

White v Mehta

2007 NY Slip Op 33866(U)

November 16, 2007

Supreme Court, Kings County

Docket Number: 0023442/2002

Judge: Gerard H. Rosenberg

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At an IAS Term, Part MMTRP. of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn New York, on the 16th of November, 2007.

P R E S E N T:

HON. GERARD ROSENBERG,
Justice.

-----X
SAM WHITE, et ano.,
Plaintiffs,

Index No. 23442/02

- against -

DWIREF MEHTA, M.D., et al.,
Defendants.
-----X

The following papers numbered 1 to 19 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-3 8-10 12-15
Opposing Affidavits (Affirmations) _____	4-6 16-18
Reply Affidavits (Affirmations) _____	7 11 19
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers in this action to recover damages for medical malpractice, defendants Neil Goldberg, M.D. and Neil Goldberg, M.D., P.C. (Dr. Goldberg), Parkway MRI, P.C. (Parkway), and John Iozzio, D.C. and John Iozzio, D.C., P.C. (Dr. Iozzio), by

separate motions, each move for summary judgment dismissing the complaint of plaintiffs Sam White (Mr. White) and Desiree White (collectively, plaintiffs) as against them.¹

On January 7, 2000, Mr. White, an employee for the New York City Parks Department, sustained a work-related injury while attempting to move a wheelbarrow loaded with asphalt. He was taken to the emergency room of Methodist Hospital after suffering pain in his lower back. He was diagnosed with acute back pain and discharged the same day. Mr. White then went to defendant Dwiref Mehta, M.D. (Dr. Mehta), a surgeon with a workers' compensation rating (who had seen Mr. White in the 1990's in connection with various compensation claims filed by him), for evaluation. Dr. Mehta diagnosed Mr. White as suffering from lumbar myofascitis or lumbar disc disease. On January 20, 2000, Dr. Mehta referred Mr. White for an MRI and prescribed pain medication.

On February 17, 2000, Mr. White underwent an MRI scan of the lower back on the lumbar spine at Damadian, a radiological facility. That MRI was interpreted by Dr. Diamond, a radiologist, on February 18, 2000. The MRI study revealed that Mr. White had a posterior disc herniation at L4/5 and L5/S1, disc degeneration, a posterior disc bulge at L3/L4, a posterior subligamentous disc bulge at T12/L1, and edema in the interior L5 vertebra adjacent to the disc space. On February 29, 2000, Dr. Mehta diagnosed Mr. White with lumbar disc bulges with impingements.

¹ Plaintiffs did not oppose motions for summary judgment made by defendants New York Methodist Hospital (Methodist Hospital), Damadian MRI, P.C. (Damadian), Robert M. Diamond, M.D. (Dr. Diamond), and Robert Diamond, M.D., P.C. These motions, therefore, have been granted, and the action has been severed with respect to the remaining defendants.

Dr. Mehta referred Mr. White to Dr. Iozzio for chiropractic care and acupuncture. Mr. White's first visit with Dr. Iozzio was on March 7, 2000. Mr. White informed Dr. Iozzio of his history of the workers' compensation back injury from January 7, 2000, and he also reported that he had previously sustained another work-related back injury in 1997. Mr. White complained of sharp pain in his lower back as well as pain in his right leg and right hip, with a numbness extending to his legs. Dr. Iozzio's March 7, 2000 examination of Mr. White revealed analgesic right sacroiliac joint spasm, and he performed category blocking and acupuncture to the right lumbar musculature. Dr. Iozzio diagnosed Mr. White as suffering from lumbar posterior facet syndrome and myofascial pain syndrome. He concluded that Mr. White's complaints were related to the January 7, 2000 accident, and his chiropractic treatment plan was to treat Mr. White with acupuncture, manipulations, and adjunctive therapies.

Thereafter, Dr. Iozzio treated Mr. White once to twice a week with acupuncture and chiropractic techniques, such as chiropractic adjustment, electronic stimulation, traction, and heat and ultrasound with cortisone. While Mr. White was receiving treatment from Dr. Iozzio, he continued to be treated by his internist, Dr. Mehta, on a regular basis.² On May 3, 2000,

²From January 11, 2000, through October 11, 2001, Mr. White was treated by Dr. Mehta on 20 occasions. Dr. Mehta's treatment of Mr. White, over the course of his care, included: bed rest, use of a heating pad, pain-medication, physical therapy, acupuncture, use of a back brace, use of a transcutaneous electro-nerve stimulator unit, epidural injections, and pain management consultation.

Mr. White was seen by a neurological surgeon (to whom he was referred by Dr. Mehta), Dr. Stephen Burstein (Dr. Burstein), who diagnosed Mr. White with lumbar radiculopathy.

On July 26, 2000, Mr. White sustained injuries in a car accident. He sought treatment at Lamed Medical, P.C. (Lamed), and was examined by an internist, Dr. Amina Khattak (Dr. Khattak), who diagnosed Mr. White with cervical and lumbosacral sprain, cervical and lumbar radiculopathy, disc bulge at C4 - C5, and disc bulge at L4- L5. Dr. Khattak ordered MRIs of the cervical and lumbosacral spine, and referred Mr. White to a physical therapist, neurologist, acupuncturist, and chiropractor.

On August 3, 2000, Mr. White underwent an MRI of the cervical spine at Parkway, a radiological facility. Dr. Goldberg was the radiologist who interpreted the MRI film. He found that the MRI showed a C4 and C5 disc bulge and dural impingement with foraminal effacement. On August 21, 2000, Mr. White was seen by Dr. Gregory Shtender (Dr. Shtender), a physical medicine and rehabilitation physician at Lamed, for a neurological examination. Dr. Shtender diagnosed Mr. White with cervical and lumbar injuries causally related to the July 26, 2000 motor vehicle accident, and stated that Mr. White's neurological difficulties would persist for an indefinite period of time. He recommended continued physical therapy and chiropractic treatment.

On September 5, 2000, Mr. White underwent an MRI of the lumbosacral spine which was interpreted by Dr. Goldberg. Dr. Goldberg was not informed of the earlier MRI performed by Damadian or of Mr. White's history regarding his earlier Workers' Compensation claim. Dr. Goldberg's impression of the MRI was a disc bulge at L4-L5 with dural flattening and

foraminal narrowing, greater on the right than on the left, and a right-sided L5 nerve root impingement. His report noted that there was no paravertebral soft tissue mass or bone destruction.

On September 20, 2000, Mr. White had a nerve condition study performed at Lamed. Dr. Mikhail Mirer (Dr. Mirer), a neurologist, interpreted the study, and recommended that Mr. White continue treatment, including physical therapy and chiropractic manipulations. He further recommended acupuncture for better pain control.

On February 15, 2001, Mr. White underwent another lumbosacral MRI at Bromer Medical Imaging, P.C. (Bromer). Robert Scott Schepp, M.D. (Dr. Schepp), a radiologist, interpreted it, and found spinal stenosis and hypertrophy of bilateral zygapophyseal joints, compressing the cal sac and bilateral L5 nerve roots with bulging discs at L2-L3 and L3-L4. On March 20, 2001, Dr. Ashok Anant (Dr. Anant), a neurosurgeon, reviewed the February 15, 2001 MRI. He stated that it showed significant spinal stenosis at the L3-4, L4-5, and L5-S1 levels, and some element of stenosis of L2-3 as well, and that there may be disc herniation at L4-5.

A report dated March 16, 2001 of Dr. Harold Tanenbaum, M.D. (Dr. Tanenbaum) of Bay Imaging, addressed to Dr. C. DeMarco, notes “multiple lytic areas in the right femur” and that multiple myeloma should be considered with respect to an MRI taken of Mr. White’s right hip and right femur. Dr. Tanenbaum found that “[n]o demonstrable lytic lesions” were present on the MRI of the lumbosacral spine, and stated only an impression of “[p]artial compression fracture of L3 as to that area. Mr. White’s last treatment with Dr. Iozzio (who was not informed of this MRI) was on April 14, 2001.

On May 2, 2001, Mr. White was again seen by Dr. Burstein. Dr. Burstein recommended that Mr. White might benefit from surgical intervention. On August 24, 2001, Mr. White underwent a lumbar myelogram and post-myelogram CT scan at Drucker, Genuth & Augenstein M.D.s., P.C. (Drucker). This study noted the following impression:

- “1. Extensive patchy decreased attenuation throughout vertebral body marrow spaces within multiple superimposed focal, expansile lytic lesions including cortical erosion. The appearance is considered highly suspicious for multiple myeloma. Recommend clinical correlation and further evaluation as clinically warranted, including, if indicated, surgical biopsy.
2. T11 -2: Mild stenosis.
3. L2-3: Moderate stenosis.
4. L3-4 Posterior bulge, severe stenosis.
5. L4-5: Posterior bulge favors right, severe stenosis.
6. L5- S1: Moderately large right posteriolateral herniation.”

On August 29, 2001, Mr. White was seen, once again, by Dr. Burstein, whose plan was to go forward with surgical intervention, including a decompressive lumbar laminectomy and discectomy. On October 29, 2001, Mr. White was admitted to Winthrop University Hospital (Winthrop) for elective back surgery. In the pre-operative period, a work-up which included blood studies was performed. The blood studies were abnormal, showing Mr. White to be anemic. Further studies were ordered, including a bone marrow biopsy. This study confirmed that Mr. White was suffering from multiple myeloma, an incurable cancer of the plasma cell. Mr. White remained admitted to Winthrop through December 27, 2001. He was started on chemotherapy and radiation therapy in January 2002. He continues to be treated for multiple myeloma since that time.

On June 13, 2002, Mr. White and his wife, Desiree White, commenced this action against Dr. Mehta, Dwiref Mehta, M.D., P.C., Dr. Iozzio, John Iozzio, D.C., P.C., Dr. Diamond, Robert Diamond, M.D., P.C., Methodist Hospital, Parkway, Dr. Goldberg, and Neil Goldberg M.D., P.C., and on August 12, 2003, they amended their complaint to add Bromer, Dr. Burstein, Stephen D. Burstein, M.D., P.C., and Lamed as defendants.³ Mr. White seeks damages for his injuries due to alleged medical malpractice by defendants, and his wife seeks damages for loss of consortium.

In addressing the motion by Dr. Goldberg and Neil Goldberg, M.D., P.C., and the motion by Parkway (who plaintiffs allege is vicariously liable for Dr. Goldberg's alleged malpractice), the court notes that "[t]he proponent of a motion for summary judgment 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" (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence and that such departure was a proximate cause of injury or damage" (*Kramer v Rosenthal*, 224 AD2d 392, 392 [1996]; *see also Bloom v City of New York*, 202 AD2d 465, 465 [1994]). However, "[g]eneral allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence tending to establish the essential elements of the claim, are insufficient to defeat a defendant physician's entitlement to summary judgment" (*see Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 359 [1998]).

³ As noted above, plaintiffs' action has been dismissed as against Methodist Hospital, Damadian, Dr. Diamond, and Robert Diamond, M.D., P.C.

Dr. Goldberg and Neil Goldberg, M.D., P.C. have submitted the expert affirmation of James B. Naidich, M.D., (Dr. Naidich), a radiologist. Dr. Naidich opines to a degree of medical certainty that the September 5, 2000 MRI “showed abnormalities most consistent with an obese individual engaged in manual labor, and did not suggest a diagnosis of multiple myeloma,” and that no actions or failure to act by Dr. Goldberg proximately caused injuries to Mr. White.

In opposition to this prima facie showing, plaintiffs contend that Dr. Goldberg improperly interpreted the MRI of Mr. White’s lumbosacral spine taken on September 5, 2000. As proof of this, plaintiffs submit the affirmation of their expert, a board-certified radiologist, who explains that multiple myeloma is a progressive hematologic (marrow) disease which causes demineralization of the bone. Plaintiffs’ expert radiologist explains that this will produce diffuse osteopenia of the spine, which leads to compression fractures of the vertebral end plates. This expert states that compression fractures associated with multiple myeloma often may be partial and complete compression fracture is not required to raise suspicion of the disease.

Upon review of the MRI taken at Parkway and reviewed by Dr. Goldberg, plaintiffs’ radiology expert states that “[t]he study of September 5, 2000 demonstrates the presence of multilevel vertebral end plate compression fractures.” The expert explains that “[s]uch findings in a 50-year-old male with no known history of any disease processes causing bone demineralization would be highly suspicious for an infiltrative disease process such as multiple myeloma.” Plaintiffs’ expert opines with a reasonable degree of medical certainty

that Dr. Goldberg and Parkway departed from accepted standards of radiological care in failing to interpret this study as showing multilevel end plate compression fractures which are often indicative of multiple myeloma, and to identify and report these findings.

Plaintiffs further contend that the alleged failure on the part of Dr. Goldberg to properly interpret the MRI films directly lead to Mr. White's injuries. They submit, as proof of this, the affirmation of their expert board certified oncologist. This expert oncologist opines that Mr. White's multiple myeloma existed for at least three years prior to diagnosis in December 2001. Therefore, they assert that Mr. White must have suffered from this condition at the time the MRI films were taken at Parkway and interpreted by Dr. Goldberg. Plaintiffs' oncology expert further states that a diagnosis of multiple myeloma can be made from a properly performed and interpreted MRI. The expert also notes that the September 5, 2000 MRI was noted by Dr. Anant to be of poor quality. The expert asserts that if Mr. White had been promptly diagnosed and treated, the therapies utilized would have been more specific, his suffering (including the side effects from his treatment) would have been reduced, and his normal functioning would have been impaired to a lesser degree.

Plaintiffs argue that based upon their expert affirmations, they have rebutted these defendants' prima facie showing. They state that Dr. Naidich ignores the findings of the presence of vertebral and plate deformities and compression fractures present on the MRI film, as explained by their expert radiologist, which was suggestive of multiple myeloma. They contend that the disagreement between their experts and Dr. Naidich creates a triable issue of fact.

Plaintiffs' contention is without merit. "The opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards has no probative force where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation" (*Wong v Goldbaum*, 23 AD3d 277, 279 [2005]; see also *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Lee v Shields*, 188 AD2d 637, 639 [1992]).

In the case at bar, Dr. Goldberg and Parkway, in reply to plaintiffs' opposition, note the deposition testimony of Dr. Schepp, who explained that trauma could account for these compression fractures, rather than bone demineralization from cancer. Moreover, Dr. Schepp specifically testified that in cases of multiple myeloma, there is typically compression fractures of the whole vertebral body, i.e., a marked collapse of vertebral bodies, whereas in trauma related compression fractures, the anterior aspect of the superior end plate of the vertebral body is compressed. Plaintiffs' radiologic expert makes no reference to Mr. White's car accident or work-related back injuries. Thus, plaintiffs' expert has failed to show that multilevel end plate compression fractures were inconsistent with or could not be explained by the trauma of Mr. White's July 26, 2000 car accident (which immediately preceded and prompted this MRI to be ordered by Dr. Khattak), his prior job-related accident, and his excessive weight (which was between 300 and 350 pounds) (see generally *Lawrence v Capital Care Med. Group, LLC*, 14 AD3d 833, 836 [2005]; *Margolese v Uribe*, 238 AD2d 164, 167 [1997]).

Furthermore, plaintiffs' own expert oncologist explains that in the majority of patients with multiple myeloma, soft spots, referred to as osteolytic lesions, will appear, even on a

standard bone X-ray. There is no showing that there were any lytic lesions present on the September 5, 2000 MRI taken at Parkway and interpreted by Dr. Goldberg. In fact, the diagnosis of multiple myeloma was first suspected based upon the presence of lytic lesions (rather than compression fractions), which did not initially appear until after Dr. Goldberg's evaluation. Indeed, these lytic lesions were not revealed to be on the lumbosacral spine until the lumbar myelogram and post-myeloma CT scan (not an MRI) taken by Drucker on August 24, 2001. Thus, plaintiffs have failed to raise a triable issue of fact as to the findings on the MRI sufficient to suggest the diagnosis of multiple myeloma.

In addition, while plaintiffs' expert oncologist notes that Dr. Anant found the September 5, 2000 Parkway MRI had poor imaging quality "probably due to the patient's habitus" (i.e., heavy weight), there is no showing that a higher quality MRI taken at that time would have detected multiple myeloma. In fact, the later February 15, 2001 Bromer MRI did not indicate any abnormalities indicative of the presence of multiple myeloma. Moreover, plaintiffs' radiology expert does not indicate any difficulty encountered in reading the September 5, 2000 Parkway MRI. Thus, plaintiffs have not rebutted Dr. Goldberg's showing that the MRI interpreted by him was of a diagnostic quality sufficient to allow Dr. Goldberg to make accurate observations.

Consequently, plaintiffs have failed to rebut Dr. Goldberg's prima facie showing that he did not depart from good and accepted medical practice (*see generally Wickman v Nassau County Health Care Corp.*, 27 AD3d 644, 645 [2006]; *Holbrook*, 248 AD2d at 359; *Margolese*, 238 AD2d at 166-167). Therefore, Dr. Goldberg and Neil Goldberg, M.D., P.C.'s

motion for summary judgment must be granted (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 326-327 [1986]). Since these defendants are not liable, Parkway, whose liability would only be vicarious with respect to Dr. Goldberg's interpretation of the MRI, is also entitled to summary judgment (*see* CPLR 3212 [b]).

In turning to Dr. Iozzio's motion, it is noted that it is well established that in order for a physician to be liable for medical malpractice, a plaintiff must first prove that the physician departed from a "level of care acceptable in the professional community in which [that physician] practices" (*Schrempf v State of New York*, 66 NY2d 289, 295 [1985]). Further, a plaintiff must establish that the treatment rendered was, in fact, the proximate cause of the plaintiff's injuries (*see Wicksman*, 27 AD3d at 644; *Margolese*, 238 AD2d at 167; *Prete v Rafla-Demetrious*, 224 AD2d 674, 676 [1996]).

Dr. Iozzio, in support of his motion, has submitted the expert affirmations of Gil Allen, D.C. (Dr. Allen), a chiropractor licensed in New York State and Lynn Ratner, M.D., (Dr. Ratner), a New York physician board certified in internal medicine and sub-certified in medical oncology. Dr. Allen and Dr. Ratner both recount Dr. Iozzio's involvement in Mr. White's care, and state, with a reasonable degree of chiropractic and medical certainty, respectively, that Dr. Iozzio acted in good and accepted chiropractic practice, and, as such, did not contribute to Mr. White's alleged injuries.

Plaintiffs have submitted the affidavit of their chiropractic expert. Plaintiffs' chiropractic expert explains that given the continual and progressive nature of Mr. White's back and hip pain for over a year, Dr. Iozzio should have considered an alternative source of

Mr. White's pain. This chiropractic expert states that additional radiologic and/or laboratory studies should have been ordered by him or in concert with the treating physicians. Plaintiffs' chiropractic expert further states that Dr. Iozzio did not properly communicate Mr. White's lack of progress with Mr. White's medical physicians. Plaintiffs' chiropractic expert concludes that Dr. Iozzio departed from accepted standards of chiropractic care which resulted in the delay in diagnosing and treating Mr. White's multiple myeloma and caused or substantially contributed to his injuries and suffering.

It is true that when a physician determines that a patient requires medical care that is outside the physician's range of expertise, that physician has a duty to refer the patient to an appropriate specialist (*see Vito v North Med. Family Physicians, P.C.*, 16 AD3d 1039, 1040 [2005]). However, here, Dr. Allen and Dr. Ratner both point out that Dr. Iozzio was a chiropractor providing symptomatic relief for Mr. White's complaints of pain. Dr. Allen and Dr. Ratner specifically opine that Dr. Iozzio had no reason to refer Mr. White to outside specialists, as his complaints were consistent with his medical history of two prior back injuries and the findings on his February 17, 2000 MRI report. Dr. Ratner explains that it is impossible to distinguish between back pain caused by multiple myeloma and back pain secondary to a back injury. Dr. Ratner asserts that Mr. White's diagnosis was complicated by his history of two work-related accidents and the car accident, which resulted in complaints of chronic pain. Dr. Allen and Dr. Ratner also both state that based on Mr. White's MRI findings and his medical history of the prior back injuries and a car accident, it was reasonable for him to have continued complaints of back and hip pain for approximately one year.

Furthermore, Dr. Iozzio noted on May 26, 2000, in his record, that Mr. White was making slow progress with an increased range of movement, and that, on some occasions, he reported feeling well. In addition, Dr. Allen and Dr. Ratner point out that during the approximately one-year period from May 2000 through April 2001, Mr. White reported periods of temporary relief to Dr. Iozzio after undergoing chiropractic treatment and acupuncture. They opine, therefore, that Dr. Iozzio appropriately continued to provide chiropractic treatment to Mr. White. Thus, plaintiffs have not established an evidentiary basis to show that Dr. Iozzio departed from good and accepted chiropractic care by not considering an alternative source of Mr. White's pain (*see generally Viola v City of New York*, 13 AD3d 439, 440 [2004], *lv denied* 5 NY3d 706 [2005]).

Moreover, a physician may not be held liable in a malpractice action for failure to consult with another physician where there is no evidence that such lack of consultation proximately caused the plaintiff's injuries (*see McElroy v Yousuf*, 268 AD2d 733, 736 [2000]; *Bartha v Lombardo & Assoc.*, 212 AD2d 494, 494 [1995]). Here, there is an absence of such evidence.

During the approximately one-year period (from March 7, 2000 through April 14, 2001) that Dr. Iozzio treated Mr. White, he received contemporaneous care by a variety of other medical physicians and specialists, including internists, neurosurgeons, radiologists, neurologists, and physical therapists. Mr. White also underwent lumbosacral spinal MRIs on February 17, 2000, September 5, 2000, and February 15, 2001, and a cervical spinal MRI on August 3, 2000. None of these physicians or reports of the MRIs gave any indication that Mr.

White had developed multiple myeloma. Dr. Iozzio merely rendered chiropractic treatment to Mr. White, treating Mr. White only for symptomatic relief of his pain. Dr. Iozzio was not managing any other medical conditions of Mr. White, as he deferred to Mr. White's medical providers to render appropriate care and treatment (*see Bellino v Spatz*, 233 AD2d 355, 355 [1996]).

Plaintiffs cannot make a showing that Dr. Iozzio assumed responsibility over Mr. White's care or that he had a duty to supervise and control the treatment rendered by Mr. White's internist and other medical specialists (*see generally Yasmin v Manhattan Eye, Ear & Throat Hosp.*, 254 AD2d 281, 282 [1998]). Mr. White's internist, Dr. Mehta, had referred Mr. White to Dr. Iozzio for chiropractic treatment and acupuncture in order to provide him with symptomatic relief for his back and hip pain. Mr. White was not referred to Dr. Iozzio upon any suspicion of cancer, but only presented to Dr. Iozzio with a history of work-related back injuries, which was consistent with his symptoms.

Dr. Allen and Dr. Ratner both specifically opine, with a reasonable degree of chiropractic and medical certainty, respectively, that Dr. Iozzio had no reason to suspect any disease process and had no reason to refer Mr. White to outside specialists and/or order radiological studies or blood work, as Mr. White's complaints to him were consistent with his medical history of two prior back injuries and the findings on his February 17, 2000 MRI reports. As these opinions are entirely supported by the unrefuted evidence, Dr. Iozzio cannot be held liable for a failure to refer Mr. White to specialists or to order radiological studies or blood work.

Plaintiffs, however, also rely upon the affirmation of their expert oncologist, who refers to vertebral and plate deformities on the MRI taken at Parkway. They assert that this indicates that the multiple myeloma existed during Dr. Iozzio's treatment of Mr. White. Such assertion is without moment. As noted above, Dr. Goldberg's interpretation of this September 5, 2000 MRI did not indicate the existence of multiple myeloma. In addition, Dr. Schepp, at his deposition, testified that the February 15, 2001 Bromer MRI was not suspicious for multiple myeloma. Dr. Allen and Dr. Ratner both opine that Dr. Iozzio timely and appropriately deferred to Mr. White's other physicians and health care professionals to render appropriate medical care and treatment. They state that Dr. Iozzio had no reason to question the MRI reports nor did the standard for chiropractic treatment call for Dr. Iozzio to question those MRI reports.

Dr. Iozzio, in rendering chiropractic care to Mr. White, relied upon the radiologist's impression in the February 17, 2000 MRI and treated Mr. White under a diagnosis of lumbar posterior facet syndrome and lumbar disc herniation. Furthermore, Dr. Iozzio testified, at his deposition, that Dr. Diamond's February 18, 2000 MRI findings were significant to him in terms of showing degenerative arthritic changes that may be painful. Dr. Iozzio deferred to the radiologist's interpretation and testified that he believed these findings were due to trauma and degeneration.

The propriety of a treatment is to be determined by reference to the existing facts which were or ought to have been known by the physician in the exercise of due care and not by hindsight or reference to later-acquired knowledge (*see Wong*, 23 AD3d at 279; *Villane v Long*

Is. Jewish Med. Ctr., 195 Misc 2d 799, 810 [2003]). Dr. Allen states that it is his opinion that the report of the MRI taken on February 17, 2000 revealed marked degenerative disc disease and degenerative joint disease with advanced hypertrophic changes. The first radiological study that indicated a suspicion of multiple myeloma was the March 16, 2001 MRI, which showed lytic lesions in the right femur and noted that multiple myeloma was to be considered. Plaintiffs do not dispute that the March 16, 2001 MRI was never reported to Dr. Iozzio.

It is well settled that “although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied upon by the patient” (*Markley v Albany Med. Ctr. Hosp.*, 163 AD2d 639, 640 [1990]). It is also long established that a physician is held only to the standard of care required by the particular locality where the physician practices (*see Hylick v Halweil*, 112 AD2d 400, 401 [1985]; *Gibson v D’Amico*, 97 AD2d 905, 905, [1983], *lv denied* 61 NY2d 603 [1984], *rearg denied* 64 NY2d 646 [1984]).

Education Law § 6551, which defines the practice of chiropractic, limits the services and care which a chiropractor is licensed to provide. Under this statute, a chiropractor does not render the same services as a licensed physician and a chiropractor’s standard of care does not rise to the same level as required by a physician. By law, the scope of the practice of chiropractic does not include the treatment for any “malignant neoplasms” (*see* Education Law § 6551). Dr. Allen and Dr. Ratner both opine, to a reasonable degree of chiropractic and **medical certainty, respectively, that the diagnosis and treatment for and associated with**

multiple myeloma are not within the specialty of a duly licensed and practicing chiropractor and/or acupuncturist in New York State. In addition, Dr. Iozzio testified, at his deposition, that he never received any training in the diagnosis or treatment of multiple myeloma. Thus, it was not within the scope of the practice of chiropractic to diagnose or treat multiple myeloma.

While plaintiffs' chiropractic expert claims that Dr. Iozzio did not meet the standard for chiropractic care, that expert is licensed in Georgia, not in New York. In this regard, it is noted that the Georgia statutes regulating the scope of chiropractic practice provide for a broader scope of chiropractic services and standards, and that plaintiffs' Georgia chiropractic expert inappropriately applies this higher standard in rendering an opinion.

A physician only assumes the duties associated with the functions undertaken (*see Mosezhnik v Berenstein*, 33 AD3d 895, 897 [2006]; *Chulla v Distefano*, 242 ad 57, 658 [1997]; *Markley*, 163 AD2d at 640) Thus, Dr. Iozzio cannot be held liable for a failure to diagnose a latent condition which was not reported to him in the radiologists' reports and which was not undertaken by him to diagnose (*see Patrella v Atlantic Chiropractic Group*, 41 AD3d 806, 807-808 [2007]; *Viola*, 13 AD3d at 440). Consequently, the court finds that Dr. Iozzio fulfilled his duties under the applicable standard of care. Summary judgment dismissing the complaint as against him is, therefore, warranted (*see* CPLR 3212 [b]).

Accordingly, Dr. Goldberg and Neil Goldberg, and Neil Goldberg, M.D., P.C.'s motion. Parkway's motion, and Dr. Iozzio and John Iozzio, D.C., P.C.'s motion for summary judgment dismissing plaintiffs' complaint as against them, are granted. Plaintiffs' action is severed with respect to the remaining defendants.

This constitutes the decision and order of the court.

ENTER,



HON. GERARD H. ROSENBERG

J. S. C.