

**Phebe v Nassau Health Care Corp.**

2009 NY Slip Op 30995(U)

April 27, 2009

Supreme Court, Nassau County

Docket Number: 15320/05

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

DELIA PHEBE,  
Plaintiff,

- against -

NASSAU HEALTH CARE CORPORATION and  
NASSAU UNIVERSITY MEDICAL CENTER,  
Defendant.

TRIAL / IAS PART 31  
NASSAU COUNTY

Index No. 15320/05

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2, 3</u>
Replying Affidavits .....	<u>4</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendant moves for an order pursuant to CPLR 2221 (d) for leave to reargue this Court's January 7, 2009 order denying portions of the defense motion for summary judgment on the ground questions of fact do not exist on the issues of medical malpractice and lack of informed consent. The plaintiff opposes this instant motion on the ground questions of fact do exist on these issues. This Court has carefully reviewed and considered all of the papers submitted with respect to this motion.

The plaintiff was referred by Elmont Community Health Center for a colonoscopy screening based upon her age, to wit then 70 years old. The plaintiff, a Haitian native,

who never had a colonoscopy, did not speak, understand nor read English, so her adult children accompanied the plaintiff for any medical visits, including presentations at the defendant medical center. There is no dispute all conversations among the physicians, the plaintiff and her adult children were done with the plaintiff's offspring translating to her in Creole, her native language. Moreover, one of the plaintiff's sons testified he often signed his mother's name on documents because of her limited ability to read English and barely sign her name.

On August 5, 2004, Dr. Stephen Yang, a gastroenterology fellow, performed a pre-colonoscopy physical examination of the plaintiff, who had a medical history of hypertension, asthma, and a surgical history of a thyroidectomy. Dr. Yang stated, in an affidavit dated August 3, 2008, his custom and practice included discussion of the risks, benefits and alternatives to a colonoscopy screening during that initial physical examination of the plaintiff. Dr. Yang stated the risk discussion would have included the low risk of a perforated colon, bleeding, a failure to pass the scope, and the benefits of performing the colonoscopy for early detection of forms of cancer, including colon cancer. Dr. Yang checked off the box, in the plaintiff's August 5, 2004 medical history and physical form, which reflected he discussed those risks and benefits of the planned colonoscopy.

On September 15, 2004, the plaintiff presented to the defendant for more pre-colonoscopy testing. The plaintiff's son, who testified at a deposition, admitted he signed the consent for the colonoscopy for his mother, as was their custom and practice.

The plaintiff's son also testified, while he could not specifically recall a conversation with Beverly Griffith, a nurse who assessed the plaintiff during the pre-colonoscopy testing at the defendant medical center, he customarily would have translated for his mother regarding any conversations with the nurse.

On September 23, 2004, Dr. Yang performed the colonoscopy procedure, in the presence of Dr. Crescens Pellecchia. An emergency abdominal xray was performed which showed free air in the abdomen, so a colorectal surgery consultation was called. The plaintiff was operated for a sigmoid colon perforation at the defendant medical center by Elizabeth Cirincione, M.D., a surgeon, and was subsequently discharged from the defendant medical center.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted standards of medical practice, and (2) evidence that such a departure was a proximate cause of the plaintiff's injury (*see Bloom v. City of New York*, 202 A.D.2d 465, 609 N.Y.S.2d 45). "On a motion for summary judgment, a defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Williams v. Sahay*, 12 A.D.3d 366, 368, 783 N.Y.S.2d 664). "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" (*Thompson v. Orner*, 36 A.D.3d 791, 828 N.Y.S.2d 509). General allegations that are conclusory and unsupported are insufficient to defeat summary judgment (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572) *Keevan v. Rifkin*, 41 A.D.3d 661, 662, 839 N.Y.S.2d 151 [2<sup>nd</sup> Dept., 2007]; *see also Barila v. Comprehensive Pain Care of Long Island*, 44 A.D.3d 806, 844 N.Y.S.2d 103 [2<sup>nd</sup> Dept., 2007].

Here, the defense made a prima facie showing of entitlement to summary judgment

based upon the affidavit dated August 1, 2008, by their expert, Dr. James Sullivan, M.D., a board certified colorectal surgeon, who opined to a reasonable degree of medical certainty, despite the plaintiff's perforated colon during the September 23, 2004 colonoscopy procedure, all of the care rendered in the performance of that colonoscopy, the timely diagnosis of the perforated tear and the performance of the repair were within accepted standards of good medical practice then existing. The defense expert opined, to a reasonable degree of medical certainty, a colon perforation is a known and accepted complication for that procedure despite its low risk of occurrence. The defense expert opined, to a reasonable degree of medical certainty, the then 70 year old plaintiff with no prior history of a colonoscopy, and a low risk of a perforation occurrence, coupled with detection of early colon cancer, would have as a reasonable person agreed to undergo a colonoscopy examination. Dr. Sullivan maintains any subsequent complaints and complications by the plaintiff, such as a hernia which occurred 16 months after the plaintiff's discharge was known and accepted complications from the plaintiff's laparotomy repair.

The burden thus shifts to the plaintiff to provide a physician's sworn statement regarding a departure from accepted practice with the that doctor's opinion omissions or departures by the defendant was a proximate cause of the injury. The plaintiff's expert, Dr. Tomas Pattugalan, M.D., a private practitioner, in an affidavit dated October 10, 2008, clearly indicates informed consent should have been give to the plaintiff about the colonoscopy. The plaintiff's expert states he reviewed the affidavits of the plaintiff and

her son, Wagner Phebe, and the plaintiff's medical records regarding the left para umbilical hernia requiring the repair of the incisional hernia at North Shore University Hospital. Dr. Pattugalan opines, with reasonable medical certainty, the failure to properly inform the plaintiff about the nature and extent of the colonoscopy, the risks, benefits and alternatives was not consistent with good and accepted medical practice. Dr. Pattugalan states the plaintiff should have been given the opportunity to be informed in Creole or in some other manner as to the nature and extent of the colonoscopy, and the risks in order to give the plaintiff choice as to whether the plaintiff wished to go through the procedures. Dr. Pattugalan states, with reasonable medical certainty, the care and treatment rendered to the plaintiff by the defendants was not consistent with good and accepted medical practice, and they did not properly inform the plaintiff nor provide adequate information as to the consequences and the risks with respect to the colonoscopy, and further negligence and carelessness by the hospital staff causing a left paraumbilical hernia and which later required repair.

Under these circumstances, the October 10, 2008 affidavit by Dr. Pattugalan was sufficient to raise a triable issue of fact (*contrast Ross v. Braverman*, 44 A.D.3d 923, 845 N.Y.S.2d 359 [2<sup>nd</sup> Dept., 2007]).

“To recover damages for lack of informed consent, a plaintiff must establish, pursuant to Public Health Law § 2805-d, that (1) the defendant physician failed to disclose the material risks, benefits, and alternatives to the contemplated medical procedure which a reasonable medical practitioner ‘under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation’, and (2) a reasonably prudent person in the patient's position would not have undergone the

procedure if he or she had been fully informed” (*Dunlop v Sivaraman*, 272 AD2d 570, 570-571 [2000], quoting subdivision [1] and citing subdivision [3] of the statute). Where a plaintiff fails to adduce expert testimony establishing that the information disclosed to the patient about the risks inherent in the procedure is qualitatively insufficient, the cause of action for medical malpractice based on lack of informed consent must be dismissed (CPLR 4401-a; *Gardner v Wider*, 32 AD3d 728, 730 [2006]), particularly where she has failed to prove that a reasonably prudent person in her position would not have undergone the procedure had she been fully informed of the risks of the procedure (*Evans v Holleran*, 198 AD2d 472, 474 [1993])

*Rodriguez v. New York City Health and Hospitals Corp.*, 50 A.D.3d 464, 858 N.Y.S.2d 99 [2<sup>nd</sup> Dept., 2008].

The defendant contends the plaintiff waived an interpreter by providing her own language facilitator, to wit in her words during her deposition, her “thirty something year old” son. The plaintiff contends, in opposition, she was unable to understand and communicate in English to the extent that she could meaningfully participate in the medical treatment process. The plaintiff asserts she would not have consented to the colonoscopy because her husband died in surgery some six months before her procedure. The defense points out the plaintiff’s offspring interpreters were aware of their father’s death during the time they interpreted for their mother.

Both the plaintiff and her son testified at depositions. The plaintiff claims never having had a colonoscopy before the instant procedure, and neither speaking, understanding nor being able to speak English notwithstanding all conversations or writings between healthcare providers and the plaintiff were done with the plaintiff’s adult children, who translated in Creole for the plaintiff during those conversations and writings. The defense expert gives an opinion employing the statutory objective standard

to a reasonable degree of medically certainty, that is what a reasonable person in the plaintiff's place would have done given the risks, benefits and alternatives of the colonoscopy. The plaintiff expert opines using subjective criterion, to wit basing that opinion upon the plaintiff's affidavit and deposition testimony and a review the records.

[A] showing by defendants, as proponents of the evidence, that plaintiff was the source of the information recorded (*see, Musaid v. Mercy Hosp.*, 249 A.D.2d 958, 959-960, 672 N.Y.S.2d 573, citing Prince, Richardson on Evidence § 8-310, at 611 [Farrell 11th ed.] ), and that the translation was provided by a competent, objective interpreter whose translation was accurate, a fact generally established by calling the translator as a witness (*cf., People v. Romero*, 78 N.Y.2d 355, 362, 575 N.Y.S.2d 802, 581 N.E.2d 1048; *People v. Generoso*, 219 A.D.2d 670, 671-672, 631 N.Y.S.2d 722, *lv. denied* 87 N.Y.2d 901, 641 N.Y.S.2d 231, 663 N.E.2d 1261). *Quispe v. Lemle & Wolff, Inc.*, 266 A.D.2d 95, 698 N.Y.S.2d 652 [1<sup>st</sup> Dept., 1999].

On the evidence presented, this Court concludes the plaintiff authorized her offspring to speak and sign documents for her in the interactions with the defendant's representatives. Moreover, this State's highest Court holds:

The rationale of the agency exception to the hearsay rule is simply that if a party has made an interpreter an agent for the purpose of translating what he or she says, the interpreter's translations may be received as party admissions (see, 4 Wigmore, Evidence § 1078 [Chadbourn rev 1972]; 6 Wigmore, op. cit., § 1810)...where "there is no motive to mislead and no reason to believe the translation is inaccurate, the agency relationship may properly be found to exist. In those circumstances the translator is no more than a 'language conduit,' *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973), and a testimonial identity between declarant and translator brings the declarant's admissions within Rule 801(d)(2)(C) or (D)" (id., at 832 [emphasis added])

*People v. Romero*, 78 N.Y.2d, *supra*, at 361-362; *see also McNeil v. Wagner College*, 246 A.D.2d 516, 667 N.Y.S.2d 397 [2<sup>nd</sup> Dept., 1998].

Here, the plaintiff denies the translators and the medical personnel informed her of the

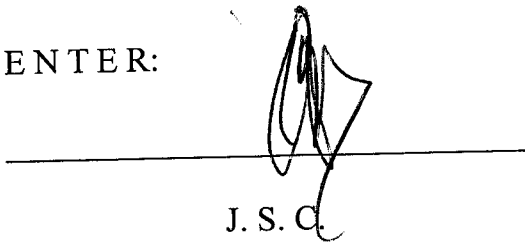
material risks, benefits, and alternatives to the contemplated medical procedure which a reasonable medical practitioner 'under similar circumstances would have disclosed, in a manner permitting her to make a knowledgeable evaluation. But, the evidence shows otherwise. The defendant has shown the doctors informed the plaintiff, with the aid of her children acting as interpreters, of the material risks, benefits, and alternatives to the colonoscopy in a manner permitting the plaintiff to make a knowledgeable evaluation of it. The recordings regarding the fact of such discussions with the plaintiff in the medical records disclose there is no reason to believe the translation was inaccurate.

Accordingly, the motion is granted solely to the extent that upon reargument summary judgment is granted to the defendant on the issue of lack of informed consent as there is no triable issue of fact with respect to that allegation, and that cause of action with respect to lack of informed consent is dismissed.

So ordered.

Dated: **April 27, 2009**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

**ENTERED**  
**APR 30 2009**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**