

**Dwyer v Gibbs**

2008 NY Slip Op 32327(U)

August 20, 2008

Supreme Court, New York County

Docket Number: 0108912/2006

Judge: Joan B. Lobis

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

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS  
*Justice*

PART 6

DWYER, EMILIA NICOLE  
Plaintiff.

- v -

GIBBS, ERIC P., D.D.S., et al  
Defendant.

INDEX NO. 108912/06  
MOTION DATE 7/9/08  
MOTION SEQ. NO. 003  
MOTION CAL. NO.

The following papers, numbered 1 to 38 were read on this motion to/for Summary judgment.

PAPERS NUMBERED

Notice of Motion / Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits X MOT: 17  
Replying Affidavits \_\_\_\_\_

1-16  
18-21 ; 30-33  
22-29 ; 34-35 ; 36-38

Cross-Motion:  Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

**FILED**

AUG 22 2008

**MOTION DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION AND ORDER**  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: August 20, 2008

JBL  
JOAN B. LOBIS, J.S.C.

Check one: [ ] FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
EMILIA NICOLE DWYER, by her Mother and Natural  
Guardian, DONNA DWYER,

Plaintiff,

Index No. 108912/06

-against-

**Decision and Order**

ERIC P. GIBBS, D.D.S., REUVEN MOHL, D.D.S.,  
DR. DELFINA COLON and GENTLE DENTLE CARE  
OF WEST 94TH STREET,

Defendants.

**FILED**

AUG 22 2008

COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**JOAN B. LOBIS, J.S.C.:**

Defendants Reuven Mohl, D.D.S. and Gentle Dental Care of West 94th Street

("Gentle Dental") move for summary judgment pursuant to C.P.L.R. Rule 3212 on the grounds that there are no material issues of fact to support the claim that these defendants deviated from the accepted standards of care in treating Emilia Nicole Dwyer ("plaintiff") or that plaintiff's alleged injuries were proximately caused by any acts of these defendants. Plaintiff, together with her mother, who brings this action on her behalf, opposes defendants' motion and cross-moves for summary judgment against Dr. Mohl, Gentle Dental, and co-defendant Dr. Delfina Colon. Dr. Gibbs, an orthodontist who had unsuccessfully sought summary judgment in an earlier motion, submitted an affirmation in partial opposition to Dr. Mohl's motion. He seeks to have statements contained in the July 24, 2007 decision of the Hon. Eileen Bransten, to whom this matter was previously assigned, considered as findings of fact as to Drs. Mohl and Colon. That decision was made before Drs. Mohl and Colon were co-defendants with Dr. Gibbs.<sup>1</sup> The factual statements adverse to Drs. Mohl and

---

<sup>1</sup> Drs. Mohl and Colon, and Gentle Dental, were sued in a separate lawsuit under Index No. 107331/07, which was commenced on May 24, 2007, three days before Dr. Gibbs submitted his motion. The cases were subsequently consolidated under the earlier Index Number on October 16, 2007.

Colon contained in the decision of July 24, 2007 can be given no preclusionary effect in the claims brought against them in the instant action.

This is an action for dental malpractice arising from the treatment of plaintiff, who is currently fourteen years old. Plaintiff claims that defendants failed to recognize that she was suffering from root resorption and failed to act to prevent further deterioration of her teeth. Root resorption is the absorption of the tooth root. It leads to instability of the involved tooth and can result in tooth loss. Dr. Gibbs treated plaintiff from October 2003 to April 2006 and fitted her with certain orthodontic devices over the span of his treatment. All of the devices were removed by April 2006. Drs. Mohl and Colon are general dentists. In March 2005, Dr. Colon saw plaintiff for one visit. At that time, Dr. Colon was employed by Gentle Dental. Plaintiff returned to Gentle Dental in August 2005 and saw Dr. Mohl. She was seen by Dr. Mohl again in October 2005, April 2006, and October 2006.

In support of his motion, Dr. Mohl describes the treatment he and Dr. Colon rendered. On March 28, 2005, Dr. Colon performed a periodic oral exam including prophylaxis (cleaning) and fluoride treatment. A number of x-rays were taken. Dr. Colon left the employment of Gentle Dental one or two weeks later, and did not treat plaintiff again. By the time of this examination, plaintiff had been fitted with upper and lower braces by Dr. Gibbs. A palate expander that had been in place since May 5, 2004, was removed by Dr. Gibbs on December 22, 2004.

Dr. Mohl first saw plaintiff on August 19, 2005, when he performed another periodic oral exam, prophylaxis, and fluoride treatment. Additional x-rays were taken. Dr. Mohl asserts that

at some point between August 19, 2005, and his additional treatment of plaintiff on October 3, 2005, he told the mother or the guardian<sup>2</sup> that plaintiff needed to go back to the orthodontist because there was root resorption. On October 3, 2005, Dr. Mohl again performed a periodic oral exam, prophylaxis, and fluoride treatment, and noted in his records "X-rays exhibits: bone loss." Plaintiff returned to Dr. Mohl for two more visits on April 10, 2006 and October 10, 2006, and underwent similar oral exams. A progress note for April 10, 2006, records bone loss. The first reference to root resorption in the progress notes appears on October 10, 2006, which says ". . . mother wrote me a letter dated 10/08/06 to the indication that Nicole's root resorption was due to her wearing braces. I spoke to her and mother and told them that they needed to speak to the orthodontist." A copy of the note was included with the moving papers.

Dr. Mohl argues that all treatment provided to plaintiff was in accordance with good and accepted dental practice. It is Dr. Mohl's and Gentle Dental's contention that, even assuming that questions of fact exist as to whether there were departures from the standard of care, there is no nexus between those alleged departures and the damage to plaintiff's teeth roots. Further, they argue that since there is no evidence of any injury at the hands of Dr. Mohl or Gentle Dental, the cause of action for informed consent must fail. Finally, once all claims against Dr. Mohl are dismissed, the claim against Gentle Dental cannot be maintained since the claim is based on vicarious liability.

In further support of the motion, Dr. Mohl and Gentle Dental submit the affirmation of John P. Graziano, D.D.S., a duly licensed orthodontist admitted to practice in the State of New

---

<sup>2</sup> By guardian, I can only assume he was referring to plaintiff's babysitter, who occasionally accompanied plaintiff to her appointments, and not someone with legal status, since no such person has been identified.

York. Dr. Graziano opined that the actions of Dr. Mohl and Gentle Dental did not proximately cause or contribute to plaintiff's claimed damages. In support of this conclusion, he opines that, after comparing the x-rays from April 2003, March 2005, and August 2005, the majority of the root resorption had occurred by the time Dr. Mohl treated plaintiff. In any event, he opines that the root resorption was untreatable and that the damage is idiopathic, which could occur in conjunction with orthodontic care but was more likely the result of a genetic predisposition. He admits that some further root resorption had occurred after Dr. Mohl first saw plaintiff, but that any further root resorption after August 2005 was in spite of the orthodontic care rather than as a result of it. Even if plaintiff's braces were removed on August 19, 2005, after Dr. Mohl's treatment, or the date he knew or should have known of the condition, the root resorption could not have been arrested. Dr. Mohl's dental work was at all times in accordance with good and accepted dental practice, including his documentation and timely notice to plaintiff, her mother, and/or her guardian of the need to seek follow-up care from plaintiff's orthodontist.

Plaintiff opposes the motion and cross-moves for summary judgment against Drs. Mohl and Colon, and Gentle Dental. An affirmation submitted by plaintiff's counsel<sup>3</sup> argues that both Drs. Colon and Mohl had taken x-rays that reveal root resorption and never contacted the orthodontist or plaintiff's mother. The fact that neither the root resorption nor the follow-up contacts with plaintiff's mother and the orthodontist were adequately documented in the chart are separate violations of the standard of care. Furthermore, in response to the claim by defendants that there can

---

<sup>3</sup> Counsel is also an orthodontist. But his statements of opinion must be discounted. It is improper for him to voice such opinion unless he wishes to make himself a witness, subject to cross-examination. If that is so, he has an obligation to withdraw as counsel or be in possible violation of Disciplinary Rule 5-102, 22 N.Y.C.R.R. § 1200.21.

be no proof that defendants' actions or inaction proximately caused plaintiff's injury, he asserts that prompt and proper action by defendants would have decreased the rate of root resorption that occurred between March 28, 2005 and April 10, 2006.

In an expert affidavit submitted by plaintiff, Robert Gottlieb, D.M.D., opines that severe root resorption was evident on the x-rays taken on March 28, 2005, and August 19, 2005. He disputes defendants' claim that plaintiff had a genetic predisposition, since he opines that there is no scientific support for establishing that with any degree of dental certainty. He asserts that a dentist must compare x-rays with prior x-rays, record findings on treatment charts, notify a parent and a treating orthodontist immediately, and record such notification in the chart. He claims that it was a departure from the standard of care for Dr. Colon not to recognize root resorption and notify plaintiff's parent and orthodontist immediately. He asserts that Dr. Mohl violated the standard of care by not recording the increase in root resorption and not notifying plaintiff's mother and the treating orthodontist immediately. The increase in root resorption that occurred was injury to plaintiff that was proximately caused by defendants' departures.

Plaintiff's mother also submitted an affidavit. In it she states that she first learned of her daughter's root resorption from Dr. Gibbs when the braces were removed and x-rays taken. This is in sharp contrast to the statement attributed to Dr. Mohl.

The gist of the opposition and reply papers submitted by Dr. Mohl and Gentle Dental is to dispute the claim that the departures claimed caused the injury. They dispute the claim that the

root resorption could have been arrested or lessened, and reiterate the statements of their expert as to causation.

Dr. Colon's opposition<sup>4</sup> highlights that she only saw plaintiff once and left the employment of Gentle Dental one or two weeks later. She asserts that she properly made a diagnosis of shortened roots on March 28, 2005. But, she was not in possession of an earlier film done by a prior treater, and therefore she could not compare the films. At her deposition, she stated that she did request that Gentle Dental's office manager obtain the films. In support of her claim that her care was proper, she offered the affirmation of Leslie Seldin, D.D.S., who supported Dr. Colon's position that she did not deviate from the standard of care. She also quoted from an affidavit of Dr. Melvin Wallshern, D.D.S., submitted by plaintiff in opposition to an earlier motion by Dr. Gibbs for summary judgment, wherein he states that absent agreement with the family dentist or pediatric dentist that they will share information from x-rays they take, it is not the usual practice to so communicate.

The party moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician was negligent. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Once the movant satisfies this burden, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Id. (citation omitted).

---

<sup>4</sup> Dr. Colon's opposition papers request summary judgment in her favor, but the court is unaware that she has moved for such relief.

Specifically, this requires, in a medical or dental malpractice action, that a plaintiff opposing a physician's summary judgment motion

must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact. . . . General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion.

Id. at 324-25 (citations omitted).

The motion is granted solely as to any claim of informed consent. The cross-motion is denied. While defendants Dr. Mohl and Gentle Dental have made a *prima facie* showing for summary judgment, plaintiff has come forward with sufficient opposing affidavits and affirmations to raise questions for a jury, with the exception of the issue of informed consent. The experts sharply dispute whether departures from the standard of care occurred and whether further root resorption could have been prevented if prompt notice of the condition had been given to plaintiff's mother and plaintiff's orthodontist. However, plaintiff offered no opposition to the assertion that no cause of action for informed consent has been shown. That claim is dismissed.

This constitutes the decision and order of the court. The parties are scheduled to appear for a status conference on September 23, 2008, at 9:30 a.m.

Dated: August 20, 2008

**FILED**

AUG 22 2008

COUNTY CLERK'S OFFICE  
NEW YORK



JOAN B. LOBIS, J.S.C.