NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3256-06T3

FABIO VERGARA, deceased,
by the Administratrix of his
Estate, Blanca Cardona,

Plaintiff-Appellant,

v.

DR. MICHAEL P. STEIN, M.D.,

Defendant,

and

SAINT CLARE'S HOSPITAL,

Defendant-Respondent.

Submitted January 28, 2008 - Decided February 20, 2008

Before Judges S.L. Reisner, Baxter and King.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, L-724-03.

Bongiovanni, Collins & Warden, attorneys for appellant (John B. Collins, on the brief).

Sachs, Maitlin, Fleming & Greene, attorneys for respondent Saint Clare's Hospital (Raymond J. Fleming and Margaret Skarbek Stefandl, on the brief).

PER CURIAM

Plaintiff, the Estate of Fabio Vergara, appeals from an April 27, 2005 trial court order granting summary judgment dismissing the Estate's claim against St. Clare's Hospital, based on a claim that the Hospital failed to ensure that a physician with admitting privileges had malpractice insurance.[1] We affirm.

I

Plaintiff's complaint stems from alleged malpractice committed by Dr. Michael P. Stein, a physician with admitting privileges at St. Clare's Hospital. In compliance with the Hospital's by-laws requiring physicians to provide proof of malpractice insurance, Dr. Stein provided proof of "claims-made" malpractice insurance for the period March 2000 to March 2001; "claims-made" insurance covered claims submitted during the life of the policy. Dr. Stein did not pay for "tail coverage,"[2] which under the terms of the policy he could have purchased within thirty days of the end of the policy period or by March 31, 2001.

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[1] Fabio Vergara died during the pendency of this litigation. We will refer to his estate as "plaintiff."

[2] The Hospital's by-laws required attending physicians to have medical malpractice coverage but did not specify that they had to have "tail coverage," which covers claims made after a policy has expired.

Dr. Stein later obtained claims-made policies for March 1, 2002 to March 1, 2003, and for August 1, 2003 to August 1, 2004. He provided the Hospital with proof of this insurance. However, it is undisputed that Dr. Stein did not purchase claims-made malpractice coverage for the period March 1, 2003 to August 1, 2003. He contended at his deposition that his policy expired on March 1, 2003, and he had difficulty finding replacement insurance.

The alleged malpractice occurred on May 30, 2000. However, plaintiff did not file suit against Dr. Stein until March 12, 2003, and Dr. Stein was not served with the complaint until July 7, 2003.[3] Thus, according to plaintiff, the claim associated with plaintiff's complaint fell within the March-August 2003 gap in Dr. Stein's claims-made malpractice coverage. On January 16, 2004, plaintiff filed an amended complaint naming the Hospital as a defendant, premised on the Hospital's alleged failure to require Dr. Stein to provide proof of malpractice insurance coverage.

[3] Although Judge Langlois dismissed plaintiff's complaint against the Hospital in 2005, plaintiff eventually obtained a default judgment of over $1.9 million against Dr. Stein on January 9, 2007. This appeal was filed thereafter, since there was no final order in the case until 2007. However, the January 9, 2007 judgment against Dr. Stein is not the subject of this appeal.

The Hospital filed a motion for summary judgment, contending that it did not owe plaintiff a duty to require Dr. Stein to have malpractice coverage. Alternatively, the Hospital argued that under Sparks v. St. Paul Insurance Company, 100 N.J. 325 (1985), and Hodge v. Garrett, 263 N.J. Super. 278 (App. Div. 1993), plaintiff's claim should be deemed covered by the March 2000 policy. In a reply brief filed on January 27, 2005, plaintiff's counsel agreed with the latter point, but contended that the court could not reach the issue because the insurer was not a party to the action. Plaintiff urged that "a Third Party Complaint should be filed against the Western Indemnity Insurance Company seeking a Declaratory Judgment that the 'claims-made' [policy] should be converted to [an] 'occurrence' policy, because of the [policy's] inappropriate retroactive date." No such complaint was filed, perhaps because the insurer had become insolvent.

In a written Statement of Reasons dated April 27, 2005, Judge Langlois concluded that the hospital had no duty to ensure that Dr. Stein had medical malpractice insurance, relying on our decision in President v. Jenkins, 357 N.J. Super. 288 (App. Div. 2003), aff'd in part and rev'd in part on other grounds, 180 N.J. 550 (2004). Judge Langlois also concluded that there was no basis to infer a private right of action based on

legislation requiring doctors to have medical malpractice coverage, N.J.S.A. 45:9-19.17, or based on Board of Medical Examiners regulations providing for sanctions to be imposed on doctors who do not obtain insurance, N.J.A.C. 13:35-6.18.

II

On this appeal plaintiff raises the following contention:

> POINT I: WAS SUMMARY JUDGMENT ERRONEOUSLY ENTERED IN FAVOR OF THE DEFENDANT, ST. CLARE'S HOSPITAL, BASED UPON THE CONCLUSION OF THE TRIAL COURT THAT N.J.S.A. 45:9-19.17 DOES NOT SUPPORT A PRIVATE CAUSE OF ACTION AGAINST THE HOSPITAL FOR GRANTING DR. STEIN PRIVILEGES TO PERFORM SURGERY WITHOUT APPROPRIATE MEDICAL MALPRACTICE LIABILITY INSURANCE COVERAGE?

We review the trial court's grant of summary judgment de novo, using the same standard the trial court uses to adjudicate a summary judgment motion. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Employing that standard, we conclude that the case was ripe for summary judgment and that Judge Langlois correctly decided the case as a matter of law. We affirm substantially for the reasons stated in Judge Langlois' cogent opinion. We add the following comments.

In President v. Jenkins, supra, we held that a hospital had no duty to its patients to ensure that a physician with

admitting privileges had current malpractice insurance. We noted that, at the time of the alleged malpractice, there was no legislation requiring physicians to have malpractice coverage. More significantly, we concluded that it was for the Legislature to decide whether to impose on hospitals the duty to ensure that their physicians had malpractice insurance, and the Legislature had not adopted such a requirement. 357 N.J. Super. at 316-17.

Since President was decided, the Legislature still has not adopted any legislation either requiring hospitals to enforce the insurance requirement or permitting a private cause of action against hospitals that do not do so. Moreover, in light of the existing statutory limitation on the liability of non-profit hospitals for malpractice, N.J.S.A. 2A:53A-8, we consider it highly unlikely that the Legislature would have intended to allow plaintiffs to collect multi-million-dollar verdicts from hospitals based on their failure to ensure that doctors have malpractice insurance. Finally, we note that the Florida precedent on which plaintiff relies has been reversed by the Supreme Court of Florida, which recently held that there is no private right of action against a hospital for failing to ensure that a physician with admitting privileges has malpractice insurance. See Horowitz v. Plantation Gen. Hosp., 959 So.2d 176 (Fla. 2007).

We decline plaintiff's invitation to reconsider the President opinion insofar as it addressed the issue of hospital liability. We also note that, in light of plaintiff's concession in the trial court that Dr. Stein should be entitled to malpractice coverage, it is highly unlikely that plaintiff could prove that the Hospital's actions or omissions were the proximate cause of plaintiff's loss.

Affirmed.