

**Elrac, Inc. v Radna**

2010 NY Slip Op 32085(U)

July 29, 2010

Supreme Court, Suffolk County

Docket Number: 04-29781

Judge: Mark D. Cohen

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 28 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. MARK D. COHEN  
Justice of the Supreme Court

MOTION DATE 5-12-10  
ADJ. DATE 7-13-10  
Mot. Seq. # 008 - MG; CASEDISP

-----X  
ELRAC, INC. d/b/a ENTERPRISE RENT A CAR, :  
:   
Plaintiff, :  
:   
- against - :  
:   
RICHARD J. RADNA, M.D., :  
:   
Defendant. :  
-----X

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Upon the following papers numbered 1 to 36 read on this motion for summary judgment by Notice of Motion/Order to Show Cause and supporting papers (008) 1 - 17 ; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 18-34; Replying Affidavits and supporting papers 35-36; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is

**ORDERED** that this motion (008) by the Defendant, Richard J. Radna, M.D., pursuant to CPLR 3212 for an order granting summary judgment dismissing Plaintiff's complaint is granted and the complaint is dismissed with prejudice.

The complaint of this action alleges that the Defendant Richard J. Radna, M.D. (Dr. Radna) rendered medical care and treatment to Steve L. Stancil relating to injuries claimed to have been sustained by Mr. Stancil arising out of a motor vehicle accident which occurred on March 7, 2000 when the Stancil vehicle and the vehicle, owned by Elrac d/b/a Enterprise Rent-A-Car (Elrac) and operated by Anthony J. Kingsberry, collided. Mr. Stancil commenced an action in the Supreme Court, County of Kings, State of New York against Elrac and Kingsberry sounding in negligence wherein he sought damages for his injuries and pain and suffering. On or about November 2003, that action proceeded to trial and a verdict rendered November 21, 2003 was reduced to judgment against Elrac and Kingsberry. A three million dollar post-judgment settlement was entered into thereafter. On or about February 2004, the judgment was paid in full by Elrac, a self-insured entity, and by Empire Fire and Marin Insurance Company (Empire). Elrac now claims that the injuries suffered by Mr. Stancil were directly and proximately caused by the medical malpractice and/or negligence or recklessness of the Defendant Dr. Radna in that Dr. Radna, on November 21, 2002, performed a multi-level surgical procedure consisting of a decompressive laminotomy/facetectomy at C3-4, C4-5, and C5-6, and decompressive laminotomy/facetectomy at C6-7 with extension to full laminectomy at C4, C5 and C6 when the same was not indicated as the Plaintiff has negative clinical tests and negative radiological studies. Elrac claims that this unnecessary multi-level cervical surgery rendered Stancil totally disabled and destabilized Stancil's condition of his cervical spine. Elrac has commenced the instant action seeking contribution from Radna in whole or in part of the three million dollar post-judgment settlement entered into in the underlying negligence action.

The Defendant, Dr. Radna, now seeks summary judgment dismissing the complaint of this action on the basis that the surgery performed was indicated by Mr. Stancil's clinical presentation and diagnostic studies and that the surgery was properly performed. Dr. Radna further claims that in this claim for contribution, that he, as an alleged subsequent tortfeasor, is liable only for the separate injury or aggravation attributable to his conduct, and that after the surgery, Mr. Stancil's condition improved and that there is no separate injury or aggravation of the injuries sustained by Mr. Stancil at the time of the underlying automobile accident.

The proponent of a summary judgment motion 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. 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]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). 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]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). 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]).

In support of the instant application, Defendant Dr. Radna has submitted, inter alia, an attorney's affirmation; copy of the summons and complaint in this action and for the underlying action; Defendant's answer; Judgment in the amount of Three Million Dollars, all of which is attributable to past pain and suffering; extract of Jury Verdict dated November 21, 2003; Elrac's bill of particulars and supplemental bill of particulars; reports of Dr. Guy dated March 7, 2000, March 13, 2000 and December 23, 2002 with medical records; operative report dated November 21, 2002 and annexed medical records; copies of the transcripts of the examinations before trial of Richard Radna, M.D. dated January 30, 2009, Steve Stancil dated June 17, 2009 and Donald Rally on behalf of Elrac dated November 5, 2008; and the affidavit of Steven Stancil dated April 7, 2010; affidavit of George DiGiacinto, M.D. dated March 29, 2010.

The requisite elements of proof 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]).

Donald Nally testified to the effect that he is currently employed by Elrac, then stated he was employed by Elco Administrative Services, a subsidiary of Elrac, which is a subsidiary of Enterprise Rent-A-Car. Elrac rents cars to Enterprise. Elco handles (adjusts and settles) the third-party liability claims and some first-party No-Fault claims against Elrac across the country. He has been a corporate liability manager for one year overseeing the daily operation of each of the Elcos. Sometime in 2003 he became assigned and managed the Stancil matter. He stated that the renter (Kingsberry) took SLP (Supplemental Liability Premium) insurance sold by Elrac insurance up to \$1,000,000 at the time of rental so the third-party administrator, Cambridge, who handles the claim for Empire Insurance which insures up to one million dollars, determined the file could possibly exceed a value of \$1,000,000, so the matter was then sent to Elco. His recollection of the Stancil matter was "a five-level laminectomy in a poor venue with clear liability." After he received the case from Cambridge and prior to the trial, he made a determination based upon his experience as a claims adjuster, without any experience in the area of medical malpractice, that Dr. Radna committed medical malpractice in his treatment of Mr. Stancil, however, he did not commence a third-party action against Dr. Radna. He attended the Stancil trial every day and approved the settlement of the Stancil matter in the amount of three million dollars. It was his decision after the judgment in January 2004 to commence the action against Dr. Radna on the basis that the extent of the surgery that was performed drove up the amount Elrac would needed to pay to settle the case as he felt the surgery was not necessary and Mr. Stancil's condition was made worse because of the surgery. He never discussed this issue with Dr. Steinberger who testified on Elrac's behalf at the time of the Stancil trial. The jury came in with an award of \$3,550,000. Post-verdict negotiations were entered into and the action was settled for \$3,000,000 with the entire amount allocated to past pain and suffering.

Steven Stancil set forth in his affidavit submitted in support of Dr. Radna's motion for summary judgment dismissing this action that on November 21, 2002 he underwent a posterior decompressive cervical laminectomy/facetectomy at C3-4, 4-5, 5-6 and 6-7 with extension to full laminotomy of C4, 5 and 6 bilaterally by Dr. Radna at St. Joseph's Hospital. He avers that he developed progressively worsening complaints of neck pain, pain and tingling and loss of function in his right arm and hand which started with the motor vehicle accident of March 2000. He avers that the progressive worsening complaints in his neck and right arm and hand were interfering with his ability to perform his job. This affidavit is consistent with his trial and deposition testimonies. After surgery, he states, his complaints of pain, numbness, tingling and loss of function of his right arm and hand were resolved. In mid 2004, after a period of recovery from the surgery of approximately one and one-half years, he returned to his prior employment and has remained employed experiencing no further physical difficulties in the performance of his job since recovery from surgery. He has also returned to playing sports.

Dr. Radna testified to the effect that he is chief of neurosurgery at St. Joseph's Hospital and in 2002 was assistant professor of neurosurgery at Mt. Sinai Hospital in New York . He gave medical testimony at Mr. Stancil's underlying trial concerning the motor vehicle accident of March 7, 2000 in which his vehicle was struck in the rear. Mr. Stancil was referred to him by Dr. Guy, a rehabilitation specialist. Mr. Stancil's complaints to him on November 12, 2001 consisted of pain on both sides of his neck, shoulder blades, elbow, right arm radiation to the elbow, and lower bilateral back pain radiating to the right lower extremity to his thigh. He experienced this pain on a daily basis following the accident. Upon examination, a 60% moderate restriction of cervical and lumbar flexion and leg raising was found, which restrictions continued until surgery. He opined that Mr. Stancil had nerve root irritation but the nerve root motor function and reflex and sensory functions were still working ok. No myelopathic signs arising from the spinal cord were noted. Cervical spine MRI's (static study) had been performed before and after the accident. The April 4, 2000 cervical MRI (considered the gold standard) revealed that after the March 7, 2000 accident there was a herniated disc (described as a disc which is

protruding where it does not belong normally outside the confines of the vertebral body) at the C3-4 level with contact with the spinal cord and obliteration of the anterior subarachnoid space, as well as protrusions at C 4,5, 6, and 7, of less degree than 3-4. The C4-5 herniation was proximating the spinal cord with some preservation of minimal subarachnoid space with the potential for irritation to the cord. His opinion was the same for the C6-C7 discs. He testified that a Dr. Scuderi read that MRI film and found a herniated disc at C3-4 and commented that the intervertebral disc spaces are well maintained. An EMG study was positive for nerve root component at the C3-4 level. He stated that no other findings were positive on EMG means very little as impingement of the cord or a sensory root will give no EMG findings.

Dr. Radna testified that on November 12, 2001 when he saw Mr. Stancil that he felt his symptoms indicated permanency of his injuries based upon his history, physical findings, imaging studies, lack of resolution of the problems for almost two years since the trauma, passing of time with treatment with an excellent physiatrist without permanent relief, and working but unable to do heavy athletics as he was before the accident. At that time he indicated in his records that an anterior cervical discectomy at C3-4 to relieve the pressure on the spinal cord was a future option. He stated anterior discectomy as opposed to a posterior approach provides more access to the disc. When the disc is removed, the bones fuse naturally. There is an advantage to the posterior approach for optimal result without more need of surgical intervention. He recommended the posterior approach as he felt the anterior approach had its risks and he felt no advantage to the anterior approach. With a posterior approach there is an incisions with exposure of the various levels, unroofing (laminectomy) of the posterior spine and extending the decompression to decompress the nerve roots (medial facetectomy and associated foraminotomy-multilevel). The extent of the laminectomy is based upon the clinical presentation, physical findings, imaging studies and the patient's response to treatment and in this case, the ongoing progressive complaints with diffused pain into Mr. Stancil's right hand with numbness. Therefore, laminaectomies were recommended and performed at C4-5-6 with associated foraminotomies, bilaterally. He preferred it to placing hardware at the site. He advised Mr. Stancil of the different options available and advised Mr. Stancil he would refer him to another surgeon if he opted for the graft and hardware. He also advised that it would take one to two years for maximum healing with generally good results with this type of procedure.

A week before surgery a repeat MRI was conducted which revealed the same findings as the prior MRI, and therefore no further studies were indicated. He also testified that he disagreed with Dr. Puljic's findings upon the reading of the MRI films and stated the findings as compared to the April 2000 MRI were unchanged with disc herniation at C3-4 and the disc protrusions were shown to be herniations at C5-7 and C6-7 as well. The disc herniation at C 4-5 was unchanged, and there was still compression of the spinal cord at C3-C4. When Dr. Puljic re-read the MRI films, he issued an addendum indicating a posterior discogenic bulge at the level of C3-4, with clinical correlation suggested. Dr. Radna testified that with this posterior surgery with laminectomy there is no risk of destabilizing the spine as in the "Three-column model of stabilization, if you maintain two columns, in this case the vertebral bodies, the pedicles and the lateral facets, that the spinal will remain stable as it is in this case." He was also advised that an anterior approach might be necessary for disc removal in the future at the C3-4 level. Mr. Stancil was afraid of having surgery and opted treatment with Dr. Guy. Thereafter, Mr. Stancil, diagnosed with partial disability, could not stand the pain any longer and could not work and opted to have surgery. Dr. Radner filmed the surgical procedure performed on November 21, 2002 and indicated that photos reveal C3-4 compressing the spinal cord and disc protrusions contacting the cord at the C4-5 level and C6-7 level very clearly. As expected, after the surgery, Mr. Stancil had a temporary total disability. He wore a cervical thoracic orthosis for comfort after surgery and Mr. Stancil indicated at his one month post-operative visit that the pain in his arm was improving. As of March 15, 2003, Mr. Stancil was disabled for work activity. As of March 22, 2004, Mr. Stancil returned to work.

George DiGiacinto, M.D. has submitted a physician's affidavit on behalf of Dr. Radna and avers that he is a physician licensed to practice medicine in the State of New York and has been board certified in neurosurgery since 1981. Dr. DiGiacinto sets forth the materials he reviewed in support of his opinions and conclusions which he sets forth with reasonable degree of medical certainty. It is Dr. DiGiacinto's opinion that Dr. Radna did not deviate in any way from the accepted standards of medical or surgical care at any time during his care and treatment of Stancil and that he did not proximately cause any of the injuries allegedly sustained by Steven Stancil.

Dr. DiGiacinto states that Mr Stancil commenced treatment with Dr. Ali Guy following the accident of March 7, 2000 for complaints of neck pain radiating to the left shoulder and low back pain radiating to the right buttock. Dr. Guy recommended physical therapy and a diagnostic workup if the symptoms persisted. In April 2000, an MRI of the cervical spine revealed a central herniated nucleus pulposus at C3-4 with associated spinal cord compression. An EMG by Dr. Guy showed evidence of left C3-4 nerve root dysfunction. Although Mr. Stancil continued with physical therapy, one year later in October 2001, Dr. Guy found that Mr. Stancil's symptoms had not improved with conservative treatment and referred him to neurosurgeon Dr. Radna.

Dr. DiGiacinto sets forth that Dr. Radna saw the thirty-one year old Mr. Stancil who had continued complaints of cervical pain with radiation to the shoulders and scapular region and low back pain with radiation to the right thigh. He noted the MRI findings of April 2000 and diagnosed causally related cervical and lumbar spine musculoskeletal and radicular pain syndromes of a permanent nature. Weight loss and continued physical therapy and possible anterior cervical discectomy were recommended as a future option. Dr. Radna's notes do not document any improvement in Mr. Stancil's presentation as of November 2002. Dr. Radna treated Mr. Stancil conservatively through treatment with other specialties before surgery was finally undertaken. On November 21, 2002, Dr. Radna performed the multi-level laminectomy/facetectomy from C3-7 at which time it was noted that there was bilateral nerve root compressions at C4, C5 and C7 between herniated discs anteriorly at C3-4, C4-5 and C6-7, and hypertrophic ascending facets and ligamentum flavum, posteriorly. Observation of central stenosis of the cord required extension of the surgery to full laminectomy at the C4- C5 and C6 levels, effectuating decompression of the spinal cord. The discs were preserved to enhance spinal stability in that, although the discs were herniated, there was no observed risk of imminent extrusion of the discs.

Given the findings in Dr. Radna's operative report, in conjunction with Mr. Stancil's complaints of worsening clinical symptoms for almost two years, it is Dr. DiGiacinto's opinion that the scope of the surgery performed by Dr. Radna was not a deviation from the standard of care. He states the decision to use a posterior approach to perform the laminectomies, as opposed to an anterior approach, is a surgical decision that was properly within the medical judgment of Dr. Radna based upon his clinical observations and his interpretation of the radiological studies. Both the anterior and posterior approaches are recognized as standard and accepted neurosurgical procedures. The fact that postoperatively Mr. Stancil had more limited function than prior to surgery is not evidence of malpractice or complications of surgery in that limited activities during recovery is a necessary and precautionary part of recovery after cervical spine surgery and is not an unanticipated complication and that the period of recovery was appropriate and reasonable. Dr. DiGiacinto states that Mr. Stancil's deposition testimony demonstrates that immediately following surgery, he experienced relief of his symptoms that led him to seek surgical treatment from Dr. Radna, and that since he has recovered, he has no pain or limitations in his activities due to the condition of his arms or neck, has been able to return to work and his usual physical activities, and can play basketball. He no longer has pain or limitations.

Based upon the foregoing, it is determined that the Defendant Dr. Radna has established prima facie entitlement to summary judgment dismissing the complaint on the basis that he did not depart from the accepted standards of neurosurgical care and treatment of Mr. Stancil; exercised his medical judgment in deciding to use the posterior approach in surgery; that the surgery was indicated and appropriately performed; that the Plaintiff did not experience relief from the pain caused by his injuries resulting from the motor vehicle accident for a period of more than two years after the accident and obtained relief from his symptoms only after the surgery and the recovery period, permitting him to return to work and resume his activities of daily living; and that there is no proximate cause between the care and treatment rendered by Dr. Radna and Mr. Stancil's injuries claimed to have been caused by Dr. Radna.

The Plaintiff has opposed this motion for summary judgment with, inter alia, an attorney's affirmation, the affirmations of Joseph M. Waltz, M.D. and A. Robert Tantleff, M.D., report of Dr. Tantleff; photocopies of the cervical MRI; MRI reports and medical records.

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 injuries of the Plaintiff (*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 it is noted that the affirmation by Dr. Waltz and the affirmation by Dr. Tantleff do not set forth that either physician is currently licensed to practice in the State of New York and neither physician attests to the truth of the curriculum vitae accompanying the affirmations. Accordingly, the affirmations of the Plaintiff's experts do not establish the physician's qualifications to testify as experts and thus do not raise factual issues to preclude summary judgment.

Even if this court were to consider those expert affirmations, the Plaintiff has failed to raise a triable issue of fact to preclude summary judgment. Dr. Waltz states that the logical approach for the surgery would have been an anterior approach rather than a posterior approach and does not affirm that the posterior approach was a departure from the accepted standard of care. "The mere fact that a claimant's expert would have opted for a different treatment, without more, represents, at most, a difference of opinion among medical providers, which is not sufficient to sustain a prima facie case of malpractice. For liability to ensue, it must be shown that the medical provider's treatment decision was something less than a professional medical determination" (*Ibguy v State of New York*, 261 AD2d 510, 690 NYS2d 604 [2<sup>nd</sup> Dept 1999]; see also, *Darren et al v Safier et al*, 207 AD2d 473, 615 NYS2d 926 [2<sup>nd</sup> Dept 1994]). Here, Dr. Waltz has not established that the decision to perform a posterior approach was something less than a professional medical determination. It has been established that the Defendant Dr. Radna chose to perform surgery based upon the clinical presentation, physical findings, imaging studies and the patient's response to conservative treatment, and in this case, the ongoing progressive complaints of diffuse pain into Mr. Stancil's right hand with numbness. The Plaintiff's experts have demonstrated nothing more than a difference of opinion among medical providers and have not raised a factual issue. Nor have the Plaintiff's experts demonstrated proximate cause of the claimed departures to any injuries separate and apart from the injuries sustained by the Plaintiff at the time of the accident and treatment for the same.

Dr. Waltz further does not set forth the risks or benefits between the anterior discectomy or posterior laminectomies and facetotomy, nor does Dr. Waltz address how an anterior discectomy at C3-4 would have corrected the conditions existing at the lower cervical levels addressed during the posterior surgery. Nor does Dr. Waltz address the surgical issues concerning multilevel anterior discectomies as opposed to the laminectomies and facetectomies and the benefits of one as opposed to the other. He does not dispute that the

posterior approach did not cause instability of Mr. Stancil's spine as claimed in the bill of particulars by the Plaintiff. Dr. Waltz sets forth in a conclusory, unsupported opinion that Mr. Stancil's radicular symptoms would have improved with just immobilization without surgery because the symptoms improved after surgery when he was immobilized. However, Dr. Waltz fails to address the issue of whether or not the improvement was the result of the surgery in that Mr. Stancil experienced the ongoing radicular symptoms for over two years prior to surgery, and fails to address Mr. Stancil's partial disability to engage in work or his usual activities of daily living or the finding of permanency due to the duration of the symptoms he experienced prior to surgery. Dr. Waltz does not address the finding of hypertrophy of the facet joints as described by Dr. Puljic on the MRI of November 11, 2002, and whether or not such conservative treatment or anterior discectomy would have addressed or corrected that condition. Dr. Waltz opines that Mr. Stancil's unnecessary surgery caused him to experience unwarranted pain and suffering for an extensive period of time. However, Dr. Waltz does not address the issue that if only conservative treatment and immobilization were used to treat Mr. Stancil's condition, what the length of time he would have experienced pain would have been and what the prognosis would be for future exacerbations. Dr. Waltz does not address Mr. Stancil's affidavit and testimony that his symptoms did not improve for the period of over two years prior to surgery and were only eliminated after surgery and the subsequent recovery period, permitting him to return to full work and engage in sports as he did prior to the accident.

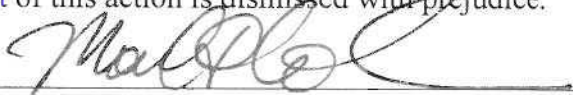
Dr. Waltz opines in a conclusory manner that the primary purpose of medical records is to document change of symptoms and findings and that there is no change documented in Dr. Radna's record. However, Dr. Waltz does not indicate any improvement of Mr. Stancil's condition was noted in the medical records either to support his opinion that the surgery was not necessary and caused Mr. Stancil to experience unwarranted pain and suffering for an extensive period of time. Obviously missing is an opinion that Mr. Stancil would not have had the continuing pain and symptoms had he not had the surgery. Dr. Waltz does not indicate whether or not Dr. Guy, who was treating Mr. Stancil medically, prescribed anti-inflammatory, and sets forth Dr. Radna did not order the same or that such medication would have corrected Mr. Stancil's condition, that it would correct the condition of the herniated discs or improve or eliminate the radicular symptoms or hypertrophy of the facet joints.

Dr. Tantleff's opinions concerning his interpretation of the MRI studies do not take the clinical presentation and response to conservative treatment with Dr. Guy into consideration, nor does he set forth as a radiologist a basis for his conclusory opinion that there was no need for surgical intervention or that an MRI is the sole criteria for making such determination.

"In a case of successive and independent tortfeasors, the initial tortfeasors are liable to the Plaintiff for all damages proximately caused by their wrongful acts including the aggravation of his initial injuries or foreseeable new injuries that their initial conduct precipitated. The successive tortfeasor is liable only for the separate injuries which its conduct caused" (*Clickner v Shanley et al*, 141 Misc2d 600, 533 NYS2d 832 [Supreme Court of New York, Rensselaer County 1988]). In the instant action, the Plaintiff's experts' affirmations neither established that they were qualified as experts, nor, even if they were in admissible form, did they establish that there were separate injuries proximately caused by the Defendant Dr. Radna not relating to the care and treatment for the injuries sustained in the accident. Instead, the Plaintiff's experts merely set forth conclusory opinions which do not raise triable factual issues to preclude summary judgment.

Accordingly, motion (008) is granted and the complaint of this action is dismissed with prejudice.

Dated: July 29, 2010

  
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J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION