BARNES v. SCHLEIN

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The plaintiff appeals from a judgmentfor the defendant, rendered after the trial court concludedthat the plaintiff's medical malpractice suit was

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barred by the statute of limitations and granted thedefendant's motion for summary judgment. In herappeal, the plaintiff claims the court erred in grantingthe motion because (1) a prior motion for summaryjudgment had been denied, thus establishing the lawof the case; (2) the court applied the wrong statute oflimitations, and; (3) there existed a genuine issue of factconcerning the date when the injury was discovered.

The facts, undisputed by either party, are as follows:The plaintiff was injured as the result of a slip and fallon December 20, 1972. She was taken to Park CityHospital in Bridgeport, where she was treated by thedefendant, Allen Schlein, an orthopedic surgeon. Heperformed an operation on the plaintiff on December20, 1972, and again on February 20, 1973.

Schlein informed the plaintiff in April, 1973, that sheneeded extensive physical therapy and further surgeryto relieve her from the pain she was still experiencing.Thereafter, the plaintiff sought and received a secondopinion from another physician, who performed surgeryon April 16, 1973.

On December 16, 1975, the plaintiff filed suit againstthe defendant, alleging that Schlein had been negligentin treating her and had caused her to endure furthersurgery as well as extreme pain and suffering.

On June 22, 1982, the defendant filed a motion forsummary judgment similar to an earlier motion thathad been denied in October, 1978. The court, uponreview of the newly filed motion, concluded that therewas no genuine issue of fact as to whether the actionwas brought more than two years after the discoveryof the injury and granted the defendant's motion.

I

The plaintiff claims that, although denial of a motionfor summary judgment is an interlocutory order, it

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nevertheless becomes the law of the case and can beoverturned only if good reason exists to entertain arenewed motion.

"The law of the case is not written in stone but isa flexible principle of many facets adaptable to theexigencies of the different situations in which it maybe invoked. See 18 Wright, Miller & Cooper, FederalPractice and Procedure: Jurisdiction 4478." Breen v.Phelps, 186 Conn. 86, 99, 439 A.2d 1066 (1982). Wehave declared that, although a judge should not lightlydepart from a prior ruling on a motion before the sameor a different judge, the prior ruling is not binding."From the vantage point of an appellate court it wouldhardly be sensible to reverse a correct ruling by a secondjudge on the simplistic ground that it departed fromthe law of the case established by an earlier ruling. 18Wright, Miller & Cooper, supra, 4478; ParmeleeTransportation Co. v. Keeshin, 292 F.2d 794, 797 (7thCir.), cert. denied, 368 U.S. 944, 82 S.Ct. 376, 7 L.Ed.2d340 (1961). In an appeal to this court whereviews of the law expressed by a judge at one stage ofthe proceedings differ from those of another at a differentstage, `the important question is not whether therewas a difference but which view was right.' Dawsonv. Orange, 78 Conn. 96, 129, 61 A. 101 (1905)." Breenv. Phelps, supra, 100. See also Schwarzschild v. Martin,191 Conn. 316, 325, 464 A.2d 774 (1983).

II

The plaintiff next claims that the trial court shouldhave applied the statute of limitations for actions concerningimplied contract[2] and not the statute of limitationsconcerning malpractice actions.[2]

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General Statutes 52-584 provides in pertinent partthat "[n]o action to recover damages for injury to theperson, or to real or personal property, caused by . . .malpractice of a physician . . . shall be brought butwithin two years from the date when the injury is firstsustained or discovered or in the exercise of reasonablecare should have been discovered . . . ." (Emphasisadded.) It is clear that all actions for malpracticefall under the ambit of General Statutes 52-584.Whether the plaintiff's cause of action is one for malpracticedepends upon the definition of that word andthe allegations of the complaint. See Staples v. Lucas,142 Conn. 452, 456, 115 A.2d 337 (1955); Camposanov. Claiborn, 2 Conn. Cir. Ct. 135, 196 A.2d 129 (1963).

Malpractice is commonly defined[3] as "the failure ofone rendering professional services to exercise thatdegree of skill and learning commonly applied underall the circumstances in the community by the averageprudent reputable member of the profession withthe result of injury, loss, or damage to the recipientof those services . . . ." Webster, Third New InternationalDictionary; Black's Law Dictionary (5th Ed.1979); see Camposano v. Claiborn, supra. A fair readingof the complaint reveals that the gravamen of the

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suit was the alleged failure by the defendant to exercisethe requisite standard of care.[4] Her complaint isabsolutely barren of any allegation that the defendantbreached any contractual agreement made with her.Cf. Camposano v. Claiborn, supra (physician's assurancethat operation would result in only hairline scarsof a minor nature governed by six year statute of limitations).The court did not err in holding that GeneralStatutes 52-584 governed the plaintiff's cause ofaction as set out in her complaint.

III

In her final claim of error, the plaintiff claims thata material fact was in dispute and that the defendantdid not clearly establish the absence of all genuineissues of material fact. In order to address this claimadequately, we must first set out the evidence presentedto the court by the defendant.

The defendant filed, along with his motion for summaryjudgment, his own affidavit and part of the plaintiff'sdeposition. In his affidavit, he averred that thelast time he had treated the plaintiff was on April 5,1973. In the deposition, the plaintiff stated that sheknew that something was wrong with her leg when sheconsulted with a second physician in April.[5] She

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further stated that prior to her third operation on April16, 1973, she had decided to sue Schlein.[6] Although thecourt had these facts before it, the plaintiff failed topresent any evidence to dispute them in the counter-affidavitfiled in her behalf.[7]

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"`A trial court may appropriately render summaryjudgment when the documents submitted demonstratethat there is no genuine issue of material fact remainingbetween the parties and that the moving party isentitled to judgment as a matter of law. Practice Book384; Yanow v. Teal Industries, Inc., 178 Conn. 262,268, 422 A.2d 311 (1979); United Oil Co. v. UrbanRedevelopment Commission, 158 Conn. 364, 377-78,260 A.2d 596 (1969).' Bartha v. Waterbury HouseWrecking Co., 190 Conn. 8, 11, 459 A.2d 115 (1983).See Herman v. Endriss, 187 Conn. 374, 446 A.2d 9(1982). Once the moving party has presented evidencein support of the motion for summary judgment, theopposing party must present evidence that demonstratesthe existence of some disputed factual issue.Bartha v. Waterbury House Wrecking Co., supra,11-12; Farrell v. Farrell, 182 Conn. 34, 38,438 A.2d 415 (1980); Rusco Industries, Inc. v. Hartford HousingAuthority, 168 Conn. 1, 5, 357 A.2d 484 (1975). Itis not enough, however, for the Opposing party merelyto assert the existence of such a disputed issue." Burnsv. Hartford Hospital, 192 Conn. 451, 455,472 A.2d 1257 (1984).

General Statutes 52-584 requires a plaintiff to filesuit within two years of discovering the injury or

beforever barred from suit. Burns v. Hartford Hospital,supra. The uncontradicted testimony of the plaintiff at

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her deposition reveals that she knew in April, 1973, thatshe had suffered "some form of actionable harm."Burns v. Hartford Hospital, supra. Despite this knowledgeshe waited until December 16, 1975, two and onehalf years later, to file suit. There was no genuine disputeas to these facts. The court, therefore, correctlyconcluded that the defendant was entitled to summaryjudgment.

There is no error.

1. General Statutes 52-584 provides: "No action to recover damagesfor injury to the person, or to real or personal property, caused bynegligence, or by reckless or wanton misconduct, or by malpractice of aphysician, surgeon, dentist, podiatrist, chiropractor, hospital orsanatorium, shall be brought but within two years from the date when theinjury is first sustained or discovered or in the exercise of reasonablecare should have been discovered, and except that no such action may bebrought more than three years from the date of the act or omissioncomplained of, except that a counterclaim may be interposed in any suchaction any time before the pleadings in such action are finally closed."

2. General Statutes 1-1 provides: "(a) In the construction of thestatutes, words and phrases shall be construed according to the commonlyapproved usage of the language; and technical words and phrases, and suchas have acquired a peculiar and appropriate meaning in the law, shall beconstrued and understood accordingly."

3. In the fourth paragraph of her complaint, the plaintiff alleges:"[T]he Defendant made repeated examinations of the plaintiff for bothphysical therapy, medical and post-surgical care purposes, but in doing sodid not use the care and skill normally used by physicians engaged inmedical practice in the Bridgeport, Connecticut area, nor did the Defendantperform the aforementioned surgical procedures with the care and skillrequired to insure proper healing of the Plaintiffs injuries." In paragraphs six through nine, the plaintiff alleges that "[a]s aconsequence of the Defendant's negligence" she was forced to undergocorrective surgery and suffered pain and injury.

4. In her deposition, the plaintiff engaged in the followingcolloquy: "Q. Well, then, why did you go to Dr. Truchly? "A. Because of what Dr. Schlein said to me the last time he spoke tome. You'd have to have therapy for about a year. And, then, you're goingto have to have an arthritic operation.' "As a layman, I never heard of that term, arthritic operation. "And then, I thought that was, `Oh, oh!' That's when I called BridgeportHospital. I went out to see Dr. Truchly the very same day, I believe. "Q. What did he recommend? "A. He recommended the open reduction operation. "Q. What do you mean an open reduction operation? "A. He rebroke my bones and reset them. Then, you work from - youcut on both sides of the ankle. "Q. Why did he rebreak your bones and reset them? "A. Because something was wrong. "Q. What was that? What was wrong? "A. My leg was not healed."

5. Further along in the deposition the following colloquy took placeconcerning a conversation between the plaintiff and her attorney: "Q. Did he agree that you should sue Dr. Schlein when you first discussedit prior to April 15, 1973? "A.

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Before my operation in Bridgeport Hospital I think we did discussit to the point where it could be a suit against Dr. Schlein. "Q. He advised you it could be a suit? "A. Yes. He advised me. That would be the word for it. We discussedthe procedure along that route. "Q. That he would sue Dr. Schlein? "A. Yes. "Q. That was prior to the April 15, 1973 operation? "A. That's right. "Q. Did you ever discuss it with Dr. Truchly? "A. The suit I did not discuss with Dr. Truchly. What had happened tome prior to seeing Dr. Truchly, of course, I discussed it with him. Ithappened to me. "Q. Did you discuss the possibility of a claim against Dr. Schlein withDr. Truchly? "A. I don't think we discussed it as lawyers would discuss it. I think wediscussed it as far as patient and doctor, what happened."

6. The plaintiff's counsel filed his own affidavit - a practice wedo not encourage and strongly disapprove; see Dorazio v. M. B. FosterElectric Co., 157 Conn. 226, 228-29, 253 A.2d 22 (1968); confirming thefacts as revealed by the plaintiffs deposition, and further averring thatthe suit had not been initiated earlier because the plaintiff was unableto find a physician who would state that Schlein's treatment in thiscase had been negligent. The plaintiffs counsel claimed both at thehearing on the motion and at oral argument on this appeal that onlywhen a plaintiff secures a physician's opinion of whether malpracticehas occurred does the statute of limitations begin to run on a causeof action for medical malpractice. The operative language in thestatute unambiguously provides, however, that "[n]o action torecover damages . . . shall be brought but within two years fromthe date when the injury is first sustained or discovered or in theexercise of reasonable care should have been discovered." Althoughan expert opinion may lead to discovery of an "actionable harm"; Burnsv. Hartford Hospital, 192 Conn. 451, 460, 472 A.2d 1257 (1984); itdoes not follow that a plaintiff cannot reasonably discover an injuryabsent verification by a qualified expert.