

McCaffrey v Salierno

2010 NY Slip Op 33337(U)

October 26, 2010

Supreme Court, Suffolk County

Docket Number: 06-25170

Judge: Thomas F. Whelan

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.

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4-27-10 (#001)
MOTION DATE 7-9-10 (#002)
ADJ. DATE 8-23-10
Mot. Seq. # 001 - MotD
002 - XMotD

-----X
KEVIN A. MC CAFFREY, LORAIN :
MC CAFFREY and KEVIN MC CAFFREY, :
 :
 :
 : Plaintiffs, :
 :
 : - against - :
 :
 : JOSEPH SALIERNO, D.D.S., ROBERT PALMA, :
 D.M.D. and ROBERT PALMA, D.M.D., P.C., :
 :
 : Defendants. :
-----X

BRIAN P. NEARY, P.C.
Attorney for Plaintiffs
50 Elm Street
Huntington, New York 11743

KAUFMAN BORGEEST & RYAN, LLP
Attorney for Defendants
1205 Franklin Avenue, Suite 200
Garden City, New York 11530

Upon the following papers numbered 1 to 28 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 22; Answering Affidavits and supporting papers 23 - 26; Replying Affidavits and supporting papers 27 - 28; ~~Other~~ Other; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by the defendants for an order 1) pursuant to CPLR 3212 granting them summary judgment dismissing the complaint or, in the alternative, 2) pursuant to CPLR 3211 (a) (7) dismissing the plaintiffs' third cause of action, is granted to the extent that summary judgment dismissing the complaint as against defendants Robert Palma D.M.D. and Robert Palma D.M.D. P.C., and dismissing the claims by Lorraine McCaffrey and Kevin McCaffrey for expenditures made after Kevin A. McCaffrey reached his majority, is granted, and is otherwise is denied; and it is further

ORDERED that this cross motion by the plaintiffs for an order granting summary judgment dismissing the defendants' third and fourth affirmative defenses, is granted to the extent that the third affirmative defense is dismissed as to the infant plaintiff, Kevin A. McCaffrey, and the fourth affirmative defense is dismissed in its entirety, and is otherwise denied.

The instant action seeks to recover damages for dental malpractice arising from the defendants' purported failure, *inter alia*, to timely diagnose that the plaintiff's lower right first bicuspid had

ankylosed, to take sufficient, adequate, appropriate and timely x-rays, to obtain plaintiffs' informed consent, and the defendants' alleged action in "continuing to apply pressure to chain [on the ankylosed tooth] even after observing and documenting that lower teeth were sinking and upper teeth shifting." The complaint sets forth three causes of action. The first and second causes of action sound in dental malpractice and lack of informed consent, respectively. The third cause of action, on behalf of the plaintiffs Lorraine McCaffrey and Kevin McCaffrey, asserts a claim for reimbursement of monies expended, or to be expended, with respect to the dental care and treatment occasioned by the injuries caused by the defendants herein.

On June 5, 2000, the 14 year-old plaintiff, Kevin A. McCaffrey (Kevin), was first seen by the defendant Joseph Salierno, D.D.S. Dr. Salierno, an orthodontist, took a panoramic x-ray and noted that the lower right bicuspid (permanent tooth) and the deciduous (baby) tooth in that location were impacted. Due to the permanent tooth's failure to erupt, the teeth in front and back, the lower right first and second molars and the lower right first bicuspid, were "collapsing" into the space where the permanent tooth should have been located. At this initial visit, Dr. Salierno decided to commence orthodontic treatment of the lower arch only. His treatment plan involved an attempt to "upright" the collapsing teeth in order to create space for the permanent tooth to erupt into the lower arch, and to refer Kevin to an oral surgeon to extract the left and right lower third molars and for an opinion as to whether it was possible to extract the impacted baby tooth. Once space was created for the permanent tooth to erupt through orthodontic treatment, Kevin would return to the oral surgeon for a surgical exposure of the impacted permanent tooth and the placement of a bracket with a gold chain. Dr. Salierno would then tie the gold chain to the arch wire on the orthodontic appliance (braces) placed on the lower arch, which would put upward pressure on the permanent tooth in an attempt to lift it into place.

On June 12, 2000, Kevin was evaluated by Dr. William Schneider, an oral surgeon, who also recommended the extraction of Kevin's lower third molars and discussed the risks attendant with the extraction of the baby tooth with the plaintiffs. That same day, Dr. Schneider telephoned Dr. Salierno and indicated that the plaintiffs had agreed to the extraction of the lower molars and that they were contemplating the extraction of the baby tooth. He informed Dr. Salierno that he could probably extract the baby tooth, but that the procedure would be difficult. On July 17, 2000, Dr. Schneider extracted Kevin's lower left and right third molars but, in accordance with the plaintiffs' instructions, he did not extract the impacted baby tooth.

On August 21, 2000, Kevin returned to Dr. Salierno's office for placement of braces on his lower arch. Kevin missed his September appointment. He returned to Dr. Salierno's office on October 9, 2000, at which time the doctor replaced the original Nitinol arch wire with a new .014 stainless steel arch wire. On November 18, 2000, Dr. Salierno placed a .016 stainless steel arch wire on the braces and a coil spring start up was placed in the space he was attempting to create for the permanent tooth. On December 11, 2000, Dr. Salierno reactivated the coil spring. On January 8, 2001, a larger .0018 stainless steel arch wire was placed, and Dr. Salierno noted that Kevin's bite appeared to be opening up in the lower arch.

On February 5, 2001, Dr. Salierno took a panoramic x-ray which showed that there was adequate space for Kevin's permanent tooth to erupt, and he spoke with Mrs. McCaffrey and Kevin about surgical exposure of the permanent tooth. He called Dr. Schneider on February 6, 2001, asking for an evaluation of the impacted teeth and for a Denta-Scan. On March 15, 2001, Dr. Schneider spoke with Mrs. McCaffrey about obtaining a Denta-Scan to determine the position of the lingual nerve in relation to Kevin's baby tooth. Kevin was seen for an emergency visit with Dr. Salierno on March 19, 2001, and he was advised to see the oral surgeon. On April 14, 2001, the plaintiffs met with the oral surgeon, Dr. Schneider, who reviewed the Denta-Scan results with them and advised them that the baby tooth could be extracted without damage to the nerve. Dr. Schneider presented four options to the plaintiffs: 1) extraction of the baby tooth and surgical exposure and bracketing of the permanent tooth; 2) surgical exposure and bracketing of the permanent tooth without extraction of the baby tooth; 3) extraction of the permanent tooth, leaving the baby tooth in place; and 4) doing nothing.

Kevin's mother cancelled his appointment with Dr. Salierno scheduled for April 23, 2001. When Kevin returned on April 30, 2001, Dr. Salierno noted that Kevin was planning to undergo the surgical exposure of his permanent tooth without extraction of his baby tooth. On August 6, 2001, Dr. Schneider performed the surgical exposure and bracketing procedure. On August 20, 2001, Dr. Salierno tied the chain and bracket, on the now exposed permanent tooth, to the arch wire with a .030 thread to create pressure on the tooth to lift it into place. Dr. Salierno retied the chain with a .030 thread on September 15, 2001. On October 22, 2001, Dr. Salierno placed a "gable bend" between the permanent tooth and the lower right first molar to help elevate the permanent tooth. After Kevin missed an appointment scheduled for November 19, 2001, he returned on December 5, 2001, at which time Dr. Salierno noted that the lower right arch form was slightly depressed and that it was not contacting the upper teeth. Dr. Salierno suspected one of two causes for the condition of Kevin's teeth on this visit. First, that the permanent tooth had ankylosed, or fused to the jaw bone, and second, a possible right lateral tongue thrust. He referred Kevin to a speech pathologist to determine if tongue thrust was causing the problem. In addition, Dr. Salierno placed another "gable bend" in the gap in the lower arch.

On January 7, 2002, Mrs. McCaffrey called Dr. Salierno's office, advising the doctor that the speech pathologist with whom they had consulted had found no tongue thrust. On January 12, 2002, Dr. Salierno placed a brace on the lower right second molar to level the arch, placed a .016 Nitinol arch wire, which was not tied to the permanent tooth, and allegedly removed any pressure on that tooth.

On January 23, 2002, Kevin returned to Dr. Schneider, who noted that the lower arch had been "pulled down," as it appeared that the permanent tooth had not erupted and that it had ankylosed. A panoramic x-ray confirmed the finding, and Dr. Schneider gave the plaintiffs three treatment options: 1) extraction of the permanent tooth and a bridge between the lower right first bicuspid and the lower right first molar; 2) luxation of the permanent tooth; or 3) completion of orthodontics to level the arch. On January 28, 2002, Dr. Salierno spoke with Dr. Schneider, who relayed his findings and the three treatment options given to the plaintiffs.

On February 11, 2002, Dr. Salierno placed a .016 stainless steel arch wire and discussed the three treatment options with the plaintiffs. Mrs. McCaffrey advised the doctor that they had not decided how to proceed and that they would decide with Dr. Schneider's input. On April 22, 2002 and May 13, 2002, Dr. Salierno placed new arch wires to attempt to level the lower arch. On June 17, 2002, Dr. Salierno changed to a rectangular 21 x 25 wire. On July 22, 2002, he noticed that the lower arch was depressed more than he would prefer, and he again discussed with the plaintiffs that tongue thrust could be a possible cause. On August 19, 2002, a new arch wire was placed, and on September 9, 2002, Dr. Salierno uprighted the lower right first molar and the lower right first bicuspid with bends in the arch wire.

At the September 30, 2002 visit, Dr. Salierno took impressions of Kevin's upper and lower arches in order to prepare retainers. On October 28, 2002, Kevin's braces were removed and he was given upper and lower retainers to be worn at night. In addition, Dr. Salierno referred Kevin back to Dr. Schneider for removal of the bracket on his permanent tooth. On November 21, 2002, Dr. Schneider removed the bracket, he noted that the plaintiffs were aware of the potential problems with the continued presence of the impacted baby tooth and the impacted permanent tooth, and he noted that the patient "does not want any further treatment."

Kevin returned for visits to Dr. Salierno on November 25, 2002, January 13, 2003, February 24, 2003, May 14, 2003, February 2, 2004, and July 26, 2004 for evaluation and adjustments to his retainers. On November 2, 2004, Kevin's general dentist, Dr. Vincent Genna, called Dr. Salierno to express his concern about an excessive "curve of spee," which relates to the curvature of the occlusal plane of the teeth. On November 8, 2004, Dr. Salierno documented concern that the lower arch might be canting, or tilting downwards, around the area of the ankylosed permanent tooth, and he took x-rays, photos, and impressions of Kevin's mouth. On November 29, 2004, Kevin returned to Dr. Schneider, who documented that Kevin had malocclusion of the right mandible, that orthodontics could not be completed due to the presence of impacted teeth, and that the plaintiffs now wished to have the impacted teeth extracted. On January 10, 2005, Dr. Schneider performed the extractions of Kevin's impacted teeth.

On January 24, 2005, Dr. Salierno placed ceramic braces on Kevin's lower arch and he followed up with Kevin on January 31, 2005, February 28, 2005, March 28, 2005, April 25, 2005, and May 23, 2005. Kevin missed an appointment scheduled for June 20, 2005, but he returned on July 11, 2005. At that visit, Dr. Salierno received a telephone call from Dr. Richard Faber, with whom Kevin had consulted for a second orthodontic opinion on June 30, 2005. Dr. Faber recommended that braces be placed on Kevin's upper arch, the placement of temporary anchorage devices, and the extraction of Kevin's upper right first bicuspid and both upper wisdom teeth. On August 8, 2005, Dr. Salierno placed braces on Kevin's upper arch. Three weeks later, Kevin transferred his orthodontic care to Dr. Faber.

The defendants move for summary judgement dismissing the complaint. The requisite elements of proof in a medical or dental malpractice action are (1) a deviation or departure from accepted

standards of medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff's injury or damage (see *Sheenan-Conrades v Winifred Masterson Burke Rehabilitation Hosp.*, 51 AD3d 769, 858 NYSd 280 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]; *Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; *Calabro v Heschel*, 22 AD3d 622, 801 NYS2d 921 [2d Dept 2005]). To establish a claim for medical or dental malpractice based on lack of informed consent, a plaintiff must prove (1) that the medical professional providing the treatment failed to disclose alternatives to such treatment and failed to inform the plaintiff of the reasonably foreseeable risks of such treatment that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same situation would not have undergone the treatment had he or she been fully informed of the risks, and (3) that the lack of informed consent was a proximate cause of the plaintiff's injuries (see *Sarwan v Portnoy*, 51 AD3d 655, 857 NYS2d 667 [2d Dept], *lv denied* 11 NY3d 705, 866 NYS2d 609 [2008]; *Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]; *DeVivo v Birnbaum*, 301 AD2d 622, 754 NYS2d 60 [2d Dept 2003]).

Thus, on a motion for summary judgment seeking dismissal of a medical malpractice claim, a defendant physician or dentist has the initial burden of establishing that the treatment he or she rendered did not deviate from good and accepted medical practice, or that the plaintiff was not injured by such treatment (see *Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]; *Starr v Rogers*, 44 AD3d 646, 843 NYS2d 371 [2d Dept 2007]; *Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; *Juba v Bachman*, 255 AD2d 492, 680 NYS2d 626 [2d Dept 1998], *lv denied* 93 NY2d 809, 694 NYS2d 631 [1999]). To make a prima facie showing of entitlement to judgment as a matter of law, a defendant physician or dentist must establish through medical records and expert affidavits that he or she did not depart from accepted medical practice in the treatment of the plaintiff (see *Starr v Rogers*, *supra*; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Juba v Bachman*, *supra*). If the defendant makes such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (see *Luu v Paskowski*, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]; *Rebozo v Wilen*, *supra*; *Vera v Soohoo*, 41 AD3d 586, 838 NYS2d 154 [2d Dept 2007]).

In support of their motion, the defendants submit the pleadings, the medical records of Dr. Salierno, Dr. Schneider, Dr. Genna and Dr. Faber, the depositions of the parties, and the affirmation of an expert. Initially, the Court notes that while the affirmation of the defendants' expert is not properly affirmed "to be true under the penalties of perjury" pursuant to CPLR 2106, there is authority for the proposition that, if the issue is raised, defects of this nature may be corrected (*Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539, 871 NYS2d 135 [1st Dept 2009]; *Wester v Sussman* 304 AD2d 656, 757 NYS2d 500 [2d Dept 2003], *lv denied* 100 NY2d 510, 798 N.E.2d 348, 766 N.Y.S.2d 164 [2003]; *DiLeo v Blumberg*, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]). In the instant case, the defendants corrected the error.

Irrespective of the Court's consideration of the affirmation of the defendants' expert, there are material issues of fact which preclude the grant of summary judgment to Dr. Salierno. The depositions of the parties reveals a series of factual disputes which require a trial herein including, but not limited to, questions whether Dr. Salierno ever suggested the placement of upper braces or whether the plaintiffs refused same, whether pressure on the permanent tooth was removed after approximately five months or whether it was after approximately 15 months, and whether Dr. Salierno ignored the plaintiffs' physical complaints.

The plaintiffs submit the affidavit of an expert who opines, *inter alia*, that Dr. Salierno failed to timely recognize that Kevin's permanent tooth was ankylosed, that his failure to place braces on Kevin's upper arch was a departure from accepted standards of orthodontic practice, and that his records do not reflect that Dr. Salierno discussed potential problems, options for treatment, or his treatment plan with the plaintiffs. Here, the conflicting affidavits of the parties dental experts establish the existence of factual issues as to negligence and proximate causation concerning the failure of Dr. Salierno to timely and properly diagnose and treat Kevin's condition. Resolution of the conflicting expert medical testimony based on facts in evidence present a credibility question for the jury to resolve (*Shields et al v Baktidy et al*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]). Therefore, summary judgment is precluded as to Dr. Salierno.

In contrast, the record is devoid of any factual allegations against the defendants Robert Palma, D.M.D. and Robert Palma, D.M.D. P.C. The plaintiffs testified at their depositions that they had one consultation with Dr. Palma, who never made any recommendations for Kevin's treatment. Dr. Palma testified at his deposition that he did not recall seeing Kevin, that he had no written record of the consultation, and that he never discussed Kevin's treatment with Dr. Salierno. He further testified that he is partners with Dr. Salierno in the Huntington, New York office, but that he also has a private practice as a professional corporation, with offices in Fort Salonga, New York, separate from Dr. Salierno. In addition, the affidavit of the plaintiffs' expert fails to set forth an opinion regarding any departures from accepted standards of dental practice by Dr. Palma.

The defendants Robert Palma, D.M.D. and Robert Palma, D.M.D. P.C. have established their entitlement to summary judgement herein. It is well settled that a proponent of a motion for summary judgment under CPLR 3212 must make a *prima facie* showing of entitlement to judgment as a matter of law with proof in admissible form sufficient to establish the lack of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). Once this showing has been established, the burden shifts to the party in opposition to the motion for summary judgment, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (CPLR 3212 [b]; *Alvarez v Prospect Hospital supra*; *Zuckerman v City of New York supra*). The plaintiffs have failed to do so. Accordingly, summary judgment dismissing the complaint is granted to defendants Robert Palma, D.M.D. and Robert Palma, D.M.D. P.C.

The defendants also seek an order dismissing the plaintiffs' third cause of action for reimbursement of monies expended, or to be expended, with respect to the dental care and treatment occasioned by the injuries caused by the defendants herein. While couched as relief sought pursuant to CPLR 3211 (a) (7), the relief is considered pursuant to 3212. The Court finds that, while the remaining defendant, Joseph Salierno, has established his entitlement to summary judgment dismissing the derivative action of Lorraine McCaffrey and Kevin McCaffrey, parents of Kevin A. McCaffrey, insofar as it relates to monies expended after their son reached 21 years of age, he has not established his entitlement to summary judgment prior to that date (*Mount Vernon Hosp. v Nasibu*, 67 AD3d 871, 888 NYS2d 426 [2d Dept 2009]; *McArdle v 123 Jackpot, Inc.*, 51 AD3d 743, 858 NYS2d 692 [2d Dept 2008]; *Radcliffe v Hofstra.*, 200 AD2d 562, 606 NYS2d 333 [2d Dept 1994]; *Clough v Board of Education*, 56 AD2d 233, 392 NYS2d 170 [4th Dept 1977]). "While one attains majority at the age of eighteen (Domestic Relations Law, § 2), a [parent] is nevertheless obliged to support a child under 21 years of age (Domestic Relations Law, § 32; Family Ct Act, § 413; Social Services Law, § 101)" (*Clough v Board of Education, id.*). However, the culpable conduct of a parent may reduce any recovery in an action by a parent for medical costs expended for the child's injuries (*Nelson v State*, 105 Misc2d 107, 431 NYS2d 955 [Ct Cl 1980]). Accordingly, summary judgment dismissing the claims for expenditures made by Lorraine McCaffrey and Kevin McCaffrey after Kevin A. McCaffrey reached 21 years of age is granted, and is otherwise is denied.

The plaintiffs move for summary judgment for an order dismissing the third and fourth affirmative defenses set forth in the defendants' verified answers. In light of the Court's decision dismissing the complaint as against the defendants Robert Palma, D.M.D. and Robert Palma, D.M.D. P.C., the Court will address the motion as it relates to Dr. Salierno's answer only. The third affirmative defense plead by Dr. Salierno reads:

"Whatever injuries plaintiff may have sustained ... were caused ... by the culpable conduct and want of care on the part of the plaintiff and without any negligence or fault or want of care on the part of the defendant. Upon trial, it may appear that some or all of the damages claimed by plaintiff herein were brought about or contributed to by reason of plaintiff's own acts, actions or negligence, and if so, plaintiff's damages, if any, must be diminished accordingly."

The plaintiffs have failed to establish their entitlement to summary judgment dismissing the third affirmative defense. There are material issues of fact regarding the plaintiffs' alleged refusal to timely agree to the extraction of Kevin's impacted teeth and to agree to the placement of braces on Kevin's upper arch. In addition, the record is not clear as to Kevin's involvement in deciding the course of his treatment after he reached the age of majority. Under the particular circumstances presented in this dental malpractice case, the Court finds that the issues raised on this branch of the plaintiffs' motion are best left to the trial judge, who has broad discretion as to the admissibility of evidence offered at trial (*see Radosh v Shipstad*, 20 NY2d 504, 285 NYS2d 60 [1967]). Accordingly, that branch of the plaintiffs' motion to dismiss Dr. Salierno's third affirmative defense is denied.

McCaffrey v Salierno

Index No. 06-25170

Page 8

The fourth affirmative defense plead by Dr. Salierno reads:

“Upon information and belief, that injuries and damages were caused by the culpable conduct of some third person or persons over whom answering defendant neither had nor exercised control.”

The plaintiffs' have established their entitlement to summary judgment regarding this affirmative defense. A review of the record indicates the absence of any testimony or document which would indicate that a third person or persons were in any way culpable in causing Kevin's alleged injuries. The affirmation of the defendants' expert does not raise the possibility that anyone other than Kevin's parents, who are parties to this action, might be held culpable herein. The defendant has failed to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of this defense (CPLR 3212 [b]; *Alvarez v Prospect Hospital supra*; *Zuckerman v City of New York supra*). Accordingly, the fourth affirmative defense in the answer of defendant Joseph Salierno, D.D.S., is dismissed.

The Court directs that the claims and defenses dismissed herein are severed and that the remaining claims and defenses shall continue (*see*, CPLR 3212 [e] [1]).

Dated: _____

10/26/10



THOMAS F. WHELAN, J.S.C.