

Farrell v. Johnson & Johnson (SC 20225)

On October 25, 2019, the Connecticut Supreme Court heard *Farrell v. Johnson & Johnson*. In 2007, the plaintiff, Mary Beth Farrell, was diagnosed with a pelvic organ prolapse and her gynecologist recommended she see Hines, the defendant. Hines recommended a mesh implant surgery which was performed on November 19, 2008. After the surgery Farrell experienced excessive bleeding, abdominal pain and was diagnosed with two large pelvic hematomas. Due to her continued pain Hines attempted to remove as much mesh as possible in February 2009, however, some of it was embedded in her tissue and unable to be removed. Her pain continued and Hines attempted to remove the mesh again in the summer. She was then diagnosed with damage to the pudendal and obturator nerves. After numerous unsuccessful procedures she resigned from her job as a teacher to focus on her health and was contemplating another “major” surgery when the trial began in 2016. The plaintiffs (Farrell and her husband) sued Hines and Urogynecology and Pelvic Surgery, LLC for (1) lack of informed consent; (2) innocent misrepresentation; (3) negligent misrepresentation; (4) intentional misrepresentation; and (5) loss of consortium. The trial court directed a verdict in favor of the defendant on the innocent representation claim and the jury sided with the defendant on the remaining claims. The plaintiffs then appealed the decision and argued that the trial court (1) abused its discretion by excluding two journal articles from evidence as hearsay and; (2) improperly directed a verdict in favor of the defendants on the innocent misrepresentation claim. The Appellate Court affirmed the trial courts decision. The case was then brought to the Supreme Court of Connecticut to determine (1) whether the evidence was properly excluded as hearsay; and (2) whether liability for innocent misrepresentation should be extended to render physicians strictly liable for statements made in the course of medical treatment. The court concluded that the evidence was properly excluded and declined to extend the liability for innocent misrepresentation.

Hearsay

During the trial the plaintiffs sought to have three journal articles admitted as evidence, the court rejected two as hearsay. The first article was from the American College of Obstetrics & Gynecology (ACOG Practice Bulletin). The plaintiffs sought to admit a section from the article stating that the procedure she underwent should be considered experimental and patients should consent to surgery understanding it is experimental. The plaintiffs wanted three statements from D. Ostergard “Lessons from the Past: Directions for the Future” (Ostergard article) which discussed the procedures experimental nature, the lack of information preventing physicians from determining if it is the safest and most effect treatment and how patients are unable to provide true informed consent because of the lack of information. The trial court excluded both articles from being admitted into evidence as hearsay.

Hearsay is an out-of-court statement offered to establish the truth of the matter. In order for a statement to be admitted as nonhearsay the court must find that it is relevant to the case for a reason other than its truth, such as notice. Meaning a statement is not hearsay if offered to provide notice to the reader. To be relevant for a nonhearsay purpose the offering party must establish that the adverse party heard, saw or read the statement. In the context of articles courts have concluded they are admissible to show whether a party should have known a fact at issue. Thus, articles can be admitted if the offering party demonstrates that the other party should have known the contents because of an independent duty to do so, such as the duty physicians possess to stay abreast with the state of medical science. Thus, the plaintiffs had to show that Hines read the articles or reasonably should have read the contents of the articles. The court rejected the argument that Hines had a duty to read the journal articles as being published in a journal does

not make the article representative of the state of medical science automatically. Furthermore, the court distinguished this case from *Blue Cross of California* as the journal articles were not highly publicized information released by the national media thus, do they not qualify as notice. Consequently, the court affirmed the Appellate Court decision.

Innocent Misrepresentation

Regarding the second issue, innocent misrepresentation occurs when during a sale, rental or exchange transaction with another, one makes a representation of a material fact to induce the other to act or refrain from acting in reliance upon the representation. Essentially, it is a false statement that was not made fraudulently or negligently, that induced the other to act during a commercial exchange.

First, the court held that as a matter of law innocent misrepresentation was not an actionable claim in this case because it did not involve a “sale, rental or exchange transaction.” The relationship between Johnson and Hines was not that of a buyer and seller as Johnson was seeking surgery, not the purchase of the mesh. Thus, their dealings were not a commercial exchange. Consequently, the plaintiffs had to convince the court to extend strict liability for innocent misrepresentation to doctors advising their patients.

The court agreed with the defendant’s argument that extending the scope would have the adverse consequence of holding doctors strictly liable for not knowing before the procedure that the outcome would be unfavorable. Furthermore, the court noted that unlike product sellers (who are within the scope of innocent misrepresentation) medical professionals often rely on medical opinions, not statements of facts. Thus, innocent misrepresentations are expected to happen; also people are still protected from false or negligent statements by doctors as they can sue for

misrepresentation. The court concluded by stating that extending innocent misrepresentation would be inconsistent with the doctrine of informed consent which requires doctors to provide patients with information that a reasonable patient would find material (important) to the decision to undergo treatment. The court noted that extending innocent misrepresentation would alter this standard as a physician would be liable for any inaccuracies discovered in the future, not just one's they would find material as a reasonable patient cannot expect to be informed of a risk that is unknown. Consequently, the court affirmed the rulings of the lower courts.

The key takeaway from this case is that the law does not impose a duty on doctors to know the information in every medical journal and does not impose strict liability on them for not informing a patient of a risk that is unknown. People deciding to undergo surgery ought to be aware that there may not be a judicial remedy for complications that arise after, especially if it is an experimental surgery as they are more likely to have risks that are unknown to their doctors and to the medical community at large.