

**Farnham v White**

2012 NY Slip Op 30228(U)

January 4, 2012

Sup Ct, Suffolk County

Docket Number: 12517/2008

Judge: William B. Rebolini

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**  
**Justice**

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Paul Farnham and Mary Stedman-Farnham,

Plaintiffs,

-against-

Merritt B. White, D.O.,

Defendant.

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Clerk of the CourtMotion Sequence No.: 002; MOT.DMotion Date: 6/24/11Submitted: 8/26/11Index No.: 12517/2008Attorney for Plaintiffs:Debra S. Reiser, Esq.  
100 Park Avenue, 15<sup>th</sup> Floor  
New York, NY 10017Attorney for Defendant:Furey, Furey, Leverage, P.C.  
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Hempstead, NY 11550

Upon the following papers numbered 1 to 36 read upon this motion for partial summary judgment: Notice of Motion and supporting papers, 1 - 20; Answering Affidavits and supporting papers, 21 - 30; Replying Affidavits and supporting papers, 31 - 36.

Plaintiffs commenced this medical malpractice action on April 1, 2008. They seek to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Paul Farnham as a result of defendant's failure to diagnose and treat his Hodgkin's lymphoma prior to its reaching stage IV, when it was detected by other physicians. Plaintiff had been treated by defendant from March 20, 1992 through March 14, 2006. Plaintiffs allege that defendant was negligent in, among other things, failing to timely diagnose and treat his Hodgkin's lymphoma at an early stage thereby causing the Hodgkin's lymphoma to invade the T2 vertebral body, mediastinum, and supraclavicular region and causing plaintiff to develop neoplastic lymphadenopathy. In addition, plaintiffs allege that defendant improperly performed chiropractic maneuvers and procedures that exacerbated plaintiff's condition

and caused a compression fracture of T-2 vertebrae. Plaintiffs further allege that as a result, plaintiff had to undergo posterior cericothoracic laminectomy of T1 and T2, costotransversectomy of T2, left side, posterior fusion C7-T4 with bone grafting and cancer therapy. Their other allegations of negligence include misdiagnosing spinal cord compression secondary to tumor; failing to consider elevated white blood cell count; failing to timely order, perform and interpret diagnostic studies such as x-rays, MRI scans and PET scans; and prescribing contraindicated medications such as Darvocet and antibiotic therapy.

Defendant now moves for partial summary judgment pursuant to CPLR §214-a dismissing plaintiff's claims for medical malpractice based on negligence for the period from 1992 through October 2005 as time-barred and for dismissal of plaintiff's cause of action for medical malpractice based on lack of informed consent. In addition, defendant asserts that the continuous treatment doctrine is inapplicable for the period from 1992 through October 2005 inasmuch as plaintiff presented with various unrelated complaints that were treated accordingly and that there was a gap in treatment in excess of six years from July 1995 through February 25, 2002 which exceeds the applicable statute of limitations period. Defendant also argues that plaintiff's claim of lack of informed consent must be dismissed inasmuch as there was no invasion or disruption of the physical integrity of plaintiff's body and lack of informed consent was not the proximate cause of plaintiff's injuries. In support of the motion, defendant's submissions include the pleadings, plaintiffs' bill of particulars and supplemental bill of particulars, the signed deposition transcripts of the parties and plaintiff's medical records.

In opposition to the motion, plaintiffs do not contest defendant's argument that any claims relating to treatment rendered between March 20, 1992 through February 26, 2002 are time-barred. However, they contend that any claims concerning treatment rendered between June 15, 2004 and October 1, 2005 are not time-barred inasmuch as the continuous treatment doctrine applies to toll the statute of limitations from June 15, 2004. Plaintiffs submit their expert internist's affirmation in support of the position that defendant continuously treated plaintiff's symptoms related to his underlying condition of Hodgkin's Lymphoma from June 15, 2004 through January 27, 2006. Plaintiffs contend that they have a cause of action for lack of informed consent inasmuch as they are alleging that defendant negligently performed contraindicated procedures such as osteopathic manipulative therapy and prescribing antibiotics and never discussed the risks or alternatives to said therapy, that plaintiff never executed consent forms and that the osteopathic manipulative therapy caused injury to plaintiff. Plaintiffs note that defendant testified at his deposition that, had he known of plaintiff's true condition, he would not have performed the osteopathic manipulative therapy.

In reply, defendant argues that plaintiff's last visit was on March 14, 2006, after which there was no physician-patient relationship competing with litigation concerns for statute of limitations purposes, such that the continuous treatment doctrine does not apply and any claims with respect to visits prior to November 17, 2005 are time-barred. He emphasizes that plaintiff had a ten-year history of chronic back pain and did experience improvement with his intermittent treatment, resulting in gaps in treatment and that plaintiff had only one complaint of a rash which resolved. In addition, defendant criticizes plaintiffs' expert's affirmation as conclusory and vague in failing to provide an accrual date such as when plaintiff's tumor of the T2 vertebra first become clinically diagnosable, when the cancer reached stage IV or when plaintiff manifested enlarged lymph nodes. Defendant submits the

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affirmation of his expert internist in support of the position that plaintiff's expert did not and cannot state that defendant departed from the standard of care on January 18, 2005 and should have diagnosed Hodgkin's Lymphoma or taken further action to rule it out based on the medical record.

It is well settled that the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 NY2d 1065 [1979]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing 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" (Alvarez v. Prospect Hosp., 68 NY2d 320 at 324 [1986], citing to Zuckerman v. City of New York, 49 NY2d 557 at 562 [1980]).

With respect to the timeliness of plaintiff's claims for medical malpractice based on negligence, defendant established, *prima facie*, that the action was commenced on April 1, 2008 and that all causes of action to recover damages for malpractice arising from acts or omissions occurring prior to October 1, 2005 were barred by the 2 ½-year statute of limitations (see, CPLR §214-a; Cox v. Kingsboro Med. Group, 88 NY2d 904, 906 [1996]; Udell v. Naghavi, 82 Ad3d 960, 962 [2<sup>nd</sup> Dept., 2011]) The burden then shifted to plaintiffs to demonstrate the existence of a triable issue of fact (see, *id.*).

Generally, a cause of action alleging medical malpractice accrues on the date of the alleged wrongful act or omission, and the statute of limitations begins running on that date. However, in those instances where the patient is undergoing a "continuous course of treatment" with the physician with respect to the same condition or complaint that gives rise to the lawsuit, the statute of limitations will not begin to run until the end of the course of treatment (see, Nykorchuck v. Henriques, 78 NY2d 255, 261 [1991]; Gomez v. Katz, 61 AD3d 108, 111 [2<sup>nd</sup> Dept., 2009]; see also, Udell v. Naghavi, 82 Ad3d 960 [2<sup>nd</sup> Dept., 2011]; Stewart v. Cohen, 82 AD3d 874, 876 [2<sup>nd</sup> Dept., 2011]). In the absence of continuing efforts by a physician to treat a particular condition, the policy underlying the continuous treatment doctrine does not justify tolling the statute of limitations (see, Stewart v. Cohen, 82 AD3d 874, 876 [2<sup>nd</sup> Dept., 2011]).

Plaintiff's expert internist states by affirmation that symptoms of Hodgkin's Lymphoma include enlargement of the lymph nodes, achiness, fever, chills and fatigue, that enlarged anterior mediastinal lymph nodes can cause chest pain in the sternum area and that Hodgkin's lymphoma can also cause a high white blood cell count. Plaintiff's expert notes that on June 15, 2004, plaintiff visited defendant with complaints of back pain and that, based on the medical records and plaintiff's testimony, the back pain escalated from 2004 to the cancer diagnosis in early 2006. Plaintiff's expert also notes that in August, 2004, plaintiff began experiencing sternum pain which also escalated from 2004 to the cancer diagnosis in early 2006 and that he complained to defendant of the sternum pain on September 10, 2004. Plaintiff's expert indicates that the medical records reveal that defendant treated plaintiff on 12 occasions between June 15, 2004 and January 27, 2006 and that at least seven of the visits related specifically to plaintiff's back pain and two visits related specifically to plaintiff's

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sternum pain. According to plaintiff's expert, defendant continued to treat plaintiff's back and chest pain with osteopathic manipulative treatment therapy and general supportive instructions but there was no improvement in symptoms which would be anticipated in the absence of underlying disease. Plaintiff's expert further notes that on January 18, 2005 plaintiff complained of a rash on his legs for two weeks and defendant treated the rash as poison ivy, even though that condition rarely affects people in the middle of winter. Plaintiff's expert also indicates that during the November 17, 2005 and December 2, 2005 visits, plaintiff complained of high fever, weakness, achiness, chills and pain in his eyes and that despite no known tick bite or rash, defendant suspected Lyme disease and prescribed antibiotics. The results of a blood test on November 17, 2005 were negative for Lyme disease but showed an elevated white blood cell count. Plaintiff's expert opines to a reasonable degree of medical certainty that the symptoms plaintiff complained of during his January 18, 2005, November 17, 2005, and December 2, 2005 visits and plaintiff's elevated white blood count are all consistent with the diagnosis of Hodgkin's lymphoma. In addition, plaintiff's expert opines that plaintiff's chronic back pain from mid-2004 and chronic sternum pain from August 2004 are symptoms of Hodgkin's lymphoma and T2 tumor. Plaintiff's expert further opines that defendant treated plaintiff for unrecognized symptoms of Hodgkin's lymphoma and T2 tumor on a continuous basis from June 14, 2004 through January 27, 2006.

Defendant's expert internist states in his affirmation that the symptoms manifested by plaintiff on January 18, 2005, November 17, 2005 and December 2, 2005 are consistent with many disease processes and notes that plaintiff's expert did not and cannot state that defendant departed from the standard of care on January 18, 2005 and should have diagnosed Hodgkin's lymphoma or taken further action to rule it out. Defendant's expert emphasizes that plaintiff's treatment from 1992 to 2002 is significant for chronic complaints of back pain, particularly following physical activity such as surfing and arm wrestling. In addition, he states that plaintiff sought no treatment from defendant from July 1995 until February 2002, when he fell off of a ladder and then did not return until June 15, 2004 with complaints of lower back pain which plaintiff attributed to jogging and pain in the dorsal spine while fishing. Defendant's expert notes that defendant properly ordered x-rays of the dorsal and lumbosacral spine, which were negative, giving defendant reasonable assurance that he was not dealing with a bony lesion and properly ordered blood tests since plaintiff had a history of being bitten by a tick in 2003. He emphasizes that plaintiff has had a history of chronic back problems most of his adult life noting that plaintiff has had an active recreational lifestyle and his work as a fisherman is also physically demanding. Defendant's expert states that plaintiff's episodic and intermittent muscle, ligament, skeletal and nerve problems were treated by defendant and relief was obtained until the next flare-up. According to defendant's expert, the June and July 2004 visits were the natural extension of the chronic back complaints that plaintiff has had since he had a motorcycle accident when he was 19 years old. Defendant's expert indicates that defendant was not engaged in a course of treatment of Hodgkin's lymphoma but was instead engaged in episodic treatments for discrete and separate aggravations of plaintiff's chronic pains that he has had for much of his adult life. He opines within a reasonable degree of medical certainty that defendant did not depart from the standard of care from June 15, 2004 through January 18, 2005 in failing to diagnose Hodgkin's lymphoma and a tumor at T2.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury"

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(Feinberg v. Feit, 23 AD3d 517, 519 [2<sup>nd</sup> Dept., 2005] [citations omitted]; see, Wexelbaum v. Jean, 80 AD3d 756, 758 [2<sup>nd</sup> Dept., 2011]; Darwick v. Paternoster, 56 AD3d 714, 715 [2<sup>nd</sup> Dept., 2008]; Bjorke v. Rubenstein, 53 AD3d 519, 520 [2<sup>nd</sup> Dept., 2008]).

Here, plaintiff raised triable issues of fact as to whether the statute of limitations was tolled by the continuous treatment doctrine based on defendant's treatment (see, Rosenthal v. So, 72 AD3d 784, 785 [2<sup>nd</sup> Dept., 2010]). Therefore, defendant's request for summary judgment dismissing plaintiff's claims for medical malpractice based on negligence for the period from 1992 through May 2004 as time-barred is granted, and for the period of June 15, 2004 through October 1, 2005 is denied.

Lack of informed consent is defined as "the failure of the person providing the professional treatment ... to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation" (Public Health Law §2805-d [2]). "The right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law §2805-d [2]). To establish a cause of action sounding in lack of informed consent, a plaintiff must establish that "a reasonably prudent person in the patient's position would not have undergone the treatment ... if he [or she] had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought" (Public Health Law §2805-d [3]; see, Johnson v. Staten Is. Med. Group, 82 AD3d 708, 709 [2<sup>nd</sup> Dept., 2011]; Thompson v. Orner, 36 AD3d 791 [2<sup>nd</sup> Dept., 2007]; Manning v. Brookhaven Mem. Hosp. Med. Ctr., 11 AD3d 518 [2<sup>nd</sup> Dept., 2004]).

Here, contrary to defendant's assertions, plaintiffs have sufficiently alleged a cause of action under Public Health Law §2805-d (2)(a). Their allegation that defendant failed to inform plaintiff of the risks associated with osteopathic manipulative therapy which proximately caused his spinal injuries could support plaintiff's right to recover for medical malpractice based on a lack of informed consent (see, Public Health Law §2805-d [2] [a]; see generally, Muchler v. Penwarden, 207 AD2d 977 [4<sup>th</sup> Dept., 1994]; Marchione v. State of New York, 194 AD2d 851 [3<sup>rd</sup> Dept., 1993]; Dooley v. Skodnek, 138 AD2d 102 [2<sup>nd</sup> Dept., 1988]). Therefore, defendant's request for summary judgment dismissing plaintiff's cause of action alleging medical malpractice based on lack of informed consent is denied.

So ordered.

Dated:

1/4/2012

  
 HON. WILLIAM B. REBOLINI, J.S.C.

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