Capobianco v Marchese

2013 NY Slip Op 30786(U)

April 12, 2013

Supreme Court, Suffolk County

Docket Number: 09-3707

Judge: W. Gerard Asher

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.

[* 1]

SHORT FORM ORDER

INDEX No. 09-3707
CAL. No. 12-01353MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-7-12 (#007)
MOTION DATE 11-27-12 (#008)
ADJ. DATE 1-29-13
Mot. Seq. # 007 - MD
008 - MD

---X

LAURA CAPOBIANCO,

Plaintiff,

- against -

NICHOLAS MARCHESE, D.P.M., DR. JOSEPH GERVASIO, ROBERT J. GOTTLIEB, D.P.M., P.C., ROBERT J. GOTTLIEB, D.P.M., DAVID E. NEGRON, D.P.M., MARIA N. PECORA, D.P.M. MARK E. PUGACH, M.D., ROGER LAO, M.D. and NEXT GENERATION RADIOLOGY,

Defendants.

---X

CASTRO & TRODDEN, LLC
Attorney for Plaintiff
29 Bellemeade Avenue. Suite 201
Smithtown, New York 11787

MARTIN CLEARWATER & BELL LLP
Attorney for Defendants Marchese & Gervasio
220 East 42nd Street
New York, New York 10017

KAUFMAN, BORGEEST & RYAN, LLP
Attorney for Defendants Gottlieb, Pecora & Negron
1205 Franklin Avenue, 2nd Floor
Garden City, New York 11530

Upon the following papers numbered 1 to 55 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (007) 21-36; Notice of Cross Motion and supporting papers (008) 1-20; Answering Affidavits and supporting papers 37-51; Replying Affidavits and supporting papers 52-53; 54-55; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (007) by defendant, Nicholas Marchese, D.P.M., for an order pursuant to CPLR 3212 and CPLR 214-a granting summary judgment and dismissal of plaintiff's complaint is denied; and it is further

ORDERED that this motion (008) by defendants, Robert J. Gottlieb, D.P.M., P.C., Robert M. Gottlieb D.P.M., Maria N. Pecora, D.P.M., and David E. Negron, D.P.M., for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is denied.

This medical malpractice action is premised upon the alleged negligence of defendants during their podiatric care and treatment of the plaintiff, Laura Capobianco. The complaint asserts causes of action alleging negligent departures from the accepted standard of care, lack of informed consent, and negligent hiring. It is alleged that defendant Nicholas Marchese, D.P.M. treated the plaintiff from on or about June 15, 2006 through

August 17, 2006, and that he failed to diagnose and treat a fracture in her foot which she sustained when she stepped on a weight at the gym while kickboxing on May 29, 2006, and that he further failed to advise her of the attendant risks to the recommended modality of treatment. The plaintiff's last date of treatment with defendant Marchese was October 27, 2006. She then followed up with Maria Pecora, D.P.M. on November 15, 2006. Dr. Pecora allegedly did not consider a fracture in her differential diagnosis, but noted the MRI report of August 2006 revealed that no fracture was demonstrated. The plaintiff then saw David E. Negron, D.P.M. on March 6, 2007 after she fell down stairs as a result of a sharp pain in her left foot, and injured her right foot. Dr. Negron x-rayed her left foot and found no fracture. The plaintiff alleges that defendants Pecora, Negron, and Gottlieb negligently failed to diagnose and treat her fracture and failed to provide informed consent with regard to her care and treatment. The plaintiff underwent surgery on her left foot in November 2007, and alleges that due to the departures by the defendants, that this surgery would have been unnecessary had she been properly diagnosed and treated. The action was discontinued against defendant Joseph Gervasio, D.P.M. s/h/a Dr. Joseph Gervasio.

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 are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503[2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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,*** 221 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, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

Medical records are required to be submitted in admissible form which requires that they be certified pursuant to CPLR 3212 and 4518 (***Friends of Animals v Associated Fur Mfrs.,*** *supra*). Expert testimony is limited to facts in evidence (*see also* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). It is noted that neither moving party has submitted medical records in admissible form in that none of the records have been certified.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "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" (***Bengston v Wang,*** 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]).

In support of motion (007), the defendant Nicholas Marchese, D.P.M. has submitted, inter alia, an attorney's affidavit, copies of the summons and complaint, defendants' respective answers and the plaintiff's amended verified bill of particulars; plaintiff's uncertified medical records; the affirmation of the defendant's expert Dr. Russell Caprioli, D.P.M.; and the transcripts of the examinations before trial of Laura Capobianco dated October 21, 2010; Maria N. Pecora, D.P.M. dated April 22, 2011, and David Negron, D.P.M. dated November 16, 2011.

A podiatric malpractice claim generally accrues on the date of the alleged wrongful act or omission, and is governed by a 2 ½ year statute of limitations (NY CPLR 214-a; ***Bedeau v Santi***, 221 AD2d 396, 633 NYS2d 533 [2d Dept 1995]). However, under the continuous treatment doctrine, the 2 ½ year period does not begin to run until the end of the course of treatment which includes the wrongful acts or omissions, and runs continuously and is related to the same original condition or complaint. Essential to the application of the continuous treatment doctrine is that there is a course of treatment established with respect to the condition that gives rise to the lawsuit (***Leifer v Parikh***, 292 AD2d 426, 739 NYS2d 415 [2d Dept 2002]). This action was commenced on January 30, 2009. The plaintiff's last date of treatment with defendant Marchese for treatment of her left foot was October 27, 2006. The action was commenced approximately two years and three months from the last date of continuous treatment for the same condition complained of upon her initial presentation. Thus, the two and one-half year statute of limitation under the continuous treatment doctrine allows plaintiff's claims encompassing treatment provided by the defendants more than two and a half years prior to commencement of the action to be extended and encompassed in the instant action.

Accordingly, that part of defendant Marchese's application pursuant to CPLR 214-a, for dismissal of the complaint on the basis that it seeks damages for the alleged malpractice taking place more than two and one-half years prior to the commencement of this action is denied.

Defendant Marchese's expert, Russell Caprioli, D.P.M. averred that he is duly licensed to practice podiatric medicine in New York and has been board certified in podiatric surgery since 1989 with recertification in 1999 and 2008. He set forth his education and training and the materials and records which he reviewed, and opined within a reasonable degree of medical certainty that Dr. Marchese met the standard of care at all times in the podiatry treatment he rendered to the plaintiff from June 15, 2006 through October 27, 2006. Dr. Caprioli continued that defendant Marchese obtained the prior medical and surgical history, medication history, and chief complaint; that he met the standard of care on June 15, 2006 by properly performing visual, physical, and neurological examinations of the plaintiff's left foot; that the plaintiff's condition was consistent with a sprain/strain; and that he properly and timely obtained four view x-rays of the plaintiff's left foot and ankle, which revealed no radiological evidence of a fracture, including a left avulsion fracture.

Dr. Caprioli continued that when the plaintiff presented to defendant Marchese on June 15, 2006, she advised him that she stepped on a weight in the gym and had an x-ray taken which showed it was "not broken."

Swelling, and black and blue discoloration was noted at the middle of the plaintiff's ankle/foot. During additional visits, defendant Marchese noted and documented that the pain, swelling, and black and blue (ecchymosis) had improved over the two weeks since the initial injury, but that she reported numbness at the toes and weakness of the left foot, with tenderness on palpations at the third and fourth metatarsophalangeal joint and positive tenderness at the lateral inferior malleolus. Range of motion was documented within normal limits. His diagnosis was sprain/strain of the left foot/ankle and tendonitis of the left foot. An Unna boot was prescribed.

Dr. Caprioli described defendant Marchese's care and treatment of the plaintiff on June 20, 2006, and stated that examination revealed that the left foot was still painful, but a little better, and that there was decreased ecchymosis, increased range of motion, but there was positive edema. Thus, he discontinued the Unna boot and continued treatment with a trauma shoe and physical therapy. Dr. Carpioli stated that defendant Marchese not only properly diagnosed left ankle sprain/strain, and exceeded the standard of care by continuing treatment with the trauma shoe and starting physical therapy to treat the soft tissue contusion as the radiological evidence did not reveal a fracture. After five weeks of physical therapy, the plaintiff presented again to Dr. Marchese and complained of slight pain, but improvement. There was positive tenderness, no ecchymosis, no edema, and full range of motion. The trauma shoe was discontinued. Again plaintiff's expert opined that defendant Marchese complied with the standard of care, that there was vast improvement, and there was no clinical basis to obtain further x-rays or MRI/CT scan. Thereafter, on August 10, 2006, when the plaintiff returned with pain in the left lateral tendon level of the ankle, defendant Marchese appropriately referred the plaintiff for an MRI to rule out a peroneal tear or neuroma. The MRI revealed edema signal in the left talar neck and the aspect of the calcaneus, with no fractures, with findings compatible with bone marrow contusion. Dr. Caprioli opined that this edema was consistent with a sprain/strain injury, with no fracture. He continued that because of the bone marrow contusion, there would not be an avulsion fracture at the same location. If there was a fracture, the MRI would have shown inflammation in the bone, and any space where a fracture would have occurred would show up on the MRI.

Dr. Caprioli stated that when the plaintiff returned on August 17, 2006, with continued complaints of pain, that Dr. Marchese appropriately informed her of the radiology findings, casted her for orthotics, and instructed her to continue with physical therapy and application of an Ace bandage as needed. On October 27, 2006, the plaintiff returned to Dr. Marchese with complaints of continued pain, but that it felt better with orthotics. The plan was to continue stretching and using orthotics, which Dr. Caprioli opined that Dr. Marchese comported with the standard of care in that there was no clinical radiological evidence of a fracture. He added that the care and treatment provided by Dr. Marchese was not a proximate cause of any of the plaintiff's claimed injuries.

Based upon the foregoing, it is determined that Dr. Marchese has not established prima facie entitlement to summary judgment dismissing the complaint as asserted against him on the basis that he comported with the appropriate standard of podiatric care and treatment and did not proximately cause any of the injuries claimed by the plaintiff in that there has been no expert testimony establishing that had the plaintiff's avulsion fracture been diagnosed and treated earlier, she would not have required the surgery to remove the bone fragment, as alleged by the plaintiff.

Accordingly, motion (007) by defendant, Nicholas Marchese, D.P.M. for an order granting summary judgment dismissing plaintiff's complaint is denied.

[* 5]

Motion (008) is supported with, inter alia, an attorney's affirmation; the expert affidavit of Craig Campbell, D.P.M.; copies of the summons and complaint, defendants' answers, and plaintiff's verified and amended verified bills of particulars; plaintiff's various uncertified medical records; copies of the examinations before trial of Laura Capobianco dated October 21, 2010; Maria N. Pecora, D.P.M. dated April 22, 2011, David Negron, D.P.M. dated November 16, 2011, and Robert J. Gottlieb, D.P.M. It is noted that the unsigned but certified copy of the plaintiff's deposition transcript has not been objected to and is considered.

The expert affidavit of Craig Campbell, D.P.M. has been submitted on behalf of defendants Robert J. Gottlieb, D.P.M., David E. Negron, D.P.M., and Maria N. Pecora, D.P.M. Dr. Campbell averred that he is licensed New York State for the practice of podiatric medicine, and is board certified in podiatric surgery and podiatric orthopedics. He set forth his education and training and the materials and records which he reviewed. It is Dr. Campbell's opinion within a reasonable degree of medical certainty that at all times, the defendants rendered care and treatment to the plaintiff in accordance with good and accepted podiatric practice and did not proximately cause or contribute to any damage to the plaintiff.

Dr. Campbell set forth the care and treatment rendered to the plaintiff by co-defendant Dr. Marchese, including the x-ray taken of the plaintiff's left foot and ankle which revealed no fracture or dislocation. Thereafter, an MRI of the plaintiff's left foot on August 11, 2006, ordered by Dr. Marchese on August 10, 2006, revealed moderate degenerative changes at first MTP joint and findings compatible with early adventitial bursitis in the soft tissues plantar to the first and fifth MTP joints, and edema signal in the talar neck and that aspect of the calcaneous, without any fractures being identified. The findings were compatible with a bone marrow contusion. The plaintiff's last visit with Dr. Marchese was on October 27, 2006.

Dr. Campbell continued that the plaintiff was thereafter seen in the office of Dr. Robert Gottlieb on November 16, 2006 for a second opinion by Dr. Maria Pecora who reviewed the copy of the MRI provided by the plaintiff. Dr. Pecora's examination and x-rays of the plaintiff revealed mild degenerative changes at the MPJ with mild bursitis. She recommended a neurology consult to rule out neurproxia and neuritis, and noted that she would consider cortisone injections pending the results of the neurology consultation, and ruled out a fracture based upon her review of the x-rays and MRI report, and subjective complaints by the plaintiff. Dr. Campbell stated that Dr. Pecora testified that she did not order a CT scan as it was not indicted based upon those findings and because the plaintiff had an MRI which was negative for fracture. Neurology consult and EMG neurology studies were normal. On February 21, 2007, the plaintiff returned to Dr. Pecora with complaints of numbness and pain in her left foot. Dr. Pecora's assessment was that of neuroma versus neuritis versus reflex sympathetic dystrophy (RSD) post-trauma. An MRI was repeated on February 27, 2007, revealing a small effusion at the first MTP joint, with resolution of the previously described edema in the calcaneous and talar neck.

Dr. Campbell continued that on March 6, 2007, the plaintiff presented emergently to Dr. Gottlieb's office where she was seen by Dr. David Negron who examined her and found that she had pain in her right foot over the base of the 4th and 5th metatarsals after having felt a sharp pain in her left foot and ankle causing her to invert her right foot. The plaintiff's left foot presented with generalized tenderness at the peroneal brevis insertion to the styloid process and pain at the floor of the sinus tarsi and anterior lateral ankle joint gutter. No fracture was seen in either foot upon x-ray examination. She was recommended to a physiatrist, a pain management specialist, and her primary care physician, and was advised to consider anti-depressant medication. He injected the lateral sinus talas and anterior lateral ankle joint of her left foot with Dexamethasone and Lidocaine, after explaining the risks and benefits.

On March 23, 2007, the plaintiff presented emergently to Dr. Robert Gottlieb with complaints of pain on the outer part of her left ankle, noted to be in the sinus tarsi region. His primary diagnosis was sinus tarsi syndrome of the left ankle, with a secondary diagnosis of rear foot varus and forefoot valgus deformity. He injected her with cortisone to the left foot, and prescribed orthotics. Dr. Negron then saw the plaintiff on March 29, 2007 wherein she reported some resolution of her symptoms, but she was still experiencing pain in the left foot at the floor of the lateral sinus tarsi region. His diagnosis was possible chronic regional pain syndrome-low grade, and the plan was to maintain bracing and to wean into supportive shoe gear, home exercise and physical therapy, as her presentation was not consistent with a fracture. Dr. Pecora saw the plaintiff on April 18, 2007 for dispensing adjustments to the custom orthotics. She was also given an injection into her left foot.

On May 15, 2007, the plaintiff was again seen by Dr. Negron for continued pain in her left foot. His impression was remaining scar tissue along the lateral articulation of the talis to the calcanuu and fibula, likely related to the injury from one year ago, edema and injections. Prolo therapy injections were given to reorganize the scar tissue, and repeated on July 10, 2007 for continued pain with plantar flexion and eversion of the foot. She also presented with a new symptom of sharp cramping lateral mid-foot pain along the dorsal margin of the anterior calcaneus. On June 5, 2007, Dr. Negron ordered a CT scan to rule out evidence of a chronic fracture injury or other degenerative changes, and referred her to Dr. Richard Braccio, an orthopedist. The CT scan of the left foot was performed on July 14, 2007 and revealed an avulsion fracture from the distal lateral aspect of the calcaneus. In November 2007, the plaintiff underwent open treatment of the fracture with excision of the fracture fragment by Dr. Levine at Hospital for Special Surgery.

Dr. Campbell opined that the defendants, Drs. Gottlieb, Pecora and Negron, at all times complied with the standard of care in that the diagnostic studies and reports ruled out the possibility of a fracture, and that the defendants properly relied upon the results of the x-rays, and MRI study, which were properly interpreted by the radiologist as showing evidence of bone marrow edema but no fracture in the plaintiff's left foot. He set forth the basis for his opinion with regard to each of the co-defendants, indicating that an MRI can diagnose a soft tissue injury as well as a fracture, as well as bone inflammation indicative of a fracture. He continued that CT scans are not as good as MRIs as the CT scans are limited to bone contouring and bone imaging. Dr. Campbell continued that the decision to perform a CT or an MRI is within the sound discretion and clinical judgment of the defendants. The subsequent MRIs showed improvement over the initial MRI study. Additionally, neuritic condition was ruled out by Dr. Pecora. Home exercise, physical therapy, orthotics, injections, and supportive shoe gear was appropriately recommended. It was appropriate for Dr. Negron to order the CT scan when the plaintiff presented with new and different complaints. Dr. Campbell opined that the plaintiff's alleged injuries were not proximately caused by the defendants who properly explained the risks and benefits of the treatments to the plaintiff, and that a reasonably prudent person in plaintiff's position would have gone forward with the injections in an effort to lessen the pain.

Based upon the foregoing, it is determined that the defendant doctors, Negron, Gottlieb and Pecora have not established prima facie entitlement to summary judgment dismissing the complaint as asserted against them on the basis that they comported with the appropriate standard of podiatric care and treatment and did not proximately cause any of the injuries claimed by the plaintiff in that there has been no expert testimony establishing that had the plaintiff's avulsion fracture been diagnosed and treated earlier that she would not have required the surgery to remove the bone fragment, thus leaving this court to speculate on that issue.

The plaintiff has submitted a redacted copy of her expert's affidavit. A redacted version of an expert

affidavit lacks evidentiary value. A party may successfully oppose a summary judgment motion without disclosing the names of the party's expert witnesses (*see* ***Marano v Mercy Hospital,*** 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]). In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an unredacted original is provided to the court for its in camera inspection (***Marano v Mercy Hospital***, *supra*). This procedure preserves the confidentiality of the name of plaintiff's medical expert while also preserving plaintiff's obligation in opposing defendant's motion, in that by submitting a redacted affirmation and by offering the original to the court for in camera inspection, plaintiff has opposed the motion by evidence in admissible form (***Rubenstein v Columbia Presbyterian Medical Center,*** 139 Misc.2d 349, 527 NYS2d 680 [NY County 1988]). An unredacted copy of the affidavit with the expert's name and signature has not been provided to this court under separate cover. Accordingly, plaintiff's expert affidavit is not in admissible form and is insufficient to raise a triable issue of fact as to the defendant's alleged malpractice (***Rose v Horton Medical Center,*** 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]). Even if the court were to consider the affidavit of plaintiff's expert, the expert has failed to address the issue of proximate cause, and whether, had the avulsion fracture of the plaintiff's left foot been diagnosed earlier, she would have needed the surgery to remove the bone fragment, or whether it would have healed properly.

While the plaintiff's expert has set forth that he is licensed to practice podiatric medicine in New York, and is board certified in podiatric medicine and podiatric surgery, he has not set forth his education and training or provided a copy of his curriculum vitae for the court's review. The plaintiff's expert opined within a reasonable degree of medical certainty that the defendant doctors, Marchese, Gottlieb and the professional corporation, Negron and Pecora, departed from the accepted standard of care in failing to timely diagnose and treat the plaintiff's left calcaneal avulsion fracture, thereby depriving her of the opportunity to heal without surgery, and that she suffered unnecessary, significant and prolonged physical and psychological pain. He further opined that the defendants failed to inform the plaintiff of the treatment alternatives along with the risks and benefits of each alternative.

The plaintiff's expert stated that an avulsion fracture involves the detachment of a bone fragment that results from the pulling away of a ligament, tendon, or joint capsule from its point of attachment on a bone, and often manifests radiographically as a tiny osseous fragment located adjacent to the expected attachment site of a ligament or tendon. He continued that often, the only findings at conventional radiography are joint effusion or soft-tissue swelling, findings that may be apparent after only relatively minor trauma and may be disregarded by some. He continued that although the plaintiff's injury occurred on May 29, 2006, and she did not see Dr. Marchese until June 15, 2006. The plaintiff's expert does not address the significance of this delay in seeking treatment and how, if in any way, this two and a half-week delay affected the proper healing of the avulsion fracture.

The plaintiff's expert stated that he reviewed the plaintiff's initial x-rays of June 2006. He did not see an avulsion fracture and opined that defendant Marchese did not misinterpret the films. Although he opined that defendant Marchese departed from the standard of care in timely diagnosing and treating the plaintiff, he does not set forth the time frame involved as being "timely." He continued that defendant Marchese should have taken additional x-rays, casted her foot and ankle, and should not have ordered physical therapy. When the MRI of August 11, 2006 revealed a bone contusion, defendant Marchese should have immobilized her ankle and foot and obtained a CT to determine whether there was a fracture. It is noted that even if the defendants had met their prima facie burden and even if the plaintiffs affidavit were admissible the plaintiff's expert and Dr. Campbell's opinions differ as to the standard of care and the treatment modalities relative to this case, precluding summary judgment due to the conflicting expert medical opinions.

[* 8]

The plaintiff's expert further opined that all the defendants departed from the standard of care by not immobilizing the plaintiff's ankle and foot and obtaining a CT scan to rule out a fracture. However, he does not opine whether immobilization after the plaintiff's failure to treat from May 29, 2006, when the injury occurred, until her first visit with each of the defendants, would have made a difference concerning whether or not the plaintiff would have required surgery to remove the bone fragment, precluding summary judgment on this issue. The plaintiff's expert further set forth all the alleged departures by defendants Pecora, Negron and Gottlieb, including ignoring the MRI finding of bone contusion. Plaintiff's expert and the defendants' experts disagree as to whether the CT scan was indicated at the respective dates of treatment by each defendant. The plaintiff's expert continued that defendant Negron ordered an x-ray on March 6, 2007, but did not properly read the x-ray and failed to diagnose the avulsion fracture. However, he does not set forth a basis for such conclusory opinion that the x-ray was misread and revealed a fracture. Additionally, the plaintiff's expert does not relate such failure to proximate cause and he does not opine as to whether that alleged failure would have avoided surgery had the film been properly read in March 2007. With regard to the issue of informed consent, although the plaintiff's expert opined that the defendants failed to obtain informed consent with regard to treatment options, he does not set forth what treatment choices should have been provided pursuant to the applicable standard of care, and whether those treatment choices were within the discretion of the treating defendants.

Accordingly, motion (008) by defendants, Robert J. Gottlieb, D.P.M., P.C., Robert M. Gottlieb D.P.M., Maria N. Pecora, D.P.M., and David E. Negron, D.P.M., for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is denied.

Dated: April 12, 2013   W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**