SCAM

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 36
NASSAU COUNTY

HELEN RAZENSON, CHARLES RAZENSON, WILLIAM RAZENSON and THOMAS RAZENSON, an infant by his Parents and Natural Guardians, HELEN RAZENSON and CHARLES RAZENSON.

Plaintiffs.

Sequence No.: 001 & 002
Index No.: 016386/01

- against -

JOSEPH S. CHAMPAGNE and CHAMPAGNE ASSOCIATES, P.C.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	**X**
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	**X**
Replying Affidavits	**X**

Upon reading the papers submitted and due deliberation having been had herein, the motion by defendants for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint is denied.

This is an action to recover damages for professional malpractice. Defendants are engineers experienced in the area of roadway design, construction, maintenance and safety as well as in the area of accident reconstruction who testified at plaintiffs' trial on those issues as well as accident reconstruction.

The underlying action arose out of a two car collision which occurred on November 28, 1993 on Quaker Meeting House Road in Farmingdale, N.Y. Plaintiffs in that action were all occupants of one vehicle. The other motor vehicle was operated by Grace Germann and owned by Rolf Germann. That accident led to several lawsuits seeking damages for bodily injury. In addition to the dispute as to the culpability between the adverse driver, plaintiffs claimed culpability on the part of the Nassau County as the owner with responsibility for the allegedly defective roadway on which the accident occurred.

From a practical standpoint, plaintiffs' claim against defendant Champagne is akin to pleading and prosecuting a *prima facie* case in legal malpractice. In fact, the parties in their submissions agree to that concept. It is well settled that an action for legal malpractice requires proof of the negligence of the attorney, a showing that the negligence was the proximate cause of the loss sustained; and proof of actual damages. Schwartz v. Olshan Grundman Frome & Rosenzweig, 302 AD2d 193; Pellegrino v. File, 291 AD2d 60, *lv denied* 98 NY2d 606; Between The Bread Realty Corp. v. Salans Hertzfeld, Heilbronn Christy & Viener, 290 AD2d 380, *lv denied* 98 NY2d 603. In order to survive dismissal, the complaint must show that but for [counsel's] alleged malpractice, the plaintiff would not have sustained some ascertainable damages *** A failure to establish proximate cause requires dismissal regardless of whether negligence is established. Notwithstanding [counsel's] purported negligence, the client must demonstrate his or her own likelihood of success; absent such a showing, counsel's conduct is not the proximate cause of the injury. Nor may speculative damages or conclusory claims of damage be a basis for [legal] malpractice." (Citations omitted) Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 AD2d 63, 67. Moreover, the "remedy relies on *prima facie* proof that [the client] would have succeeded" (Price v. Herstic, 240 AD2d 151, 152; Pellegrino, supra.

Defendants move for summary judgment dismissing the complaint, claiming, *inter alia*, that the negligence, if any, of the defendants did not cause the plaintiffs' loss, i.e., an adverse jury finding. They argue that since the jury in the prior action expressly determined that Mrs. Germann's vehicle did not exceed the 30 miles per hour speed limit on Quaker Meeting House road, the jury was effectively barred from considering the County's liability as well as any testimony offered by Mr. Champagne concerning the County's claimed responsibility. In other words, inasmuch as the jury never reached the issue regarding the County's liability, nor did it have reason to consider the weight of Champagne's testimony with regard to the County, it is clear that Champagne's claimed testimony did not cause the plaintiffs to lose their action against the County. Considering these circumstances, defendants submit that no basis exists for the plaintiffs to continue prosecuting their claim that Champagne's negligence prevented them from securing a verdict against the County.

Defendants argue that the purpose of the defendant Champagne"s testimony at trial was to establish that the roadway in question was defective in that even if a motor vehicle was traveling at less than 30 mph in the curve on that road under rainy and wet conditions the motor vehicle would slip or skid into oncoming traffic. In that regard they point to the testimony of the defendant, Champagne, on direct examination.

Defendants further argue that in the bill of particulars, plaintiffs allege as follows:

a) Defendants negligently miscalculated road measurements on a plan of Quaker Meetinghouse Road in the vicinity of the Plaintiffs' accident. Defendant and his associate, MR. HOCHSTEIN, negligently concluded in a previous case – the O'Lenihan case - - that the road

begins to curve at distance of 50 feed west of Puritan Lane, but at the Plaintiff's trial, Mr. CHAMPAGNE negligently testified that the curve began six feet west of the intersection. In the prior O'Lenihan case, Mr. HOCHSTEIN measured the radius of the curve in the road to be 250 feet. At the Plaintiffs' trial, Mr. CHAMPAGNE testified that the radius of the curve was 440 feet. He admitted on the witness stand that Mr. HOCHSTEIN'S previous measurement was an error. He further admitted that the roadway had not changed physically between the two accidents and the difference in measurements was an error.

(b) Mr. CHAMPAGNE negligently submitted an affidavit falsely stating that the Razenson accident and the prior O'Lenihan accident resulted in fatalities. He had to admit on the witness stand, at trial, that this was an error and there were no fatalities in either accident.

(c) Mr. CHAMPAGNE negligently submitted an affidavit falsely stating that the Razenson vehicle "lost control" and collided with an eastbound vehicle.
Mr. CHAMPAGNE had to admit on the witness stand, during trial, that this was error and that he did not mean to state that the Razenson vehicle "lost control".

(d) Mr. CHAMPAGNE negligently failed to inform the Plaintiffs' trial attorney of affidavits submitted by his firm in the O'Lenihan case, although he was specifically asked if he, or any member of his firm, had made prior sworn statements concerning the condition of the roadway and

(e) Mr. CHAMPAGNE was so unprepared for testifying that he destroyed the credibility of his own testimony and of the Plaintiffs' case.

In opposition to this motion, plaintiffs' counsel alleges that the purpose of Mr. Champagne's testimony in the prior action was two-fold: "(1) to establish that the roadway was hazardous and too slippery for any car going over the 30 m.p.h. speed limit; and (2) to establish that Mrs. Germann's car was going over 30 m.p.h. and therefore lost control and crashed into the Razenson vehicle.

In that regard the plaintiff offers the testimony of the expert as elicited on cross examination by the attorney for one of the then defendants, Nassau County. Plaintiff argues that during that examination the expert (in answer to skillful questioning on the part of the County's attorney) indicated that the defendant in that lawsuit (Ms. Germann) was traveling at greater than 30 mph when she negotiated the curve and the accident occurred.

Defendant here argues that all the testimony of him elicited on direct examination was introduced to establish that even if the vehicle in that case was traveling at less than 30 mph, the defective roadway would cause the vehicles to skid.

The court agrees that the most reasonable reading of the transcript of the prior proceeding is that the expert there (and defendant here) was called by plaintiff (in both cases) to establish that even if Germann was traveling at less than 30 mph that the vehicle which she was driving would

skid or slide due to the defectively designed roadway. Thus, if there had been no cross examination of the expert the jury would only have heard from there defendant Germann that she was going 20 to 25 mph and skidded and from the expert given that scenario as a hypothetical that the skidding occurred because the roadway was defectively and negligently designed. What the court cannot understand is how after an expert was apparently called for this purpose and all of the testimony that was elicited on direct examination pointed to those facts, there appeared on the verdict sheet instructions that if same were to be the case the jury could not consider the negligence of one of the defendants Nassau County. Not only does the scenario fly in the face of the theory that it appears plaintiff attempted to establish but to this court it flies in the face of logic. One would think that the slower one was traveling when one skidded the more likely it is that the roadway was badly designed and, in the alternative that if someone testified that she skidded while traveling greater than the speed limit, e.g., she was speeding, the less likely it would be that road design contributed to the skidding.

In fact the plaintiffs themselves point out to this court in their papers in opposition that Mr. Champagne did, indeed, offer testimony that the vehicle was traveling was "about 25 to 30 an hour". Therefore when the plaintiffs on their case introduce the expert's opinion based upon a set of circumstances consistent with the defendant driver's testimony that she was traveling 25 mph and the only testimony regarding that defendant's speed was by the defendant herself and the jury returns a verdict which indicates that the there defendant was traveling less than 30 mph it would seem that the expert who appears to have been called to establish the County's negligence under circumstances where a driver was traveling at less than 30 mph was successful.

It would appear though that the plaintiffs' position is that although they elicited an opinion from their expert consistent with the Germann's vehicle traveling at less than 30 mph, because there was testimony from him (on cross examination) that the Germann's vehicle was exceeding 30 mph, it is the latter fact that the jury should have focused upon and their verdict indicates that they rejected his testimony, apparently because he was so incompetent.

What troubles the court is not so much the conclusion it would reach but whether it is entitled to do so; is this rather simple decision one of fact finding and therefore precluded on a motion for summary judgment. The court must reluctantly answer the question in the affirmative.

The court is troubled that the presentation of evidence to support the parties' legal theories comes in such an obtuse manner. Although there is no question that the introduction of prior sworn testimony can be an appropriate vehicle to support such a motion, in a situation such as this where both sides draw different inferences as to that testimony, it would appear that it would have been a much more direct way to support each party's contentions to have had an affidavit from the person involved. Thus, it would have been helpful to hear from the attorney for the plaintiffs in the underlying case as to the plaintiffs' contentions here and correspondingly, equally helpful to hear from the defendant here that, of course, the plaintiffs never put him forth to establish what they now say they did. Instead, there is nothing from the plaintiffs and an affidavit from defendant which seems to be offered to reiterate and buttress his attorney's affirmation and legal

position. May this court suggest that it is not helpful to have paragraphs commencing with "I am advised by my attorneys" about their legal conclusions in this case. The court is aware of the defendant's attorneys' legal position and need not know that they have advised their client of that. Instead, the court is left to determine from the prior testimony submitted that one of the two scenarios is the one that actually occurred. From that the court finds that the plaintiffs have established that a question of fact exists and therefore summary judgment is precluded.

Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

So Ordered.

A.J.S.C.

Dated: February 10, 2004

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE