

**Septimus v Matos**

2010 NY Slip Op 30623(U)

March 19, 2010

Supreme Court, New York County

Docket Number: 106298/2008

Judge: Joan B. Lobis

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

PRESENT: Juan B. Lobis  
Justice

PART 6

Septimus W

- v -

Matas, D.J.

INDEX NO. 106298/08

MOTION DATE 2/16/10

MOTION SEQ. NO. 007

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 22 were read on this motion to for partial summary joint

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

1-11

12-15

16-17

opp. 18-19

reply: 20-22

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

**FILED**  
MAR 25 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/19/10

JBL

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X  
WOLFSON SEPTIMUS,

Plaintiff,

Index No. 106298/2008

-against-

Decision and Order

DR. JORGE MATOS, DR. MARK BRONSKY,  
and DR. REEM STEPHANOS,

Defendants.

**FILED**  
MAR 25 2008  
NEW YORK  
COUNTY CLERK

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

Motions 007 and 008 are consolidated for disposition.

In this dental malpractice action, defendant Dr. Jorge Matos ("Dr. Matos") moves (Motion Sequence Number 007), as does co-defendant Dr. Mark Bronsky ("Dr. Bronsky") (Motion Sequence Number 008), for an order granting them partial summary judgment dismissing plaintiff Wolfson Septimus's ("Mr. Septimus") claims for punitive damages.

In 2003, Mr. Septimus, who was then 33 years old, began seeing, on the recommendation of his significant other, Lisa Lupinski ("Ms. Lupinski"), Dr. Stanley Sirgutz ("Dr. Sirgutz"), a general dentist with some periodontal training. Mr. Septimus had not seen a dentist for about six years. On the first visit, Dr. Sirgutz found that Mr. Septimus's mouth was a "mess" and that he had severe periodontal disease, including deep pockets more than six millimeters in depth. Dr. Sirgutz allegedly recommended that Mr. Septimus have periodontal surgery, which could improve the pocketing, and include bone replacement therapy. Mr. Septimus's teeth also demonstrated mobility. Mr. Septimus, during his treatment, always had some gingival inflammation,

according to Dr. Sirgutz. Dr. Sirgutz, although he informed Mr. Septimus of the deep pockets, tooth mobility and his impaired periodontal condition, that his teeth would get looser, and that he would be at risk of losing them, testified that Mr. Septimus was never interested in having periodontal surgery, notwithstanding that he was supposedly repeatedly told by Dr. Sirgutz to see a periodontist. Dr. Sirgutz had surmised that Mr. Septimus could not afford it, and was of the opinion that Mr. Septimus was only interested in how his teeth appeared, since, as a disc jockey, he was in the entertainment industry.

Since Mr. Septimus allegedly did not, over the course of his treatment, want to have periodontal surgery, Dr. Sirgutz performed full-mouth scaling and root planing on Mr. Septimus on a regular basis for several years, in an attempt to at least try to prevent the worsening of Mr. Septimus's periodontal health and the loss of his teeth. Dr. Sirgutz also treated Mr. Septimus for, among other things, sensitivity and infections, caused by his compromised periodontal condition. Dr. Sirgutz testified that during the time he treated Mr. Septimus, he always had active periodontal disease with deep pocketing and a lot of bone loss.<sup>1</sup>

At an August 15, 2005 visit, Mr. Septimus, who had crooked teeth with gaps, asked Dr. Sirgutz about Invisalign orthodontics. Dr. Sirgutz testified that Mr. Septimus was simply pricing such orthodontics, and that he gave Mr. Septimus a price of \$7,000, but that he would never have placed such appliances on Mr. Septimus's teeth, in light of his periodontal disease, since

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<sup>1</sup> Dr. Sirgutz testified that active periodontal disease was when bacterial inflammation was present, which "leads to bone loss, pain, pus, and the loosening of the teeth."

orthodontics cause teeth to move, which could worsen Mr. Septimus's condition. Dr. Sirgutz stated that "[y]ou don't move around loose teeth." He further testified that the Invisalign company would never have fabricated appliances for Mr. Septimus, once it saw his x-rays, showing his extensive periodontal disease. It also appears that, at that time, Dr. Sirgutz was not a certified Invisalign provider.

At his deposition, Mr. Septimus asserted that Dr. Sirgutz told him that he was willing to provide him with Invisalign appliances. Mr. Septimus's deposition testimony, while somewhat equivocal and inconsistent, further recited that Dr. Sirgutz had told him that he had gum disease; might have mentioned that he had periodontal disease and that he needed gum surgery; did not refer him to a gum specialist/periodontist; and told him that he had bone loss.

A friend of Mr. Septimus's then recommended her orthodontist, Dr. Bronsky, and Mr. Septimus, accompanied by Ms. Lupinski, saw Dr. Bronsky for an initial consultation on December 6, 2005. Mr. Septimus filled out a health history form that day, indicating that he had never had periodontal/gum treatment, and another form, indicating that his dentist was Dr. Sirgutz. At the next visit, x-rays were taken, and study models were created. Dr. Bronsky advised Mr. Septimus that Invisalign was inappropriate for him, and formulated a treatment plan which included fixed appliances. In a five-page letter, dated January 3, 2006, Dr. Bronsky thanked Dr. Sirgutz for referring Mr. Septimus (a referral which he did not make), and informed him of his orthodontic treatment plan. That letter advised that "before any fixed orthodontic therapy," the patient would be required to have any needed "periodontal and restorative care to eliminate active disease processes

- as per Dr. Sigurtz [*sic*”]; that “[d]ue to the compromised soft and hard tissue periodontal support, the patient may require periodontal therapy before, during, and following orthodontic treatment to arrest the progress of the current periodontal problems and to improve the bony and soft tissue supporting structures for the future”; and that “[d]ue to severe periodontal compromise, the patient may require removal of additional teeth during or following orthodontic therapy.” Dr. Bronsky testified that the severe bone loss was about 50%. He concluded by indicating that he would enjoy discussing the case with Dr. Sirgutz at his convenience, and that if Dr. Sirgutz had any questions or comments, he should contact Dr. Bronsky.

Mr. Septimus testified that, although he was given a copy of that letter, he never read it. He further testified that, essentially, the only thing Dr. Bronsky discussed before the braces were placed in his mouth was what would be placed in his mouth, the cost of over \$11,000, and how everything would turn out perfectly. According to Mr. Septimus, prior to the braces’ placement, Dr. Bronsky never discussed bone loss; that his bone loss would get worse; that the condition of his gums could worsen; that he needed to have any required gum or restorative work; or that he could lose teeth. Evidently, Mr. Septimus did not read the consent form before signing it on February 14, 2006, the day the braces were placed on his teeth.

Ms. Lupinski testified that she had accompanied Mr. Septimus to several visits to Dr. Bronsky’s office, before February 14, 2006, including one at which he advised them that he had unsuccessfully tried to reach Dr. Sirgutz by phone, that Dr. Sirgutz had failed to respond to the January 3, 2006 letter, and that he was unsure why he was not responding. Dr. Bronsky then

allegedly told them that the braces would be a "great thing for Wolf," and that he should continue his dental care with Dr. Sirgutz. According to Ms. Lupinski, Dr. Bronsky never discussed at this visit that Mr. Septimus had bone loss.

Contrary to Ms. Lupinski's version of the events, Dr. Bronsky, who never periodontally probed Mr. Septimus's teeth, testified that he had spoken to Dr. Sirgutz about bone support and the proposed treatment plan prior to the braces being placed, and was told that Dr. Sirgutz had been treating the patient periodontally for a few years, and that he was disease free and under good control. No record of that alleged conversation was in Dr. Bronsky's chart, although conversations with other dental providers on later occasions were so noted.

According to Dr. Sirgutz, whose office chart contained Dr. Bronsky's letter, he had no recollection of having seen that letter at any time that he treated Mr. Septimus. Dr. Sirgutz also had no recollection of ever having had a phone conversation with Dr. Bronsky or with any other orthodontist during the time that he treated Mr. Septimus, never consulted or conversed with Dr. Bronsky, and never told Dr. Bronsky that the patient's periodontal issues were solved and that he was cleared periodontally for braces. Dr. Sirgutz testified that, if any orthodontists had contacted him, he would have clearly told them that orthodontia was not advised. He also indicated that braces make it harder to clean under the gums.

On February 14, 2006, Mr. Septimus had the braces placed on his teeth, evidently by Dr. Matos, whose exact relationship to Dr. Bronsky or the orthodontic practice is not revealed on

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these applications.<sup>2</sup> Dr. Matos, who never probed Mr. Septimus's teeth, testified that, before placing the braces, he was aware of Mr. Septimus's moderate to severe bone loss from the x-rays which had been taken, and thus asked Dr. Bronsky about it. Dr. Bronsky allegedly told him that he had spoken with the patient's general dentist, who advised that he had done periodontal treatment on Mr. Septimus and that "he was okay to have orthodontic treatment." Dr. Matos further testified that, before treatment had begun, he asked Mr. Septimus whether he had obtained periodontal treatment, and that Mr. Septimus informed him that he had just had a full cleaning. Dr. Matos conceded that a full cleaning did not necessarily mean periodontal treatment.

Mr. Septimus continued his orthodontic treatment, returning approximately monthly, sometimes seeing Dr. Bronsky, at other times seeing Dr. Matos, and on occasion seeing named defendant orthodontist, Dr. Reem Stephanos.<sup>3</sup> He returned to Dr. Sirgutz for a full-mouth periodontal cleaning on May 1, 2006. Mr. Septimus testified that movants and another staff member were amazed at how quickly Mr. Septimus's teeth moved once the braces were placed on them, and that they could not account for the speed with which his teeth moved.

According to Mr. Septimus, he constantly had swelling in his mouth while he was under the defendants' care, and, as a result, that at almost every visit they had to press on the area of swelling and "pop off" his "stuff." Then he would be told that "it's okay." Movants' version

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<sup>2</sup> The chart indicates that there was apparently an entity entitled "Mark J. Bronsky, D.M.D., M.S., P.C." Whether Dr. Matos was a shareholder of that entity or was simply an employee of it or of Dr. Bronsky is not stated.

<sup>3</sup> Dr. Stephanos has evidently not been made a party.

was that there was one incidence of swelling, which was noted on September 25, 2006, and that when pressure was exerted, fluid emerged. A panorex was taken that day to evaluate the swelling, which film showed some additional bone loss since the time of the pre-treatment x-rays, but according to movants, the amount of bone loss between x-rays was insignificant. Movants testified that Dr. Sirgutz was sent a copy of the panorex, that Mr. Septimus was advised that day to promptly see Dr. Sirgutz to evaluate the swelling, and that thereafter, Mr. Septimus had told them that he had seen his dentist, and that the situation had been taken care of.

Mr. Septimus denies that he was told to see Dr. Sirgutz or that he advised Dr. Matos that he had seen Dr. Sirgutz, and Dr. Sirgutz denies that he ever saw the panorex. Movants' chart does not reflect that Mr. Septimus was told to see his dentist, that Mr. Septimus had advised that the problem had been taken care of, or that a copy of the panorex had been sent to Dr. Sirgutz.

Mr. Septimus next saw Dr. Sirgutz for his periodontal cleaning on December 10, 2006, was told to return in March 2007, and was advised that he could not have a laminate on tooth #6 until his orthodontics were completed. Dr. Sirgutz, who apparently was taken aback by the braces, allegedly told Mr. Septimus that, since he evidently had the financial resources, he would have thought that Mr. Septimus would have spent his money on periodontal treatment, rather than on braces, but that he knew that the appearance of Mr. Septimus's smile was important to him for his career. Mr. Septimus never returned to Dr. Sirgutz, allegedly because he was dissatisfied with the amount of time Dr. Sirgutz spent on the cleanings.

According to Dr. Matos, at a visit of July 2, 2007, he noticed that there was a loss of stippling on Mr. Septimus's gums and that a smell emanated from his mouth, which prompted him to advise Mr. Septimus to see his dentist. He also noticed, allegedly for the first time, mobility in Mr. Septimus's teeth. Dr. Bronsky testified that the loss of stippling was all over Mr. Septimus's gums, and indicated that there was inflammation. The chart entry of that day did not mention the odor, the loss of stippling, or that Mr. Septimus was advised to see his dentist. Mr. Septimus denies that he was told to see his dentist. He further claims that Dr. Matos never told him that he had inflammation or bone loss.

Several weeks later, Mr. Septimus contacted Ms. Lupinski's current dentist, Dr. Burney Croll (Dr. Croll), for a routine cleaning, and saw him that month. Dr. Croll was allegedly shocked when he saw the deep pocketing in Mr. Septimus's gums. He took x-rays which showed that Mr. Septimus's bone structure had lost about 50% of its mass since the original x-rays were taken at movants' office, i.e., there were areas of bone loss of about 75%. Dr. Croll immediately referred Mr. Septimus to a periodontist, a Dr. Diamond, and contacted Dr. Bronsky, indicating that the braces had to be removed due to Mr. Septimus's periodontal condition. Mr. Septimus testified that he was told by Dr. Diamond and Dr. Croll that he would be losing most of his teeth, and that he would need implants after necessary periodontal work. Shortly thereafter, the bands were removed from Mr. Septimus's teeth.

Mr. Septimus commenced this action against movants, asserting departures from accepted standards of orthodontic care (first cause of action) and a lack of informed consent (second

cause of action). With respect to the first cause of action, it was alleged, among other things, that movants "willfully and wantonly with a reckless disregard for the health of the plaintiff" started and continued orthodontic care for a patient with severe periodontic problems and bone loss, knowing that it would fail and lead to more bone loss as well as to tooth loss. The lack of informed consent cause of action alleges that the defendants "willfully and wantonly with a reckless disregard for" Mr. Septimus's health failed to advise him of the risks, consequences, and "the folly of," and the alternatives to the proposed treatment, and that the defendants failed to advise of the destructive nature of the treatment.

Movants now seek partial summary judgment dismissing the claims for punitive damages attendant to both causes of action. They maintain that such damages are unwarranted, since the claimed behavior was not aimed at the public; they had no intent to harm the plaintiff, but instead hoped to straighten his teeth; the alleged conduct did not go beyond mere negligence; and because the evidence did not demonstrate the requisite moral culpability and egregious and reckless conduct needed to sustain such a claim. Mr. Septimus opposes the motion, and claims that the papers, including his and Dr. Sirgutz's deposition testimony, raise issues of fact as to whether the movants' initiation and continuation of orthodontic treatment, in the face of severe periodontal disease and bone loss, constituted a gross, reckless, and conscious disregard for his dental health.

Punitive damages are not intended to compensate a plaintiff, but instead serve to punish the wrongdoer and deter that individual and those in a similar situation from engaging in the same behavior in the future. Ross v. Louise Wise Services, Inc., 8 N.Y.3d 478, 489 (2007). In tort

cases, conduct aimed at the public need not necessarily be shown. Giblin v. Murphy, 73 N.Y.2d 769, 772 (1988); Don Buchwald & Associates, Inc. v. Rich, 281 A.D.2d 329 (1st Dep't 2001). Additionally, bad faith, an intent to harm, malicious motives, and an intentional violation of a party's rights are not always required to warrant a punitive damages award, particularly when a case involves an unintentional tort. See Home Ins. Co. v. American Home Products Corp., 75 N.Y.2d 196, 203 (1990); Randi A. J. v. Long Island Surgi-Center, 46 A.D.3d 74, 80 (2d Dep't 2007); Rev v. Park View Nursing Home, Inc., 262 A.D.2d 624, 627 (2d Dep't 1999). More than mere negligence or carelessness is required to permit a punitive damages claim. Fordham-Coleman v. National Fuel Gas Distribution Corp., 42 A.D.3d 106, 113 (4th Dep't 2007); Rev v. Park View Nursing Home, Inc., 262 A.D.2d at 627; Gruber v. Craig, 208 A.D.2d 900, 901 (2d Dep't 1994).

To justify the imposition of punitive damages, the conduct must be "exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights." Ross v. Louise Wise Services, Inc., 8 N.Y.3d at 489 (internal quotation marks and citations omitted). A conscious or reckless disregard of another's rights is necessary. Home Ins. Co. v. American Home Products Corp., 75 NY2d at 203; Welch v. Mr. Christmas Inc., 57 N.Y.2d 143, 150 (1982); Zuckerman v. Goldstein, \_\_\_ A.D.3d \_\_\_, 2010 N.Y. Slip Op. 01689 (1st Dep't 2010); Melfi v. Mount Sinai Hosp., 64 A.D.3d 26, 41-43 (1st Dep't 2009); Guariglia v. Price Chopper Operating Co., Inc., 38 A.D.3d 1043 (3d Dep't 2007); Lieberman v. Riverside Mem. Chapel, Inc., 225 A.D.2d 283, 291 (1st Dep't 1996). In a malpractice action, punitive damages are "not recoverable unless the conduct is wantonly

dishonest, grossly indifferent to patient care, or malicious and/or reckless.” Schiffer v. Speaker, 36 A.D.3d 520, 521 (1st Dep’t 2007). Punitive damages are “considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another.” Home Ins. Co. v. American Home Products Corp., 75 N.Y.2d at 203 (internal quotations marks and citations omitted). Whether an award of punitive damages is justified, and, if so, in what amount, are issues for the trier of fact. Nardelli v. Stamberg, 44 N.Y.2d 500, 503 (1978); Dobroski v. Bank of America, N.A., 65 A.D.3d 882 (1st Dep’t 2009); Fordham-Coleman v. National Fuel Gas Distribution Corp., 42 A.D.3d at 114; Swersky v. Dreyer & Traub, 219 A.D.2d 321, 328 (1st Dep’t 1996).

Mr. Septimus’s claim for punitive damages in connection with his lack of informed consent cause of action clearly lacks merit, and is accordingly, dismissed. While in obtaining a patient’s informed consent to treatment, a doctor is required to advise the patient of the reasonably foreseeable risks and benefits of and the alternatives to the proposed treatment (Public Health Law § 2805-d [1]), a doctor is not required to tell the patient that inappropriate treatment will be rendered which will likely harm that patient. Benfer v. Sachs, 3 A.D.3d 781 (3d Dep’t 2004) (claim that doctor performed a procedure that was not medically indicated was evidence of negligence, and did not support a lack of informed consent claim). In other words, a doctor is not required to tell a patient as part of the informed consent process that he or she will be departing from accepted standards of orthodontic practice and be injuring the patient.

Here, a review of the plaintiff’s pleadings relating to the lack of informed consent cause of action, makes it readily apparent that Mr. Septimus is seeking punitive damages because

he is claiming that movants failed to inform him of the "folly" of and destructive nature of the proposed treatment, i.e., that such treatment should never have been offered or performed. Thus, the demand for punitive damages under the lack of informed consent cause of action is simply duplicative of that request under the first cause of action, which seeks punitive damages in connection with alleged departures from accepted standards of practice. Therefore, the punitive damages claim under the lack of informed consent cause of action is dismissed as to both Dr. Bronsky and Dr. Matos.

The branches of movants' motions which seek summary judgment dismissing the punitive damages claim attached to the remaining cause of action are denied. The papers raise issues of fact as to whether movants, in rendering treatment to Mr. Septimus, acted with a conscious, gross, or reckless indifference to the safety of their patient. As to Dr. Bronsky, it is readily apparent from his five-page letter to Dr. Sirgutz, that he was aware of the severity of Mr. Septimus's periodontal condition, including that there was compromised soft and hard tissue support for the braces, and that before the orthodontic treatment could commence, any necessary treatment to eliminate active periodontal disease would be required. The mere sending of such a letter strongly suggests that Dr. Bronsky was aware that if any needed periodontal treatment were not rendered, there could be serious consequences for the patient. Although Dr. Bronsky claims that he was told by Dr. Sirgutz that he had been treating the patient periodontally for a few years, that he was disease free, and was cleared for braces, Dr. Sirgutz denies that he ever advised Dr. Bronsky that Mr. Septimus's periodontal issues were solved and that he was cleared for orthodontia, and denies that the patient ever had the needed periodontal treatment. Dr. Sirgutz's testimony is supported by the health history

form filled out by Mr. Septimus on his first visit to Dr. Bronsky, which indicated that the patient never had periodontal/gum treatment. It is also supported by Ms. Lupinski's claim that Dr. Bronsky informed her and Mr. Septimus that he could not reach nor had he heard from Dr. Sirgutz, and was unsure why there was a lack of response. Further, Mr. Septimus testified that, before he was seen by Dr. Croll, he was never informed by either movant about his bone loss, that his gums could worsen, that he could lose teeth, or that he needed gum or restorative work. In light of the conflicting testimony, a jury could reasonably conclude that Dr. Bronsky, who presumably stood to gain financially from the proposed treatment, proceeded in gross and reckless disregard of Mr. Septimus's safety, when, with knowledge of the severity of Mr. Septimus's periodontal condition, he permitted orthodontia to go forward, without having had the patient periodontally cleared, and with the knowledge that he had not heard from Dr. Sirgutz, and was unsure why.

In view of the disputed testimony as to whether Dr. Bronsky ever had Mr. Septimus cleared by speaking with Dr. Sirgutz, Dr. Matos, who was aware of Mr. Septimus's compromised periodontal condition before he started treatment, yet who proceeded with it, cannot be granted summary judgment dismissing the punitive damages claim on the first cause of action, although it is theoretically possible that Dr. Bronsky intentionally misled Dr. Matos by falsely telling him that Mr. Septimus's dentist had cleared him periodontally. These issues should await trial, since they involve credibility. The court also notes that Dr. Sirgutz's assertions that Mr. Septimus had deep pockets, inflamed gums and loose teeth, when coupled with Mr. Septimus's testimony that his gums were inflamed throughout movants' treatment, which inflammation was allegedly treated by movants, and that movants never referred him to his dentist, raise an issue as to whether movants acted with


reckless indifference in continuing Mr. Septimus's treatment once it had begun. Therefore, the branch of the motion which seeks dismissal of the punitive damages claim in connection with the first cause of action is denied.

Accordingly, it is

ORDERED that Motion Sequence Numbers 007 and 008, which seek partial summary judgment dismissing Wolfson Septimus's punitive damages claims, are granted to the extent that partial summary judgment is granted to Dr. Jorge Matos and to Dr. Mark Bronsky dismissing the punitive damages claim asserted under the second cause of action sounding in lack of informed consent, but is otherwise denied.

This constitutes the decision and order of the court.

Dated: March 19, 2010

  
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JOAN B. LOBIS, J.S.C.  
**FILED**  
MAR 25 2010  
NEW YORK  
COUNTY CLERK'S OFFICE