

<p>Caputo v McCormack</p>
<p>2010 NY Slip Op 33752(U)</p>
<p>October 1, 2010</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 100825/2009</p>
<p>Judge: Judith N. McMahon</p>
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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JOHN CAPUTO and STEPHANIE CAPUTO,

Plaintiff(s)
-against-

**PATRICIA C. McCORMACK, GARY A. LEVINE,
and ACADEMIC DERMATOLOGY,**

Defendant(s).

-----X

DCM Part 5

Present:

HON. JUDITH N. MCMAHON

DECISION AND ORDER

Index No. 100825/2009

Motion No. 002

The following papers numbered 1 to 3 were used on this motion this 14th day of September, 2010:

[002]Notice of Motion [Defendant Dr. McCormack](Affirmations in Support)	1
Affirmation in Opposition [Plaintiff]	2
Reply Affirmation [Defendants]	3

On or about March 31, 2009, the plaintiffs, John Caputo and Stephanie Caputo, commenced this medical malpractice action against the defendants after John Caputo allegedly suffered injuries as a result of the alleged negligent administration of UVB light therapy by defendants. It is undisputed that plaintiff John Caputo was diagnosed with Crohn's disease for which he was prescribed Humira. Mr. Caputo thereafter developed a rash which was diagnosed as psoriasis and the treatment prescribed was UVB light therapy.

Plaintiff, John Caputo, first began UVB light therapy sessions by Dr. Henry Lee in New York, New York. On or about June 28, 2008, the plaintiff John Caputo began UVB light therapy sessions at defendant Dr. Patricia McCormack's offices and was seen by defendant, physicians assistant, Gary A. Levine. Mr. Caputo thereafter presented again to Dr. McCormack's office on July 1, and July 8, 2008, for a total of three UVB light therapy

sessions. According to the records, the first session lasted approximately 33 seconds and the two subsequent sessions lasted approximately 1 min and 6 seconds each. The crux of the dispute is whether the plaintiff was offered protective eye goggles for the sessions.

Thereafter, the plaintiff John Caputo contacted Dr. McCormack's office with complaints of eye pain, blurriness and light sensitivity. He was instructed, by defendant Gary A. Levine, to cease light therapy for a week and see an ophthalmologist. On July 10, 2008, Mr. Caputo presented to Dr. Ebby Elahi, an ophthalmologist, who diagnosed him as suffering from, *inter alia*, radiation conjunctivitis/maculopathy of both eyes. Dr. Elahi saw Mr. Caputo on one other occasion. Mr. Caputo also treated with Dr. Neil Cooper, O.D. and Dr. Ramin Mostafavi, M.D., for continuing problems regarding his eyes. At present, discovery is complete and the defendant Dr. Patricia McCormack is moving for summary judgment on the ground that she did not depart from accepted medical standards and, in fact, did provide plaintiff John Caputo with protective eyewear.

It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard “ the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference” (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent

upon the party opposing the motion to produce “evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). “The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage” (Deutsch v Chaglassian, 71 AD3d 718, 719 [2d Dept., 2010]).

Here, defendant Dr. McCormack has established her entitlement to summary judgment as a matter of law by establishing that she did not depart from accepted medical standards (Alvarez v Prospect Hosp., 68 NY2d at 324; Deutsch v Chaglassian, 71 AD3d 718, 719 [2d Dept., 2010]). It is undisputed that defendant Dr. McCormack never personally treated the plaintiff John Caputo. Dr. McCormack testified that she trained her staff on the requirements of eye protection during UVB treatment. She also indicated that patients were able to leave their goggles at the facility for return visits and upon a subsequent inspection found that plaintiff John Caputo’s goggles were still present at the facility. In addition, non-party witness Angela Klayman (an employee of Dr. McCormack), testified that she not only asked if plaintiff John Caputo was wearing his goggles for the treatment but actually observed him wearing the goggles during his July 8, 2008, session. Clearly, defendant Dr. McCormack established her entitlement to summary judgment.

In opposition, the plaintiff John Caputo testified that he never received any instructions on eye protection from defendant Dr. McCormack or her staff on any of his UVB visits. Further, plaintiff provides the expert opinion of Dr. Howard Schwartz who

opined “that the care rendered to JOHN CAPUTO by Dr. PATRICIA MCCORMACK was both substandard and a contributing cause of the injuries sustained by JOHN CAPUTO”. Dr. Schwartz delineates that the failure of Dr. McCormack’s staff to provide protective eyewear to the plaintiff was a deviation from accepted medical standards and that this deviation led to plaintiff John Caputo’s injuries, namely, pain, light sensitivity, tearing and puffiness. Where credibility issues exist this Court is constrained to deny summary judgment and permit a jury resolution (Martin v. Siegenfeld, 70 AD3d 786, 788 [2d Dept., 2010])[finding that “issues of credibility require a jury’s resolution”]; Rabinowitz v. Elimian, 55 AD3d 813, 814 [2d Dept., 2008]).

Accordingly, it is

ORDERED that defendant Patricia C. McCormack’s motion for summary judgment is hereby denied, and it is further
ORDERED that this case proceed immediately to trial.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: October 1, 2010

E N T E R,

Hon. Judith N. McMahon
Justice of the Supreme Court