IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DEBORAH L. SPICER, individually and as Parent and Natural Guardian of BRITTANY SPICER, a minor,	)	
Plaintiffs,	)	C.A. NO. 08C-04-218 MJB
v.	)	
ABIMBOLA OSUNKOYA, M.D., DELAWARE PRIMARY CARE, LLC, STEPHEN COOPER, M.D., ENT & FACIAL PLASTIC SURGERY, P.A.,DELAWARE SURGERY CENTER,	)	
DEFENDANTS.	)	

Submitted: October 6, 2010
Decided: January 31, 2011

Upon Defendants Abimbola Osunkoya and Delaware Primary Care, LLC's Motion for Summary Judgment.
GRANTED.

OPINION AND ORDER

Gilbert F. Shelsby, Jr., Esq. Shelsby & Leoni, P.A., Stanton, Delaware, Attorney for Plaintiffs.

John D. Balaguer, Esq., Dana Spring Monzo, Esq., White and Williams LLP, Wilmington, Delaware, Attorneys for Defendants.

BRADY, J.

INTRODUCTION

This is a medical malpractice action. Deborah L. Spicer ("Ms. Spicer"), on behalf of her minor daughter, Brittany Spicer ("Brittany"), filed this suit against several defendants after Brittany suffered an anoxic brain injury the day after a tonsillectomy.

On March 15, 2007, Brittany was referred by her physician, Dr. Abimbola Osunkoya, to Dr. Stephen Cooper, an ears, nose and throat specialist ("ENT") for consultation related to what was perceived by Dr. Osunkoya to be "recurrent tonsillitis." Brittany was subsequently examined by Dr. Cooper, and in April 2007, Dr. Stephen Cooper performed an out-patient tonsillectomy on Brittany. The next day, Brittany suffered a severe brain injury, which has resulted in severe cognitive and physical defects.

Plaintiffs filed this suit against Dr. Osunkoya, his professional association, Delaware Primary Care, LLC; Dr. Cooper, and his professional association, ENT & Facial Plastic Surgery, P.A.; and Delaware Surgery Center.[1] Plaintiffs alleged that Dr. Osunkoya negligently diagnosed and referred Brittany, which resulted in an unnecessary surgery. Dr. Osunkoya and Delaware Primary Care, LLC have filed for summary judgment. For the reasons set forth in this Opinion, the Court concludes that Dr. Osunkoya and Delaware Primary Care are entitled to summary judgment as a matter of law. Therefore, Defendants' Motions are **GRANTED**.

[1] The parties have since stipulated to the dismissal of the Delaware Surgery Center.

FACTUAL BACKGROUND

In November 2003, Brittany visited Dr. Osunkoya for the first time.[2] No records related to this visit mention complaints of a sore throat.[3]

On January 17, 2004, during a visit to Dr. Osunkoya's office, Brittany complained of a sore throat, fever, a runny nose, congestion, postnasal drip, a headache and a cough.[4] Brittany was diagnosed with acute bronchitis and was prescribed Zithromax and Rondec. Dr. Osunkoya did not order a throat culture.[5] On August 24, 2005, Brittany returned to Dr. Osunkoya's office, at which time she complained of a sore throat, runny nose, congestion and neck pain. Dr. Osunkoya prescribed Cefzil and did not order a throat culture.[6]

On March 15, 2007, Brittany presented to Dr. Osunkoya's office with complaints of a sore throat. Dr. Osunkoya noted in his records that Brittany's tonsils were large and red.[7] Dr. Osunkoya diagnosed Brittany with "recurrent tonsillitis" and referred her to an ear, nose, and throat specialist ("ENT"). Brittany was also diagnosed with GERD and given a prescription for Prevacid. Again, no throat culture was ordered by Dr. Osunkoya, nor was it noted how long Brittany's symptoms had lasted. March 15, 2007 was the last time Brittany visited Dr. Osunkoya's office.[8] In his deposition, Dr. Osunkoya stated that he sent referred Brittany to Dr. Cooper because "she had [a] recurrent problem with regards to [her] tonsils."[9] Dr. Osunkoya further stated that "when I examined her, her tonsils were pretty enlarged, which suggest that, yes, these [are] the symptoms that have

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[2] Pl. Am. Compl. 14.
[3] *Id*.
[4] *Id*. at 15.
[5] Amend. Compl. ¶ 16.
[6] Amend. Compl. ¶ 15.
[7] Def. Mot. Ex. A.
[8] Def. Mot. Ex. B.
[9] Def. Mot. Ex. B., Dr. Osunkoya's Deposition, pg 24, line 19-21.

been going on and on for some time. I though it was worth having a second opinion for evaluation with Dr. Cooper."[10] Dr. Osunkoya did not have any discussions with Dr. Cooper prior to Brittany's surgery, however, he gave Brittany a note stating that she had "chronic tonsillitis for evaluation."[11] There is however, no record that Dr. Osunkoya ever diagnosed Brittany with tonsillitis or tested her for the existence of strep throat.

On March 28, 2007, Brittany was examined by Dr. Cooper. In his medical records, Dr. Cooper noted that Brittany was referred due to "a history of recurrent strep throat and tonsillitis."[12] Dr. Cooper's notes also state that

> [w]hen questioning her and her father, they believe that she has had a least four episodes in the last twelve months. She also has chronic tonsillitis from the standpoint that she has had trouble swallowing because of the large size of her tonsils and chronic low grade sore throats.[13]

During Brittany's visit with Dr. Cooper, Dr. Cooper concluded that Brittany was a candidate for tonsillectomy based upon her history of recurrent tonsillitis and strep throat. This history was obtained exclusively from Brittany and her stepfather, who accompanied her to Dr. Cooper's office.[14] According to Dr. Cooper, whether a person is a candidate for a tonsillectomy is dependent entirely on the patient's history. Dr. Cooper did not consult Dr. Osunkoya to determine whether she had any prior history of tonsillitis. Dr. Cooper explained that he relied entirely on Brittany and her step father's description of her medical history regarding her tonsillitis. Dr. Cooper explained that this is often done because a family doctor will not necessarily be aware of every episode a patient has because patients often times visit the emergency room or a walk-in clinic. Dr. Cooper's

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[10] Dr. Osunkoya's Dep. pg 25, lines 1-6.
[11] Dr. Osunkoya's Dep. pg 86, lines 13-16.
[12] Pl. Amend. Compl. 27.
[13] Dr. Cooper's medical records.
[14] Dr. Cooper's Dep. pg. 49.

impression was recorded in his officer chart as "chronic tonsillitis."[15] Dr. Cooper recommended a tonsillectomy, and scheduled the surgery for April 19, 2007.

Dr. Cooper did not consult Dr. Osunkoya in any capacity regarding Brittany's diagnosis or medical history, and made a completely independent assessment of Brittany's condition and an independent determination of her treatment plan.[16] In his deposition, Dr. Cooper explained the independence of his diagnosis and decision to perform surgery on Brittany:

> Q: Do you rely at all on the referring physician's diagnosis?
> A: No.
> Q: So you wouldn't even have read Dr. Osunkoya's referral?
> A: They don't bring one.
> Q: They don't bring one?
> A: No. Usually, in my office, the experience I have with most general practitioners or pediatricians is they will either give just a one-page, I refer to Dr. Cooper, a question of tonsillitis, or they just schedule it with my office the visit.
> Q: Okay.
> A: And then you get the history from the patient.[17]

Three weeks prior to the surgery, Dr. Cooper sent a letter to Dr. Osunkoya, which informed him that a tonsillectomy procedure was being scheduled based on the history of chronic tonsillitis and multiple episodes of strep throat. Dr. Osunkoya never responded to Dr. Cooper's letter.[18]

On April 17, 2007, two days prior to the surgery, a nurse of the Surgery Center contacted Ms. Spicer and obtained a medical history for pre-anesthesia clearance. Ms. Spicer disclosed her daughter's current medications as well as her history of syncope.

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[15] *Id*. Ex. C, Dr. Cooper's Medical records.
[16] *Id*. Ex. D, Deposition of Dr. Cooper.
[17] Dr. Cooper's Dep. pg. 56-57.
[18] Pl.'s Resp. ¶ 3.

The Surgery Center obtained medical records prior to the surgery.[19] In addition, the day before surgery an anesthesiologist, on behalf of the Surgery Center, conducted an in-person evaluation of Brittany.[20] The following was noted during an apparently comprehensive evaluation: she had a history of vasodepressor syncope, and that she was on Atenol that was discontinued; she had no symptoms of this condition in the past year, was ASA Class 2, with adequate mouth opening, adequate neck ROM, MP 1 class.[21]

On April 18, 2007, a pre-anesthesia evaluation form was completed by Brittany. The form indicated the following: Seroquel 50 mg hs, Ceftin 250 mg am, currently sore throat 8-9/10, low blood pressure for which she was on medications, discharged when pregnant, syncope (1/31/06) per patient, happens about three times per year, negative tilt table at DuPont.[22] At no time was Brittany told stop any of her medications prior to surgery.

On April 19, 2007, Dr. Cooper performed the tonsillectomy. Anesthesia was given pre- and post-operatively. Dr. Cooper noted that Brittany tolerated the surgery well. Plaintiff alleges that no record of Brittany's vital signs were taken post-operatively. Moreover, Plaintiff alleges that Dr. Cooper did not perform any post-operative evaluation, nor was there any neurological evaluation performed, as required. Brittany was discharged and provided prescriptions for Phenergan, to alleviate nausea, and oxycodone for pain. [23] In her deposition, Ms. Spicer stated that she gave Brittany the prescribed dosage of oxycodone.[24]

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[19] *Id*. Ex. E (medical records of Delaware Surgery Center); See also Dep. of S. Rodenheiser, pp. 26-37, Ex. F.
[20] *Id*. Ex. F at pp. 34-37.
[21] Pl. Amend. Compl. 32.
[22] Pl. Amend. Compl. 33.
[23] *Id*. Ex. E.
[24] *Id*. Ex. G. pp50-57

The next day, Ms. Spicer found Brittany unresponsive and called Kent County EMS. Brittany was taken to Kent General Hospital and diagnosed with acute respiratory distress and an altered neurological status.[25]

On April 20, 2007, the day after surgery, Kent County EMS was called to the Spicer home after Ms. Spicer found Brittany unresponsive. The EMS report noted that Brittany had guppy breathing and only a carotid pulse. An oral airway was inserted and Brittany was transported to Kent General Hospital. At the hospital, Brittany was diagnosed with acute respiratory distress, altered level of consciousness and had an abnormal neurological exam. Brittany remained in the hospital for the next 10 days. During her hospitalization, Brittany was evaluated and tested revealing severe brain injury resulting in cognitive and physical deficits. On April 30, 2007, Brittany was transferred to Dupont Hospital where she remained until July 20, 2007. As a result of her brain injuries, Brittany requires constant care.

Plaintiff filed this medical negligence action against Dr. Osunkoya, his profession association Delaware Primary Care, LLC; Dr. Cooper, his professional association ENT & Facial Plastic Surgery, P.A.; and the Delaware Surgery Center.[26]

Plaintiff alleges Dr. Osunkoya was negligent in each of the following ways:

> (1) improperly referred Brittany to an ENT with a diagnosis of recurrent tonsillitis without objective evidence from a throat culture or other diagnostic testing of that diagnosis;
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> (2) failed to ensure ENT specialist was given a complete and accurate medical history of Brittany;

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[25] *Id*. Ex. H. Kent General Hospital discharge summary,

[26] Plaintiff claims Dr. Cooper and/or the Delaware Surgery Center committed medical negligence in that (1) the surgery was unnecessary; (2) failed to confirm medical history prior to performing surgery; (3) Spicer was inappropriately discharged after the surgery; and (4) they prescribed an excessive amount of Oxycodone which caused respiratory depression leading to anoxia and brain damage.

> (3) failed to fully and appropriately perform proper clinical evaluations of Brittany to determine the presence or absence of tonsillitis;
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> (4) failed to timely and appropriately inform referral physicians of Brittany's medications and medical history upon referral for a possible tonsillectomy; and
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> (5) failed to respond to and follow up with Dr. Cooper as to a letter received by Dr. Osunkoya from Dr. Cooper before the surgery took place which contained a misdiagnosis and inaccurate history because Brittany had never been tested for tonsillitis.[27]

PARTIES' CONTENTIONS

Plaintiffs argue that Dr. Osunkoya's conduct proximately caused Brittany's anoxic brain injury because it was a foreseeable consequence or, at the very least, whether it was foreseeable is a question for the jury to determine, not a court of law.

Defendants contend that even if the Court were to assume that Dr. Osunkoya was negligent in referring Brittany to Dr. Cooper and in not responding to Dr. Cooper's letter, those acts were not the proximate cause of the injuries suffered. Defendants claim that because Plaintiff cannot prove the element of causation in their medical negligence claims against Dr. Osunkoya and Delaware Primary Care, LLC, they are entitled to judgment as a matter of law.

STANDARD OF REVIEW

The standard for granting summary judgment is high.[28] Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact

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[27] See Pl. Amend. Compl.

[28] *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).

and that the moving party is entitled to judgment as a matter of law.[29] In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party.[30] When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted.[31]

DISCUSSION

I. Dr. Osunkoya's duty to Brittany was terminated upon Dr. Cooper's independent decision that she undergo surgery.

Whether a physician's duty to his or her patient continues after the patient is referred to a specialist appears to be an issue of first impression in this jurisdiction. However, other jurisdictions have declined to recognize a continuing duty, once the patient has been referred to a specialist and that specialist exercises his or her independent judgment.[32]

In this case, Dr. Osunkoya's alleged misdiagnosis and improper referral during the March 17, 2007 office visit is legally inconsequential. Dr. Osunkoya diagnosed Brittany as suffering from chronic tonsillitis and referred her to Dr. Cooper, an ENT. According to Dr. Cooper, he did not rely upon any of Dr. Osunkoya's impressions regarding Brittany, and made an independent determination that Brittany needed to undergo a tonsillectomy for her condition. Once Dr. Cooper made the determination,

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[29] Super.Ct.Civ.R. 56(c).
[30] *Muggleworth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. Ct. 2005).
[31] *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005).
[32] See *Billebault v. DiBattiste*, 1998 WL 255546 (E.D. Pa.); *Joyce v. Boulevard Physical Therapy & Rehabilitation Center, P.C.*, 694 A.2d 648 (Super. Pa. 1997) (distinguishing a physician to physician referral where the referring physician's duty is extinguished, and a physician – pharmacist referral where the physician's duty continues); Estate of R. Hannis v. Ashland State General Hospital, 123 Pa. Cmwlth. 390, 398 (Cmmwlth. Pa. 1989) (holding that "[t]here is no precedent in Pennsylvania which requires a family practitioner to follow a patient after referring the patient to a specialist").

using his own independent judgment, regarding her conditions and treatment plan, Dr. Osunkoya's duty to Brittany was extinguished.[33] Therefore, even if Dr. Osunkoya misdiagnosed Brittany as having chronic tonsillitis, that diagnosis was rendered meaningless once Dr. Cooper made an independent determination that Brittany needed surgery for her condition.

In *Billebault v. DiBattiste*, the District Court for the Eastern District of Pennsylvania held that a "referring physician's duty to a patient is extinguished once another physician exercises independent medical judgment as to the patient's medical care in performing a surgical procedure."[34] In *Billebault*, the defendant surgeon recommended that the plaintiff undergo surgery, and referred the matter to another surgeon within the practice. During surgery, a complication arose. In dealing with the complication, the operating surgeon exercised his own independent judgment as to the proper course of action. The complication resulted in harm to the plaintiff, and suit was brought against both the defendant and operating surgeon. The court held that the operating surgeon's independent decisions made during surgery severed the defendant surgeon's duty as to any of those surgical choices.

In this case, the relationship between Dr. Osunkoya and Brittany was even more attenuated. Here, the referring physician, Dr. Osunkoya, did not make the determination that Brittany needed to undergo surgery; rather, Dr. Cooper did. Moreover, Dr. Cooper's exercise of independent judgment occurred prior to the surgery. Thus, Dr. Osunkoya's duty toward Brittany, as related to the tonsillectomy and any pre- and post-operative

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[33] See *Billebault v. DiBattiste*, 1998 WL 255546 (E.D. Pa.)
[34] *Id*. at 4.

treatment, ended not during the operation as was the case in *Billebault*, but rather at the moment Dr. Cooper decided that Brittany needed to undergo surgery.

A physician refers his or her patients to a specialist so that a doctor with more experience and training in a particular medical field can provide a patient with a proper diagnosis and treatment plan. This is a valuable service to patients. However, if physicians were held liable for a specialist's independent decision, over which the referring physician does not or cannot exercise any control, there could create a disincentive to refer patients at all.[35]

Based on the foregoing, neither Dr. Osunkoya nor his office can be held liable because their duty to Brittany was severed once Dr. Cooper made an independent diagnosis and recommendations for treatment.

II. Even if Dr. Osunkoya's duty to Brittany remained in effect subsequent to Dr. Cooper's independent determination, Dr. Osunkoya is not liable for Brittany's injuries.

Proximate cause is a legal device concerning the question of whether a defendant should be held accountable for his or her negligence.[36] The plaintiff must demonstrate by a preponderance of the evidence a natural, unbroken chain of causation between the defendant's negligent act and the resulting harm to the plaintiff.[37]

Even if the Court accepts the fact that Brittany would not have undergone surgery and post-operative treatment "but for" Dr. Osunkoya's referral, in Delaware that is not enough for the Plaintiff to establish proximate causation.[38] The "but for" test is a

[35] If a physician referred a patient to a specialist knowing that the specialist was incompetent, there could be a basis of liability. There are no facts in this case to suggest that Dr. Osunkoya knew or should have known that Dr. Cooper was incompetent.
[36] *Vollendorf v. Craig*, 2004 WL 440418, *2 (Del. Super.)
[37] *Id*. at 3.
[38] *Id*. at 4.

limitation on liability and never a basis for it.[39] This is because a "but for" test would include any negligent act associated with the injury, regardless of how remote and unforeseeable that negligent act was.[40] Where there are multiple negligent acts that combine to cause the plaintiff's injury, the court must determine a reasonable starting point within the chain of causation for purposes of proximate cause and liability.

In *Vollendorf v. Craig*, the court decided that a reasonable starting point for purposes of proximate causation was subsequent to the defendant's negligent act even though in an abstract manner that negligence contributed to the plaintiff's injury.[41] That case involved a three car collision in which the plaintiff's vehicle, while sitting in the left turn lane, was struck from behind and pushed into the path of a car in the oncoming lane driven by the defendant. The court had to determine whether the driver in the oncoming lane that hit the plaintiff's vehicle was the proximate cause of the injuries involved. Even though the driver was speeding, and thus, negligent *per se*, the evidence established that the defendant would have collided with the plaintiff's vehicle even if he were traveling at the posted speed limit. The plaintiff argued that the court should consider the negligent act of speeding prior to the time the plaintiff's car was pushed into the oncoming lane. The plaintiff contended that had the defendant not been speeding while traveling along the road he would not have been at the point of collision at the time the plaintiff's car was pushed into the oncoming lane. The court in *Vollendorf*, however, determined that a reasonable starting point for purposes of proximate cause analysis was the moment in time in which the plaintiff's car was struck from behind and pushed into oncoming traffic. At that time, the defendant's speeding could not be considered a proximate cause

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[39] *Id*.
[40] *Id*.
[41] *Id*.

of the harm. The court held that the defendant's negligence (speeding) was not a proximate cause of the plaintiff's injuries and granted the defendant's motion for summary judgment. In so concluding, the court explained that although the defendant's negligent act was a "but for" cause of the collision "the risk posed by the defendant's negligence was not that it would make it possible for another driver's negligence, by coincidence, to push a car into his path."

Similarly, in this case, Dr. Osunkoya's referral is too attenuated from the post-operative treatment to be considered a proximate cause of the injuries to Brittany. A reasonable starting point would be the moment in which Brittany was placed in a position of exposure to harm. In this case, that moment was when Dr. Cooper decided that Brittany needed surgery. That determination ultimately exposed Brittany to the risk of harm that arises from surgery and the attendant post-operative treatment, including prescription medication.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be **GRANTED**.

IT IS SO ORDERED.

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M. Jane Brady
Superior Court Judge