SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Eileen Branstein PART 6

0123543/2001

SANTOS, JOSE
VS
ST. VINCENT'S HOSPITAL

SEQ 2

AMEND

INDEX NO. 123543/01

MOTION DATE 8/11/05

MOTION SEQ. NO. 02

MOTION CAL. NO. 13

The following papers, numbered 1 to 3 were read on this motion to/for amend complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum.

FILED
MAR - 3 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2-24-05

EILEEN BRANSTEN J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

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JOSE SANTOS, as Administrator of the Estate of DAUDI SANTOS, deceased infant, and JOSE SANTOS, Individually,

Plaintiffs,

-against-

ST. VINCENT'S HOSPITAL AND MEDICAL CENTER OF NEW YORK, RITA FISCHER, M.D., PO CHING FONG, M.D., ELIZABETH SETON CHILD BEARING CENTER, KATHERINE CORONA, "JANE DOE" and "MARY DOE",

Defendants.

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Index No.:123543/01
Motion Date: 02/01/05
Motion Seq. No.: 002
Motion Cal. No.: 013

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3025(b), plaintiffs Jose Santos ("Mr. Santos"), as Administrator of the Estate of Daudi Santos ("Daudi"), deceased infant, and Mr. Santos, Individually, move for permission to file and serve a supplemental summons and amended complaint adding Dea Alves-Santos ("Mrs. Santos") as a plaintiff. Defendants St. Vincent's Hospital and Medical Center of New York ("St. Vincents"), Rita Fischer, M.D. ("Dr. Fischer") and Po Ching Fong, M.D. ("Dr. Fong") oppose this motion.[1]

[1] Pursuant to a stipulation of the parties, plaintiffs discontinued against the Center and Dr. Corona. Therefore, they are no longer parties to this action. Aff., at ¶ 5.

Background

On December 16, 1999, Mrs. Santos gave birth to Daudi at St. Vincents. Plaintiffs' Affirmation in Support of Motion ("Aff."), at ¶ 3. Daudi, a full-term baby, was born alive. Defendants' Affirmation in Opposition ("Opp."), Ex. B, at ¶ 31 (Verified Complaint). Shortly after the delivery, a nurse allegedly negligently used a vacuum extractor on Daudi, which deprived him of oxygen and caused his death. Aff., at ¶ 3.

On January 14, 2002, plaintiffs commenced this action claiming that defendants negligently caused Daudi to asphyxiate and die. Aff., at ¶ 3. Mrs. Santos was originally a party to the action and claimed pain and suffering due to defendants' negligence. Opp., at ¶ 3.

On December 19, 2002, the Court granted plaintiffs leave to amend their complaint to include Jose Santos as Administrator of Daudi's estate. Aff., at ¶ 4. Mrs. Santos also voluntarily discontinued her claims because she had no individual claims for pain and suffering. *Id.*

Plaintiffs now move for leave to amend their complaint to add Mrs. Santos as a plaintiff based on the Court of Appeals' recent decision in *Broadnax v. Gonzalez*, 2 N.Y.3d 148 (2004). They argue that they should be permitted to add Mrs. Santos as a plaintiff even though the statute of limitations has expired because her claim relates back to the original filing date under CPLR 203(f). Plaintiffs' Reply ("Reply"), at ¶ 13. Furthermore, they argue

that Mrs. Santos is not barred from bringing this action even though she previously discontinued her claims because waiver is the relinquishment of a known right and Mrs. Santos did not have a right to bring this suit – *Broadnax* had not yet been decided – when she discontinued her claims. Reply, at ¶ 10.

Defendants oppose this motion, arguing that *Broadnax* does not apply because Daudi was born alive. Opp., at ¶¶ 4,5. Further, defendants urge that *Broadnax* and its progeny should not apply retroactively to cases filed before it was decided. Opp., at ¶ 4. Additionally, they argue that Mrs. Santos waived any claims that she might have had in this action when she voluntarily discontinued them. Opp., at ¶ 3b. Finally, defendants contend that Mrs. Santos's claim is barred by the statute of limitations. *Id.*

Analysis

With regard to prenatal medical treatment, medical professionals owe a separate duty of care to the mother and the developing fetus. *Woods v. Lancet*, 303 N.Y. 349, 357 (1951). Thus, when a doctor negligently causes a fetus to suffer permanent injuries, the infant, if later born alive, has a cause of action against the doctor. *Id.* Likewise, if a doctor commits medical malpractice against the mother's person that causes her physical injury, she has a separate cause of action against the doctor. *Endresz v. Friedberg*, 24 N.Y.2d 478, 484 (1969).

Until 2004, however, neither a mother nor her fetus had a cause of action if a doctor negligently caused a miscarriage or stillbirth unless the mother sustained actual physical injury. *Tebbutt v. Virostek*, 65 N.Y.2d 931 (1985). For example, in *Fahey v. Canino*, 2002 WL 484164 (Sup. Ct., Broome Cty. March 5, 2002), Supreme Court held that a mother had no right to recover for pain and suffering after delivering an eighteen-week-old fetus into her own hands while sitting on the toilet because she suffered no permanent injuries and her emotional distress was only out of regard for her fetus. *Id.*, at * 1.

In 2004, the Court of Appeals considered *Fahey* and a similar case in *Broadnax v. Gonzalez*, 2 N.Y.3d 148 (2004). Reversing the courts below, the Court of Appeals held for the first time that, even in the absence of independent physical injury, a mother can recover against a negligent doctor for the emotional distress of miscarrying or having a stillbirth.[2] *Id.*, at 156. The court reasoned, quoting Judge Kaye's dissent in *Tebutt v. Virostek*, 65 N.Y.2d, at 940, that if, "the fetus cannot bring suit, 'it must follow in the eyes of the law that any injury here was done to the mother.'" *Id.*, at 154.

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[2] It is unclear whether the fetus in *Fahey* was stillborn or alive. The Court of Appeals makes no mention of a live birth and in its holding, twice uses the phrase "miscarriage or stillbirth." *See, Broadnax v. Gonzalez*, 2 N.Y.3d, at 151, 155. Supreme Court in *Fahey*, however, stated that plaintiff delivered a "live, 18-week-old fetus," who later died. *Fahey v. Canino*, 2002 WL 484164, at 1. Because the Court of Appeals does not specifically address a live birth, the bench and bar can only assume, based on the court's explicit language, that its holding is limited to situations involving miscarriage and stillbirth. *See, Kotler v. Swerksy*, 10 A.D.3d 350, 351-52 (2d Dep't 2004) (applying *Broadnax* to case involving stillbirth).

Cases following *Broadnax* have slightly expanded this rule to authorize recovery for a mother's emotional distress not only when fetuses die in utero, but also in cases in which an infant was born severely impaired because of negligence inflicted upon the fetus while in utero.

For example, in *Sheppard-Mobley v. King*, 10 A.D.3d 70 (2d Dep't 2004), defendants attempted to terminate plaintiff's pregnancy with methotrexate, but did not administer enough of the drug. As a result, plaintiff gave birth to an infant with serious birth defects. Plaintiff alleged that defendants negligently managed and cared for her during her pregnancy and that their failures caused her pain and suffering. The court held that, the "duty owed to the mother remains the same whether the fetus is stillborn or is born in an impaired state. The duty is not vitiated by virtue of the live birth of a child in a severely impaired state." *Id.*

Likewise, in *Stuart v. New York City Health and Hospital Corp.*, 2005 WL 320675 (Sup. Ct. Queens Cty. Jan. 10, 2005), plaintiffs claimed that defendant doctors negligently provided medical care to the mother while she was pregnant and, as a result, her child was born with brain damage and cerebral palsy. *Id.*, at 1. The court permitted plaintiffs to amend their complaint to add a cause of action for the mother, stating that the purpose of *Broadnax* was "to extend the duty of care medical professionals owe to the expectant mother, as a patient, whose health is linked to the fetus." *Id.*, at 2.

Plaintiffs argue that they should be permitted to add Mrs. Santos as a plaintiff because now she has a cause of action under *Broadnax*. But here, unlike the fetuses in *Broadnax*, Daudi was born healthy and alive. There was no miscarriage or stillbirth. Defendants allegedly injured Daudi shortly after he was born, not when he was in utero. Therefore, this case is also readily distinguishable from *Shepard-Mobley* and *Stuart*, in which defendants' negligence was committed upon the mother's person during her pregnancy and caused harm to the infant in utero. In the end, Daudi's injuries were not caused while Mrs. Santos was carrying him. The alleged negligence was inflicted independent of Mrs. Santos; it was inflicted upon Daudi.

Instead, this case is much more analogous to cases in which parents have witnessed harm or death to their children.

For example, in *Shaw v. QC-Medi New York, Inc.*, 10 A.D.3d 120 (4th Dep't 2004), plaintiff's daughter suffocated on her ventilator for several minutes before being rushed to the hospital where she recovered. *Id.* Plaintiff mother witnessed this event, and claimed that defendants' failure to attend to her daughter caused her great anxiety and stress, and exacerbated her diabetes. *Id.* The Appellate Division held that the mother did not have a cause of action against defendants because defendants provided the care to her daughter, not her. *Id.* It concluded that, "Under common law, defendants have no duty to protect plaintiffs from emotional injuries sustained as the result of witnessing the allegedly negligent

care provided to decedent by defendants. *** To permit liability under these circumstances would create untold numbers of claims by third parties." *Id.*

Similarly, in *Osborn v. Andrus Pavilion of St. John's Riverside Hosp.*, 100 A.D.2d 840 (2d Dep't 1984), plaintiff mother wanted to recover for her emotional distress, which allegedly resulted from defendants' negligence in causing the death of her six-year-old infant. The court dismissed the mother's action, stating that defendants did not breach any duty of reasonable care owed to her because they allegedly hurt the infant, not her. *Id.*, at 841.

Finally, in *Landon v. New York Hosp.*, 101 A.D.2d 489 (1st Dep't 1984), parents brought a medical malpractice action against defendants for their own pain and suffering, alleging that they suffered fear of contracting meningitis as a result of defendants' alleged failure to timely diagnose their child with the disease. The Appellate Division held that the parents had no cause of action because defendants treated the child, not the parents. Specifically, the court stated, "It has repeatedly been held that there is no recovery in this State for psychic or emotional injuries suffered as a result of observing injury inflicted upon one's child." *Id.*, at 490.

In this case, Mrs. Santos is seeking recovery because she allegedly watched defendants improperly suction Daudi, which caused him to asphyxiate. Although defendants previously treated Mrs. Santos in pregnancy, it was their care of Daudi after his birth that

allegedly caused his death. Defendants are not accused of causing Daudi's death through their negligent treatment of Mrs. Santos while he was in utero.

This distinction is an important one. New York case law establishes that in analyzing a mother's ability to recover for emotional distress based on injuries to her child, courts must draw a line between injuries caused in utero and those inflicted after the child was born. Otherwise, courts will open the gates of recovery for mothers to recover *anytime* something happens to their children. "In any case of medical malpractice, it is foreseeable that many individuals at various degrees of closeness to the directly injured party will suffer emotional distress. If such foreseeability is held to create or define a duty as a foundation of liability, it may well open our courts to an inundation of claims for emotional injuries extending far afield of the epicenter of the injury." *Landon v. New York Hosp.*, 101 A.D.2d, at 491.

Allowing mothers to recover for emotional distress based on their children's injuries only when they are caused in utero is a sound rule. After all, injuries inflicted in utero are inflicted on a fetus directly through its mother. After birth, however, the child has its own separate existence and its injuries are independent. They are not effected through its mother.

In this case, defendants' alleged medical malpractice was committed upon the child and the mother – who was not a conduit for the injuries – should not be permitted to recover merely based on her relationship to her child. Indeed, the court in *Broadnax* held that the treating physician owes no duty of care to the expectant father, *see*, *Broadnax v. Gonzalez*,

2 N.Y.3d, at 155, n.3, and under circumstances such as these there is no basis to distinguish between a mother and a father.

Since Daudi was injured after birth and not in utero, Mrs. Santos has no cause of action and her request to be added as a plaintiff must be denied. Because Mrs. Santos has no cause of action, this Court need not consider defendants' statute of limitations and waiver objections.

Accordingly, it is

ORDERED that plaintiff's motion to amend her complaint is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, NY
February 24, 2005

ENTER

Hon. Eileen Bransten