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

PRESENT: HON. RICHARD F. BRAUN J.S.C. PART 23

Index Number : 103735/2008

WIRTH, PAMELA et al

VS

STEVEN R. KRAWITZ, P.C., et al.

Sequence Number : 001

DISQUALIFY COUNSEL

INDEX NO. _____

MOTION DATE 2/11/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/~~for~~ disqualify counsel

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted to the extent of disqualifying plaintiffs' attorneys as counsel for plaintiffs.

This constitutes the decision and order of this Court. See separate opinion.

FILED

JUL 12 2010

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Dated: New York, New York, June 24, 2010

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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PAMELA WIRTH and LEWIS WIRTH,

Plaintiffs,

- against -

STEVEN R. KRAWITZ, P.C., STEVEN R. KRAWITZ LLC, AND STEVEN KRAWITZ, ESQ.

Defendant.

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STEVEN R. KRAWITZ, P.C., STEVEN R. KRAWITZ LLC and STEVEN KRAWITZ, ESQ.,

Third-Party Plaintiffs,

-against-

WILLIAM GREENBERG, ESQ. and GREENBERG & MASSARELLI, LLP,

Third-Party Defendants.

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Index No. 103735/08

OPINION

RICHARD F. BRAUN, J.:

This is an action for damages for legal malpractice. Defendants Steven R. Krawitz, P.C., Steven R. Krawitz LLC and Steven Krawitz, Esq., (defendants) move for summary judgment. Defendants move separately to disqualify William Greenberg, Esq. and Greenberg & Massarelli, LLP (third-party defendants) as counsel for plaintiffs, pursuant to 22 NYCRR 1200.21.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 382 [2005]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557,

562 [1980]).

The Court in *Schwartz v Olshan Grundman Frome & Rosenzweig* (302 AD2d 193, 198 [1st Dept 2003]) stated the elements of a legal malpractice claim:

> It is well established that an action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages (citations omitted). In order to demonstrate proximate cause, plaintiff must establish that but for the attorney's negligence, plaintiff would have prevailed in the matter in question or would not have sustained any ascertainable damages (*Senise v Mackasek*, 227 AD2d 184, 185 [1st Dept 1996]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]). The failure to establish proximate cause requires dismissal of the legal malpractice action, regardless of whether it is demonstrated that the attorney was negligent (*see Natural Organics Inc. v Anderson Kill & Olick, P.C.*, 67 AD3d 541, 542 [1st Dept 2009]; *Tanel v Kreitzer & Vogelman*, 293 AD2d 420, 421 [1st Dept 2002]; *Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002], *lv denied* 98 NY2d 606).

The Court in *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer* (8 NY3d 438, 442 [2007]) declared that "a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages (*McCoy v Feinman*, 99 NY2d 295, 301-302 [2002] [internal quotation marks and citation omitted])." (*see Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380, 380 [1st Dept 2002]; *Plentino Realty v Gitomer*, 216 AD2d 87, 88 [1st Dept 1995].) In order to show causation, a plaintiff must demonstrate that s/he would have been more successful in the underlying action "but for" the negligence of his or her counsel (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *Agate v Herrick, Feinstein LLP*, 57 AD3d 341, 342 [1st Dept 2008]).

Plaintiffs were allegedly injured in an automobile accident. The accident resulted after one

car had stopped, and the cab that plaintiffs were in struck the first vehicle in the rear. Then that cab was hit in the rear by a third vehicle. The alleged malpractice occurred in part because defendants did not timely commence litigation against the driver and owner of the third car. A material question of fact is set forth in the affidavit of Dante A. Brittis, M.D., who stated in relation to plaintiff Pamela Wirth that it is his "medical opinion within reasonable probability that the symptomatology and condition ... was (*sic*) directly related to the automobile accident ...; both the front and rear impacts were medical causes of the condition for which I treated Pamela."

Defendants contend that plaintiffs are attempting to create a feigned issue of fact (*see Madtes v Bovis Lend Lease LMB, Inc.*, 54 AD3d 630 [1st Dept 2008]). However, contrary to defendants' contention, Dr. Brittis' January 10, 2007 statement is consistent with his affidavit. In his 2007 statement, Dr. Brittis explains that plaintiff Pamela Wirth "was a passenger in a taxi cab and was sandwiched between two cars in a moderate-speed motor vehicle accident." Dr. Brittis then consistently concludes that plaintiff Pamela Wirth's symptomatology and condition were related to the automobile accident, which Dr. Brittis had defined as including the three motor vehicles. These statements are not inconsistent with plaintiff Pamela Wirth's deposition testimony that the second impact was moderate, and she never stated that the second collision was not a factor in her alleged injuries.

With respect to defendants' separate motion to disqualify third-party defendants as counsel for plaintiffs, defendants claim that the proximate cause of any damages sustained by plaintiffs was not the alleged malpractice of defendants, but rather the intervening and superseding negligence of plaintiff's successor attorneys/third-party defendants (*see Herkrath v Gaffin & Mayo*, 192 AD2d 487, 488 [1st Dept 1993]). A successor counsel's superceding, intervening malpractice can be the

proximate cause of a plaintiff's damages rather than the prior counsel's actions or omissions (*see Pyne v Block & Assoc.*, 305 AD2d 213 [1st Dept 2003]).

Defendants contend that third-party defendants' alleged malpractice included settling for an insufficient sum in that plaintiffs' injuries may have merited a greater recovery; extinguishing the possibility of a recovery from the driver and owner of the third car; not obtaining the consent of plaintiffs' carrier, precluding underinsured motorist coverage; not proceeding to trial to obtain a judgment against the driver and owner of the third car; and failing to conduct an independent investigation to search for assets to ascertain if a greater recovery could have been achieved. In light of the allegations against third-party defendants, 22 NYCRR 1200.21 (D) applies here. That section provides:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

Third-party defendants should be disqualified because, although plaintiffs state that they will not call third-party defendant William Greenberg as a witness, defendants state that they will on a significant issue, and that the testimony will likely be prejudicial to plaintiffs (*see Elizabeth St. v 217 Elizabeth St. Corp.*, 301 AD2d 481, 482 [1st Dept 2003]; *cf. S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 446 [1987] [where it was held that the contention of prejudice was "vague and conclusory"). Defendants have met their burden of showing that the testimony of third-party defendant William Greenberg, Esq. is likely and necessary, and that the testimony that he will be

asked to give may very well be adverse to what plaintiffs are advocating.

Accordingly, defendants' motion for summary judgment was denied by this court's separate decision and order, dated June 23, 2010. A total of $100.00 motion costs has been awarded to plaintiffs against defendants on that motion, pursuant to CPLR 8106 and 8202, to abide the event. Defendants' separate motion to disqualify has been granted, by this court's June 24, 2010 decision and order to the extent of disqualifying plaintiffs' attorneys as counsel for plaintiffs.

Dated: New York, New York
June 25, 2010

Richard F. Braun

RICHARD F. BRAUN, J.S.C.