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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Marilyn Shafer Justice PART 8

Index Number : 104305/2005
KAPITENOVA, NINA
vs.
MORAN, EDWARD K.
SEQUENCE NUMBER : 002
TRIAL PREFERENCE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is granted in accord with the annexed memorandum.

FILED
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/27/08

HON. MARILYN SHAFER, JSC
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8
----------X
NINA KAPITANOVA,

Plaintiff,

- against - Index No. 104305/2005

EDWARD K. MORAN, LANDAU, MILLER & MORAN, KENNETH BECKER and PANKEN, BESTERMAN, WINER, BECKER & SHERMAN, L.L.P.,

Defendants.
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MARILYN SHAFER, J.:

In this action alleging legal malpractice, two motions (sequence numbers 002 and 003) are consolidated for disposition in accordance with the following decision and order. In motion sequence number 002, plaintiff Nina Kapitanova moves for a trial preference, pursuant to CPLR 3403 (a) (3), on the ground that the interests of justice will be served by an early trial.[1] In motion sequence number 003, defendants Kenneth Becker and Panken, Besterman, Winer, Becker & Sherman, L.L.P. (PBWBS; collectively, with Becker, Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them.[2]

[1]Although Kapitanova's notice of motion states that the motion is brought pursuant to CPLR 3403.05 [3], no such subsection exists, and that is presumably a typographical error.

In motion sequence number 002, defendants Kenneth Becker and Panken, Besterman, Winer, Becker & Sherman, L.L.P. originally cross-moved for an order: (1) pursuant to CPLR 2106, 3216 and 3402 and 22 NYCRR 202.21, vacating plaintiff's note of issue and certificate of readiness for trial on the ground that discovery in this action was not complete; (2) pursuant to CPLR 3101 and 3126 and 22 NYCRR 202.21, compelling plaintiff to provide certain allegedly outstanding discovery and "HIPAA" authorizations; and (3) pursuant to CPLR 3126 (2), precluding plaintiff from presenting certain evidence at trial which had allegedly not been provided or disclosed to those defendants pursuant to demands and/or court orders. However, the cross motion has already been separately addressed and will not be addressed herein.

[2]Defendants' notice of motion states that the motion is brought pursuant to CPLR 3126, which is also presumably a typographical error.

FACTUAL ALLEGATIONS AND BACKGROUND

Kapitanova alleges that Defendants committed legal malpractice while representing her in connection with a personal injury action entitled *Kapitanova v Rafaeli* (Sup Ct, NY County, Cozzens, J., index no. 105439/98) (hereinafter, the Underlying Action). Kapitanova was struck by a taxi cab on February 12, 1998 while she was traveling on foot on an area of a roadway in Central Park which, although adjacent to automobile traffic lanes, is designated for use by pedestrians and other non-automobile traffic. The driver of the taxi cab, Joseph Rafaeli, suffered a fatal heart attack at or about the time of the accident. The taxi cab and the associated taxi cab medallion were allegedly owned by him and his wife Luba Rafaeli.

Kapitanova originally retained defendant Edward Moran and his law firm, defendant Landau, Miller & Moran (LMM), to represent her in connection with the injuries suffered by her in the accident. In or about December 1999, LMM referred the matter to Becker and/or his law firm, PBWBS, and Becker acted as Kapitanova's trial attorney in the Underlying Action. Plaintiff's counsel alleges that Moran and LMM have not been served with the summons or complaint in this action because LMM was dissolved before this action was commenced, and because he has been unable to locate any of the named partners or members of LMM.

Ms. Rafaeli was the only defendant named in the Underlying Action. She conceded that, as an owner of the taxi, she was liable for injuries which were caused by any negligent operation of the taxi by her husband. The trial of the Underlying Action was bifurcated into a liability phase and a damages phase. At the trial of the liability phase, Becker presented the theory to the jury that the taxi went out of control due to Mr. Rafaeli's negligence, and that his heart attack was traumatic, in that it occurred after, and was induced by trauma associated with, the accident (the Traumatic Heart Attack Theory). Becker called only one witness, Kapitanova, to testify at the trial. She testified that she was unable to remember who or what had struck her

Ms. Rafaeli's attorney presented the theory to the jury that Mr. Rafaeli lost control over the taxi as the result of his heart attack, such that the accident was not the result of any negligence on

his part but was caused, rather, by an "act of God" (the Precipitating Heart Attack Theory). Ms. Rafaeli's attorney called four witnesses at the trial: Ms. Rafaeli; Sandra Levine, an emergency medical technician who provided medical treatment to Mr. Rafaeli at the accident scene, and who completed an "ambulance call report" relating to that treatment; Steven Pate, a passenger in the taxi at the time of the accident, whose testimony concerning Mr. Rafaeli's behavior and the motion of the taxi tended generally to support the Precipitating Heart Attack Theory; and Stephen Factor, M.D., an expert medical witness who opined to the effect that Mr. Rafaeli's heart attack preceded the accident. At the conclusion of the trial of the liability phase, the jury rendered a verdict against Kapitanova and in favor of Ms. Rafaeli, finding that there had been no negligence.[3]

Kapitanova's bill of particulars alleges that Defendants committed malpractice in the Underlying Action by failing to: (1) investigate, prepare and present to the jury the theory that Mr. Rafaeli was negligent in driving the taxi, and/or that Ms. Rafaeli was negligent in allowing him to drive the taxi, because the condition of Mr. Rafaeli's heart made it foreseeable that he would suffer a heart attack or other health consequences while driving the taxi which would pose a danger to others (the Foreseeable Heart Attack Theory); (2) obtain Mr. Rafaeli's pre-accident medical records, and testimony by an expert medical witness based upon those records, which could be offered in support of the Foreseeable Heart Attack Theory; (3) adequately attack the Precipitating Heart Attack Theory by, inter alia, arranging for the appearance of an expert medical witness to oppose the testimony of Dr. Factor; (4) name Mr. Rafaeli's estate as a defendant; (5) insist upon a unified trial of the action rather than a trial bifurcated into a liability phase and a damages phase; (6) join in the action any other individuals or entities who knew or should have known about Mr. Rafaeli's heart condition and who permitted or enabled him to drive a taxi and/or provided him with a license which permitted him to do so; (7) properly investigate and explain to Kapitanova the intricacies of her personal injury case; (8) provide Russian translation to Kapitanova in Becker's conferences and

[3]The trial court's dismissal of the complaint in the Underlying Action, based upon the jury verdict, was subsequently affirmed on appeal (*see Kapitanova v Rafaeli*, 16 AD3d 108 [1st Dept 2005]).

phone calls with her; and (9) insist upon and provide a Russian interpreter to Kapitanova during her trial and court appearances (*see* Hannan Affirm., Ex. C, Bill of Particulars, ¶¶ 4-5).

DISCUSSION

"In order to prevail on a claim for legal malpractice, a party must establish that the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community, that such negligence was a proximate cause of the loss in question, and that actual damages were sustained" (*Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 [1st Dept 2007]). "Proximate cause requires a showing that 'but for' the attorney's negligence, the plaintiff would either have been successful in the underlying matter or would not have sustained any ascertainable damages" (*id.*). "To succeed on a motion for summary judgment, the defendant in a legal malpractice action must present evidence in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements" (*Dimond v Kazmierczuk & McGrath*, 15 AD3d 526, 527 [2d Dept 2005]).

Defendants have failed to establish that Kapitanova will be unable to prove the first element of her malpractice claim -- i.e., that Defendants were negligent in failing to exercise the degree of care, skill and diligence commonly possessed and exercised by a member of the legal community -- except with respect to the portion of her claim which alleges that Defendants were negligent in failing to insist upon a unified trial rather than a bifurcated trial in the Underlying Action.

Kapitanova maintains that Defendants were negligent primarily in pursuing the Traumatic Heart Attack Theory of liability at the trial in the Underlying Action instead of, and to the exclusion of, the Foreseeable Heart Attack Theory of liability. Defendants base their argument that Becker was not negligent in pursuing only the former theory upon opinions set forth in an affidavit submitted by Defendants' legal expert, Dudley Thompson, Esq. Thompson opines that it was appropriate and reasonable for Becker to present the Traumatic Heart Attack Theory, and not to present the Foreseeable Heart Attack Theory, because: (1) there was evidence to support the Traumatic Heart Attack Theory, namely, the ambulance call report that was completed by Levine; and (2) there was

no evidence to support the Foreseeable Heart Attack Theory.[4] Relying upon Thompson's opinion, Defendants assert that Becker's decision to pursue only the Traumatic Heart Attack Theory was a choice of one among several reasonable courses of action, which did not constitute malpractice.

"[A]n attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt" (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]). Thus, as Defendants correctly assert, an attorney's "selection of one among several reasonable courses of action does not constitute malpractice" (*id.* [citation and internal quotation marks omitted]). However, "[a]bsent such 'reasonable' courses of conduct found as a matter of law, a determination that a course of conduct constitutes malpractice requires findings of fact" (*id.*). It cannot be determined as a matter of law that it was a reasonable course of action for Becker to present the Traumatic Heart Attack Theory, rather than and to the exclusion of the Foreseeable Heart Attack Theory, in view of: the insubstantial weight of the evidence which existed to support the Traumatic Heart Attack Theory; the considerable weight of the evidence that Becker knew or should have known would be offered at trial to support the Precipitating Heart Attack Theory, which contradicted the Traumatic Heart Attack Theory; and Defendants' failure to establish that no evidence existed to support the Foreseeable Heart Attack Theory.

The only evidence which Defendants cite as supporting the Traumatic Heart Attack Theory, and as warranting Becker's presentation of that theory at trial, is the ambulance call report which Levine completed after she provided Mr. Rafaeli with emergency medical treatment. Defendants have not submitted a copy of that report in the papers supporting their motion, but it appears that the report contains the notation "presumptive diagnosis cardiac arrest, traumatic," and a statement that Mr. Rafaeli had a "large contusion" on his chest (Hannan Affirm., Ex. F, Record on Appeal, at 180-181, 231). The contusion located upon that part of Mr. Rafaeli's body might arguably support the proposition that he suffered physical trauma which caused his heart attack.

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[4]Becker stated at his deposition that -- although "[o]f course [he] pursued" the Foreseeable Heart Attack Theory -- he did not present that theory at trial because "[he] had no evidence to support that theory" (Becker EBT, at 71).

However, the weight of the ambulance call report as evidence supporting the Traumatic Heart Attack Theory was insubstantial in view of the additional circumstances that: the report was on a form which evidently contained a small box that was to be checked in the event that the presenting problem was a "cardiac arrest from a trauma," and that box was apparently "not checked" (*id.* at 214); it was Ms. Rafaeli's counsel who called Levine as a witness at the trial, and who introduced the ambulance call report into evidence; and Levine's testimony before the jury supported the Precipitating Heart Attack Theory rather than the Traumatic Heart Attack Theory. Levine testified: that she "felt the cardiac arrest wasn't trauma-related"; that "it seemed to [her] like [Mr. Rafaeli] had some sort of medical situation that happened that caused the accident"; that, "looking at the whole scenario together ..., in [her] clinical judgment, it was not a traumatic [cardiac] arrest"; and that her judgment was based upon the "[a]bsence of [tire] skid marks, [Mr. Rafaeli's] age [and] the condition of [his] body" (*id.* at 85-86). Thus, it is not clear that it was reasonable for Becker to rely exclusively upon the Traumatic Heart Attack Theory at trial, based upon nothing more than the ambulance call report, in view of the considerable weight of the testimony which Becker knew, or should have known, would be presented in support of the Precipitating Heart Attack Theory.

Defendants have also failed to establish that no evidence existed to support the Foreseeable Heart Attack Theory. Becker stated at his deposition that, in preparation for the trial of the Underlying Action, he had consulted with approximately six cardiologists as to "whether ... from the information that [he] had available, could they give an opinion as to whether or not the decease[d] had been suffering from cardiac problems, for such a length of time, with such seriousness that it would be dangerous for him to be driving a car" (Becker EBT, at 20). Becker further testified that, because no autopsy had been conducted on Mr. Rafaeli's body, none of the cardiologists could render such an opinion (*see id.* at 23). Thompson opines that -- because Becker was unable to obtain an expert medical opinion as to the condition of Mr. Rafaeli's heart at the time of the accident, and had no evidence to support the Foreseeable Heart Attack Theory -- "Becker did the right thing[] by presenting the best theory available to him based upon the evidence" (Thompson Affid., ¶ 16).

However, when Becker was asked at his deposition whether he could identify any of the physicians he had consulted, he replied that he could not (*see* Becker EBT, at 20, 46-47). Becker further indicated: that, although he had made notes when he talked with the physicians, he didn't know where the notes were; that, when the trial of the Underlying Action concluded, he had returned the case file to LMM without keeping copies of its contents for himself; that, when this action was commenced, he had contacted the attorney at LMM who had originally had the case in an attempt to get the file back; and that he couldn't recall whether that attorney had disposed of the file or not (*see id.* at 20-21). Becker stated at another point in his deposition that, when he "requested ... the return of the file, ... the file no longer existed, so that was the end of that" (*id.* at 61).[5]

Defendants have not submitted an affidavit by any medical expert to substantiate the proposition that -- with the benefit of whatever materials would have been available at the time of the trial -- a physician would have been unable to render an opinion as to the condition of Mr. Rafaeli's heart, the seriousness of his heart condition, or the foreseeability of his having a heart attack while driving a taxi at the time of the accident.[6] Whether Becker did consult with certain

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[5]Plaintiff's counsel alleges that Defendants have not complied with his repeated requests for: (1) copies of the materials contained in the case file which PBWBS maintained for the Underlying Action, and which Becker allegedly returned to LMM; and (2) information as to the whereabouts of any of the partners or members of LMM. Although Becker indicated at his deposition that he could provide plaintiff's counsel with an address for the LMM partner or member named Miller (*see* Becker EBT, at 104-105), Becker has allegedly not done so.

[6]Indeed, Thompson states in his affidavit that "Dr. Factor, in the underlying case, ... opined that ... by reading the medical documents in this case and without an autopsy he could, with a reasonable degree of medical certainty, gauge the condition of Mr. Joseph Rafaeli's heart" (Thompson Affid., ¶ 14).

Dr. Factor had, in fact, prepared an opinion letter dated July 6, 2002 -- a copy of which Becker presumably received from LMM -- which suggested that Mr. Rafaeli was, at least, subject to an increased risk of fatal cardiac arrhythmia due to his physical condition (*see* Perlman Affirm., Exs. 7, 8). The opinion letter states, inter alia: that Mr. Rafaeli "had a history of hypertension, hypercholesterolemia [and] ischemic heart disease with an abnormal electrocardiogram"; that he was "a heavy smoker (3 packs per day)"; that, "[b]ased on the records and the witness statement," it was Dr. Factor's opinion that Mr. Rafaeli had a "sudden ventricular arrhythmia"; that "[f]atal ventricular

unidentified cardiologists, and what they may have told him concerning their ability to offer an opinion as to the condition of Mr. Rafaeli's heart at the time of the accident, are facts exclusively within Becker's knowledge. Accordingly, Becker's self-serving testimony with regard to those facts is not alone sufficient to establish that no medical expert could legitimately have rendered an opinion concerning the condition of Mr. Rafaeli's heart at the time of the accident or, accordingly, that no evidence could have been obtained to support the Foreseeable Heart Attack Theory (*see e.g. Gaughan v Chase Manhattan Bank*, 204 AD2d 67, 68 [1st Dept 1994] [stating that, "where the knowledge of salient facts remains exclusively within the possession of the moving party, a motion for summary judgment must be denied"]). Nor does Thompson's opinion concerning those facts constitute probative evidence, since his opinion is, in that regard, merely "conclusory and the views are apparently based to a great extent on hearsay statements from unspecified witnesses as well as upon speculations on the part of the expert" (*Gardner v Ethier*, 173 AD2d 1002, 1003-1004 [3d Dept 1991]).

For the aforementioned reasons, Defendants have not established that Kapitanova will be unable to prove that they were negligent in presenting the Traumatic Heart Attack Theory at trial instead of, and to the exclusion of, the Foreseeable Heart Attack Theory. Defendants have also failed to establish that Kapitanova will be unable to prove that they were negligent in failing to: (1) obtain Mr. Rafaeli's pre-accident medical records; (2) name Mr. Rafaeli's estate as a defendant in the Underlying Action; and/or (3) adequately attack the Precipitating Heart Attack Theory by, inter alia, arranging for the appearance of an expert medical witness to oppose the testimony of Dr. Factor.

Kapitanova alleges that Becker was negligent in failing to obtain Mr. Rafaeli's pre-accident

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arrhythmia ... is a common outcome in patients with ischemic heart disease"; that, "as early as 6 years before his death, [Mr. Rafaeli] had a documented abnormal EKG, abnormal stress test, and evidence of a remote myocardial infarction"; that "[h]e also had hypertension and probable left ventricular hypertrophy (based on the EKG findings and the presence of an abnormal heart sound, e.g. S4 gallop)"; that "[l]eft ventricular hypertrophy, myocardial scarring, hypertension, and smoking are all independent risk factors for fatal cardiac arrhythmia"; and that it was Dr. Factor's opinion, "with a high degree of medical certainty, that Mr. Rafaeli had a sudden arrhythmic cardiac arrest due to ischemic heart disease" (Perlman Affirm., Ex. 8, Dr. Factor's Opinion Letter dated July 6, 2002).

medical records because the lack of those records prevented Becker from presenting the Foreseeable Heart Attack Theory of liability at the trial in the Underlying Action. Becker testified at his deposition that he made "every effort [he] could" to obtain Mr. Rafaeli's pre-accident medical records (Becker EBT, at 26). However, he was allegedly unable to obtain the records because neither Mr. Rafaeli nor his estate was named as a party in the Underlying Action (*see id.* at 28-29, 44). Becker testified to the effect that Mr. Rafaeli's pre-accident medical records would have been "irrelevant," in any event, because -- when he consulted with physicians for the purpose of obtaining an expert medical opinion concerning the condition of Mr. Rafaeli's heart at the time of the accident -- the physicians did not ask to see Mr. Rafaeli's pre-accident medical records, but only an autopsy report for Mr. Rafaeli, which did not exist (*see id.* at 45-46).

However, Defendants have failed to establish either that Mr. Rafaeli's pre-accident medical records would not have provided evidence supporting the Foreseeable Heart Attack Theory or that those records could not have been obtained. Becker's testimony to the effect that Mr. Rafaeli's pre-accident medical records would have been irrelevant is not alone sufficient to establish that fact since, as previously indicated, Becker's testimony -- based upon his alleged conversations with unidentified physicians -- concerns facts exclusively within Becker's knowledge. Moreover, Becker testified that:

> Because ... there was no autopsy on Mr. Rafaeli ... no doctor that I spoke to would offer an opinion concerning pre-existing cardiological disease without being able to look at the autopsy finding to determine whether or not ... the decease[d] had in fact suffered previous myocardial infarctions, ... whether or not there was heart ... damage or blockage [and] whether he had any surgery in the past.
>
> And without that information ..., no self respecting doctor could offer an opinion as to a pre-existing condition based upon the facts that were in this case.

(*id.* at 23). However, at least certain of that information could presumably have been obtained from Mr. Rafaeli's pre-accident medical records instead of from an autopsy report, e.g., whether Mr. Rafaeli had "had any surgery in the past" or "suffered previous myocardial infarctions" (*see* Perlman Affirm., Ex. 8, Dr. Factor's Opinion Letter dated July 6, 2002 [stating that Mr. Rafaeli had "a positive thallium scan in 1992 that demonstrated a remote inferior-septal wall myocardial

infarction"]). Thus, Defendants have not established that Mr. Rafaeli's pre-accident medical records, if they had been obtained, would not have provided evidence to support the Foreseeable Heart Attack Theory. As previously stated, Becker's deposition testimony appears to indicate that he was unable to obtain Mr. Rafaeli's pre-accident medical records because neither Mr. Rafaeli nor his estate was named as a defendant in the Underlying Action. However, Defendants have not adequately articulated any reason why the estate could not have been named as a defendant in the Underlying Action.[7]

Defendants assert that Becker was not negligent in failing to present an expert medical witness at trial to oppose the testimony of Dr. Factor because, again, Becker consulted with certain unidentified physicians, but was unable to locate a physician who would draw conclusions opposed to those of Dr. Factor without having an autopsy report. However, for the reasons previously indicated, Becker's unsubstantiated testimony concerning his consultations with unidentified physicians is insufficient to satisfy Defendants' burden, as the proponents of a summary judgment motion, of establishing that Kapitanova will be unable to prove that Defendants were negligent in failing to present an expert medical witness to oppose the testimony of Dr. Factor.

Defendants have not specifically addressed Kapitanova's contentions that Defendants were negligent in failing to: join in the action any other individuals or entities who knew or should have known about Mr. Rafaeli's heart condition and who permitted or enabled him to drive a taxi and/or provided him with a license which permitted him to do so; properly investigate and explain to Kapitanova the intricacies of her personal injury case; provide Russian translation to Kapitanova in Becker's conferences and phone calls with her; and insist upon and provide a Russian interpreter to Kapitanova during her trial and court appearances.

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[7]Thompson opines that it "would only have been relevant and appropriate" to name Mr. Rafaeli's estate as a defendant in the Underlying Action "if ... Becker had decided to pursue" the Foreseeable Heart Attack Theory (Thompson Affid., ¶ 18). However, inasmuch as Defendants have not established on this motion that it was reasonable not to pursue the Foreseeable Heart Attack Theory, Defendants have also failed to establish that it was reasonable not to name Mr. Rafaeli's estate as a defendant in the Underlying Action on that ground.

Defendants' motion for summary judgment is granted, however, to the extent of dismissing so much of Kapitanova's malpractice claim as alleges that Defendants committed malpractice by permitting the trial of the Underlying Action to be bifurcated into a liability phase and a damages phase. Kapitanova's bill of particulars asserts that a bifurcated trial "permitt[ed] or encourag[ed] courtroom dynamics that disfavored Plaintiff and reduced her chances to positively convey her limitations [and] needs ... at and during appearance of the parties before the trier of the facts" (Bill of Particulars, ¶¶ 4-5). Kapitanova is apparently arguing that, because the liability and damages phases would have been tried before different juries, the jurors in the damages phase would have been less sympathetic towards her injuries and, as a consequence, would have been likely to award a lesser amount of damages to her than a single jury which considered both liability and damages in a unified trial.

However, as Defendants argue, the same jury will generally handle both the liability phase and the damages phase of a bifurcated trial. Subsection 22 NYCRR 202.42 (e) provides, with respect to bifurcated trials, that, "[i]n the event of a plaintiff's verdict on the issue of liability ..., the damage phase of the trial shall be conducted immediately thereafter ***before the same judge and jury, unless the judge presiding over the trial, for reasons stated in the record, finds such procedures to be impracticable***" (emphasis added). Since Kapitanova's opposition papers do not oppose Defendants' argument with respect to bifurcation of the trial, or establish that a trial of the damages phase of the Underlying Action was likely to have been tried before a different jury than the liability phase, Kapitanova has failed to raise an issue of fact as to whether Defendants were negligent in permitting the trial to be bifurcated. Accordingly, Defendants have established that Kapitanova will be unable to prove the first element of her malpractice claim, but only insofar as the claim alleges that Defendants committed malpractice by permitting the trial of the Underlying Action to be bifurcated.

Defendants have failed to establish that Kapitanova will be unable to prove the second element of her malpractice claim, namely, that Defendants' purported negligence proximately caused

her alleged loss. Defendants do not separately and specifically address the element of proximate cause, but apparently rely upon the argument that, since Kapitanova cannot prove the negligence which is the first element of her claim, then, necessarily, she cannot prove that Defendants' negligence proximately caused her alleged loss. However, inasmuch as Defendants have failed to establish that Kapitanova will be unable to prove that Defendants were negligent, Defendants have also failed to establish that she will be unable to prove the second element of proximate cause.

Nor, finally, have Defendants sustained their prima facie burden of establishing that Kapitanova will be unable to prove the third element of her malpractice claim, i.e., that she sustained actual damages as a result of the alleged negligence. Defendants argue that Kapitanova will be unable to prove that she suffered any actual damages because: (1) even if Becker had recommended that she accept a $30,000 settlement offer which was made on behalf of Ms. Rafaeli in the Underlying Action, and Kapitanova had accepted that offer, all of that money would have gone to pay her medical expenses, so that she would have been left in the same position as she is in now; and (2) even if Kapitanova had received a substantial damages award in the Underlying Action, she would have been unable to actually collect any such award, because Ms. Rafaeli allegedly testified under oath, at the time of the trial, that she had no money.

Neither of those arguments has merit. Defendants' argument concerning the $30,000 settlement offer is both irrelevant, because Kapitanova does not allege that Defendants committed malpractice by counseling her not to accept that settlement offer, and also incorrect, because a plaintiff's non-receipt of a damages award which the plaintiff should have received would constitute an actual loss even if the award, had the plaintiff received it, would have gone to reduce the plaintiff's indebtedness. Defendants' argument based upon Ms. Rafaeli's purported statement that she had no money with which to pay a damages award to Kapitanova is unavailing, first, because Defendants have failed to establish the truth of that statement. Defendants have also failed to establish that the value of the taxi cab medallion could not have been reached to satisfy a judgment in the Underlying Action (*see* Becker EBT, at 50 [stating that "[m]y feeling all along was if we were

successful we had a reasonably good chance to get to either all or a good portion of the ... medallion value"], 58 [stating that "my thought [was that] if we can lev[y] on the medallion there would be more than enough to pay her bills, and at the same time she would have some recovery in this case"], 79 [stating that he had explained to Kapitanova "that if we win this case on liability, the chances were very, very ... good that negotiations would be commenced with respect to the medallion"]; *see also* Kapitanova Affid., at 2).

Accordingly, Defendants have failed to satisfy their prima facie burden of establishing that Kapitanova will be unable to prove any of the essential elements of her malpractice claim, except with respect to the portion of Kapitanova's claim which is based upon Defendants' failure to insist upon a unified rather than a bifurcated trial. With respect to the remainder of Kapitanova's claim, Defendants' failure to satisfy their burden as the proponents of a summary judgment motion -- by making "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" -- "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [citation, internal quotation marks and emphasis omitted]).

Kapitanova's motion for a trial preference is granted. Kapitanova asserts that a preference is warranted in the interests of justice because she suffers from substantial economic hardship and adverse psychological effects as a result of the injuries that she sustained in the accident. Kapitanova alleges with regard to her financial condition that, as a result of the accident, she has required repeated medical operations; that her medical expenses, after exhausting available no-fault benefits, have left her owing a balance of approximately $200,000.00; that she "earns what monies she can" by taking various odd jobs, including babysitting, cleaning apartments and "working as a saleswoman in 'Russian retail stores' in 'Russian neighborhoods'" (Perlman Affirm., ¶ 24; *see also* Perlman Reply Affirm., ¶ 21); and that she "gets by," but has no savings and no steady job (Perlman Reply Affirm., ¶ 21). Kapitanova alleges with regard to her psychological condition: that she has been emotionally and psychologically damaged by the accident and by the injuries, disfigurements

and personal reactions which flowed from it; that she is now 46 years old; that "[t]he psychological impact most probably will increase as [she] gets older" (Perlman Affirm., ¶ 42); and that she is unable to afford one-on-one psychiatric counseling or "any attempt at a partial revision of her emotional reaction to her scars and disfigurement" (*id.* at 41).

In considering an application for a trial preference on the ground that an early trial will serve the interests of justice, a court will examine "the unique circumstances" of the particular case (*Patterson v Anderson Ave. Assoc.*, 242 AD2d 430, 431 [1st Dept 1997]). Courts have granted such trial preferences where a plaintiff has adequately demonstrated that he or she was destitute or indigent and unable to work (*see e.g. Thompson v City of New York*, 140 AD2d 232, 233 [1st Dept 1988]; *Cenname v Lindholm*, 69 AD2d 848, 849 [2d Dept 1979]; or, in certain instances, where the plaintiff was not technically destitute or indigent, but suffered from extreme financial hardship (*see e.g. Patterson v Anderson Ave. Assoc.*, 242 AD2d at 431). Courts have also granted trial preferences, in certain instances, where the plaintiff was suffering from a severe injury that would worsen over time (*see e.g. Zangiacomi v Hood*, 193 AD2d 188, 195 [1st Dept 1993]).

It has been over 10 years since Kapitanova's accident. At the time of the accident, she was a clerk for Metropolitan Travel Agency and was married, neither of which is currently true. (Bill of Particulars ¶ 25; Perlman Affirm.¶ 25). While she is "not technically destitute or indigent" (Perlman Affirm., ¶ 41), she has no steady job and has refused to file for bankruptcy or to seek relief. (Perlman Reply Affirm. ¶ 21 - 23) Her substantial handicaps are documented in the medical report by Leonard Harrison, M.D.(Perlman Affirm. Exhibit J).

Plaintiff has a meritorious claim. As set forth above, defendants have failed to establish that Kapitanova will be unable to prove any of the essential elements of her claim.

Finally, plaintiff's counsel has submitted an "affidavit of exigency" which, together with two affirmations, sets forth that he will require open heart surgery; that his period of convalescence following the surgery is expected to be three months; that he is 75 years old and expects that, following the surgery, he "probably will be caused to retire and not renew [his] professional

activities" (Perlman Reply Affirm., ¶ 30); and that -- because he has "singular" knowledge of Kapitanova's case and because she is "totally uncomfortable with attorneys, given her particular history"(Perlman Affid. of Exigency, at 1) -- he wishes to try this case personally before his surgery, and "before most probably retiring" (Perlman Answering Affirm. to Def. Cross Motion, ¶ 22 [c]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for a trial preference (sequence number 002) is granted: and it is further

ORDERED that the motion by defendants Kenneth Becker and Panken, Besterman, Winer, Becker & Sherman, L.L.P. for summary judgment (sequence number 003) is granted, but only in part, to the extent that the portion of the complaint which alleges that those defendants committed malpractice by insisting upon or permitting the bifurcation of the trial of the action entitled *Kapitanova v Rafaeli* (Sup Ct, NY County, Cozzens, J., index no. 105439/98) is dismissed; and it is further

ORDERED that the motion by defendants Kenneth Becker and Panken, Besterman, Winer, Becker & Sherman, L.L.P. for summary judgment (sequence number 003) is otherwise denied.

Dated: 6/27/07

ENTER:

MARILYN SHAFER J.S.C.

J.S.C.

FILED
JUL 02 2007
COUNTY CLERK'S OFFICE
NEW YORK