

**Steier v Jonke**

2009 NY Slip Op 32406(U)

September 16, 2009

Supreme Court, Suffolk County

Docket Number: 02-32328

Judge: Peter Fox Cohalan

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 - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 8-20-08  
ADJ. DATE 4-1-09  
MNEMONIC: # 002 - MD  
# 003 - XMD

-----X  
ARTHUR STEIER and DENISE STEIER, :  
: :  
: :  
Plaintiffs, :  
: :  
: :  
- against - :  
: :  
: :  
GUENTER J. JONKE, D.M.D., SUFFOLK :  
ORAL SURGERY ASSOCIATES, LLE, :  
RICHARD HAMBURG, M.D., JOHN BURGER, :  
RPA-C, AZAD K. ANAND, M.D. and LONG :  
ISLAND DIAGNOSTIC IMAGING, :  
: :  
Defendants. :  
-----X

KELNER & KELNER  
Attorneys for Plaintiffs  
140 Broadway, 37<sup>th</sup> Floor  
New York, New York 10005  
  
FINDER & CUOMO, LLP  
Attorneys for Defendants Jonke & Suffolk  
Oral Surgery Associates, LLP  
9 East 38<sup>th</sup> Street  
New York, New York 10016  
  
LEWIS JOHS AVALLONE AVILES, LLP  
Attorneys for Defendant Hamburg  
425 Broad Hollow Road, Suite 400  
Melville, New York 11747  
  
WILSON, ELSER, MOSKOWITZ, et al.  
Attorneys for Defendant Burger  
3 Gannett Drive  
White Plains, New York 10604-3407  
  
VARDARO & HELWIG  
Attorneys for Defendants Anand & Long  
Island Diagnostic Imaging  
732 Smithtown Bypass, Suite 203  
Smithtown, New York 11787

Upon the following papers numbered 1 to 55 read on this motion and cross motion for summary judgment by Notice of Motion/Order to Show Cause and supporting papers (002) 1 - 17; Notice of Cross Motion and supporting papers (003) 18-26; Answering Affidavits and supporting papers 27-38; 39-49; Replying Affidavits and supporting papers 50-51, 52-55; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is

**ORDERED** that this motion (002) by the defendants, Guenter J. Jonke, D.M.D., and Suffolk Oral Surgery Associates, pursuant to CPLR §3212, for an order granting summary judgment dismissing plaintiffs' complaint is denied; and it is further

**ORDERED** that this motion (003) by the defendant, Richard Hamburg, M.D., pursuant to CPLR §3212 for an order granting summary judgment dismissing plaintiffs' complaint is denied.

The complaint of this action states causes of action for dental/medical malpractice, lack of informed consent, and the intentional concealment of the risks, hazards and alternative treatment of Arthur Steier (hereinafter the plaintiff). Although Denise Steier is named as a plaintiff, no cause of action, derivative or otherwise, has been pleaded in her behalf in the complaint although the verified bill of particulars does state that she suffered a loss of services, society, companionship and consortium of her husband due to his pain and disability from chemotherapy and radiation treatments. The plaintiff claims that he was under the care of the defendants for diagnostic and dental care and treatment, and that by their negligence, the defendants failed to diagnose and recognize a cancerous mass in the plaintiff's left maxillary sinus with erosion of the medial wall into the nose. The plaintiff further claims that the defendants failed to obtain his informed consent with regard to their treatment and undertook to and did conceal the risks, hazards and alternatives of the treatment rendered by them. The plaintiff claims that as a result of the defendants' negligence and intentional acts that the plaintiff suffered infiltrating carcinoma of the floor of the maxillary antrum on the left with extension into the lateral pterygoid space, a metastatic lesion extending through the lateral wall of the maxilla into the anterior and lateral soft tissues of the infratemporal fossa, displacement of the pterygoid plates, diminution of sensations of the skin of the left cheek, ulcerated lesion of the left upper gum and gingivo-buccal sulcus, loosening of the upper premolar and molar teeth on the left side and need for prosthesis implantation surgery.

In motion (002) Guenter J. Jonke, D.M.D. (hereinafter Jonke) and Suffolk Oral Surgery Associates, LLP (hereinafter Suffolk Oral Surgery) seek summary judgment dismissing the complaint as asserted against them on the basis they did not depart from the standard of care and that defendant Jonke immediately recognized that the plaintiff's sinus-related complaints were non-dental and promptly and timely referred the plaintiff for an ENT evaluation.

In motion (003) the defendant Richard Hamburg, M.D. (hereinafter Hamburg) seeks summary judgment dismissing the complaint on the basis of the expert report submitted by the co-defendant, Dr. Jonke, and claims that his care and treatment did not proximately cause the plaintiff's injuries.

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]). 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]). 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]).

The elements of proof required 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[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, *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [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 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [1994]).

Jonke testified at his examination before trial (hereinafter EBT) and submitted a supporting affidavit stating that it was his opinion within a reasonable degree of medical certainty that neither he nor his partners in his group departed from the standard of care in their dental treatment of the plaintiff; that his prompt referral of the plaintiff to an ENT for a CAT scan so that other possible non-dental causes of his sinus complaints could be appropriately diagnosed and then treatment completely within the standard of care; and that there is nothing that he did or failed to do that caused the cancer in the first instance or resulted in any delay of the proper diagnosis and treatment.

Hamburg testified at his EBT that he received his education in dentistry and holds a DDS, but his dental license is not still active. He also went to medical school and is Board Certified in otolaryngology and is a Fellow of the American College of Surgeons. He stated that John C. Burger (hereinafter Burger) is a physician's assistant who was employed by him for many years but is no longer with him. Hamburg testified he first saw the plaintiff on June 29, 2000 on a referral and set forth his care and treatment of the plaintiff.

Hamburg also testified that his office note of July 3, 2000 indicates he spoke with Azad K. Anand, M.D. who advised him concerning the results of the CAT scan which revealed "On the left a max sinus erosion into the nasal cavity consistent with a neoplasm," which Hamburg was concerned was a tumor in the sinus. He felt there was more concern that the process was a neoplastic process versus just an infectious process, and until there was a tissue diagnosis, there was always a question. The plaintiff was then seen by him on July 5, 2000 for a review of the CAT scan of the sinuses, but Hamburg did not have the written report. However, the Impression was "Inverting papilloma" which he described as a neoplasm with the implication that it involved the left maxillary sinus bone. His differential considered an inverted papilloma and a malignancy. An endoscopic sinus surgery was planned providing for a biopsy, and if the results of the biopsy suggested a neoplastic disease, then there would be additional treatment necessary. Hamburg also testified he performed a functional endoscopic sinus surgery on the left maxillary sinus on August 8, 2000 at St. Catherine's Hospital under general anesthesia, revealing bulging of the medial wall of the maxillary sinus on the left side. A polypoid grapelike mass was found attached to the floor of the maxillary sinus mucosa but he could not determine if it invaded or extended into the periosteum (bone). He removed the mass along with a portion of the posterior extent of the inferior turbinate by enlarging the ostium. The pathology report received back from St. Catherine's Hospital indicated there was no evidence of an inverted papilloma noted in the entire tissue submitted for histology. Hamburg's opinion was that there was at the very least, chronic sinusitis and inflammation, and at the worst, a combination remaining of chronic sinusitis and still a neoplasm yet to be diagnosed.

The plaintiff was seen again on September 13, 2000 at which time Hamburg stated his examination revealed normal post-surgical sinus cavities, and the plaintiff was advised to return in four months or sooner if he had any problems. Hamburg testified that the plaintiff presented again on November 27, 2000 complaining of a tooth problem and was seen by Burger who found the turbinates to be hypertrophied and ordered a CAT scan which was performed on November 30, 2000. The plaintiff returned on December 11, 2000. Hamburg stated that the CAT scan report from Long Island Diagnostic Imaging revealed that there was a regrowth of the previous mass and erosion. Thereafter, he thought the most appropriate and proficient approach was to go directly at the mass and bone and get a piece of it by performing a Caldwell Luc procedure. On January 10, 2001, a procedure was performed wherein Hamburg cut a piece of tissue from the plaintiff's gum area as the plaintiff was complaining of a bulge in the area. He stated the specimen came back positive for squamous cell carcinoma, poorly differentiated. He then felt pretty confident that the cancer that was seen or identified also related to the findings in the CAT scan from November, 2000 as it was in close proximity to the original area and there was no reason to assume otherwise. Hamburg testified that he did not perform a medial maxillectomy on the plaintiff in August 2000 as the whole medial wall of the sinus was not taken off without having a definitive pathological diagnosis.

Hamburg has not submitted an expert affirmation or affidavit on his own behalf and has relied upon the affidavit of co-defendant Jonke's expert Erick J. Dierks, M.D. in support of his motion.

Erick J. Dierks, M.D., D.M.D., F.A.C.S. (hereinafter Dierks), submitted his expert affidavit on behalf of Jonke, and stated that he is licensed, or in the past was licensed, by the States of Kentucky, Hawaii, Texas, and Oregon, and is Board Certified in Oral and Maxillofacial Surgery and Otolaryngology. He opines with a reasonable degree of medical certainty that Jonke and the members of his oral surgery group did not deviate from the standard of care in the treatment of the plaintiff, nor did their conduct cause any injury to him. The plaintiff's dental condition was properly diagnosed by Jonke, his treatment was appropriate, the plaintiff was advised both verbally and in writing of the alternatives and risks, no evidence of sinus cancer was evident from a review of the panorex of March 21, 2000, the extraction was carried out without a departure from the standard of care, and the follow up care was entirely appropriate, including a timely referral to an ENT for a CAT scan, all of which were the standard of care. He further states that whether diagnosed in August 2000 or January 2001, the plaintiff would have had to undergo substantially the same type of surgery and post-operative radiotherapy, and that he remains cancer free today.

Based upon the foregoing, the Court finds that Jonke has established that neither he, nor anyone employed in his dental group, departed from accepted standards of care and that he did not do or fail to do anything which did not fall within accepted standards of care and practice.

However, based upon the foregoing, the Court finds that Hamburg did not establish prima facie that he did not depart from accepted standards of care and that he did not do or fail to do anything which did not fall within accepted standards of care and practice. Dierks does not opine as to the care and treatment rendered by Hamburg and whether or not Hamburg departed from good and accepted standards of care in his care and treatment of the plaintiff

and accordingly, Hamburg has not demonstrated that he did not depart from accepted standards of care in treating the plaintiff.

As to proximate causation, Dierks opined that the plaintiff would have had to undergo substantially the same type of surgery and post-operative radiotherapy whether his condition was diagnosed earlier or not. The Court finds that Dierks' affidavit relative to proximate causation is conclusory and does not contain a basis upon which he reaches that opinion.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendants, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the plaintiff's injuries (see, *Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [1997]). Here the plaintiff, by way of his expert affirmations, has raised factual issues as to both Jonke's and Hamburg's care and treatment and proximate causation, thus precluding summary judgment from being granted to either moving defendant.

The plaintiff has submitted the affirmation of his radiologist who is Board Certified in Radiology who states that based upon his reviews of the scans of June 29, 2000, November 29, 2000, January 25, 2001, and June 29, 2000 that the interval growth of the mass progressed inferiorly with destruction of portions of the left upper jaw and portions of the left hard palate and extension into the oral cavity, there was growth through the anterior wall of the sinus into the superficial facial structures, medial growth into the nasal cavity and growth of the mass superiorly to involve the floor of the orbit. The plaintiff's radiology expert stated that this was a rapidly growing left maxillary sinus mass lesion.

The plaintiff has submitted the affidavit of his expert dentist who specializes in oral and maxillofacial surgery and states forth that the panorex film taken during the plaintiff's first visit with Jonke reveals the plaintiff's sinus projected inferiorly to the roots of the posterior maxillary teeth in question and reveals some cloudiness of the left maxillary sinus. The plaintiff's dental expert states with a reasonable degree of maxillofacial surgery certainty that Jonke failed to develop a proper differential diagnosis taking into consideration the findings on the panorex, the patient's complaints and the finding of the cottage cheese drainage at the time of the extraction (more common findings in sinus conditions) and given the evidence of possible sinus involvement on the panorex, good and accepted maxillofacial surgical practice would have required the practitioner to consider that the patient's complaints indicated a possible sinus component. Therefore, a referral to an ENT surgeon was in order along with a recommendation for a CAT scan. The plaintiff's expert further states that the Augmentin prescribed by Jonke was the antibiotic of choice for the treatment of sinus infections and was not usually used to treat simple dental infections, calling into question whether Jonke suspected a sinus infection at the initial examination.

The plaintiff's expert has also opined that although Jonke stated in his record that the post-operative visit on March 29, 2000 sets forth that the plaintiff's extraction site was pink without dry socket, a clot was in place and that it was healing well, the note of April 6, 2000 indicates that someone from the Jonke's staff called the plaintiff and learned he was doing alright. He stated the plaintiff testified that after the first post-operative visit, he called Jonke to

advise that he has a temperature and there was "pus" coming out, draining into his mouth. On the third post operative visit on May 23, 2000, Jonke's records confirm the complaints of sinus congestion and the contradiction between the patient's testimony and the office record is not explained by Jonke's expert, Dierks. The plaintiff's expert further states that normally one post operative visit would be required for this type of extraction and that because there were many more patient/surgeon communications with the plaintiff that it is implied that there was more to the healing process than the records indicate.

The plaintiff's dental expert has further stated that the findings on the CAT scan taken June 29, 2001 compared to findings made in January 2001 reveal significant changes, and that the earlier the diagnosis the greater the opportunity to save the plaintiff from the extensive surgery and post-operative radiotherapy that the plaintiff was compelled to undergo. The plaintiff's expert states that the three CAT examinations of the paranasal accessory sinuses reveal a rapidly growing left maxillary sinus lesion initially involving the medial and lateral walls of the sinus that over the next seven months invaded the oral cavity, the nasal cavity, the hard palate and the floor of the orbit, and had the diagnosis been made in July or August of 2000, the extent of the surgery would have been significantly less given the rapid growth confirmed by the CAT scans. The plaintiff's expert further states that the failure to send the patient to an appropriate ENT specialist at the time of the original procedure or during the months of April or May 2000 led to a further progression of the disease. The plaintiff underwent extensive surgery on February 5, 2001, almost a year after the plaintiff first sought treatment. Another medical doctor performed a left total hemimaxillectomy with orbital floor preservation and a split thickness skin graft repair with the placement of a palatal obturator. At the time of surgery, there was an extensive tumor filling the left maxillary sinus and all gross disease was removed. The plaintiff's expert opines that earlier diagnosis would have permitted a preservation of part of the upper jaw including teeth and part of the palate, leading to a much better quality of life and less chance of metastasis of the cancer at some time in the future. He further states that had the diagnosis been made in late June or early July when the patient first saw Hamburg, the need for the radiotherapy may have been averted.

The plaintiff has also submitted the sworn affidavit of his expert otolaryngologist who is Board Certified in Otolaryngology-Head & Neck Surgery. The plaintiff's otolaryngology expert has set forth the sequence of the plaintiff's care as revealed by the medical records maintained by Hamburg, the laboratory and radiology reports, and testimony of the parties. Upon his review and recitation at length, he states with a reasonable degree of maxillofacial surgical certainty that had the diagnosis been made in July 2000 or August of 2000, the extent of the surgery necessary to treat the plaintiff would have been significantly less given the rapid growth confirmed by the CAT scans; the delay in scheduling the surgery by Hamburg, whether caused by failing to have a proper differential diagnosis, or by not recognizing the significance of a diagnosis which included a malignancy, allowed the disease to advance. The plaintiff's otolaryngology expert opines that the delay became all the more tragic when in August of 2000, Hamburg became aware that his "biopsy" had not successfully determined the nature of the disease process, and Hamburg advised the plaintiff to wait four months under the inexcusable theory that if he was correct and there was a malignancy, the plaintiff would return at an earlier date with more symptoms. The plaintiff's otolaryngology expert states that almost a year after the plaintiff first sought treatment, surgery was performed in Memorial Hospital. He states that had Hamburg adhered to good and accepted medical practice, an earlier diagnosis would have permitted a preservation of part of the upper jaw including teeth and part of the palate at least.


This would have lead to a much better quality of life and less chance that the plaintiff would have a metastasis of the cancer at some time in the future. He further states with a reasonable degree of medical certainty that although the plaintiff is at this moment cancer free, it does not mean that he will be so in the future. The plaintiff's expert opines that had Hamburg diagnosed and treated the condition sooner, the plaintiff's prognosis would be better. Given the extent of the tumor at the time it was finally diagnosed, the plaintiff's expert expects that the plaintiff will never be able to assert that he is cancer free without fear of local recurrence or distant metastasis for at least ten years post-operatively.

The plaintiff's expert otolaryngologist also opines with a reasonable degree of medical certainty that the failures on the part of Hamburg were that he did not develop a proper differential diagnosis in July 2000 or develop a proper differential diagnosis and schedule surgery on an emergent basis, did not perform a proper surgical procedure on August 8, 2000 to allow for proper pathology findings, did not immediately address the fact that the pathology report failed to reveal the cause of the plaintiff's complaints and failed to schedule a further immediate and more definitive procedure which led to a delay in the diagnosis of the condition and further delay in its treatment. This delay lead to the further extension of the tumor and the extensive surgery required in February of 2001 to treat this cancerous condition. The plaintiff's expert further states with a reasonable degree of maxillofacial surgical certainty that Dierks, the defendants' expert, is in error when he states that the delay between August of 2000 and January 2001 is of no moment since the "substantially" same treatment would have been performed and that Dierks does not state what he means by "substantially." The plaintiff's expert states that it is obvious that allowing a malignant tumor to grow untreated for seven months invading normal tissue would guarantee more extensive surgery, that had the diagnosis been made in late or early July 2000 when the plaintiff first saw Hamburg, the need for the radiotherapy may have been averted and that Dierks does not attempt to claim that Hamburg conformed to good and accepted medical practice and no additional affidavit was included to make that claim.

Here the conflicting affidavits of the parties medical/surgical and dental experts establish the existence of factual issues as to negligence and proximate causation concerning the failure of Jonke and Hamburg to timely and properly diagnose the plaintiff's cancerous mass and the subsequent treatment necessary thereafter. The conflicting expert medical testimony based on facts in evidence requires resolution by a jury (*Shields et al v Baktidy et al*, 11 AD3d 671, 783 NYS2d 652 [2<sup>nd</sup> Dept 2004]). Therefore, summary judgment is precluded.

Accordingly, motions (002) and (003) for summary judgment dismissing the complaint are denied.

Dated: September 16, 2009

  
\_\_\_\_\_  
J.S.C.

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