IN THE COURT OF COMMON PLEAS of PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT of PENNSYLVANIA

CIVIL TRIAL DIVISION

SUSAN RACHLIN	:	
Plaintiff	:	AUGUST TERM, 1997
v.	:	
	:	
DAVID R. EDMISON, M.D., F.R.C.S.	:	
and	:	
FOCUS EYE CENTRE	:	
and	:	
20/20 LASER CENTERS	:	
and	:	
RICHARD B. PRINCE, M.D., F.A.C.S. :		
and	:	
TRI-COUNTY EYE PHYSICIANS	:	
and SURGEONS, P.C.	:	
Defendants	:	No. 2282

OPINION of the COURT

November 14, 2000 GOODHEART, J.

INTRODUCTION

By the time that this case was assigned to me for trial, all of the Plaintiff's claims except those asserted against Defendant 20/20 Laser Centers had been dismissed by other judges of this Court.

After presentation of the Plaintiff's case-in-chief, I granted a defense Motion for Compulsory Nonsuit and dismissed the Plaintiff's remaining claims; this Opinion addresses the Post-Trial Motions that followed.

BACKGROUND

In the spring of 1995, the Plaintiff (a long-term contact lens wearer) was referred to Harleysville Eye Associates by her regular eye doctor, because she had been experiencing "redness, discomfort and itching in both eyes with contact lenses" (Complaint, ¶19), and wanted to be evaluated for laser surgery that would eliminate her need for corrective lenses.

At Harleysville, she was examined by George E. White, III, D.O., who referred her to Defendant Tri-County Eye Physicians and Surgeons, so that Defendant Prince could perform several corneal topographies on her eyes, a necessary prerequisite to the laser procedure. After the topographies were done, the Plaintiff underwent bilateral photo-refractive keratectomy[1], on August 25, 1995, in Ottawa, Ontario, Canada, which was performed by Defendant Edmison at his Focus Eye Centre there[2].

After the first surgery, the Plaintiff returned to the care of Dr. White at Harleysville, but about six months later -- believing that her eyesight had not been sufficiently corrected by the first procedure -- she came under the care of Dr. Prince, and in May of 1996, he performed a second Laser PRK procedure on the Plaintiff at the offices of 20/20 Laser Centers, in Plymouth Meeting, PA[3].

According to the Plaintiff's Complaint, the second PRK procedure significantly worsened her vision, and on August 21, 1997, she commenced the instant lawsuit against Edmison, Focus, Prince, Tri-County and 20/20 Laser Centers.

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[1] Laser PRK is a procedure that was popular in the mid-1980's to improve the vision of eyeglass- or contact-lens-wearer to the point where corrective lenses would no longer be required. It has since been largely supplanted by Lasik®, a similar type of procedure.

[2] At the time, Laser PRK had not been approved for use in the United States.

[3] By this point, the Laser PRK procedure had become available in the United States.

Significantly, the Plaintiff's Complaint does **not** allege that her injuries resulted from the care that she received following the first procedure and before the second, and neither Dr. White nor Harleysville were named as Defendants in the action.

The Plaintiff requested – and obtained – Dr. White's treatment records in April, 1998. In his letter to Dr. White requesting those records, the Plaintiff's counsel specifically reassured Dr. White "…that [he was] not considered a Defendant in this action…."

The initial report of the Plaintiff's expert, Wayne F. Bizer, D.O., dated April 27, 1999, placed the blame for the Plaintiff's unsatisfactory outcome on the treatment rendered to her by Dr. Prince and Tri-County[4] following the first laser treatment, up to and including Dr. Prince's decision to perform the second surgery. This report mentioned Dr. White only in passing, and made no criticism whatsoever of his care.

On May 25, 1999, the Plaintiff took Dr. White's deposition. Dr. White was not represented by counsel.

By the time that the case was called for trial, all claims against Defendants Prince and Tri-County had been dismissed (as had all claims against TLC arising from the first surgery), and Dr. Bizer had submitted a second report, in which he – for the first time – blamed Dr. White for the Plaintiff's injuries.

TLC (by this time, the sole remaining Defendant) filed motions *in limine*, seeking to preclude evidence of negligence on the part of Dr. White or of TLC itself. I granted both motions, and prevented Dr. Bizer from testifying.

At the close of the Plaintiff's case in chief, I granted the Defendant's Motion for a

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[4] Dr. Bizer's first report was somewhat equivocal, but – because the Plaintiff ultimately did not rely on it – I need not decide whether it provided an adequate basis for testimony.

compulsory nonsuit; the instant timely Post-Trial Motion followed.

DISCUSSION

Though the Rules of Civil Procedure permit a Complaint to be amended at any time -- even during trial -- to conform to the evidence adduced, provided that the amendment does not enlarge or alter the substance of the Plaintiff's claims, by the time that Dr. Bizer submitted his second report, the statute of limitations had long since run on any care rendered to the Plaintiff by Dr. White.

The Plaintiff thus could not amend her Complaint to assert a claim against Dr. White directly, and -- indeed -- she did not even request leave to do so.

The Plaintiff claims, however, that Dr. Bizer's report was sufficient to support her claims against TLC based upon "corporate negligence" as defined in ***Thompson v. Nason Hospital***, 370 Pa. Super. 115; 353 A.2nd 1177 (1988)[5].

The Plaintiff also contends that Paragraph 46 of her Complaint contains allegations sufficient to support Dr. Bizer's proposed testimony[6], because the jury should have been allowed to decide whether Dr. White was acting as an agent of TLC at the time that he rendered allegedly-deficient care to the Plaintiff. That may be true, but Dr. Bizer's second report contained no

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[5] Subparagraphs (f), (j), (k), (l), (m), (n) and (o) of Paragraph 46 of the Complaint arguably plead "corporate negligence".

[6] The pertinent portion of Paragraph 46 of the Complaint reads as follows :

> "46. In the care and treatment of plaintiff, defendant, 2020 Laser Centers, either individually, or acting through their agents, representatives, servants and/or employees was negligent in the following respects…."

analysis of the independent duty owed to the Plaintiff by TLC, nor any specific examples of how that duty had been breached.

"Corporate liability" as defined in ***Thompson*** requires a Plaintiff to prove negligence in one of four enumerated areas; it is not merely a substitute for liability based upon agency in cases where agency cannot be proven. Because Dr. Bizer's second report does not set forth specific breaches of any duty owed to the Plaintiff by TLC, my decision to preclude his testimony as to "corporate liability" was appropriate.

In ***Alumni Association v. Sullivan, et al***, 369 Pa. Super. 1095; 535 A. 2nd 1095 (1987), a Superior Court panel set forth the basic pleading requirements in cases where the liability of a principal turns upon tortious acts of an alleged agent :

> "While it is unnecessary to plead all the various details of an alleged agency relationship, a complainant must allege, as a minimum, facts which : (1) identify the agent by name or description; and (2) set forth the agent's authority, and how the tortious acts of the agent either fall within the scope of that authority, or if unauthorized, were ratified by the principal." ***Id.***, at 605; 535 A.2nd, at 1100.

Given that Dr. White's name appears nowhere in the Plaintiff's Complaint, and that the Plaintiff maintained – as late as April, 1998 – that Dr. White was not considered a Defendant in this case, it is not "…clear from the complaint…" [***Perridge v. Horning***, 440 Pa. Super. 31, at 44; 654 A.2nd, at 1189 (1995)] that the reference to TLC's "agents" in Paragraph 46 of the Complaint was intended to include Dr. White.

For that reason alone, my decision to prevent Dr. Bizer from testifying as to Dr. White's negligence was proper, but this opinion would not be complete without a discussion of the inherent unfairness -- whether intended or otherwise -- of the last-minute change in the Plaintiff's theory

of this case.

At the time that Dr. Bizer issued his first report, on April 27, 1999, Dr. White had not yet been deposed, though Dr. Bizer did review Dr. White's records during the preparation of that report. Dr. White's deposition was taken on May 25, 1999. It was not until July 7, 1999 – when Dr. Bizer issued his second report – that Dr. White's care was called into question. Shortly thereafter – based upon the second report – Dr. Prince and his practice, Tri-County, obtained dismissal of all claims against them, which left the Plaintiff with an expert report that did not attribute the Plaintiff's injuries to negligence on the part of TLC, the sole remaining Defendant.

The Plaintiff was thus forced into the position of claiming not only that Dr. White -- who had not been previously identified by name or description as a negligent actor -- had caused the Plaintiff's injuries, but that he had done so in his capacity as an agent of TLC. This stretched the allegations of the Plaintiff's Complaint past the breaking point, resulting in the preclusion orders and the ensuing compulsory nonsuit.

It also appears, from the parties' post-trial submissions, that Dr. White had agreed to indemnify TLC from any claims resulting from his own negligence. Because Dr. White was never a Defendant in this case – and was, in fact, affirmatively reminded of that fact by the Plaintiff's counsel on at least one occasion, several months after the case was filed – allowing the Plaintiff to proceed against TLC based upon Dr. White's alleged negligence would have potentially placed Dr. White in the unhappy position of being held liable for his own negligence without having had an opportunity to defend himself.

I am unwilling to assume that TLC's defense of the action would have sufficiently inured to the benefit of Dr. White to have eliminated the obvious prejudice to Dr. White, had the case gone to trial. After all, if TLC lost the case and was forced to pay a judgment, TLC would be

able to look to Dr. White for reimbursement; under those circumstances, one might well question whether TLC would defend Dr. White as vigorously as it would defend itself.

CONCLUSION

For all of the reasons set forth above, my pre-trial rulings were correct; a compulsory nonsuit was thus the only proper outcome. I therefore respectfully suggest that my decision to deny post-trial relief should be affirmed.

BY THE COURT:

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Goodheart, J.