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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWELVE

JILL R. HAMILTON and JEFFREY D. HAMILTON as the Natural Parents and Next Friends of [redacted] a Minor, Plaintiffs, v. STORMONT-VAIL HEALTHCARE, INC., a Kansas Corporation, d/b/a, STORMONT-VAIL REGIONAL MEDICAL CENTER, JOHN H. BERNARD, M.D. and JOSE L. GIERBOLIN, M.D., Defendants.	)	Case No. 08 C 206

MEMORANDUM DECISION AND ORDER

This action is before the Court on the Motion to Strike Comparative Fault Designations, which was filed by the Plaintiffs on July 22, 2009. Defendant Gierbolini filed a response on July 31, 2009, and both Defendant Stormont-Vail and Defendant Bernard filed responses on August 4, 2009. The Plaintiffs filed a reply on August 24, 2009. Furthermore, the parties represented to the Court at the Pretrial Conference that the issue presented had been fully briefed and that no oral argument was required. Thus, the Court deems the Motion to Strike Comparative Fault Designations to be submitted for ruling.

NATURE OF ACTION

This is a medical malpractice action brought by Jill and Jeff Hamilton, as natural parents and next friends of their mino[redacted]. The Defendants are Stormont-Vail Regional Healthcare Inc., John H. Bernard, M.D., and Jose I. Gierbolini, M.D. During 2005, while pregnant [redacted] Jill Hamilton was the patient of Dr. John Bernard. On July 5, 2005, Dr. Bernard , who is a family practitioner, admitted Ms. Hamilton to Stormont-Vail Regional Medical Center. At Stormont-Vail, he continued to serve as Jill Hamilton's physician. In addition, Ms. Hamilton received nursing care from several labor and delivery nurses employed by the hospital.

On July 6, 2005, Dr. John Bernard delivered [redacted] using a vacuum extractor and forceps. As a family practitioner, Dr. Bernard did not have privileges to perform cesarian sections, and he did not believe it was necessary to call in an obstetrician to perform to deliver the baby by cesarian section. Unfortunately, as a result of various conditions noted in the medical records, [redacted] was taken to the Neonatal Intensive Care Unit (NICU) shortly after delivery. In the NICU, the infant was cared for by Dr. Jose Gierbolini, who is a neonatologist, and he received nursing care from several neonatal nurses.

In this action, the Plaintiffs contend that Dr. John Bernard, Dr. Jose Gierbolini, and several members of the nursing staff at Stormont-Vail were negligent in the care and treatment they provided to Jill and [redacted]. Moreover, they contend that the Defendants caused or contributed to permanent neurologic injury to the infant's brain, which has resulted in hypoxic-ischemic encephalopathy and cerebral palsy.

The Plaintiffs further contend that [redacted] will require 24-hour skilled care for the remainder of [redacted] life. As a result, the Plaintiffs are seeking to recover $14,737,780.96 in damages from the Defendants.

FACTUAL CONTENTIONS AND LEGAL THEORIES

In the factual contentions and legal theories section of the Plaintiffs' Pretrial Questionnaire, twelve (12) deviations from the appropriate standard of care are asserted against Dr. John Bernard and seven (7) deviations from the appropriate standard of care are asserted against Dr. Jose Gierbolini. Moreover, the Plaintiffs contend that Stormont-Vail is responsible for numerous negligent acts or omissions asserted against its nursing staff, and they assert two (2) additional allegations of negligence against the corporation. Furthermore, at the Pretrial Conference, counsel for the Plaintiffs represented to the Court that his clients are asserting "concurrent" acts of negligence on the part of the Defendants and that they are not seeking to recover damages under a "loss of chance" theory.

In the factual contentions and legal theories set forth in the Pretrial Questionnaires submitted by the Defendants, each and every allegation of fault asserted against them by the Plaintiffs is denied. The Defendants specifically deny that they were negligent or that they caused the injuries suffered by [redacted]. Each Defendant also seeks to reserve the right to compare the fault of any co-defendant that settles with the Plaintiffs or is dismissed as a party following the entry of the Pretrial Order. Furthermore, the Defendants assert that if they seek to compare the fault of any of the healthcare providers currently named as parties at trial, they would adopt the opinions expressed by the Plaintiffs' expert witnesses.

LEGAL ANALYSIS AND CONCLUSIONS

The Plaintiffs argue that the Defendants should not be allowed "to switch positions if an empty chair becomes available to blame" at trial. They further argue that "the rules require the defendants to state whether or not they contend that another defendant is at fault . . . ." In response, the Defendants argue that "it is entirely permissible" to reserve the right to allege "that they will affirmatively assert fault under some circumstances but will not affirmatively assert fault under others." Moreover, the Defendants argue that it would be "unfair" for the Plaintiffs to gain a "tactical advantage of being able to decide whether to settle out or dismiss one or more of the defendants prior to trial, and also hold the consequent advantage of being able to remove certain evidence and testimony altogether from the jury's consideration."

The issue presented in the Plaintiffs' Motion to Strike Comparative Fault Designations is neither new nor unique to this case. Similar arguments have been raised by zealous advocates since the enactment of K.S.A. 60-258a by the Kansas Legislature in 1974. In fact, this Court has addressed the issue presented on several occasions. In doing so, the Court has always found the Commentary to K.S.A. 60-258a, 4 Gard and Casad, *Kansas Code of Civil Procedure Annotated*, Vol. 4, pp. 347-52. (4th Ed. 2003), to be quite helpful.

"It is now clear that, by court construction, it is ***the combined causal negligence of all persons as to whom negligence may be attributed*** that provides the proper basis for allegations of degrees of fault by the trier of fact, even though some defendants (or potential defendants) may be immune from liability or have settled with the plaintiff." (Emphasis

added.) *Id.* at p. 348. "The intent of the legislature in adopting [K.S.A. 60-258a] was to impose liability for damages for negligence . . . ***based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages*** even though one or more parties cannot be . . . held legally responsible for his or her proportionate fault." (Emphasis added.) *Id.* at pp. 349-50. Specifically, the Kansas Supreme Court has held that "[t]he intent and purpose of [K.S.A. 60-258a] was 'to impose individual liability for damages ***based on the proportionate fault of all parties to the occurrence.***'" (Emphasis added.) *Dodge City Implement, Inc. v. Board of County Commissioners,* 288 Kan. 619, 625, 205 P.3d 1265 (2009), quoting *Brown v. Keill,* 224 Kan. 195, 207, 580 P.2d 867 (1978).

K.S.A. 60-258a "requires the weighing of causal negligence; if any, ***of all parties whose conduct brought about the harm*** and the consequent imposition of individual liability for damages ***based upon the proportionate fault of each party to the occurrence.***" (Emphasis added.) *Haley v. Brown,* 36 Kan. App. 2d 432, Syl. 1, 140 P.3d 1051 (2006). Even when a person or entity has immunity, "such party's fault should be considered to determine the other defendants' percentage of fault and liability." *Negley v. Massey Ferguson, Inc.,* 229 Kan. 465, 472, 625 P.2d 472 (1981), citing *Brown v. Keill,* 224 Kan. at 206. It has been held that "[t]he concept of immunity does not mean there is no duty; only that there is a prohibition against the recovery of damages if a duty is breached." *Fitzpatrick v. Allan,* 24 Kan. App. 2d 896, 905, 955 P.2d 141 (1998).

Similarly, if the Plaintiffs in this action should make the decision to settle with or voluntarily dismiss one or more of the Defendants, it would not mean that the former

Defendant no longer had a duty to provide appropriate care and treatment to [redacted] in [redacted]. Likewise, it would not mean that the former Defendant was not at fault. In fact, it is certainly possible that the Plaintiffs could reach a settlement with the party to the occurrence who was primarily responsible for the injuries and damages suffered by [redacted] [redacted].

As the Kansas Supreme Court has held, "[t]he legislature intended to equate recovery and duty to pay to degree of fault . . . There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their share of the loss." *Brown v. Keill*, 224 Kan. at 203. A settlement or voluntary dismissal of one defendant in a case involving multiple defendants does not change the fact that a person or entity was one of the "parties to the occurrence which gave rise to the injuries and damages." Rather, it simply means that a plaintiff has made a strategic or tactical decision not to seek recovery of damages from that defendant at trial.

As indicated above, the Plaintiffs in this action are claiming "concurrent" acts of negligence on the part of multiple health care providers. Should a settlement be reached with, or a voluntary dismissal obtained by, one of the current Defendants after the Pretrial Conference, the Court would anticipate that the Plaintiffs would likely seek to "retreat" from the comprehensive allegations of fault set forth in their Pretrial Questionnaire against the former Defendant. Likewise, the Court would anticipate that one or more of the remaining Defendants would likely seek to "pick-up the flag" dropped by the Plaintiffs and carry it

forward so that "individual liability for damages" would continue to be "based on proportionate fault of all parties to the occurrence." Thus, under this scenario, ***both*** the Plaintiffs and the Defendants would be seeking "to switch positions" from those set forth in their Pretrial Questionnaires.

Should these events come to pass, the remaining Defendants would be required to assume the burden of proof against their former ally. Such a strategy has potential benefits and potential risks because the remaining Defendants would have to prove that the former Defendant deviated from the appropriate standard of care and that the deviation caused or contributed to the injuries and damages suffered by [redacted]. In doing so, the remaining Defendants would be limited to the expert witnesses, exhibits and allegations identified by the parties at or prior to the Pretrial Conference. Thus, the persons or entities whose fault may be compared at trial and the specific allegations against them are those set out in the Pretrial Order, and the parties can plan accordingly.

As stated during the Pretrial Conference, should one or more of the Defendants be granted summary judgment in this case, the Court would not allow the remaining Defendants to compare the fault of that person or entity at trial. Unlike a settlement or a voluntary dismissal, the granting of summary judgment means that the Court has found as a matter of law that there is not sufficient evidence of fault to present to the jury. Thus, if there is insufficient evidence for the Plaintiffs to reach the jury on their claims against a particular Defendant, the remaining Defendants would also be bound by the Court's decision because they have chosen to contingently adopt the Plaintiffs' allegations of fault.

CONCLUSION

For the reasons set forth above, the Court finds that the Defendants have adequately reserved the right to compare the fault of any other Defendant that may be voluntarily dismissed from this action by the Plaintiffs following the entry of the Pretrial Order. If the remaining Defendants wish to have the jury compare the fault of a former Defendant at trial, however, they will have the burden to come forward with sufficient evidence to establish within a reasonable degree of medical probability that the former Defendant deviated from the appropriate standard of care and that such deviation caused or contributed to the injuries and damages suffered by [redacted]. Furthermore, the remaining Defendants would be limited to the allegations of fault set forth in the Pretrial Order. Therefore, the Plaintiffs' Motion to Strike Comparative Fault Allegations is denied.

This Memorandum Decision and Order shall serve as the Order of the Court. No further Journal Entry is required.

IT IS SO ORDERED.

Entered on this 9th day of October, 2009.

David E. Bruns
District Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of October, 2009, she served a true and correct copy of the above and foregoing pleading by United States mail, first class postage prepaid.

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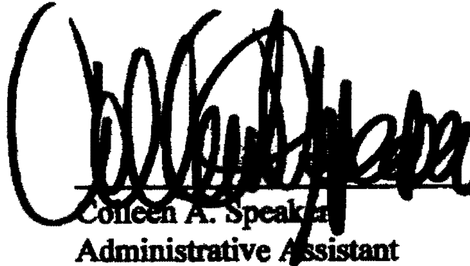

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