

**Sugamele v Frendo**

2008 NY Slip Op 33031(U)

October 31, 2008

Supreme Court, Nassau County

Docket Number: 18084/06

Judge: Kenneth A. Davis

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SCAN

SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK

Present: HON. KENNETH A. DAVIS,  
Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

VINCENT SUGAMELE, as Administrator of the  
Estate of LOUISE SUGAMELE, Deceased, and  
VINCENT SUGAMELE, Individually,

Plaintiff,

SUBMISSION DATE: 9/18/08  
INDEX No.: 18084/06

-against-

CHRISTOPHER D. FREND, D.O., FARSHAD  
LALEHZARIAN, M.D., MEHRAN MANSOURI, M.D.,  
ISLAND ORTHOPEDICS AND SPORTS MEDICINE,  
P.C., "NORTH AMERICAN PARTNERS  
IN ANESTHESIOLOGY, LLP and NORTH SHORE  
UNIVERSITY HOSPITAL AT PLAINVIEW,

MOTION SEQUENCE # 1

Defendants.

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... X
- Answering Papers..... X
- Reply..... X

This motion by defendant Mehran Mansouri, M.D., for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him or determining certain facts as a matter of law is determined as provided herein.

This is an action to recover damages for medical malpractice, lack of informed consent and wrongful death. Defendant Dr. Mansouri seeks summary judgment dismissing the complaint against him. He maintains that all of his actions were consistent with good and accepted medical standards and that in any event, nothing he did or failed to do caused Sugamele's demise.

[\*2]

The pertinent facts are as follows:

The plaintiff's decedent Louise Sugamele underwent elective back surgery by defendant Christopher Frendo at North Shore University Hospital at Plainview on May 17, 2006. Defendant Dr. Lalehzarian was the anesthesiologist. Complications developed at 12:05 PM, approximately three and one-half hours into the surgery. Sugamele's surgical wound was packed and closed and she was moved from the prone to supine position and resuscitative efforts began. The defendants Dr. Frendo and Lalehzarian diagnosed Sugamele as suffering an embolic event or vascular injury. The defendant Dr. Mansouri, a vascular surgeon, was called in to consult. Drs. Frendo and Lalehzarian both testified at their examinations-before-trial that Dr. Mansouri responded five to 15 minutes after Sugamele was put on her back. According to Dr. Frendo's testimony at his examination-before-trial, Dr. Mansouri stayed for approximately ten minutes, determined that Sugamele was not suffering from a vascular injury and left. Dr. Frendo testified that the patient was not yet hypotensive or tachycardic when Dr. Mansouri arrived but that chest compressions started before Dr. Mansouri arrived and that when they were started, the patient's systolic blood pressure was in the 30's or 40's. Dr. Lalehzarian testified that when Dr. Mansouri arrived, the patient had no pulse and had only pulseless electrical activity of the heart, and that CPR had already been in progress for ten minutes. While he had no independent recollection of these

[\* 3 ]

incidents, from his operative report, Dr. Mansouri testified that the patient's condition was as testified to by Dr. Lalehzarian. According to Dr. Lalehzarian, when Dr. Mansouri arrived, blood had already been drawn for lab work and lines were in place or being placed for fluid and blood transfusion.

Dr. Mansouri testified at his examination-before-trial that after being informed that she had no pulse and had only pulseless electrical activity of the heart, he palpated her abdomen and found no indication for internal bleeding. In fact, he had never encountered an incident of a vascular bleed occurring during a surgery such as this patient's. Given Sugamele's condition upon his arrival, the overall clinical picture and the small likelihood of a vascular intervention, Dr. Mansouri provided no treatment to the patient at that time. He testified that he believed that intervention would not have altered her condition in any event.

When Sugamele's blood test results were received, both her hemoglobin and hematocrit were very low, increasing the likelihood that she was in fact experiencing a vascular injury. Dr. Mansouri was called upon again to re-evaluate. At his examination-before-trial, Dr. Mansouri testified that while he thought her condition had not changed, when he was told about her blood count, he immediately performed an exploratory laparotomy. Dr. Mansouri testified that he did not believe that he could change Sugamele's condition, but he proceeded to try and stop the bleeding because

[\*4]

the other doctors' resuscitative efforts were continuing. Dr. Mansouri testified that he encountered a large volume of blood in Sugamele's peritoneal cavity and upon entering the retroperitoneal area, he found an almost complete laceration of Sugamele's right internal iliac artery vein and complete disorption of her right iliac vein. Both the artery and vein were clamped to control bleeding. Dr. Mansouri then transected and tied off the ends of Sugamele's internal iliac artery and repaired the iliac vein, after which only minimal bleeding occurred. Despite continued resuscitative efforts, Sugamele died.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented

by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damages. Rebozo v Wilen, 41 AD3d 457, 458 (2<sup>nd</sup> Dept. 2007); see also, Ramsay v Good Samaritan Hosp., 24 AD3d 645 (2d Dept. 2005); see also, Thomason v Orner, 36 AD3d 791 (2<sup>nd</sup> Dept. 2007); DiMitri v Monsouri, 302 AD2d 420, 421 (2d Dept. 2003); Holbrook v United Hosp. Medical Center, 248 AD2d 358 (2d Dept. 1998). "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 [and/or hospital] were negligent." Taylor v Nyack Hospital, 18 AD3d 537 (2d Dept. 2005) citing Alvarez v Prospect Hosp., supra. Thus, a moving defendant doctor or hospital has "the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the plaintiff was injured thereby." Chance v Felder, 33 AD3d 645 (2<sup>nd</sup> Dept. 2006) quoting Williams v Sahay, 12 AD3d 366, 368 (2d Dept. 2004), citing Alvarez v Prospect Hosp., supra; Johnson v Queens-

Long Island Medical Group, P.C., 23 AD3d 525, 526 (2<sup>nd</sup> Dept. 2005); Taylor v Nyack Hospital, supra; see also, Thompson v Orner, supra.

To establish proximate cause, a "plaintiff must present 'sufficient evidence from which a reasonable person might conclude that it was more probable than not that' the defendant's deviation was a substantial factor in causing the injury." Alice v Liguori, \_\_\_ AD2d \_\_\_, 2008 WL 4260933 (2<sup>nd</sup> Dept. 2008), quoting Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 (2<sup>nd</sup> Dept. 2005); Zak v Brookhaven Memorial Hosp. Medical Center, \_\_\_ AD2d \_\_\_, 2008 WL 4256014 (2<sup>nd</sup> Dept. 2008), citing Lyons v McCauley, 252 AD2d 516 (2<sup>nd</sup> Dept. 1998). As for damages, a plaintiff must submit evidence "from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [her] injury." Flaherty v Fromberg, 46 AD2d 743, 745 (2<sup>nd</sup> Dept. 2007), citing Barbuto v Winthrop Univ. Hosp., 305 AD2d 623, 624 (2<sup>nd</sup> Dept. 2003); Wong v Tang, 2 AD3d 840, 840-841 (2<sup>nd</sup> Dept. 2003); Jump v Facelle, 275 AD2d 345, 346 (2<sup>nd</sup> Dept. 2000), lv. dismiss. 95 NY2d 931 (2000), lv. to app. den., 98 NY2d 612 (2002).

"An expert may not make conclusions based on facts not in evidence or which are directly contradicted by the evidence. See, Holbrook v United Hospital Medical Center, supra; see also, Kaplan v Hamilton Medical Associates, P.C., 262 AD2d 609, 610 (2<sup>nd</sup> Dept. 1999). In fact, a qualified expert's opinion that "a plaintiff's injuries were caused by a deviation from relevant industry

standards has no probative force when the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation." See, Wong v Goldbaum, 23 AD3d 277, 279 (1<sup>st</sup> Dept. 2005) citing Diaz v New York Downtown Hosp., 99 NY2d 542, 544 (2002).

If the moving party meets his burden, "in opposition, 'a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury.' " Domaradzki v Glen Cove Ob/Gyn Assocs., 242 AD2d 282 (2d Dept. 1997); see also, Mosezhnik v Berenstein, 33 AD3d 895 (2d Dept. 2006). And, the plaintiff's expert must not only differentiate between the specific acts of each defendant but must also address the operative facts relied on by the defendants' experts. See, Kaplan v Hamilton Medical Associates, P.C., *supra*, at p. 610; see also, Rebozo v Williams, 41 AD3d 457, 459 (2<sup>nd</sup> Dept. 2007); Slone v Salzer, 7 AD3d 609 (2d Dept. 2004); Ventura v Beth Israel Medical Center, 297 AD2d 801, 803 (2d Dept. 2002), *lv den.*, 99 NY2d 510 (2003); Fhima v Maimonides Medical Center, 269 AD2d 559, 560 (2d Dept. 2000).

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. . . . Such credibility issues can only be resolved by a jury. Roca v Perel, 51 AD3d 757, 759 (2<sup>nd</sup> Dept. 2008) quoting Feinberg v Feit, 23 AD3d 517, 519 (2<sup>nd</sup> Dept. 2005); Graham v

Mitchell, 37 AD3d 408 (2<sup>nd</sup> Dept. 2007).

To establish a claim for lack of informed consent, plaintiff must establish that "a reasonably prudent person in the patient's position would not have undergone the treatment . . . if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought." Manning v Brookhaven Memorial Hosp. Medical Center, 11 AD3d 518 (2d Dept. 2004). However, a claim for lack of informed consent does not apply where surgery was of an emergency nature. Public Health Law § 2805d(2); Sample v Levada, 8 AD3d 465 (2<sup>nd</sup> Dept. 2004); Connelly v Warner, 248 AD2d 941 (4<sup>th</sup> Dept. 1998).

Relying on both his own and Dr. Lalehzarian's testimony at their examination-before trial, Dr. Mansouri maintains that what he did and/or failed to do did not cause Sugamele's death. More specifically, at his examination-before-trial, Dr. Lalehzarian testified that "even if you had a miraculous hand cross clamping the aorta, there is nothing you can do for this patient." He testified that the likelihood that her life could be saved was "impossible," explaining "[i]f you transect a major blood vessel and you replace that venous return with air to the point that your heart is pumping air instead of blood, there is nothing anybody can do to bring that patient back." He further testified that "if you could miraculously with the hand of God, as soon as the injury had occurred, fix those vessels in a fraction of a second after injury,

if you still have 40, 50, 60, 70 cc's of air in your vascular system, that patient's demise is a hundred percent." Dr. Mansouri also testified that he thought there was a zero percent chance of saving Sugamele's life when he went to the operating room the first time as well as the second time but he performed surgery because the other doctors wanted to go the extra mile and he could not tell them "no," even though he knew in his heart that he could not save her.

In support of his motion, Dr. Mansouri has submitted the affirmation of Sebastiano Cassaro, M.D., a Board Certified Surgeon. Having reviewed all of the pertinent records, i.e., the pleadings, the Bills of Particulars, the medical records, and deposition transcripts, it is his opinion to a reasonable degree of medical certainty that there is no causal connection between Dr. Mansouri's care and treatment of Sugamele and her "(a) iatrogenic injury to the right internal iliac artery; (b) iatrogenic injury to common iliac vein; (c) bleeding and intra-abdominal hemorrhage; (d) shock." He notes that the injuries to her right internal iliac artery and common iliac vein existed before Dr. Mansouri became involved and that Sugamele was in shock when he got involved, as well. He opines that informed consent was not necessary because an emergency situation was taking place. He notes that the surgery was properly done and even if it wasn't, it could not have caused Sugamele's "(a) iatrogenic injury to the right internal iliac

artery; (b) iatrogenic injury to common iliac vein; (c) bleeding and intra-abdominal hemorrhage; (d) shock." As for the timing, i.e., Dr. Mansouri's alleged failure to recognize the emergency in a timely fashion, Dr. Cassaro notes that blood tests were already being done when Dr. Mansouri became involved; that blood, fluids and medication were already being administered; and, that Dr. Mansouri proceeded to perform exploratory surgery as soon as the blood test results became known. He further opines to a reasonable degree of medical certainty that Dr. Mansouri did not depart from accepted standards of medical practice in not calling in consultants nor is there any causal connection between that and Sugamele's injuries. Dr. Cassaro opines that there is no causal connection between any alleged failure by Dr. Mansouri to recognize an emergency and "(a) iatrogenic injury to the right internal iliac artery; (b) iatrogenic injury to common iliac vein; (c) bleeding and intra-abdominal hemorrhage; (d) shock."

The defendant's expert Dr. Cassaro does not address causation between Dr. Mansouri's actions and Sugamele's death. However, both Dr. Mansouri and Dr. Lalehzarian do. The defendant has accordingly met his burden of establishing his entitlement to summary judgment dismissing the complaint against him thereby shifting the burden to plaintiff to establish the existence of a material issue of fact.

In opposition to Dr. Mansouri's motion, the plaintiff has

submitted the Affirmation of Richard Bassin, M.D., a Board Certified General Surgeon. Having reviewed the pleadings, the Bills of Particulars, Sugamele's hospital record and the pertinent deposition transcripts, he opines to a reasonable degree of medical certainty that Dr. Mansouri's actions contributed to Sugamele's demise. He explains "[b]ecause a vascular injury sufficient to cause such a precipitous drop in the end tidal CO2 would be life-threatening if not promptly and surgically addressed, it could not properly be dropped from the differential diagnosis until disproved [and] it was never disproved." He notes that the critical surgery was not done until 53 minutes after Dr. Mansouri first came to examine Sugamele and 43 minutes after he left the operating room the first time. Dr. Bassin further opines that Dr. Mansouri should have "intervene[d] surgically on the first occasion when he was called to the operating room." He explains that "[t]here was sufficient evidence that the patient was bleeding to have warranted surgery, specifically, the drop in her end tidal CO2, the drop in her blood pressure and the difficulty in obtaining a pulse reading.

He states:

"As the vascular surgeon responsible for that aspect of the case, it was Dr. Mansouri's obligation to investigate the patient's condition so as to determine whether surgery was necessary. That was the reason he was called into the operating room on an emergent basis. In this respect, too, Dr. Mansouri deviated and departed from good and accepted standards of care and practice in conducting a cursory examination and leaving the operating

room only ten minutes after he arrived, without ascertaining the true cause of the patient's condition."

As for causation, Dr. Bassin declares that the combination of the vascular injuries to the two blood vessels and the lack of timely surgical intervention to repair those vessels caused Sugamele's death. As for Dr. Mansouri's position that nothing could have saved Sugamele, Dr. Bassin notes that although the medical chart records pulseless electrical activity, blood pressures are consistently recorded in the chart. Specifically, Ms. Sugamele's blood pressures are recorded as 85/50 at 12:15 p.m., 78/38 at 12:30 p.m., 75/27 at 12:21 p.m., 124/40 at 12:24 p.m., 68/20 at 12:25 p.m., 70/10 at 12:30 p.m., 55/10 at 12:45 p.m., 55/5 at 12:50 p.m. and 50/0 at 1:00 p.m. Furthermore, a pulse is recorded as present at 12:24 and 12:25 p.m., approximately the time when Dr. Mansouri was in the operating room on the first occasion. In sum, he opines "[t]o a reasonable degree of medical certainty, these deviations and departures by Mehran Mansouri, M.D., did cause Louise Sugamele's continued bleeding, continued decline and her death, and did deprive her of a substantial chance of cure and survival." He states "[t]o a reasonable degree of medical certainty, had Dr. Mansouri intervened surgically promptly upon his arrival in the operating room on the first occasion, Louise Sugamele would have had a substantial chance of survival. Dr. Mansouri's failure to do so deprived her of that chance and was therefore a cause of her

death."

The plaintiff's claim for lack of informed consent is dismissed without opposition. However, in view of the conflicting expert's opinions both based on the record, issues of fact exist necessitating a denial of Dr. Mansouri's application to dismiss the medical malpractice and wrongful death causes of action.

This decision constitutes the order of the court.

Dated: OCT 31 2008

  
KENNETH A. DAVIS J.S.C.

**ENTERED**

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**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**