

**Heaney v McCullen**

2018 NY Slip Op 33675(U)

October 4, 2018

Supreme Court, Saratoga County

Docket Number: 2016-341

Judge: Ann C. Crowell

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ORIGINAL

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF SARATOGA

SUSAN HEANEY and BRIAN HEANEY,

Plaintiffs,

**ACTION #1**

-against-

RJI #45-1-2017-0982  
Index # 2016-341

MARY BETH McCULLEN,

Defendant.

**DECISION and ORDER**

SUSAN HEANEY and BRIAN HEANEY,

Plaintiffs,

**ACTION #2**

-against-

RJI #45-1-2017-0644  
Index # 2017-248

JEFFREY R. RIDHA, M.D., JEFFREY R. RIDHA MD P.C.,  
and GLENS FALLS HOSPITAL,

Defendants.

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**APPEARANCES**

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ANN C. CROWELL, J.

Plaintiffs commenced two separate actions asserting causes of action against the defendants. In Action #1, plaintiffs assert a claim of premises liability against defendant Mary Beth McCullen (“McCullen”). In Action #2, plaintiffs assert a claim of medical malpractice against the defendants Jeffrey R. Ridha, M.D. and Jeffrey R. Ridha MD P.C. (“Ridha”) and Glens Falls Hospital.

Defendants Ridha and Glens Falls Hospital have filed motions to consolidate Action #2 with Action #1 for trial based upon the existence of common questions of fact and law. Plaintiffs and defendant McCullen oppose consolidation.

On September 13, 2015, plaintiff Brian Heaney fell while ascending the exterior stairs of defendant McCullen’s property where Heaney resided with his wife. When Brian Heaney fell his right arm went through a window adjacent to the stairs. He sustained serious injuries. On July 15, 2016, after undergoing extensive treatment, Brian Heaney’s right arm was amputated below the elbow.

In Action #1, plaintiffs seek to recover for Brian Heaney’s injuries caused by McCullen’s alleged negligence in failing to maintain her property in reasonably safe condition. Defendant McCullen claims Brian Heaney’s injuries did not occur in the manner he alleges. She challenges his version of the events. She contends plaintiffs are fabricating their claims against her. Defendant McCullen asserts Brian Heaney’s level of intoxication is the root cause of his fall.

On the day of his fall , plaintiff was treated at Glens Falls Hospital . Defendant Dr.

Ridha was called in to assess his injuries and treat Brian Heaney. In Action #2, plaintiffs allege that Dr. Ridha and Glens Falls Hospital's care and treatment was negligent and deviated from the required standard of care. As a result, they exacerbated/aggravated Brian Heaney's injuries. Plaintiffs allege the medical malpractice defendants negligence included failing to timely and properly explore Brian Heaney's right arm injury and to repair his ulna and median nerves and his ulnar artery. Plaintiffs claim that the delay in treatment resulted in Brian Heaney's below-the-elbow amputation of his right arm. Discovery proceeded jointly per the consent of all parties. Plaintiffs have filed a Note of Issue in both cases.

CPLR § 602(a) states:

“Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

It is well settled that a motion for consolidation is addressed to the sound discretion of the trial court, and absent a showing of substantial prejudice by the party opposing the motion, consolidation is proper where there are common questions of law or fact. *Bradford v John A. Coleman Catholic High School*, 110 AD2d 965 [3d Dept. 1985]; *Mattia v Food Emporium, Inc.*, 259 AD2d 527 [2d Dept. 1999]; *Stephens v Allstate Ins. Co.*, 185 AD2d 338 [2d Dept. 1992]. ‘Further consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts.’ *Moses v. B & E Lorge Family Tr.*, 147 AD3d 1043, 1045 [2d Dept. 2017].

Defendants Ridha and Glens Falls Hospital argue consolidation is appropriate. They

point out that in both actions the plaintiffs are seeking recovery for the same injuries, the medical providers and chronology of medical treatment is identical, and the claimed damages are identical. Defendants Ridha and Glens Falls Hospital favor a consolidated trial to prevent duplicating medical and economic loss testimony, conserve judicial resources and most importantly avoid the risk of inconsistent verdicts. Notably the medical witnesses will be the same in both damages cases with exception perhaps, of the premises and malpractice defendants retaining their own medical experts.

Plaintiffs argue against consolidation because the liability proof of negligence in each action is separate and distinct and will be elicited through different witnesses. Primarily, plaintiffs contend that the question of comparative negligence arising from plaintiff's intoxication could unfairly prejudice the jury against the plaintiff in the medical malpractice action and potentially lead to jury confusion. Defendant Rhida counters that assertion contending Brian Heaney's level of intoxication was relevant to his treatment of plaintiff Brian Heaney on the night of the incident. Defendant McCullen plans to present evidence that plaintiff Brain Heaney was highly intoxicated on the night he fell and that his intoxication caused his fall. Defendant McCullen also intends to present evidence that plaintiffs' depiction of the events prior to his fall and the description of how his injury occurred is fabricated. Defendant McCullen opposes consolidation due to the possibility of juror confusion. His counsel is concerned defendant McCullen's "case would get lost during the complicated medical malpractice portion of a joint trial."

Plaintiffs' damages in each action present common questions of law or fact. That commonality supports consolidation of the actions for trial. Plaintiff Brian Heaney's high level of intoxication is prejudicial and probative. There is no apparent dispute that his level

of intoxication wasn't accurately reported. While prejudicial, defendant Rhida's bills of particulars allege comparative negligence based upon Brian Heaney's level of intoxication. Plaintiff's alleged fabrication is relevant and a defense to causation in the premises liability action and relevant as to plaintiff's general credibility in the medical malpractice action. Juror instructions may be necessary at trial to alleviate any undue prejudice or potential confusion. Those decisions will be addressed upon application at a later date.

Defendant Rhida's Second Supplemental Response to Plaintiffs' Demand for a Verified Bill of Particulars sets forth allegations of comparative fault related to plaintiff Brian Heaney's fall. Those claims have no bearing on plaintiff's alleged comparative fault in a medical malpractice action. *Vallone v. Saratoga Hosp.*, 141 AD3d 886 [3d Dept. 2016]. Plaintiff Brian Heaney's comparative negligence prior to his injury is not relevant in a medical malpractice action. Defendant Rhida's liability extends only to that portion of plaintiffs' injuries attributable to the alleged malpractice. *Vallone v Saratoga Hosp.*, 141 AD3d 886 [3d Dept. 2016], citing *DiMarco v New York City Health & Hosps. Corp.*, 247 AD2d 574 [2d Dept. 1998]. The distinct theories of liability in Action #1 and Action #2 and the different theories of comparative fault being asserted against the plaintiff Brian Heaney in Action #1 and Action #2 create the possibility of some juror confusion. *County of Westchester v White Plains Ave., LLC*, 105 AD3d 690 [2d Dept. 2013]; *Cronin v Sordoni Skanska Constr. Corp.*, 36 AD3d 448 [1st Dept. 2007]. Appropriate juror instructions and a carefully crafted jury verdict form will be necessary to alleviate potential juror confusion. Moreover, if while deliberating jurors are confused about an instruction they may present questions to the Court for clarification or simple read back.

If a jury finds the initial tortfeasor, McCullen to be negligent and that her negligence

caused plaintiffs injuries, McCullen is liable for plaintiffs' original injuries as well as any alleged aggravation of injuries and additional pain and suffering caused by the defendants Rhida and Glens Falls Hospital's alleged medical malpractice. *Hill v St. Clare's Hosp.*, 67 NY2d 72 [1986], see also 1B NY PJI3d 2:305 at 972 [2018]. McCullen is subject to a potential claim over by Rhida and Glens Falls Hospital. The issue of plaintiffs' damages and the extent to which those damages may or may not be attributable to defendant Ridha's and defendant Glens Falls Hospital's alleged malpractice are inextricably intertwined. One jury should determine the amount of damages attributable to the original injury and the amount of plaintiffs' damages attributable to any exacerbation of the original injury caused by the medical defendants' malpractice. This approach will eliminate the need to call expert medical witnesses and economists in two different trials. One jury hearing all of the medical proof on damages in both cases will eliminate the possibility of inconsistent verdicts and/or a double recovery by plaintiffs for the same damages. *Kupferschmid v Hennessy*, 221 AD2d 225 [1st Dept. 1995]; *Cusumano v Cusumano*, 114 AD3d 633 [2d Dept. 2014].

After consideration of the arguments presented the Court finds consolidation is appropriate. Concerns over potential juror confusion or prejudice may, if necessary, be addressed through suitable jury instructions. The potential for inconsistent damages verdicts and the lack of overall judicial economy outweighs all other concerns in this matter. The defendant Ridha's and defendant Glens Fall Hospital's motions to consolidate Action #1 and Action #2 for trial are granted. This decision shall constitute the Order of the Court. No costs are awarded to any party. The original Decision and Order shall be forwarded to the attorney for defendant Rhida for filing and entry. The underlying papers

ENTERED

Craig A. Hayner

will be filed by the Court.

Dated: October 4, 2018  
Ballston Spa, New York

*Craig A. Hayner*  
Saratoga County Clerk

*Ann C. Crowell*  
ANN C. CROWELL, J.S.C.

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ENTERED

Papers Received and Considered:

- Defendant Ridha's Notice of Motion, dated July 16, 2018
- Affidavit of Terence P. O'Connor, Esq., sworn to July 16, 2018, with Exhibits A-E
- Defendant Ridha's Memorandum of Law, dated July 16, 2018
- Defendant Glens Falls Hospital's Notice of Motion, dated July 17, 2018
- Affirmation of Courtney M. Haskins, Esq., dated July 17, 2018, with Exhibits A-H
- Defendant Glens Falls Hospital's Memorandum of Law, dated July 17, 2018
- Affidavit of Victor L. Mazzotti, Esq., sworn to September 7, 2018, with Exhibit A
- Plaintiffs' Memorandum of Law, dated September 6, 2018
- Affirmation of Edward B. Flink, Esq., dated September 10, 2018
- Defendant McCullen's Memorandum of Law, dated September 10, 2018
- Affidavit of Terence P. O'Connor, Esq., sworn to September 13, 2018, with Exhibit A
- Affirmation of Courtney M. Haskins, Esq., dated September 13, 2018