FBT-CV23-6124536-S CONNECTICUT SUPERIOR COURT

TERESA FAZZOLARI,
CONSERVATOR JUDICIAL DISTRICT OF BRIDGEPORT

VS. AT BRIDGEPORT

THE WESTCHESTER MEDICAL
GROUP, PC May 31, 2024

MEMORANDUM OF DECISION re MOTION TO DISMISS (#104.00)

Background

This is a medical malpractice action in which some (but not all) defendants have moved to dismiss the case -- specifically, defendants Westmed Medical Group, Anne Baggley, M.D., Samantha D'Annunzio, M.D., and Ross Mazo, M.D., As a medical malpractice action, the plaintiff[1] was required to submit an opinion from a similar health care provider (General Statutes § 52-190a) and defendant Baggley claims that the opinion letter submitted by the plaintiff, as an attachment to the complaint, is deficient as a matter of law. All of the moving defendants contend that a COVID-19-era Executive Order issued by the governor under his emergency powers, providing immunity to health care providers under certain conditions, applies to their situation such that they are immune from suit under the facts of this case.

The plaintiff, of course, disagrees with the analysis and claims provided by the defendants.

[1] The complaint names Teresa Fazzolari and Linda Fazzolari as plaintiffs, with Teresa Fazzolari identified as acting as a conservator for Linda Fazzolari. In effect, there is one plaintiff, Linda Fazzolari, acting personally and through a conservator. The court will therefore refer to the plaintiff in the singular.

Notice sent to
All counsel & RJD.
5/31/24 Asst. Clerk

The court is required to apply recent decisions of our Supreme Court to both challenges made by the defendants. In early 2023, the Court revisited and dramatically overhauled the proper application of § 52-190a as it relates to sufficiency of opinion letters, overruling precedents established over the course of the previous decade. Several months later – after the defendants had filed their motion to dismiss – the Court released two opinions addressing the proper manner of application of Executive Order 7V (a modification of Executive Order 7U) as it relates to immunity of health care providers during the state of emergency as had been declared for COVID.

The defendants rely on a summary of the allegations of the complaint, and the court will use an edited version of that recitation of allegations as a starting point, generally accepting her allegations as true:

On February 16, 2021, Plaintiff Linda Fazzolari fell and injured her head. On February 17, 2021, she sought medical care at an Urgent Care Center in Greenwich, Connecticut where she came under the care of Defendant Baggley. The plaintiff informed Defendant Baggley about her fall the previous day and claims that Defendant Baggley ignored her complaints, diagnosing her with gastroenteritis. On or about February 20, 2021, the plaintiff was taken by ambulance to Greenwich Hospital, where she was treated by Defendant Mazo and Defendant D'Annunzio, and reportedly presented with altered mental status and complaints of dizziness and nausea following her fall on February 16, 2021. At this time, a CT scan was taken of the plaintiff's head which revealed an intracranial hemorrhage.

During her resulting hospitalization, the plaintiff's intracranial hemorrhage worsened, she developed deep vein thrombosis, and she suffered a bilateral stroke resulting in aphasia, left hemiparesis, left foot drop, dysphagia, and an inability to walk

The Plaintiff alleges that on February 17, 2021, Defendant Baggley misdiagnosed her with gastroenteritis; failed to diagnose her with an intracranial hemorrhage; failed to pay proper attention to her complaints; failed to see that proper tests and studies were conducted; failed to formulate an appropriate treatment plan; failed to provide proper care; and caused and allowed untrained and inexperienced healthcare providers to provide care and treatment to her.

The Plaintiff further alleges that on February 20, 2021, Defendant Mazo and Defendant D'Annunzio failed to elicit a proper history; failed to pay proper attention to her complaints; failed to timely and properly assess her condition; failed to perform a proper examination; failed to confer with medical and surgical specialists; failed to see that proper tests and studies were conducted; failed to make a proper diagnosis; failed to formulate an appropriate and effective treatment plan; failed to provide proper care and treatment; improperly continued anticoagulation in the presence of an intracranial hemorrhage; failed to place an inferior vena cava (IVC) filter; and caused, permitted, and allowed untrained and inexperienced healthcare providers to provide care and treatment to her.

In the motion before the court, all of the moving defendants rely on the immunity provided by Governor Lamont's Executive Orders 7V and 7U. More narrowly and additionally, defendant Baggley seeks dismissal based on the claim that the plaintiff has failed to obtain and submit a written and signed opinion of a similar health care provider, as defined in General Statutes § 52-184c, as required by General Statutes § 52-190a.

Before addressing the application of controlling law to the situation presented by the allegations and posture of this case, the court will lay out some context. The motion to dismiss was filed on July 20, 2023. The Supreme Court issued its decisions relating to application of the Emergency Executive Orders a few weeks later; *Mills v.*

Hartford HealthCare Corp., 347 Conn. 524 (2023) and *Manginelli v. Regency House of Wallingford, Inc.*, 347 Conn. 581 (2023) – the decisions were published in the Connecticut Law Journal on August 15, 2023, but had been officially released on August 8, 2023.

The issue relating to sufficiency of the opinion letter is governed by a decision issued by the Connecticut Supreme Court months prior to the initial submission by the defendants – *Carpenter v. Daar*, 346 Conn. 80 (2023) had been released on February 1, 2023. Despite the release of the Supreme Court decision more than five months prior to their submission, the defendants appear to have relied upon the Appellate Court decision that had been released in 2020 (199 Conn. App. 367, 405, 236 A.3d 239 (2020)) – overruled by the Supreme Court decision – at least in the brief initially submitted in support of the motion to dismiss. (The Supreme Court recited the factual and procedural background relying upon the Appellate Court decision for that purpose, but the court rejected the analysis recited in the Appellate Court decision (which appears to have been a correct decision based on then-existing Supreme Court precedents).)

Moving towards the substantive issues, the immunity issue raised by the defendants appears to require primacy of attention. The immunity is identified as one from suit, which is claimed to be a form of subject matter jurisdiction under existing jurisprudence, and subject matter jurisdictional challenges generally require treatment before addressing any other matters being raised. ("[O]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented ... and the court must fully resolve it before proceeding further with the case." (Internal quotation marks and citation, omitted.) *Machado v. Taylor*, 326 Conn. 396, 402, 163 A.3d 558, 562 (2017).)

Further, there is a practical quality to addressing immunity first. If Dr. Baggley has immunity from suit, it is of no consequence whether an opinion letter directed to her treatment of the plaintiff meets the applicable statutory standard. It also would be of no consequence if the opinion letter were subject to possible amendment (discussed in *Carpenter*) because the action as directed to all of the moving defendants would no longer be before the court and subject to amendment.

I. Immunity

Manginelli and *Mills* were released less than a year ago, and weeks after the defendants filed their motion. Not surprisingly, given the time it takes for matters to be decided, appealed, and appellate decisions released, prior to those decisions there was no authoritative treatment of the manner in which Executive Order 7U as modified by 7V should be applied. In the decisions, the Supreme Court recognized the range of possible application (interpretations) that could be utilized, including the somewhat extreme (and therefore rejected) interpretation that the Orders effectively created an immunity for all medical treatment during the period that the emergency underpinnings for the Orders existed.

After discussing possible interpretations and application, the Supreme Court stated its conclusions in *Mills*, before applying its holding to the case at hand:

> "We therefore conclude, subject to the caveat that we articulate in part I C of this opinion, that § 6 of Executive Order No. 7V confers immunity from suit and liability only for acts and omissions that are undertaken in good faith and in connection with the provision of such services. Health care services in support of the state's COVID-19 response necessarily would include those undertaken for the prevention, diagnosis, or treatment of COVID-19. The language of the immunity provision and

> the policies the immunity is expressly intended to advance require a defendant to demonstrate a nexus between the alleged negligence and the services rendered in support of the state's COVID-19 response. Mindful of these broad contours of the part of the immunity provision at issue, we now turn to the parties' arguments as to its application to the present circumstances." *Mills v. Hartford Healthcare Corp.*, 347 Conn. 524, 554-55, 298 A.3d 605 (2023)

Recognizing that the defendants' initial submission could not have taken advantage of the guidance of *Manginelli* and *Mills*, the argument in their supporting brief seems to have adopted the broadest application, the provision of medical services during the existence of an emergency warrants application of immunity. The only recognized exceptions to immunity from such a broad application, as set forth in that initial submission, would be for exceptions "such as, criminal conduct, willful misconduct, or gross negligence."

The reply was filed well after those decisions were released (and they already had been invoked by the plaintiff in opposition to the motion). Much of the argument of the defendants in the reply (in connection with the immunity issue) addresses procedural issues, including the extent to which supplementary information may be provided to the court by affidavit (with a resulting need, on occasion, for an evidentiary hearing). The substance of the argument appears to be set forth in two paragraphs (pages 8-9 of reply), after concluding a procedural discussion (including applicability of language from *Conboy v. State*, 292 Conn. 642 (2009)):

> "The facts in the present matter are distinguishable from Conboy in that the Plaintiffs' do not address the facts surrounding Defendant Baggley administering the COVID-19 test on February 17, 2021 for the purpose of diagnosing and/or preventing the spread of COVID-19 or the fact that Defendant Baggley never saw Plaintiff Linda following February 17, 2021, making it impossible for her to provide any follow up care after receipt of the negative COVID-19 test result on February 19, 2021.

> The evidence attached to this Reply sets forth facts not apparent on the record, as allowed under Connecticut Practice Book § 10-30(c), that Defendant Baggley administered a COVID-19 test based on the symptoms described by Plaintiff Linda; the test was administered for the purpose of diagnosing and/or preventing the spread of COVID-19; and that Plaintiff Linda never returned to Defendant Baggley for further medical care after her visit on February 17, 2021. Therefore Defendants' Motion to Dismiss must be granted."

The defendants do not address, at least explicitly, how the facts presented and the argument above are perceived to satisfy the requirement of demonstrating a causative link between COVID and the claimed malpractice. ("The language of the immunity provision and the policies the immunity is expressly intended to advance require a defendant to demonstrate a nexus between the alleged negligence and the services rendered in support of the state's COVID-19 response.")

Given that COVID symptoms generally are not specific to the virus, anyone with any symptom potentially related to COVID likely was being given a COVID test in the relevant timeframe, to rule out the possibility of that ailment, but the administration of a precautionary test, alone, would not be sufficient to implicate immunity under the Executive Order. To be sure, if there was a level of uncertainty as to the proper diagnosis, due to the possibility that COVID itself was the proper diagnosis, that might be a sufficient basis for application of immunity; part of the holding in *Mills* was that a level of uncertainty in the diagnosis that was attributable to the unknown COVID status of the patient properly brought into play the immunity intended by Executive Order 7V. ("The plaintiff has offered no evidence to call into dispute the defendants' affidavits attesting that the decedent's COVID-19 status was a material factor in their diagnosis of the decedent and their decisions on her treatment and care." *Mills v. Hartford Healthcare Corp.*, 347 Conn. 524, 556, 298 A.3d 605 (2023).) The defendants' reference to the fact that the plaintiff did not return to

Dr. Baggley after the negative COVID test result was known, seems to be an attempt to come within the scope of that distinction as articulated in *Mills*.

That analysis may be facially attractive, except for the fact that the plaintiff claims in her complaint that she had given a history of a fall the previous day, with a head injury, which was ignored.

> "26. While under the care of the defendants BAGGELEY and WESTMED the plaintiff LINDA FAZZOLARI told these defendants that she fell and injured her head.
>
> "27. The defendants BAGGELEY and WESTMED ignored her complaints and instead concluded that she suffered from gastroenteritis."

Both sides are in agreement that the plaintiff's visit on February 17 was related to symptoms that had their origin of February 16. The records submitted by the defendants, in support of this motion, do not mention any "incident" on the prior day but only the onset of certain symptoms the prior day. The plaintiff claims a report of a head injury; there is no mention of any such history in the record. While somewhat ambiguous with regard to the initial visit on February 17, the hospital admission 3 days later includes a report of dizziness arising from the head injury; the records from February 17 report, in an affirmative sense, a denial of any dizziness.

There are two flaws or omissions in the establishment of a nexus. There was a diagnosis of gastroenteritis, inferentially based on an assumption of a negative result for COVID. That was confirmed by the test result, such that any conditionality of the diagnosis of gastroenteritis was removed shortly after the diagnosis. That diagnosis, however, did not consider a head injury and there was no suggestion that the possibility of COVID might have been a factor. There was no nexus between COVID and the ordered test for COVID on the one hand, and the absence of any

consideration (much less testing or treatment for) a head injury and the consequences of a head injury. Rather, with or without COVID as a possibility, the thrust of the plaintiff's complaint is that the diagnosis, however tentative, did not recognize the significance of a fall with a head injury that occurred the prior day. Putting aside the relative routineness of a COVID test at the time, COVID had nothing to do with the claim that the defendants "ignored her complaints" relating to a head injury.

That partially segues to a second flaw in the analysis. The defendants note that under *Conboy*, there are three levels of analysis of a jurisdictional challenge: the record as established by the plaintiff's filings; the initial record as supplemented by undisputed factual assertions of the defendant; and evidentiary conflicts that require an evidentiary hearing to resolve the conflict. That last level, however, comes with a caveat. In connection with the observation that "if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits," *Conboy v. State*, 292 Conn. 642, 653, 974 A.2d 669 (2009), footnote 16 goes on to observe that "[w]hen the jurisdictional facts are intertwined with the merits of the case, the court may in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred." The possibility recognized in that footnote seems to be directly applicable here. (It may actually be more accurate to state that it would eliminate any jurisdictional issue.)[2]

[2] Somewhat coincidentally, this same point is made in *Carpenter v. Daar,* 346 Conn. 80, 97 n.12, 287 A.3d 1027 (2023), the focus of the second issue addressed in this decision.

If the plaintiff had complained about a fall and head injury the day before her visit, but those complaints and history had been ignored (to the extent of not even being mentioned in the records), then COVID would seem to have no nexus with that affirmative disregard for those complaints and relevant history. A perceived need to rule out a possibility of COVID would not seem to have any rational relationship to a failure to consider and address the consequences of an explicit history of a fall and head injury (assuming it had been given). If the plaintiff had not complained of a fall and head injury the day prior to her visit, then the failure to give any attention to complaints/history never provided probably could not have been negligence – but COVID would not have been relevant to the claimed ignoring of a history and complaints that were never actually given.

In sum, based on the record before the court (and especially the limited nature of the record that can exist short of an eventual trial on the merits relating to the history actually given by the plaintiff on February 17, 2021 concerning events of February 16, 2021), there is no demonstrated nexus between COVID and the negligence of Dr. Baggley as claimed by the plaintiff.

The motion to dismiss is denied, to the extent that it relies on the immunity conferred by Executive Order 7V.

II. Statutory compliance

Alternatively, the defendants assert the inadequacy of the opinion letter filed by the plaintiff in accordance with the requirements of General Statutes § 52-190a. The defendant contends that the opinion letter is not from a similar health care provider, as required by § 52-190a by way of reference to General Statutes § 52-184c.

This case was commenced several months after the Supreme Court issued its decision in – *Carpenter v. Daar*, 346 Conn. 80 (2023). As discussed in that decision, the effects of the controlling interpretations of the opinion letter requirement over the course of the prior decade had led the court to conclude that the then-existing interpretations needed to be revisited and overhauled. Of relevance to this case were two points that are or might be applicable. The court abandoned the strict limitations on the ability to amend a submission, in the event that an opinion letter as submitted was deemed to be deficient in some manner; the plaintiff has offered to amend her opinion letter to the extent that it might be deemed deficient.

The court finds dispositive a different aspect of the decision. The court adopted an approach analogous to a motion to strike, in evaluating the sufficiency of an opinion letter and especially when the author of the letter was a similar health care provider – the issue of similarity is to be governed by the level of expertise asserted in the complaint.

> "First, we agree with the argument of the trial lawyers and clarify that, as stated in *Bennett*, the inquiry under § 52-190a is squarely and solely framed by the allegations in the complaint, rendering the only question at the motion to dismiss stage whether the author of the opinion letter is a similar health care provider to the defendant as their respective qualifications are pleaded in the complaint and described in the opinion letter.... Thus, contrary to the Appellate Court's decision in *Labissoniere v. Gaylord Hospital, Inc.*, supra, 182 Conn. App. 452-53, there simply is no place in the § 52-190a inquiry for the consideration of affidavits or other materials intended to inject factual disputes beyond the adequacy of the pleadings and the annexed letter." 346 Conn. 125-126.

Paragraphs 4 and 5 of the affidavit of defendant Baggley, submitted in support of the motion to dismiss, attempt to do precisely what the Supreme Court has identified as impermissible in the above-quoted passage – they attempt to create a

disparity between the factual level of specialization of the defendant as compared to what is alleged in the complaint and supporting opinion letter. Prior to the Supreme Court decision in *Carpenter* that may have been a permissible tactic, but the law seemingly was clearly settled to the contrary as of the date that this action was commenced and the still later date that this motion to dismiss was filed.

The complaint asserts that the defendant was not acting as a specialist such that the standards for a similar health care provider are governed by § 52-184c(b). The arguments advanced (and the impermissible evidence submitted) address the qualifications of a similar health care provider when the subject is a specialist, as governed by § 52-184c(c). The plaintiff correctly interprets and applies *Carpenter* as requiring this court to compare the allegations of the complaint to the opinion letter. There is no room for dispute as the absence of any claim in the complaint that Dr. Baggley was holding herself out or otherwise acting as a specialist; rather, the complaint explicitly states (in ¶ 4) that she "was a non-specialist medical doctor employed by and an agent of the defendant WESTMED."

Although the defendants' reply acknowledges, for the first time, that the Supreme Court decision in *Carpenter* is controlling (which necessarily undermines the reliance of the defendants in their earlier submission on decisions predating February 2023), they cannot avoid going outside the scope of the record before the court, notwithstanding the statement, quoted above, that "there simply is no place in the § 52-190a inquiry for the consideration of affidavits or other materials intended to inject factual disputes beyond the adequacy of the pleadings and the annexed letter." Despite the clear prohibition, at the bottom of page 10 of the reply, the defendants insist (addressing the opinion letter author's statement of similarity of qualifications): "We know this to be false based on the Affidavit attached to the Defendants' initial Motion to Dismiss that states that Defendant Baggley is actually board certified in

Family practice Medicine. These allegations contain no specific facts to support a finding that Defendant Baggley is a 'non-specialist doctor' and are therefore insufficiently pled to be construed as facts."

It seems clear that the defendant's argument as to the sufficiency of the opinion letter is inextricably linked to the impermissible affidavit initially submitted. There is no analysis as to how the court can find the opinion letter deficient, in the sense of the author not having requisite qualifications, without going outside the record as comprised of the complaint and opinion letter itself.

The court does not need to reach the issue of a substitute/amended opinion letter. The defendant has not established that the opinion letter, when analyzed under the Supreme Court's guidance as set forth in *Carpenter*, is legally deficient; to the contrary, given the explicit claim that the defendant was not acting as a specialist, the opinion letter appears to be from a suitably qualified practitioner.

Conclusion

With respect to the claim of immunity due to the COVID pandemic and resulting declaration of an emergency, the defendants filed their motion prior to any definitive appellate determination of the scope of the immunity conferred by Executive Order 7V. The issuance of two decisions, clarifying the proper application of the immunity provisions, occurred before the plaintiff responded such that there was an adequate opportunity for both sides to address immunity in the context of controlling jurisprudence. There is no question about the good faith of the defendant in ordering a COVID test; if anything, it was commonplace. COVID, however, did not seem to play a role in the actual diagnosis of gastroenteritis (other than a possibility that needed to be ruled out) – the diagnosis made was, at most, subject to reconsideration

if there had been a positive test. Outside the realm of apparent consideration was the issue of a head injury from the fall the day preceding the visit on February 17, 2021; COVID and the possibility of COVID and the need to address COVID in an emergency framework had nothing to do (as far as the record reveals) with the failure to consider or address the possible implications of a head injury. Based on the record, there could not have been a "nexus" between COVID and the failure to consider head trauma as in need of attention.

Again, the records relating to the visit on February 17, 2021, do not recite any history of a fall or injury to the head or any possible consideration of physical trauma as needing consideration. This may well be evidence of the plaintiff's claim that her complaints of that nature were ignored, or it could be evidence of a lack of any complaints of that nature having been made. (There might be alternate explanations, but these seem to be the most obvious.)

The court cannot conclude that there is any nexus with COVID. Any factual resolution effectively would require a determination of the merits of the dispute, not simply a determination of a subordinate fact going only to jurisdiction/immunity.

As to the opinion letter challenge mounted by the defendants, the Supreme Court decision in *Carpenter* is dispositive. Not only did that decision reverse, or at least render suspect, any prior decision addressing the manner of analyzing an opinion letter as required by § 52-190a, it also made it clear that the analysis of the sufficiency of an opinion letter was to be based on the existing record without outside supplementation – a directive to compare the contents of the opinion letter with the allegations of the complaint. The defendants persisted, as set forth in their reply, with going outside the record and relying upon an affidavit submitted by defendant Baggley, notwithstanding the unambiguous prohibition on doing so. There was no

attempt to establish how the opinion letter was deficient (the author not appropriately qualified), using a record comprised solely of the complaint and the opinion letter.

For all of these reasons, the motion to dismiss is denied as to the claim of immunity under Executive Order 7V (modifying Executive Order 7U), and it also is denied as to the challenge to the sufficiency of the opinion letter relating to the malpractice claim asserted against Dr. Baggley.

POVODATOR, JTR.