

**Abony v TLC Laser Eye Centers, Inc.**

2007 NY Slip Op 34294(U)

December 28, 2007

Supreme Court, New York County

Docket Number: 0100158/2004

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM  
*Justice*

PART 13

Lorne Abony

INDEX NO. 100158/04

MOTION DATE 12/8/07

- v -

MOTION SEQ. NO. 17

TLC Laser Eye Centers, Inc. et al.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by defendants Laser and Corneal Associates, P.C. and Mark G. Speaker, M.D., PhD to preclude plaintiff's proposed liability expert, S. Percy Amoils, M.D., FRCS, from testifying at trial or, alternatively, to conduct a hearing to determine whether Dr. Amoils is sufficiently familiar with the standard of care for ophthalmologists performing LASIK surgery in New York to testify at trial, is denied.

In this medical malpractice action, plaintiff alleges, among other things, that defendants failed to properly evaluate him as a candidate for enhancement LASIK surgery on his left eye in January 2002 and that such enhancement surgery was contraindicated because corneal topographies showed evidence of a preexisting condition known as Pellucid Marginal Degeneration or PMD. Movants contend that Dr. Amoils, a South African ophthalmologist who is licensed to practice medicine in New York, should be precluded as a matter of

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

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PAPERS NUMBERED  
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law from testifying as an expert because he has never practiced medicine in the United States, is not certified by the American Board of Ophthalmology and has never performed LASIK surgery here and therefore is not qualified to proffer opinions as to the applicable standard of care in ophthalmology and LASIK in the State of New York.

To support their contentions, movants cite cases requiring that doctors accused of malpractice be held to the degree of learning and skill ordinarily possessed by physicians and surgeons "in the locality" where the doctor practices (see generally Pike v. Honsinger, 155 NY 201 [1898]). But a medical professional's "competency to testify as an expert [is] within the discretion of the trial court" and the weight to be given his testimony is for the jury (Selleck v. Board of Education of Central School District No. 1, 276 AD 263, 267 [1949], citing People v. Rice, 159 NY 400 [1899]) (Canadian doctor permitted to testify as an expert in a New York State case). Further, it has been held to be reversible error not to allow an expert witness to testify to diagnostic standards and treatment available decades before the witness graduated from medical school (Keane v. Sloan-Kettering Institute for Cancer Research, 96 AD2d 505 [1983]), or to the standards of care used in laser surgery although the witness had never performed the procedure (Arlola v. Long, 197 AD2d 605 [1993]).

In support of their motion, movants submit the affirmation of Robert C. Cykiert, M.D., a board certified ophthalmologist, licensed to practice medicine in New York State, who maintains a practice specializing in ophthalmology in New York City. Dr. Cykiert states that he has reviewed Dr. Amolls's curriculum vitae and plaintiff's CPLR 3101(d) expert response and opines that Dr. Amolls "is not sufficiently familiar with the standard of care in the community for ophthalmologists performing LASIK surgery in New York to qualify as an expert or offer testimony as an expert witness at trial." Dr. Cykiert points out that maintaining a license to practice medicine in New York does not

mean that Dr. Amoils is sufficiently familiar with the appropriate standard of care in New York for ophthalmologists performing LASIK surgery, that the requirements for licensing in South Africa, where Dr. Amoils practices, are different from the licensing requirements and standards of care applicable in the U.S. and specifically in New York State, that his lack of board certification indicates that Dr. Amoils has not demonstrated acceptable training and experience in the specialty of ophthalmology, that Dr. Amoils's clinical fellowship at Massachusetts Eye & Ear Infirmary in the mid-1960's predates the existence of refractive surgery and FDA approval in 1995 of the excimer laser for refractive surgery used in this case and that U.S. ophthalmologists are prohibited from purchasing lasers from other countries because of differences in the manufacture of the lasers and because they fail to comply with FDA-approved standards.

Plaintiff opposes these assertions with the affirmation of Dr. Amoils in which he counters that he is qualified to serve as an expert witness in this case as he is fully familiar with the standards of care in the New York ophthalmological community regarding performance of LASIK surgery and has previously qualified to testify as an expert witness in Schiffer v. Speaker, Index No. 101191/03, a case tried before Justice Alice Schlesinger in New York County Supreme Court in July 2005. Schiffer involved issues substantially similar to the ones in this case.

Dr. Amoils also states, among other things, that he has been performing refractive surgery since 1987 and has performed more than 9,000 laser refractive surgical procedures in South Africa, has published 13 peer-reviewed papers dedicated to the cornea in journals published in the U.S. and South Africa, including eight peer-reviewed papers concerning laser refractive surgery and its complications with special emphasis on iatrogenic Keratectasia, has delivered dozens of specialized corneal lectures throughout the world, more than half of which were given in the U.S., and has been a referee for two

journals on refractive surgery which are published in the U.S. Regarding board certification, Dr. Amoils states that he is a Fellow of the Royal College of Surgeons, whose eligibility requirements are equivalent to those imposed by the American Board of Ophthalmology for board certification, and that he was granted a license to practice medicine in New York in reciprocity for his degree as a Fellow in the Royal College of Surgeons. Dr. Amoils further points out that not practicing medicine in the U.S. and the differences, if any, in the standards for the approval of lasers and other surgical equipment in the U.S. and South Africa or the different protocols and parameters for how eye surgery is performed in each country are irrelevant to his capability to analyze whether defendants departed from accepted ophthalmological standards of care in this case. According to Dr. Amoils, "[s]uch matters are irrelevant because the issue in this case is not whether the defendants correctly operated the LASIK machine or used improper equipment, but whether LASIK surgery itself was contraindicated for Mr. Abony.... The anatomy and physiology of [the] human eye and its diseases is the same throughout the world. A surgical procedure involving the eye that is medically contraindicated due to a preexisting condition in South Africa is medically contraindicated in the United States and vice versa." This court agrees.

The motion must be denied because movants have failed to show that Dr. Amoils is not familiar with the standards of care for ophthalmologists performing LASIK surgery in New York or that a hearing is required to determine whether he is. To the contrary, based upon the record here, there seems little doubt of Dr. Amoils's qualifications to testify as an expert in this case.

Accordingly, it is

ORDERED that the motion is denied.

Dated: December 28, 2007

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 J.S.

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