



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 7, 2020

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RE: S.M., a minor, by Mesfin Hagos, her father and next friend, and Embiet Kessa, her mother and next friend v. James A. Thompson, M.D., et al.
Case No. CL-2019-0011030

Dear Counsel:

This case came before the Court on December 6, 2019 for a hearing on the Defendant's demurrer. Having taken the demurrer under advisement and after reviewing the memoranda of law and arguments submitted by counsel, the Court issues the following opinion.

BACKGROUND

This matter arises from Dr. James Thompson's performance of a cardiac catheterization procedure on S.M., a minor, at Inova Fairfax Hospital, on June 19, 2018. Prior to any procedures occurring, on April 27, 2018, S.M. initially presented to Dr. Thompson, a pediatric interventional cardiologist, with an atrial-septal defect. An atrial-septal defect is a birth defect in which there is

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a hole in the wall (the septum) dividing the upper chambers of the heart (the atria). In S.M.'s case, this hole did not close, and the atrial-septal defect, which remains open can cause various serious long-term health problems and complications. During their consultation, Dr. Thompson noted the atrial-septal defect was getting larger over time, and recommended closure. The procedure for closing this defect is well-established and has been used for many years. The procedure is done by using cardiac catheterization, in which the catheter contains a closure device deployed through the defect and then opens on each side to seal the hole. There are two FDA-approved devices to accomplish this, one of which is known as the "umbrella device."

S.M. was fourteen years old when Dr. Thompson set out to correct an atrial-septal defect pursuant to the cardiac catheterization procedure. This procedure has two parts: first, the catheterization portion, which is the diagnostic portion, and second, the interventional portion, in which the device is employed to close the atrial-septal defect.

The crux of the matter before the Court begins at this juncture. Prior to the surgery, Plaintiff consented to the first portion of procedure—this fact is undisputed. However, Plaintiff contends to the interventional portion of the procedure, Plaintiff's parents only consented to the use of the umbrella device to close the atrial-septal defect. Plaintiff alleges when Dr. Thompson recommended closure to Plaintiff's parents, Dr. Thompson explained he would use the umbrella device, and Plaintiff's parents consented to the procedure with the umbrella device. On June 19, 2018, Plaintiff and Plaintiff's parents presented to Inova Fairfax Hospital for the surgery, and signed a consent form provided by an Inova nurse, who, the Plaintiff alleges, explained the form as a Cardiac Catheterization Informed Consent Form for the procedure using the umbrella device although the device was not listed on the consent form. Following this explanation, Plaintiff's parents signed the Informed Consent Form.

Unbeknownst to Plaintiff and the parents, during the June 19, 2018 surgery, Dr. Thompson did not use the umbrella device. Instead, Dr. Thompson performed the cardiac catheterization procedure with NobleStitch. Plaintiff alleges NobleStitch is a new, non-FDA-approved medical device, and Dr. Thompson is involved with the NobleStitch clinical trial as a principal investigator. The NobleStitch Clinical Trial expressly excludes patients under 18, as the trial is limited to adults. Further, to participate in any clinical trial, a patient must provide informed consent. Prior to the surgery, Plaintiff's parents were not given any information about NobleStitch or informed about the potential use of NobleStitch in the procedure.

Only after Dr. Thompson completed the operation did he inform Plaintiff's parents he used NobleStitch to close the atrial-septal defect. Unfortunately, the NobleStitch device failed to permanently close the hole. Thus, Plaintiff is left with a continuing—albeit smaller—atrial-septal defect. In the aftermath of this operation, Plaintiff consulted with physicians at Children's Hospital in Washington, D.C., who determined the NobleStitch cannot be removed for fear of creating a more dangerous condition. As a result, Plaintiff's condition has not been corrected, and Plaintiff will need to be monitored for the rest of her life.

Consequently, Plaintiff, a minor, filed the Amended Complaint against James A. Thompson, M.D., Pediatrix Medical Group of the Mid-Atlantic P.C., and Inova Health Care Services, through her parents as next friend, on November 6, 2019. In the Amended Complaint, Plaintiff brought forth four Counts: Count I – Fraud, Count II – Battery, Count III – Lack of Informed Consent, Count IV – Medical Negligence, and Count V – Medical Malpractice. In response, Defendants Dr. Thompson and Pediatrix filed the instant Demurrers to Plaintiff’s Complaint claiming the Complaint fails to state a claim upon which relief could be granted for Counts I & II (Fraud & Battery).

After hearing arguments on the Motion, the matter was taken under advisement to address the issues of whether there is sufficient evidence pled in the Amended Complaint to satisfy the elements of fraud and battery. The Court will take these issues in turn.

I. FRAUD

Under Virginia law, a cause of action for fraud requires a plaintiff to meet six elements: 1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damages to the party misled. *State Farm Mut. Auto. Ins. Co. v. Remley*, 270 Va. 209, 218, 618 S.E.2d 316, 321 (2005).

Defendants argue Plaintiff fails to allege Dr. Thompson made a misrepresentation of an existing or pre-existing fact with an intent to mislead. Rather, Plaintiff alleges during the procedure Dr. Thompson used a different atrial-septal closure device than discussed and anticipated prior to the procedure. However, this does not constitute the intent to defraud or mislead the parents at the time of the pre-surgery statements. Defendants rely on the case of *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 699 S.E.2d 483 (2010), arguing that in order to allege a cause of action for fraud based on an unfulfilled promise or statement as to a future event, Plaintiff must allege Dr. Thompson represented he would use the umbrella device when, in fact, his intent was just the contrary, i.e., he never intended to use the umbrella device. Plaintiff must allege he made those representations with the intent to mislead from the beginning, and such an allegation is not present in the Amended Complaint.¹ Because Plaintiff does not allege all elements of a cause of action for fraud, and fails to state sufficient facts in support of her claim for fraud, Count I of Plaintiff’s Amended Complaint should be dismissed.

Plaintiff responds, alleging in oral argument, Dr. Thompson used a “bait and switch,” by representing to S.M.’s parents he would operate using the umbrella device. Moreover, this representation was material, made intentionally, and made with the intent S.M.’s parents would believe the representation. In providing consent to the cardiac catheterization with the umbrella device, the parents actually believed and actually relied upon the representation made by Dr. Thompson about using the umbrella device. However, contrary to those express representations,

¹ Both parties referenced *Patrick v. Summers*, 235 Va. 452 (1988) holding fraud can be based on a future event if that is the intent.

Dr. Thompson instead used the NobleStitch device. Plaintiff argues she has adequately alleged a present intent to deceive and this is sufficient to survive a demurrer.

ANALYSIS

The purpose of a demurrer is to determine whether a complaint states a cause of action upon which relief may be granted. *Bell v. Saunders*, 278 Va. 49, 53, 677 S.E.2d 39, 40-41 (2009). A demurrer admits the truth of the facts contained in the pleading to which it is addressed as well as any facts that may be reasonably and fairly implied and inferred from those allegations. *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102, 540 S.E.2d 134, 136 (2001). In considering a demurrer, the court is limited to review of the complaint and any attachments to the complaint. *TC MidAtlantic Dev., Inc. v. Commonwealth*, 280 Va. 204, 212, 695 S.E.2d 543, 548 (2010). To withstand demurrer, a complaint need only contain "sufficient allegations of material facts to inform a defendant of the nature and character of the claim," and need not "descend into statements giving details of proof." *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). At issue in the demurrer before the Court is whether the Amended Complaint sufficiently pleads that the "intent to mislead" existed at the time Dr. Thompson made the representations to S.M.'s parents.

In Virginia, claims of fraud must be pled with particularity, which requires the plaintiff to precisely plead the actions that encompasses the fraud. *Mortarino v. Consultant Eng'g Servs.*, 251 Va. 289, 295, 467 S.E.2d 778, 782 (1996). Generally, an action based upon fraud must favor the misrepresentation of present pre-existing facts and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. *Lloyd v. Smith*, 150 Va. 132, 132, 142 S.E. 363 (1928); see *Soble v. Herman*, 175 Va. 489, 500, 9 S.E.2d 459, 464 (1940). The Supreme Court of Virginia has noted well-recognized exceptions to this general rule. One of these exceptions is where an action for fraud and deceit is "predicated on promises which are made with a present intention not to perform them, or on promises made without any intention to perform them." *Patrick v. Summers*, 235 Va. 452, 454-55, 369 S.E.2d 162, 164 (1988) (quoting *Lloyd v. Smith*, 150 Va. 145).

The Amended Complaint sets forth facts to support the doctor made a false representation of a material fact, intentionally and knowingly, and the party who was misled relied on the misrepresentation, which resulted in damages to S.M. However, the Amended Complaint fails to allege sufficient facts for the intent to mislead. Dr. Thompson did allegedly inform the parents he would use the umbrella device, and he ultimately used a different device than the umbrella device. However, these facts alone are insufficient to satisfy the intent to defraud or mislead the parents at the time of the pre-surgery statements. It fails to show the doctor had the intent to mislead at the time he made the false representations of material fact, which is insufficient to meet the standard for Fraud.

The Court finds the demurrer to Count I – Fraud, must be sustained with leave to amend.

II. BATTERY

A battery consists of: (1) the willful or unlawful touching, (2) of the person of another, (3) by the assailant, or by some object set in motion by him. *Wood v. Commonwealth*, 149 Va. 401, 140 S.E. 114 (1927).

A “technical battery” is when a physician can be liable for a battery occurring in the scope of the practice of medicine. In *Mayr v. Osborne*, 293 Va. 74 (2017), the Supreme Court of Virginia established a technical battery is present where (1) the patient placed terms or conditions on consent for a particular procedure, and the doctor ignored those terms or conditions; (2) the physician intentionally performed an additional procedure beyond the procedure the patient consented to; or (3) the physician intentionally performed a different procedure or one that differs significantly in scope from the procedure for which the patient provided consent.²

Defendants contend the Amended Complaint fails to allege Dr. Thompson performed a substantially different procedure or one substantially exceeding the scope, and the facts fail to allow an inference of his intent to violate her bodily interest. In support, they cite the *Mayr* decision, “a physician is not liable for a battery unless plaintiff ‘establishes a prima facie case that the physician performed an operation ‘against the patient’s will or substantially at variance with the consent given’.” *Mayr* at 84. Dr. Thompson used a different atrial septal closure device than anticipated, but per *Mayr*, this does not constitute a battery. Otherwise, allowing a battery claim anytime a doctor uses different specific medical instruments, devices, equipment, etc. would expand the definition of a “procedure” in Virginia medical malpractice law and impermissibly expand the scope of what constitutes a technical battery in Virginia. Therefore, Plaintiff’s claim for battery fails as a matter of law.

Plaintiff alleges Plaintiff’s parents consented to the umbrella device and Dr. Thompson intentionally used a different device than what the parents consented to being used. Plaintiff argues the device can be equated to a procedure, and thus, the use of a different device equates to the performance of a different procedure. As set forth in *Pugsley v. Privette*, “the relationship between physician and patient is a consensual one and ‘[a] surgical operation on the body of a person is a technical battery or trespass unless he or some authorized person consented to it’.” 220 Va. 892, 899 (1980). As a result, Dr. Thompson’s use of NobleStitch instead of the umbrella device constitutes Dr. Thompson intentionally performing a different procedure than the one for which the Plaintiff’s parents provided consent. Plaintiff argues by providing informed consent to a cardiac catheterization with the umbrella device, Plaintiff’s parents only consented to the use of

² Id. at 80 (citing *Washburn v. Klara*, 263 Va. 586, 592 (2002); *Woodbury v. Courtney*, 239 Va. 651, 654 (1990); *Pugsley v. Privette*, 220 Va. 892, 899-900 (1980)). The Court in *Mayr* found the battery claim failed as a matter of law, because the physician did *not* perform a substantially different or additional procedure which differed significantly in scope, when the surgeon mistakenly fused the wrong level of the patient’s spine. Id. at 84 (the facts must permit an inference the physician intended to disregard the patient’s consent).

the umbrella device, and thus, the use of a different, unapproved device, means the Defendant intentionally performed a different procedure.

ANALYSIS

At issue is whether the Amended Complaint sufficiently pleads the requisite elements of Battery (Technical Battery) based on the allegation Defendant Thompson used a different device in the procedure, the NobleStitch device, constituting a Battery (Technical Battery) and whether, in this case, the use of a different device is congruent with a different procedure.

Pursuant to *Mayr v. Osbourne*, the Plaintiff must allege facts showing the physician intentionally performed a different procedure or one differing significantly in scope from the procedure for which the patient provided consent. The Amended Complaint bases its battery claim on the idea of the congruence of using a different medical device with performing of a different procedure. The procedure that Defendant Thompson performed was a cardiac catheterization. During this procedure, he used a different device. The Court can envision many instances in the heat of surgery where a different device or instrument may be employed given the fluidity of the operation. Calls must be made, and a claim of battery cannot await a doctor who chooses to use a different device during surgery. There is no time to obtain consent or inform parents every time a new decision is needed. There may be cases where a procedure is changed midway during the operation and a different procedure is performed but that is not the facts pled in this matter. Battery cannot be found when a doctor uses a different device during a consented procedure. This does not turn the surgery into a new and different procedure; such an instance may be negligence, but it is not battery. Consequently, the Amended Complaint fails to allege facts sufficient to meet a claim for battery or technical battery as a matter of law.

The Court finds the demurrer to Count II – Battery, must be sustained with prejudice.

CONCLUSION

For the reasons stated above, Plaintiff did not plead sufficient facts to allege Counts I and II in the Amended Complaint, consisting of Fraud and Battery. The demurrer to Count I is sustained with leave to amend Count I within 14 days of this order. The demurrer to Count II is sustained with prejudice.

Sincerely yours



Penney S. Azcarate
Fairfax County Circuit Court

PSA/jl

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