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Plaintiffs Get Jump On Deposing Defendants

Judge's ruling riles defense attorneys

By THOMAS B. SCHEFFEY

In the first in-depth written decision on the point, Waterbury Superior Court Judge Jane Scholl has concluded that a plaintiff can file a notice of deposition with the initial complaint. This tactical advantage gives the plaintiff first crack at digging up — or nailing down — key information in the case.

Scholl ruled that the Practice Book rules "do not restrict when notices of depositions may be served," so long as the deposition takes place at least 20 days after the case has formally begun.

The decision is not sitting well with defense lawyers. This "essentially means that a defendant can never take a plaintiff's deposition first, which seems unfair," said David J. Robinson, one of the attorneys working on the medical malpractice case over which Scholl is presiding.

Scholl ruled Aug. 6 in a medical malpractice case brought by clients of Silver, Golub & Teitell, a prominent Stamford plaintiffs' firm. Partners Richard A. Silver and Peter M. Dreyer used the procedural one-two punch when they served New Milford gynecologist Orlito A. Trias last fall, a on behalf of their clients, Allison and Michael Downs.

Even before Trias had a defense lawyer, he was served with the complaint and a notice of deposition on Sept. 6, 2007, with a "return day" of Oct. 2. The return day is, by practice rule, a Tuesday, at least four weeks after the complaint is filed in court, by which the plaintiff must have filed proof that the writ, summons and complaint were all properly served on the defendant. It's the official starting date of a civil action.

In this case, Dreyer set the deposition for Nov. 5, 2007.

Contributed Photo

Stamford attorney Peter M. Dreyer said other judges have accepted the notion that a notice of deposition can be filed along with the original complaint.

Start Of Standoff

However, on Oct. 18, Trias's malpractice insurance carrier called Silver, Golub and said it had just received the complaint, and requested time to secure counsel. It asked to postpone the deposition, and the plaintiffs' lawyers agreed.

The doctor's malpractice carrier selected Madonna Sacco, a feisty med-mal defense lawyer who was then at Stratford's Bai, Pollock, Blueweiss & Mulcahey (and who since has moved to the Hartford firm known as Danaher, Lagnese & Sacco). After postponing the scheduled Nov. 5 deposition of Dr. Trias, Sacco in late November filed notices to depose the plaintiffs on Jan. 21. When that day came, plaintiffs' lawyer Dreyer called to say his clients wouldn't appear because he had served Trias first, and had priority over the defendant under common Connecticut practice.

On April 2, 2008, Robinson wrote Silver a one-line letter, saying the defense team did not "intend to produce Dr. Trias for a deposition until the depositions of the plaintiffs have been completed." The battle was joined.

Firing off a six-page motion to compel deposition April 7, Dreyer argued that Practice Book rule 13-26 allows a party to take depositions "at any time after the commencement of the action."

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Notice A Nullity?

Sacco objected to Dreyer's motion to compel by citing Practice Book 13-2, which states that discovery can only take place in a pending action.

Because the deposition notice was served before the civil action's official starting day, Sacco argued that it was a legal nullity. Sacco reasoned that she had filed the first legitimate notice of deposition after the case was a "pending action," and thus should have priority in deposing the plaintiffs first.

She contended that Silver had been criticized by New Haven Superior Court Judge David W. Skolnick in a 2003 case for the practice of filing the deposition notice and complaint at the same time. While Skolnick allowed it, he said he didn't want his decision to be viewed as a precedent, Sacco noted.

Dreyer countered that Skolnick's ruling upheld the dual filing as legitimate. He also cited a statement from the bench by then-Superior Court Judge Chase T. Rogers, noting that it makes a certain amount of sense for the defendant to be deposed first, particularly in a malpractice case. "[T]he plaintiffs are not going to be contributing much to the true issues in the case," she noted, such as whether there was a breach of the medical standard of care, or whether there was proximate cause with regard to the injuries.

Misquoting Rule?

In his reply to Sacco's objection, Dreyer wrote that she simply misquoted Rule 13-2 and took it out of context. Furthermore, there is no statute, Practice Book rule or case law that favors having the plaintiffs deposed first, he added.

Sacco, in turn, wrote that since the plaintiffs have the burden of proving their malpractice case, they should be deposed first. In this case, she said, Dr. Trias should be "given the fair opportunity to find out what this case is about." (Plaintiff Allison Downs contends that she developed ovarian cancer after Trias performed a partial hysterectomy, and that he had negligently failed to remove both of her ovaries.)

In lively oral argument before Scholl July 21, Sacco argued that the practice of filing a deposition notice simultaneously with the complaint was never intended by the legislature, the Practice Book or by any common law rationale. Although Dreyer contends his firm doesn't always seek a defendant's deposition from the start, Sacco said, "in all of the Silver, Golub & Teitell cases where Mr. Silver is the controlling attorney, it happens." She said: "The trend they're trying to create in a very astute and formidable way is to take advantage of a loophole. It's not what was ever intended."

Dreyer stuck to his original argument that the benefits of practice rules can fall unevenly to one party or the other, but they must be followed nonetheless.

Judge's Opinion

Scholl, in her written opinion, dismissed the language of Practice Book Rule 13-2, outlining the scope of discovery, as inapplicable. A notice of deposition is not discovery, so it needn't be delayed, like other discovery, until a case is pending, the judge wrote. What is persuasive is the language of 13-26, which states that "at any time after the commencement of the action or proceeding" a party may "take the deposition of any person, including a party."

And case law is clear that commencement of an action is not the return date, Scholl concluded. Commencement of action occurs once the writ, summons and complaint have been served, she stated.

David Robinson, one of Sacco's partners at Danaher, Lagnese, said Scholl's ruling is tougher-minded than some remedies suggested by her peers. "This is an issue that's arisen before, and in other cases, judges have allowed us to depose both sides on the same day," said Robinson.

Allowing plaintiffs to file deposition notices with the complaint, he said, "essentially means that a defendant can never take a plaintiff's deposition first, which seems unfair. In ordinary litigation, the plaintiff has the burden of proof and has to put on their case first. Here they're doing just the opposite." ■