

# New Jersey Law Journal

VOL. CLX - NO. 3 - INDEX 177

APRIL 17, 2000

ESTABLISHED 1878

M 163 p 526  
38  
6

## Complex Litigation

### Expanding the Discovery Rule

State Supreme Court provides guidance in med mal and other complex cases

By **Abbott S. Brown** and **William L. Gold**

In a trilogy of recently decided cases, the New Jersey Supreme Court has provided substantial guidance to the bench and bar regarding the application of the discovery rule in medical malpractice and other complex cases. *Mancuso v. Neckles*, A-90-98; *Gallagher v. Burdette-Tomlin Memorial Hospital*, A-94-98; *Martinez v. Cooper Hospital*, A-102-98.

These decisions demonstrate the Court's unwavering commitment to the equitable interpretation of the statute of limitations.

A brief review of the facts of these cases demonstrates their significance. In *Mancuso*, one of the defendants, Dr. Clifford Beinart, interpreted mammograms in 1988 and 1989 as revealing a benign cyst in plaintiff Pia Mancuso. In 1991, Mancuso had a mammogram that revealed abnormalities. The radiologist recommended a follow-up, but defendant Dr. Peter Neckles failed to order any follow-up studies.

In July 1992, Mancuso's mammogram

---

The authors are partners at West Orange's Bendit Weinstock. Gold argued *Gallagher v. Burdette-Tomlin Memorial Hospital* *amicus curiae* for the Association of Trial Lawyers of America-N.J.

revealed she had cancer. In December of that year, the plaintiff learned of the abnormalities in the 1991 mammogram and that Neckles had ignored the recommendation to follow-up. In June 1993, the plaintiff consulted an attorney. One year later, the attorney consulted with an expert who opined that Neckles committed malpractice in 1991.

In July 1994, Mancuso filed suit against Neckles. In April 1996, Neckles' expert submitted a report stating that the 1989 mammogram revealed "a possible malignancy." This was the first indication that Beinart may have committed malpractice. In November 1996, the plaintiff's attorney consulted with, another expert who stated that Beinart committed malpractice. In July 1997, five years after Mancuso learned that she had cancer, she filed an amended complaint naming Beinart as a defendant.

The trial court dismissed the claim against Beinart and the Appellate Division affirmed. *Mancuso v. Neckles*, 316 N.J. Super. 128 (App. Div. 1998), rev'd, \_\_\_ N.J. \_\_\_ (2000).

#### ***Gallagher v. Burdette-Tomlin Memorial Hospital***

In *Gallagher*, plaintiff Anna Gallagher underwent surgery in May 1994 to alleviate an incontinence condition. The surgery was performed by Drs. Alexander Pagnani and Gene Braga. Following the procedure, Gallagher suffered from pain, and in August 1994, she was admitted to the hospital and a CT scan was performed. At this point, Gallagher was then under

the care of Drs. Neil Phillips, Howard Goldstein and Robert Steeb.

In September 1994, Drs. Phillips and Goldstein obtained another CT scan, which disclosed a large abscess. The Supreme Court observed that the presence of the abscess was the first indication to the plaintiff that "something had gone dramatically wrong." *Gallagher*, slip opinion at 4.

In May 1995 the plaintiff filed suit against Drs. Pagnani and Braga. In September 1995 plaintiff's expert stated that Steeb negligently failed to detect the abscess in the August 1994 CT scan, and Gallagher amended the complaint to name him as a defendant. In October 1997, Steeb's expert asserted that Drs. Phillips and Goldstein were negligent. This was the first indication to plaintiff that either Phillips or Goldstein may have been negligent, and the plaintiff promptly amended the complaint to name them as defendants.

The last-named defendants moved for summary judgment but the trial court denied the motion and the Appellate Division affirmed, expressly disagreeing with the decision in *Mancuso*. *Gallagher v. Burdette-Tomlin Memorial Hospital*, 318 N.J. Super. 485 (App. Div. 1999), aff'd, \_\_\_ N.J. \_\_\_ (2000).

#### ***Martinez v. Cooper Hospital***

In *Martinez*, plaintiff Olga Martinez's former companion — Carl Farrish — was assaulted in April 1993 and admitted to Cooper Hospital, where he died several days later. Martinez went to see Farrish at the hospital, and was told that he had died due to a "small hole in his intestines" and that the hospital staff "did all they could." *Martinez*, slip opinion at 3.

The death certificate indicated that the death was a "homicide." *Id.* at 4. In October 1995, Martinez's attorney received an anonymous letter from someone who worked in the hospital advising that the Farrish died due to a delay in treatment. In April 1996, the attorney advised Martinez of this letter and in January 1997 — 3.5 years after the date of the decedent's death but within two years of receiving the letter — Martinez filed suit against Cooper Hospital and several John Doe defendants.

The trial court denied Cooper Hospital's motion for summary judgment but the Appellate Division reversed and remanded for a *Lopez* hearing. After the hearing, the trial court dismissed with prejudice and the Appellate Division affirmed in an unpublished opinion.

In allowing all three claims to proceed, the Supreme Court first explained that the application of the discovery rule depends on the "type of case." *Mancuso*, slip opinion at 9.

This "type of case" involving medical malpractice requires special focus on the "nature of the information" possessed by the claimant. ... In cases of complex medical causation, it is not at all self-evident that the cause of the injury "(a) the fault of (b), a third party. Not only is the nature of the injury generally unclear, its very existence is frequently masked." In that context of masked injury and complex causation more is required than suspicion — in the sense of an uninformed guest or of speculation without some reasonable medical support — of a causal connection between a physical condition and chemical exposure [to start] the running of the statute of limitations. *Mancuso*, slip opinion at 9-10.

The Court added that "In order to start the statute of limitations running in this context of medical malpractice, more is required than mere speculation or an uninformed guess 'without some reasonable medical support' that there was a causal connection between Pia Mancuso's condition and Dr. Beinart's conduct." *Mancuso*, slip opinion at 10.

The justices emphasized that the

plaintiff was not dilatory and expressly rejected the Appellate Division's analysis that plaintiff should have "second-guessed" her experts. "Could or should she have insisted that her attorney seek further experts, and if so, how many? Lawyers retaining expert witnesses do not target the expert on a particular defendant, theory or cause of action. They seek the best advice possible." *Id.* at 13.

The *Mancuso* Court observed that the plaintiff's counsel was constrained by the rules of professional conduct which bar filing suit "unless the lawyer knows or reasonably believes there is a basis for doing so that is not frivolous." *Id.*, citing RPC 3.1. The Court also cited the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1, and noted that the "ethical requirement of a good faith belief in an actionable claim is reinforced by the recent enactment of the Affidavit of Merit Statute. N.J.S.A. 2A:53A-27." *Id.* The Court explained:

Thus, in addition to filing the action within two years of its accrual, a claimant must also have in hand or be able to obtain within 60 days the expert's opinion pursuant to the Affidavit of Merit Statute; otherwise the claim is precluded. Realistically, most attorneys and parties will want to have the report in hand before filing suit. *Mancuso*, slip opinion at 14.

The Court therefore held that the plaintiff's claim against Beinart should have been permitted to continue.

Applying these principles, we are satisfied that Pia Mancuso was reasonably unaware, until the 1996 deposition, that her injury was possibly due to the fault of Dr. Beinart. The "nature of the information" that she possessed did not suggest that the spread of her cancer may have been due to the fault of Dr. Beinart. In fact, two sets of medical professionals had confirmed that Dr. Beinart's initial diagnosis of a benign cyst in her right breast was correct. Indeed, Pia Mancuso received years of post-operative care from physicians at the world-renowned Memorial Sloan-Kettering Cancer Center.

Not one of those physicians alerted her to the possibility of fault on behalf of Dr. Beinart. The "quality of the requisite state of mind" that she possessed appeared blameless. *Id.* at 11.

The *Mancuso* Court concluded with the following instruction:

We are thus satisfied that when a patient has relied on competent expert advice that one or more of her treating physicians did not contribute to the patient's injuries, later assertions to the contrary by a competent expert would then provide the basis for an actionable claim. *Id.* at 14.

Thus, unless the defendant can meet the heavy burden of demonstrating actual prejudice because of the delay, the plaintiff's claims should be permitted to proceed. Indeed, in *Mancuso*, the Court held that Dr. Neckles' death did not meet the burden of demonstrating actual prejudice. *Id.* at 15.

Similarly, in *Gallagher*, the Supreme Court first explained that invocation of the discovery rule will depend on the "type of case." *Gallagher*, slip opinion at 7. "This 'type of case' involving medical causation demands special attention due to the intrinsic hardship facing a potential medical malpractice claim in determining fault." *Id.* The *Gallagher* Court rejected the defendants' reliance on *Baird v. American Optical*, 155 N.J. 54 (1998), stating that *Baird* did not create:

[A] new bright-line discovery rule for medical malpractice cases that starts the statute of limitations running for all potentially responsible parties when a patient knows that she has been injured and knows or has reason to know that someone has probably been at fault. Defendant relies on the language in *Baird*: "The discovery rule prevents the statute of limitations from running when injured parties reasonably are unaware that they have been injured, or, although aware of the injury, do not know that the injury is attributable to the fault of another." ... We disagree that that generic statement was ever intended to mean that statutes of limitations could not

run at different times for different defendants. *Gallagher*, slip opinion at 7-8.

In fact, the *Gallagher* Court explicitly held that the statute of limitations could run at different times for different defendants. *Id.* at 8. The Court gave the example of a patient who sues a doctor for malpractice arising out of surgery. "Assume that more than two years after the initial surgery, the patient undergoes corrective surgery at which time it is discovered that an object was left in her knee by one other than the surgeon whom she had sued. Would such a claim be precluded by the language in *Baird*? We think not." *Id.*

The justices concluded that when the patient is unaware that "the injury was due to the fault or neglect of an identifiable individual or entity," the patient is entitled to rely on the discovery rule. *Id.*

No readily apparent indication of Drs. Phillips and Goldstein's potential contribution to the patient's medical deterioration materialized until [Dr. Steeb's expert] brought the failure to treat plaintiff's infection to light. Competent experts retained by [plaintiff] did not express any opinion on the care and treatment of plaintiff provided by Drs. Phillips and Goldstein. *Id.*

The Court emphasized that "The unfairness of denying plaintiff leave to amend her complaint was compounded in this case by the discovery posture taken by the initial defendants." *Id.* at 9. The justices observed that although the plaintiff filed suit in May 1995, the initial defendants did not contend, prior to the expiration of the statute of limitations, that any other doctor may be liable:

Not until the statute of limitations had passed did Dr. Steeb's expert suggest the fault of the after-care physicians. Invoking the principles of *Young v. Latta*, 123 N.J. 584 (1991) (that require parties seeking to diminish their share of fault to "give prompt notice"), the trial court reasoned that it would be especially unfair to deny plaintiff the benefit of the discovery rule. *Id.* at 9.

Similarly, the *Martinez* Court held that the statute of limitations does not begin to accrue until the plaintiff is aware that the injury is "attributable to the fault of another." *Martinez*, slip opinion at 8. The Court explained the essence of the discovery rule is that:

[W]here, within the limitations period, a plaintiff knows of an injury and that the injury is due to the fault of another, he or she has a duty to act. However, those cases also stand for the proposition that where a plaintiff knows of an injury, but fault is not self-evident or implicit in the injury itself, it must be shown that a reasonable person would have been aware of such fault in order to bar the plaintiff from invoking the discovery rule. *Id.* at 12.

In permitting *Martinez* to pursue the claim, the Court observed that it was reasonable for her to believe that Farrish died from the beating. The Court noted that the death certificate stated that the cause of death was a homicide and that the staff at the hospital told the plaintiff "they did all they could," thereby misleading the plaintiff. The *Martinez* Court explained that although the plaintiff could have immediately obtained the extensive medical record:

It is not necessary every time a person dies in a hospital for his or her relatives to immediately suspect malpractice. ... The rule accepted by the lower courts, that Ms. Martinez was unreasonable because she did not obtain and analyze [the decedent's] medical records even though she was not suspicious, encourages mistrust and essentially pits patients against their physicians even in cases where there is not even a trace of negligence apparent. *Id.* at 16.

The Court distinguished *Martinez* from a case where an otherwise healthy individual undergoes elective surgery and dies. In such cases "some inquiry would be required by a reasonable person in such circumstances." *Id.* at 16-17. The Court therefore allowed *Martinez* to pursue the

claim.

We are satisfied that under presently existing standards governing the discovery rule, Ms. Martinez acted in an objectively reasonable way in connection with [the decedent's] death. She believed the official version of events and had no duty to investigate further. ... She did not delay but took timely action as soon as she received the information in the anonymous letter. No issue of prejudice to the Hospital was raised in this appeal. The judgment of the Appellate Division is reversed. *Id.* at 17.

It should be noted that both plaintiff's counsel and defense counsel in *Martinez* have confirmed in telephone interviews that the plaintiff therein was only pursuing a survival claim and did not file a wrongful death claim. Therefore, the Supreme Court did not need to discuss N.J.S.A. 2A:31-3, which requires that a claim for wrongful death must be brought within two years after the date of death and does not contain the same accrual language as N.J.S.A. 2A:14-2.

Similarly, the Court did not need to cite *Presslaff v. Robins*, 168 N.J. Super. 543 (App. Div. 1979), declining to apply the discovery rule to a wrongful death case.

### Analysis

The lesson to be learned from this trilogy of cases is that when plaintiff's counsel in a medical malpractice or other similarly complex case obtains the relevant records and has the records reviewed by a competent expert, the plaintiff will not be barred from pursuing a claim against a defendant whose culpability is discovered after what would otherwise be the expiration of the statute of limitations. This is particularly true where the defendants fail to assert the culpability of the late-named defendants on a timely basis.

These decisions are a continuation of the trend of recent Supreme Court cases that recognize the practical realities of litigating complex cases involving medical causation, and further the Court's goal of avoiding the dismissal of meritorious cases for mere technical reasons. ■