NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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June 5, 2017

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Re: Danielle E. Hahn vs. Evelyn S. Felluca et al.
CL-2016-0007057

Dear Counsel:

This case came before the Court on May 10, 2017 for a hearing on the Plea in Bar of Defendants Kenneth L. Harkavy, M.D., Joseph A. Stiskal, M.D., Vanaja N. Alexander, M.D., and Emergency Medicine Associates, P.A. ("EMA") (hereinafter "Neonatology Defendants"). After taking the matter under advisement and reviewing the memoranda of law as well as considering the evidence and arguments presented by Counsel at the hearing, the Court issues the following opinion denying Defendants' Plea in Bar.

BACKGROUND

This is a medical malpractice claim arising out of the premature delivery and death of infant, [redacted]. On May 6, 2014, Danielle Hahn (hereinafter the "Plaintiff"),

[redacted] mother, was admitted to Reston Hospital Center because she was experiencing symptoms including fever, chills, and flank pain. At the time, Plaintiff was 28 weeks pregnant and tests indicated she had a low blood cell count with moderate bacteria. After being hospitalized for five days, Plaintiff still had a fever that antibiotics did not temper, indicating to her physicians that her condition was viral.

In the early morning hours of May 11, 2014, Plaintiff's membranes ruptured and delivery was imminent. Dr. Evelyn Felluca, Plaintiff's on-call obstetrician, treated Plaintiff with steroids and magnesium sulfate and ordered viral studies of her blood in an attempt to search for potential intrauterine infections that could affect her unborn child. This set of laboratory tests administered on the Plaintiff was known as a TORCH panel of blood work, which was subsequently sent to Quest Diagnostics for analysis. All Parties acknowledged a TORCH panel tests for certain infections which can affect a newborn – namely, toxoplasmosis, rubella, cytomegalovirus, and herpes simplex virus. In light of the circumstances that Plaintiff was 28 weeks pregnant, had ruptured membranes, and remained febrile despite treatment with three different antibiotics, consultations with related specialists were also ordered for Plaintiff, including the consultation with Defendant Dr. Harkavy, one of the neonatologists with EMA. Dr. Mohammed Adel Elkousy, an OB-GYN and maternal fetal specialist, was also consulted and attested that he was told by Dr. Felluca of the pending TORCH panel.

As testified, Dr. Felluca consulted with Dr. Elkousy first regarding the Plaintiff's condition and then orally conferred with Dr. Harkavy later in the day. To compose his final Consultation Note, Dr. Harkavy testified that he relied upon the oral conversations he had with Dr. Elkousy and Dr. Felluca, the six-page Consultation Note of Dr. Elkousy, his actual meeting with Plaintiff, as well as any available consult notes or previous medical records for the Plaintiff, including documents in a binder at the Hospital's physician workstation.

Through his testimony, Dr. Harkavy admitted his primary concern was looking for diseases in the Plaintiff which would ultimately affect the baby. He also testified he was informed Plaintiff was most likely suffering from viral and not bacterial infections as well as understood certain viral infections, when acute, could be dangerous and could profoundly affect the baby. In a closer examination of his final Consultation Note, Dr. Harkavy included a statement that "[a]ll prior toxoplasmosis titers have been negative, but acute set is still pending." When asked about this statement during cross-examination, Dr. Harkavy testified this finding was based on either his oral conversation with Dr. Elkousy or Dr. Felluca, where he was informed that a toxoplasmosis acute set had been ordered but no one told him specifically of a TORCH set. While Dr. Felluca testified that she did inform Dr. Elkousy of the TORCH panel, she did not remember if she told Dr. Harkavy of such panel or if she specifically used the word "TORCH" panel. Nevertheless, she did testify that she would have told Dr. Harkavy that the Plaintiff ruptured at 28 weeks and that she was testing and "working Plaintiff up" for infections due to her fevers of unknown origins. Dr. Felluca also testified that the only acute set involving toxoplasmosis pending at that time was the TORCH panel.

Baby [redacted] was born on [redacted] at Reston Hospital Center and was handed to the attending EMA neonatologist, Dr. Stiskal, for immediate care. Defendant Dr. Stiskal was noted to have provided treatment to [redacted] on May 13th, 16th, and 18th. Defendant Dr. Alexander, another attending EMA neonatologist, also cared for [redacted] after she was admitted to the neonatal intensive care unit ("NICU") on May 15th and 17th.

Of the TORCH panel Dr. Felluca ordered for Plaintiff, all tests came back negative except for herpes simplex virus type 2, which came back positive. These results became available and were reported to the Hospital on May 16, 2014. However, none of the physicians treating [redacted] nor the Plaintiff reviewed them. Though [redacted] remained in the NICU, Plaintiff was discharged from the hospital on May 17, 2014. [redacted] initially appeared normal and healthy given her premature birth; but, by May 19th her condition began to deteriorate quickly. She would eventually die, alleged in part, of the herpes infection on May 21, 2014, after she was transferred to Washington Children's Hospital.

As a result, Plaintiff brought this medical malpractice action individually and as personal representative of [redacted] estate. Specifically regarding the Neonatology Defendants, Plaintiff claims that the individual neonatologists each breached the standard of care by failing to follow up on, react to, and communicate regarding the results of the TORCH panel.

In response, the Neonatology Defendants filed the instant Plea in Bar on February 15, 2017, based on statutory immunity. They essentially argue that the Neonatology Defendants are precluded from liability in this matter pursuant to Va. Code § 8.01-581.18:1, which provides immunity to physicians for failure to review or act on laboratory tests they did not request or authorize.

ARGUMENT

PHYSICIAN IMMUNITY PURSUANT TO VA. CODE § 8.01-581.18:1

In the matter at hand, the Neonatology Defendants seek physician immunity pursuant to Virginia Code § 8.01-581.18:1. This statute was recently amended and reenacted on April 5, 2006 in response to back-to-back Virginia Supreme Court decisions rendered in regards to the scope of immunity from civil liability afforded a physician under the old Code Section. *See Auer v. Miller*, 270 Va. 172 (2005); *Oraee v. Breeding*, 270 Va. 488 (2005). Namely, the previous Virginia Code § 8.01-581.18 subsections were separated and amended to add § 8.01-581.18:1, relating to immunity of physicians for laboratory results and examinations. Under the current provision, subsection A:

> "No physician shall be liable for the failure to review or act on the results of laboratory tests or examinations of the physical or mental condition of any patient, which tests or examinations the physician neither requested nor authorized, unless (i) the report of such results is provided directly to the physician by the patient so examined or tested with a request for consultation; (ii) the physician assumes responsibility to review or act on the results; or (iii) the physician has reason to know that in order to manage the specific mental or physical condition of the patient, review of or action on the pending results is needed. However, no physician shall be immune under this section unless the physician establishes that (a) no physician-patient relationship existed when the results were received or accessed; or (b) the physician received or accessed the results without a request for consultation and without responsibility for management of the specific mental or physical condition of the patient relating to the results or (c) the physician consulted on a specific mental or physical condition, the results were not part of that physician's management of the patient and the physician had no reason to know that he was to inform the patient of the results or refer the patient to another physician; or (d) the physician

> received or accessed results, the interpretation of which would exceed the physician's scope of practice and the physician had no reason to know that he was to inform the patient of the results or refer the patient to another physician."

Accordingly, in order for a physician to properly claim immunity under this statute, a physician must first be found to have neither requested nor authorized the particular laboratory tests or examinations at issue. Next, a physician must then not fall within any of the three exceptions to the statutory immunity. Lastly, after establishing all of the exceptions are inapplicable, a physician must demonstrate at least one of four predicates apply to ultimately qualify for statutory immunity.

In support of their Plea In Bar, the Neonatology Defendants argue they indeed are subject to Va. Code § 8.01-581.18:1 since there is no factual dispute Dr. Felluca ordered the TORCH panel before any of the Neonatology Defendants saw the Plaintiff and thereby cannot be held liable for the TORCH panel results. Next, the Neonatology Defendants submit that they do not fall within any of the three exceptions to the statute, as (1) Plaintiff never provided the TORCH panel results to the Neonatology Defendants, (2) none of the Neonatology Defendants assumed responsibility to review or act on the TORCH panel results, and (3) these Defendants had no reason to know a review of or action on the pending TORCH panel results was needed, where they allegedly had no knowledge this particular set of tests were even ordered for Plaintiff. Moreover, the Neonatology Defendants further assert they remain immune since they have also satisfied all four of the necessary predicates for the statute's application. Namely, there was no physician-patient relationship formed between Plaintiff and the Neonatology Defendants, as all Parties believed the care these Defendants were providing was confined solely to [redacted]; the Neonatology Defendants did not receive or access the TORCH panel results while caring for [redacted] after she was born; and, finally, none of these Defendants were, in fact, caring for the Plaintiff either when the TORCH panel was ordered or when the results were actually received by Reston Hospital Center, thereby giving them no reason to inform anyone of the results or refer the Plaintiff to another physician.

In response, Plaintiff preliminarily contends that Va. Code § 8.01-581.18:1 is in derogation of the well-established common law duty medical providers maintain to adhere to the standard of care, where this statute must be given particular scrutiny and should be strictly construed. Plaintiff also argues extending immunity to the Neonatology Defendants would be manifestly unfair and unjust given their involvement in the Plaintiff's diagnosis and the nature of their work with [redacted]. In regards to the application of Va. Code § 8.01-581.18:1, first, Plaintiff concedes the first exception does not apply because Plaintiff did not know of the TORCH panel results until after [redacted] died, and so she could not have provided such results to the Neonatology Defendants. However, Plaintiff argues the Neonatology Defendants knew Plaintiff was symptomatic of a viral infection and an investigation was ongoing as to the source of her symptoms, which included the ordering of tests for several viral infections. As such, these Neonatology Defendants had the responsibility to follow-up on Plaintiff's pending tests to determine whether the results would be needed to manage any specific physical conditions of a premature baby. Therefore, Plaintiff argues the Neonatology Defendants, and specifically Dr. Harkavy who conducted the initial consult with Plaintiff, knew or should have known that Plaintiff's test results could or would affect the treatment of [redacted], wherein a follow-up was necessary. Accordingly, this triggers the second and third exceptions to immunity under Va. Code § 8.01-581.18:1.

Notwithstanding, Plaintiff goes on to contend that even if the Neonatology Defendants did not fall within any of the exceptions, they will not be able to prove their burden that any of the four predicates further required under the statute can be met to provide immunity. Though [redacted] was still in utero when the initial consultation with Plaintiff occurred, Dr. Harkavy was allegedly providing treatment to both, thereby creating a physician-patient relationship with Plaintiff and [redacted]. Furthermore, since [redacted] was the Neonatology Defendants' patient, it was their responsibility to identify, manage, and treat any specific physical conditions she may have had. Plaintiff continues to allege these physicians knew that certain tests were ordered for the Plaintiff, and they also knew certain positive test results for the mother could have an impact on the premature baby. Therefore, since they should have known about the TORCH panel testing, and the results did become available when [redacted] was still alive, they would have acted to treat the positive herpes infection in [redacted]. In the end, Plaintiff submits all of the Neonatology Defendants had a duty to follow-up on the TORCH panel conducted on Plaintiff because they knew from Dr. Harkavy's consultation a potential viral infection in Plaintiff could be a risk for their patient, [redacted]. Thus, because the Neonatology Defendants knew or should have known to act on the TORCH panel results in order to manage [redacted] treatment, none are immune from liability pursuant to Virginia Code § 8.01-581.18:1.

After hearing testimony by Dr. Harkavy, Dr. Felluca, Dr. Elkousy as well as Ms. Theresa Rimers, the Director of Advanced Clinicals at Reston Hospital, the Court took this matter under advisement.

ANALYSIS

At the start of the hearing on May 10, 2017, Defendants' counsel brought a preliminary oral motion to limit expert testimony as to the standard of care in relation to the statute at issue. Essentially, the Court was to determine if a standard of care finding based on expert testimony had any bearing on the analysis of the statutory immunity. After oral argument by both counsel, the Court ruled a standard of care determination was not relevant to the instant Plea in Bar. From the Court's plain reading of the statute, the language indicates even if a physician were to breach the standard of care in his or her "failure to review or act . . .," the statute would still confer immunity in certain circumstances. In accordance, it would not follow that a subsequent standard of care requirement would be considered in the Court's factual analysis of the evidence to determine physician immunity. Incorporating a standard of care requirement in the statute under "reason to know" would nullify the statute, as no doctor could ever be found immune in any situation. In essence, it is a non-sequitur. Thus, the Court granted the Defendants' oral motion to preclude any expert testimony or evidence presented at the hearing regarding the issue of standard of care.

A plea in bar is a defensive pleading that reduces the litigation to a single issue, which, if proven, creates a bar to the plaintiff's right of recovery. *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594, 537 S.E.2d 580, 590 (2000) (internal citations omitted). The burden of proof rests on the moving party. *Id.* A plea is distinguished from an answer or grounds of defense, in that the plea does not address the merits of the issues raised by the bill of complaint or the motion for judgment. *Nelms v. Nelms*, 236 Va. 281, 289, 374 S.E.2d 4, 9 (1988). However, a plea in bar may be used "to present a single issue [such as statute of limitations, res judicata, collateral estoppel, accord and satisfaction, or statute of frauds] which may result in ending the proceedings." Leigh B. Middleditch, Jr. & Kent Sinclair, *Virginia Civil Procedure* § 9.8 (2d ed.,

Michie 1992). Indeed, a plea is a pleading that alleges a single state of facts or circumstances, which, if proven, constitutes an absolute defense to the claim. *Nelms*, 236 Va. at 289.

In the instant matter, none of the Parties dispute that the Neonatology Defendants did not request, authorize, or otherwise order the TORCH panel series of tests on May 11, 2014. In fact, Dr. Felluca admits at the hearing that she was indeed the physician who ordered these laboratory viral testing for Plaintiff before any of the specialist physicians ever saw the Plaintiff. Therefore, Va. Code § 8.01-581.18:1 initially is applicable to the Neonatology Defendants.

Turning now to the three exceptions, the Code provides, in relevant part, that a "physician shall not be liable . . . unless

> [1] the report of such results is provided directly to the physician by the patient so examined or tested with a request for consultation;
> [2] the physician assumes responsibility to review or act on the results; OR
> [3] the physician has reason to know that in order to manage the specific mental or physical condition of the patient, review of or action on the pending results is needed."

The results of Plaintiff's TORCH panel was received and reported to Reston Hospital Center on May 16, 2014 - five days after the panel of infection tests had been ordered by Dr. Felluca. There is no evidence on the record demonstrating Plaintiff gave the TORCH panel results to any of the Neonatology Defendants with a request for consultation nor that any of the Neonatology Defendants assumed the responsibility to review of act on the results of the TORCH panel at any point. Therefore, the Court finds the circumstances of exceptions (1) and (2) do not arise to preclude the Neonatology Defendants from claiming statutory immunity.

However, it is the third exception which the Court holds applicable to the Neonatology Defendants. Here, Defendants primarily argue that none of the neonatologists, and specifically Dr. Harkavy, had any knowledge a TORCH panel had been ordered for Plaintiff; thereby, they had no reason to know any action was required on the results of those tests. However, Plaintiff attempts to argue the Neonatology Defendants knew or should have known of the TORCH panel, thereby requiring their review or action on the pending results. Due to the prior ruling that a standard of care determination was not relevant to the instant Plea in Bar, it would not follow that a "reason to know" analysis would impute a "should know" standard of care analysis. Hence, this Court's interpretation of "reason to know" must be based on a factual finding.

Since the enactment of § 8.01-581.18:1 in 2006, no Virginia case law interprets this statute, including any analysis of the phrase, "reason to know." However, the Virginia Supreme Court has examined this phrase within other tort litigation, primarily product liability actions. *See Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 134-36 (1992); *see also Funkhouser v. Ford Motor Co.*, 285 Va. 272 (2013); *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949 (1979). In these cases, the Court turned to the Restatement (Second) of Torts for guidance, which becomes instructive for this Court in the instant analysis. Particularly, the *Owens-Corning* Court discussed the legal difference between the phrases "reason to know" and "should know" to impose liability on a manufacturer of chattel, highlighting that the words "reason to know" are used throughout the Restatement. *Owens-Corning*, 243 Va. at 135. Relevant to the analysis at hand, the *Owens-Corning* Court would further elucidate that, while the phrase "reason to know" does not imply any duty of knowledge on the part of the actor, it does mean the actor has information or knowledge of facts from which a reasonable man of ordinary intelligence or one

of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist. *Id.* at 135-36. Following, the Virginia Supreme Court as well as federal District Courts of Virginia have since relied on the *Owens-Corning* Court's discussion of this "reason to know" standard in various subsequent decisions. *See, e.g., Jones v. Ford Motor Co.,* 263 Va. 237, 253 (2002); *Torkie-Tork v. Wyeth,* 757 F. Supp. 2d 567, 572-73 (E.D. Va. 2010); *Sutherlin v. Lowe's Home Ctrs., LLC*, 2014 U.S. Dist. LEXIS 177149, *26-28 (E.D. Va. Dec. 23, 2014); *Fields v. Jobar Int'l, Inc.*, 2014 U.S. Dist. LEXIS 52855, *10-11 (E.D. Va. Apr. 16, 2014).

Turning to the instant matter, the evidence established, while Dr. Felluca did not explicitly state to Dr. Harkavy a TORCH panel had been ordered, he was told that Plaintiff was 28 weeks pregnant, that she had ruptured membranes, and that she remained febrile notwithstanding treatment by a number of antibiotics. In accordance, he was aware Plaintiff most likely had a viral infection as opposed to a bacterial one. As such, though not specifically indicated as a TORCH panel, Dr. Felluca conveyed to Dr. Harkavy she was testing and "working Plaintiff up" for infections. As a neonatologist, Dr. Harkavy admitted at the hearing his primary concern was to look for potential conditions in the mother that would ultimately affect the baby, where certain viral infections, if acute, could have a significant and dangerous effect on a premature baby. Furthermore, Dr. Harkavy was also on notice, either through his conversation with Dr. Elkousy or Dr. Felluca, a toxoplasmosis acute set had been ordered, where Dr. Felluca testified the only pending acute set involving toxoplasmosis at the time of the Plaintiff's consultation was the TORCH panel. As a result, Dr. Harkavy expressly included in his final Consultation Note, "acute set is still pending."

After consideration of all the exhibits, testimony, and arguments presented at the hearing as well as the relevant Virginia case law, the Court makes the factual determination that Dr. Harkavy had reason to know of a pending TORCH panel. As a neonatologist, Dr. Harkavy is an actor of superior intelligence who had information or knowledge of facts that either could lead him to infer the existence that a TORCH panel had been ordered or made the existence of an ordered TORCH panel so highly probable that his subsequent conduct would be based upon the assumption that the TORCH panel did exist. A mother and unborn child are woven together in medicine and the health of one can affect the health of the other. Under the statute, a doctor cannot voice immunity to pending tests ordered on a mother who is cocooning the soon to be born child by claiming, although he knew acute tests were pending, he did not know the exact name of the test ordered.

At this Plea in Bar stage, the Neonatology Defendants maintain the burden to demonstrate they had no reason to know review or action on the pending results of the TORCH panel was needed. In light of the totality of the evidence presented to the Court, the Court finds that the Neonatology Defendants did not sufficiently meet their burden, where the exhibits and testimony indicate that Defendant Dr. Harkavy did have reason to know of the TORCH panel, as he clearly stated "acute set is still pending" in his Consultation Note; the TORCH panel was ordered for Plaintiff prior to her labor and remained pending; and, review of such tests was necessary to manage the associated, potentially substantial affects it could have on her premature baby. Therefore, since Defendants have not met their burden to demonstrate that Dr. Harkavy had no reason to know of the necessity to review or take action on the pending TORCH panel results ordered by another physician for the Plaintiff, the Court concludes the plea based upon physician immunity of Va. Code § 8.01-581.18:1 is defeated.

In the end, since Defendants cannot satisfy this last exception to physician immunity, there is no need for the Court to further analyze the remainder of the statute and address the subsequent four predicates to quality for statutory immunity.

CONCLUSION

Defendants' Plea in Bar based on statutory immunity is denied. The Court requests Defendants' counsel to prepare an order reflecting the Court's ruling.

Penney S. Azcarate
Fairfax County Circuit Court

PSA/kt