

<b>Morrissey v O'Malley</b>
2013 NY Slip Op 30483(U)
March 7, 2013
Supreme Court, New York County
Docket Number: 100476-10
Judge: Joan B. Lobis
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: LoBis  
Justice

PART 6

M. Morrissey  
M. O'Malley

INDEX NO. 100476-10  
MOTION DATE 1-8-13  
MOTION SEQ. NO. 005 \*

*\* Formerly 004*

The following papers, numbered 1 to 14, were read on this motion to for Summary judgment  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits  
Answering Affidavits — Exhibits  
Replying Affidavits

No(s). 1-12  
No(s). 13  
No(s). 14

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION + ORDER

**FILED**

MAR 11 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/7/13

JBL, J.S.C.  
**JOAN B. LOBIS**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

\* 2]  
**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
MARYLIN MORRISSEY and ROLAND KONICKE,

Plaintiffs,

Index No. 100476/10

-against-

**Decision and Order**

MARTIN J. O'MALLEY, M.D., "JOHN DOE"  
JOHNSON, M.D., THE HOSPITAL FOR SPECIAL  
SURGERY, and FOOT AND ANKLE  
ORTHOPAEDIC SURGERY, P.C.,

**FILED**

Defendants.

MAR 11 2013

-----X  
JOAN B. LOBIS, J.S.C.:

**NEW YORK  
COUNTY CLERK'S OFFICE**

Defendants Martin J. O'Malley, M.D., and Foot and Ankle Orthopaedic Surgery, P.C., move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. Plaintiffs Marylin Morrissey and her husband, Roland Konicke, have sued the Defendants, alleging medical negligence and lack of informed consent. For the following reasons, Defendants' motion is denied.

Marylin Morrissey began experiencing foot pain in the spring of 2007. She is a registered nurse and a long-distance runner. On July 17, 2007, she consulted with Dr. Martin J. O'Malley, who is a New York-licensed, orthopedic surgeon. Based on his physical examination and x-ray of the left foot, he recommended that Ms. Morrissey undergo a modified McBride bunionectomy with proximal metatarsal osteotomy. Ms. Morrissey signed a consent form, and the procedure was performed on July 23, 2007, at the Hospital for Special Surgery. At follow up visits, in August and September of 2007 and January 2008, x-rays were taken of the foot.

In February 2008, Ms. Morrissey complained of pain under the ball of her left foot. She began treatment with Dr. Matthew Kassnove. In meeting with Dr. Kassnove, Ms. Morrissey related that she had been running 30 miles per week before her July 2007 foot surgery, but now she only ran 15 miles per week, with pain. Dr. Kassnove recommended orthotics and continued treating Ms. Morrissey through 2009.

Plaintiffs filed this action in January 2010. They allege in pertinent part that Defendants engaged in medical malpractice in treating Ms. Morrissey's left foot and that there was lack of informed consent. The action against the Hospital for Special Surgery has been discontinued.

In moving for summary judgment, Defendants contend that there are no material issues of fact. They claim that Defendants did not deviate from accepted standards of medical care. Nor did their conduct cause Ms. Morrissey's injuries. In support of the motion, Defendants submit the expert opinion of Dr. Philip A. Robbins, a New York-licensed physician, who is a Diplomate of the American Board of Orthopedic Surgery. In preparing his opinion, Dr. Robbins reviewed among other things the post operative x-rays. He opines that Dr. O'Malley achieved an excellent surgical result and that Ms. Morrissey's injuries are not related to the surgery but rather to her running. Even if there were lack of informed consent, he opines that the surgery is not the proximate cause of Ms. Morrissey's alleged injuries.

In opposing Defendants' motion, Plaintiffs submit the expert opinion of Lawrence P. Horl, D.P.M. Dr. Horl is a New York-licensed podiatrist and a Diplomate of the American Board of Podiatric Surgery. In preparing his opinion, Dr. Horl examined Ms. Morrissey and reviewed the

x-rays and other medical records and deposition transcripts in this case. He opines that the Defendants' care and treatment of Ms. Morrissey deviated from proper standards of care and proximately caused her injuries. Specifically, he opines that Ms. Morrissey's foot pain is caused by the screws that were installed during her July 2007 surgery. The bunionectomy involved a long cut in the bone in which three screws were inserted to fixate the bone. Dr. Horl contends that the screws were negligently inserted. He argues that the first and second screws were too long and extend too far beyond the plantar cortex of the metatarsal. The first screw, in his view, particularly extends well beyond the bond and into Ms. Morrissey's tissue by several millimeters, beyond acceptable standards. The deviation is visible on the post-operative x-rays. He criticizes the extension of the screw heads into the extensor tendon. In addition to using screws that were too long, Dr. Horl opines that Dr. O'Malley failed to countersink the three screws that he did use: the heads sit too high off the top of the metatarsal, irritating Ms. Morrissey's extensor tendon. Dr. Horl was able to feel the tips and heads of the screws in examining Ms. Morrissey. He recommends that she have the screws removed.

It is "a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that [the movant] is entitled to judgment as a matter of law." Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep't 2012). In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). If the movant meets this burden, then the opposing party must proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostrov, 91 A.D.3d at 152.

