

**Jenkins v Khan**

2012 NY Slip Op 30277(U)

January 20, 2012

Supreme Court, Nassau County

Docket Number: 17713/09

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

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NANCY JENKINS, as mother and natural guardian  
of SHALAH JENKINS, and NANCY JENKINS,  
Individually,

Plaintiff,

-against-

**MICHELE M. WOODARD  
J.S.C.  
TRIAL/IAS Part 8  
Index No.: 17713/09  
Motion Seq. Nos.: 01 & 02**

SABEEH KHAN, D.D.S., SABEEH KHAN, D.D.S., P.C.,  
ORCHID NAGHAVI, D.D.S., JOHN LEE, D.D.S., and  
KHAN DENTAL PRACTICE (this name being fictitious  
pending identification of the practice name).

Defendants.

**DECISION AND ORDER**

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**Papers Read on this Motion:**

Defendant Orchid Naghavi, D.D.S.'s Notice of Motion	01
Defendant John Lee's Notice of Cross-Motion	02
Plaintiffs' Affirmation in Opposition	xx
Defendant John Lee's Reply Affirmation	xx

This motion by the defendant Orchid Naghavi, D.D.S., for an order pursuant to CPLR §3212 granting him summary judgment dismissing the complaint against him is **granted**.

This motion by the defendant John Lee, D.D.S., for an order pursuant to CPLR §3212 granting him summary judgment dismissing the complaint against him is **granted**.

The plaintiffs in this action seek to recover for dental malpractice. They allege that in orthodontically treating the infant-plaintiff Shalah Jenkins from 2002 through 2005, the defendants failed to timely diagnose a benign cyst, an ameloblastoma underneath the wisdom tooth in the far right lower corner, tooth #32, which had to be surgically removed along with two adjacent teeth in order to access the cyst. Drs. Naghavi and Lee seek summary judgment dismissing the complaint against them.

They not only maintain that there is no evidence that the cyst existed when they treated the infant-plaintiff, they maintain that their involvement with the infant-plaintiff was extremely limited. More specifically, that their care of the infant-plaintiff was limited to routine maintenance of the braces on his upper jaw; that the services did not involve examinations which could have revealed the growth; and, that neither the infant-plaintiff nor his mother made no complaints warranting further examination.

“On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept 2004), *affd as mod.*, 4 NY3d 627 (2005), *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp.*, *supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept 2006), *citing Secof v Greens Condominium*, 158 AD2d 591 (2d Dept 1990).

“The requisite elements of proof in a dental malpractice action are a deviation or departure from accepted standards of dental practice, and that such departure was a proximate cause of the plaintiff’s injuries (citations omitted).” *Zito v Jastremski*, 84 AD3d 1069, 1070 (2d Dept 2011), *lv den.*, 17 NY3d 885 (2011). “Consequently, on a motion for summary judgment, a defendant has the initial burden of establishing that he or she did not depart from good and accepted practice, or if there was such a

departure, that it was not a proximate cause of the plaintiff's injuries." *Zito v Jastremski, supra*, at p. 1070. "To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars (citations omitted)." *Koi Hou Chan v Sammi Yeung*, 66 AD3d 643, 643 (2d Dept 2009). "To defeat summary judgment, the nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing." *Zito v Jastremski, supra*, at p. 1070-1071, citing *Stukas v Streiter*, 83 AD3d 18, 21-26 (2d Dept 2011).

The transcripts relied on by defendant Lee are admissible. Not only were the majority of them produced by the plaintiff's lawyer, they are valid under CPLR §3116(a). Having been produced by the plaintiffs' attorney, the medical records were produced by the plaintiffs as well.

Dr. Naghavi only treated the infant-plaintiff twice, on November 3<sup>rd</sup> and 10<sup>th</sup>, 2003. Dr. Lee only treated the plaintiff twice too, on September 21, 2004 and November 3, 2004. The cyst was not discovered until February 28, 2005 by Dr. Ruggerio. At his examination-before-trial, Dr. Ruggerio was unable to state how long the cyst had been there. In fact, there is no evidence at all which indicates that it existed when the infant-plaintiff was treated by the defendant Drs. Naghavi and Lee. Absent such evidence, the plaintiffs' claim against them fails.

In any event, assuming, *arguendo*, that there was evidence which indicated that the cyst existed when the moving defendants treated the infant-plaintiff, liability still would not lie.

The infant-plaintiff began treatment with Dr. Khan in December 2002. He conducted a thorough examination including x-rays and a growth study analysis and formulated a treatment plan. Upper braces were placed by Dr. Kahn on March 19, 2003. Dr. Naghavi saw the infant-plaintiff on November 3, 2003 on which date he only placed four separators, i.e., small bands placed between teeth

to assist them to gently move apart, between the first molar and pre-molar in the upper jaw. No complaints were lodged and no other orthodontic treatment was called for that day. Dr. Naghavi saw the infant-plaintiff a week later on November 10, 2003 on which date he placed orthodontic bands providing an anchor for the brackets on the first upper molars, a new wire in the upper braces and changed the rubber bands on the upper braces. Again, no symptoms were present and no complaints were made and so that was the complete orthodontic care called for that day.

Dr. Lee saw the infant-plaintiff on September 21, 2004 and November 3, 2004. On both occasions, he only adjusted the palate expander which was part of the upper bite plate and replaced rubber bands.

At her examination-before-trial, the infant-plaintiff's mother, the plaintiff Nancy Jenkins testified that she first became aware of swelling on her son's face in August 2004 upon his return from California. She contacted his pediatrician Dr. Lashey and made an appointment for him to be seen three months later in November 2004. She admitted that she never expressed any concern about it to any other doctors including the defendants in the interim. When Dr. Lashey saw the infant-plaintiff on November 10, 2004, he diagnosed him with swollen glands and prescribed antibiotics. His chart indicates "was in fight and wire from braces traumatized cheek."

The infant-plaintiff did not see Dr. Ruggiero until February 8, 2005. At his examination-before-trial, Dr. Ruggiero testified that he couldn't say how long the lesion existed before he discovered it nor could he opine when it began to grow, how quickly it grew or how long it had been there. He testified that there is no real cause for it; it was developmental.

Having examined the pertinent legal and medical records, Dr. Winslow, an orthodontist, notes that Dr. Naghavi did not see this patient for the first time until the braces had been on for eight months.

By that point, all preparation work had already been performed with reference to the braces and the braces had already been placed and adjusted. Moreover, he notes that there had been no indication at any point that the plaintiff was suffering from a lower mandibular cyst. Dr. Winslow notes that the care rendered by Dr. Naghavi was very limited and rightly so as there was no indications either medically or verbally by the infant-plaintiff or his mother which warranted any further examination or treatment.

With regard to the November 3<sup>rd</sup> visit, he opines:

“This routine orthodontic visit to place separators would not have involved an extensive intraoral examination of the plaintiff and certainly would not have involved an examination of the plaintiff’s mandibular ramus region, that is the area where the plaintiff ultimately had a benign growth. Additionally, this visit would not have necessitated any type of radiographs.”

With regard to the November 10, visit, he opines:

“This too was routine maintenance of the orthodontic braces and did not necessitate the taking of any radiographs or any intraoral examination that would have in any way addressed the mandibular ramus. The plaintiff did not make any complaints of a dental nature to Dr. Naghavi on this date, nor was there any indication that the plaintiff had an ameloblastoma.”

Thus, Dr. Winslow concludes that Dr. Naghavi saw the infant-plaintiff only twice in the span of a week for “simple orthopedic maintenance and adjustment which in no way would have called for the need to perform radiographs of any nature nor would have necessitated an intraoral examination of the infant-plaintiff that could in any way have led [him] to believe that the infant-plaintiff had a benign growth in the mandibular ramus region.” He also notes that there is no evidence that the growth existed then. In conclusion, he opines that Dr. Naghavi’s care of the infant-plaintiff was within the medically accepted standard of care and that he did not depart from good and accepted dental practice in his care of the infant-plaintiff. He explains that the ameloblastoma is a developmental growth not caused by any specific act or trauma and not the care rendered by Dr. Naghavi.

Dr. Naghavi has established his entitlement to summary judgment dismissing the complaint against him.

Dr. Lee has also established his entitlement to summary judgment dismissing the complaint against him as his care of the infant-plaintiff was also very limited and nothing medically or verbally warranted further examination or treatment.

The burden accordingly shifts to the plaintiff to establish the existence of material issues of fact.

The plaintiffs have not opposed Dr. Naghavi's motion and they have not met their burden with respect to Dr. Lee.

The defendants Dr. Naghavi and Dr. Lee's motions are *granted* and the complaint against them is *dismissed*.

This constitutes the Decision and Order of the Court.

**DATED:** January 20, 2012  
Mineola, N.Y. 11501

**ENTER:**

  
HON. MICHELE M. WOODARD  
J.S.C.

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**ENTERED**  
JAN 27 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE