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NEW YORK

ORAL SURGERY MALPRACTICE

Summary Judgment in Queens County



Robert A. Fitch

In this action, plaintiff alleged that Rawle & Henderson LLP's client, Dr. X, an oral and maxillofacial surgeon, committed dental malpractice because he failed to detect and diagnose Actinomyces, a rare bacteria, and failed to send him to the proper specialists to treat same, which caused plaintiff to develop osteomyelitis on the right side of his face and undergo multiple surgical procedures and hospitalizations. Plaintiff also alleged that he did not have informed consent for the procedures performed by Dr. X.



Stephen J. Levy

In our motion for summary judgment, we argued—with the support of our expert, Dr. Y—that at no time did Dr. X fail to properly and timely diagnose Actinomyces during treatment rendered to plaintiff. Moreover, even if an Actinomyces infection had been diagnosed at the beginning of Dr. X's treatment, the infection and osteomyelitis would still have progressed in the way it did no matter what treatment was rendered.

We further included an Affidavit in support from Dr. X, who pointed out that, while he was treating plaintiff, plaintiff was also seeing other specialists.

In opposition, plaintiff, with the support of Dr. Z, a general dentist (as opposed to an oral and maxillofacial surgeon), argued that Dr. X departed from the standard of care by negligently failing to notice the signs and symptoms of Actinomyces, negligently continuing to prescribe antibiotics even though plaintiff's infection was not healing, and negligently failing to refer plaintiff to a specialist in infectious diseases or an oral pathologist.

Plaintiff additionally argued that, given plaintiff was not improving on antibiotics, it was incumbent on Dr. X to order cultures to ascertain the specific bacterial strains causing

the infection. Instead, plaintiff argued, Dr. X prescribed antibiotics randomly in a “shotgun” approach toward resolution, and the proper antibiotic treatment specific to Actinomycosis was not prescribed.

We submitted a vigorous Reply, in which we annexed a further Expert Affidavit from Dr. Y, as well as an Affidavit from our client, Dr. X. In summary, we argued that plaintiff failed to raise an issue of fact to preclude summary judgment in that plaintiff improperly relied on the opinion of Dr. Z who, as a general dentist, was simply not qualified to render an opinion about the standard of care of an oral and maxillofacial surgeon (like Dr. X) or about Actinomycosis—an extremely rare infection—in general.

We pointed out that Dr. Z admitted in his Affirmation that a general dentist might not have the experience to recognize the signs or symptoms of Actinomycosis. We cited several cases—*Behar v. Coren*, 21 A.D.3d 104 (2nd Dept. 2005), *Tsimbler v. Fell*, 123 A.D.3d 1009 (2nd Dept. 2014), and *Lavi v. NYU Hospital Center*, 133, A.D.3d 830 (2nd Dept. 2015)—in which the Court held that plaintiff’s expert lacked the requisite skill, training or experience to render an opinion as to raise an issue of fact in order to defeat a summary judgment motion. Our expert, Dr. Y, provided an Affirmation supporting this point.

We further pointed out—citing *Lopez v. Gramuglia*, 133 A.D.3d 424 (1st Dept. 2015) and *Sassen v. Lazar*, 105 A.D.3d 410 (1st Dept. 2013)—that Dr. Z relied on inaccurate “facts” that were not in evidence. For instance, he erroneously indicated that a lesion found by a periodontist who examined plaintiff was producing pus, which was contradicted by the records.

Our client, Dr. X, and our expert, Dr. Y., provided additional papers setting forth in detail the erroneous “facts” relied on by plaintiff’s expert and why same were crucial to an assessment of the case. We also noted that plaintiff’s cause of action for “lack of informed consent” must be dismissed as plaintiff’s did not even address this issue in their opposition papers.

Justice Peter J. O’Donoghue, of the Supreme Court, Queens County, granted our motion for summary judgment finding that plaintiff’s expert, Dr. Z, a general dentist, was not qualified to render an opinion with respect to the standard of care to be followed by an oral and maxillofacial surgeon such as our client, Dr. X; therefore, Dr. Z’s affirmation had no probative value and failed to raise a question of fact sufficient to defeat our motion.

Plaintiff’s counsel has indicated that they are appealing Justice O’Donoghue’s decision.

Robert A. Fitch is the resident partner in our New York City office. He concentrates his practice on the defense of architects and engineers, construction, medical and oral surgery malpractice claims, and commercial motor vehicle litigation. He received his undergraduate degree from Syracuse University and his J.D. from Syracuse University College of Law. He is admitted to practice in New York since 1974, as well as in Federal Courts in Southern, Eastern and Northern Districts of New York and the Second Circuit Court of Appeals. Bob has tried over 100 cases to verdict and is a member of the Defense Research Institute, Federal Bar Council, PIAA and Trucking Industry Defense Association. Bob was named a New York Metro Super Lawyer in 2013, 2014, 2015, 2016 and 2017 by the publishers of *Law & Politics*. He has a peer review rating by Martindale-Hubbell of AV (the highest).

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Stephen J. Levy is Of Counsel to the firm in Rawle & Henderson’s New York City office. He concentrates his practice in the areas of medical professional liability, dental professional liability, insurance coverage and environmental torts. Stephen earned his J.D. from Boston University School of Law in 1986 and his B.S. from Cornell University in 1983. He is admitted to practice in New York, as well as the U.S. District Courts for the Eastern and Southern Districts of New York.

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NEW YORK PERSONAL INJURY

Summary Judgment Granted on Behalf of Snow Removal Company and Retail Liquor Store

Anthony D. Luis, a partner in our New York City office, recently obtained a summary judgment in the personal injury case *Anne Sisia v. Viscount Wines & Liquors et. al.*

The case resulted from an accident on December 19, 2013, when plaintiff fell in the parking lot area of defendant Viscount Wines & Liquors in Wappingers Falls, New York, around noon after she had left the liquor store. Plaintiff suffered a tri-malleolar fracture of her right ankle, which required surgery. Rawle & Henderson LLP represented a snow removal company that had a contract to remove snow in front of the liquor store.

Rawle & Henderson LLP argued that pursuant to the contract, our client performed snow and ice removal only upon request of the co-defendant property owner, Viscount Wines & Liquors. There was no evidence indicating a request for snow and ice removal and the weather was above freezing on the day of accident.

The weather reports confirmed that there was no precipitation, and that temperatures at the time of the accident were above freezing. Therefore, ice would not have been present. Witnesses testified that there was no precipitation on the date of the accident. Without the snow removal contract being triggered, our client—the snow removal company—did not owe plaintiff a duty of care. Our client had plowed the Viscount parking lot on December 17, 2013, and salted the lot on December 18. They did not plow or salt the lot on the day of the accident.

Plaintiff normally used a walker, but used a shopping cart as a substitute for her walker when she entered and left

the store on December 19. In deposition testimony, under cross-examination plaintiff admitted that she could not identify any defect or condition that caused her to fall. Although she testified she subsequently observed slush in the vicinity of where she fell, she said that she did not know what caused her to fall.



Anthony D. Luis

In addition, a Viscount Wines & Liquors employee testified that after being informed of the accident, she went to the area where plaintiff fell and observed that there was no debris or precipitation in the form of snow, ice or water. A second Viscount employee testified that there was no ice or slush in the parking lot when she went out to attend to plaintiff.

Rawle & Henderson LLP moved for summary judgment, arguing that our client had *prima facie* entitlement based on evidence that plaintiff did not know what caused her to fall, that our client did not create a condition that caused plaintiff to fall, and that they did not have actual or constructive notice of a condition in a reasonably sufficient amount of time to remedy it. The motion was granted and the case was dismissed as to all defendants.

Anne Sisia v. Viscount Wines & Liquors et. al., Supreme Court of the State of New York, County of Dutchess, Index No. 1785/2014

Anthony D. Luis is a partner in our New York City office. He concentrates his practice on the defense of clients involving architects & engineers malpractice, casualty & premises liability, commercial motor vehicle litigation, medical malpractice, oral surgery & dental malpractice, construction defect cases, workers' compensation and commercial litigation. He served as an Assistant District Attorney in Queens as a prosecutor in the Homicide Investigation Unit, Domestic Violence Unit, and the Felony Trial Bureau where he tried numerous cases to verdict including jury trials. He has been rated AV Preeminent by Martindale-Hubbell. Anthony received his J.D. at Western New England University School of Law in Springfield, Massachusetts, in 1999. He earned a B.A. in Political Science and English in 1996 from State University of New York at Geneseo. He is admitted to practice in New York and New Jersey, as well as U.S. District Courts for the Eastern and Southern Districts of New York and the U.S. District Court for the District of New Jersey.

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PIAA DENTAL WORKSHOP



Robert A. Fitch

Robert A. Fitch, Maryanne Kolenovsky and Paul E. Blutman will speak at the *2018 PIAA Dental Workshop* being held April 11-13 in Santa Monica, California. The Physician Insurers Association of America (PIAA) is an insurance industry trade association that represents medical professional liability insurance companies, risk retention groups and other entities.

Robert A. Fitch and Maryanne Kolenovsky will speak in a session on April 12 titled “*Board Actions: Stories from the Trenches.*” Bob, Maryanne and other panelists will discuss the disciplinary actions taken by dental boards and some of the key steps that can be taken to decrease risk and thus avoid investigations or disciplinary actions.

Paul E. Blutman will speak in a session on April 13 titled “*Shocking But True! High Dollar and Bizarre Claims.*” Paul and other attorneys will present several case studies on high dollar and bizarre claims involving dental and oral surgical professionals and procedures. They will discuss the wide variety of issues and scenarios that can lead to dental and oral surgical professional liability claims.

Robert A. Fitch is the resident partner in our New York City office. See his biography on the second page of this *Rawle's Reports*.

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Maryanne Kolenovsky is a partner in our Long Island office. She represents health care providers in all medical specialty fields. After becoming licensed as a Registered Professional Nurse in 1977, Maryanne worked in both nursing and hospital risk management. She has extensive trial experience in the defense of medical, dental, nursing and chiropractic professionals. She has tried numerous cases to verdict in venues throughout the boroughs of New York City, Nassau, Suffolk, Rockland, Orange and Columbia Counties. Maryanne earned her J.D. from Pace University School of Law in 1991 and her B.A., *cum laude*, from Queens College of the City University of New York in 1987. Maryanne was named in the top 1% of trial lawyers in the state of New York for 2012. This selection was based solely upon actual results in trials.

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Paul E. Blutman is the resident partner in our Long Island office. He concentrates his practice on the defense of medical and dental professionals, hospitals, nursing homes, products manufacturers' liability, premises liability, toxic torts, auto liability, and commercial and business litigation. He lectures to medical and dental professionals, hospitals, and corporations on liability issues. He earned both his J.D. and B.A. degrees from Hofstra University. He is a recipient of the Hofstra University School of Law Distinguished Alumni Award, OMSNIC Rising Star Award and the Hofstra Law Distinguished Faculty Award. He is admitted to practice in the courts of the State of New York, as well as the Federal Courts for the Southern and Eastern Districts of New York. Paul was listed as a “Top Rated Lawyer” by the *New York Law Journal* in 2017. He has been rated AV Preeminent by Martindale-Hubbell for over 25 years.

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Maryanne Kolenovsky



Paul E. Blutman