

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

JANET SCHMIDT

Plaintiff

v.

JEFFREY POSNICK, M.D., et al.

Defendants

:

: 2006 CA 008796 M
: Judge Judith Macaluso
: Calendar 9

:

:

**ORDER DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

This court has before it defendants' Motion for Summary Judgment, plaintiff's opposition, defendants' reply, plaintiff's supplemental opposition, and defendants' supplemental reply. The court previously ruled on issues raised in the Motion but reserved on defendants' argument that the plaintiff is prohibited from pursuing what are essentially medical malpractice claims under the Consumer Protection Procedures Act (CPPA) as a matter of law. In the alternative, defendants argue that even if the court finds it appropriate to pursue medical malpractice claims under the CPPA, the plaintiff is unable to show that the defendants' intentionally or deliberately misled her, as the CPPA requires.

In response, plaintiff argues that a 2000 amendment to the statute allows claims regarding tortious conduct, including medical malpractice. In the alternative, plaintiff argues that she can pursue CPPA claims for the entrepreneurial aspects of her medical procedure separately from her claims for medical malpractice stemming from negligence. The plaintiff argues that the evidence she has provided shows that a jury may find that

defendants Posnick and the Posnick Center intentionally or deliberately misled her in order to gain a financial benefit.

I. Standard for Summary Judgment

To prevail on a motion for summary judgment, the moving party must establish, based upon the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact and that it is therefore entitled to judgment as a matter of law. *Grant v. May Department Stores Co.*, 786 A.2d 580, 583 (D.C. 2001); Super. Ct. Civ. R. 56(c). A trial court considering a motion for summary judgment must view the evidence in the light most favorable to the non-moving party and may grant the motion only if a reasonable jury, having drawn all reasonable inferences in favor of the non-moving party, could not find for the non-moving party based upon the evidence in the record. *Grant*, 786 A.2d at 583 (citing *Nader v. De Toledano*, 408 A.2d 31, 42 (D.C. 1979)); *Bailey v. District of Columbia*, 668 A.2d 812, 816 (D.C. 1995). The moving party has the initial burden of proving that there is no issue of material fact in genuine dispute. If the moving party carries its initial burden, then the non-moving party assumes the burden of establishing that there is an issue of material fact genuinely in dispute. *Grant*, 786 A.2d at 593 (citing *O'Donnell v. Associated Gen. Contractors of America, Inc.*, 645 A.2d 1084, 1086 (D.C. 1994)). To avoid conceding a fact, the non-moving party must come forward with a response showing that there is a genuine issue for trial. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970). If the non-moving party fails to establish that a genuine issue of material fact is in dispute, the moving party is entitled to summary judgment. *Adickes*, 398 U.S. at 160-61; *Boulton*, 808 A.2d at 502; Super. Ct. Civ. R. 56(e).

II. A Plaintiff May Pursue CPPA Claims in Addition to a Medical Malpractice Claim

In October 2000, the Council of the District of Columbia amended the CPPA so that the DCRA's jurisdiction was not linked to the scope of private civil litigation. The amended statute provides:

A person, whether acting for the interest of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia and may recover or obtain the following remedies:

- (A) treble damages, or \$ 1,500 per violation, whichever is greater, payable to the consumer;
- (B) reasonable attorney's fees;
- (C) punitive damages;
- (D) an injunction against the use of the unlawful trade practice;
- (E) in representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice, or
- (F) any other relief which the court deems proper.

D.C. Code 28-3905 (k) (1) (2001).

Until it was amended in 2000, the CPPA clearly did not apply to tortious conduct. Since the amendment, the Court of Appeals has noted that while the CPPA no longer prohibits actions under the statute for 'damages for personal injury of a tortious nature,' we cannot say. . . whether removal of the DCRA reference . . . is enough in itself, to allow actions for personal injury of a tortious nature under the statute as amended."

Caulfield v. Stark, 893 A.2d 970, fn. 9.

The court does not have to reach this issue here because plaintiff asserts that her “CPPA claim has nothing to do with Defendants’ negligence; it has everything to do with Dr. Posnick’s entrepreneurial activities and the manner in which he persuaded Plaintiff to purchase his medical services.”¹ Supplemental Opposition at p. 4. The court, therefore analyzes plaintiff’s claim on that basis. In Caulfield, the Court of Appeals noted that given its previous ruling that the legal profession is a trade practice, it saw no reason why the medical profession should not be considered a trade practice under the CPPA. 893 A.2d at 976; see also Banks v. District of Columbia Dept. of Consumer & Regulatory Affairs, 643 A.2d 433 (D.C. 1993).

Moreover, plaintiff does not allege that the alleged misrepresentation were negligent. To the contrary, she asserts intentional misrepresentation and material omission in Count III of her Complaint and limits those claims to actions that arose before the surgery. All of these alleged actions of intentional misrepresentation are commercial in their nature, and thus this court finds it most appropriate to apply the “Entrepreneurial-Nexus Test”.² If the plaintiff successfully meets the test, she may only proceed on damages directly caused by the alleged “*unlawful trade practices* undertaken by Defendant Jeffrey C. Posnick, M.D. *prior* to the December 2003 surgery – in his efforts and intentional misrepresentations made in order to induce Plaintiff to retain him as a surgeon.” Plaintiff’s Supplement Opposition, p. 3.

¹ In looking at D.C. Code § 28-3901(a)(6), trade practice is defined as any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services.” As such, this court does not believe that all tortious conduct, including injuries cause by unintentional negligence, necessarily fall under the CPPA.

² Although the pleadings discuss pursuing CPPA claims for all of the alleged medical malpractice, including the alleged negligence, Count III of the complaint only alleges CPPA violations for actions taken by Dr. Posnick and the Posnick Center in arranging and soliciting the surgery based on a theory of intentional misrepresentation and material omission.

Pursuing the CPPA claims for unlawful trade practices under a theory of intentional misrepresentations makes Dorn v. McTigue, 121 F.Supp.2d 17 (D.D.C. 2000) (Dorn I) and Dorn v. McTigue, 157 Supp.2d 37 (D.D.C. 2001) (Dorn II) the guiding cases. Both cases have been cited as authoritative by the Court of Appeals. See Caulfield, 893 A.2d 970. The Entrepreneurial-Nexus Test attempts to separate the entrepreneurial side of the medical profession from the professional side. It seeks to separate claims of medical malpractice that address the physician's performance from claims that address the physician's actions for financial gain, such as false advertising. Caulfield at 978; Dorn II at 48. In this case, for example, the plaintiff may pursue claims for damages she believes she suffered by the alleged misrepresentation of Dr. Posnick. However, the plaintiff may not simply argue that because Dr. Posnick made intentional misrepresentations, all acts of negligence by him whether or not they are related to the misrepresentations, can be pursued under the CPPA. She must show that a certain action taken by Dr. Posnick for the purpose of financial gain directly damaged her and prove those damages separately from any damage caused by his alleged negligence.

III. There is Sufficient Evidence to Sustain the Plaintiff's Claims of Intentional Misrepresentation at this Stage of the Litigation

Defendants argue that the plaintiff has not provided any support for her argument that Dr. Posnick intentionally misled her. At this juncture, the court must view the evidence in the light most favorable to the non-movant. Accordingly, viewed in that light, at this juncture, plaintiff's evidence is sufficient to meet the entrepreneurial-nexus test. The evidence includes alleged solicited through advertising, "denigration" of other physicians, and email representations by Dr. Posnick to the plaintiff.

IV. Damages

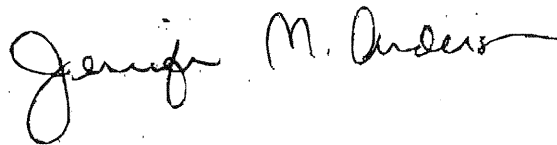
As stated at the April 18, 2008 hearing on this matter, the issue of how damages are assessed for the CPPA claim will be addressed at trial once the court has heard the evidence and understands fully what damages plaintiff alleges are a result of the alleged intentional misrepresentation.

V. Conclusion

Accordingly, it is this 4th day of February 2009, hereby

ORDERED that defendants' Motion is **DENIED IN PART**; and it is further

ORDERED that plaintiff may proceed on CPPA allegations contained in Count III of the complaint solely for those action that meet that the Entrepreneurial-Nexus test and only against defendants Posnick and the Posnick center.



Judge Jennifer M. Anderson
Signed in chambers