July 24, 2001

Counsel

Mario DiNatale, with whom were *Paul A. Slager* and, on the brief, *Richard A. Silver*, for the appellants (plaintiffs).

Garie J. Mulcahey, with whom, on the brief, was *Heidi M. Priwall*, for the appellee (named defendant).

Deborah S. Chang, for the appellee (defendant Stamford Hospital).

Opinion

NORCOTT, J. The issue in this appeal¹ is whether allegations asserted in an amended complaint related back to the original complaint and, therefore, were timely under General Statutes § 52-584.² The plaintiffs, Herman Alswanger (Alswanger) and his wife, Myrna Alswanger, appeal from the judgment of the trial court granting summary judgment in favor of the defendants.

The plaintiffs claim that the trial court improperly reached one or more of the following conclusions of law: (1) that the amendments to the informed consent allegation necessarily stated a claim for battery, rather than negligence, and thus stated a new cause of action that did not relate back to the plaintiffs' original complaint; (2) that the fact that an inexperienced resident would perform significant parts of a patient's surgery was not material information that a patient should be told before giving his informed consent, and, accordingly, that there was no actionable negligence; and (3) that the plaintiffs' amended allegations of the defendants' negligence in obtaining Alswanger's consent arise from a different set of facts than the allegations of the original complaint, and, accordingly, were time-barred because they did not relate back either to the plaintiffs' informed consent allegations, or to the plaintiffs' general negligence allegations in the original complaint. We conclude that the allegations in the plaintiffs' amended complaint alleging lack of informed consent regarding a resident's participation in the surgery arose from a different set of facts than the allegations set forth in the original complaint. The amended complaint, therefore, did not relate back and was barred under the statute of limitations. Accordingly, we affirm the judgment of the trial court.³

The plaintiffs initiated this action against the defendants, Douglas R. Smego, a physician, and Stamford Hospital (hospital), alleging, *inter alia*, that the defendants failed to advise the plaintiffs of all material risks involved in a certain surgical procedure. The plaintiffs then filed an amended complaint, specifically alleging that the defendants failed to obtain Alswanger's consent to the participation of a surgical resident, Jay Dewell, as a co-operating surgeon. The defendants filed motions for partial summary judgment with respect to this allegation, claiming that it was a new claim that did not relate back to the original complaint and, therefore, was barred by the applicable statute of limitations. The court granted the defendants' motions for summary judgment. The plaintiffs withdrew their other informed consent allegations and the case went to trial on the remaining issues. The court granted the hospital's motion for a directed verdict.⁴ Thereafter, the jury returned a verdict in favor of Smego. The court, subsequently, denied the plaintiffs' motion to set aside the verdict and rendered judgment for Smego. This appeal followed.

The following facts are relevant to our disposition of this appeal. Smego had been treating Alswanger for a recurring superficial phlebitis condition of the right greater saphenous vein in his leg since 1986. Because of recurring problems, the parties agreed in January, 1990, that Smego would perform a surgical procedure to ligate and strip Alswanger's right greater saphenous vein. The surgery was performed on March 19, 1990,

by Smego and Dewell, a first year medical resident. Immediately after the surgery, Alswanger experienced pain from his groin down into his right leg. The pain continued throughout Alswanger's postoperative treatment with Smego, which lasted until June, 1990. Alswanger's pain finally subsided when a second surgery was performed on May 1, 1991, by a different physician.

Thereafter, the plaintiffs filed a complaint against the defendants on June 16, 1992. The complaint alleged that Smego was negligent in sewing through a nerve in Alswanger's upper thigh with permanent silk sutures, and in failing to disclose "all material risks involved in connection with his care and treatment, including the nature and possible consequences of the operation, the prospects of success, the prognosis if the procedure was not performed, and alternative methods of treatment available" The complaint also included a general negligence allegation that the defendants "failed to exercise that degree of care, skill, and/or diligence ordinarily employed by surgeons under similar circumstances"

On March 2, 1998, the plaintiffs filed an amended complaint. The relevant portions of the amended complaint restated the allegations of the original complaint and added claims of negligence relating to Dewell's involvement in the surgical procedure. Specifically, the amended complaint alleged that Smego was negligent "in that he failed to disclose to and inform [Alswanger] of all material risks involved in connection with his surgery, care and treatment, including but not limited to the nature and possible consequences of the operation, the prospects of success, the prognosis if the procedure was not performed, the alternative methods of treatment available, *and the fact that a medical resident, Jay Dewell, M.D., would participate as a co-operating surgeon*" (Emphasis added.) The amended complaint also alleged that Smego was negligent "in that the operation was performed without the consent of [Alswanger] to the participation of Jay Dewell, M.D., as a co-operating surgeon"

The defendants each objected to the plaintiffs' proposed amendment. The court, *D'Andrea, J.*, granted the plaintiffs' motion to amend the complaint, but explicitly declined to address the legal sufficiency of the new allegations, stating that those issues would be more appropriately addressed through other procedural vehicles. In answering the amended complaint, the defendants each asserted a special defense, claiming that the plaintiffs' amended allegations were barred by the applicable statute of limitations, § 52-584. The defendants, thereafter, each moved for summary judgment, again alleging that the plaintiffs' amended claim was barred by the statute of limitations.

The court, *Tierney, J.*, granted the summary judgment motions on August 17, 1998, and, in doing so,

explained the relation back doctrine. “It is proper to amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same. But where an entirely new and different factual situation is presented, a new and different cause of action is stated. In the event that a new and different factual situation is presented, any amendment will not relate back to the initial commencement of the lawsuit unless the original pleading had given a fair notice to the adverse party that a claim is being asserted against him for some particular transaction or occurrence.” The general rule, the court explained, would be to consider whether it would permit the admission of evidence relating to the consent of Dewell’s involvement in the surgery under the original complaint. Under this precept, the court determined that the original complaint lacked any allegations that there was a failure to obtain informed consent to Dewell’s participation and, therefore, concluded that such evidence would not have been admitted. Accordingly, the court concluded that the amended complaint did not relate back to the original complaint and, therefore, granted the defendants’ motions for summary judgment.

The relation back doctrine has been well established by this court. “A cause of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief. . . . A right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant. The facts which establish the existence of that right and that delict constitute the cause of action. . . . A change in, or an addition to, a ground of negligence or an act of negligence arising out of the single group of facts which was originally claimed to have brought about the unlawful injury to the plaintiff does not change the cause of action. . . . It is proper to amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same, but where an entirely new and different factual situation is presented, a new and different cause of action is stated. . . . Our relation back doctrine provides that an amendment relates back when the original complaint has given the party fair notice that a claim is being asserted stemming from a particular transaction or occurrence, thereby serving the objectives of our statute of limitations, namely, to protect parties from having to defend against stale claims” (Citation omitted; internal quotation marks omitted.) *Barrett v. Danbury Hospital*, 232 Conn. 242, 263–64, 654 A.2d 748 (1995).

Two cases in particular are illustrative of this court’s approach to the relation back doctrine. In *Sharp v. Mitchell*, 209 Conn. 59, 60, 546 A.2d 846 (1988), three men were asphyxiated in an underground fuel storage

facility during the course of their employment. The plaintiffs, the administrators of the decedents' estates, alleged a wrongful death action based on negligent supervision in their first complaint. *Id.*, 73. They subsequently amended their complaint to allege that the defendant had negligently designed and constructed the storage facility. *Id.* In concluding that the amended complaint did not relate back to the original complaint, the court held that "[t]hese complaints involve two different sets of circumstances and depend on different facts to prove or disprove the allegations of a different basis of liability. . . . The defendants did not have fair notice of the claim of negligent construction and design of the underground storage area when the original complaint merely alleged that [the defendant] was negligent in ordering the employees to enter the area." *Id.* Moreover, the court noted that "[t]he fact that the same defendant is accused of negligence in each complaint and the same injury resulted . . . does not make any and all bases of liability relate back to an original claim of negligence." *Id.*

This court came to a different conclusion in *Gurliacci v. Mayer*, 218 Conn. 531, 590 A.2d 914 (1991). In that case, the plaintiff claimed that she had suffered injuries when her vehicle was struck in the rear by a driver who was intoxicated. *Id.*, 534. The plaintiff's first complaint alleged that the defendant had acted negligently in operating his automobile while he was intoxicated. *Id.*, 546. After the relevant limitations period had passed, the plaintiff amended her complaint to add allegations that the defendant had acted either wilfully, wantonly and maliciously, or outside the scope of his employment. *Id.* In distinguishing *Gurliacci* from *Sharp*, we explained that the amendment in *Sharp* was significant because "the defendant would have been required to gather different facts, evidence and witnesses to defend the amended claim." *Id.*, 549. In *Gurliacci*, however, the amendment "did not inject two different sets of circumstances and depend on different facts" (Citation omitted; internal quotation marks omitted.) *Id.* Accordingly, we concluded that the amended complaint related back to the original complaint. *Id.*, 546.

In the present case, we are faced with an amended complaint, filed after the statute of limitations had expired, alleging an act of negligence based on a different set of facts from that alleged in the original complaint. Although the focus of the original complaint was on the informed consent as it related to the surgical procedure itself, the amended complaint shifted the focus to consent by the patient to the participation of the individuals involved in the surgery. For example, the amended complaint would have required evidence as to Dewell's actual and specific role in the surgery, his experience, whether the plaintiffs were informed of the role he would play and his experience, whether the defendants were required to provide that information

to the plaintiffs, and the hospital's policy, as a teaching hospital, regarding a resident's involvement in surgery. Any discussion as to much of this evidence, however, would have been irrelevant under the original complaint, which asked whether the defendants adequately informed the plaintiffs regarding the surgical procedure. As in *Sharp*, the amendment in the present case would have forced the defendants "to gather different facts, evidence and witnesses to defend the amended claim." *Gurliacci v. Mayer*, supra, 218 Conn. 549. Accordingly, the trial court properly disallowed the relation back of the amended complaint.

The plaintiffs claim that their amended complaint set forth only a more specific informed consent allegation and, therefore, the defendants were on notice that a lack of consent to Dewell's participation was an issue they could raise. We disagree that the amendments gave the defendants adequate notice. All of the informed consent cases in Connecticut have involved the adequacy of information disclosed regarding the procedure and treatment to be performed. See, e.g., *Fabrizio v. Glaser*, 237 Conn. 25, 26, 675 A.2d 844 (1996) (alleging lack of informed consent for extraction of wisdom teeth); *Pedersen v. Vahidy*, 209 Conn. 510, 512, 552 A.2d 419 (1989) (alleging lack of informed consent for failure to disclose risks associated with lipoma removal); *Shelnitz v. Greenberg*, 200 Conn. 58, 60, 509 A.2d 1023 (1986) (alleging lack of informed consent for failure to disclose spinal headache as risk of myelogram procedure); *Logan v. Greenwich Hospital Assn.*, 191 Conn. 282, 284, 465 A.2d 294 (1983) (alleging lack of informed consent for failure to disclose alternatives to percutaneous renal biopsy). In *Logan v. Greenwich Hospital Assn.*, supra, 292, we held that informed consent involves four specific factors: (1) the nature of the procedure; (2) the risks and hazards of the procedure; (3) the alternatives to the procedure; and (4) the anticipated benefits of the procedure. We are not aware of any case adjudicated by this court where the identity and qualifications of the participants in the procedure, and the policies of teaching hospitals, constituted a lack of informed consent claim. Thus, the defendants were reasonable in assuming that the originally alleged negligence involved only the procedure itself. Our case law supports the notion that the defendants had no reason to be on notice that informed consent to the surgical staff team was in issue.⁵

The amended complaint, although alleging negligence related to the same surgery as the original complaint, had its basis in a different set of facts from the original complaint. That the injuries alleged and the parties involved in each complaint were identical did not eliminate the fact that the complaints were based on different facts. *Sharp v. Mitchell*, supra, 209 Conn. 73.

The judgment is affirmed.

In this opinion SULLIVAN, C. J., and BORDEN and ZARELLA, Js., concurred.

¹ The plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 65-1, and General Statutes § 51-199 (c).

² General Statutes § 52-584 provides: “No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed.”

³ It is important to note that this decision is limited to the issue of whether the allegations in the amended complaint arose from a different set of facts than those alleged in the original complaint. The judgment of the trial court similarly was limited to this issue. Contrary to the claims set forth in the plaintiffs’ briefs, the trial court did not conclude that the amendments necessarily stated a claim for battery; nor did the trial court conclude that a patient is without the right to know the identity and experience level of those participating in his or her own surgery. At oral argument before this court, the plaintiffs acknowledged the trial court’s limited holding. Accordingly, we decline to address the underlying issues involved in the plaintiffs’ other claims.

⁴ In granting the hospital’s motion for a directed verdict, the court concluded that Dewell was the “borrowed servant” of Smego during the surgical procedure. Thus, Dewell’s negligence, if any, could not be imputed to the hospital.

⁵ Our holding should not be read to suggest that informed consent does not involve a patient’s right to know the identity and qualifications of the surgical team involved in the patient’s procedure. Rather, we make no comment on that issue. We cite these cases only to demonstrate the validity and reasonableness of the defendants’ surprise.