

**Kalisher v Smith**

2007 NY Slip Op 30112(U)

February 7, 2007

Supreme Court, Suffolk County

Docket Number: 0000078

Judge: Thomas F. Whelan

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

*Handwritten:* COPY

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 9/1/06  
ADJ. DATES 11/3/06  
Mot. Seq. # 003 - MD

-----X  
DEREK KALISHER, by his mother and natural :  
guardian, LOREEN KALISHER, and LOREEN :  
KALISHER, individually, :  
:  
Plaintiffs, :

STEVE MARCHELOS, PC  
Attys. For Plaintiffs  
87 Mineola Blvd.  
Mineola, NY 11501

-against-

SIMMONS, JANNACE & STAGG, LLP  
Attys. For Defs. Carrion, Haralabatos,  
Klein and Brebbia  
75 Jackson Ave.  
Syosset, NY 11791

BRADLEY T. SMITH, M.D., SUK NAMKOONG, :  
M.D., WESLEY V. CARRION, M.D., SUSAN S. :  
HARALABATOS, M.D., AVI BAITNER, M.D., :  
SCOTT M. KLEIN, M.D., JOSEPH ANDREW :  
MANNINO, M.D., MICHAEL SCHWARTZ, M.D. :  
MARIA MINEO, M.D. and JOHN BREBBIA, :  
M.D., :  
Defendants. :

ANDREW CUOMO, ESQ.  
NYS Attorney General  
Atty. For Def. Mineo  
120 Broadway  
New York, NY 10271

-----X  
DEREK KALISHER, by his mother and natural :  
guardian, LOREEN KALISHER and LOREEN :  
KALISHER, Individually, :  
:  
Plaintiffs, :

INDEX No. 22343-03 - ACTION #2

FUREY, FUREY, LEVERAGE ET ALS  
Attys. For Petraco, Huntington Med. Grp.  
600 Front St.  
Hempstead, NY 11550

-against-

DOUGLAS M. PETRACO, M.D., HUNTINGTON :  
MEDICAL GROUP, P.C., MARY C. SPAK, :

KELLY, RODE & KELLY, ESQS.  
Attys. For Spak  
350 Old Country Rd.  
Mineola, NY 11501

M.D., HUNTINGTON HOSPITAL, DIX HILLS : HOBBS & TONETTI, ESQS.  
PHYSICAL THERAPY, : Attys. For Kalisher on Counterclaim  
: 739 E. Main St.  
Defendants. : Riverhead, NY 11901  
:  
: GEISLER & GABRIELE, LLP  
: Attys. For Dix Hills Phys. Therapy  
: 100 Quentin Roosevelt Blvd.  
: Garden City, NY 11530  
:  
: McHENRY, HORAN & BURKE, PC  
: Attys. For Huntington Hospital  
: 6800 Jericho Tnpk.  
: Syosset, NY 11791  
-----X

Upon the following papers numbered 1 to 21 read on this motion to amend pleadings  
\_\_\_\_\_; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross  
Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 4-7; 10-11; 14-15; 16-17; 18-  
19; Replying Affidavits and supporting papers 8-9; 20-21; Other 12-13 (supplemental  
affirmation); (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendant, Dix Hills Physical in Action No. 2, for summary judgment pursuant to CPLR 3212 dismissing plaintiffs' complaint against it, with prejudice, on the grounds that there are no triable issues of fact and permitting said defendant to enter judgment and direct the Clerk of the Court to enter judgment accordingly with statutory fees and costs, is denied; and it is further

**ORDERED** that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for plaintiff and the defendants in both actions within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1),(2) or (3) and thereafter file the affidavit(s) of service with the Clerk of the Court.

This is a medical malpractice/negligence action brought subsequent to the infant plaintiff's treatment by the defendants in action No. 1. Moving defendant, Dix Hills Physical Therapy (hereinafter "Dix Hills") in action No. 2 now moves for summary judgment dismissing plaintiffs' complaint on the grounds that there are no triable issues of fact regarding the treatment rendered to the infant plaintiff during a therapy session wherein he sustained a second fracture to his left femur.

In support of its motion, Dix Hills submits the affidavit of A. Phillip Fontanetta, M.D. (hereinafter "Dr. Fontanetta"), an orthopedic surgeon and the examinations before trial of the infant plaintiff, Derek

Kalisher, and his mother, Loreen Kalisher,<sup>1</sup> as well as, the uncertified records from Dix Hills. The motion is opposed by plaintiff and co-defendants in action No. 2, Douglas M. Petraco, M.D. (hereinafter “Dr. Petraco”) and Huntington Medical Group, P.C. (hereinafter collectively “Huntington Medical”). Huntington Medical submits only an attorney’s affirmation and a copy of the uncertified physical therapy records from Dix Hills. Besides the affirmation of their attorney, plaintiffs submit in opposition copies of the uncertified medical and psychological records, both prior to and after the date of the subject incident at Dix Hills, of the infant plaintiff, as well as, the affidavit of Lori Saunders (hereinafter “Saunders”), a licensed physical therapist. Although plaintiffs raise an issues as to the qualifications of Dix Hills’ expert to render an opinion as to the standard of care of the physical therapists (*see Kirker v Nicolla*, 256 AD2d 865, 681 NYS2d 689 [3d Dept 1998]), wherein the medical professionals were general surgeons, the Court finds that Dr. Fontanetta’s medical discipline as an orthopedic surgeon qualifies him as an expert able to render an opinion on the standard of care in follow-up physical therapy treatment of an orthopedic injury (*see Mineo v Young*, 248 AD2d 1012, 670 NYS2d 152 [4<sup>th</sup> Dept 1998]; *Matter of Enu v Sobel*, 208 AD2d 1123, 617 NYS2d 960 [3d Dept 1994]; *compare Weinstein v Daman*, 132 AD2d 547, 517 NYS2d 278 [2d Dept 1987]; *Taormina v Goodman*, 63 AD2d 1018, 406 NYS2d 350 [2d Dept 1978]).

In his affidavit, Dr. Fontanetta states that he reviewed plaintiff’s Bill of Particulars, the medical records from Dix Hills concerning its treatment of the infant plaintiff, and plaintiff’s examination before trial; that it is his understanding the infant plaintiff is making a claim of medical malpractice against Dix Hills; that a physical therapist does not assess fracture healing or determine whether weight bearing is appropriate during rehabilitative therapy; that, when administrating physical therapy, the standard of care a physical therapist follows is that of the orders of a medical doctor; that Dix Hills followed the orders of Dr. Petraco; that the infant plaintiff’s therapy was to be weight bearing as tolerated, thus in compliance with the standard of care; that he finds nothing in the treatment rendered to the infant plaintiff nor in plaintiff’s deposition testimony that indicates a contradiction for the prescribed physical therapy rendered on April 17, 2000; that the standard relating to physical therapy care was completely complied with; and that, with a reasonable degree of medical certainty, it is his opinion that the physical therapy administered by Dix Hills was not a competent producing cause of plaintiff’s alleged injuries (*see* affd. Dr. Fontanetta, MD).

---

<sup>1</sup> Copies of the pretrial transcripts submitted to the Court are unsigned and uncertified. The examinations were held on June 28 and 29, 2005. However, none of the parties claim them to be inaccurate. Assuming that the original transcripts were properly submitted for signature or that, in fact, the signatures were affixed, transcripts of depositions attached as exhibits to an attorney’s affirmation may be used in support of or to defeat a summary judgment motion (*see* CPLR 3116; *Thomas v Hampton Express, Inc.*, 208 AD2d 824, 617 NYS2d 831 [2d Dept 1994]; *app. den.* 85 NY2d 803, 624 NYS2d 373 [1995]; *Olan v Farrell Lines*, 64 NY2d 1092, 489 NYS2d 884 [1985]).

In her affidavit, Saunders states that she is a self-employed physical therapist with experience in working with children; that she reviewed the affidavit of Dr. Fontanetta, the papers submitted in support of the motion for summary judgment, the medical records provided by Dix Hills, including the initial evaluation reports and the handwritten incidents reports by Dix Hills personnel, who provided treatment to the infant plaintiff on the day of the incident; that based upon her review of the records, the infant plaintiff was using a walker to ambulate with his left foot and ankle wrapped in an ace bandage; that the physical therapy modalities and procedures utilized in treating the infant plaintiff were therapeutic, stretching, strengthening, electrical stimulation and gait training; that references are made to conversations with the infant plaintiff's physicians regarding weight bearing; that the notes of the treating therapists included slowly increasing weight bearing as tolerated with the patient to be cautioned not to be aggressive; that the initial therapy was quad sets and straight leg raising with light weights to be initiated as appropriate, in addition to, abduction, abduction and extensions; that the report of the incident indicates the fracture occurred when the infant plaintiff was performing hip abduction; that the infant plaintiff was directed to abduct only to 30 degrees and no further; that on his third repetition, the infant plaintiff reportedly lifted his leg to 45 degrees with side bending of his body to the right; that while he was bringing his leg down, the re-fracture occurred; and that based upon her review of the records, a question of fact exists whether the therapist violated the standard of care for a physical therapist while treating the infant plaintiff.

Saunders also states that there is nothing in Dr. Petraco's medical records to indicate physical therapy should be performed with ankle weights; that Dr. Petraco's prescription does not reference ankle weights; that there is no proof Dr. Petraco directed ankle weights to be used during therapy, which would be a departure from the accepted standard of care; that the term weight bearing has a specific meaning in the discipline of physical therapy, including the amount of weight an individual applies to his limb usually while in a standing or walking position; that in all of her years of experience, the term "weight bearing" has never meant using weights in conjunction with the performance of therapeutic exercises; that the standard of care for the application of physical therapy treatment often differs with the age of the patient; that an elderly, young adult or child patient is treated differently; that a therapist has a professional obligation to make sure the patient understands what the therapist means by the instructions given and how the therapeutic exercises should be done; that upon a review of the incident report, it appears the therapist wanted the infant plaintiff to perform a hip abduction exercise no higher than 25-30 degrees and if this was, in fact, the safe limit, then the therapist should have used some type of physical guidance to prevent the infant plaintiff from abducting his leg beyond that point; that a question of fact exists as to whether the physical therapist departed from acceptable standards of care by virtue of the failure to insure the infant plaintiff understood the therapy instructions; and that if the therapist failed to insure the instructions were understood, reasonable steps should have been taken to insure the infant plaintiff did not exceed the exercise limits (*see* affd Saunders 10/6/06).

A motion for summary judgment should not be granted unless it is clear that the moving party has made out a case on the undisputed material facts presented on the record by affidavit or other proof (*see Piccolo v DeCarolo*, 90 AD2d 609, 456 NYS2d 171 [3d Dept 1982]; *Barrett v Jacobs*, 255 NY 520 [1931]).

“If material facts are in dispute or different inferences may be reasonably drawn from facts themselves undisputed, a motion for summary judgment must be denied” (*Supan v Michelfeld*, 97 AD2d 755, 756, 468 NYS2d 384 [2d Dept 1983]).

When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*see Stone v Goodson*, 8 NY2d 8, 200 NYS2d 627 [1960]; *Sillman v Twentieth Century Fox*, 37 NY2d 395, 165 NYS2d 498 [1957]). It is not for the court to determine issues of credibility on a motion for summary judgment (*see Williams v Bonowicz*, 296 AD2d 401, 745 NYS2d 58 [2d Dept 2002]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 655 NYS2d 25 [1997]; *Air Flow Taxi Corp. v C.I.T., Corp.*, 258 AD 857, 15 NY2d 965 [4<sup>th</sup> Dept 1939]; *app rearg den* 258 AD 1030, 17 NYS2d 1002 [4<sup>th</sup> Dept 1940]; *Bernstein v Kritzer*, 224 AD 387, 231 NYS 97 [1928]) or where the facts are in dispute and where conflicting inferences may be drawn from the evidence or where, as here, in the instant matter, there are issues of credibility (*see Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366, 489 NYS2d 580 [2d Dept 1985]) and therefore are a matter within the province of the trier of fact (*see Miller v Long Island Lighting Co.*, 166 AD 2d 564, 560 NYS2d 847 [2d Dept 1990]).

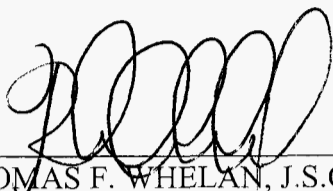
While the affidavit of Dix Hills’ expert contends that the physical therapists adhered to acceptable standards of physical therapy care in treating the infant plaintiff, the expert fails to address any of the specific, factual allegations of malpractice set forth in plaintiff’s bill of particulars (*see Ward v Engel*, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]; *see also Johnson v Peconic Diner*, 31 AD3d 387, 818 NYS2d 543 [2d Dept 2006]).

The affidavit of plaintiffs’ expert submitted in opposition raises triable issues of fact and credibility regarding the standard of care and the treatment rendered to the infant plaintiff on the date of the incident. Where an affidavit has been submitted in opposition to a motion for summary judgment, it is improper for the Court to grant the application if the affidavit raises a genuine triable issue of fact (*see* 6B Carmody-Wait 2d § 39:17; *see also Cooper v St. Vincent’s Hosp.*, 290 AD2d, 736 NYS2d 41 [1<sup>st</sup> Dept 2002]; *Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650, 724 NYS2d 423 [2d Dept 2001]; *Walker v Mount Vernon Hosp.*, 272 AD2d 468, 708 NYS2d 322 [2d Dept 2000]; *Weissman v Wider*, 235 AD2d 474, 652 NYS2d 1006 [2d Dept 1997]).

Under the facts and circumstances presented herein, the issues of credibility presented by the affidavits of the parties experts and Dix Hills expert’s failure to address the allegations set forth in plaintiffs bill of particulars in his affidavit, Court concludes that the moving defendant has failed to demonstrate its prima facie entitlement to judgment as a matter of law (*see Doe v Church of St. Christopher*, 19 AD3d 641, 797 NYS2d 293 [2005]; *Menzel v Plotnick*, 202 AD2d 558, 610 NYS2d 50 [2d Dept 1994]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366, *supra*) and declines to grant summary judgment.

Accordingly, the motion is denied as noted herein. This constitutes the Order and decision of the Court.

DATED: 2/7/07

  
\_\_\_\_\_  
THOMAS F. WHELAN, J.S.C.