



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

THOMAS BAIRD, :
 :
Plaintiff :
 :
v. : C.A. No.: N11C-09-241 RRC
 :
FRANK R. OWCZAREK, M.D., and : TRIAL BY JURY DEMANDED
EYE CARE OF DELAWARE, LLC, :
 :
Defendants :

FIRST AMENDED COMPLAINT

INTRODUCTION

1. This is a case of LASIK eye surgery malpractice, and continuous negligent treatment, that resulted in the patient being left legally blind in one eye.

2. From January 2004, through October 2009, Defendants Frank R. Owczarek, M.D. (“Dr. Owczarek”), and his professional corporation, Eye Care of Delaware, LLC (“ECOD”) (collectively “Defendants”), embarked on a course of continuous negligent treatment, including performing repeated, contraindicated LASIK surgeries on the eyes of Plaintiff Thomas Baird (“Plaintiff”).

3. In January 2004, Defendants told Plaintiff that he was a good candidate for this elective surgery, when in fact he was not. On or about January 27, 2004, Defendants performed their initial negligent LASIK surgery upon both of Plaintiff’s eyes.

4. When the initial surgery failed, leaving Plaintiff with visual acuity worse than 20/50 and 20/60, in his right and left eye, respectively, Defendants performed additional surgery on October 14, 2009. In the language of the LASIK industry, this corrective surgery is euphemistically referred to as an “enhancement.” Defendants advised Plaintiff that

enhancements are relatively common within the LASIK industry, and Plaintiff had no reason to be concerned.

5. However, the patient's pre-enhancement eye examination revealed clear signs of kerataconus, a vision threatening disease, for which LASIK surgery is contraindicated. Defendants missed or ignored these warnings, and forged ahead with the enhancement of Plaintiff's left eye. However, instead of making the patient better, they made him worse, and made him legally blind, with 20/200 visual acuity in his left eye. Neither surgery was appropriate. As a result, the patient has post-LASIK ectasia in both eyes, with the left eye worse than the right.

PARTIES

6. Plaintiff Thomas Baird is an adult resident of the State of Delaware, residing at 206 Hazlett Avenue, New Castle, Delaware 19720.

7. Defendant Dr. Owczarek is an adult resident of the State of Delaware, who at all times complained of herein, was licensed to practice medicine in the State of Delaware.

8. Defendant Dr. Owczarek, at all times complained of herein, maintained his principal place of business located at 4102 Ogletown Stanton Road, Newark, Delaware 19713.

9. Defendant ECOD is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business located at 4102 Ogletown Stanton Road, Newark, Delaware 19713.

COUNT I: CONTINUOUS NEGLIGENCE OF DR. OWCZAREK AND ECOD

10. Plaintiff repeats, realleges, adopts and incorporates by reference paragraphs 1 through 9 of this Complaint as though fully set forth herein.

11. At all times of which Plaintiff complains, Defendant Dr. Owczarek, was licensed to provide ophthalmologic services in the State of Delaware, and represented to the public and to Plaintiff possession of that degree of skill, knowledge and ability ordinarily possessed by a reasonably competent physician providing ophthalmologic services.

12. At all times of which Plaintiff complains, Defendant Dr. Owczarek, was acting individually and/or as the real, apparent and/or ostensible agent, servant and/or employee of the Defendant, ECOD, within the scope of his employment.

13. Defendants Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, owed to Plaintiff a duty to exercise that degree of care, skill and judgment ordinarily expected of a reasonably competent practitioner of his chosen specialty acting in the same or similar circumstances, which duty included the performance of adequate and proper tests and procedures to determine the nature and severity of the conditions of Plaintiff; the careful diagnosis of such conditions; the employment of appropriate procedures and treatments to correct such conditions; the continuous evaluation of the effects of such treatments; the adjustment of the course of treatment in response to such evaluations; and the appropriate notification to Plaintiff of the various alternatives and risks involved in various modalities of treatment.

14. Defendants embarked upon their course of continuous negligent treatment in January 2004.

15. On or about January 16, 2004, Plaintiff, Thomas Baird, presented to the facility of Defendant ECOD, and came under the care of the Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees.

16. On or about January 27, 2004, Plaintiff, Thomas Baird, came under the care and treatment of Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, for the purpose of undergoing refractive surgery on both eyes, known as LASIK surgery.

17. Defendants failed to recognize that due to the condition of Plaintiff's eyes, including without limitation, suspicion for keratoconus and keratoconus, Plaintiff was not a suitable candidate for LASIK surgery. Indeed, their own form of informed consent provides: "I understand the treatment should not be performed on persons with signs of keratoconus since eyes with this condition may have unstable corneas." However, Defendants never informed Plaintiff that he had signs of keratoconus.

18. The standard of care contemplates that after the patient's vision stabilizes, the LASIK surgeon will see the patient only if the patient has worsened symptoms or complaints. This can occur years later.

19. The time bomb of post-LASIK ectasia can have a long fuse. One prominent study reports that the onset of post-LASIK ectasia can be delayed for as long as 45 months. J. Bradley Randleman, M.D., *et al.*, *Risk Factors and Prognosis for Corneal Ectasia after LASIK*, *Ophthalmology*, Vol. 110, No. 2, February 2003 (noting that "one patient maintained a relatively stable topography and acuity for more than 4 years before the onset of ectasia.")

20. In this case, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, explained to Plaintiff that many patients require corrective surgery, or what is euphemistically referred to as an "enhancement," often a few years in the future.

21. Defendants instructed Plaintiff that he need not return after his vision stabilizes. Defendants further instructed Mr. Baird that his vision might change in the future, in which case, Mr. Baird should return as part of the treatment plan for the initial LASIK surgery.

22. The course of negligent treatment continued through September 30, 2009, when Plaintiff presented to the facility of Defendant ECOD, complaining of decreased visual acuity. Once again, Defendants explained that many LASIK patients require subsequent enhancement surgery, to correct decreased visual acuity after initial LASIK surgery.

23. Accordingly, on or about October 14, 2009, Plaintiff, Thomas Baird, came under the continued care and treatment of Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, for the purpose of undergoing corrective refractive surgery, on his left eye

24. Again, Defendants failed to recognize that Plaintiff was not a suitable candidate for LASIK surgery.

25. Again, by performing LASIK surgery on Plaintiff's left eye, on or about October 14, 2009, instead of "enhancing" his vision, Defendants made it worse.

26. As a consequence of the LASIK surgeries performed by Defendants, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, Plaintiff, Thomas Baird, suffered post-LASIK ectasia.

27. Individuals with post-LASIK ectasia, including Plaintiff, Thomas Baird, suffer from problems related not only to the amount of their vision, or visual acuity, but also to the quality of their vision, including without limitation, halos, blurry vision, glare, ghosting, starbursts, double vision, light sensitivity, contrast sensitivity, loss of depth perception, trouble driving, especially at night, headaches, dry eyes, and foreign body sensation.

28. Plaintiff, Thomas Baird, further alleges that as a result of the inadequate, inappropriate and continuous negligent medical care, treatment and management by Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, Plaintiff, Thomas Baird, was severely injured and damaged, including, but not necessarily limited to, loss of vision.

29. The continuous negligent and careless acts and omissions of Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, include, but are not limited to:

- a. failing to employ adequate diagnostic procedures and tests to determine the nature and severity of the Plaintiff's conditions;
- b. failing to diagnose such conditions carefully;
- c. failing to employ appropriate treatments and procedures to correct such conditions;
- d. failing to carefully and thoroughly evaluate the effects of the chosen treatments;
- e. failing to adjust such chosen treatments in response to evaluation of the effects of prior treatments;
- f. failing to recognize that due to the condition of Plaintiff's eyes, each of the LASIK surgeries performed was contraindicated;
- g. failing to train, supervise and/or manage their agents, servants and/or employees;
- h. failing to appropriately and adequately obtain an informed consent from the Plaintiff for each of the surgeries; and
- i. being otherwise negligent and careless.

30. Plaintiff, Thomas Baird, further alleges that as a result of the continuous negligent and careless acts and omissions of Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, Plaintiff,

Thomas Baird, experienced a severe shock to his nerves, pain, mental anguish, unnecessary procedures, unnecessary hospital and medical care and expenses, loss of earnings and earning capacity and was otherwise injured and damaged, including, but not necessarily limited to, loss of vision.

31. Plaintiff further alleges that as a result of the continuous negligence of Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, he was forced to incur and will continue to incur in the future, costs and expenses for medical care, which were and will be provided to Plaintiff, Thomas Baird, in the treatment of the Plaintiff's injuries and damages.

32. Plaintiff, Thomas Baird, further alleges that all of these injuries and damages were caused by the continuous negligent acts and omissions of Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, without any negligence or want of due care on the part of Plaintiff thereunto contributing.

COUNT II: FAILURE TO INFORM OF DR. OWCZAREK AND ECOD

33. Plaintiff, Thomas Baird, repeats, realleges, adopts and incorporates by reference paragraphs 1 through 32 of this Complaint as though fully set forth herein.

34. Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, owed to Plaintiff, Thomas Baird, the duty of appropriate notification to Plaintiff of the various alternatives and risks involved in various modalities of treatment.

35. Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, were continuously negligent in

failing adequately and appropriately to explain the proposed procedures or treatment, to warn of material risks or dangers inherent in or collateral to the proposed procedures or treatment, to discuss with the patient the viable medical alternatives to the proposed procedures or treatment, to allow the patient to make an intelligent and informed choice about whether or not to undergo the proposed procedures or treatment, to inform the patient promptly of material changes in the medical circumstances, to obtain an informed consent from Plaintiff, Thomas Baird, and were otherwise continuously negligent.

36. If Plaintiff, Thomas Baird, had been informed properly of the foregoing risks, benefits and alternatives to his LASIK surgery and enhancement procedures, he would not have agreed to either procedure, both of which were elective and non-emergent procedures.

37. As a result of the continuous negligence of Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, Plaintiff, Thomas Baird, experienced a severe shock to his nerves and nervous system, pain, mental anguish, unnecessary procedures, unnecessary hospital and medical care and expenses, loss of earnings and earning capacity and was otherwise injured and damaged including but not limited to a loss of vision.

38. Plaintiff further alleges that as a result of the continuous negligence of Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or ostensible agents, servants and/or employees, he was forced to incur and will continue to incur in the future, costs and expenses for medical care, which were and will be provided to Plaintiff, Thomas Baird, in the treatment of Plaintiff's injuries and damages.

39. All of these injuries and damages were caused by the continuous negligence of Defendants, Dr. Owczarek and ECOD, individually and/or through their real, apparent and/or

ostensible agents, servants and/or employees, without any negligence on the part of Plaintiff thereunto contributing.

WHEREFORE, Plaintiff demands judgment against Defendants for compensatory damages in an amount to be determined by a jury pursuant to Title 10 Delaware Code Section 3724, plus costs and prejudgment and postjudgment interest.

Dated: November 28, 2011

/s/ Bruce L. Hudson

Bruce L. Hudson, Esq.

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Application for Admission Pro Hac Vice Pending

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