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DANIEL R. PEKERA, ADMINISTRATOR (ESTATE OF CHARLENE WALKER), ET AL. *v.* DAVID PURPORA ET AL.
(SC 17133)

Norcott, Katz, Palmer, Vertefeuille and Zarella, Js.

Argued December 6, 2004—officially released April 12, 2005

Cynthia C. Bott, with whom, on the brief, was *John D. Jessep*, for the appellants (plaintiffs).

Jeffrey R. Babbin, for the appellee (defendant Allan Rodrigues).

Opinion

ZARELLA, J. The principal issue in this certified appeal[1] is whether the trial court properly declined to consider the plaintiffs'[2] purported request to amend their medical malpractice complaint against the defendant,[3] Allan Rodrigues, to include an allegation of failure to inform the decedent of the consequences of her refusal to be intubated after the court had granted the defendant's motion for summary judgment and rendered judgment thereon. Although the plaintiffs discussed the possibility of amending the complaint in their reply to the summary judgment motion, they did not file a request for permission to amend before the judgment was rendered. On appeal, the Appellate Court determined, inter alia, that the trial court properly had declined to consider the matter because the plaintiffs had failed to file a request for leave to amend their complaint and had not established that the court abused its discretion. *Pekera* v. *Purpora*, 80 Conn. App. 685, 693, 836 A.2d 1253 (2003). We affirm the judgment of the Appellate Court.

The following relevant facts and procedural history are set forth in the opinion of the Appellate Court. "[O]n April 5, 1996, the patient[4] was admitted to Griffin Hospital [in Derby] because she was suffering from severe diabetic ketoacidosis and pneumonia. The defendant, a pulmonologist, was asked to examine the patient in the early hours of the following day. The defendant immediately determined that she needed an endotracheal intubation in order to receive ventilatory support. He also immediately summoned her husband to the hospital to discuss the seriousness of the patient's condition . . . .

"The patient repeatedly refused to be intubated, despite repeated efforts to persuade her to do so, both by the defendant and [the patient's] husband. When, at the urgent importuning of her husband, she finally consented to this procedure, she was promptly intubated, but it was too late. She died an hour later." Id., 689.

"The plaintiffs . . . filed a sixteen count malpractice complaint[5] naming five physicians, two professional corporations and Griffin Hospital as defendants. The complaint alleged that each of [the defendants] negligently had engaged in conduct that had caused the [patient] . . . to suffer injury and to die at Griffin Hospital on April 6, 1996. . . .

"The malpractice allegations against the defendant were set out in five specifications in count nine of the plaintiffs' complaint.[6] During pretrial proceedings, however, the plaintiffs withdrew each allegation except that stated in paragraph 5 (c) of count nine, namely, that the defendant 'failed to timely intubate and properly manage the [patient's] pulmonary condition . . . .' "

Id., 687–88.

"The plaintiffs could not proceed with this claim without the support of expert testimony. . . . In his deposition, the plaintiffs' expert witness, Daniel M. Goodenberger, a pulmonologist, did not fault the timeliness of the intubation. He did not question the defendant's decision not to intubate the patient without her consent. It was, however, his view that the patient would have consented to the intubation earlier if the defendant had been more forceful in explaining to her the seriousness of her condition. Goodenberger stated that in his experience, 'when patients are told that the alternative to a procedure such as this is death . . . they will accept it.' According to the expert, the defendant's care had been substandard because the defendant had not appreciated the seriousness of the patient's condition as soon as he should have and therefore had not advised the patient adequately of the risk of declining intubation." (Citations omitted.) Id., 690.

"The defendant filed a motion for summary judgment on two grounds. He asserted that (1) the plaintiffs' expert witness had not substantiated the plaintiffs' claim of malpractice as stated in paragraph 5 (c) of count nine, and (2) the plaintiffs were not entitled to amend their complaint to conform to the expert's opinion that the defendant improperly had failed to inform the patient of the consequences of her refusal to be intubated.

"In their reply, the plaintiffs contested each of the defendant's claims. They argued that paragraph 5 (c) of count nine, as drafted, encompassed a claim of failure to inform because, like the alleged failure to intubate in a timely manner, it arose out of the same factual circumstances. If that argument was unpersuasive, the plaintiffs requested the court's permission 'to amend [their] complaint to include specific language relating to that claim so that the relation back analysis can be applied with a specific allegation.'

"The trial court granted the defendant's motion [for summary judgment]. It concluded that paragraph 5 (c) of count nine neither expressly nor impliedly charged the defendant with failure to inform the patient of the risks of refusal to consent to intubation. It further concluded that it did not need to address the possibility of an amendment of the complaint because 'there is no complaint left to amend.'

"In their appeal from the [trial court's] judgment . . . the plaintiffs claim[ed] that the court (1) [had] construed their complaint too narrowly and (2) should have permitted them to amend their complaint to include an allegation of failure to inform." Id., 688–89. The Appellate Court rejected both claims and concluded that the trial court properly had granted the defendant's motion for summary judgment on its merits. Id., 692, 693. This

certified appeal followed.

The plaintiffs claim on appeal to this court that the Appellate Court (1) failed to recognize that the trial court erred as a matter of law, and (2) improperly concluded that the trial court did not abuse its discretion in declining to consider an amendment to their complaint.[7]

The plaintiffs first claim that the Appellate Court failed to recognize that the trial court erred as a matter of law in declining to consider an amendment to their complaint. They contend that the trial court had jurisdiction and authority to rule on an amendment and that its decision not to do so elevated form over substance. We disagree.

When a trial court's decision is not based on its exercise of discretion but, rather, on a legal conclusion, our review is plenary, and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record.[8] E.g., *Robinson* v. *Coughlin*, 266 Conn. 1, 5, 830 A.2d 1114 (2003).

The rules that govern the amendment of a complaint are well established. Practice Book § 10-59 provides in relevant part: ''The plaintiff may amend any defect, mistake or informality in the writ, complaint or petition and insert new counts in the complaint, which might have been originally inserted therein . . . during the first thirty days after the return day.'' Practice Book § 10-60 (a) further provides in relevant part: ''[A] party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in [Practice Book § 10-59] in the following manner:

''(1) By order of judicial authority; or

''(2) By written consent of the adverse party; or

''(3) By filing a request for leave to file such amendment, with the amendment appended, after service upon each party . . . and with proof of service endorsed thereon. . . .''

In the present case, the plaintiffs did not satisfy the applicable rules of practice because they did not file and serve upon the defendant a written request to amend their complaint with the amendment appended thereto. See Practice Book § 10-60 (a). They merely argued in their reply to the defendant's summary judgment motion that a cause of action for the defendant's failure to inform the decedent of the consequences of her refusal to be intubated was encompassed within paragraph 5 (c) of count nine and that, ''[s]hould the court find it is not, [the] plaintiff[s] *would request* the court's permission to amend [their] complaint to include specific language relating to that claim so that the relation back analysis can be applied with a specific allegation.'' (Emphasis added.) This argument can only

be construed to mean that, if the court found that a cause of action for failure to inform was not contained within paragraph 5 (c) of count nine, the plaintiffs *then* would request the court's permission to amend the complaint so that such a claim could be considered.

Although the parties discussed the relation back doctrine in connection with the timeliness of a possible amendment to the complaint in their respective memoranda on the defendant's summary judgment motion, neither party maintained, or even implied, that an amendment to the complaint was then before the court. Both parties initially directed their arguments to whether paragraph 5 (c) of count nine alleged a cause of action for the defendant's failure to inform the decedent about the consequences of her refusal to be intubated. They then addressed whether the two year statute of limitations for medical malpractice actions would permit the plaintiffs to amend their complaint *if* the court determined that paragraph 5 (c), as written, did not encompass the claim. In fact, counsel for the defendant expressly stated at the summary judgment hearing that, ''[i]n terms of a pleading, a revised pleading, at this point, would not be timely. *It's not formally before the court. There is no request to file an amended complaint.*'' (Emphasis added.) The plaintiffs did not dispute this observation. Accordingly, discussion of the relation back doctrine took place in the context of the *future* filing of an amendment to the complaint and not in the context of an existing filing.[9]

The issue of a ''prospective amendment'' was discussed by the parties but was not before the trial court because the plaintiffs had not provided the court with the ''specific language'' necessary for it to consider a claim of failure to inform by properly filing a request to amend. Indeed, the plaintiffs explained in their Appellate Court brief that, ''if the plaintiffs [had] amended their complaint to substitute language specifically alleging in a new subparagraph that [the defendant] failed to warn [the decedent] of the risk of refusing intubation, [the] plaintiffs would no longer be able to argue that paragraph [5 (c)] encompassed [the] plaintiffs' expert's opinion . . . .'' Accordingly, this is not a case in which the plaintiffs expressed a clear intention to amend their complaint but neglected to follow the proper procedure. Rather, the record reveals that the plaintiffs did *not* wish to amend their complaint when the defendant's summary judgment motion was filed because an amendment might have weakened their position that the existing complaint encompassed a claim of failure to inform. The plaintiffs' reference to a possible future amendment in their reply memorandum thus cannot be considered a request to amend under the applicable rules of practice.[10] In the absence of a properly filed request to amend, the trial court was not called upon to exercise its discretion, and it correctly declined, as a matter of law, to consider the purported amendment.

The dissent's real, and only, problem with the trial court's actions is that the court ''improperly granted the defendant's motion for summary judgment before considering whether the plaintiffs could amend their complaint . . . .'' It is undisputed, however, that the plaintiffs *wanted and therefore actively sought* a decision by the trial court on the defendant's summary judgment motion because the plaintiffs believed that they were entitled to prevail on their challenge to that motion. Thus, without expressly saying so, the dissent argues that, if the trial court intended to grant the defendant's summary judgment motion, the court then *was required* to have so informed the plaintiffs of that intent—in advance of ruling on the motion—so that the plaintiffs could perfect a request to amend their complaint prior to the adverse ruling on the summary judgment motion. In other words, the dissent effectively maintains that the trial court was obligated to give the plaintiffs an advance, or advisory, opinion about the merits of the defendant's summary judgment motion if, and only if, the court concluded that that motion was meritorious. It simply cannot be the case that a trial court has such a responsibility. Because the dissent fails to address that point expressly, however, it also avoids explaining how a trial court legitimately can be required to discharge its duties in that manner.

The trial court's failure to consider an amendment did not work an injustice to the plaintiffs in view of their decision not to amend their complaint following Goodenberger's initial deposition in November, 2001, nearly nine months before the defendant filed his summary judgment motion. At that time, Goodenberger expressed his view that the defendant had failed to inform the decedent that death was a likely consequence of her refusal to be intubated immediately. In fact, an argument can be made that, because the plaintiffs did not assert their failure to inform claim until they replied to the summary judgment motion, more than three years after the plaintiffs filed their complaint, it was the defendant who suffered an injustice by having to respond to new allegations long after the action had been commenced.

The plaintiffs could have filed a motion to open the judgment for the purpose of restoring the case to the docket and amending the complaint after the court had granted the defendant's motion and rendered judgment thereon.[11] See Practice Book § 17-4. They chose not to do so, however. Accordingly, the trial court could not reach the relation back question, to the extent that it was briefed and argued by the parties in the context of a future amendment to the complaint, because the court's decision on the summary judgment motion disposed of the complaint in its entirety and there was no legal basis for ruling upon the purported amendment.

The present case is similar to *Cardi Materials Corp.*

v. *Connecticut Landscaping Bruzzi Corp.*, 77 Conn. App. 578, 823 A.2d 1271 (2003), in which the defendant, Connecticut Landscaping Bruzzi Corporation, challenged the standing of the plaintiff, Cardi Materials Corporation, to sue on a contract entered into by an affiliate of the plaintiff and not by the plaintiff itself. Id., 580, 581. In response to the defendant's oral motion to dismiss at the conclusion of the evidence, counsel for the plaintiff stated: ''I could move to substitute [the affiliate] now, which I guess I would formally do to make this accurate.'' (Internal quotation marks omitted.) Id., 580. Even though the plaintiff did not move to substitute the affiliate, the trial court denied the defendant's motion to dismiss and rendered judgment in favor of the plaintiff. Id. In reversing the trial court's judgment, the Appellate Court observed that the plaintiff had not moved ''to substitute [the affiliate] as the plaintiff, nor did the court order that [the affiliate] be substituted for the plaintiff.'' Id. As a result, the Appellate Court concluded that the plaintiff lacked standing to bring the action because it was not a party to the contract. Id., 581–82.

In the present case, as in *Cardi Materials Corp.*, the plaintiffs considered taking steps to correct a perceived deficiency in their pleadings, namely, amending their complaint to include a claim for failure to inform, but did not follow through and take the contemplated action. Consequently, just as the Appellate Court in *Cardi Materials Corp.* determined that the trial court's judgment should be reversed because the plaintiff in that case had failed to cure a fatal defect in its pleadings; see id., 580, 581–82; the trial court in the present case properly declined to consider an amendment because the plaintiffs had failed to file a request to amend in accordance with the rules of practice.

The plaintiffs argue that a request to amend does not have to be in writing but can be made in the form of an oral motion. See, e.g., *Falby* v. *Zarembski*, 221 Conn. 14, 21, 25, 602 A.2d 1 (1992). They did not make an oral motion to amend their complaint, however, at the hearing on the defendant's summary judgment motion. Although the plaintiffs' counsel argued during that hearing that paragraph 5 (c) of count nine encompassed a cause of action for failure to inform, he did not request to amend the complaint or express his intention to make such a request at any future time. We therefore conclude that the Appellate Court properly affirmed the trial court's judgment.

The plaintiffs contend that the trial court should have considered the purported amendment because Connecticut courts have followed a liberal policy in favor of allowing amendments, trial courts have wide discretion to entertain amendments before, during and after trial, and this court has regarded amendments offered in conjunction with or in response to motions for summary judgment with leniency. We are not persuaded.

The cases to which the plaintiffs cite are inapposite because they focus on the timing of a properly filed request to amend; see, e.g., *Wagner* v. *Clark Equipment Co.*, 259 Conn. 114, 128–30, 788 A.2d 83 (2002); *Daily* v. *New Britain Machine Co.*, 200 Conn. 562, 572–73, 512 A.2d 893 (1986); *Saphir* v. *Neustadt*, 177 Conn. 191, 206, 413 A.2d 843 (1979); *Wright* v. *Coe & Anderson, Inc.*, 156 Conn. 145, 155–56, 239 A.2d 493 (1968); *Smith* v. *New Haven*, 144 Conn. 126, 132, 127 A.2d 829 (1956); *Cook* v. *Lawlor*, 139 Conn. 68, 71–72, 90 A.2d 164 (1952); *McNeil* v. *Riccio*, 45 Conn. App. 466, 474, 696 A.2d 1050 (1997); *Moore* v. *Sergi*, 38 Conn. App. 829, 836–38, 664 A.2d 795 (1995); *Shuster* v. *Buckley*, 5 Conn. App. 473, 479, 500 A.2d 240 (1985); whereas the issue in the present case involves the plaintiffs' complete failure to file such a request. Furthermore, the plaintiffs cite no case in which the court considered whether a party's reference to the possible future filing of a request to amend could be construed as a request under the applicable rules of practice. The cases cited by the plaintiffs thus have no precedential value in the present context because they are factually distinguishable.[12]

The plaintiffs further contend that the trial court should have considered the purported amendment because the amendment they proposed merely would have added more specific language to the existing allegations, the parties had time to undertake any further preparations for trial that might have been necessitated by an amendment, the amendment was vital to the plaintiffs' case and the harm suffered by the plaintiffs as a result of the trial court's failure to consider an amendment outweighs any possible prejudice to the defendant. These arguments are without merit. In light of our conclusion that the plaintiffs failed to file a request to amend, this court need not respond to substantive arguments pertaining to a matter not properly before it.

In *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986), we determined that when the trial court is properly called upon to exercise its discretion, its failure to do so is error. In the present case, we conclude that the plaintiffs did not seek a discretionary ruling by the trial court because not only was there no complaint left to amend, but the plaintiffs made no request to amend that required a discretionary ruling. ''Our rules of procedure do not allow a [party] to pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him. . . . To rule otherwise would permit trial by ambuscade.'' (Internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 246, 864 A.2d 666 (2004). Accordingly, we need not address the plaintiffs' remaining claim that the Appellate Court improperly concluded that the trial court did not abuse its discretion in declining to consider an amendment to their complaint.

The judgment of the Appellate Court is affirmed.

In this opinion NORCOTT, PALMER and VERTEFEUILLE, Js., concurred.

[1] We granted the plaintiffs' petition for certification to appeal limited to the following issue: "Did the Appellate Court properly conclude that the trial court did not abuse its discretion in not permitting the plaintiffs to amend their complaint?" *Pekera* v. *Purpora*, 267 Conn. 919, 841 A.2d 1191 (2004).

[2] The plaintiffs in this action are Daniel R. Pekera, administrator of the estate of the decedent, Charlene Walker, and Earl Walker, the decedent's husband.

[3] The plaintiffs initially named as defendants David Purpora, the Clinical Center for Neoplastic Diseases, P.C., David Moll, Valley Medical Associates, P.C., Allan Rodrigues, Howard Quentzel, Jeanne Kuslis and Griffin Hospital. The plaintiffs subsequently withdrew their complaint against Moll, Valley Medical Associates, P.C., Quentzel, Kuslis and Griffin Hospital. Purpora and the Clinical Center for Neoplastic Diseases, P.C., are not parties to this appeal. In the interest of simplicity, we refer to Rodrigues as the defendant throughout this opinion. We refer to all of the defendants collectively as the defendants.

[4] Throughout the rendition of the facts, we refer to the decedent as the patient.

[5] Each plaintiff filed one count against each of the eight defendants. Earl Walker, the decedent's husband, sought recovery for loss of consortium.

[6] "Count ten was a claim for loss of consortium by Earl Walker [the decedent's husband]. It relied on the same allegations of misconduct that were pleaded in count nine." *Pekera* v. *Purpora*, supra, 80 Conn. App. 688 n.5.

[7] In their brief, the plaintiffs claim that the Appellate Court erred in (1) "finding that the plaintiffs had not properly raised the issue of their proposed amendment," and (2) "holding that the trial court properly exercised its discretion in refusing to rule on the plaintiffs' proposed amendment." For purposes of our analysis, we consider these claims as one because the trial court's decision that it could not consider an amendment following its ruling on the defendant's summary judgment motion was based on the plaintiffs' failure to file a request to amend their complaint earlier in the proceedings.

[8] We note that, although the certified question requires us to determine whether the trial court abused its discretion in not permitting the plaintiffs to amend their complaint; see footnote 1 of this opinion; the relevant facts and circumstances require us to reframe the certified question as follows: Did the Appellate Court correctly conclude that the trial court properly declined to consider the plaintiffs' purported request to amend their complaint after the trial court had granted the defendant's motion for summary judgment?

[9] The dissent inexplicably devotes considerable attention to the legal principles governing the relation back doctrine and even states an opinion as to how the trial court should have ruled on an amendment to the plaintiffs' complaint. We deem this discussion both irrelevant and inappropriate because the issue has not been raised on appeal.

[10] We also note that the plaintiffs' complaint was not amended by order of the judicial authority or by written consent of the adverse party, the only other ways in which it could have been amended under Practice Book § 10-60.

[11] The dissent interprets our reference to the plaintiffs' failure to file a motion to open the judgment in order to amend the pleadings as an adverse inference. This is not the case. We merely observe that the plaintiffs did not pursue other available options to preserve their rights. Accordingly, it reasonably cannot be inferred that the trial court reached that question and decided it in a manner adverse to the plaintiffs' interests.

[12] We note that the dissent cites several of the same cases in support of its claim that our long-standing jurisprudence favors the filing of amendments before, during and after trial. E.g., *Wright* v. *Coe & Anderson, Inc.*, supra, 156 Conn. 155; see *Moore* v. *Sergi*, supra, 38 Conn. App. 835–36. As we have noted, however, the parties in those cases properly filed requests to amend. Consequently, those cases are inapposite.