

**Knaster v Memorial Hos. for Cancer & Allied  
Diseases**

2007 NY Slip Op 33159(U)

September 24, 2007

Supreme Court, New York County

Docket Number: 0117749/2004

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

Sandra Knaster

INDEX NO. 117749/04

MOTION DATE 7/11/07

- v -

MOTION SEQ. NO. 001

Memorial Hospital for Cancer & Allied Diseases,  
et al.

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

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

**FILED**  
OCT 03 2007  
NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

Notice of Motlon/ 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 for summary judgment is granted only to the extent indicated below.

This medical malpractice action involves the death of Mr. Julian Knaster, age 70, on January 27, 2003 following a surgery performed by defendants Robert J. Downey, M.D. and Gary Stephens, M.D. on January 13, 2003. The surgery was a right lower lobe lobectomy that was done due to a finding of an adenocarcinoma in the right lower lobe. The autopsy report lists the probable immediate cause of death as "respiratory failure due to diffuse alveolar damage." The autopsy report also indicates as follows:

At autopsy, the patient's remaining right and left lung were involved by a bilateral, diffuse consolidative process. Microscopically, the lung demonstrated changes consistent with the organizing state of diffuse alveolar damage. Representative sections reveal diffuse interstitial fibrosis and intraluminal fibroblastic proliferation. Widespread reactive and focally

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

metaplastic epithelial changes are present. Stains for infectious organisms are negative. The trigger for this process has not been identified. Attempts at culturing the right and left lung, pleural fluid and blood did not yield pathogens. An infectious etiology is still highly likely. This pulmonary process, in conjunction with, or as a result of, other manifestation of multiorgan failure, resulted in the patient's death.

[Defendants' Ex 1]

Defendants' expert and plaintiff's expert both take the position that Mr. Knaster developed a syndrome called Acute Lung Injury ("ALI") subsequent to the surgery and that the ALI ultimately caused the patient's death. Defendants' expert, Gary M. Kline, M.D., a board certified thoracic surgeon, has opined that ". . . the development of ALI is unusual, unfortunate, unpredictable and unpreventable" and that "[t]he treatment for ALI is not specific and is essentially supportive treatment, which was provided in this case." (Kline affirmation, ¶ 6). Dr. Kline also states that the patient's development of ALI "certainly was not the result of any care or lack of care" and that once ALI develops, there is a mortality rate of 30%-70% of patients in this setting. (Kline affirmation, ¶ 17).

In opposition to the motion, plaintiff's expert has not disputed Dr. Kline's opinion that the development of ALI is unpreventable. Rather, the expert has raised triable issues of fact by identifying departures relating to a delay in identifying the signs of ALI and responding to those developments, has opined that proper post-surgical management improves the outcome and lowers the mortality rate from ALI, and has concluded that departures by defendants were causes of Mr. Knaster's "respiratory deterioration and untimely demise." (Plaintiff's expert's affirmation, ¶ 29). For example, after citing various portions of the hospital record, plaintiff's expert has opined:

The patient should have been transferred to the ICU on January 15, 2003 when he initially exhibited signs of oxygen desaturation and respiratory distress. The defendants' failure to provide early and timely proper pulmonary care and management; obtain pulmonary consult, transfer patient to ICU, monitor arterial blood gases by performance of serial blood gas studies, perform serial chest x-rays; respond to deterioration in mental status, utilize positive pressure respiratory therapy and respond to patient's decreased ability to participate in intensive pulmonary rehabilitation resulted in lack of early detection of interstitial edema and failure of prompt response and ICU management, diuretic and steroid administration and delay of intubation until patient was in extremis constitutes a departure from accepted standards of post-surgical management, which deprived Mr. Knaster of the opportunity of a favorable outcome.

[Plaintiff's expert's affirmation, ¶ 22]

In reply, defendants' counsel argues that "[t]he critical flaw in plaintiff's expert's affirmation, is that since he agrees that ALI has no identifiable cause, it makes absolutely no sense to conclude that it was the defendants' lack of "diagnostic care and management" . . . that caused the ALI and Mr. Knaster's subsequent death." (Doty affirmation, ¶ 6). However, it does not follow that because the cause of ALI has not been identified, that the ALI cannot be managed. Nor does counsel's citation to "countless articles" placing mortality from ALI at 40% render the opinion of plaintiff's expert incompetent in terms of pointing out departures by defendants in identifying and then responding to the patient's ALI. Counsel has cited to several articles from medical journals, some of which are not included as exhibits to the reply. Those articles that are annexed do not show that the opinions of plaintiff's expert should be precluded as scientifically unreliable, or that defendant is entitled to a Frye hearing.<sup>1</sup>

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<sup>1</sup>Defendants' request for a Frye hearing is not made in their initial motion papers, but instead is buried on p. 14 of their

For example, while defendants assert that "there are a plethora of papers that indicate that no therapeutic measures in ALI alter the course"(Doty reply affirmation, ¶ 9), one of the articles annexed to the reply papers states that "[t]here is no known successful treatment for ALI/ARDS. The mainstay of treatment is supportive care, although many therapies have been advocated." (Acute Lung Injury and Acute Respiratory Distress Syndrome After Pulmonary Resection, published in Seminars in Cardiothoracic and Vascular Anesthesia 2004). The supportive measures and suggested therapies are then discussed in the article. This article actually supports the opinion of plaintiff's expert that steps can be taken to manage ALI.

Based upon the foregoing, defendants' motion is denied to the extent that it seeks dismissal of the negligence cause of action.

The cause of action for lack of informed consent is dismissed. Defendants have made a prima facie showing that there is no triable issue of fact regarding lack of informed consent, and neither plaintiff's expert nor her counsel have addressed this claim. Accordingly, the second cause of action is dismissed.

Dated: 9/24/07

SA-A  
 NEW YORK COUNTY CLERK'S OFFICE S.C.

**FILED**

OCT 03 2007

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

\_\_\_\_\_ reply affirmation.