

**Scasso v Sirota**

2007 NY Slip Op 34032(U)

December 5, 2007

Supreme Court, Nassau County

Docket Number: 3753-05/

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8  
NASSAU COUNTY

ENZA SCASSO and FRANCESCO SCASSO,

Plaintiff(s),

MOTION DATE: 9/19/07

INDEX NO.: 13753/05

-against-

SEQ. NO. 2

CAL. NO. 2007H1177

HAROLD K. SIROTA, D.O, et al.,

Defendant(s)

The following papers read on this motion for summary judgment:

Notice of Motion/ Order to Show Cause.....	1-5
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Upon the foregoing papers, it is ordered that this motion by defendants Harold K. Sirota, D.O., N.K. Raman, M.D. and Sunrise Medical Associates for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint against them is denied.

This is an action to recover money damages for personal injuries sustained by plaintiff Enza Scasso as the result of defendants' medical malpractice, lack of informed consent and a derivative action claiming loss of consortium by plaintiff Francesco Scasso.

Plaintiffs allege that defendants Harold A. Sirota, D.O. (hereinafter "Sirota"), Nillepelly K. Raman, M.D. s/h/a N.K. Raman, M.D. (hereinafter "Raman") and Sunrise Medical Associates, P.C.

(hereinafter "Sunrise") committed malpractice from 1996 through March 5, 2005 in failing to perform a proper headache work-up on Enza Scasso, in failing to appreciate and recognize said plaintiff's complaints of headaches and shoulder pain; in failing to make appropriate referrals and in failing to diagnose and treat her non-small cell lung carcinoma.

From January, 1995 through September, 2004, plaintiff Enza Scasso was a patient at Sunrise. During this time period primary care providers Sirota and Raman treated her for various ailments which were pulmonary, neurological, orthopedic and hematological in nature. Specifically, she received care and treatment for non-deficiency anemia, migraine headaches, shoulder bursitis, asthma and upper respiratory infections.

Defendants move for summary judgment dismissing the complaint claiming that they did not commit malpractice in connection with their treatment and care of plaintiff.

In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician was negligent (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324; **Savage v Franco**, 35 AD3d 581). "If the moving party makes its *prima facie* showing, then the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit attesting to a departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent producing cause of the injury" (**Savage v Franco**, *supra*; see **Johnson v Queens-Long Island Medical Group, P.C.**, 23 AD3d 525, 526).

In support of this motion defendants rely upon the affirmations of internist Brent W. Spears, M.D. and oncologist Reed W. Phillips, M.D.

In his affirmation, Dr. Spears states, in pertinent part, as follows:

"proper examinations were performed at Sunrise Medical Associates. When further evaluations were necessary, the plaintiff was referred for those evaluations. The plaintiff was referred to appropriate specialists including hematology, physical medicine, orthopedic, neurology and rheumatology. The specialists evaluated the plaintiff and sent reports to Sunrise Medical Associates regarding their evaluations. Dr. Sirota, Dr. Raman and Sunrise Medical Associates relied on the evaluations and recommendations of the specialists. The plaintiff did not return to Sunrise Medical Associates after September 2004.

Dr. Raman, Dr. Sirota and Sunrise Medical Associates provided care to the [sic] appropriately based on her presenting symptoms and made appropriate referrals to specialists over the years. The plaintiff's symptomology and presentation did not warrant a suspicion of a neoplastic process. There is no causal relationship between the care and treatment rendered to the plaintiff by Dr. Sirota, Dr. Raman and Sunrise Medical Associates and the plaintiff's condition. All of their professional involvement with the plaintiff was perfectly appropriate and completely proper. There was no injury to the plaintiff as a result of any care and treatment rendered by Dr. Sirota, Dr. Raman and Sunrise Medical Associates."

In his affirmation, Dr. Phillips states, in pertinent part, as follows:

"Dr. Raman, Dr. Sirota and Sunrise Medical Associates treated the plaintiff appropriately based on her presenting symptoms and made

appropriate referrals to specialists based on her symptoms. The plaintiff was referred to appropriate specialists including hematology, physical medicine, orthopedic, neurology and rheumatology. The specialists evaluated the plaintiff and provided reports to Sunrise Medical Associates regarding their evaluations. None of the evaluations led to a suspicion of a neoplastic process. There is no causal relationship between the care and treatment rendered to the plaintiff by Dr. Sirota, Dr. Raman and Sunrise Medical Associates and the plaintiff's condition. All of their professional involvement with the plaintiff was perfectly appropriate and completely proper. There was no injury to the plaintiff as a result of any care and treatment rendered by Dr. Sirota, Dr. Raman and Sunrise Medical Associates."

Defendants have made a *prima facie* showing of entitlement to judgment as a matter of law dismissing plaintiffs' medical malpractice cause of action.

In opposition to this motion plaintiffs argue that the defendants deviated from accepted medical practices and procedures by failing to appreciate Enza Scasso's history and condition and in failing to establish cancer screening protocol. Specifically, the plaintiffs assert, *inter alia*, that she should have been placed on a regime of annual chest x-rays and/or CTs to evaluate her for the potential development of a lung cancer and that defendants cannot claim that their role as primary care physicians is simply to take vitals and refer her to appropriate specialists. In support thereof, plaintiffs refer this court to the affirmations of Dr. Debra A. Taubel, M.D. and Richard J. Hirschman, M.D.

In her affirmation, Dr. Taubel states that:

"[b]ased upon the history of cigarette smoking

and asthma, as related by Mrs. Scasso, the chronic upper respiratory tract infections associated with cough, wheezing and shortness of breath [dyspnea], Mrs. Scasso should have received annual diagnostic studies to ensure that any development of a lung cancer could have been detected in its early stages (stage I), which would have dramatically increased her chances for survival. That protocol required that Mrs. Scasso receive a baseline chest x-ray, upon her initial evaluation by these defendants, and then a chest x-ray again and/or a CT of her lungs every year. This screening should have been done at least on an annual basis considering Mrs. Scasso's history of cigarette smoking, asthma, and chronic reoccurring upper respiratory issues.

In addition to an annual screening with a chest x-ray and/or CT scan these defendants failed to conduct necessary and appropriate pulmonary function testing, peak flow testing, arterial blood gas testing or pulse oximetry. Each of these tests were required upon the presentation of the symptomology that Mrs. Scasso had, specifically pertaining to the asthma and upper respiratory tract infections. Certainly as a result of the risk of lung cancer based on her history of smoking, these tests should have been performed on an annual basis.

Had the aforementioned testing been performed upon the presentation of the symptomology and/or on an annual basis regardless of symptomology, the aforementioned testing would have revealed symptomology of the underlying condition that would have led to additional diagnostic testing and the identification of

the lung mass when it was in stage I."

In his affirmation, Dr. Hirschman states that defendants departed from accepted medical practices and procedures in the following manner:

"Mrs. Scasso presented to these defendants in 1994 and communicated that she had ceased smoking six years prior to her first visit. However, the defendant doctors failed to determine the duration of the smoking and the quantity of cigarettes Mrs. Scasso smoked daily.

Based upon the history of cigarette smoking and asthma, as related by Mrs. Scasso, the chronic upper respiratory tract infections associated with cough, wheezing and shortness of breath [dyspnea], Mrs. Scasso should have received annual diagnostic studies to ensure that any development of a lung cancer could have been detected in its early stages (stage I), which would have dramatically increased her chances for survival. That protocol required that Mrs. Scasso receive a baseline chest x-ray, upon her initial evaluation by these defendants and then a chest x-ray again and/or a CT of her lungs every years. This screening should have been done at least on an annual basis considering Mrs. Scasso's history of cigarette smoking, asthma and chronic reoccurring upper respiratory issues.

On March 14, 2005, Mrs. Scasso underwent a radiographic study of her chest that identified a primary tumor in her lung that was approximately 48 cubic centimeters in size. Based upon the known volume doubling times for adenocarcinoma of the lung, that

mass would have been at age I in 2002 and up to and including June of 2003 when Mrs. Scasso was under the care and treatment of the defendants in this matter. Thus, had the defendants in this matter performed a chest x-ray or a CT scan on June 20, 2003 upon Mrs. Scasso's visit to the defendants, those films would have identified a stage I adenocarcinoma in Mrs. Scasso's lung. Had that diagnosis of a stage I adenocarcinoma of the lung had been made on/or about June 20, 2003, appropriate surgery would have resulted in an approximate 5 year survival rate of 70% for Mrs. Scasso.

The 5 year survival rate for stage IV lung adenocarcinoma-the stage at which Mrs. Scasso's lung adenocarcinoma was identified-is less than 5%. Therefore, Mrs. Scasso lost a substantial chance of a cure as a result of the delay of 22 months in diagnosing her cancer."

The affirmations submitted by plaintiffs' experts demonstrate the existence of a triable issue of fact as to whether defendants deviated from accepted medical practice and whether such departures were the direct cause of the delay in diagnosing Enza Scasso's adenocarcinoma of the lung (see **Taylor v Nyack Hospital**, supra; see **Alvarez v Prospect Hospital**, supra).

Plaintiffs' claim of lack of informed consent, however, should be dismissed.

In order to sustain a cause of action for lack of informed consent, the pleadings must establish that there was some affirmative violation of the physical integrity of the patient (**Hecht v Kaplan**, 221 AD2d 100; see also **Martin v Hudson Valley Associates**, 13 AD3d 419; **Jay Cox v Reid**, 5 AD2d 994; **Redone v Thippeswamy**, 309 AD2d 792; **Smith v fields**, 268 AD2d 579; **Schel v Roth**, 242 AD2d 697; **Etkin v Marcus**, 74 AD2d 633;). Considering the

allegations set forth in the complaint, there is no evidence that defendants violated Enza Scasso's physical integrity by performance of any invasive act in their care and treatment of plaintiff.

In view of the foregoing, this motion for summary judgment is denied as to the medical malpractice claim, but granted as to the lack of informed consent cause of action, which is dismissed.

The attorneys for all parties are directed to appear for a conference before the undersigned Justice on January 4, 2008, at 9:30 a.m. to discuss defendants' motion to vacate the note of issue and the existence of any outstanding discovery.

Dated: DEC 05 2007

*William J. Scasso*  
J.S.C.

**ENTERED**  
DEC 10 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE