

DOCKET NO.: CV-14-6023180S : SUPERIOR COURT
ROBIN SHERWOOD and
GREG HOELSCHER : J.D. OF STAMFORD
V. : AT STAMFORD
STAMFORD HEALTH SYSTEM, INC.
D/B/A STAMFORD HOSPITAL : December 1, 2014

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
STAMFORD HEALTH SYSTEM, INC.’S MOTION TO STRIKE**

Stamford Health System, Inc. (“Stamford Hospital”), by its counsel, Neubert, Pepe & Monteith, P.C., respectfully submits this Reply Memorandum of Law in Further Support of its Motion to Strike.

THE STANDARD AS IT APPLIES TO THIS COMPLAINT

A motion to strike "admits all facts well pleaded" and "[t]he allegations of the pleading involved are entitled to the same favorable construction a trier would be required to give in admitting evidence under them and if the facts provable under its allegations would support a defense or a cause of action, the motion to strike must fail." Mingachos v. CBS, Inc., 196 Conn. 91, 108-09 (1985) (all internals omitted). However, an allegation that a party is a product seller is not a fact; it is a legal assertion. See, e.g., Nazar v. Palli, 2013 Conn. Super. LEXIS 830, 10-11, 2013 WL 1867072 (Conn. Super. Ct. Apr. 15, 2013)(Striking CPLA claim and reasoning that “it is well-established that the question of whether the defendants are ‘product sellers’ is a question of law. The plaintiff makes a number of conclusory statements in her complaint, such as that the defendants ‘were engaged in the selling of products, including the running water and plumbing facilities provided to the tenant and his family, the plaintiff . . .’ The plaintiff states similar legal conclusions to support her claim that the defendants are ‘product manufacturers.’ These statements are not factual allegations, and the court is not required to admit such

conclusory statements as true.”). In other words, alleging a party is a product seller is not a well pleaded fact. By contrast, alleging that Stamford Hospital purchased vaginal mesh from AMS and Gynecare for use in surgery by Dr. Hines, who then implanted the same into Ms. Sherwood, would be well pleaded facts. They could lead the Court to determine on a motion to strike whether Stamford Hospital is a product seller or not.

Whether or not a defendant is a product seller is a question of law.¹ Id.; see also, Burkert v. Petrol Plus of Naugatuck, Inc., 216 Conn. 65, 72, 579 A.2d 26 (1990).² One must examine the underlying allegations. Thus the issue on this Motion to Strike is whether Stamford Hospital is a “product seller” under the Connecticut Product Liability Act (the “CPLA”) with respect to the vaginal mesh manufactured by Ethicon and AMS and implanted by Ms. Sherwood’s physician in Stamford Hospital’s operating room. As a matter of law, Stamford Hospital cannot be a product seller under the CPLA for medical devices implanted during surgery and therefore the Motion to Strike should be granted.

¹ In Farrell v. Johnson and Johnson, Stamford Hospital asked the Court to reconsider its decision denying summary judgment and argued that contrary to the Court’s decision, it is not possible for there to be an issue of fact whether Stamford Hospital is a product seller, especially given the facts of these cases. According to the Connecticut Supreme Court, whether a defendant is a product seller under the CPLA must be decided as a matter of law, not fact. This precludes the Court’s holding in Farrell that there is some unidentified issue of fact which prevents the Court from reaching a conclusion. Whether a defendant is a product seller is an issue of law that must be decided by the Court and which cannot be left for a jury to decide. Counsel is therefore hopeful that the Court will reconsider its decision for this reason, and the other reasons articulated in the Motion for Reconsideration, and dismiss the Complaint in Farrell against Stamford Hospital. Regardless, the tri-fold, which is not reported by Lexis, should not have any precedential effect.

² See also, South United Methodist Church v. Joseph Gnazzo Co., 2011 Conn. Super. LEXIS 3228, 4 (Conn. Super. Ct. Dec. 23, 2011)(“Whether a party is a product seller under the PLA is a question of law.”); Lewis v. Huntleigh Healthcare, LLC, 2011 Conn. Super. LEXIS 1667, 10, 2011 WL 3276712 (Conn. Super. Ct. July 1, 2011); Klein v. Phelps, 2007 Conn. Super. LEXIS 2205, 6 (Conn. Super. Ct. July 19, 2007); Estate of Maroni v. Bobcat of Connecticut, Inc., 2007 Conn. Super. LEXIS 408, 6 (Conn. Super. Ct. Feb. 7, 2007); Leahey v. Lawrence D. Coon & Sons, Inc., 2006 Conn. Super. LEXIS 2157, 7, 2006 WL 2130438 (Conn. Super. Ct. July 14, 2006); Plas-Pak Indus. v. Prime Elec., LLC, 2006 Conn. Super. LEXIS 1851, 14 (Conn. Super. Ct. June 19, 2006); Caruso v. Kovatch Corp., 2005 Conn. Super. LEXIS 2890, 10, 2005 WL 3112749 (Conn. Super. Ct. Oct. 31, 2005).

ARGUMENT

I. Under Connecticut Law, A Hospital Is Not A Product Seller of Medical Devices Used in Surgery

In its initial brief, Stamford Hospital cited and discussed Connecticut Appellate and Superior Court precedent which stand for the principle that a hospital is not a product seller with respect to medical devices implanted during surgery. Plaintiffs ignored these cases and did not even attempt to distinguish them. Because plaintiffs do not challenge these cases there cases, counsel will not again recite their “uniform” holdings in this Reply Brief.

Relying on the body of Appellate and Superior Court precedent, treatises which analyze Connecticut product liability law have all concluded, without caveat, that in Connecticut “a hospital cannot be held strictly liable for providing a drug or medical device in conjunction with a medical procedure.” 1-8 Products Liability Practice Guide § 8.05, fn 38. See also, 1 Tort Remedies in Connecticut § 17-6, fn 66.2.1. In other words, Connecticut precedent is overwhelming and the treatises memorialize that fact.³

³In response, plaintiffs cite two unpublished Superior Court cases. Plaintiffs cite Charette v. McGhan Med. Corp., 1999 Conn. Super. LEXIS 784, at *2-*3 (March 23, 1999) and argues that the court denied a hospital’s summary judgment motion because there was an issue of fact whether the hospital was a product seller with respect to breast implants. P. 3, Plaintiff’s Memo. As defense counsel pointed out in the briefing in the Farrell litigation, the motion was denied because the court directed that this issue should be re-raised by filing a motion for summary judgment in Master File with assistance of Liaison Counsel. Id.; see also 5-65 Products Liability Practice Guide § 65.05, fn 62.1. The goal was “to avoid multiple rulings on issues common to many of the breast implant cases.” Id. The precedential value of this decision is therefore nothing. Plaintiffs also cite Basso v. Boston Sci. Corp., 2008 Conn. Super. LEXIS 3020, 1 (Conn. Super. Ct. Nov. 21, 2008). In that case Judge Hiller focused on the fact that Greenwich Hospital did not provide any precedent stating that “a hospital cannot be a ‘product seller’ as a matter of law.” Id. at 2. However, the body of cases both in Connecticut and nationally do not hold that a hospital could never be a product seller. That is a straw man argument and analysis. A hospital could sell a product in its gift show for example and be liable as a product seller. Instead, all of these cases show that hospitals provide a service and that medical devices implanted during surgery are incidental to that service. See Zbras v. St. Vincent’s Medical Center, 91 Conn. App. 289, 294 (2005)(“transaction in this case, a surgery, clearly was labeled a service rather than the sale of a product.”). For that reason, none of the cases support plaintiffs’ argument that Stamford Hospital could be liable under the CPLA for medical devices implanted during surgery.

II. Nationally, A Hospital Is Not A Product Seller of Medical Devices Used in Surgery

Plaintiffs' claim is not viable in Connecticut or nearly anywhere else in the United States. According to the Restatement 3d of Torts, **“in a strong majority of jurisdictions, hospitals are held not be sellers of products they supply in connection with the provision of medical care, regardless of the circumstances.”** (Emphasis added) Restatement 3d of Torts: Products Liability, § 20 “Definition of ‘One Who Sells or Otherwise Distributes,’ Comment d. The Restatement surveys cases from throughout the United States on this issue and finds the result to be nearly uniform – “hospitals are held not be sellers of products they supply in connection with the provision of medical care.” Id. As discussed previously, national products liability treatises agree with the Restatement 3d. See 1-8 Products Liability Practice Guide § 8.05 (“The overwhelming majority of jurisdictions . . . hold that a hospital cannot be held strictly liable for providing a drug or medical device in conjunction with a medical procedure.”); see also, In re Breast Implant Prod. Liab., 331 S.C. 540, 549-550, 503 S.E.2d 445, 450, 1998 S.C. LEXIS 62, 15, 38 U.C.C. Rep. Serv. 2d (Callaghan) 49 (S.C. 1998) (“A significant number of other jurisdictions have also reached the conclusion that strict liability should not be imposed upon health care providers.”). That is also why appellate courts uniformly affirm trial court decisions dismissing product liability claims against hospitals for devices implanted during surgery. Royer v. Catholic Med. Ctr., 144 N.H. 330, 335, 741 A.2d 74, 78, 1999 N.H. LEXIS 118, 13, CCH Prod. Liab. Rep. P15,700 (N.H. 1999)(“Accordingly, the trial court did not err in granting the defendant [hospital]'s motion to dismiss” the product liability claim against Catholic Medical Center for the prosthetic knee implanted during surgery); Zbras v. St. Vincent’s Medical Center, 91 Conn. App. at 294.

Unless plaintiffs are right and nearly every court, appellate and trial, and every treatise and Restatement are incorrect, or the Court is willing to depart from the law of the fifty states, including Connecticut, this Motion to Strike should be granted.

III. The Cases And Arguments Offered By Plaintiffs Are Incorrect

There is no basis for plaintiffs' arguments. As demonstrated by the treatises and the Restatement quoted and discussed above, plaintiffs do not have a viable claim anywhere in the United States, save one or two jurisdictions. The other arguments offered by plaintiffs similarly lack a basis in law.

A. Plaintiffs Fail to Accurately Represent The Law

The claims made by plaintiffs in their brief about the state of the law of the fifty states are not accurate. Plaintiffs first cite Kasel v. Remington Arms Inc., 24 Cal. Ct. App. 711, 726 (1972) a California Appellate court case from 1972, referencing the court's description of a seller in a products liability claim. Kasel, however, does not involve a medical provider or a hospital in a product liability case. Like nearly every other state, California has held on several occasions that a hospital is not in the business of selling the products and equipment it uses in providing medical services and it therefore cannot be held strictly liable for defective products during such services. See Hector v. Cedars-Sinai Med. Ctr., 180 Cal. App. 3d 493, 507-08 (1986) (hospital not strictly liable for defective pacemaker implanted during surgery); Silverhart v. Mount Zion Hosp., 20 Cal. App. 35 1022, 1027-28 (1971) (hospital not strictly liable for a needle that broke during a surgery).

Plaintiffs also cite cases from Texas, Alabama, Ohio, and New Mexico. All of these cases, however, are distinguishable from this case. Plaintiffs cite Providence Hosp. v. Truly, 611 S.W. 2d 127, 131 (Tex. Civ. App. 1980) a Texas case, which held that the hospital was a seller of

a medication used during treatment under the provision of the Texas Business and Commerce Code. This case, however, does not deal with a “seller” in a products liability claim, which is the issue in this case. Texas, like nearly every other state, does not hold hospitals strictly liable for medical devices implanted during surgery. Easterly v. HSP of Texas, Inc., 772 S.W.2d 211, 214, 1989 Tex. App. LEXIS 1840, 6, CCH Prod. Liab. Rep. P12, 239, 9 U.C.C. Rep. Serv. 2d (Callaghan) 530 (Tex. App. Dallas 1989) (“Texas follows the majority rule that the essence of the hospital stay is the furnishing of the institution's healing services. These services necessarily require certain goods or products, and these goods are usually incidental to the primary purpose of the hospital's function which is to heal.”).

Similarly, Plaintiffs cite Skelton v. Druid City Hosp. Board, 459 S. 2d 818, 821 (Ala. 1984) an Alabama case, where the court held that the use of a needle in surgery was not a sale under Alabama’s U.C.C., but rather “more akin to a lease or rental than a sale.” As in Providence Hosp., this case deals with a sale under the state’s U.C.C. provisions, rather than a products liability claim.

Plaintiffs also cite a case from Ohio, Saylor v. Providence Hosp., 113 Ohio App. 3d 1, 3 (1996) where a plate and screw were implanted during surgery and broke in the patient’s back. In Saylor, the court found that the plaintiff “failed to state a products liability claim for misrepresentation or for any other theory of strict liability.” Id. at 6. The only claim that survived the motion for summary judgment was a claim for supplier liability under the statute that defines supplier, which is much broader than the definition of seller in Connecticut’s product liability statute. Id. at 5.

Lastly, while plaintiffs cite Perfetti v. McGhan Med., 662 P.2d. 646, 654 (N.M. App. 1983) a 1983 New Mexico case, plaintiffs ignore a 1996 New Mexico Court of Appeals case,

Parker v. St. Vincent Hosp., 122 N.M. 39, 45 (1996) where the court held that the “policies favoring strict products liability in the context of potential hospital liability for defectively designed medical products selected by treating physicians” is inappropriate. The court recognized that the weight of authority from other jurisdictions is that a hospital is not a distributor for medical suppliers even though the hospital might have billed separately and charged the patient for the supplies. Id. at 41. The court did not adopt that rationale, but instead analyzed the underlying public policy reasons for strict liability and determined that a hospital is not strictly liable for supplying a defectively designed product (joint implant) used during surgery. Id. at 45-46.

B. The Other Arguments Offered By Plaintiffs Lack A Legal Basis

Plaintiffs make a series of arguments, without citation, that lack a legal basis and therefore should not be considered. For example, plaintiffs seek to apply definitions in the Code of Federal Regulations promulgated for other purposes by the Food and Drug Administration (the “FDA”) to CPLA claims. See pp. 3-4, Plaintiffs’ Brief. Since the Connecticut legislature enacted its own definitions, and its courts (and the courts of the fifty states) have interpreted those definitions and not the FDA’s definitions, the entire argument is specious. Plaintiffs are asking this Court to legislate, change the statute, and reverse all Connecticut and national precedent on this issue.

Plaintiffs argue that Stamford hospital is “deemed [a] mandatory reporter[] of adverse events by the FDA” and “[t]he Hospital’s willful and egregious failure to report adverse events, including Ms. Sherwood’s . . . contributed to the delay in FDA action. First, these statements have nothing to do with a CPLA claim so they are irrelevant. Secondly, according to the Complaint, Ms. Sherwood’s surgery took place in 2006. The Complaint was served more than

eight years later. Based on these facts, even presuming that Ms. Sherwood's alleged injury is causally related to a medical device implanted more than eight years ago, her counsel has not explained how Stamford Hospital would know that or why the pain Ms. Sherwood is allegedly experiencing in 2014 is an FDA reportable event for a 2006 surgery under the FDA regulations. The entire argument simply makes no sense whatsoever.

CONCLUSION

For the foregoing reasons, the Motion to Strike should be granted.

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CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was emailed and sent by mail, postage prepaid, by U.S. Mail, this 1st day of December, 2014, to the following counsel of record:

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