

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Diamond v. Sokol](#), S.D.N.Y., December 27, 2006
185 A.D.2d 690, 586 N.Y.S.2d 80

Dona M. Kenney et al., Respondents,
v.
Aaron M. Zimmerman et al., Appellants.

Supreme Court, Appellate Division,
Fourth Department, New York
743
(July 14, 1992)

CITE TITLE AS: Kenney v Zimmerman

HEADNOTE

ATTORNEY AND CLIENT MALPRACTICE

() Following jury trial in personal injury action, plaintiff was awarded judgment for \$30,000; Appellate Division reversed and granted new trial on ground testimony of plaintiff's treating physician that plaintiff suffered permanent neck injury should have been precluded because plaintiff did not mention this specific injury in her bill of particulars and did not timely disclose doctor's findings as required by court rules; second trial ended with verdict of no cause of action, based upon jury's finding plaintiff failed to establish 'serious injury' under Insurance Law --- In this legal malpractice action, summary judgment was properly granted on issue of liability against plaintiffs' counsel at first trial; failure to comply with well-established disclosure rules fell below level of skill and knowledge possessed by other members of profession in community; if attorney had not been negligent, moreover, plaintiff would not have lost \$30,000 verdict or been exposed to uncertainties of new trial --- With respect to plaintiffs' counsel at second trial, at most, failure to call one of plaintiff's treating physicians, was error of judgment by attorney, which does not rise to level of malpractice; record contains conflicting evidence concerning whether this attorney was negligent in her preparation and investigation of case and whether negligence on her part was proximate cause of plaintiff's loss; summary judgment, therefore, was improperly granted against second attorney.

Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: This legal malpractice action arises from defendants' representation of plaintiffs in a personal injury action. Following a jury trial, plaintiff Dona Kenney was awarded judgment for \$30,000. This court reversed the judgment and granted a new trial on the ground that the testimony of plaintiff's treating physician that plaintiff suffered a permanent neck injury should have been precluded "because plaintiff did not mention this specific injury in her bill of particulars ([CPLR 3042 \[c\]](#)), and did not timely disclose the doctor's findings as required by this department's rules (22 NYCRR 1024.25 [c], [e]; [Cramer v Toledo Scale Co.](#), 89 AD2d 1059, 1060)" ([Kenney v Amodei](#), 119 AD2d 1006). The second trial ended with a verdict of no cause of action, based upon the jury's finding that plaintiff failed to establish a *691 "serious injury" under the Insurance Law (*see*, [Insurance Law § 5102 \[d\]](#) [former § 671 (4)]).

Summary judgment was properly granted on the issue of liability against defendant Zimmerman, plaintiffs' counsel at the first trial. "Though an attorney may not be liable for errors of judgment ... he may be liable for his ignorance of the rules of practice ([Von Wallhoffen v. Newcombe](#), 10 Hun 236, 240)" ([Siegel v Kranis](#), 29 AD2d 477, 479). The failure to comply with well-established disclosure rules fell below the level of skill and knowledge possessed by other members of the profession in the community (*see*, [Logalbo v Plishkin, Rubano & Baum](#), 163 AD2d 511, 513, *lv dismissed* 77 NY2d 940). If Zimmerman had not been negligent, moreover, plaintiff would not have lost a \$30,000 verdict or been exposed to the uncertainties of a new trial. Thus, the record establishes "not only that the attorney was negligent, but also that 'but for' the attorney's negligence plaintiff would have prevailed in the underlying action" ([Pacesetter Communications Corp. v Solin & Breindel](#), 150 AD2d 232, 234, *lv dismissed* 74 NY2d 892).

We reach a different conclusion with respect to defendant Rojas, plaintiffs' counsel at the second trial. At most, the failure to call Dr. Delahanty, one of plaintiff's treating physicians, was "an error of judgment by [Rojas], which does not rise to the level of malpractice" ([Rosner v Paley](#), 65 NY2d 736, 738). The record contains conflicting evidence concerning whether Rojas was negligent in her

preparation and investigation of the case and whether any negligence on her part was the proximate cause of plaintiff's loss. Summary judgment, therefore, was improperly granted against Rojas. (Appeals from Order of Supreme Court, Onondaga County, Mordue, J.-- Summary Judgment.)

Present--Boomer, J. P., Green, Balio, Boehm and Fallon, JJ.

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