

Cusack v Saperstone
2007 NY Slip Op 30420(U)
March 29, 2007
Supreme Court, Albany County
Docket Number: 0038332
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

DONALD CUSACK, SUSAN CUSACK, and
THOMAS CUSACK,

Plaintiffs,

-against-

DECISION and ORDER
RJI NO.: 3833-04
INDEX NO.:0104080556

JAMES D. SAPERSTONE, MD., GUILDERLAND
PEDIATRIC CENTER, CAPITAL CARE
PEDIATRICS-GUILDERLAND, CAPITAL CARE,
INC., E. SCOTT MACOMBER, MD, W.B.
MACOMBER GROUP, PLASTIC SURGERY GROUP,
and E. SCOTT MACOMBER, MD., PC.,

Defendants.

Albany County Supreme County All Purpose Term, March 22, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Defendant, E. Scott Macomber, MD., PC., brings this motion for summary judgment pursuant to CPLR § 3212 and to dismiss claims of Plaintiffs, Thomas and Susan Cusack, as untimely. Co-Defendants, James D. Saperstone, MD., Guilderland Pediatric Care, Capital Care Pediatrics-Guilderland and Capital Care, Inc, support the motions. Plaintiffs oppose the motion for summary judgment only.

After fully reviewing the record, this Court denies Defendant's motion for summary judgment, but dismisses Plaintiffs', Thomas and Susan Cusack, derivative claim as time-barred.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept 1996]). The court's main function in granting summary judgment is issue identification, rather than issue determination (See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (See Wingrad v. New York University Medical Center, 64 NY2d 851 [1985]). The party opposing the motion will be given the benefit of every reasonable inference (See Boyce v. Vazquez, 249 AD2d 724; see also Dykestra v. Winridge Condominium One, 175 AD2d 482 [3d Dept 1991]).

Plaintiffs contend that Defendant, Scott Macomber, MD., a plastic surgeon to whom Plaintiff Donald Cusack was referred due to the abnormally large size and redness of his right ear, committed medical malpractice by failing to conduct his own, independent examination of the ear, diagnose or treat the problem over the years that Donald saw him. According to Plaintiffs' medical expert, Donald was born with an arteriovenous malformation (AVM) in his

right ear. An AVM is an anomolous vascular formation where an artery or arties fail to properly form into capillaries or veins and instead form a nidus which continues to grow as the child ages and grows exponentially during puberty. Symptoms of an AVM include pulsing, an elevated temperature, extreme red discoloration and independent growth spurts.

Donald's mother became concerned about Donald's ear shortly after he was born and Donald's pediatician (Defendant James D. Sapperstone, MD) told her that it was a port stain birth mark. Around the time Donald was in fifth grade, Dr. Sapperstone concluded that the disfiguration in Donald's ear was a hemangioma rather than a birth mark. A hemangioma is a mass of capillaries that effects only the skin surface. Dr. Sapperstone told Donald's mother that they generally clear up without medical intervention and waited until Donald was in seventh grade to refer him to a specialist, Defendant Macomber, who agreed with Dr. Sapperstone's diagnosis of the ear and performed a series of laser surgeries to reduce the discoloration and size of the ear. Three years later, with minimal progress having been made via laser surgery, Dr. Sapperstone recommended an in office surgical procedure to correct the problem. At this point, Donald's mother sought a second opinion with Dr. Dupree as required by the insurance company as a prerequisite for surgery.

Dr. Dupree immediately diagnosed Donald with an AVM and asserted that the surgery planned by Dr. Macomber, which was suitable for a hemangioma, would have caused Donald to bleed to death on the operating table. Donald, ultimately, had a two part surgery in 2001, but because it was performed so late in life, that not all of the AVM could be removed. Plaintiff's medical expert opined that if the surgery had been conducted when Donald was first presented to Dr. Macomber, the results would have been better.

Defendant, Dr. Macomber, contends that he is entitled to summary judgment because his treatment of Donald was in accordance with good and accepted medical practice. In his affidavit, Dr. Macomber asserts that he diagnosed Donald with a hemangiomas port wine stain type lesion that was not significant enough to warrant putting him through invasive diagnostic procedures. Dr. Macomber then recommended a conservative treatment plan that involved attempting to ease the discoloration with laser treatments rather than subjecting Donald to an invasive surgery with a low success rate. Dr. Macomber only began discussing surgery “when I felt we had reached the best result we were going to get with the conservative laser treatment and I started to see some changing in the ear.” Dr. Macomber further opined that there would have been no benefit of performing surgery at an earlier date.

As seen above, this case is replete with triable issues. Plaintiffs have presented an affidavit by a medical expert opining that Dr. Macomber failed to properly diagnose and treat Donald’s condition and that this resulted in a substantial worsening of the condition and it being less susceptible to future treatments. Dr. Macomber contends that this Court should disregard Plaintiffs’ medical expert because the affidavit redacted not only the name of the expert, but the expert’s credentials and the name of another practitioner with whom he consulted. Although, Defendant is entitled to Plaintiffs’ expert’s qualifications, this omission is not enough to render the affidavit insufficient to defeat a motion for summary judgment (Rojas v. McDonald, 267 A.D.2d 130 [1st Dept 1999]). This Court has reviewed the affidavit in camera as it relates to this motion. Moreover, Defendant may continue to pursue expert disclosure as part of discovery in this case.

Accordingly, this Court denies Defendant’s motion for summary judgment, but dismisses

Plaintiffs', Thomas and Susan Cusack, derivative claim as time-barred.

All papers, including this Decision and Order, are being returned to the attorney for the Plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: March 29, 2007

Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Defendants', E. Scott Macomber, MD., Plastic Surgery Group and e. scott Macomber, MD., PC., Notice of Motion, dated October 27, 2006 with Attached Exhibits A-L.
2. Plaintiffs' Affidavit in Opposition by Susan Cusack, dated February 28, 2007
3. Plaintiffs' Affidavit in Opposition by Donald Cusack, dated February 23, 2007.
4. Plaintiff's Opposition, dated March 1, 2007 with Attached Exhibits
5. Plaintiffs' Expert Affidavit, dated March 2, 2007.
6. Co-Defendants' affidavit in Support, dated November 21, 2006
7. Defendat's Reply, dated March 22, 2007 with Attached Exhibit A.