IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JEANETTE BALINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. N13C-02-246 PRW**
	)	
DARRELL J. BAKER, ESQUIRE,	)	
DARRELL J. BAKER, ESQUIRE,	)	
P.A., a Delaware Professional	)	
Association, and	)	
ABER, GOLDLUST, BAKER	)	
& OVER, a Delaware association	)	
of law practices,	)	
	)	
Defendants.	)	

Submitted: August 5, 2013
Decided: August 22, 2013

OPINION

Upon Defendants' Motion to Dismiss Claim on the Pleadings
GRANTED.

Richard M. Welsh, Esquire, Kevin W. Gibson, Esquire, Gibson & Perkins P.C., Wilmington, Delaware, Attorneys for Plaintiff.

Chase T. Brockstedt, Esquire, Baird, Mandalas, Brockstedt, LLC, Lewes, Delaware, Gregory S. Hyman, Esquire, Amy B. Goldstein, Esquire, (*pro hac vice*), Kaufman, Dolowich & Voluck, LLP, Hackensack, New Jersey, Attorneys for Defendants.

WALLACE, J.

I. INTRODUCTION

Defendants Darrell J. Baker, Esquire, Darrell J. Baker, Esquire, P.A., and Aber, Goldlust, Baker & Over (collectively, the "Defendants") filed a motion for judgment on the pleadings in this legal malpractice action. In the Complaint, Plaintiff Jeanette Balinski claims Mr. Baker, in his capacity as a Delaware lawyer and while employed by Defendant law firms, breached his professional duty of care and committed professional negligence. He did so, she claims, in the course of representing Mrs. Balinski in a personal injury action arising from an automobile accident in which Mrs. Balinski was a passenger in a vehicle driven by her husband. Mr. Baker advised her to sign a settlement agreement and release (the "Release") which Mrs. Balinski complains, by its terms, now prevents her from pursuing a negligence action against Dr. Morris Peterzell, one of the physicians who treated her for injuries resulting from the traffic accident, and Plaza Medical Associates ("Plaza Medical"), Dr. Peterzell's employer.

Defendants say that the Release does not cover Dr. Peterzell or Plaza Medical. Because neither Dr. Peterzell nor Plaza Medical were named in the Release, named in the underlying suit, nor received any consideration in exchange for the Release, Defendants argue Mrs. Balinski is not barred from filing her medical negligence claim against them. At oral argument,

Plaintiff's counsel suggested that the instant claim in this suit is warranted because Mrs. Balinski has received advice from several medical malpractice attorneys who each purportedly believe the Release bars a negligence suit against Dr. Peterzell and Plaza Medical. Notably, Mrs. Balinski has never filed suit against Dr. Peterzell or Plaza Medical, therefore neither party's representation of the viability of the medical negligence claim has been tested.

Defendants conceded at oral argument that even if their motion were granted, this case would continue on Mrs. Balinski's additional claims not related to her allegedly forfeited right to sue Dr. Peterzell and Plaza Medical.[1] Because the Court finds the Release does not cover Dr. Peterzell or Plaza Medical, Defendants' motion is **GRANTED** as to that claim of negligence.

II. FACTUAL BACKGROUND

On June 25, 2010, Jeanette Balinski was a passenger in her own vehicle driven by her husband, Joseph Balinski, when they were involved in a two-car collision in the southbound lane of DuPont Highway in

[1] For instance, Mrs. Balinski has a separate claim alleging that Mr. Baker committed an act of malpractice by "[a]dvising [Mrs.] Balinski to settle the matter . . . when the amount [ ] received in the settlement did not cover existing unpaid medical expenses." Complaint at ¶ 52(b). That claim and any others unrelated to the Release are unaffected by this motion.

Wilmington, Delaware.[2] In the collision, Mrs. Balinski injured her chest and right shoulder. She filed a personal injury claim with Nationwide Mutual Insurance ("Nationwide") and hired Mr. Baker to represent her in connection with that benefits application.[3] MRI tests revealed that Mrs. Balinski had torn her right rotator cuff.[4] Although her treating physician recommended surgery to correct the tear, Mrs. Balinski couldn't have the operation until August 2011, more than a year later.[5] Following the surgery, Mrs. Balinski's treating physician recommended physical therapy to rehabilitate her shoulder.[6]

In September 2011, Mrs. Balinski scheduled an appointment with MX Physical Therapy, but Mr. Baker's paralegal contacted Mrs. Balinski while she was attempting to check in at MX and directed her to instead see Dr. Peterzell at Plaza Medical, located in the same building on a different floor.[7]

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2 Complaint at ¶¶ 5-6

3 *Id.* at ¶¶ 7, 10-11 .

4 *Id*. at ¶ 13. Mrs. Balinski had previously injured the same rotator cuff, which was repaired through arthroscopic surgery on December 2, 2009. *Id*. at ¶ 14.

5 *Id*. at ¶¶ 18-19.

6 *Id*. at ¶ 20.

7 *Id*. at ¶¶ 22-23.

Mrs. Balinski claims she did not receive adequate physical therapy over the course of approximately two months of treatment with Dr. Peterzell.[8] She also claims that in November 2011, Dr. Peterzell negligently instructed her to perform an unsupervised "cable lat pulldown" exercise which caused a recurrent rotator cuff tear and required additional surgery.[9] Following that incident, Mrs. Balinski discontinued treatment with Dr. Peterzell.[10]

On June 25, 2012, Mr. Baker, as counsel for Mrs. Balinski, advised Mrs. Balinski to enter into a settlement agreement that released Nationwide and Mr. Balinski from all further liability related to the automobile accident.[11] In signing the agreement, Mrs. Balinski also released:

> [A]ll other persons, firms, entities, and corporations, whether named or unnamed and whether known or unknown, against whom Releasor now has or may in the future have for each and all claims, suits, actions, causes of actions, administrative claims, statutory claims, damages, and claims for damages and injuries arising out of or in any way related to the Accident, including but not limited to, all debts, dues, sums of money, covenants, contracts,

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8 *Id*. at ¶ 27.

9 *Id*. at ¶¶ 29-33; 35-36.

10 *Id*. at ¶ 33.

11 *Id*. at ¶ 41.

> controversies, compensatory damages, punitive damages, costs, expenses, attorneys' fees, costs of litigation, or otherwise.

Nationwide disbursed $50,000 as consideration for the Release. After taking into account Mr. Baker's attorney fees, $33,208.34 of the settlement amount was paid to Mrs. Balinski.[12] She claims that after applying those settlement funds to her outstanding medical bills, her remaining unpaid medical bills total $46,634.83.[13] In addition to her claim that Mr. Baker advised her to enter into a settlement agreement that now prevents her from pursuing a viable claim against Dr. Peterzell and Plaza Medical, Mrs. Balinski also claims Mr. Baker had a conflict of interest and caused her damages by way of unpaid medical bills not covered by the settlement payment.[14]

III. STANDARD OF REVIEW

Defendants make their motion under Superior Court Civil Rule 12(c), which "entitles the non-moving party to the benefit of any inference that can

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12 *Id*. at ¶¶ 43-44; ¶ 49

13 *Id*. at ¶ 49.

14 *Id*. at ¶¶ 50-53.

be fairly drawn from its pleading."[15] The standard is identical to that applicable to a motion for summary judgment.[16] Thus, the motion will be granted only where, looking at the facts in the light most favorable to the non-moving party, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law.[17]

IV. PARTIES CLAIMS

There are two questions raised by Defendants' motion to dismiss:

(1) As pled, and given the present factual and legal context of the harm alleged – an ill-advised release of a party potentially liable to Mrs. Balinski for personal injury damages – is the Plaintiff's claim ripened to the point it could sustain a legal malpractice action?; and

(2) Whether Dr. Peterzell and Plaza Medical are, in fact, released from liability?

The requirement of the Court to engage in the preternatural exercise of predicting what a medical malpractice defendant might claim here or what the Court might decide if the proper parties and arguments were actually

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[15] *Velocity Exp., Inc., v. Office Depot, Inc.*, 2009 WL 406807, at *3 (Del. Super. Ct. Feb. 4, 2009)(citing *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1205 n.9 (Del. 1993)).

[16] *Id*.

[17] *Id.*; *Alston v. Alexander*, 2011 WL 5335289, at *2 (Del. Super. Ct. Nov. 1, 2011); *Rochen v. Huang*, 1989 WL 5374, at *1 (Del. Super. Ct. Jan. 6, 1989).

joined here is itself likely enough to dismiss this particular malpractice claim.

"Whether or not a given issue is ripe for adjudication is a determination calling for a balancing of all relevant practical considerations and the sound exercise of discretion, not an analytic approach that is legalistic or formalistic."[18] And a legal question is not ripe where it is "truly hypothetical . . . at the time the complaint is filed . . . ."[19] The plaintiff bringing a legal malpractice claim must establish the following elements: a) the employment of the attorney; b) the attorney's neglect of a professional obligation; and c) resulting loss.[20] As to the last element, "an attorney must cause more than speculative damage to a plaintiff."[21] Even when proven or obvious, "[t]he mere breach of professional duty, causing only . . .

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[18] *Cooper Companies, Inc. v. Cooper Development Co.*, 1989 WL 69395, at *7 (Del. Ch. Ct. June 15, 1989).

[19] *Id.* at *8 (concept of ripeness implicated where: (1) alleged harm may never come about and thus matter "may never ripen into legal action" or (2) where "the facts are not fully developed").

[20] *Flowers v. Ramunno*, 2011 WL 3592966, at *2 (Del. Aug. 16, 2011).

[21] *Power Gourmet Concepts, Inc. v. Irwin & McKnight*, 2010 WL 5147233, at *3 (M.D. Pa. Oct. 1, 2010).

speculative harm, or the threat of future harm – not yet realized – does not suffice to create a cause of action for negligence . . . ."[22]

The parties agree that an uninformed and unconsented to forfeiture of valid claims of liability via a general release can form the basis of a later legal malpractice action against the attorney who had his client execute such release. Mrs. Balinski argues that her claim ripened upon the execution of the Release that she now posits immunizes the alleged tortfeasors in her planned medical malpractice action. She cites to no case, however, where the alleged harm from such a release had not been realized, i.e. actual dismissal of an action actually brought where that dismissal was the direct result the attorney's negligent action or inaction.[23]

Here, rather than pursue her desired negligence action against Dr. Peterzell, Mrs. Balinski, in filing this action, assumes she is barred. In doing so, her claim: (1) presents the practical difficulties visited when trying the

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[22] *Rizzo v. Haines*, 555 A.2d 58, 68 (Pa. 1989) (quoting *Schenkel v. Monheit*, 45 A.2d 493, 494 (Pa. Super. Ct. 1979) and *Budd v. Nixon*, 491 P.2d 433, 436 (Cal. 1971) (*invalidated by statute*)).

[23] Plaintiff cites: *O'Neal v. Agee*, 8 S.W.3d 238 (Mo. Ct. App. 1999) (alleged tortfeasors granted summary judgment due to plaintiff's previously executed general release); *Swain v. Leahy*, 433 S.E.2d 460 (N.C. Ct. App 1993) (plaintiff's suit barred by statute of limitations which lapsed due to attorney negligence); and *Little v. Middleton*, 401 S.E.2d 751 (Ga. Ct. App. 1991) (plaintiff's insurer was presented with and refused to pay her claim for uninsured motorist benefits based upon the release her attorney had her sign).

medical malpractice case within the legal malpractice case; and (2) depends upon the speculation that that medical malpractice case is undoubtedly winnable but, in fact, foregone due to her former attorney's failure.[24] These alone appear to be insuperable barriers.[25]

Defendants address this issue obliquely, never developing the argument[26] and instead insisting that Mrs. Balinski is simply wrong on the second question: Dr. Peterzell and Plaza Medical were not released from a potential medical malpractice claim. Because the parties have chosen to engage on that second question only, the Court will assume without deciding that the potential loss of Mrs. Balinski's desired, but-as-yet uninitiated, medical malpractice claim alleges sufficient harm.

Defendants contend the Release signed by Mrs. Balinski does not prevent her from filing a negligence claim, or any other action against Dr. Peterzell or Plaza Medical. Defendants point to two Delaware cases, *Alston*

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[24] *Flowers*, 2011 WL 3592966, at *2 (plaintiff must demonstrate that the underlying action would have been successful but for the attorney's negligence).

[25] *See, e.g., Bowman v. Abramson*, 545 F. Supp. 227 (E.D. Pa. 1982) (client's legal malpractice action against attorneys who represented him in a medical malpractice case dismissed for lack of a justiciable controversy, since the medical malpractice case was still pending on appeal, and until the underlying medical malpractice case was decided adversely to client, the loss allegedly caused by attorney was hypothetical and client's damages were speculative).

[26] The single mention of the ripeness issue consists of two sentences and one case citation. Def. Rule 12(c) Mot. at ¶ 10.

v. Alexander[27] and *Rochen v. Huang*[28], where this Court denied summary judgment to defendants who, as unnamed third parties to settlement releases, attempted to use the releases to bar the plaintiffs' claims. In both cases the Court found the release clauses were ambiguous, and that whether the releases applied to unnamed third parties was an issue to be resolved by the Court or the trier of fact.[29]

Mrs. Balinski argues that *Alston* and *Rochen* are distinguishable from her circumstance, and urges that the Court must follow *Chakov v. Outboard Marine Corp.*, a Delaware Supreme Court opinion which construes a settlement release signed in a personal injury case arising from a boating accident.[30] In *Chakov*, the Court found the settlement agreement, negotiated and signed by the plaintiff with the owner of the subject boat, not only released the boat owner, but also released the unnamed manufacturer of the subject boat of any liability related to the accident.[31] The Supreme Court upheld this Court's order granting summary judgment to the boat

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27 2011 WL 5335289 (Del. Super. Ct. Nov. 1, 2011).

28 1989 WL 5374 (Del. Super. Ct. Jan. 6, 1989).

29 *Alston*, 2011 WL 5335289, at *4; *Rochen*, 1989 WL 5374, at *2.

30 429 A.2d 984, 985 (Del. 1981).

31 *Id.* at 986.

manufacturer.[32] There being no genuine issues of material fact remaining, the Court must determine whether Defendants are entitled to judgment on the pleadings because under applicable law (*Alston*, *Rochen*, and *Chakov)* the Release does not bar Mrs. Balinski from pursuing a claim against Dr. Peterzell and Plaza Medical.

V. DISCUSSION

"[I]n order for a release to protect a third party as a matter of law, the language of the release must be crystal clear and unambiguous in its inclusion of that person among the parties released."[33] In interpreting the language of a release, "[w]ords of general application . . . which generally follow a specific recital of the subject matter concerned are not to be given their broadest significance, but will be restricted to the particular matters referred to in the recital."[34] Where a release is ambiguous, extrinsic evidence is admissible to show the parties' objective intent.[35]

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[32] *Id*. at 985.

[33] *Rochen*, 1989 WL 5374, at *3.

[34] *Alston*, 2011 WL 5335289, at *2 (quoting *Adams v. Jankouskas*, 452 A.2d 148, 156 (Del. 1982)).

[35] *Rochen*, 1989 WL 5374, at *1. "Ambiguity is defined as language that is reasonably capable of being understood in more than one sense." *Id*. *3.

Because neither Dr. Peterzell nor Plaza Medical is named in the Release, and because the Release is limited to "injuries arising out of or in any way related to the Accident," the language of the settlement agreement releasing Nationwide and Mr. Balinski from all liability related to the automobile accident does not apply to Mrs. Balinski's potential medical negligence claims against Dr. Peterzell and Plaza Medical. This Court cannot broadly construe "words of general application . . . which generally follow a specific recital of the subject matter."[36] The second paragraph describes the subject matter of the Release; in exchange for $50,000, Mrs. Balinski released Mr. Balinski and Nationwide for all claims "arising out of or in any way related to an accident that occurred on or about 8-25-2010, at or near DuPont Highway in Wilmington, New Castle County, Delaware (hereinafter the "Accident")."[37] In the following paragraph, Mrs. Balinski releases "all other persons" for "claims and damages arising out of or in any way *related to the Accident*."[38]

That third paragraph of the Release expressly releases "all other persons" whose potential tortious acts directly related to the actual

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36 *Alston*, 2011 WL 5335289, at *2 (quoting *Adams*, 452 A.2d at 156).

37 Ex. B to Complaint.

38 *Id.* (emphasis added).

occurrence car accident, i.e. those who could be viewed as Mr. Balinski's joint tortfeasors.[39]

Dr. Peterzell and Plaza Medical are clearly not joint tortfeasors whose alleged negligence arose out of the accident occurring on DuPont Highway on August 25, 2010. The nexus between the injury occurring from the car accident and the alleged injury occurring more than fifteen months later from the unsupervised "cable lat pulldown" exercise is tenuous and remote.[40] Although Mrs. Balinski argues Dr. Peterzell's allegedly negligent acts share a nexus with the automobile accident because he allegedly caused a subsequent tear of her same rotator cuff injured in the accident,[41] that is not the significant relationship under the language of the Release. Rather, by its terms the Release only discharges liability of the named parties, and "all persons," including third parties, whose tortuous actions in relation to

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[39] *See Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 986 (Del. 1981).

[40] *MacDougall v. Mahaffy & Assocs., Inc.*, 2013 WL 1091005, at *3 (Del. Super. Ct. Jan. 22, 2013) ([W]hen the nexus from the alleged cause to the injury becomes so remote and tenuous, it becomes totally unforeseeable and cannot trigger liability."); *McKeon v. Goldstein*, 164 A.2d 260, 262 (Del. 1960) ("A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury even though such injury would not have happened but for such condition or occasion.").

[41] The parties do not dispute that Mrs. Balinski first had shoulder surgery prior to the car accident in August, 2010.

the car accident itself may provide Mrs. Balinski with a negligence claim. "Theoretically, one can argue a whole series of events fall into the 'but for' category,"[42] but Dr. Peterzell's alleged negligence arising from his treatment plan is too remote from the car accident to be subject to the terms of the Release.[43]

The Court comes to the same conclusion even if the Release clause is deemed ambiguous. Where a clause is ambiguous, this Court it must then look to evidence of the objective intent of the parties.[44] This Court "will only enforce contractual terms according to their broadest significant if the undisputed facts show a manifested intent by the parties to release such a broad swath."[45]

While Mr. Baker's intent has been questioned, there has been no evidence adduced from which one could infer that he intended that Mrs. Balinski would release Dr. Peterzell or Plaza Medical from potential liability arising from her post-accident, post-operative treatment. Moreover, Mrs.

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42 *MacDougall*, 2013 WL 1091005, at *3 (Del. Super. Ct. Jan. 22, 2013).

43 *E.g.*, *Rochen*, 1989 WL 5374, at *3 (Court could not, on summary judgment, reasonably find that doctor's alleged tortious acts that occurred during treatment of plaintiff for injuries suffered in an automobile accident, were covered by the general release entered to settle litigation concerning the automobile accident).

44 *See id.* at *2.

45 *Alston*, 2011 WL 5335289, at *2.

Balinski's own intent not to release Dr. Peterzell or Plaza Medical is manifest from her Complaint in this action, as well as from the facts agreed upon by the parties and the evidence supporting their respective arguments. Neither Dr. Peterzell nor Plaza Medical negotiated with Mrs. Balinski. And neither offered consideration in exchange for the Release.[46] In short, the Court can infer no objective intent of the actual contracting parties – Mrs. Balinski, Mr. Balinski and Nationwide – to release Dr. Peterzell or Plaza Medical.

Thus Defendants' motion is **GRANTED**. Mrs. Balinski's breach of contract and professional negligence claims are dismissed in part; any portion of those claims pertaining to Mrs. Balinski's rights with respect to the as yet untested medical negligence claim are dismissed without prejudice. Mrs. Balinski is granted leave to pursue those legal malpractice claims, subject to the applicable statute of limitations, if it comes to pass that

[46] *Id*. at *2 ("The release agreement is made according to contract law and must be supported by some consideration.")(citing *Egan & Sons Air Conditioning Co. v. Gen. Motors Corp.*, 1988 WL 47314, at *3 (Del. Super. Ct. Apr. 22, 1988)).

her medical negligence claim against Dr. Peterzell and Plaza Medical is prevented by the language of the Release.

IT IS SO ORDERED.

/s/ Paul R. Wallace
PAUL R. WALLACE, JUDGE

Original to Prothonotary
cc: All counsel via File & Serve