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Guy Miner, Administrator of the Estate of Amber Miner v. Lindsay Tarkington, PA-C et al.

MMXCV136008903S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF MIDDLESEX AT MIDDLETOWN

2013 Conn. Super. LEXIS 1525

July 9, 2013, Decided
July 9, 2013, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] Julia L. Aurigemma, J.

OPINION BY: Julia L. Aurigemma

OPINION

MEMORANDUM OF DECISION ON MOTION TO DISMISS

The defendants, Lindsay Tarkington, PA-C and ProHealth Physicians, Inc. ("ProHealth"), have moved to dismiss the First and Third Counts of the complaint on the grounds that the plaintiff failed to attach an opinion letter pursuant to *Connecticut General Statutes §52-190a* that was authored by a certified physician's assistant ("PA-C").

Factual Background

The plaintiff has alleged that Ms. Tarkington is a licensed physician assistant who treated the plaintiff's decedent for three decades for a variety of conditions. The First Count alleges that Ms. Tarkington was negligent in her care of the decedent in that she prescribed certain medications on September 8, 2010, in response to the decedent's complaint of knee pain. It further alleges that as a result of Ms. Tarkington's negligent treatment, the decedent ingested a fatal overdose of medications. The Second Count alleges negligence by James Ouellette, M.D., a family practitioner. The Third Count alleges a cause of action against ProHealth for vicarious liability based on the conduct of Ms. Tarkington and Dr. Ouellette.

The plaintiff attached to the complaint [*2] a letter written by a board certified physician specializing in family medicine and dated December 3, 2012. The letter states an opinion that Ms. Tarkington was negligent in her care and treatment of the decedent and states a similar opinion with respect to the conduct of Dr. Ouellette. The plaintiff did not attach a letter authored by a licensed physician assistant.

The defendants argue that the plaintiff has failed to satisfy the presuit requirements of *Connecticut General Statutes §52-190a(a)* because he has not provided an opinion from a similar health care provider. Based on this omission, the defendants seek dismissal of the First

Count for lack of personal jurisdiction. They also seek dismissal of the Third Count in so far as it alleges a cause of action based on the alleged negligent conduct of Ms. Tarkington.

Discussion of the Law and Ruling

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Bacon Construction Co. v. Dept. of Public Works, 294 Conn. 695, 706, 987 A.2d 348 (2010)*. "A motion [*3] to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Wilcox v. Webster Ins., Inc., 294 Conn. 206, 213, 982 A.2d 1053 (2009)*. "The grounds which may be asserted in [a motion to dismiss] are: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; and (5) insufficiency of service of process." *Zizka v. Water Pollution Control Authority, 195 Conn. 682, 687, 490 A.2d 509 (1985)*, citing Practice Book §143, which is now *§10-31*. "The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." *Bennett v. New Milford Hospital, Inc., 300 Conn. 1, 11, 12 A.3d 865 (2011)*.

Connecticut General Statutes §52-190a(a) provides in relevant part:

> (a) No civil action . . . shall be filed to recover damages resulting from personal injury or wrongful death . . . in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances [*4] to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in *section 52-184c*, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion . . . The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate . . .

[Section] 52-190a requires the dismissal of medical malpractice complaint that are not supported by opinion letters authored by similar health care providers." *Bennett v. New Milford Hospital, Inc., 300 Conn. 1, 25, 12 A.3d 865 (2011)*. [*5] "The failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with *§52-190a*, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court." *Morgan v. Hartford Hospital, 301 Conn. 388, 401, 21 A.3d 451 (2011)*.

An opinion letter that is not authored by a similar health care provider does not comply with *§52-190a(a)*. In such cases, the court must dismiss the complaint pursuant to *§52-190a(c)*. *Bennett v. New Milford Hospital, Inc., supra, 300 Conn. 24-25*. *See also Lucisano v. Bisson, 132 Conn.App. 459, 469, 34 A.3d 983 (2011)*.

In order to qualify as a similar health care provider, the author of an opinion letter directed to a non-specialist must be (1) licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualification and (2) trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim. *Connecticut General Statutes §52-184c(b)*.

"Read [*6] in conjunction with one another, *§§52-190a* and *52-184c* provide a plain and unambiguous

definition of similar health care provider." (Internal quotation marks omitted.) *Lucisano v. Bisson, supra, 132 Conn.App. 465*. "*[Section] 52-190a* established objective criteria, not subject to the exercise of discretion, making the prelitigation requirements more definitive and uniform and, therefore, not as dependent on an attorney of self-represented party's subjective assessment of an expert's opinion and qualifications." (Internal quotation marks omitted.) *Bennett v. New Milford Hospital, Inc., supra, 300 Conn. at 21*.

The defendants argue that under *Bennett and Wilkins v. Connecticut Childbirth & Women's Center, 135 Conn.App. 679, 687-88, 42 A.3d 521 (2012)*, a medical malpractice claim against Ms. Tarkington must be supported by the opinion letter of another physician assistant who is trained and experienced in the same discipline or school of practice, specifically, another physician assistant licensed pursuant to *Connecticut General Statutes §20-12b*.[1] The only letter submitted by the plaintiff was written by a board certified physician without any training or education as a physician assistant. Therefore, [*7] the plaintiff has failed to support her claim against defendant Tarkington with an opinion letter of a similar health care provider, as defined by *Connecticut General Statutes §52-184c(b)* and the letter fails to comply with *§52-190a*.

> 1 *Section 20-12b* provides in relevant part, "The department may . . . issue a physician assistant license to an applicant who . . . (2) has graduated from an accredited physician assistant program . . ."

The plaintiff argues that the author of the opinion letter, a physician board certified in family medicine, and the defendant Tarkington, a certified physician's assistant, are trained and experienced in the same "discipline or school of practice," and, therefore, the letter complies with *§52-190a*. This argument was rejected by the court in *Wilkins*:

> The plaintiff contends that an opinion letter by an obstetrician is sufficient to meet the requirements of *§52-190a* because obstetricians and nurse midwives both provide obstetrical care to patients and the author of the opinion letter that she submitted has both taught and supervised certified nurse midwives and is familiar with the standard of care required of them. Additionally, the plaintiff argues that, because [*8] there is a statutory requirement that nurse midwives work in collaboration with obstetricians; see *General Statutes §§20-86a* and *20-86b*; [fn 8] an obstetrician is a similar health care provider who may author a prelitigation opinion letter in an action concerning purported negligence by nurse midwives. [fn 9.] The plaintiff's claim in this regard is controlled by *Bennett v. New Milford Hospital, Inc., supra, 300 Conn. 1*. In *Bennett*, our Supreme Court concluded that, "in cases of specialists, the author of an opinion letter pursuant to *§52-190a(a)* must be a similar health care provider as that term is defined by *§52-184c(c)*, regardless of his or her potential qualifications to testify at trial pursuant to *§52-184c(d)*." *Id., 21*. In other words, one's familiarity with or knowledge of the relevant standard of care, for purposes of authoring a prelitigation opinion letter, is not a proper consideration in determining the adequacy of that letter if the author does not meet the statutory definition of a "similar health care provider." Thus, pursuant to *Bennett*, the plain language of *§§52-190a(a)* and *52-184c(c)* dictates that a "similar health care provider" with respect to the plaintiff's [*9] health care providers would be one who is trained and experienced in nurse midwifery or nursing and is certified in nurse midwifery or nursing. The author of the opinion letter submitted by the plaintiff is neither.

Wilkins v. Connecticut Childbirth & Women's Center, 135 Conn.App. at 686-88.

The plaintiff attempts to distinguish *Wilkins* by arguing that the Appellate Court decided that case on the basis of *Connecticut General Statutes §52-184c(c)*, stating that an obstetrician and a nurse midwife are not of the same "specialty." However, to the extent *subsection (c)*, rather than *subsection (b)*, applies to this case, *Wilkins* is squarely on point.

The *Wilkins* Court's reference to *subsection (c)* in conjunction with the *Bennet* case, dictates that an author and defendant cannot practice within the same "specialty" as contemplated by *subsection (c)*, unless they first share the same "discipline or school of practice," as required by *subsection (b)*. When the statute is read as a whole, the scope of the term "specialty" incorporates the separate and distinct terms "discipline" and "school of practice" such that an author may not qualify as a similar health care provider unless he shares the same [*10] schooling and degree of knowledge as the defendant (i.e., medical degree, nursing degree or physician assistant certification), pursuant to *subsection (b)* of the statute. If the defendant is a "specialist," the author must also share the same board certification within the defendant's specialty.

The author of the opinion letter in this case is not a similar health care provider with respect to the defendant Tarkington under either *subsection (b)* or *(c)*. He has a degree from a medical school and board certification from the American Board of Family Medicine, but does not have a degree from an accredited physician assistant program, nor is he certified by the National Commission on Certification of Physician Assistants.

For the foregoing reasons, the Motion to Dismiss the First Count is granted.

The defendants also seek to dismiss the Third Count to the extent it alleges vicarious liability against ProHealth for the alleged negligence of Ms. Tarkington. The court in *Wilkins* held that failure to submit an opinion letter authored by a nurse midwife was grounds for dismissal not only as to the defendant nurse midwife, but also as to her employer. See also *Lucisano v. Bisson, supra, 132 Conn.App. 469* [*11] (affirming dismissal of dental malpractice claims and derivative vicarious liability claim).

Based on the foregoing, the Motion to Dismiss the Third Count is also granted and so much of that count as alleges vicarious liability based on the conduct of Ms. Tarkington is dismissed, while the balance of the Third Count remains.

By the Court,

Aurigemma, J.