

Schein v Strauss

2007 NY Slip Op 33417(U)

October 17, 2007

Supreme Court, Suffolk County

Docket Number: 0006121/2004

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 6-27-07
ADJ. DATE 9-19-07
Mot. Seq. # 001 - MotD 003 - XMD
002 - XMD 004 - XMD

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JOYCE SCHEIN and MARK SCHEIN,	:	KRAKOWER & GOLDMAN
	:	Attorneys for Plaintiffs
Plaintiffs,	:	55 Old Turnpike Road, Suite 304
	:	Nanuet, New York 10954
- against -	:	
	:	VARDARO & HELWIG, LLP
	:	Attys for Defts Strauss, Satnick & Allergy & Asthma
DR. RAPHAEL E. STRAUSS, DR. STEVEN	:	732 Smithtown Bypass
SATNICK, ALLERGY & ASTHMA CARE OF	:	Smithtown, New York 11787
L.I., P.C., SUFFOLK OBSTETRICS &	:	
GYNECOLOGY, L.L.P., DR. JENNIFER	:	KELLY, RODE & KELLY, LLP
MARSHAK, DR. JOHN G. PETRACO, DR. G.	:	Attys for Defts Sampogna & Campbell
MICHAEL PETERS, DR. DOUGLAS S. LEE, DR.	:	218 Griffing Avenue
GERARDO A. SAN ROMAN, DR. LANCE	:	Riverhead, New York 11901
EDWARDS, DR. SUSAN STERLACCI, DR.	:	
DOMINICK A. SAMPOGNA, DR. JOSEPH P.	:	ROGAK & GIBBONS, LLP
BONAFEDE & DR. TODD W. CAMPBELL,	:	Attys for Defts Suffolk OB/GYN, Marshak, Petraco,
	:	Peters, Lee, San Roman, Sterlacci & Edwards
Defendants.	:	90 Merrick Avenue
-----X		East Meadow, New York 11554

Upon the following papers numbered 1 to 73 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-20; Notice of Cross Motion and supporting papers 21-35; 36-47; 48-60; Answering Affidavits and supporting papers 61-64; 65-66; Replying Affidavits and supporting papers 67-68; 69-71; Other 72-73; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (001) by defendants, Suffolk Obstetrics & Gynecology, LLP, Jennifer Marshak, M.D., John Petraco, M.D., Michael Peters, M.D., Douglas Lee, M.D., Gerardo San Roman, M.D., Susan Sterlacci, M.D., and Lance Edwards, M.D., pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint, is granted as to Susan Sterlacci, M.D. and denied as to the remaining above named defendants; and it is further

ORDERED that this cross motion (002) by defendants, Dominick A. Sampogna, M.D. and Todd W. Campbell, M.D., pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint, is denied; and it is further

ORDERED that this cross motion (003) by defendants, Dr. Raphael E. Strauss, Dr. Steven Satnick, and Allergy and Asthma Care of L.I., P.C., pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint, is denied; and it is further

ORDERED that this cross motion (004) by plaintiffs Joyce Schein and Mark Schein pursuant to CPLR 3212 for summary judgment against defendants Dominick A. Sampogna, M.D., Todd W. Campbell, M.D., Dr. Raphael E. Strauss, Dr. Steven Satnick, and Allergy and Asthma Care of L.I., P.C., and severing those claims from the claims asserted against defendants Suffolk Obstetrics & Gynecology, LLP, Jennifer Marshak, M.D., John Petraco, M.D., Michael Peters, M.D., Douglas Lee, M.D., Gerardo San Roman, M.D., Susan Sterlacci, M.D., and Lance Edwards, M.D., is denied as untimely.

This is an action for medical malpractice wherein it is alleged defendants failed to timely and properly test, diagnose, evaluate, and treat plaintiff, Joyce Schein, for adenoidal cystic carcinoma, and delayed testing, diagnosis and treatment of this condition until her pregnancy was concluded, and caused and permitted a substantial worsening of plaintiff's condition. Causes of action asserting medical malpractice, lack of informed consent, and a derivative claim on behalf of plaintiff's spouse, Mark Schein, have been asserted.

Plaintiff alleges in her bill of particulars that because the tumor was permitted to grow it became invasive requiring removal of plaintiff's right eye, right jaw bone, and half the palate; multiple surgeries for reconstructive surgeries including skin harvesting; failed skin grafting; inability to have additional skin grafting due to radiation treatment; multiple surgeries to reduce the pressure on the brain; seizures; constant headaches; swelling of plaintiff's face and body secondary to the use of steroids; necessity to use Keppra and Dilantin; emotional flattening and diminished affect; diminished enjoyment of day to day life; loss of senses of taste and smell secondary to the surgeries; leaking of food through and out of plaintiff's nose causing great discomfort and embarrassment; hydrocephalus; placement of a shunt in plaintiff's brain to relieve pressure; subdural hematoma requiring surgery; radiation therapy for thirty five days; abscess of the frontal lobe; difficulty with coordination, walking, and speech; and the inability to drive a car.

The moving defendants allege there were no departures from the appropriate standards of care and treatment with regard to the care and treatment rendered to plaintiff and they did not cause or contribute to plaintiff's medical condition of adenoidal cystic carcinoma and did not cause or contribute to plaintiff's claimed injuries, and thus seek summary judgment dismissing the complaint.

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*, 253 AD2d 852, 678 NYS2d 503 [2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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, Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2nd 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 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2nd Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202

AD2d 465, 465, 609 NYS2d 45 [2nd 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 [2nd Dept 1979]) 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 [2nd 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.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In motion (001) by defendants, Suffolk Obstetrics & Gynecology, LLP (hereinafter Suffolk OB-GYN), Jennifer Marshak, M.D., John Petraco, M.D., Michael Peters, M.D., Douglas Lee, M.D., Gerardo San Roman, M.D., Susan Sterlacci, M.D., and Lance Edwards, M.D., seek summary judgment dismissing plaintiffs’ complaint, and in support have submitted, *inter alia*, copies of the summons and verified complaint; their verified answer; a copy of plaintiffs’ verified bills of particulars; affirmations of Susan L. Sterlacci, M.D., and David Myssiorek, M.D.; copies of the transcripts of the examinations before trial of Dr. Raphael E. Strauss, Dr. Steven Satnik, John G. Petraco, M.D., Joyce Schein, and Jennifer Marshak, M.D.; and various medical records of plaintiff.

In her affirmation, Susan L. Sterlacci, M.D. sets forth that she is a physician licensed to practice medicine in New York State and was a partner in Suffolk Obstetrics & Gynecology, LLP during the period of time at issue in this lawsuit from October 29, 2001 through June 14, 2002, and during this period of time, did not see, treat, or render any medical care to Joyce Schein. This is undisputed by plaintiff.

Accordingly, this action is dismissed against Susan L. Sterlacci, M.D.

David Myssiorek, M.D. affirms that he is a physician licensed to practice medicine in New York State and is board certified in Otolaryngology. Based upon his review of the records and testimony, and experience as a head and neck surgeon, it is his opinion based upon a reasonable degree of medical certainty that the medical care and treatment of Joyce Schein by Suffolk Obstetrics & Gynecology, LLP, Jennifer Marshak, M.D., John Petraco, M.D., Michael Peters, M.D., Douglas Lee, M.D., Gerardo San Roman, M.D., Susan Sterlacci, M.D., and Lance Edwards, M.D. was in accordance with acceptable medical practice and their obstetrical care and treatment was and is not the proximate cause of plaintiff’s

claimed injuries, and their obstetrical care and treatment did not cause or contribute to plaintiff's claimed injuries.

Dr. Myssiorek avers that plaintiff had been a patient of Suffolk Obstetrics and Gynecology, LLP since December 22, 2000 and her initial patient history indicates she had a history of sinus polyps which had been removed in 1994. She was taking Zyrtec for allergic rhinitis.

On October 29, 2001, Mrs. Schein came to defendant Suffolk, and was seen by a Nurse Practitioner, Dorothy Kozlowski. She was pregnant with her second child and had an EDC of June 12, 2002. She again documented her history of sinus polyps at age 31, with no other significant medical history. She was scheduled for routine pregnancy monitoring.

On November 27, 2001, she was again seen by nurse practitioner Kozlowski for a routine prenatal visit, and again documented the history of sinus polyps at age 31, and that she was on Levaquin at some point since her last menstrual period. She had been referred for genetic counseling as she was a Tay Sachs carrier, but her husband was negative.

Plaintiff's third routine prenatal visit was on December 26, 2001, at which time she was seen by Dr. G. Michael Peters with no complaints offered to him. On January 22, 2002, she was seen by Dr. Douglas Lee for an amniocentesis. She offered no complaints at that time.

On February 4, 2002, an ultrasound was taken and recorded. At a routine prenatal visit on February 19, 2002, she was seen by Dr. Rosanne Laurora with no complaints offered.

On March 19, 2002, Mrs. Schein was seen by Dr. John Petraco for a prenatal visit at which time she was twenty eight weeks pregnant. At this visit she indicated to Dr. Petraco that she had major congestion and was seeing her ENT and that she had a history of polyps. She also called Suffolk OB-GYN on March 23, 2002 and had a conversation with Dr. Stephen Ross about a sinus infection wherein she was approved to use Biaxin and Afrin nasal spray ordered by another physician.

On April 18, 2002, plaintiff indicated to Dr. Jennifer Marshak that she was taking Prednisone and Biaxin. No problems were reported to Dr. Paul Lograno when she saw him on May 1, 2002. On May 15, 2002, she was seen by Dr. San Roman, with no complaints offered.

A May 17, 2002 progress note by Dr. Petraco indicates he spoke with Dr. Campbell, plaintiff's ENT, who feels there might be something other than nasal polyps as there were some neurologic findings and some kind of mass that he was not convinced is a polyp. Dr. Campbell wanted a CAT scan after she delivered.

On May 21, 2002, Mrs. Schein returned for a prenatal visit and was again seen by Dr. Marshak. According to plaintiff's records and testimony, Dr. Myssiorek states Dr. Marshak received a phone call from ENT specialist, Dr. Campbell, after the prenatal visit and noted "per Dr. Campbell, concern regarding nasal polyps-wants CT postpartum-consider induction when/if cervix favorable."

On May 28, 2002 she was seen by Dr. Lee at Suffolk OB-GYN. On June 3, 2002, the cervix was

long and closed and a sonogram indicated the fetal weight was 7 pounds 4 ounces.

The June 4, 2002 progress note indicates that on June 4, 2002, Dr. Lee spoke with Dr. Sampogna, plaintiff's ENT specialist, who expressed worry that plaintiff may have a tumor causing pressure and polyps. Dr. Lee indicated he "will try to deliver by term so that he can follow up. On June 10, 2002, the cervix was long and high, and the plan, as written by Dr. Edwards, was for induction. Thereafter, plaintiff was admitted to St. Charles Hospital by Dr. Marshak for induction on June 12, 2002, at which time she delivered a healthy baby boy weighing 7 pounds 10 ounces with Apgars of 8 and 9.

A CT scan was performed at St. Charles Hospital on June 13, 2002, as ordered by Dr. Marshak. The report indicated there is a complete opacification of the right maxillary sinus and an expansion and remodeling of the walls of the sinus. The bony wall on the right was expanded into the nasal cavity across the midline with abnormal soft tissue attenuation filling the right side of the nasal cavity. There was expansion and remodeling of the posterior wall of the sinus and the process extends into the right pterygomaxillary fissure and pterygopalatine fossa. There is expansion into the ethmoid sinus and right orbit with displacement of the medial rectus muscle and optic nerve causing proptosis. It was opined that the findings likely represented an aggressive benign etiology due to bony remodeling rather than frank destruction. An MRI with gadolinium was recommended for further evaluation.

On June 17, 2002, Mrs. Schein was admitted to South Side Hospital by Dr. Sampogna for biopsy of the right maxillary mass. A frozen section diagnosis of biopsy indicated probable adenocystic carcinoma. The surgical pathology report confirmed this with perineural invasion.

On August 2, 2002, Mrs. Schein underwent a right maxillectomy with right orbital exenteration at Memorial Sloan Kettering Cancer Center. Defendants' expert states that since this surgery, plaintiff has experienced complications of her malignancy process including headaches and seizures.

Defendants' expert avers that throughout Mrs. Schein's pregnancy, the nasal issues raised by Mrs. Schein were addressed by her allergists and her ENT specialists, as properly documented when she advised her obstetricians. No reason was presented to the obstetricians which would have caused or necessitated their intervention in the care given to her by her allergists and her ENT specialists. There was at no time a discussion of a possible malignancy. The stated concerns on May 17, 2002 and May 21, 2002, three weeks before her due date, were that she undergo a CT scan of the sinus following the delivery, which was promptly accomplished the day following delivery. And that CT scan result stated plaintiff had a benign process, a probable aggressive benign etiology.

It is defendants' expert opinion within a reasonable degree of medical certainty that based upon the August 2, 2002 operative report and pathology report of that surgery, that had the adenoid cystic carcinoma been detected three weeks earlier than the patient's due date, the CT would still have been read identically as a benign process and the ultimate surgical intervention would have been identical. Defendants' expert further opines that defendants did not cause or contribute to plaintiff's claimed injuries, that this is a very rare disease which is indolent and relentless in growth, spreading along the nerves and invading diffusely, and that the mass was present long before the pregnancy. Defendants' expert further opines that the hormonal changes of pregnancy engorged the sinuses, causing the complaint of nasal congestion being addressed by physicians with expertise in the areas of allergy and

otolaryngology. He further opines that even if the mass had been diagnosed and removed earlier, she would have required the same surgery she underwent on August 2, 2002 and her prognosis would have been the same.

Based upon the foregoing, this court determines that Suffolk Obstetrics & Gynecology, LLP, Jennifer Marshak, M.D., John Petraco, M.D., Michael Peters, M.D., Douglas Lee, M.D., Gerardo San Roman, M.D., and Lance Edwards, M.D. have demonstrated prima facie entitlement to summary judgment on the issue of negligence and proximate cause.

Turning to cross motion (002), defendants Dominick A. Sampogna, M.D. and Todd W. Campbell, M.D., seek summary judgment, and have submitted in support, *inter alia*¹, an attorney's affirmation; copies of the verified answers of Dr. Sampogna, Dr. Campbell, Dr. Statnick, Dr. Strauss, Allergy and Asthma Care of L.I.; copies of plaintiffs' verified bills of particulars as to Dr. Bonafede, Dr. Sampogna, Dr. Campbell; copies of the transcripts of the examination before trial of Dr. Sampogna and Dr. Bonafede; copies of plaintiff's medical records; a signed stipulation discontinuing the action with prejudice as to Dr. Bonafede; and affidavits of Dominick Sampogna and Todd Campbell, and defendants' expert Michael Setzen, M.D.

The moving defendants have not submitted a copy of the summons and complaint (CPLR 3212[b]), however, a copy of the same is found in a search of the records.

Dr. Michael Setzen avers he is licensed to practice medicine in New York State and is Board Certified in otolaryngology and head and neck surgery. After a review of those documents itemized in his affidavit, Dr. Setzen opines that Dr. Dominick Sampogna and Dr. Todd Campbell exercised appropriate medical judgment and did not deviate from accepted standards of medical care with regard to their treatment of Joyce Schein, and that their care and treatment was not the proximate cause of injury to plaintiff. Instead, he opines, the cause of the difficulties that Mrs. Schein experienced was a result of her very severe medical condition which had no relationship whatsoever to the care and treatment rendered to her by defendants Sampogna and Campbell.

Defendants' expert states Mrs. Schein was diagnosed with adenoid cystic carcinoma of the maxillary sinus in a very short period of time by Dr. Sampogna. He describes this adenoid cystic carcinoma as the most silent and difficult to diagnose cancers which is often not diagnosed until it has extended far into the surrounding tissues as the sinus is a confined space with a hollow area that allows for extensive growth producing no symptoms. The difficulty surrounding the diagnosis of Mrs. Schein's condition is made worse by the benign and yet extensive growth of polypoid disease of the sinus which mimics exactly the course of the adenoid cystic carcinoma.

Dr. Setzen states that the primary treatment of adenoid cystic carcinoma (AdCC) is surgical removal with clean margins, which can be very difficult and challenging in the head and neck region due to the tumor's tendency to spread along nerve tracks. Adjuvant or palliative radiotherapy is commonly given following surgery, which Mrs. Schein did receive. She did not have chemotherapy as she had no further metastatic spread. Dr. Setzen describes the cancer as very slow growing, and therefore, a delay of

¹ The moving defendants have not submitted any papers as Exhibit F.

a few months is of no consequence in the final outcome, nor the necessity for extensive surgical resection.

Mrs. Schein was a 37 year old, six months pregnant female when she contacted Dr. Sampogna and Dr. Campbell for continued sinusitis that began again during her pregnancy with her second child. She was due to deliver in June, 2002. She had left sinus surgery consisting of a nasal anrostomy performed in 1993/1994 by a prior treating physician for nasal polyposis. The tumor diagnosed in June, 2002, was located on the right side. Prior to seeing Dr. Sampogna and Dr. Campbell, Mrs. Schein was being treated by her obstetricians at Suffolk Obstetrics and Gynecology since November, 2001, and by her allergists, Dr. Satnick and Dr. Strauss since February, 2002.

Defendants' expert states that Mrs. Schein first presented to Dr. Sampogna on March 22, 2002 at which time a complete examination was done of her eyes, ears, nose, throat, using palpation, visualization with a nasal endoscope, as well as her entire head and neck area. She presented with complaints of facial swelling and nasal blockage. Dr. Sampogna diagnosed a polypoid meati, rhinosinusitis, and a deviated septum after noting a polyp in her sinus. He prescribed Biaxin and Nasacort. Dr. Setzen states that Dr. Sampogna performed a thorough and complete physical examination and there was no effect on the disease process itself, and it did not alter in any way the extent or type of treatment necessary.

On March 27, 2002, Mrs. Schein contacted Dr. Bonafede at Dr. Sampogna's office and stated she did not feel she was getting any better. Dr. Bonafede instructed her to continue the Biaxin, and if not feeling better, to come in the next day. On March 29, 2002, she called again stating she was not feeling better. Dr. Sampogna returned the call and told her to continue the medication and call in one week.

On April 5, 2002, she called again at which time Dr. Sampogna spoke with her and reassured her that it takes a long time for sinusitis to resolve on some occasions, and especially in light of the fact that she was pregnant, as pregnancy is a known irritant to the sinuses. She was to continue on the Biaxin and add an aqueous sinus saline solution to ease her congestion. Dr. Setzen opines that this is completely appropriate and within the standard of care to add the saline solution to someone who is experiencing a sinus condition during pregnancy.

On April 17, 2002, Mrs. Schein was seen by Dr. Bonafede for complaints of bilateral nasal congestion which was getting worse and she was experiencing pain and pressure in her right eye, right ear and had blurred vision. Upon examination, Dr. Bonafede did not find proptosis, or bulging of the eye, but her nose was found to have a huge right inferior turbinate which was bluish and positive for polyps. Her right eye was full posteriorly to palpation. No ecchymosis of the lining of the eye or chimosis or paralysis of the eye was noted. Diagnosis at this time was polyposis and unresolving set of symptoms of sinusitis. Dr. Bonafede spoke with Mrs. Schein's obstetricians about her medication as he wanted to change the Biaxin to Augmentin and added Solu Medrol and Afrin nasal spray. She was told to return in two days. Dr. Setzen opines that these symptoms are totally consistent with sinusitis accompanied by polypoid disease and that Dr. Bonafede's examination and treatment at this visit was appropriate, but complicated by the fact that she was close to delivery of her child and little could be accomplished until the pregnancy was concluded.

On April 19, 2002, when Mrs. Schein was seen again by Dr. Campbell, she was noted to have a decrease in the symptoms in her nose and eye, although still congested, was better. Her diagnosis was

sinusitis in the right ethmoid. She was placed on Ceftin as the Biaxin was causing stomach complaints.

On April 24, 2002 she was seen by Dr. Sampogna who indicted her symptoms, after examination, had not changed.

On May 9, 2002, when Dr. Sampogna examined her, he did not notice any proptosis in her right eye, no global tenderness, and no global signs in the eye, meaning ecchymosis or chemosis. The nasal mucosa was cultured which showed moderate growth of coagulase negative staphylococcus, so Astelin was added to her treatment. Dr. Setzen opines that this treatment was well within the standards of care.

On May 17, 2002, Dr. Campbell noted her condition to be worse and noted a question of a slight proptosis and decreased sensation in her soft palate which he felt was probably caused by her symptoms of benign polyposis. It was at this point that Dr. Campbell immediately contacted plaintiff's obstetrician's office, concerned that she was suffering from a condition other than simple polypoid disease and recommended a CT scan immediately upon delivery. He spoke with Dr. Petraco. Dr. Setzen states that this care and treatment was appropriate and did not deviate from accepted standards of care. There was a cooperative effort on the part of all her physicians to keep her comfortable until the time of delivery when more definitive care of her sinuses could be undertaken, well within the standard of care of patients with these conditions.

On May 21, 2002, Dr. Marshak, plaintiff's obstetrician, noted Dr. Campbell called and wants a CT scan and to consider induction when/if the cervix is favorable. Dr. Setzen opines that Mrs. Schein's AdCC was not in any way worsened by the care and treatment rendered by Dr. Campbell and Dr. Sampogna from March 22, 2002 until the birth of her child on June 12, 2002.

On May 24, 2002 Dr. Sampogna saw Mrs. Schein and noted the right nasal chamber is still occluded by a prominent inferior turbinate with right orbital rim fullness which is of concern and needs to be watched. She was to come back in one week.

On May 25, 2002, Dr. Shugrue increased her Nasacort from four to six times a day.

Dr. Setzen states that one of the allegations in the bill of particulars was that a CT scan should have been performed on Mrs. Schein even though she was pregnant. He states that when the CT scan was done in June immediately after delivery of the infant, as ordered by Dr. Marshak at the request of Dr. Sampogna and Dr. Campbell, it demonstrated a "probably benign condition." Therefore, he states, even if a CT scan had been ordered during the pregnancy, no further surgical procedure would have been performed due to the report issued from the CT scan until the pregnancy was concluded. Therefore, he further states, there was no deviation from accepted standards of care to wait until the conclusion of pregnancy to conduct a potentially dangerous radiological study of the sinus of an eight-months pregnant woman.

It is further alleged by plaintiff that a needle biopsy should have been performed between the period of March to June of 2002 by Mrs. Schein's ENT doctors. Dr. Setzen opines that this procedure can be utilized as a diagnostic tool in the diagnosis of some sinus cancers, however, a needle biopsy is of little value in diagnosing some sinus cancers, and an excisional biopsy is the only way to be assured of a

correct diagnosis, and an open procedure could not and should not have been performed on Mrs. Schein during the time of her pregnancy.

Dr. Setzen opines within a reasonable degree of medical certainty that even had the alleged testing been performed earlier and the diagnosis rendered three months earlier, her prognosis and treatment requirements would have been exactly the same as they were when the surgery was performed in August 2002, and her prognosis would have been the same as it was in August 2002. Therefore, opines Dr. Setzen, Dr. Sampogna's and Dr. Campbell's treatment of Mrs. Schein did not deviate from any acceptable standards of medical care and treatment and did not proximately cause her injuries.

Both Dr. Sampogna and Dr. Campbell set forth their care and treatment of Mrs. Schein in their supporting affidavits, which care and treatment has been set forth above as contained in Dr. Setzen's affidavit. Dr. Sampogna and Dr. Campbell both conclude and opine with a reasonable degree of medical certainty that the care and treatment rendered by each did not deviate from good and accepted standards of medical care and treatment, nor did any care and treatment rendered to plaintiff proximately cause any of the injuries alleged in this matter. They both opine that plaintiff's prognosis and treatment requirements would have been exactly the same as they were when the surgery was performed in August, 2002, and her prognosis would have also been the same also as to the rendered care and treatment between March 22, 2002 and June 17, 2002.

Based upon the foregoing, this court determines that defendants Dominick Sampogna, M.D. and Todd W. Campbell, M.D. have demonstrated prima facie entitlement to summary judgment on the issue of negligence and proximate cause.

Cross motion (003), by defendants Dr. Raphael E. Strauss, Dr. Steven Satnick, and Allergy & Asthma Care of L.I., P.C. for summary judgment dismissing plaintiff's complaint, is supported by an attorney's affirmation; a copy of the summons and complaint; a copy of the verified answers of defendants Steven Satnick, M.D., Raphael Strauss, M.D. and Allergy & Asthma Care of L.I., P.C.; copies of the verified bills of particulars for defendants Dr. Strauss, Dr. Satnick, and Allergy & Asthma Care of L.I., P.C.; a copy of the transcripts from the examinations before trial of Dr. Strauss, Dr. Satnick, and Joyce Schein; a copy of plaintiff's medical records; and the affidavit of Mitchell B. Boxer, M.D., defendants' expert physician.

Dr Mitchell Boxer affirms he is licensed to practice medicine in the State of New York and sets forth his opinions within a reasonable degree of medical certainty that the medical care and treatment provided to Joyce Schein by Dr. Raphael E. Strauss, Dr. Steven Satnick, and Allergy and Asthma Care of L.I., P.C. was at all times in conformity with good and accepted medical practices as they existed during the relevant period of time, and that the care and treatment rendered by these defendants was not the proximate cause of her claimed injuries.

Dr. Boxer states Joyce Schein first presented to the office of the defendants, Dr. Raphael E. Strauss, Dr. Steven Satnick, and Allergy and Asthma Care of L.I., P.C., in December, 1995 at which time she was seen by Dr. Satnick. Her prior treatment had been with Dr. D'Amore, whose records were pending. She gave Dr. Satnick a history of receiving allergy shots every other week for about seven or eight years and reported suffering from allergies since age ten. She also gave a history of sinusitis and

removal of nasal polyps by Dr. Miceli in 1994.

Dr. Boxer sets forth that a review of the records indicates she was treated at defendants' office for allergy shots from December 1995 through November 1997. He states the records also indicate that on September 22, 2001, the plaintiff had a telephone conversation with Dr. Strauss whereby she reported having a two week history of upper respiratory symptoms, nasal congestion and facial pain. She was placed on Levaquin 500 mg. for ten days.

Thereafter, in February, 2002, at twenty five weeks pregnant, she presented to Dr. Satnick and reported being off all medications since September, and that in December, 2001, she had nasal congestion, right greater than left, and was prescribed an antibiotic but received no relief. Dr. Boxer indicates that Dr. Satnick's physical examination revealed her nose was 2+ edema, plus or minus pain along the right maxillary sinus, and the tympanic membranes and her chest were clear. His plan was to prescribe Rhinocort AQ, and if she had pain or discharge, she should call for an antibiotic.

On February 25, 2002, Dr. Satnick had a telephone conversation with plaintiff wherein it was noted she was taking the Rhinocort but still had congestion, right greater than left, and tenderness in her cheek. Dr. Satnick indicated she could try Neosynephrine for one to two days, but if she still had pain, she would need to be on an antibiotic.

Dr. Boxer states Mrs. Schein next spoke with Dr. Satnick on March 4, 2002, over the telephone, and a note indicated Cefitin would be called into the pharmacy. Dr. Boxer states that based upon the records of Dr. Sampogna and the recollections of Dr. Satnick, she was referred to an ENT. It was Dr. Satnick's last contact with Mrs. Schein in June, 2002 wherein she reported she was doing alright and had the baby.

It is Dr. Boxer's opinion within a reasonable degree of medical certainty that on September 22, 2001, plaintiff suffered with symptoms consistent with sinusitis and that Dr. Strauss acted within medically accepted standards of care in prescribing antibiotic therapy to the plaintiff based on her history with the practice as well as the complaints offered during their telephone conversation in September, 2001. It is also his opinion within a reasonable degree of medical certainty that Dr. Strauss properly advised the plaintiff to return to the practice once her prescription was completed, and sooner if she did not improve, and that it is not a deviation from the standard of care to treat a longstanding patient with antibiotic therapy after telephone contact with the patient.

It is Dr. Boxer's further opinion that Dr. Satnick treated the plaintiff's symptoms appropriately with intranasal corticosteroids and antibiotics for presumed sinusitis, and when she did not respond to treatment, she was appropriately referred for an ENT evaluation.

Based upon the foregoing, it is determined that defendants, Dr. Raphael E. Strauss, Dr. Steven Satnick, and Allergy and Asthma Care of L.I., P.C., have demonstrated prima facie entitlement to summary judgment.

In cross motion (004), plaintiffs seek summary judgment against defendants Dominick A. Sampogna, M.D., Todd W. Campbell, M.D., Dr. Raphael E. Strauss, Dr. Steven Satnick, and Allergy and

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Asthma Care of L.I., P.C., and severing those actions from the claims asserted against defendants Suffolk Obstetrics & Gynecology, LLP, Jennifer Marshak, M.D., John Petraco, M.D., Michael Peters, M.D., Douglas Lee, M.D., Gerardo San Roman, M.D., Susan Sterlacci, M.D., and Lance Edwards, M.D.

The Note of Issue was filed on March 1, 1007. Plaintiff did not serve this cross motion (004) for summary judgment until August 28, 2007. It was not filed with this court until September 19, 2007. In that this motion was not made within the 120 days following the filing of the Note of Issue, or by July 1, 2007, and in that plaintiff has not made application to extend the time in which to serve the motion for summary judgment, motion (004) is denied pursuant to CPLR 2214 as untimely (*Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2nd Dept 2004]). Nor has plaintiff not demonstrated good cause for not having timely commenced such cross motion (*Gonzales v 98 Mag Leasing Corp. et al*, 95 NY2d 124, 711 NYS2d 131 [2000]).

Accordingly cross motion (004) by plaintiffs for summary judgment against defendants is denied, however, plaintiffs' papers are considered in opposition to motions (001), (002) and (003).

In opposing defendants motion and cross motions, (001), (002) and (003), plaintiffs have submitted, *inter alia*, an attorney's affirmation; the affidavit of Joyce Schein; affidavits of plaintiffs' experts Allan Norman Krutchik, M.D., and Dr. Roger A. Berg, M.D.; various excerpts of plaintiff's medical records; and copy of the transcript of the examination before trial of Dr. Campbell.

Dr. Allen Norman Krutchick states he is licensed to practice medicine in New Jersey and is board certified in Internal Medicine with a subspecialty in Medical Oncology. Dr. Krutchick opines with a reasonable degree of medical certainty that all the defendants, except Susan L. Sterlacci, M.D., have departed from good and accepted medical practice, and that pursuant to stipulation, the action has been discontinued against her.

Dr. Krutchick opines that Joyce Schein complained of right facial pain, right nasal congestion and right nasal blockage to each defendant from September 22, 2001 to June 12, 2002, and that her condition continued to worsen, as evidenced by there being no bulging of the eye at first, but later there was evidence of proptosis.

Dr. Krutchick disagrees with Dr. David Myssiorek and Dr. Setzen who assert that adenoid cystic carcinoma is slow growing and therefore probably existed for a long period of time prior to the beginning of treatment. Dr. Krutchick states that these particular tumors are also known to be relentless and unpredictable tumors with a tendency to invade perineural spaces. Therefore, a constant history of pain in plaintiff's right cheek and right side of the face is a definite indication that adenoid cystic carcinoma should be suspected and included in a differential diagnosis. Dr. Satnick and Dr. Stauss should have, at the very least, ruled it out by CAT Scan or MRI, or if necessary, a biopsy. Plaintiff complained of facial pain and obstructed nasal passages becoming worse from September 22, 2001, and it was not until March, 2002 that they referred plaintiff to the ENT doctors, Dr. Sampogna and Dr. Campbell.

When Dr. Sampogna first started treating Mrs. Schein in March 22, 2002, he prescribed Biaxin and various other medications in an attempt to alleviate her conditions. There is no indication that Dr. Sampogna considered a CAT scan to rule out a differential diagnosis of a neoplastic process, and instead,

states Dr. Krutchick, Dr. Sampogna stated it was his belief that a pregnant woman should not be subjected to a CAT scan during the term of her pregnancy, and that a pregnant woman should not be told about possible health threatening matters during the term of her pregnancy. This, states, Dr. Krutchick, prevented Joyce Schein from having a diagnosis made in a timely fashion in March, April or May of 2002 and allowed the spread of the adenoid cystic carcinoma to continue ultimately into the right orbit and finally into the dura of the brain.

He states Dr. Campbell noted a slight proptosis in April 2002, when it was not noted prior to then, indicating that the adenoid cystic carcinoma was spreading into the orbit and beyond and that neither Dr. Campbell or Dr. Sampogna did anything to check the etiology of this phenomenon. He states it was not until May, 2002 when Joyce Schein told Dr. Campbell that she cannot take the pain anymore that he called Dr. Petraco at Suffolk Obstetrics and Gynecology to discuss the possibility of early induction of labor and to have a CAT scan done after delivery of the infant. Dr. Krutchick states it is a clear indication that during the time Dr. Sampogna and Dr. Campbell treated plaintiff, they did not have an explanation for her nasal blockage, facial pain and increasing eye bulge.

Dr. Krutchick states that it is his opinion to a reasonable degree of medical certainty that each of the doctors at Allergy & Asthma Care of Long Island, P.C., at Suffolk Obstetrics and Gynecology, P.C., and Dr. Sampogna and Dr. Campbell departed from good and accepted medical practice in that they permitted and allowed the adenoid cystic carcinoma to remain undiagnosed by failing to timely order and properly test with a CAT scan, MRI or biopsy. Had these tests been ordered by Dr. Satnick or Dr. Strauss in December 2001 to February 2002, they would have been instrumental in the proper and timely diagnosis of adenoid cystic carcinoma, and allowed a timely biopsy and earlier surgery for Joyce Schein. She then would not have lost her eye, palate, sense of smell, sense of taste, and the tumor would not have penetrated into the dura of her brain and she would not have suffered seizures, could have been able to drive a car, and could have engaged in work, and speak clearly.

Dr. Krutchick also states that Dr. Petraco failed to inform Dr. Campbell that there is no contraindication to the fetus in doing a CAT scan if it is done properly, and had that been discussed, the CAT scan could have been done in May. He also opines that Dr. Marshak, who testified that a CAT scan can be safely performed on a pregnant woman and that early induction was not possible due to the fact that the fetus was not properly developed, did not suggest in May, 2002 to Dr. Campbell or Dr. Sampogna that the CAT scan be done right then. Dr. Krutchick opines that it is a departure from accepted medical practice by the obstetrical defendants not to inform Dr. Campbell and Dr. Sampogna that the CAT scan could be performed during pregnancy. He opines with a reasonable degree of medical certainty that had the CAT scan been performed in May, 2002, it is possible that Joyce Schein would have lost her eye and had to have her palate removed, but the tumor would not have penetrated into the dura of the brain resulting in seizures and being unable to engage in any form of work due to the penetration of the tumor into the dura and brain injury, and she would not have suffered from hydrocephalus or needed a shunt placed in her head or had an abscess.

Dr. Krutchick states that any delay from June 12, 2002 until August 2, 2002 when the surgery could be performed at Sloan Kettering was, in all probability, non-contributory to any of Joyce Schein's ultimate condition, because when Dr. Krauss examined her in July, 2002, there was extensive bulging of the right eye and invasion of the tumor into the dura of the brain.

Dr. Krutchick opines that the CAT scan, when done after delivery of the baby, was incorrectly read as benign rather than as malignant, and that Dr. Sampogna proceeded within a day or two of the scan to do a Caldwell-Luc procedure for biopsy and removing what could be removed. He then determined it was a highly invasive large tumor which would have to be treated by surgical specialists. It was then confirmed to be an adenoid cystic carcinoma. Mrs. Schein thereafter went to Memorial Sloan Kettering Hospital for a second opinion with Dr. Dennis Krauss, who Dr. Krutchick states, had to delay the surgery because the surgical site and surgery performed by Dr. Sampogna needed time to heal. He also notes time was needed to schedule this surgery.

Dr. Krutchick disagrees with defendants' experts who opines that had the CAT scan been taken earlier, it would have contained the same benign diagnosis as made by the radiologist in reading the CAT scan after the child's birth is without merit because even if the film was misread, the extensiveness of the invasion into the right cheek, right sinus and right orbit, as well the aggressive behavior of the tumor, would have made it necessary to be removed surgically and biopsied in any event.

Dr. Krutchick opines that Dr. Sampogna and Dr. Campbell had an obligation to fully inform Joyce Schein of her medical condition and to give her the option of whether or not she wanted a CAT scan, biopsy and early surgery, and even if there was some risk to her, it was not as great as allowing the tumor to remain untreated and undiagnosed. Even if there was risk to the fetus, she had the right to make a decision. He further opines that Dr. Sampogna had an obligation to present this information as early as March, but certainly in April or May of 2002, and that Dr. Sampogna and Dr. Campbell had an obligation to inform her that there was an undiagnosed mass which might be cancer and that there could be damage due to delay

Dr. Roger Berg, M.D. sets forth in his affidavit that he is licensed to practice medicine in the states of New York and New Jersey and is board certified in radiology. Dr. Berg states he reviewed the CAT scan of June 13, 2002, and although the radiologist who read the scan believed it to be benign, and whether it was malignant or benign, the report describing the mass as having penetrated into the right orbit, that the right eye is bulging, and that the mass has invaded into the sinuses, palate, orbit, etc, it was certainly indicative of an enormous mass which had to be dealt with medically and would have alerted the ENT doctor to investigate and perform a biopsy at this earlier date.

Dr. Berg also opines with a reasonable degree of medical certainty that a CAT scan can be done on a pregnant woman without harm to the fetus, especially if the CAT scan is done after three months from the date of conception. Additionally, he states an MRI could have been performed and this would have been immensely helpful in diagnosing the seriousness of plaintiff's condition and the need for immediate biopsy.

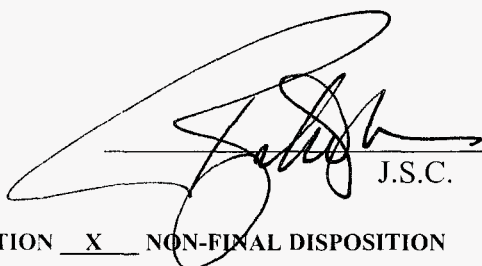
Based upon the foregoing, it is determined by this court that plaintiff has raised material factual issues as to each of the remaining defendants concerning the failure to timely and appropriately consider the differential diagnosis of cancer and rule it in or out; to timely and appropriately order diagnostic testing to make a proper and appropriate diagnosis based upon the signs and symptoms presented from September 22, 2001 through June 13, 2002; and to appropriately inform plaintiff of her condition, or possible conditions and the possible consequences of any diagnostic testing or procedures to enable her to make an informed decision about her care and treatment. There are also factual issues concerning

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whether or not earlier intervention or diagnosis of the tumor would have made a difference in plaintiff's injuries and whether the alleged delays were the proximate cause of plaintiff's injuries. In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

Accordingly, motion (001) is granted as to defendant Sterlacci and is otherwise, denied. Motions (002), (003) and (004) are denied.

Dated: OCT 17 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION