

**Gallo v Reiss**

2020 NY Slip Op 35084(U)

April 30, 2020

Supreme Court, Westchester County

Docket Number: Index No. 60981/2018

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
DANIEL GALLO and CADY LUNSFORD GALLO,

Plaintiffs,

**DECISION & ORDER**

-against-

Index No. 60981/2018

Seq. No. 1

ROBERT REISS, D.C. and ROBERT C. REISS, D.C.  
PLLC s/h/a REISS CHIROPRACTIC,

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by defendants, Robert Reiss, D.C. and Robert C. Reiss, D.C. PLLC s/h/a Reiss Chiropractic (collectively, “defendants”) i. pursuant to CPLR §3212, granting summary judgment in favor of defendants, and dismissing this action in its entirety against defendants; ii. directing the Clerk of the Court to enter judgment forthwith in favor of defendants; and iii. for such other and further relief in favor of defendants as this Court deems just and proper:

Notice of Motion, Affirmation; Exhibits A-M  
Affirmation in Opposition; Exhibits 1-5  
Reply Affirmation

### Procedural History

Plaintiffs commenced this malpractice action on February 5, 2018 to recover damages for injuries allegedly sustained by plaintiff, Daniel Gallo (“plaintiff”). Plaintiffs allege that defendants were negligent and deviated from good and accepted chiropractic practice in their care and treatment of plaintiff. Cady Lunsford Gallo, is the wife of Daniel Gallo and seeks to recover damages for loss of services and consortium.

Issue was joined on behalf of the defendants, through their verified answer on March 9, 2018. Defendants then served an amended verified answer on March 28, 2018. In the verified bills of particulars, it is alleged that defendants, in eight visits during the period from October 25, 2016 through December 12, 2016, departed from accepted chiropractic care and treatment of plaintiff in their failure to conduct proper diagnostic tests before cervical manipulation; adhere to the standards of chiropractic care; appropriately supervise their agents; properly monitor plaintiff; refer plaintiff for a neurological consult and/or diagnostic testing (e.g. MRIs, CT Scans and/or X-rays); warn plaintiff of the risks of the cervical manipulation; obtain plaintiff's informed consent. Plaintiff alleges that as result of defendants' malpractice, he developed cervical myelopathy requiring spinal surgery and suffers from severe spinal stenosis. Plaintiff claims that as a result of the malpractice, he required surgery and suffered with the following: anterior cervical compression fusion (ACDF) at C5-6 and C6-7 on 3/30/17; placement of biomechanical peek interbody implant at C5-6 and C6-7; anterior cervical plating at C5-7 with altus fuci cervical plate and screws; large C5-6 herniated disc; multiple bulging discs at C3-4 and C6-7; status post ACDF with scarring; cervical/lumbar radiculopathy; traumatic myofascial pain syndrome; multilevel disc herniations in the thoracic spine from T7-T8 through T10-11; disc bulges at L4-5 through L6-S1; debilitating back spasms and back pain; numbness and irritation in the right and left upper extremities including upper extremities including third and fourth finger and forearms; tremors; burning and tingling sensation in both calves.

Plaintiff testified at his deposition, inter alia, that prior to seeing defendant, Robert Reiss (“Reiss”), he had seen another chiropractor, Dr. Barker, intermittently, over 5 years ending in 2010 or 2011, for a stiff back and that he did not see an orthopedist or neurologist at that time. He testified that on the first visit to Reiss on October 25, 2019, he complained about pain in the back of his legs, numbness in his right arm, moderate intermittent soreness of his neck and difficulties

sleeping. His back was stiff especially when sitting in a car, he had weakness in his right arm and tingling sensations in his right fingers. Plaintiff indicated under "patient condition" on a "chiropractic registration and history" form that the reason for his visit was "neck pain" that he had had for "approximately six months." Plaintiff testified that at each visit with Reiss, the treatment would be very similar. He would lay down on a bed and Reiss would apply heat to his neck, back and hip, and sometimes use a TENS unit on him. Reiss would do adjustments and plaintiff would practice some exercises and stretches. Plaintiff stated that following each treatment, he felt "relief" and his neck would be loose and limber. Reiss last treated him on December 10, 2016. He stopped going because he got busy and his right leg and lower back were still bothering him so he decided not to return. Approximately three months later, in March of 2017, he came under the care of Dr. Goldstein at NYU Langone Hospital who performed surgery on his cervical spine.

Defendant Reiss was deposed on March 22, 2019 and April 5, 2019. On March 22, 2019, Reiss testified that chiropractic procedures on any patient would be contraindicated if there was an acute onset, a history of trauma, atrophy on one extremity, slurred speech, balance issues or fine motor skill problems. He stated that it is not contraindicated to perform chiropractic treatment for degenerative arthritis by itself without those other factors and without those symptoms there would be no reason to refer a patient for an MRI. Reiss explained that he would not initially send out a patient who complained of on and off radiculopathy for diagnostic testing. Plaintiff's complaint of neck pain with radiation down his arm indicated that there was nerve involvement probably originating from the cervical spine. Reiss testified that plaintiff stated that he had experienced symptoms for six months. Plaintiff described the pain level at five out of ten on a scale of one to ten and as both dull and sharp, with numbness and tingling. Plaintiff reported that the pain was not provoked by activity and he had low-back pain 5 years prior but he was coming to see Reiss for neck pain. Based on the information obtained from plaintiff during the first visit, Reiss planned to treat plaintiff conservatively for two to three weeks and determine if any other intervention or examinations would be necessary. Reiss further testified that he determined that plaintiff had a low risk of complications and there was no contraindication to provide chiropractic care. Last, Reiss testified that prior to any chiropractic treatment, plaintiff read and signed a "chiropractic informed consent to treat" form.

On April 5, 2019, Reiss testified that plaintiff presented his chief complaints as neck pain radiating down his right arm and numbness in his fingertips. Plaintiff reported that he had prior chiropractic treatment for low back pain and was in some motor vehicle accidents but was not treated for any injuries. Reiss testified he determined that plaintiff had issues at multiple cervical levels (C5 - T1); a right upper extremity weakness, as compared to the left side, at C5-6; had normal upper reflexes bilaterally; and did not limp or have a balance problem. Reiss testified as to the chiropractic testing he performed on plaintiff, including a spinal adjustment, stretching and muscle work. While plaintiff indicated he felt better on the second visit, he complained of numbness on his right side. Plaintiff returned to Reiss in November 2016 for spinal adjustments and reported that his pain and stiffness levels were lower and he was feeling better although he had numbness and tingling in his arm. Reiss testified that on November 22, 2016, plaintiff complained of low and mid back pain and discomfort as well as mild neck pain with increased stiffness. Reiss found tenderness at the thoracic and lumbar spine, restriction in motion, muscle spasms and increased pain in plaintiff's neck. Reiss performed spinal adjustments to plaintiff's cervical, thoracic and lumbar spine. During the next visits on November 26, 2016, November 29, 2016 and December 3, 2016, Reiss performed spinal adjustments at the cervical and lumbar levels. On December 10, 2016, plaintiff advised Reiss that he was feeling better and complained of slight pain in his neck and mild pain in his back. Reiss testified that plaintiff's range of motion had improved in his neck and back. Again, Reiss performed spinal adjustments and other chiropractic therapy on plaintiff. Plaintiff returned on December 13, 2016 and December 24, 2016 for spinal adjustments, therapeutic exercises and manual therapeutic procedures but did not return after December 24, 2016. Reiss explained during his deposition that he did not refer plaintiff for an MRI because his clinical presentation didn't warrant it and plaintiff was making progress. Reiss asserted that if plaintiff had not responded to the chiropractic treatment after two to three weeks, he would have referred him for diagnostic testing.

Following the completion of discovery, plaintiffs filed a note of issue on October 9, 2019. Thereafter, defendants filed this motion for summary judgment.

### Contentions of the Parties

In support of this motion, defendants proffer the opinions of two experts. The first expert, Scott N. Surasky, D.C., F.A.C.C., D.I.B.C.N. (“Surasky”) is a chiropractor licensed to practice in the State of New York. Surasky states in his affidavit that Reiss did not depart from the standard of care in his care and treatment of plaintiff, conducted appropriate testing and provided appropriate care and treatment to plaintiff. Surasky indicates that when plaintiff first presented to Reiss, he did not have complaints which would have required referral for diagnostic testing or for a consultation with a specialist, and it was appropriate for Reiss to commence with chiropractic treatment. Surasky opines that Reiss appropriately responded to plaintiff’s complaints. Surasky concludes that the treatment rendered by Reiss was standard chiropractic treatment (including spinal adjustment, stretching and muscle work) for someone presenting with plaintiff’s complaints and that Reiss’ testing of plaintiff met the standard of chiropractic care in the State of New York. Surasky also points out that plaintiff did not see any provider for almost 3 months after his last visit to Reiss and claims that if an adjustment was performed resulting in an acute myelopathy, plaintiff would have needed to go to the Emergency Room within 24 hours of complaints such as an inability to walk properly, and unsteady, wider based gait. In Surasky’s opinion, this extensive time lag between plaintiff’s last visit with Reiss until the date he saw his primary care physician demonstrates that there was no link between Reiss’ treatment and the medical findings and procedures that plaintiff had afterwards. Surasky further opines that even if plaintiff simply held off on being treated after seeing Reiss on the last visit, all of the diagnostic testing later performed, including x-rays and MRIs of plaintiff’s spine, show a pre-existing degenerative condition throughout the spine. Finally, Surasky gives his opinion, to a reasonable degree of chiropractic certainty, that the findings in the diagnostic tests and the anterior cervical decompression and fusion that plaintiff underwent are unrelated to Reiss’ treatment and Reiss’ treatment did not aggravate or exacerbate this pre-existing condition.

Next, defendants submit the expert affirmation of Jack Stern, M.D., Ph.D. (“Stern”), a board-certified neurosurgeon who is licensed to practice medicine and neurosurgery in New York. Stern performed an examination of plaintiff on April 17, 2019 and found that plaintiff exhibited normal higher function control function and normal cranial nerve function II-XII and ambulated with some difficulty. Additionally, he found no evidence of atrophy or fasciculation. It is Stern’s

expert opinion that all of the spinal injuries plaintiff has set forth in his bill of particulars were degenerative in nature and existed before Reiss' treatment of plaintiff. Stern opines that nothing that Reiss did or did not do to plaintiff caused any of his injuries. Stern also opines that the surgery plaintiff underwent to his cervical spine was not necessitated by anything plaintiff claims Reiss did or did not do nor did Reiss aggravate or exacerbate any pre-existing condition to plaintiff's spine. Stern adds that all of the treatment that plaintiff needed after his chiropractic treatment by Reiss was inevitable and irrespective of this treatment.

In their attorneys' affirmation in opposition, plaintiffs argue that these expert opinions are speculative, conclusory and unsupported by the medical records. Plaintiffs argue that if the Court concludes that defendants' experts' opinions should not be disregarded, and finds a prima facie showing has been made, then the Court should find that triable issues of fact exist as to defendants' failure to timely and adequately diagnose and treat plaintiff's cervical nerve root compression and myelopathy prior to performing chiropractic adjustments, including failing to conduct an x-ray, MRI or EMG to identify and determine the nature and severity of plaintiff's condition, failing to recommend that plaintiff consult a neurosurgeon and/or orthopedic spine specialist, and performing chiropractic adjustments in light of plaintiff's condition. Moreover, plaintiffs contend that there are triable issues of fact as to the adequacy of plaintiff's consent for treatment.

Plaintiff submits the opinion of their expert, Aly Guy, M.D. ("Guy") Guy's opinion is contrary to defendants' experts' opinions. Guy states that Reiss deviated from the standard of care in chiropractic treatment. He asserts that Reiss failed to conduct a proper and sufficient evaluation and investigation of plaintiff's neurological symptoms. He states that Reiss failed to determine the source of plaintiff's neurological issues and failed to properly and timely refer plaintiff for an MRI, EMG, and neurological consultation. Guy asserts that plaintiff's neurological symptoms warranted that Reiss send him for an MRI to rule out disc herniation and nerve damage, and to determine the source of his neurological issues. More specifically, Guy opines that an MRI would have revealed plaintiff's cervical myelopathy and spinal cord compression, a large disc herniation and disc osteophyte complex at level C-5 to C-6, cervical spinal stenosis, and myelomalacia on his spinal cord. Guy states that an x-ray would have ruled out contraindications for spinal manipulation and an EMG would have revealed nerve injury conditions, such as plaintiff's cervical radiculopathy. Guy concludes that Reiss's failure to obtain an x-ray and an MRI of plaintiff's cervical spine, or

refer him to a specialist, at the time of his initial presentation on October 25, 2016 or after amounted to a deviation from the standard of care. Guy opines that by failing to properly diagnose and treat plaintiff's conditions of myelopathy and cervical nerve root compression, and cervical disc herniation, both at the time of plaintiff's presentation on October 25, 2016 and after, defendants deviated from the standard of care. In Guy's opinion, Reiss deviated from the standard of care in performing chiropractic adjustments on plaintiff absent a proper assessment of his neurological complaints. Guy adds that the engagement of plaintiff's spinal cord by chiropractic adjustments, despite plaintiff's symptoms for neurological compromise, was contraindicated as the treatment posed a substantial risk and probability of exacerbating plaintiff's neurological and orthopedic spinal cord problems. He states that by performing chiropractic adjustments in light of plaintiff's symptoms, Reiss departed from accepted chiropractic practice. Guy concludes that Reiss's improper assessment and treatment of plaintiff constituted a continuous failure to understand and/or appreciate the etiology, pathogenesis, prevention, diagnosis and treatment of severe and permanent neurological and spinal cord injuries and conditions and that Reiss's examination, assessment, evaluation, testing, diagnosis, care, advice, monitoring and treatment of plaintiff was negligent, reckless, and constituted a deviation and departure from good and accepted standards of chiropractic care and treatment.

Guy posits that these departures negatively impacted upon plaintiff's prognosis and proximately caused and/or exacerbated his neurological and orthopedic spinal cord problems. Reiss's failure to refer plaintiff to a specialist resulted in plaintiff's prolonged cord compression and resulting nerve damage and caused him to suffer permanent neurological disability and extensive and debilitating injuries, treatment, and surgery with risks of further problems. Guy addresses Surasky's expert opinion that plaintiff's condition improved during Reiss's care and treatment, and therefore Reiss could not have caused plaintiff's injuries. Guy counters by stating that while plaintiff may have initially experienced some relief in his cervical neck area, there was also an occurrence of new symptoms. Guy disputes Surasky's opinion and notes that Surasky did not address the fact and effect of Reiss' failure to keep complete records or address the need for proper and timely (a) diagnosis of the patient; and (b) referral of the patient to the appropriate specialist. Last, Guy avers that Reiss deprived plaintiff from making an informed decision about his care and treatment, and thus failed to comport with the chiropractic standard of care.

### Analysis

Generally, a party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of a material issue of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of some material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

A motion for summary judgment should be granted if “upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” (CPLR 3212[b]). The purpose of a summary judgment motion is to “expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

In searching the record for an issue of fact, the Court is not obligated to ferret out speculative issues in order to force the matter to trial in the hopes that the trial may disclose something that pre-trial proceedings did not (*Andre v Pomeroy*, 35 NY2d at 364). The issues of fact must be bona fide issues raised by evidentiary facts (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Where conflicting affirmations and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. Capra*, 212 AD2d 594, 596 [2d Dept 1995]; *Epstein v Scally*, 99 AD2d 713, 714 [1st Dept 1984]). The reasoning is that conflicting expert opinions raise credibility issues that can only be resolved by the trier of fact (*Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]). Thus, “issue finding, as opposed to issue determination, is the key [in determining a motion for] summary judgment” (*Paulin v Needham*, 28 AD3d 531, 531 [2d Dept 2006] [internal quotations omitted]).

On a motion for summary judgment in a chiropractic malpractice action, a defendant has the burden of establishing, prima facie, that he or she did not deviate from good and accepted standards of chiropractic practice which proximately caused the injury claimed (*Metcalf v O'Halleran*, 137 A.D3d 758 [2d Dept 2016]). "In opposition, the plaintiff must demonstrate the

existence of a triable issue of fact only as to the elements on which the defendant has met his or her initial burden" (*Rivers v Birnbaum*, 102 AD3d 26, 43 [2d Dept 2012]).

Here, the defendants failed to establish, prima facie, that they did not depart from good and accepted chiropractic practice in treating plaintiff. However, defendants established, prima facie, that any departure from the applicable standard of care was not the proximate cause of the plaintiff's injuries (*see Shashi v South Nassau Communities Hosp.*, 104 AD3d 838, 838 [2d Dept 2013]). Defendants established that plaintiff suffered from a pre-existing degenerative condition. In response, plaintiff's expert acknowledged that plaintiff suffered from pre-existing myelopathy and cervical cord compression but stated that Reiss should have referred plaintiff to a specialist and his failure to do so resulted in plaintiff's "prolonged cord compression and resulting nerve damage." Although plaintiff's expert concluded that defendants' departures "negatively impacted upon plaintiff's prognosis and proximately caused and/or exacerbated his neurological and orthopedic spinal cord problems," this vague, speculative and conclusory opinion was unsupported. Notably, plaintiffs' expert failed to address, much less explain, the almost three-month gap between the last chiropractic treatment and plaintiff's consultation with his physician which defendants' experts argued evidenced that plaintiff's injuries were wholly unrelated to the chiropractic treatment. Therefore, plaintiffs failed to raise a triable issue of fact as to causation (*see Carioscia v Welischar*, 124 AD3d 816, 817 [2d Dept 2015]). Further, plaintiff's papers were insufficient to create an issue of fact regarding the lack of informed consent, which, in any event, was not set out in a separate cause of action (*see Stancavage v Mirman*, 309 AD2d 918 [2d Dept 2003]). Therefore, defendants have demonstrated their entitlement to summary judgment.

In light of this finding, the claims of plaintiff, Cady Lunsford Gallo, for loss of services and consortium cannot be maintained (*see Buckley v National Freight*, 220 AD2d 155 [2d Dept 1996]).

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.


Accordingly, it is

ORDERED that defendants' motion is granted and summary judgment is awarded in favor of defendants, and the action is dismissed with prejudice; and it is further

ORDERED that the Clerk enter judgment forthwith in favor of defendants.

The foregoing constitutes the decision and order of the court.

Dated: White Plains, New York  
April 30, 2020

**Joan B.  
Lefkowitz**  Digitally signed by Joan B. Lefkowitz  
DN: CN=Joan B. Lefkowitz,  
E=jlefkowi@nycourts.gov  
Reason: I am the author of this document  
Date: 2020-04-30 23:05:03  
Foxit PhantomPDF Version: 9.5.0

---

HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All Counsel by NYSCEF