

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Jaime Smith, individually and as independent )  
administrator of the estate of Ericka Smith, deceased, )

Plaintiff, )

v. )

No. 11 L 3257

Advocate Health and Hospitals Corporation d/b/a )  
Advocate Trinity Hospital, Advocate Trinity Health )  
Partners, Northwestern Memorial Hospital, and )  
Northwestern Medical Faculty Foundation, a corporation, )

Defendants. )

**MEMORANDUM OPINION AND ORDER**

A plaintiff's negligence may be compared to the defendant's only after the two have intersected. A defendant has requested leave to file a comparative-negligence affirmative defense based on the plaintiff's acts and omissions before she established a physician-patient relationship with the defendant. Since those acts and omissions pre-date the vesting of a comparative negligence claim, the defendant's motion for leave must be denied.

**FACTS**

This matter is before the court on Advocate Trinity Hospital's motion for leave to file an affirmative defense. The affirmative defense is one of comparative negligence against Ericka Smith, deceased, her daughter, Jaime Smith, and Ericka's other daughter (and Jamie's sister), Shemariah Williams. The allegations supporting the affirmative defense are that Ericka had a duty to seek and receive medical care and that Jamie and Shemariah had a duty to ensure that their mother sought and received it. The three are alleged to have breached their duties because Ericka failed to see any physician for more than 20 years prior to her admission to Advocate Trinity on February 26, 2009. At that time, she presented to Advocate Trinity's emergency department with a history since November 2008 of being confused, being unable to care for her basic needs, complaining of headaches, having undergone significant weight loss, and having skin boils over her body. Advocate Trinity alleges that these acts and omissions constitute more than 50 percent of the cause of Ericka's death and must be compared against Advocate Trinity's negligence, if any.

## ANALYSIS

The Code of Civil Procedure authorizes a defendant to file affirmative defenses, 735 ILCS 5/2-613(d), and authorizes a court to grant a defendant leave, on just and reasonable terms, at any time before final judgment, 735 ILCS 5/2-616(a). The issue here is not whether Advocate Trinity is authorized to file an affirmative defense or whether this court may grant the motion; rather it is whether it is just and reasonable for this court to grant Advocate Trinity leave to file this particular affirmative defense. It is not.

For more than a century, Illinois law has held that a defendant who assumes a duty for a plaintiff also assumes the plaintiff's existing condition. See *Chicago City R.R. v. Saxby*, 213 Ill. 274, 279-80 (1904). From that basic principle, it has come down that a plaintiff's acts or omissions causing a plaintiff to seek medical services may not be compared to a medical provider's negligence. See *Board of Trustees of Comm. College Dist. No. 508 v. Coopers & Lybrand*, 208 Ill. 2d 259, 271 (2003); *Owens v. Stokoe*, 115 Ill. 2d 177, 183 (1986). In *Board of Trustees*, the court explicitly adopted a comment to the latest restatement, providing that, "In a case involving the negligent rendition of a service, including medical services, a fact finder does not consider any plaintiff's conduct that created the condition the service was employed to remedy." 208 Ill. 2d at 271, quoting Restatement (Third) of Torts, § 7 cmt. m (2000).

This legal principle is distinguished from an equally important one: a patient's failure to follow a doctor's advice or directions *does* provide a sufficient basis for a comparative-negligence affirmative defense. See, e.g., *Gill v. Foster*, 157 Ill. 2d 304, 314 (1993); *Witherell v. Weimer*, 118 Ill. 2d 321, 339-40 (1987); *Moller v. Lipov*, 368 Ill. App. 3d 333, 346 (1st Dist. 2006); *Krkhus v. Stanley*, 359 Ill. App. 3d 471, 480-81 (1st Dist. 2005); *Malanowski v. Jabamoni*, 332 Ill. App. 3d 8, 15 (1st Dist. 2002). The basis for this principle is the pre-existing physician-patient relationship. In the cases cited, that factual difference provided a basis for a comparative-negligence affirmative defense because the physicians had instructed the patients what to do, the physicians could reasonably assume that the patients would follow the instructions, and the patients failed to do so or misled their physicians to the patients' own detriment.

These two principles clarify what Jaime must prove and what Advocate Trinity may argue. Jaime must establish that Advocate Trinity's acts or omissions while caring for Ericka fell below the standard of professional care. But Jamie's burden of proof does not preclude Advocate Trinity from introducing evidence about Ericka's failure to seek medical care for more than 20 years. That fact forms the basis of a proximate-cause defense – that Advocate Trinity cannot be the cause in

fact or the legal cause (or both) of Ericka's death because she arrived too late for Advocate Trinity to save her.

## CONCLUSION

Whether Ericka can establish facts to meet her burden of proof and whether Advocate Trinity may seek to introduce particular evidence are not at issue at this point. What is clear at this juncture is that Advocate Trinity may not compare alleged acts and omissions of Ericka and her daughters before a physician-patient relationship existed with alleged acts and omissions after that relationship began. For that reason,

### IT IS ORDERED THAT:

1. Advocate Trinity's motion for leave to file an affirmative defense based on pre-physician-patient relationship acts and omissions is denied; and
2. The April 21, 2014 case management conference scheduled for 9:30 a.m. will stand.



John H. Ehrlich, Circuit Court Judge

**Judge John H. Ehrlich**

**MAR 26 2014**

**Circuit Court 2075**