YOU'RE ON NOTICE: ANALYZING APPLICATION OF RELATION BACK DOCTRINE TO MEDICAL MALPRACTICE CLAIMS IN THE WAKE OF *OLLER* AND *TENET*

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Two recent Georgia appellate decisions by the Supreme Court of Georgia and Court of Appeals of Georgia have shed light on an important issue that arises frequently in medical malpractice actions: application of the relation back doctrine when a new claim of negligence is added after the statute of limitation has expired. The Court of Appeals' 2017 decision in Oller v. Rockdale Hospital, LLC[1] allowed a plaintiff to add an additional claim for vicarious liability against a corporate defendant well after the statute of limitation had expired by finding that the plaintiff had provided sufficient notice to meet its burden. This decision created troubling law for corporate medical malpractice defendants and defense attorneys. Subsequently, in 2018, the Supreme Court of Georgia decided *Tenet HealthSystem GB, Inc. v. Thomas*,[2] which provided some clarity regarding how to determine whether a claim for medical malpractice relates back to the original filing date. It provided a factorial based approach for analyzing the issue which can be used to guide defendants and their counsel on this important issue. This article examines the two decisions and their interplay, and discusses their importance going forward.

I. *Oller v. Rockdale Hospital, LLC*

a. Facts and Procedural Posture

In *Oller*, the plaintiff filed suit alleging that three corporate defendants, two

physicians (Dr. Mitchell and Dr. Hunt), and one registered nurse deviated from the applicable standard of care during their care and treatment of Shirley Nobles, who lost neurological function and ultimately died following a hypoglycemic event in June 2011.[3] Notably, the plaintiff failed to name the employer of the two physicians, 24 On Physicians, PC ("24 On"), in the Initial Complaint.[4] The plaintiff subsequently dismissed her suit and refiled five months later.[5] The Renewal Complaint named the same parties, and added vicarious liability claims against 24 On.[6] The affidavit filed contemporaneously with the Renewal Complaint, pursuant to O.C.G.A. § 9-11-9.1, did not state any claims against 24 On.[7] After 24 On moved to dismiss, the plaintiff subsequently filed an amended affidavit to include specific acts of negligence against 24 On.[8] Over four years after the care at issue, and over two years after the expiration of the statute of limitation, the plaintiff filed another amended affidavit which stated that the claims against 24 On were derived from "the negligence of the physicians that attended [decedent]" and that "the treating physicians [were] actual and/or ostensible agents or otherwise servants and/or employees of … 24 On."[9] Importantly, the alleged acts or omissions of 24 On employees, other than Dr. Hunt and Dr. Mitchell, had never been raised as an issue in the case until the filing of the amended affidavits well after the expiration of the statute of limitations.[10]

After the close of discovery, 24 On moved for partial summary judgment on the grounds that the plaintiff's claims for vicarious liability by any of 24 On's employees or physicians other than Dr. Mitchell and Dr. Hunt should be dismissed as untimely because those claims had not been asserted until after the expiration of the statute of limitation.[11] 24 On showed that it was not until the deposition of the plaintiff's expert affiant that 24 On learned that the

plaintiff was asserting vicarious liability claims against 24 On based upon the alleged negligence of another physician, Dr. Syed, who did not treat the decedent prior to her hypoglycemic shock.[12] The trial court granted the motion for partial summary judgment, and the plaintiff appealed.[13]

On appeal, the Court of Appeals reversed the trial court's decision in a unanimous opinion. The Court of Appeals relied heavily upon the liberality of notice pleading in Georgia to find that the plaintiff had provided sufficient notice that Dr. Syed's actions were at issue by alleging in the Renewal Complaint that 24 On was vicariously liable for the negligent acts of the treating physicians who were actual and/or ostensible agents of 24 On. The Court did not place significant weight upon the fact that the amended affidavits which purportedly clarified that the allegations against 24 On were based, in part, upon Dr. Syed's actions were not filed until well after the expiration of the statute of limitations. Instead, the Court found that the Renewal Complaint was timely filed and provided sufficient notice to the defendants such that they were not prejudiced.

24 On petitioned the Supreme Court of Georgia for certiorari to review the decision of the Court of Appeals. GDLA filed an amicus brief in support of arguments advanced by 24 On. Ultimately, the Supreme Court denied certiorari.

b. Issues Presented by Decision

The decision in *Oller* presents a number of issues that were appropriately briefed for the Court of Appeals, but unaddressed by the Court's decision. Perhaps most importantly, despite the Court's emphasis on the liberality of notice pleading in Georgia, there was nothing in the Renewal Complaint or timely-filed affidavits that provided notice to 24 On that it was required to defend the actions of Dr. Syed. The Initial Complaint filed by Respondents

did not assert a claim against 24 On. Plaintiffs asserted a vicarious liability claim against 24 On for the conduct of Dr. Hunt and Dr. Mitchell in their Renewal Complaint, which used the term "treating physicians." The affidavit accompanying the Renewal Complaint did not directly or implicitly describe any conduct that could be associated with Dr. Syed or any other 24 On employee other than Dr. Hunt and Dr. Mitchell.

The problem with allowing this to pass for "notice pleading" is self-evident. If, for example, the Renewal Complaint had added direct negligence claims against Dr. Syed, there would be little dispute that it would be subject to a meritorious motion to dismiss for failure to meet the pleading requirements of O.C.G.A. § 9-11-9.1. The affidavit did not mention him or any of his specific acts or omissions. The affidavit never even mentioned him by name. It merely used a catch-all by lumping him into the "treating physicians" for Ms. Nobles. Had Dr. Syed been named directly in the suit, he would have been ill-equipped to defend the lawsuit, since he would not have the notice (specifically contemplated by the Georgia legislature when it enacted O.C.G.A. § 9-11-9.1) that was necessary to prepare his defense.

If Dr. Syed would likely prevail on a motion to dismiss in such a scenario, it begs the question why 24 On should not be afforded the same protection. 24 On, as a corporate defendant, must defend the case against allegations of vicarious liability. In order to do so, it must have notice of the specific acts or omissions of its agents that form the basis for the vicarious liability claims, as required by O.C.G.A. § 9-11-9.1. In *Oller*, the Court found that by including the language "treating physicians," the plaintiffs had provided sufficient notice. The problem is that 24 On (1) was already defending the case based upon the alleged

negligence of two of its other employee physicians (Dr. Mitchell and Dr. Hunt), and (2) employed several of the physicians who treated the decedent at different times.

To the second point, Dr. Mitchell and Dr. Hunt both treated the decedent *before* the hypoglycemic event which allegedly caused Ms. Nobles' death. It would be reasonable to expect 24 On to carefully consider the alleged acts and omissions of its employees leading up to the hypoglycemic event when preparing its defense. On the other hand, Dr. Syed treated the plaintiff only *after* the hypoglycemic event occurred. No specific allegations had been presented, until well after the expiration of the statute of limitation, that the care provided by 24 On physicians after the hypoglycemic event was at issue. It is particularly telling that 24 On was not aware that the care provided by its employee physicians after the hypoglycemic event was at issue until its attorney deposed the plaintiff's expert witness. Although 24 On knew that many of its agents or employees treated the decedent at various times, the "notice" provided by the Renewal Complaint and contemporaneously-filed Affidavit directed 24 On to consider only the acts or omissions of its agents *before* the hypoglycemic event.

II. *Tenet HealthSystem GB, Inc. v. Thomas*.

In a concurring opinion joined by all three judges, the *Oller* Court emphasized that the claims regarding Dr. Syed's treatment would relate back under O.C.G.A. § 9-11-15 as it arose out of the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."[14] The Court detailed that notice pleading and the relation back provision operate to liberally allow the addition of claims that were originally described in the original complaint.[15] Approximately a year after *Oller* was decided, the Supreme Court of Georgia in Tenet subsequently detailed

when a late added claim arose out of the same conduct, transaction, or occurrence and when the claims will be considered separate and distinct.

On the positive side, it appears that Georgia courts – via the *Oller* and *Tenet* opinions - have not given carte blanche authority for plaintiff's attorneys to add new claims regarding different treatment and/or providers simply because they have timely and sufficiently pled a cause of action against a corporate defendant's agent. If such were true, there would be no need for detailed appellate opinions on relation back questions such as in *Oller* and *Tenet*.

It is apparent under Georgia law that whether a new claim relates back is a fact and case specific issue. Amended claims can (and should) only relate back to timely pled claims where certain and specific correlative factors are met. When analyzing *Oller* and Tenet as well as other persuasive federal and sister state opinions – especially those cited to directly by the Supreme Court in *Tenet* – there seems to be a rough benchmark for which claims the Supreme Court considers "related."

i. The *Tenet* Opinion.

In *Tenet*, the plaintiff was involved in a motor vehicle accident and EMS was called to the scene. After evaluation, EMS placed her in a cervical spine collar and transported the plaintiff to the emergency room of the defendant hospital. At the emergency room, Plaintiff alleged the doctors improperly determined that she did not have any cervical fractures, ordered a nurse to remove her cervical spine collar, and proceeded to discharge her. When the cervical spine collar was removed, the fracture in the plaintiff's spine was displaced, which caused a compression of her spinal cord and ultimately resulted in injury.

The original complaint alleged professional negligence against only the ED physicians – not the nurses. The Court

summarized the Plaintiff's theory of negligence espoused in the original pleadings as "failing to stabilize, protect, and treat or cause to be treated [Plaintiff's] dangerously unstable cervical spine prior to discharging her from the hospital."[16] The original complaint did state that Hospital nurses removed the patient's c-collar.

During the discovery period, the plaintiff learned that hospital policy prohibited nurses from removing c-collars. In light of this, plaintiff amended the complaint to allege simple negligence against the hospital via the nurse who removed the c-collar in violation of the policy. The question became whether that claim related back to the timely pled claims against the physicians.

In its analysis, the *Tenet* Court laid out a framework of factors to consider on the relation back "question." Specifically, the Court explained that only claims that are close in (1) time, (2) place, (3) subject matter, and (4) involve events leading up to the same injury, will be found to relate back.[17] Analysis of these factors inquires as to whether a defendant was on "fair notice" of the amended claims from the allegations in the original pleading.[18]

Applying the factors to the facts, the Supreme Court held the nursing claim did relate back because (1) it was within the 3.5 hour period of the treatment at issue, (2) it occurred at the same location, (3) it concerned the negligent treatment of plaintiff's unstable spine as originally alleged, and (4) removal of said collar was already alleged to have resulted in the same ultimate injury previously identified.[19]

ii. Persuasive Caselaw Cited in *Tenet*.

Tenet proves instructive not only for purposes of distinction. *Tenet* cites to many cases from other jurisdictions as exemplars for when amended claims were **and were not** allowed to relate back.[20] Importantly, the Supreme Court pointed to two cases – *Weber*

and *Moore* – to serve as examples of claims that were separate and distinct and did not relate back. It would stand to reason that the Supreme Court cited to these two cases – both for factual comparison as well as for legal reasoning – as a guidepost for trial courts in this State to consider and compare on the relation back question.

In *Weber*, a three-month-old was treated at the defendant hospital's emergency room and released. The child died two days later from a bowel obstruction. The plaintiff initially alleged that the emergency room defendants negligently failed to diagnose the bowel obstruction and sued the hospital on the basis of vicarious liability.[21]

As discovery progressed, the plaintiff attempted to amend her complaint to bring new claims of vicarious liability against the hospital based on the actions of the radiologist who interpreted the child's abdominal radiograph. Interestingly, as in *Tenet*, the plaintiffs in *Weber* learned of a hospital policy that required the radiologist to notify the emergency room physician upon discovery of a potentially life-threatening condition. The new claim arose from the radiologist's failure to comply with the policy.[22]

Ultimately, under Alabama's very similar Rule 15 provision – a fact noted in the *Tenet* opinion – it was determined the new claims did not relate back because the new claims were too far removed in time, place and subject matter. In citing Alabama's iteration of Rule 15 – which is substantively the same as Georgia's – the *Weber* court reasoned the amended claims did not arise from the same conduct, transaction, or occurrence in the original pleading because "[t]he original complaint contained no allegations regarding policies and procedures relating to radiographs or any alleged breach of the standard of care. In other words, the only allegations in the original complaint were based on the actions of [the emergency

room doctors]…"[23] In short, *Weber* highlighted the theory of negligence had changed in precluding the amended claims.

A second case cited by the *Tenet* Court, *Moore v. Baker*, echoes this finding.[24] In *Moore*, the plaintiff was prohibited from adding claims for negligent treatment rendered by the same doctor named in the original complaint after the statute of limitations expired.[25] In the original complaint, the plaintiff alleged informed consent violations prior to her surgery. She later attempted to add allegations of negligence during and after said surgery.[26]

In analyzing Fed. R. Civ. P. 15(c), the court noted, "[t]he critical issue [in evaluating relation back] is whether the original complaint gave notice to the defendant of the claim now being asserted."[27] The court then reasoned, "[t]he original complaint focuses on [defendant's] actions before [plaintiff] decided to undergo surgery, but the amended complaint focuses on [defendant's] actions during and after the surgery. The alleged acts of negligence occurred at different times and involved separate and distinct conduct."[28] In determining that the new claims were too removed to relate back, the court in *Moore* noted that plaintiff would have "to prove completely different facts" in order to recover on her amended claims. Specifically, the court noted that "although the complaint recounts the details of the operation and subsequent recovery, it does not hint that [the doctor's] actions were negligent."[29] Put another way, simply chronicling the medical care – without averring an express criticism – does not put the defendant on fair notice such care may be criticized after the statute has run.

III. Implications of *Oller* and *Tenet* Decisions

While the *Oller* decision created unfavorable law for the defense bar, the Supreme Court of Georgia has seemingly

provided some safe harbor in detailing guideposts for when new amendments will be permitted and found to provide defendants adequate notice. Taking into account the cases specifically cited in *Tenet*, the Supreme Court espoused the following standard: when amended claims assert the same theory of negligence regarding the same care and treatment originally at issue, those claims relate back; when amended claims assert a new theory of negligence regarding separate care and treatment such that wholly different facts underlie said allegations, those claims do not relate back. Using this standard might be the best way to distinguish the adverse opinion detailed in *Oller*. The original pleading in *Oller* arguably covered any treatment relating to the hypoglycemic event – which might explain how *Oller* and *Tenet* can be reconciled.

Although *Tenet* provided additional clarity on the issue of relation back, it did not overrule or expressly limit *Oller*. Therefore, counsel and corporate defendants should still take lessons from the implications of the *Oller* decision. At the initial stages of the litigation process, defense counsel should closely examine the complaint as usual, but should specifically look out for language such as "all treaters/providers," "all agents," or "all employees." Following the *Oller* decision, simply including this broad language seems to be all that is required of plaintiff's counsel in order to leave the door open for bringing new treaters into the case. Defense counsel would be wise to put their corporate defendants on notice of this possibility and should prepare from the beginning as if all care provided to the plaintiff is at issue. It might also be prudent to hold off on any blame shifting until it is absolutely clear that no other providers will be added to the lawsuit.

Defense counsel should also closely examine the contents of the expert affidavit for any broad and all-encompassing language

meant to "put defendants on notice." Following the *Oller* decision, it appears as if courts will liberally read language in either the complaint or the affidavit as sufficient notice of potentially involved treaters or care. Unfortunately, a corporate defendant in a medical malpractice action will no longer enjoy the certainty of knowing that it must only defend against the allegations specifically set forth in the Complaint and contemporaneously-filed Affidavit after the statute of limitations has expired. For the time being, some extra front-end preparation will be crucial to prevent late added care from sabotaging your entire defense.

Once the defense is aware of all care provided by its agents to the plaintiff or decedent, the *Tenet* decision will be helpful in pinpointing which care could afford a basis for liability later in litigation. Counsel for corporate defendants in a medical malpractice action must take care to ensure that all care provided by agents or employees of its client are analyzed under the factors set forth in *Tenet* to determine whether it should stand prepared to defend that care. For now, the defense bar must be aware that arguments of insufficient notice are not going to carry the day. These recent decisions indicate that defense counsel will have better footing when asserting the position that the newly added care arises out of an entirely different transaction or occurrence. When addressing arguments citing to *Oller*, defense counsel should focus on distinguishing the new care from the care originally at issue, highlighting any difference in time, location, type of treatment, and resulting injury.

As more cases are decided in the wake of these two opinions, the defense bar should acquire a better understanding of the type of care that courts will find relates back or previously put defendants on notice. The interplay between the liberal reading of O.C.G.A. §§ 9-11-8 and 9-11-15 with the heightened pleading requirements of

O.C.G.A. § 9-11-9.1 remains unclear. However, the *Tenet* decision was at least beneficial in providing more clarity and allowing defendants to fashion an argument to defeat late-added claims by showing that they arise from a different transaction or occurred. *Oller* and *Tenet* will likely be landmark decisions in the field of medical malpractice for the foreseeable future, placing a premium importance on the ability of defense attorneys to effectively apply and distinguish them.

[1] Oller v. Rockdale Hospital, LLC, 342 Ga. App. 591 (2017).
[2] Tenet HealthSystem GB, Inc. v. Thomas, 304 Ga. 86 (2018).
[3] *Oller*, 342 Ga. App. 591,591 (2017).
[4] *Id*. at 592.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*. at 593.
[10] *Id*.
[11] *Id.* at 593.
[12] *Id*.
[13] *Id*. at 596
[14] *Id*.
[15] *Id*.
[16] *Tenet* at 87.
[17] *Id*. at 91.
[18] *See id*.
[19] *Id*. at 91-92.
[20] *See generally*, *id*. at 86.
[21] *See* Weber v. Freeman, 3 So. 3d 825 (Ala. 2008).
[22] *Id*.
[23] *Id*.
[24] Moore v. Baker, 989 F.2d 1129 (11th Cir. 1993)
[25] *Id*. at 1132.
[26] *Id*. at 1131.
[27] *Id*.
[28] *Id*.
[29] *Id*. at 1130 n. 1 (emphasis added).