

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

SCOTT CZARNIAK and )  
ADRIENNE CZARNIAK, )  
 )  
Plaintiffs, )  
 )  
vs. ) 1:10-cv-03115-RPM  
 )  
20/20 INSTITUTE, LLC, and )  
MATTHEW K. CHANG, )  
 )  
Defendants. )

---

MOTIONS HEARING  
TRANSCRIPT OF PROCEEDINGS

---

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 1:55 p.m. on the 24th day of September, 2012, in Courtroom A, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiffs: Keith Francis Cross, Esq.  
Cross & Bennett, LLC  
108 East St. Vrain, #20  
Colorado Springs, Colorado 80903

Todd Jay Krouner, Esq.  
Law Office of Todd Jay Krouner  
93 North Greeley Avenue  
Chappaqua, NY 10514-3480

Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

APPEARANCES: (Continued)

For 20/20 Institute, LLC: Benjamin Paul Swartzendruber,  
Esq.  
Grund Dagner, P.C.  
1660 Lincoln Street, #2800  
Denver, CO 80264

For Matthew K. Chang: C. Gregory Tiemeier, Esq.  
Tiemeier & Stich, P.C.  
1000 East 16th Avenue  
Denver, CO 80218

Max S. Stich, Esq.  
Tiemeier & Stich, P.C.  
1000 East 16th Avenue  
Denver, CO 80218

P R O C E E D I N G S

1  
2 (At 1:55 p.m. on September 24, 2012, in the United  
3 States District Court at Denver, Colorado, before the  
4 HONORABLE RICHARD P. MATSCH, U.S. District Judge, with  
5 counsel for the parties present, the following proceedings  
6 were had:)

7 THE COURT: Please be seated.

8 We are here in Civil Number 10-cv-3115, Scott  
9 Czarniak and Adrienne Czarniak against 20/20 Institute, LLC,  
10 and Matthew Chang, MD. And we are here on the motions of the  
11 defendants for summary judgment of dismissal of the second  
12 and third claims for relief on the alleged violation of the  
13 Colorado Consumer Protection Act and fraud misrepresentation.

14 So for the plaintiffs we have Mr. Krouner and Mr.  
15 Cross.

16 MR. KROUNER: Good afternoon, Your Honor.

17 THE COURT: Afternoon.

18 And for 20/20, Mr. Swartzendruber.

19 MR. SWARTZENDRUBER: Good afternoon.

20 THE COURT: And for Dr. Chang, Mr. Tiemeier.

21 MR. TIEMEIER: Yes, Your Honor.

22 THE COURT: All right, let me--and, you know, this has  
23 been fully briefed, and there are a lot of exhibits with  
24 respect to these two claims, but I want to--the case overall,  
25 of course, is also a medical negligence case with this

1 question--and it's not disputed, as I understand it, that  
2 this machine was incorrectly calibrated. I don't know if  
3 calibrated is the right word, but the settings on the  
4 machine. There was an error. It didn't get caught. As a  
5 result, the proper setting was not used, and Scott Czarniak  
6 is contending that, as result of that, he had to have  
7 corrective surgery done elsewhere and also has permanent  
8 results.

9           So before discussing the merits of these two  
10 claims, I want to ask plaintiffs' counsel about the case  
11 overall, if you will come up. As I understand the claims in  
12 question, the position of this plaintiff is that if he had  
13 not seen the website and the information on the website and  
14 also Dr. Chang's biography on the website, he was going to do  
15 LASIK surgery, because he knew from relatives and a lot of  
16 other people that it's very beneficial, but that he picked  
17 the 20/20 Institute as a result of what he saw on the  
18 website, and if he hadn't seen that, he wouldn't have gone to  
19 20/20 Institute for the surgery. Is that right?

20           MR. CROSS: That's correct.

21           THE COURT: So what are the other damages then? Why do  
22 we have these other claims? Is it simply primarily the  
23 Colorado statute for three times actual damages?

24           MR. CROSS: Well, the Colorado Supreme Court has said  
25 that you can also make claims under the Colorado Consumer

1 Protection Act. And the damages may appear to be  
2 duplicative, but, yeah, if we have a wanton and willful and  
3 if we can prove wanton and willful--and we think we do have  
4 enough to prove that--we can get treble damages, and we also  
5 are entitled to attorney's fees and expenses.

6 THE COURT: Has this Colorado Consumer Protection Act  
7 been applied to personal injury cases?

8 MR. CROSS: It has been applied in Crowe v. Tull, which  
9 is, we think, on all fours with our case. In a legal  
10 malpractice case where the plaintiff also--

11 THE COURT: I'm not asking about that. I'm asking about  
12 the damages being the medical injury. I don't know. You  
13 know, the statute is not clear as to what it's talking about.  
14 It says three times the amount of actual damages sustained.  
15 Of course, a more normal application of the statute is  
16 economic losses where there's a purchase or something. But  
17 specifically in this case, what is it that supports three  
18 times damages in this case?

19 MR. CROSS: Well, we feel that--

20 THE COURT: I mean, the damages being what you could  
21 prove on the medical negligence?

22 MR. CROSS: Yes, which would include the economic  
23 damages specifically in his problems that he's had--

24 THE COURT: Well, I'm not talking about the economic  
25 damages. I'm talking about the physical injury.

1 MR. CROSS: Yes, physical injury.

2 THE COURT: Well, where has it been applied to that?

3 MR. CROSS: There's a case called Martinez, which  
4 discussed the applicability, and it's cited in the--

5 THE COURT: Well, what's the holding of the case? I  
6 don't know the case.

7 MR. CROSS: I don't know that there's a case that has  
8 specifically addressed medical malpractice.

9 THE COURT: That's my question.

10 MR. CROSS: Okay. We feel that the damages are  
11 everything that has ensued from the mistake that they made  
12 and the fact that he went in there in the first place, that  
13 that is the first in the chain of causation for damages.

14 THE COURT: I understand. That's what I said, so--okay.  
15 Well, this may be the first. I don't know. I'll hear from  
16 the defendants. Oh, on the striking of the affidavit of Gary  
17 Bircham, I'm denying that. He's not presented as an expert  
18 witness. His affidavit just goes to--I show--these forms and  
19 I--

20 MR. CROSS: Can I make one point on that? The--

21 THE COURT: I'm denying your motion.

22 MR. CROSS: I understand that, but could I ask for a  
23 deposition of Dr. Bircham, because we had no idea he was  
24 going to say this?

25 THE COURT: We'll get to that.

1 MR. CROSS: Okay.

2 THE COURT: All right, 20/20 Institute.

3 MR. SWARTZENDRUBER: Good afternoon, Your Honor.

4 THE COURT: Good afternoon.

5 MR. SWARTZENDRUBER: For the record, this is Dr. Danzo  
6 of 20/20 Institute today.

7 THE COURT: Owner, principal owner.

8 MR. DANZO: Yes.

9 MR. SWARTZENDRUBER: To answer your question posed to  
10 plaintiffs' counsel, Your Honor, there are no damages other  
11 than what's related to the error in this case. It's a  
12 medical negligence case. The error has been admitted.

13 THE COURT: Well, I know the consequences of the error  
14 are disputed, of course, with respect to what is the impact  
15 and whether he has a permanent impairment and all those  
16 things. But what is your position with--you know, the  
17 plaintiff wants to get treble damages.

18 MR. SWARTZENDRUBER: Well, to get treble damages you  
19 have to establish willful and wanton conduct, and there just  
20 simply is nothing that rises to that level. And, frankly,  
21 there is nothing that rises to the level of deception or any  
22 misrepresentation here.

23 THE COURT: Well, that's what we're here about, the  
24 deception.

25 MR. SWARTZENDRUBER: Right. And so plaintiffs are

1 arguing essentially, what I'll say, are four different things  
2 about deception: one, the co-management arrangement they  
3 were not aware of apparently; that there was a guarantee that  
4 Mr. Czarniak would have 20/20 vision after this procedure;  
5 that 20/20 Institute misrepresented that it was the official  
6 LASIK provider of the Avalanche and the Colts; and that 20/20  
7 Institute's corporate name is inherently deceptive.

8           To those points--well, first, the elements of the  
9 CCPA we are--

10           THE COURT: I know what the elements are.

11           MR. SWARTZENDRUBER: We're arguing--

12           THE COURT: Why isn't this a case for the jury to  
13 determine whether these things induced him to go there?

14           MR. SWARTZENDRUBER: Frankly, there's no question of  
15 fact about whether there was any deception here. There was  
16 no deception. According to even Mr. Czarniak's deposition  
17 testimony, even though plaintiffs are arguing--

18           THE COURT: What do you mean there's no deception? He  
19 testified that he was influenced by this thing with respect  
20 to the professional teams.

21           MR. SWARTZENDRUBER: And he may very well have been, but  
22 the fact is, the 20/20 Institute has had sponsorship  
23 agreements with the Avalanche since 2004 that say they  
24 bargained for the right to say they were the official LASIK  
25 provider of the team.

1 THE COURT: I know, but he read that as being if these  
2 professional athletes go there, I ought to go there.

3 MR. SWARTZENDRUBER: Well, first of all, professional  
4 athletes, as a generality, have very good eyesight, and not  
5 many need--

6 THE COURT: Well, then why bother--

7 MR. SWARTZENDRUBER: --need LASIK.

8 THE COURT: --to advertise?

9 MR. SWARTZENDRUBER: Well, the fact is that 20/20  
10 Institute has treated several members of the Avalanche going  
11 back to 2005. There is nothing that they can do to make  
12 these professional athletes come to 20/20 Institute.

13 THE COURT: Well, I understand that to be the fact, but  
14 that isn't what it says. It says official provider. Now,  
15 what does that mean to somebody? That's up to a jury, isn't  
16 it?

17 MR. SWARTZENDRUBER: Well, it means that under the  
18 contract they're the official provider and not someone else.

19 THE COURT: The jury doesn't know anything about the  
20 contract until the trial. He doesn't know anything about the  
21 contract. What he knows is that this business says, "We're  
22 the official providers for the Avalanche and the Colts."

23 MR. SWARTZENDRUBER: And according to the Avalanche and  
24 the Colts, they are the official provider.

25 THE COURT: Well, what does that mean?

1 MR. SWARTZENDRUBER: It means that--

2 THE COURT: I know what you think it means. What does  
3 that mean to the average person who is looking at it?

4 MR. SWARTZENDRUBER: It means that there is a  
5 relationship between the team and 20/20 Institute.

6 THE COURT: Well, it can also mean that these teams say  
7 to their players, Go to 20/20 Institute for your eye surgery.

8 MR. SWARTZENDRUBER: Well, the teams do, because 20/20  
9 Institute gives the players free LASIK and their immediate  
10 families, and it gives discounts.

11 THE COURT: That's deceptive, Counsel. You're going to  
12 lose.

13 MR. SWARTZENDRUBER: Okay.

14 THE COURT: And--

15 MR. SWARTZENDRUBER: Well, we disagree, but--

16 THE COURT: Well, I know. That's deceptive. And it can  
17 be--I don't know what a jury's reaction is going to be. It  
18 depends on, in part, the plaintiff's testimony and then how  
19 the jury views it themselves as to whether they think it's  
20 misleading.

21 MR. SWARTZENDRUBER: Well, the jury will apparently  
22 decide that, but I would argue that it's common sense that no  
23 one can tell someone where to go for medical services. They  
24 can go if they would like to, they can go if they get a  
25 discount, and that's why they would go.

1 THE COURT: Well, it isn't common sense the way  
2 professional teams treat their players. There is no common  
3 sense about what freedom players have to do anything.

4 MR. SWARTZENDRUBER: Well, I've stated our position that  
5 the contract stated they are allowed to do that, and so  
6 that's our position.

7 THE COURT: Well, you lose.

8 MR. SWARTZENDRUBER: Now, plaintiffs also argue that it  
9 was deceptive in that Mr. Czarniak says he was never told  
10 about any co-management arrangement. He apparently thought  
11 he was going to be seeing Dr. Chang and only Dr. Chang for  
12 every consultation. That simply isn't the case. His own  
13 testimony says he knew during his initial consultation he was  
14 going to see an optometrist, not an ophthalmologist. He knew  
15 that Dr. Bircham, who saw him on May 5th, three days before  
16 his surgery, was an optometrist. He knew that Dr. Bircham  
17 was not Dr. Chang, and he never complained about it until  
18 after the fact. So he certainly did know about the  
19 co-management arrangement, and there was no deception  
20 whatsoever with regard to the co-management.

21 THE COURT: Okay. You know, it doesn't take all of  
22 these. It only takes one.

23 MR. SWARTZENDRUBER: Well, we would ask that if you're  
24 not going to grant the motion in full that you grant it in  
25 part.

1 THE COURT: I'm not going to piecemeal it, no.

2 MR. SWARTZENDRUBER: Okay. Plaintiffs also argue that  
3 20/20 Institute's corporate name is inherently deceptive,  
4 which simply cannot be the case.

5 THE COURT: I'm not going to go through these one at a  
6 time and say yes, no, yes, no. That's what trial is about.

7 MR. SWARTZENDRUBER: Well, did you have specific  
8 questions that I can answer then?

9 THE COURT: No. You're going to lose your motion.

10 MR. SWARTZENDRUBER: Okay.

11 THE COURT: Now, you can talk about the fraud separately  
12 if you want.

13 MR. SWARTZENDRUBER: Okay. Well, the fraud goes back to  
14 similar arguments. With regard to the Avalanche and Colts,  
15 again, there were these sponsorship agreements in place, so  
16 there could be no misrepresentation that they were the  
17 official LASIK provider of the Avalanche and Colts.  
18 Plaintiffs' claim that, again, with the co-management  
19 arrangement, that was a misrepresentation, it simply was not.  
20 Plaintiffs also claim that 20/20 Institute misrepresented  
21 that Mr. Czarniak was guaranteed to have 20/20 vision. That  
22 simply was not the case. There was no vision guarantee made  
23 to Mr. Czarniak. In fact, everything he signed and  
24 everything he was told said that there were no guarantees of  
25 any kind.

1 THE COURT: Well--

2 MR. SWARTZENDRUBER: He discussed with Dr. Bircham the  
3 fact that refinements might be necessary. He understood  
4 that. The fact that he knew refinements might be necessary  
5 means he understood that he was not getting any guarantee of  
6 a visual outcome. To establish fraud they have to establish  
7 that 20/20 knew there was representation that was false, that  
8 Mr. Czarniak was ignorant of falsity, that there was an  
9 intention that it be act upon, and they can't establish any  
10 of those elements. There certainly was no intent. 20/20  
11 Institute always endeavored to live up to its advertisements.  
12 Any guarantee that Mr. Czarniak had was only a money-back  
13 guarantee, no visual guarantee; and Mr. Czarniak was, in  
14 fact, offered his money back, and he refused it.

15 THE COURT: Okay, I have your position. Thank you.

16 Mr. Tiemeier?

17 MR. TIEMEIER: Yes, Your Honor.

18 THE COURT: You want to disassociate Dr. Chang from the  
19 20/20 Institute?

20 MR. TIEMEIER: With respect to the advertising, yes,  
21 sir, that's true.

22 THE COURT: Yeah, but he's their same website; right?

23 MR. TIEMEIER: His biography is on the website, and his  
24 biography is undisputedly accurate.

25 THE COURT: Yeah. But it's his connection with the

1 Institute that is the basis upon which the plaintiff says  
2 he's liable.

3 MR. TIEMEIER: That is correct, Your Honor. That is  
4 what they are trying to say, but there is not a single case,  
5 either existent in this state or other states with respect to  
6 the CCPA, that was either cited by the plaintiff or that  
7 exists that says that merely by being an employee or even an  
8 independent contractor in this case of an organization that  
9 you are therefore liable for any of the representations or  
10 misrepresentations made by that organization.

11 To give you an example--this is rather an extreme  
12 example, but to say that an employee, a fry cook at  
13 McDonald's, is responsible for representations as to the  
14 calorie content of the food served there in a class action  
15 lawsuit brought by a number of people, certainly no one would  
16 suggest that that should be the case. In any case of  
17 vicarious liability, as I'm sure the Court's aware, the  
18 gravamen is that there be some right of control, and we don't  
19 have that here. And that's undisputed that Dr. Chang had no  
20 right of control over the contents of what was in 20/20's  
21 advertising in their website, and no one's ever said they  
22 did.

23 THE COURT: Well, why does he permit his biography to be  
24 on there?

25 MR. TIEMEIER: His biography is accurate. That cannot

1 be--

2 THE COURT: Why is it on there?

3 MR. TIEMEIER: Because it is who he is, and it is an  
4 accurate statement of who he is--

5 THE COURT: No, he isn't going to--

6 MR. TIEMEIER: --and people want to know who he is.

7 THE COURT: No.

8 MR. TIEMEIER: And that's an accurate statement.

9 THE COURT: Well, he's part of a business model here  
10 that is an issue in this case.

11 MR. TIEMEIER: I was not aware that the business model  
12 was the basis of the CCPA claim.

13 THE COURT: Well, that's what this website puts out  
14 there, a false business model. That's the claim.

15 MR. TIEMEIER: But, as I said, it's undisputed that Dr.  
16 Chang did not participate--

17 THE COURT: Your motion is denied.

18 MR. TIEMEIER: --in any of those statements.

19 THE COURT: Motion is denied. We'll go to trial on  
20 this.

21 Now, how about this Bircham and taking his  
22 deposition? Is he still with 20/20 Institute?

23 MR. DANZO: Yes, Your Honor.

24 THE COURT: Take his deposition on the basis of his  
25 affidavit. He's not here as an expert witness, as I've said,

1 as a fact witness with respect to what disclosures he made.  
2 And it's going to go to reliance, which is, of course, a  
3 major thing. But, you know, my interpretation of your case,  
4 as I have just said to defendant's counsel, is that this is a  
5 business model where you're going to claim that somebody who  
6 is going to rely on information about where to go for a  
7 medical procedure doesn't know that he's going to be going to  
8 a conveyor belt business. That's your claim; right?

9 MR. TIEMEIER: That's correct, Your Honor.

10 THE COURT: And we'll see whether that holds up.

11 Now, what else has to be done here besides the  
12 deposition that I've just authorized of this optometrist?

13 MR. TIEMEIER: I think we just need a date unless you've  
14 got something.

15 MR. SWARTZENDRUBER: Well, I do have something. Can I  
16 ask for clarification? The CCPA part of our (inaudible) has  
17 been--is this the fraud part?

18 THE COURT: Yes. Your motion is denied in its entirety.  
19 It all blends together.

20 MR. SWARTZENDRUBER: Okay. 20/20 Institute would, since  
21 the CCPA and fraud claims are continuing, ask that--we would  
22 like to (inaudible) CCPA expert, because, frankly--

23 THE COURT: I don't know anything about that. I don't  
24 intend to listen to opinion testimony about the meaning of  
25 the statute.

1 MR. TIEMEIER: And that's not what we intend to put on.

2 THE COURT: Well, what do you intend to put on?

3 MR. TIEMEIER: Basically, we have to prove what the  
4 corporate scienter is and what their intent was. And he has  
5 specialized knowledge with regard to--he's taught marketing  
6 principles at the University of Denver, and he has the text  
7 that he has cited. But what he's going to prove or show is  
8 what their intent was when--

9 THE COURT: Well, how can he testify to what the intent  
10 was?

11 MR. TIEMEIER: Well, how can you ever get corporate  
12 intent unless you put the evidence--

13 THE COURT: You go to a jury, and the jury infers the  
14 intent from the evidence presented to them.

15 MR. TIEMEIER: Well, I'm satisfied with that, but--

16 THE COURT: That's not the subject of expert testimony.

17 MR. TIEMEIER: I understand your ruling.

18 THE COURT: All right. So you don't have to file any  
19 motions about it.

20 MR. SWARTZENDRUBER: So Dr. Beck (phonetic) is not  
21 allowed to testify about the intent of 20/20's advertising?

22 THE COURT: That's right.

23 MR. SWARTZENDRUBER: Thank you.

24 THE COURT: That's, you know, quintessentially a jury  
25 question of, is there an intent to deceive or not. And

1 that's based on how they interpret the advertising and  
2 anything else that's in evidence. So we're going to try this  
3 case.

4 And so I get back to my question. It's ready for  
5 trial, as I get it, other than this one deposition; is that  
6 right?

7 MR. KROUNER: Yes, Your Honor.

8 THE COURT: How long of a trial do you expect it to be?

9 MR. TIEMEIER: (Inaudible) it could take as much as two  
10 weeks, Your Honor.

11 THE COURT: How long?

12 MR. TIEMEIER: Two weeks.

13 THE COURT: That seems like a long time for--

14 SPEAKER: (Inaudible.)

15 MR. TIEMEIER: No, (inaudible). We were suggesting  
16 (inaudible) defense counsel way back when (inaudible), but  
17 that was not just our case.

18 THE COURT: Well, what do defense counsel think?

19 MR. CROSS: Your Honor, I believe, given the presence of  
20 the (inaudible) CCPA claims, two weeks would probably be  
21 about right.

22 THE COURT: Well, that's going to delay us, but I want  
23 to get it on a trial calendar. How about April the 8th?

24 MR. SWARTZENDRUBER: Your Honor, Deana Dagner is going  
25 to be trying the case for 20/20 Institute. She is in a

1 three-week trial starting April 1st in Eagle County.

2 THE COURT: How about April the 29th?

3 MR. SWARTZENDRUBER: I would say--she has advised me of  
4 a trial--well, this is, again, double set on the three-week  
5 trial--a five-day trial starting on the 22nd, so--

6 THE COURT: Well, then the 29th is open.

7 MR. SWARTZENDRUBER: The 29th is presumably open.

8 MR. KROUNER: That's fine with us.

9 MR. CROSS: Your Honor, the 29th is available as well  
10 (inaudible).

11 THE COURT: All right, April the 29th it is. And we'll  
12 probably have to do a pretrial conference, but I don't know  
13 that we need to do it--I don't know, are there going to be  
14 some witnesses by deposition?

15 MR. CROSS: We don't actually plan on--there may be--  
16 there's a video deposition in New Mexico and another one in  
17 Texas that we could possibly present--the could be presented.  
18 I don't think we will, though.

19 THE COURT: How about your Minnesota doctor?

20 MR. CROSS: I think she's available (inaudible).

21 MR. KROUNER: Dr. Elizabeth Davis (phonetic), in  
22 anticipation of Your Honor's question, I had checked her  
23 availability through January. As I stand here at this  
24 moment, I do not know her availability in April. If she's  
25 not available at that time, then we would need to--

1 THE COURT: Get her testimony, yeah. Okay, well, the  
2 reason I asked that is that we need to have enough time to  
3 deal with objections to the--is she going to be video, would  
4 you expect then, or just--

5 MR. KROUNER: Not knowing what her availability is,  
6 obviously plaintiff's choice is to have her here live.

7 THE COURT: Yes, I understand, but--

8 MR. KROUNER: If she has a conflict, we would want to do  
9 a trial video deposition--

10 THE COURT: Yeah. Well, you know, those have to be  
11 edited in advance, so we need to have--I'm looking for a  
12 pretrial date. That's what I'm--

13 MR. KROUNER: We can know within a week, I am sure,  
14 about Dr. Davis's availability and whether any video  
15 depositions will be necessary.

16 THE COURT: Yeah. Well, how about a pretrial March the  
17 8th, Friday, March--

18 MR. SWARTZENDRUBER: Do you need counsel here?

19 THE COURT: Yes.

20 MR. SWARTZENDRUBER: Well, then Ms. Dagner will be at  
21 her three-week trial in Eagle County. I'm sorry, March the  
22 8th?

23 THE COURT: March the 8th, yes.

24 MR. SWARTZENDRUBER: That's April. I'm sorry.

25 THE COURT: Okay. 2 o'clock, March the 8th. Okay?

1 MR. KROUNER: Thank you, Your Honor.

2 THE COURT: All right. Court's in recess.

3 (2:22 p.m. - Whereupon, the proceedings were concluded.)

4

5

6

7

8

9

TRANSCRIBER'S CERTIFICATE

10 I hereby certify that the foregoing has been  
11 transcribed by me to the best of my ability, and constitutes  
12 a true and accurate transcript of the mechanically recorded  
13 proceedings in the above matter.

14 Dated at Aurora, Colorado, this 6th day of October,  
15 2012.

16

17

18

19

20

/s/ Sylvia Besel

21

Sylvia Besel

22

Federal Reporting Service, Inc.

23

17454 East Asbury Place

24

Aurora, Colorado 80013

25

(303) 751-2777