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SHORT FORM ORDER

INDEX No. 10-10523
CAL. No. 12-01106OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 11-8-12
ADJ. DATE 12-20-12
Mot. Seq. # 001 - MG

DAVID H. BYE and SUZANNE M. BYE, Plaintiffs, - against - JOHN CHARLES KAVANAUGH and KAVANAUGH CHIROPRACTIC, Defendants.	HERZFELD & RUBIN, P.C. Attorney for Plaintiffs 125 Broad Street New York, New York 10004 RALPH A. HUMMEL, ESQ. Attorney for Defendants 137 Woodbury Road Woodbury, New York 11797

Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 18-21; Replying Affidavits and supporting papers 22-24; Other __; it is,

ORDERED that this motion (seq. #001) by the plaintiffs, David H. Bye and Suzanne M. Bye, pursuant to CPLR 3212, for summary judgment in their favor on the issue of liability is granted; and it is further

ORDERED that the plaintiffs are directed to serve a copy of this Order with notice of entry within thirty (30) days of the date of this Order upon the defendants and the Clerk of the Calendar Control Part, Supreme Court, Riverhead, New York, who is directed to calendar this matter for a trial on damages.

In this chiropractic malpractice action, the plaintiff, David H. Bye, seeks damages for personal injuries allegedly caused by the negligent departures from the chiropractic standard of care by the defendants, John Charles Kavanaugh and Kavanaugh Chiropractic. Causes of action have been asserted premised upon the alleged negligent departures from the chiropractic standard of care by the defendants, their alleged violations of New York Education Law § 6551, 10 NYCRR §§ 89.1 and 89.2; and lack of informed consent. A derivative claim has been asserted on behalf of Suzanne M. Bye. It is asserted that David Bye came under the care and treatment of the defendants from April 2, 2008 through and including October 15, 2008, and during that time, the defendants negligently departed from good and accepted chiropractic care, and failed to properly examine, diagnose, assess, test, monitor, and treat his

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condition, causing him to sustain severe and permanent neurological spinal cord injuries, including, but not limited to cervical compression and myelopathy, defects, tears, myelomalacia, herniations, herniated nucleus pulposus and stenosis at the cervical, thoracic and lumbar spine levels.

It is noted that the defendants object to this motion on the basis that the Preliminary Conference Order provided that the plaintiffs file the Note of Issue on or before June 1, 2012. The Court's records indicate that the Note of Issue was received by the Court on June 4, 2012. The defendants aver by counsel that on May 31, 2012, they received service by mail of the Note of Issue dated May 29, 2012. The defendants did not oppose such filing and did not move to vacate the same. Additionally, they have not demonstrated how they have been prejudiced by receiving service of the Note of Issue the day before filing. The Court determines that the Note of Issue was served three days prior to June 1, 2012, although not entered into the Court's computer until June 4, 2012. Thus, the defendants' argument is determined to be without merit.

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 (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***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 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 [2d Dept 1981]).

The requisite elements of proof in a medical malpractice action premised upon the negligent departures of the standard of care of a chiropractor are: (1) a deviation or departure from accepted practice; and (2) evidence that such departure was a proximate cause of injury or damage (*see* ***Kwasny v Feinberg***, 157 AD2d 396, 557 NYS2d 381 [2d Dept 1990]; ***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). 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***, 224 AD2d 674, 638 NYS2d 700 [2d Dept 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, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Bloom v City of New York***, 202 AD2d 465, 609 NYS2d 45 [2d Dept 1994]).

In support of this application, the plaintiffs have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified and amended verified bills of particulars; affidavit of David Bye; an uncertified copy of plaintiff's medical record; a signed and certified copy of the transcript of the examination before trial of John Charles Kavanaugh; the affidavit of Malcolm L. Lecitin, FACC; and the affirmation of Richard Lechtenberg, M.D. with a sworn copy of his neurological examination of the plaintiff on August 12, 2010.

Based upon review and consideration of the plaintiffs' evidentiary submissions, it is determined that the plaintiffs have established *prima facie* entitlement to summary judgment in their favor on the issue of liability.

David Bye averred that on April 2, 2008, he went to the office of Kavanaugh Chiropractic in East Hampton, New York, due to pain and tension in his neck and back, numbness in his hands and feet, and recurrent shaking of his hands and feet. He never previously experienced numbness or shaking. Plaintiff continued that x-rays of his spine were taken at the defendants' office. He was advised by the defendant John Kavanaugh that due to his having tremors/shakes, he needed a series of chiropractic adjustments and activator treatments on his spine to heal these symptoms, and that "low force" adjustments would be employed, involving no risk of injury. Plaintiff stated that he was not advised to have any further testing or to seek treatment from any other medical or health care providers concerning his condition.

Plaintiff continued that from April 2 through October 15, 2008, he received fifty chiropractic adjustments from the defendant, which at first provided relief; however, there was a reappearance and increased severity of his symptoms, including loss of sensation in his hands and feet, loss of balance, problems walking, standing and sitting, recurrent coldness in his hands and feet, shakes/tremors in his hands, and pain radiating through his hands and feet. He stated that the defendant advised him that he needed further treatments to address these problems. When he did finally see a neurologist, he stated that his condition was debilitating. In February 2009, he underwent cervical spine surgery, physical therapy, and ultrasound treatments. In February 2010, he underwent placement of a baclofen pump. In 2011, he was diagnosed with a neurologic bladder.

Dr. Kavanaugh testified that he graduated from Life University, Marietta, Georgia, with a doctorate of chiropractic, and has been licensed as a chiropractor in New York State since 1992 or 1993. He stated that he has "just the usual board certifications." Kavanaugh testified that due to a fire and flood in the building, he had to throw out many records. He could not remember what happened to the plaintiff's x-rays, but was not sure if he performed x-rays. As a chiropractor, he stated, he is trained to give adjustments to patient's entire spine: cervical, thoracic, and lumbar, but his main area (more than 75%) is C1 and C2, as that area causes the most problems with the body. The area he works on does not depend upon his patient's particular complaint. He described how he evaluates a patient. Dr. Kavanaugh described low force technique used on the plaintiff, as a very powerful technique. He stated the work he does is gentle, so he does not recommend people for an MRI right away.

Kavanaugh testified that he first saw the plaintiff in April 2008, for complaints of tension, pain, stiffness, low back pain, shakes, spasms, tenderness, edema, cervical problems, 50% of range of motion, right leg short. He thought the plaintiff smelled of alcohol, so he did not know if he was drunk and had neurological problems, or Parkinsons. He did not recall ever advising the plaintiff to have an MRI. He started treatment by using the Activator by tapping the vertebrae at C-2, then did low force therapy to the plaintiff's neck at the C-2 level. Each treatment took about two to five minutes. Upon later presentation, when the plaintiff complained of low back pain, Kavanaugh advised him that the treatment to his neck would cause the back to heal by itself. He testified that the plaintiff continued to improve, although he did not enter assessments into the chart on occasions. On July 7, 2008, the plaintiff's shakes returned. Although he did not make an entry into the record, he stated that he guessed he remembered that the plaintiff fell on his boat, so his shakes came back. By July 23, he had "to take it easy on him," because he was hurting a lot. Kavanaugh reported that the plaintiff never fell down due to shakes and weakness or loss of sensation in his lower extremities. He thought the plaintiff was falling because he was a fun guy who partied and drank margaritas. Thereafter, he started giving the plaintiff treatment at L4, and he worked on his neck as well. During the September 24 visit, he was advised that the plaintiff fell at work. By October the plaintiff was feeling better, but Kavanaugh stated he treated both the lumbar and cervical spine anyway.

Plaintiff's expert, Malcolm L. Levitin averred that he is licensed to practice chiropractic in New York. He set forth his education and training, and current work as a chiropractor with thirty-four years experience. He set forth the records and material which he reviewed as well as Dr. Kavanaugh's records, recommendations, and assessments of the plaintiff. Plaintiff's expert set forth Dr. Kavanaugh's findings concerning his assessment of the plaintiff including whether the plaintiff was shaking due to alcohol, although his records do not indicate that he smelled alcohol on Mr. Bye. He stated that although Dr. Kavanaugh was concerned that the shaking and spasticity was due to Parkinsons or neurological problems, or was alcohol related, he could not recall whether he took any steps to make a determination. He continued that Kavanaugh administered fifty chiropractic treatments and adjustment on Mr. Bye's spine between April 2, 2008 and October 15, 2008, with resulting improvement, then return of the spasticity and progression of his symptoms, including loss of sensation in his extremities, loss of balance, problems ambulating, coldness in his hands and feet, continued spasticity and tremors in his hands, and pain radiating down his extremities.

Dr. Levitan opined with a reasonable degree of chiropractic certainty, and set forth the basis for his opinion, that Dr. Kavanaugh was negligent, careless, and reckless, and failed to practice within the accepted standards of care when Dr. Kavanaugh noted that the plaintiff exhibited shakes in his extremities and had neck and back pain and failed to refer the plaintiff for a neurological assessment, MRI, CT scan and/or other appropriate medical and diagnostic examinations. He set forth the basis for that opinion. The fact that Dr. Kavanaugh testified that the "work I do is so gentle, I don't have to send my patients for an MRI right away" is a departure from the standard of care and reveals a dangerous lack of appreciation of the substantial risk of serious injury that can result from a failure to refer patients for neurological evaluations and demonstrates his improper and insufficient evaluation and investigation of the plaintiff's neurological symptoms when he presented for treatment. He continued that Dr.

Kavanaugh's speculation that the plaintiff's spasticity may have been related to alcohol consumption does not obviate the need for proper medical evaluation and diagnostic testing to determine the cause.

Dr. Levitin continued that Dr. Kavanaugh's recommendation for, and performance of more than fifty chiropractic manipulations without further diagnostic testing and evaluation constituted a failure to provide a complete and proper evaluation and assessment of the complaints of spasticity observed by him, and represents a departure from the accepted standard of care. Dr. Levitin further opined that Dr. Kavanaugh's failure to disclose to the plaintiff that his condition and complaints warranted neurological, medical, and further diagnostic testing, and failure to advise the plaintiff of the risks and benefits, and consequences of more than fifty chiropractic manipulations deprived the plaintiff from making an informed decision about his care and treatment, and thus failed to comport with the chiropractic standard of care.

Dr. Levitin opined further that Dr. Kavanaugh's failure to assess the plaintiff's condition, to maintain proper records for each date of treatment, and to maintain and account for the plaintiff's x-rays were a breach of his duties under Education Law § 6551, and 10 NYCRR §§ 89.1 and 89.2. Dr. Kavanaugh's improper assessment and treatment of the plaintiff constituted a continuous failure to understand and/or appreciate the etiology, pathogenisis, prevention, diagnosis and treatment of severe and permanent neurological and spinal cord injuries and conditions, including, but not limited to, cervical compression and myelopathy, and defects, tears, myelomalacia, herniations, herniated nucleus propulus and stenosis at the cervical, thoracic and lumbar spine. Dr. Kavanaugh failed to understand the risk factors for the development and progression of such severe and permanent neurological and spinal cord injuries and medical conditions.

Accordingly, opined Dr. Levitin, Dr. Kavanaugh's examination, assessment, evaluation, testing, diagnosis, care, advice, monitoring, and treatment of David Bye were negligent, and reckless, and constituted malpractice and the deviation and departure from good and accepted standards of chiropractic care and treatment. Dr. Levitin concluded that the aforementioned departures negatively impacted upon Mr. Bye's prognosis and proximately caused and/or exacerbated his neurological and orthopedic spinal cord problems and the sequellae associated therewith, as documented in the medical and diagnostic records and reports. These departures and deviations resulted in permanent disability and extensive and debilitating injuries, treatment, damages, and surgery with risks of further problems.

Dr. Richard Lechtenberg affirmed that he is a physician licensed to practice medicine in New York State and is board certified in psychiatry and neurology. He incorporated a copy of his curriculum vitae. He set forth the materials and records which he reviewed, and submitted a copy of his report based upon his neurological examination of the plaintiff on August 17, 2012. He described his examination of the plaintiff and set forth his clinical findings, as well as the plaintiff's care and treatment by defendant Kavanaugh. He set forth his opinions within a reasonable degree of medical certainty that defendant Kavanaugh departed from the standard of chiropractic care and treatment in his assessment of the plaintiff, the administration of manipulations to the plaintiff, which departures were substantial and competent producing causes of the damage to the plaintiff's spine and neurological deficits. Numbness and spasticity are unmistakable symptoms of neurological issues. Engaging the spinal cord in

manipulations despite such symptoms is also a departure from accepted practice. He continued that defendant Kavanaugh was negligent in failing to refer the plaintiff for a neurological examination, and that the failure to do so prior to commencing the manipulations for months, despite his symptoms, was a departure from the standard of care and accepted practice.

Dr. Lectenberg continued that the failure to send the plaintiff to a neurologist for evaluation, or for appropriate MRI studies in a timely manner caused the plaintiff to suffer permanent neurological deficits. He stated that Dr. Kavanaugh failed to appreciate and understand the etiology, pathogenesis, prevention, diagnosis and treatment of severe and permanent neurological and spinal cord injuries and conditions, including, but not limited to, cervical compression and myelopathy, defects, tears, myelomalacia, herniations, herniated nucleus pulposus and stenosis at the cervical, thoracic and lumbar spine, thus departing from the standard of care. Dr. Lechtenberg continued that the records of the medical care and treatment received after Dr. Kavanaugh's chiropractic manipulations indicate that the manipulations precipitated and promoted the cervical spinal cord damage that was evident when he was finally referred for neurological evaluation on December 17, 2008, at South Shore Neurological. MRI studies revealed, among other things, ischemic changes within the spinal cord at C5-6, spinal stenosis at C3, 4, 5, and 6, with degenerative discs at L4-5. The St. Charles Hospital record of February 8, 2009, indicated progressive gait difficulty over the prior year with dysesthesias in the arms and left-sided weakness. He underwent anterior cervical discectomy on February 2, 2009, without complications. Due to cervical spondylosis with associated myelopathy, he also underwent a cervical spinal fusion at C2-3-4.

In opposing this application, Dr. Kavanaugh has submitted an affidavit wherein he stated that the plaintiff presented to his office on April 2, 2008, visibly shaking and "smelling of alcohol." At some time during treatment, the plaintiff asked him if he could drink beer while taking antibiotics. Dr. Kavanaugh continued that the plaintiff's condition improved during his care and treatment and that he had fewer symptoms of illness and felt great halfway through treatment. He stated plaintiff's care ended in October, 2008, as he could no longer afford treatment. It was not until treatment was stopped, that the plaintiff's condition deteriorated from both worsening physical degeneration and troublesome medical care. This decline, he stated, was not caused by his treatment, but rather, by the plaintiff's subsequent choices in medical care. Dr. Kavanaugh stated that he did not commit malpractice, his treatment was in accordance with the professional standards, and his treatment was competent. He continued that the plaintiffs are attempting to blame him for their own, later choices in medical care, and that he (Kavanaugh) is not responsible for the plaintiff's medical decisions after leaving his treatment.

It is determined, based upon consideration of the evidentiary submissions, plaintiff's expert affidavit, and Dr. Kavanaugh's affidavit, that defendant Kavanaugh has not raised a factual issue to preclude summary judgment. Dr. Kavanaugh did not opine within a reasonable degree of chiropractic certainty that he did not depart from the standards of care in treating the plaintiff, and he did not set forth the standards of chiropractic care, and how he comported with the same. A chiropractor is competent to testify in a personal injury action as an expert medical witness concerning matters within the scope and profession of chiropractic (***Clair v Climate Weathering***, 34 Misc3d 133A, 946 NYS2d 66 [Sup. Ct., N. Y., App. Term [2d Dept 2011]). Kavanaugh testified that he had no training in diagnosing myelopathy or spinal cord compression. He could not remember the signs or symptoms associated with myelopathy. If

a patient presented with numbness, he stated that it could be a sign of myelopathy, or a lot of different things. Kavanaugh further testified that he did not know what the plaintiff's problems were or what surgery had been done. Thus, Kavanaugh could not testify that he did not proximately cause the plaintiff's alleged injuries. The term chiropractic has been deemed "separate and distinct from the practice of medicine (***Taormina v Goodman***, 63 AD2d 1028, 406 NYS2d 350 [2d Dept 1978]). Here, no affirmation has been submitted from a neurologist or surgeon to raise a factual issue on Kavanaugh's behalf concerning the nature of the injuries suffered by the plaintiff, and the lack of proximate cause of those injuries suffered by the defendant, or how such injuries were proximately caused by the plaintiff's medical choices. Thus, the defendant has failed to raise a factual issue to preclude summary judgment from being granted in the plaintiffs' favor.

Accordingly, this motion by the plaintiffs for summary judgment in their favor on the issue of liability is granted.

Dated: January 30, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION