[* 1]
SCANNED ON 2/26/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN PART 6
Justice

SHARPE,

Plaintiffs,

- v -

WEST SIDE HEMATOLOGY et al.,

Defendants.

INDEX NO. 114639/04

MOTION DATE 12/12/06

MOTION SEQ. NO. 002

The following papers, numbered 1 to 3 were read on this motion for SUMMARY JUDGMENT.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
FEB 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 2-9-07

EILEEN BRANSTEN, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

----------X

LOUIS SHARPE, as Administrator of the Estate of JULIA PIETRI, and LOUIS SHARPE, Individually,

Plaintiffs,

-against-

WEST SIDE HEMATOLOGY & ONCOLOGY, P.C., GABRIEL A. SARA, M.D., and BASSAM J. ABI-RACHED, M.D.,

Defendants.

Index No. 114639/04
Motion Date: 12/12/06
Motion Seq. No: 002

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3211 and 3212, defendants West Side Hematology & Oncology, P.C. ("Hematology") and Gabriel A. Sara, M.D. ("Dr. Sara") move for summary judgment to dismiss the action commenced by plaintiffs Louis Sharpe ("Mr. Sharpe"), as Administrator of the Estate of Julia Pietri ("Ms. Pietri"), and Mr. Sharpe, individually. Plaintiffs oppose the motion.*

Background

On March 25, 2002, Ms. Pietri presented at Hematology to determine whether the mass in her left groin was Hodgkin's Lymphoma. Affirmation in Support of Motion ("Aff."), at ¶ 7. On April 17, 2002, doctors at Hematology – including Dr. Sara and Dr.

* Bassam J. Abi-Rached, M.D. (Dr. Abi-Rached") is not a party to this action; the case against him was previously dismissed for failure to timely commence.

Abi-Rached – completed testing on Ms. Pietri and determined that she had Stage IIB and/or Stage IIIB Hodgkin's disease. Aff., at ¶ 8. They recommended Adriamycin Bleomycin Vinblastine Dacarbazine ("ABVD") chemotherapy. *Id.* As a precaution, Dr. Sara first recommended a check of Ms. Pietri's lung function, which tested normal. Aff., at ¶ 9. Dr. Abi-Rached then explained to Ms. Pietri that Bleomycin carries a specific risk of lung toxicity and asked Ms. Pietri to sign an informed consent form, which she did. *Id.*

On April 30, 2002, Ms. Pietri underwent her first regimen of chemotherapy, which consisted of 40 mg of Adriamycin, 15U of Bleomycin, 10 mg of Vinblastine and 600 mg of Dacabazine. Aff., at ¶ 10. Ms. Pietri received the same doses of ABVD therapy at her second treatment on May 14, 2002. Aff., at ¶ 11. During the entirety of her chemotherapy regime, Ms. Pietri made weekly visits to Hematology to receive shots of Neupogen (a drug used to prevent infection and neutropenia in chemotherapy patients) from a staff nurse. *Id.* According to Hematology's records, at no time did Ms. Pietri complain to the nurse of sickness or symptoms of lung toxicity. *Id.*

On May 28, 2002, Ms. Pietri began her second cycle of chemotherapy. Aff., at ¶ 12. She returned for another dose on June 11, 2002, at which time she complained of fatigue, but denied vomiting or feeling nauseous. Aff., at ¶ 13. On this date, the doctor examining Ms. Pietri noted "few crackles at both [lung] bases, otherwise clear to auscultation and percussion." Opp., at ¶ 21.

Two weeks later, on June 25, 2002, Ms. Pietri entered her third cycle of chemotherapy. Aff., at ¶ 14. She returned on July 9, July 23 and August 6 for further treatment. Aff., at ¶ 15. Throughout this period, she developed a minor rash and continued to experience fatigue, but presented no symptoms of lung toxicity. Aff., at ¶ 14. Nonetheless, Dr. Sara instructed Ms. Pietri to undergo additional pulmonary function testing before beginning the next round of treatment. Affirmation in Opposition ("Opp."), at ¶ 24.

On August 19, 2002, Ms. Pietri presented at Hematology complaining of discomfort in her chest, especially on the right side. Aff., at ¶ 16. She did not, however, state that she had shortness of breath, bloody sputum or that she had been coughing. *Id.* Dr. Sara examined her lungs and determined that they were normal. *Id.* Moreover, despite Ms. Pietri's failure to go for the recommended interim pulmonary function testing, Dr. Sara administered another round of chemotherapy. Opp., at ¶ 24.

Ms. Pietri underwent pulmonary function testing on August 22, 2002. Opp., at ¶ 28. Five days later, on August 27, 2002, Ms. Pietri's treating pulmonologist called Hematology to report that the tests revealed worsening spirometry, lung volume and diffusing capacity. Aff., at ¶ 17. The doctor recommended that Ms. Pietri no longer be administered Bleomycin. *Id.* On September 2, 2002, Ms. Pietri began taking Prednisone to treat her lung symptoms. Aff., at ¶ 18. Thereafter, on September 9, 2002, a chest x-ray revealed reticular infiltrates. Aff., at ¶ 19.

Ms. Pietri last visited Hematology on September 17, 2002, at which time she received her last dose of chemotherapy. Aff., at ¶ 20. She reported feeling well, but had persistent bilateral crackles in both lung bases. *Id.* She was diagnosed with lung toxicity from Bleomycin and instructed to continue Prednisone. *Id.*

On September 27, 2002, Ms. Pietri presented at St. Luke's Roosevelt Hospital complaining of weight loss, weakness, decreased appetite and diarrhea. Aff., at ¶ 21. She did not, however, notify Hematology of her hospitalization and doctors at St. Luke's did not continue to administer Prednisone. Aff., at ¶¶ 21-22.

On September 30, 2002, Ms. Pietri restarted Prednisone. Aff., at ¶ 22. Nonetheless, she died October 12, 2002 of pulmonary fibrosis. *Id.*

In this medical malpractice action – commenced October 14, 2004 – plaintiffs claim that defendants negligently treated Ms. Pietri with ABVD chemotherapy for her Hodgkin's Lymphoma and failed to properly obtain her informed consent. Aff., at ¶¶ 4,32. They claim that as a result of defendants' negligence, Ms. Pietri suffered Bleomycin toxicity, causing her death. *Id.*

Analysis

Summary Judgment

Defendants now move for summary judgment dismissal of plaintiffs' actions. Aff., at ¶ 40. They rely on the affirmation of Paul A. Feffer, M.D. ("Dr. Feffer"), a physician board certified in internal medicine with sub-certifications in hematology and medical oncology. Affirmation of Dr. Feffer ("Feffer Aff."), at ¶ 1. Dr. Feffer opines to a reasonable degree of medical certainty, after review of the records and testimony in this case, that defendants did not depart from accepted standards of medical care in treating Ms. Pietri. *Id.*

In particular, Dr. Feffer avers that Ms. Pietri was properly treated with six cycles of ABVD chemotherapy and that there was no reasonable alternative to treatment that did not include Bleomycin. Feffer Aff., at ¶¶ 3,4. The doctor concludes, moreover, that Ms. Pietri was advised of the need to undergo repeat pulmonary function testing before the fourth cycle of treatment and negligently failed to do so. Feffer Aff., at ¶ 8. Dr. Feffer opines that Ms. Pietri presented no symptoms of lung toxicity on August 19, 2002, and therefore, defendants were correct to proceed with chemotherapy treatment despite Ms. Pietri's failure to undergo further pulmonary function tests. *Id.* Finally, Dr. Feffer states that Ms. Pietri was appropriately informed of the risks and benefits of treatment and that lung toxicity is a common side-effect of Bleomycin. Feffer Aff., at ¶ 7.

Plaintiffs oppose summary judgment, relying on the affirmation of a physician board-certified in internal medicine with a sub-speciality in hematology. Opp., Ex. 1, at ¶ 1. The doctor opines to a reasonable degree of medical certainty, after review of the medical records and testimony in this case, that defendants departed from accepted standards of medical care in treating Ms. Pietri. Opp., Ex. 1, at ¶ 4.

Specifically, the physician avers that defendants did not properly monitor Ms. Pietri's lung functions or treat her with corticosteroids after she developed lung difficulties. Opp., Ex. 1, at ¶ 4. The doctor also states that defendants should not have administered Bleomycin to Ms. Pietri on August 19, 2002 because she had not yet undergone appropriate pulmonary function tests. Opp., Ex., at ¶ 10. The expert concludes that these departure proximately caused Ms. Pietri's untimely death. Opp., Ex. 1, at ¶ 4. Plaintiffs' expert does not, however, discuss Ms. Pietri's lack-of-informed-consent claim.

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dept. 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dept. 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dept. 1991).

Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dept. 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324. In a medical malpractice action, the opponent of summary judgment must present evidence that the defendant physician departed from good and accepted medical practice, *Lyons v. McCauley*, 252 A.D.2d 516 (2d Dept. 1998), *lv. denied*, 92 N.Y.2d 814, and that defendant's wrongful conduct proximately caused plaintiff's injuries. *Hoffman v. Pelletier*, 6 A.D.3d 889 (3d Dept. 2004); *Hanley v. St. Charles Hosp. and Rehabilitation Ctr.*, 307 A.D.2d 274 (2d Dept. 2003). This evidence must generally be set forth through an expert affidavit. *Chase v. Cayuga Med. Ctr.*, 2 A.D.3d 990 (3d Dept. 2003).

If the nonmovant submits an admissible affidavit from a competent expert showing the existence of a triable issue of fact as to whether defendants were negligent, the summary

judgment motion must be denied. *See, Cooper v. St. Vincent's Hosp.*, 290 A.D.2d 358 (1st Dept. 2002); *Dellert v. Kramer*, 280 A.D.2d 438 (1st Dept. 2001); *Morrison v. Altman*, 278 A.D.2d 135 (1st Dept. 2000); *Avacato v. Mount Sinai Med. Ctr.*, 277 A.D.2d 32 (1st Dept. 2000).

Here, with regard to plaintiffs' negligent-administration-of-chemotherapy claim, both parties have submitted evidence sufficient to support their respective positions. The conflicting submissions establish that there is a material issue of fact that warrants a trial, namely, whether defendants negligently administered ABVD chemotherapy to Ms. Pietri, causing her death. Dr. Feffer insists that there were no departures that proximately caused Ms. Pietri's death and plaintiffs' expert urges that there were. The issue of which expert is correct is for the jury to decide after a trial. *Santiago v. Brandeis*, 309 A.D.2d 621 (1st Dept. 2003). This Court cannot hold as a matter of law that defendants have definitively established that there was no malpractice. Thus, summary judgment is denied as to this claim.

As to plaintiffs' lack-of-informed-consent claim, however, summary judgment is granted.

Public Health Law § 2805-d provides that lack of informed consent "means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved

[* 10].

* * *." The statute further requires that a plaintiff establish that a reasonably prudent person in the patient's position "would not have undergone the treatment or diagnosis" had she been fully informed. Public Health Law § 2805-d; *see also*, *Benfer v. Sachs*, 3 A.D.3d 781, 782-83 (3d Dept. 2004), *affd.*, 19 A.D.3d 853 (2005); *Dunlop v. Sivaraman*, 272 A.D.2d 570 (2d Dept. 2000); *Hylick v. Halweil*, 112 A.D.2d 400, 401 (2d Dept. 1985).

Defendants in this case have submitted sufficient proof to demonstrate a *prima facie* showing of entitlement to dismissal of plaintiffs' lack-of-informed-consent claim. *See*, Public Health Law § 2805-d; *Rozelle v. Hermann*, 215 A.D.2d 224 (1st Dept. 1995); *see also, Canosa v. Abadir*, 165 A.D.2d 823 (2d Dept. 1990). Dr. Feffer concludes that defendants properly informed Ms. Pietri of the alternatives to and risks of Bleomycin. Feffer Aff., at ¶ 7. He opines, moreover, that no act or omission of defendants in obtaining Ms. Pietri's informed consent proximately caused her injuries. *Id.*

The expert affirmation by plaintiffs' expert is wholly insufficient to rebut this showing. Plaintiffs' expert never states that defendants failed to disclose to Ms. Pietri the reasonably foreseeable risks, benefits and alternatives to treatment. *Lynn G. v. Hugo*, 96 N.Y.2d 306, 310 (2001) (dismissed for plaintiff's failure to provide expert testimony on the issue of informed consent); *Smith v. Cattani*, 2 A.D.3d 259, 260 (1st Dept. 2003). Furthermore, plaintiffs do not allege that a reasonable person in Ms. Pietri's condition would

not have undergone ABVD therapy had she been fully informed of the risk of Bleomycin toxicity. *See, Benfer v. Sachs*, 3 A.D.3d, at 782-83.

Because defendants sufficiently demonstrated their entitlement to dismissal of plaintiffs' lack-of-informed-consent claim and plaintiffs have not met their burden of rebutting defendants' showing, summary judgment is granted as to this claim.

Derivative Claim

To maintain a loss of consortium claim based on Ms. Pietri's wrongful death, Mr. Sharpe must have been married to Ms. Pietri when she died. *See, Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498 (1968).

Defendants allege that they requested documentation of Mr. Sharpe's marriage on numerous occasions but that Mr. Sharpe has failed to comply. Aff., at ¶ 25. They now move for dismissal of the derivative claims, arguing that Mr. Sharpe and Ms. Pietri were not married, and as such, Mr. Sharpe cannot maintain a derivative action. Aff., at ¶ 41.

In support, they submit a hospital-chart note by Ms. Pietri's cardiologist, Dr. Pepe, who wrote that, "Husband aware of grave outlook. He requested letter from me to allow marriage @ bedside (they've never been officially married!)." Aff., Ex. D, at 1. Defendants also rely on evidence that Mr. Sharpe filed his 2000 and 2001 tax returns as "single."

This proof – taken with Mr. Sharpe's failure to produce a marriage certificate – is sufficient to demonstrate defendants' entitlement to summary judgment dismissal of Mr. Sharpe's derivative claims. *See, Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324. The burden shifts to Mr. Sharpe to rebut this showing.

Mr. Sharpe opposes the dismissal, arguing that his failure to submit a marriage certificate is not *prima facie* evidence that he and Ms. Pietri were not married. Opp., at ¶ 7. He asserts that, in the very least, he has demonstrated a question of fact as to his marital status. *Id.*

According to Mr. Sharpe, he and Ms. Pietri were married on February 15, 1972 in a small village in Yuaco, Puerto Rico. Aff., at ¶ 27; Opp., at ¶ 51. He explains that the ceremony was performed by a priest but not held in a Catholic church because he is Jewish and Ms. Pietri was Catholic. Opp., at ¶ 51. Mr. Sharpe does not recall the name of the church or the two witnesses in attendance at the ceremony. Aff., at ¶ 27. He affirms, moreover, that he traveled to Puerto Rico shortly after Ms. Pietri's death, but was unable to locate a certificate of marriage to demonstrate the existence of this ceremony. Opp., Ex. F, at ¶ 2.

After they returned from Puerto Rico, Mr. Sharpe and Ms. Pietri lived together in New York for thirty years. During this time, the couple received Section VIII housing as

"husband" and "wife." Opp., at ¶ 52. Mr. Sharpe now receives Ms. Pietri's social security survivor and union death benefits. Opp., at ¶ 53.

The question before this Court – one not explicitly resolved by New York case law – is whether the existence of a marriage is a question of fact or law, and as such, whether Mr. Sharpe can prove his marriage to Ms. Pietri by circumstantial and testimonial evidence.

Certainly, when an original marriage certificate is available, that certificate is *prima facie* proof of marriage. CPLR 4526. Is the absence of a marriage certificate, however, dispositive?

Although no appellate-level case law directly addresses the issue, it appears that marriage in New York is a mixed question of law and fact. As to the determination of a whether a marriage ceremony occurred, that is a question of fact provable by direct or circumstantial evidence.

The presumption of a valid marriage is extremely strong. *See, e.g., Matter of Estate of Lowney*, 152 A.D.2d 574, 575 (2d Dept. 1989); *Persad v. Balram*, 187 Misc. 2d 711, 717 (Sup. Ct., Queens County, 2001); *Helfond v. Helfond*, 53 Misc. 2d 974, 977 (Sup. Ct., Nassau County, 1967) ("Wherever possible the courts have endeavored to sustain the validity of marriage"); *Springer v. Springer*, 189 Misc. 820, 822 (Sup. Ct., Kings County, 1947) ("On the highest grounds of public policy, all legal presumptions are in favour of the validity of a marriage"). In light of this strong public policy, several trial courts have

permitted parties to introduce circumstantial evidence of a wedding to prove the validity of a marriage when a certificate is unavailable or was not obtained.

For example, in *Persad v. Balram*, the parties did not produce a marriage license but Justice Darrell L. Gavrin, Jr. of Supreme Court, Queens County upheld the validity of the marriage relying on such evidence as a photo album depicting defendant in a white dress and plaintiff in tuxedo cutting a white wedding cake. 187 Misc. 2d, at 712-13. Justice Gavrin also stated, several "compelling factors, specifically the parties' postnuptial cohabitation for approximately seven years and the conception of their child, affirm their marital status." *Id.*, at 717; *see also, Springer v. Springer*, 189 Misc., at 822 (considering as proof of marriage evidence that couple lived together for several years and had two children).

Other courts have considered the absence of circumstantial evidence in determining the existence of a valid marriage. For instance, Justice Robert J. Gigante of Supreme Court, Richmond County considered evidence of the parties' sporadic cohabitation and the absence of wedding pictures, wedding invitations or witness affidavits in determining that no marriage occurred. *Gotlin v. Kabeeruddin*, 10 Misc. 3d 1074(A) (Sup. Ct., Richmond County, 2006).

Furthermore, several courts considering evidence of cohabitation have proposed that when a couple claims that they have participated in a wedding ceremony, their cohabitation raises a presumption of a valid marriage that can only be overcome by substantial evidence.

"Where persons live and cohabit as husband and wife, and are reputed to be such, a presumption arises that they have been legally married, and this presumption * * * can be rebutted only by the most cogent and satisfactory evidence." *Matter of Estate of Lowney*, 152 A.D.2d, at 575 (considering at hearing to adduce marital status evidence that couple lived together for 59 years and had two children together); *see also, Whittleton v. Whittleton*, 3 Misc. 2d 542, 546 (Sup. Ct., Erie County, 1956) (holding that there is a conclusive presumption of marriage when parties cohabit that is rebuttable "either by direct or circumstantial evidence").

Because in each of these cases the court permitted non-direct evidence to demonstrate the existence of a marriage, this Court will follow suit and allow Mr. Sharpe to rebut defendants' showing of entitlement to judgment by means other than a marriage certificate.

Mr. Sharpe avers by affidavit, "the decedent and I married on September 15, 1972." Opp., Ex. E, at ¶ 3. Accepting this statement as true, *see, Byrnes v. Scott*, 175 A.D.2d, at 786 (requiring court, on summary judgment, to accept the version of the facts most favorable to the nonmovant), Mr. Sharpe has demonstrated a question of fact warranting trial. Mr. Sharpe avers that he was married and Dr. Pepe insists that Mr. Sharpe stated that he was not. The determination of which account is to be believed is a matter of credibility to be decided by a jury after a trial. *McFadden v. Bruno*, __ A.D.3d __, 2007 N.Y. Slip. Op. 00989 (1st Dept. 2007).

There is, however, a remaining question of law – whether a Puerto Rican marriage ceremony from which there is no certificate produces a legal marriage.

If Mr. Sharpe and Ms. Pietri married in New York, it is clear that their failure to obtain or retain a marriage license would not affect their marital status. "The parties failure to obtain a marriage license does not render their marriage void, Section 25 of the Domestic Relations Law provides that 'nothing in [this section] shall be construed to render void by any reason of a failure to procure a marriage license any marriage solemnized between persons of full age." *Persad v. Balram*, 187 Misc. 2d, at 714 (upholding marriage even though couple failed to obtain a marriage license before their Hindu marriage ceremony and the priest was not licensed to perform marriage ceremonies in New York); *see also*, *Helfond v. Helfond*, 53 Misc. 2d, at 977 (Sup. Ct., Nassau County, 1967) (upholding validity of marriage performed by New York City Family Court Judge outside her jurisdiction despite the fact that she had no authority to solemnize the marriage).

In this case, however, the alleged marriage was not consummated in New York, it was consummated in Puerto Rico. In similar cases involving foreign jurisdictions, courts have applied the law of the jurisdiction to determine whether the marriage is null and void.

For instance, in *Amsellem v. Amsellem*, 189 Misc. 2d 27 (Sup. Ct., Nassau County, 2001), a New York couple participated in a religious wedding ceremony in France. *Id.*, at 28. The marriage was not properly consummated under French law, however, because

France requires a civil ceremony in addition to any religious ceremony. Nassau County Supreme Court upheld the validity of the marriage, stating that the defendant, "has failed to provide any legal authority to support his position that *according to French Law* the parties' marriage would be null or void * * *." *Id.*, at 31 (emphasis added).

Likewise, in *Springer v. Springer*, 189 Misc. 820 (Sup. Ct., Kings County, 1947) plaintiff and defendant participated in a wedding ceremony in Alberta, Canada but did not first obtain the required license. *Id.*, at 821. Upon examining the law of Alberta, Canada, which contains no indication that a wedding performed in absence of the required marriage license is null and void, the court held that the marriage was valid. *Id.*

The laws of Puerto Rico are similar to those of France and Alberta. Puerto Rico's Health and Sanitation statute requires a couple to obtain a marriage license prior to solemnizing a marriage with a religious ceremony. 24 P.R. Laws. Ann. § 1162. Further, the statute directs an officiant performing a wedding ceremony to deliver a marriage license to the register. 24 P.R. Laws. Ann. § 1163. The statute does not, however, state that a parties' failure to obtain a marriage license or an officiant's failure to deliver a marriage license renders a marriage null and void.

Indeed, the Supreme Court of Puerto Rico dealt with this very issue in *Soberal v. Marrero*, 158 P.R. 77 (2002). *See*, Certified Translation of *Soberal v. Marrero* by Robert Montalvo, Court Interpreter. Petitioner and respondent participated in a religious wedding

ceremony, but the officiant failed to file any record of the union with the Civil Registry as required. *Id.*, at 81. The couple then cohabited and had two children together. *Id.*, at 79. The court upheld the validity of the marriage, reasoning that the lack of a filed marriage certificate with the Civil Registry is not, by itself, proof that there is no marriage. *Id.*, at 88.

Pursuant to Puerto Rican case law, therefore, Mr. Sharpe's failure to locate a marriage certificate is not dispositive. If the jury believes that Mr. Sharpe and Ms. Pietri participated in a marriage ceremony in Puerto Rico, Mr. Sharpe will be permitted to maintain a derivative claim for Ms. Pietri's wrongful death.

Because defendants have not demonstrated that there is no marriage as a matter of law and Mr. Sharpe has raised a triable issue of fact as to its existence, summary judgment as to Mr. Sharpe's derivative claims is denied.

Accordingly, it is

ORDERED that summary judgment is denied as to plaintiffs' negligent-administration-of-chemotherapy claim; and it is further

ORDERED that summary judgment is granted as to plaintiffs' lack-of-informed-consent claim; and it is further

ORDERED that summary judgment is denied as to Mr. Sharpe's derivative claims.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
February 9, 2007

ENTER

Hon. Eileen Bransten