

**Shaw v Capital Region Orthopaedics**

2013 NY Slip Op 31842(U)

August 12, 2013

Sup Ct, New York County

Docket Number: 5326-11

Judge: Joseph C. Teresi

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.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

---

LISA SHAW,

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 5326-11**  
**RJI NO. 01-12-107335**

CAPITAL REGION ORTHOPAEDICS;  
and DANIEL T PHELAN, MD;

Defendants.

---

Supreme Court Albany County All Purpose Term, August 2, 2013  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Englert, Coffey & McHugh & Fantauzzi, LLP  
Gregory Schaf, Esq.  
*Attorneys for Plaintiff*  
224 State Street - P.O. Box 1092  
Schenectady, New York 12301-1092

Thorn, Gershon, Tymann and Bonanni, LLP  
Mia VanAuken, Esq.  
*Attorneys for Defendants*  
5 Wembley Court, New Karner Road  
PO Box 15054  
Albany, New York 12212

**TERESI, J.:**

On October 3, 2008 Plaintiff slipped, fell, and injured her right shoulder, elbow and wrist. She was immediately taken to a nearby hospital. While there she was diagnosed with a fractured right wrist, which was set in a cast. She was released with directions to follow up with an orthopaedist, and she complied. On October 6, 2008 Plaintiff was seen at Capital Region Orthopaedics (hereinafter "CRO") by Daniel Phelan, MD (hereinafter "Phelan"), who treated her

until November 19, 2008.

Claiming Phelan's treatment of her fell below the applicable standard of care, Plaintiff commenced this medical malpractice action against him and his employer CRO.<sup>1</sup> Issue was joined by Defendants, discovery is complete, a note of issue is filed, and a jury trial date certain has been set (September 16, 2013). Defendants now move for summary judgment dismissing Plaintiff's complaint. Plaintiff opposes the motion. Although Defendants demonstrated their entitlement to judgment as a matter of law, because Plaintiff raised a triable issue of material fact, Defendants' motion is denied.

“As the proponent of summary judgment in a medical malpractice action, a defendant bears the initial burden of demonstrating that the medical treatment rendered was within acceptable standards of care or that his or her actions did not cause the claimed injuries.” (Helfer v Chapin, 96 AD3d 1270, 1271 [3d Dept 2012]). If Defendants make such showing, the burden shifts “to plaintiff to demonstrate a triable question of fact with regard to defendant's departure from accepted medical practice and whether such departure was the proximate cause of plaintiff's injury.” (Derusha v Sellig, 92 AD3d 1193, 1194 [3d Dept 2012]; Alvarez v Prospect Hosp., 68 NY2d 320 [1996]).

On this record, Defendants met their initial burden.

Defendants first established Plaintiff's specific allegations of malpractice, which they are required to address and rebut, by submitting Plaintiff's bill of particulars, amended bill of particulars and second amended bill of particulars (hereinafter collectively “bill of particulars”).

---

<sup>1</sup>This action was also initially commenced against Richard D. Whipple, MD (hereinafter “Whipple”) and Richard L. Uhl, MD (hereinafter “Uhl”), but has been discontinued against both. Phelan and CRO will hereinafter be referred to collectively as “Defendants.”

(Suits v Wyckoff Hgts. Med. Ctr., 84 AD3d 487, 489 [1st Dept 2011] appeal withdrawn, 17 NY3d 804 [2011]). In relevant part, Plaintiff's bill of particulars alleged Phelan's malpractice consisted of his failure to: properly diagnose; use appropriate diagnostic tests; continue to diagnose, monitor, and recognize the severity of Plaintiff's injury; refer Plaintiff to a specialist; timely and properly treat Plaintiff; perform surgery to expose and reset the fracture; and, properly cast the right wrist fracture. The bill of particulars also particularized Plaintiff's injury as: complex regional pain syndrome; right pinky tingling; cast discomfort; right elbow and forearm pain; ulnar innervated digit numbness; right hand, wrist and finger swelling; right hand tenderness and hypersensitivity; and, decreased finger, wrist, elbow, and shoulder range of motion.

Defendants then sufficiently addressed and rebutted Plaintiff's malpractice claims, demonstrating their entitlement to judgment as a matter of law. Defendants submit Plaintiff's relevant medical records, along with the expert affidavits of four Board Certified orthopaedic surgeons.<sup>2</sup> Each doctor reviewed Plaintiff's medical records, including her radiological records. In addition, Phelan, Uhl and Whipple's allegations are also based upon their personal treatment of Plaintiff. Each doctor's affidavit was "detailed, specific and factual in nature and does not assert in simple conclusory form that [Phelan] acted within the accepted standards of medical care." (Martino v Miller, 97 AD3d 1009 [3d Dept 2012], quoting Toomey v Adirondack Surgical Assoc., 280 AD2d 754 [3d Dept 2001]). Rather, each discussed the specific details of Plaintiff's diagnosis and treatment, discussed the applicable standard of care and alleged that

---

<sup>2</sup> These four doctors include Phelan, prior defendants Whipple and Uhl, along with Ronald L. Mann, MD (hereinafter "Mann").

Phelan met it. Mann further specifically discussed his review of Plaintiff's x-rays, taken at each of her CRO visits, which showed "appropriate positioning and alignment of the bones and [that] surgical intervention was not appropriate." Each doctor also discussed Plaintiff's complex regional pain syndrome (hereinafter "CRPS"), and explained that it is "a medical condition affecting the nervous system" or "a nerve disorder." They explained its cause as rooted in Plaintiff's fracture, not her care and treatment. Mann specified its cause: "a result of the fracture." Each doctor discussed and then alleged that Phelan's diagnosis and treatment of Plaintiff's CRPS was both timely and appropriate. In addition, Phelan discussed the necessity for re-casting Plaintiff's wrist, and alleged that it constituted appropriate medical care. From these affidavits and the Plaintiff's medical records, Defendants demonstrated their entitlement to judgment as a matter of law.<sup>3</sup>

In opposition, however, Plaintiff raised a triable issue of material fact. Plaintiff offered the affidavit of Jeffrey C. Gundel, MD (hereinafter "Gundel"), another Board Certified orthopaedic surgeon. Contrary to Defendants' doctors' affidavits, Gundel specified that Plaintiff suffered a "comminuted distal radius fracture" and explained the difficulties associated with a comminuted fracture. He reviewed Plaintiff's x-rays and contradicted Defendants' doctors' allegations by alleging that Plaintiff's "fracture was not adequately aligned. Thus, surgery was indicated." Although Gundel did not specifically allege that Phelan's failure to properly align the fracture and perform surgery fell below the applicable standard of care, he did allege that Defendants' failure to "properly diagnose and treat [Plaintiff's] fracture and address her

---

<sup>3</sup> Due to such showing Defendants demonstrated their prima facie entitlement to dismissal of Plaintiff's claim against CRO because, absent Plaintiff's claims against Phelan, no vicarious liability against CRO would lie. (Helfer v Chapin, supra).

disproportionate pain level resulted in the permanent deformation of her right hand, and her chronic complex regional pain syndrome [CRPS].” Considered in a light most favorable to Plaintiff, the factual issues of alignment and surgery highlighted in Gundel’s affidavit are “sufficient to demonstrate triable issues of fact regarding the appropriate standard of care and whether any deviation by [Phelan] therefrom was a substantial factor in causing plaintiff’s injuries.” (Derusha v Sellig, supra; Carter v Tana, 68 AD3d 1577 [3d Dept 2009]).

Accordingly, Defendants’ motion for summary judgment is denied.

This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: August 12, 2013  
Albany, New York

  
Joseph C. Teresi, J.S.C.

**PA PERS CONSIDERED:**

1. Notice of Motion, dated July 12, 2013; Affidavit of Mia VanAuken, dated July 12, 2013, with attached Exhibits A-J; Affidavit of Daniel Phelan, dated July 15, 2013, with attached Exhibits A-B; Affidavit of Richard D. Whipple, dated June 27, 2013, Affidavit of Richard L. Uhl, dated July 15, 2013, Affidavit of Ronald L. Mann, dated June 25, 2013.
2. Affirmation of Gregory Schaff, dated July 25, 2013, with attached Exhibit A; Affidavit of Lisa Shaw, dated July 23, 2013; Affidavit of Jeffrey Gundel, dated July 25, 2013, with attached Exhibit A.
3. Affidavit of Mia VanAuken, dated August 1, 2013.