

**Feltzinger v Simon**

2009 NY Slip Op 31533(U)

July 10, 2009

Supreme Court, Suffolk County

Docket Number: 06-25405

Judge: John J.J. Jones

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. JOHN J.J. JONES, JR.  
Justice of the Supreme Court

MOTION DATE 11-25-08  
Mot. Seq. # 002 - MD

-----X		BRUCE G. CLARK & ASSOCIATES, P.C.
CATHERINE FEITZINGER, as Administrator of	:	Attorneys for Plaintiff
the Estate of RONALD JOSEPH FEITZINGER	:	22 South Bayles Avenue
and CATHERINE FEITZINGER, individually,	:	Port Washington, New York 11050
	:	
	:	LEWIS JOHS AVALLONE AVILES, LLP
	:	Attorneys for Defendants Simon, Great South Bay
Plaintiff,	:	Surgical Assocs., Gerstenhaber, Long Island
	:	Anesthesiologists, Lovemil & Good Samaritan
	:	Hospital Medical Center
- against -	:	425 Broad Hollow Road
	:	Melville, New York 11747
	:	
JOHN MATTHEW SIMON, M.D., GREAT	:	GEISLER & GABRIELLE
SOUTH BAY SURGICAL ASSOCIATES, P.C.,	:	Attorneys for Defendants Spencer & South Shore
CLAUDE SIMON GERSTENHABER, M.D.,	:	Comprehensive Medical Group
LONG ISLAND ANESTHESIOLOGISTS, PLLC,	:	100 Quentin Roosevelt Boulevard
JACQUELINE M. SPENCER, D.O., JANE A.	:	Garden City, New York 11530
KOOP, R.N., ANP-C, D. LOVEMILL, RPA,	:	
SOUTH SHORE COMPREHENSIVE MEDICAL	:	WILSON, ELSER, MOSKOWITZ, et al.
GROUP, P.C., GOOD SAMARITAN HOSPITAL,	:	Attorneys for Defendant Koop
	:	3 Gannett Drive
Defendants.	:	White Plains, New York 10604-3407
-----X		

Upon the following papers numbered 1 to 42 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 32 - 40; Replying Affidavits and supporting papers 41 - 42; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants Claude Simon Gerstenhaber, M.D., and Long Island Anesthesiologists, PLLC for an order granting summary judgment dismissing the complaint against them is denied.

Plaintiff Catherine Feitzinger, individually and as administratrix of the estate of Ronald Feitzinger, commenced this action to recover damages for medical malpractice, wrongful death, and loss

of services. Plaintiff alleges that on October 26, 2004 defendants negligently provided anesthesiology services during the umbilical bilateral inguinal hernia repair performed by co-defendant, John Simon, M.D. More particularly, plaintiff alleges, among other things, that defendants failed to properly anaesthetize Mr. Feitzinger, failed to take his full and complete medical history prior to administering anesthesia, and negligently failed to take into consideration his medical history.

Dr. Claude Gerstenhaber, who is a partner in defendant Long Island Anesthesiologists, first came into contact with decedent Ronald Feitzinger on October 26, 2004, the day of the operation, at around 5:00 p.m. Dr. Gerstenhaber, an anesthesiologist, conducted a pre-anesthesia evaluation and examination of decedent and performed a spinal epidural anesthetic prior to the surgery. Mr. Feitzinger was discharged from Good Samaritan Hospital Medical Center on October 27, 2004, at approximately 12:40 a.m. On October 29, 2004, Mr. Feitzinger was brought by ambulance to the emergency department of defendant Good Samaritan Hospital in cardiac arrest at approximately 10:10 a.m. Sadly, efforts to resuscitate the decedent were unsuccessful. According to an autopsy of the decedent performed by the medical examiner's office, the official cause of death was thrombotic microangiopathy.

Defendants Dr. Gerstenhaber and Long Island Anesthesiologists now move for summary judgment dismissing the complaint against them, asserting that there is no causal connection between their care and treatment and the injuries to decedent. In support of their motion, they submit, inter alia, a copy of the pleadings, transcripts of the deposition testimony of Dr. Gerstenhaber and Dr. Simon, hospital records relating to decedent's operation, the autopsy report prepared by the Suffolk County Medical Examiner's Office, and an affirmation of Dr. Sheldon Deluty.

The requisite elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage (*Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2005]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [1998], *lv denied* 92 NY2d 814). To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the patient (*Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2002]). To rebut a prima facie showing by the defendant physician, a plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the patient (*see Lifshitz v Beth Israel Med. Ctr.-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [1997]).

On a motion for summary judgment dismissing a medical malpractice action, a defendant physician has the initial burden of establishing that the treatment he or she rendered did not deviate from good and accepted medical practice, or that the plaintiff was not injured by such treatment (*see Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 850 NYS2d 519 [2008]; *Rebozo v Wilen*, *supra*; *Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2007]; *Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2004]). To make a prima facie showing of entitlement to judgment as a matter of law, a defendant physician must establish through medical records and expert affidavits that he or she did not

depart from accepted medical practice in the treatment of the plaintiff (*see Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2007]; *Mendez v City of New York*, *supra*). If the defendant makes such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Rebozo v Wilen*, *supra*; *Vera v Soohoo*, 41 AD3d 586, 838 NYS2d 154 [2007]).

At his examination before trial, Dr. Gerstenhaber testified that he is licensed by New York State to practice medicine and that he is certified by the American Board of Anesthesiology. He testified that he first came into contact with Mr. Feitzinger on the day of the subject surgery, at which time he conducted an examination of him. He testified the examination included auscultation of the lungs, listening to the heart, checking the patient's airways, looking at vital signs, and a general interview of the patient's health. He testified that he recommended a spinal anesthetic in this situation, due to the patient's history of throat cancer and asthma. He testified that he chose a regional anesthetic to avoid any complications with the airway, and to prevent any exacerbations of patient's asthma. He testified the anesthesia procedure and the operation were "uneventful." He testified he saw decedent in the recovery room after the surgery and prescribed medications for him.

Dr. Deluty, a physician duly licensed to practice medicine and a Diplomate of the American Board of Anesthesiology, opines in his affirmation, within a reasonable degree of medical certainty, that the care rendered by Dr. Gerstenhaber and Long Island Anesthesiologists was not the proximate cause of decedent's injuries. He states that Dr. Gerstenhaber took proper and adequate medical history of decedent and appropriately documented his findings. He also states that the anesthesia record reveals that the type of anesthesia administered and the timing of it was appropriate and within the standards of anesthetic care. He further states the postoperative care provided to decedent by Dr. Gerstenhaber was within the standards of anesthetic care. Dr. Deluty states that prior to the subject procedure, decedent was seen at the office of co-defendant South Shore Comprehensive Medical Group and was medically cleared for the procedure by co-defendant Jane Koop, a nurse practitioner. He states decedent also underwent a physical performed by co-defendant physician assistant, Dukerns Lovemil on October 19, 2004 and a pre-anesthesia evaluation performed by Dr. Gerstenhaber on the day of the surgery. Dr. Deluty further states that Dr. Gerstenhaber documented on the evaluation the type of surgery that decedent was to undergo, the medications he was taking at that time, his medical history including throat cancer, that he had undergone a right radical neck dissection; and decedent's vital signs. Dr. Deluty states that the examination of decedent included auscultation of the lungs, and heart, and airway, classifying it as "Class 1," meaning that the uvula was fully visualized.

Dr. Deluty states that Dr. Gerstenhaber completed a comprehensive pre-anesthesia evaluation of the patient, documenting his past medical history, and appropriately chose a combined spinal epidural anesthetic based upon decedent's medical history. He concludes that the post operative care provided to the decedent by Dr. Gerstenhaber was within the standards of anesthetic care, as decedent was given morphine in the postoperative care unit (PACU) and percocet was ordered by Dr. Gerstenhaber. He opines that decedent was appropriately evaluated and discharged by Dr. Gerstenhaber, who had no further contact with decedent. He states that there is no standard of care which mandates or requires any further contact by the anesthesiologist with the patient once an appropriate evaluation and discharge

from the PACU has been conducted.

Dr. Gerstenhaber and Long Island Anesthesiologists' submissions established prima facie their entitlement to summary judgment dismissing the medical malpractice action against them (*see Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2007]). Plaintiff opposes the motion and argues that defendant's expert affirmation failed to address the specific allegations of malpractice set forth in plaintiff's bill of particulars. In support of her motion, she submits a redacted affirmation of her expert, a transcript of the deposition testimony of plaintiff, and decedent's medical records.

An affirmation by plaintiff's expert, a physician duly licensed to practice medicine and a Diplomate of the American Board of Anesthesiology, opines that Dr. Gerstenhaber departed from good and accepted anesthesia practice in several ways. Plaintiff's expert's report states that Dr. Gerstenhaber failed to recommend that decedent be kept in the hospital at least overnight after surgery, so that he could be examined carefully by a physician to make sure he would have no respiratory problems after discharge. The report states that while Dr. Simon makes the final decision as to the time of discharge from the hospital, an anesthesiologist has the duty to make recommendations about care after the operation. It further states that anesthesiologists have a responsibility of informing the surgeon of respiratory problems since it is the anesthesiologist's duty to ensure that a patient's airway is clear for possible insertion of a laryngoscope, in the event of a respiratory emergency during an operation. In addition, the report states that Dr. Gerstenhaber failed to recommend that decedent be given frequent supervised incentive spirometry, to minimize the possibility of postoperative pneumonia, as was recommended by the medical clearance letter. It states that incentive spirometry is a form of simple deep breathing exercises, frequently done after surgery, using a device which the patient breathes into, against the pressure of water. Furthermore, it states that Dr. Gerstenhaber also failed to recommend that decedent continue using his continuous positive airway pressure (CPAP) machine when sleeping, both in the hospital and at home after discharge.

Plaintiff's expert opines that Dr. Gerstenhaber took an inadequate medical history of plaintiff and that he failed to inquire about decedent's sleep apnea. He asserts that if decedent's sleep apnea was known at the time of surgery, the usual and customary practice for a reasonable anesthesiologist would be to make all of the above recommendations in order to prevent pneumonia or other respiratory problems. Plaintiff's expert states that, based on the autopsy report, decedent's pneumonia with sepsis caused the thrombotic microangiopathy, which caused his death. Plaintiff's expert opines that if Dr. Gerstenhaber had recommended decedent be kept in the hospital overnight after surgery, an examination would have detected the pneumonia. He also states that if Dr. Gerstenhaber had recommended decedent be given frequent supervised incentive spirometry, he would not have developed pneumonia or, if the pneumonia had already began, it would not become serious enough to cause death. Further, plaintiff's expert asserts that if Dr. Gerstenhaber had recommended decedent continue to use the CPAP machine, the pneumonia would not have developed or would not have become serious enough to cause death.

Defendants' expert opines that the care rendered by Dr. Gerstenhaber and Long Island Anesthesiologists was not the proximate cause of decedent's injuries. Plaintiff, however, raised triable issues of fact by submitting an expert's affirmation which contradicts defendants' expert by opining that Dr. Gerstenhaber's failure to take an adequate medical history of decedent and to make the above

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described recommendations constituted a deviation from good and accepted anesthesia practice. The medical expert affirmations submitted by the parties clearly differ with respect to the alleged deviations by Dr. Gerstenhaber. It is well settled that where triable issues of fact exist when the parties offer conflicting medical expert opinions, a credibility question is presented which cannot be resolved summarily, but must be presented to the trier of fact (*see Dandrea v Hertz*, 23 AD3d 332, 804 NYS2d 106 [2005]; *Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 760 NYS2d 199 [2003]). Thus, summary judgment in favor of defendant Gerstenhaber and Long Island Anesthesiologists is inappropriate.

Dated: 10 July 09

  
J.S.C.

           FINAL DISPOSITION   X   NON-FINAL DISPOSITION