

**LaCova v Behar**

2007 NY Slip Op 32304(U)

July 24, 2007

Supreme Court, Suffolk County

Docket Number: 0014975/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 5-17-07  
ADJ. DATE 6-21-07  
Mot. Seq. # 004 - MD

-----X  
DONNA LACOVA and SALVATORE LACOVA, :  
:   
Plaintiffs, :  
:   
- against - :  
:   
DR. JASON BEHAR and DR. DANIEL STERN, :  
:   
Defendants. :  
-----X

LAWRENCE M. KARAM, P.C.  
Attorney for Plaintiffs  
41 West 72<sup>nd</sup> Street, Suite 1-F  
New York, New York 10023  
  
BARTLETT, McDONOUGH, BASTONE  
& MONAGHAN, LLP  
Attorneys for Defendants Behar & Stern  
300 Old Country Road  
Mineola, New York 11501

Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-20; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 21-27; Replying Affidavits and supporting papers 28-29; Other   ; ~~and after hearing counsel in support and opposed to the motion~~) it is:

**ORDERED** that this motion by defendant Dr. Daniel Stern pursuant to CPLR §3212 for summary judgment, is denied.

This is an action sounding in medical malpractice wherein plaintiff Donna Lacova seeks damages for injuries claimed to have arisen out of the alleged malpractice of defendants in their care and treatment of her bunions. Plaintiff claims defendants departed from good and accepted standards of medical care in, *inter alia*, failing to accurately diagnose and treat her condition of hallux varus, failing to offer non-surgical treatment, selected the wrong or less than optimal surgical procedures, failed to take necessary x-rays, cut an improper amount of bone, placed improper internal fixation, caused a hematoma to form, and over-corrected a hallux valgus, proximately causing plaintiff injuries. The complaint also alleges causes of action for lack of informed consent, and a derivative claim on behalf of plaintiff's spouse, Salvatore LaCova.

Defendant Dr. Stern now moves for summary on plaintiff's first cause of action asserting his involvement in plaintiff's care was limited, and there was nothing he did or did not do that either proximately caused or contributed to the injuries which plaintiff sustained. Dr. Stern has not moved for

summary judgment on the lack of informed consent cause of action.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home et al*, 253 AD2d 852, 678 NYS2d 503 [2<sup>nd</sup> Dept 1998]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2<sup>nd</sup> Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [3<sup>rd</sup> Dept 1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375, *app denied* 92 NY2d 814, 681 NYS2d 475 [2<sup>nd</sup> Dept 1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2<sup>nd</sup> Dept 1994]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 45 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion, Dr. Stern has submitted, *inter alia*, copies of the pleadings and an amended verified bill of particulars; copy of the Stony Brook Hospital admission record of plaintiff; copies of the transcripts of the examinations before trial of Jason Behar, M.D., Daniel Stern, M.D.; copies of various medical records and portions thereof; and the affidavit of defendant Stern's expert Zevi W. Isseroff, D.P.M.

Dr. Isseroff sets forth in his affidavit that he is certified in podiatric surgery, podiatric orthopedics and primary podiatric medicine, and maintains a private practice in New York State. Dr. Isseroff states an opinion based upon the review of pertinent materials and medical records, with a reasonable degree of podiatric certainty that Daniel Stern, D.P.M. did not depart from good and accepted podiatric practice in connection with the treatment rendered to plaintiff Donna LaCova, and that the care and treatment

rendered did not proximately cause any of Donna LaCova's injuries.

Dr. Isseroff sets forth that Dr. Stern's involvement with Donna LaCova was very limited in that he did not see plaintiff during any pre-operative visits. Surgery, consisting of a modified Austin bunionectomy with K-wire to plaintiff's right foot, was performed June 17, 2004 based upon the pre-operative diagnosis of hallux abductovalgus of the right foot. Dr. Behar was the surgeon with Dr. Stern assisting. Defendant's expert states that during surgery, an intraoperative decision was made to correct the hallux abductus angle due to the fact that part of the deformity was still present.

Dr. Isseroff states that according to the deposition testimony of Dr. Behar and Dr. Stern, as well as the operative report, at no point during the June 17, 2004 surgery did Dr. Stern cut any bone. Dr. Stern retracted, cut sutures, and bovied, duties typically left to an assistant. Post operatively, Dr. Stern only saw plaintiff on one visit on June 26, 2004 on an emergent basis, when Dr. Behar was not available, when plaintiff presented with green drainage from the operative site. Plaintiff was already on Levaquin, so Dr. Stern applied topical gentamycin cream, took a culture and put the plaintiff's foot in a boot. Thereafter, plaintiff followed with Dr. Behar, who recommended after several visits that additional surgery consisting of correction of hallux varus of the right first metatarsophalangeal joint and the removal of the screw of the right foot. Dr. Behar's assessment was that removal of the screw should be made with an attempt to realign the soft tissue to decrease a contracture of the varus.

Defendant's expert states Dr. Behar was the surgeon with Dr. Stern assisting on August 5, 2004 wherein the retained hardware was removed and a modified Joplin procedure was performed with correction of the hallux varus of the right lower extremity. Postoperatively, there was still a slightly medial proximal phalanx, but there was good movement at the metatarsophalangeal joint.

On September 16, 2004, plaintiff returned to Stony Brook Hospital for surgery on her left foot for a diagnosis of hallux abductovalgus with arthritic changes of the first metatarsophalangeal joint of the left foot. The surgical procedure performed was removal of a ganglion of the left first metatarsophalangeal joint and Austin bunionectomy at the first metatarsophalangeal joint with K-wire fixation. Dr. Isseroff again states that Dr. Stern assisted and did not perform any cutting of bone. That was the last time Dr. Stern rendered any kind of treatment or care to Ms. Lacova.

Defendant's expert states that Dr. Stern was not involved with the decision making with regard to Dr. Behar's proposed surgical plan concerning the right or left foot. Dr. Stern was not present for any of the pre-operative consultations nor did he treat plaintiff prior to the first bunion correction surgery on the right foot. Dr. Stern assisted Dr. Behar during the surgeries in a passive role, limiting his care to retraction, cutting of sutures and bovie. Dr. Stern acted under the direction of Dr. Behar, and did not participate in any of the bone cutting procedures. He did not make any decisions as to what surgical procedures were going to be performed by Dr. Behar, who made the decisions as to what cuts were to be made for the Austin and Akin procedures concerning the right foot.

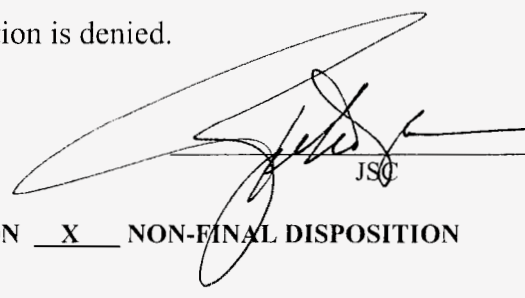
As to Dr. Stern's sole emergent visit with plaintiff, it is Dr. Isseroff's opinion with a reasonable degree of medical certainty that Dr. Stern did not deviate or depart from good and accepted podiatric practice as Dr. Stern acted reasonably and appropriately by obtaining a culture and applying topical gentamycin cream, an accepted podiatric practice.

Dr. Stern testified at his examination before trial that he saw Ms. Locova in the Coram office on June 26, 2004. He also testified that he assisted Dr. Behar with all three surgeries performed on Ms. Laccova, June 17, 2004, August 5, 2004, and September 16, 2004. At the June 17, 2004 surgery he would have retracted, cut sutures, bovied and did not cut any bone and did not remember cutting any tissue from the skin. Dr Behar made the decisions as to the type of cuts that were to be made and were made for the Austin procedure and the Akin procedure, and who decided to place the pin and the screw and the type of screw used. It was Dr. Behars' decision whether or not plaintiff needed a correction of her PASA. Dr. Stern did not remember if he did any cauterizing.

In view of the foregoing, defendant Stern has not established prima facie entitlement to summary judgment as defendant has raised factual issues in his submissions concerning whether or not Dr. Stern cut bone during any of the surgeries and whether he performed any of the cautery during the surgery. Plaintiff has alleged an over correction of the deformity of her right foot and cutting the bone at an improper angle. Plaintiff has also alleged hematoma formation at the operative site of the right foot causing injury. Dr. Stern testified at his examination before trial that he assisted Dr. Behar with all three surgeries performed on Ms. Lacova, June 17, 2004, August 5, 2004, and September 16, 2004 and at the June 17, 2004 surgery he would have retracted, cut sutures, bovied and did not cut any bone and did not remember cutting any tissue from the skin. He then testified that he did not remember if Dr Behar did any cauterizing during the surgery, but it would not be uncommon. Dr. Behar testified at his examination before trial, making reference to the June 17, 2004 surgery, that he and Dr. Stern both cut tissue and bone. However, in his affidavit dated October 26, 2006, to correct the transcript, he stated that Dr. Stern might have cut some tissue and bovied, and at no point in the surgery did Dr. Stern cut bone in any way. Dr. Behar testified that it was a combined effort for him and Dr. Stern to ligate or cauterize any bleeders. These factual issues go the claim of deformity and hematoma formation and whether or not Dr. Stern did cut bone during the procedures and whether the cautery was a shared effort between Dr. Stern and Dr. Behar, thus precluding an award of summary judgment.

Accordingly, defendant Dr. Stern's motion is denied.

Dated:     JUL 24 2007    

  
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JSC

\_\_\_\_ FINAL DISPOSITION   X   NON-FINAL DISPOSITION