

DOCKET NO.: CV-14-6025333-S : SUPERIOR COURT/CLD
ROBIN SHERWOOD and :
GREG HOELSCHER : J.D. OF WATERBURY
V. : AT WATERBURY
STAMFORD HEALTH SYSTEM, INC.
D/B/A STAMFORD HOSPITAL : DECEMBER 19, 2014

STAMFORD HOSPITAL'S MOTION FOR REARGUMENT

Stamford Hospital, by its counsel, Neubert, Pepe & Monteith, P.C., respectfully moves to reargue the Court's December 2, 2014 Order (the "Order") denying Stamford Hospital's Motion to Strike. A Memorandum of Law in Support of this motion, is attached hereto.

**DEFENDANT,
STAMFORD HEALTH SYSTEM, INC.,
D/B/A STAMFORD HOSPITAL**

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CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed, postage prepaid, by
U.S. Mail, this 19th day of December, 2014, to the following counsel of record:

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MEMORANDUM OF LAW IN SUPPORT OF
STAMFORD HOSPITAL'S MOTION FOR REARGUMENT

Pursuant to Practice Book § 11-12, Stamford Hospital, by its counsel, Neubert, Pepe & Monteith, P.C. respectfully submits this Memorandum of Law in further support of its Motion to Re-Argue¹ the Court's December 2, 2014 Order (the "Order") denying Stamford Hospital's Motion to Strike.

PRELIMINARY STATEMENT

At the oral argument on Stamford Hospital's Motion to Strike, the Court determined that the Supreme Court's decision in Zbras v. St. Vincent's Medical Center, 91 Conn. App. 289 (2005) was not controlling. Specifically, the Court asked Stamford Hospital's counsel to point to specific language whereby the Supreme or Appellate Courts made clear that a hospital is not a product seller for medical devices implanted during surgery. The Court mistakenly concluded that such precedent does not exist.

As Stamford Hospital argued, forty-nine states (Louisiana is the exception) follow the Restatement's admonition that hospitals (medical professionals) are service providers and not

¹ The standard for this type of motion is well known. "The purpose of a reargument is . . . to demonstrate to the court that there is some decision or principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts" (Internal quotation marks omitted.) Jaser v. Jaser, 37 Conn. App. 194, 202 (1995). It may also be used "to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court." K.A. Thompson Electric Co. v. Wesco, Inc., 24 Conn. App. 758, 760 (1991).

product sellers for devices implanted during surgery. This analysis is memorialized in the dozen Superior Court cases, national and Connecticut treatises cited and quoted by Stamford Hospital in its Motion to Strike. More importantly, the Connecticut Supreme Court has explicitly stated that it follows the Restatement of Torts with respect to product liability and specifically the section defining product sellers. The holding in these cases is consistent with other cases which require the Court to determine, as a matter of law, whether the defendant is a product seller by examining whether plaintiffs have alleged facts which claim that the defendant is primarily selling products or providing a service.

Because the Court overlooked these controlling Supreme Court cases, it should grant reargument.

ARGUMENT

I. The Supreme Court Follows the Restatement's Analysis that A Hospital Is Not a Product Seller for Medical Devices Implanted During Surgery

The Connecticut Supreme Court follows the principles described in the Restatement of Torts which explain when a party is a product seller. See Vitanza v. Upjohn Co., 257 Conn. 365, 373, 376 (2001) (Following the Restatement (Second) of Torts on Product Liability). See also Giglio v. Connecticut Light & Power Co., 230, 233 (1980) (The court “accepted the principles adopted by the American Law Institute as contained in § 402A of the Restatement (Second) of Torts, establishing the strict liability in torts.”)²

As Stamford Hospital argued in its Motion to Strike, the American Law Institute concluded in the Restatement of Torts that hospitals are not product sellers for devices

² Connecticut courts have also accepted principles set forth in Restatement of Torts in areas other than products liability. See Orsini v. Zimmer, No. CV075013711S, LEXIS 3442, at *8-9 (Conn. Sup. Ct. Dec. 24, 2009) (“our state accepts the common law requirements [of defamation] and generally adopts the Restatement (2d) of Torts position on this tort.”)

implanted during surgery. The Restatement provides: “in a strong majority of jurisdictions, hospitals are held not to be sellers of products they supply in connection with the provision of medical care, regardless of the circumstances.” Restatement (Third) of Torts: Products Liability, § 20 “Definition of ‘One Who Sells or Otherwise Distributes,’ Comment d.³ The treatises and the Restatement, including prior versions, cite and discuss the cases from around the country for the past several decades which conclude that medical providers provide a service and are not product sellers. A number of these cases were cited in Stamford Hospital’s papers submitted in support of its Motion to Strike.

The Court was looking for controlling Connecticut appellate precedent. When one examines these cases adopting the Restatement analysis, and reads them in conjunction with Zbras and Zichichi v. Middlesex Memorial Hospital, 204 Conn. 399, 410, 528 A.2d 805 (Conn. 1987), the dozens of superior court cases, the national and Connecticut treatises, and the cases from Supreme Courts around the country, the force and clarity of these holdings are controlling on this Court. There is no controlling precedent and no reason to keep Stamford Hospital in this case.

II. The Appellate Court has Supplied Other Controlling Precedent Which Demonstrates that Stamford Hospital Is Not A Product Seller as a Matter of Law

In its decision, the Court mistakenly failed to apply applicable appellate precedent which requires the Court to determine, as a matter of law, whether Stamford Hospital was primarily supplying a service or a product. As discussed in Stamford Hospital’s underlying papers, this

³ The Restatement surveys cases from throughout the United States on this issue and finds the result to be nearly uniform – “hospitals are held not to be sellers of products they supply in connection with the provision of medical care.” Restatement (Third) of Torts: Products Liability, § 20 “Definition of ‘One Who Sells or Otherwise Distributes,’ Comment d.

issue must be determined as a matter of law by the Court. In Truglio v. Hayes Constr. Co., the court granted the defendant construction company's motion for summary judgment as the court decided, as a matter of law, that the defendant was primarily providing a service, constructing a sidewalk, rather than selling a product. Truglio v. Hayes Constr. Co., 66 Conn. App. 681,692 (2001). See also Leahey v. Lawrence D. Coon & Sons, Inc., No. CV044002738, LEXIS 2157, at *15 (Conn. Sup. Ct. July 14, 2006) (“[T]he court concludes as a matter of law that the contract between Leahey and Coon was for the service of constructing a tobacco shed . . . it was not a contract for the sale of goods . . . and the defendant is not a product seller as defined in the statute.”).⁴

While Truglio does not stand for the proposition that a hospital is a service provider when it provides medical care which includes a device implanted during surgery, it does stand for the proposition that the Court must make that determination. In Truglio, where the plaintiff claimed that a sidewalk was a product under the Connecticut Product Liability Act, the Court analyzed the meaning of the term “product seller” and found that: “[t]he essence of the relationship between the defendant and the buyer was the furnishing of a service, not the sale of a product, because the sidewalk was composed of concrete that was transported in liquid form to the site and then used by the defendant to pour the sidewalk.” Id. Here, the Complaint alleges that Ms. Sherwood came to Stamford Hospital and a medical provider “implanted” “Pelvic Mesh Products” during surgery. ¶47, Complaint. The balance of the Complaint alleges that the product is defective and how it is defective. It was the act of the surgery which is at issue here.

⁴ Judge Landau's concurring opinion in Truglio further supports the proposition that the determination of whether a party is a product seller is a matter of law issue. Judge Landau stated that the court properly decided “as a matter of law” that the sidewalk was not a product under the product liability act because “the defendant would have been entitled to a directed verdict as a matter of law.” 66 Conn. App. at 695.

Stamford Hospital is a place where surgery occurs. There is no allegation that it has a storefront in the hospital selling medical devices such as vaginal mesh for people to buy and use. Under the Truglio test, Stamford Hospital is primarily a service provider not a product seller. The precedent previously cited in Stamford Hospital's Motion to Strike papers is in uniform agreement.

CONCLUSION

For the foregoing reasons, Stamford Hospital respectfully requests that the Court reconsider its Order and grant its Motion to Strike.

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